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PRINCIPLES, PARKING LOTS AND PARADISE

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From the standpoint of pure exhilaration, there is nothing quite like leaving a paved street for the relative serenity of a beautiful BC trail. Anyone who has ever done it on a bike will tell you the feeling of leaving the noise behind can be euphoric. If you listen very carefully, you can actually hear the sound of peace.

What cyclists don't know is that as soon as you leave the streets, and enter upon public land, as a recreational cyclist, you have virtually no legal rights beyond those of a simple trespasser. Here is the best part – in my mind, this is actually a good thing. Let me explain.

From a legal prospective, the streets are profoundly different than the trails of BC. On the streets, a cyclist enjoys a number of rights and obligations which arise from statutory and common law. If a cyclist is injured as a result of an act of negligence, relating in turn to an act or omission by some other person, a cyclist can do something about it – he or she can sue the other person for damages. Any cyclist, so injured, can ask the "tortfeasor" or wrongdoer to compensate the cyclist for pain and suffering, loss of enjoyment of life, inconvenience, anxiety, out-of-pocket expenses, past and future care costs, future income loss, and other losses. Broadly speaking, these legal rights arise from as cyclist's entitlement to use the streets, and an expectation that the streets are reasonably safe for use. If the streets are designed or used negligently, or if some calamity might have been foreseen by the public entity responsible for maintaining the streets, there may be significant recourse.

Not so on the trails. The mere mention of litigation, lawyers and liability on BC's trails is not only perceived as buzz crushing, but entirely inappropriate, and downright hostile in some circles. Indeed, as a general sentiment, the freedom to roam is desirable. Arguably, our laws should espouse that sentiment to reflect a healthy, spirited society, in which recreation is valued.

Clearly, this was the policy behind the *Occupier's Liability Amendment Act*, in 1998, which limited the duty of care owed by land owners, including the government, to the public, including cyclists. Under the amendments to that statute, and the one case in BC which has considered the amendments, cyclists who

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ride the North Shore and UBC trails will likely be treated by the law as trespassers. That doesn't mean it is illegal to ride on these trails and you can be shot at for doing it. What it means is that it is perfectly legal to ride the trails, but any cyclist who rides on a undeveloped rural property, vacant land, or a recreational trail (marked as such) is deemed to have willingly accepted all risks. The "occupier" of the land, that is, the person in possession or control of the land, is only obliged to not create a danger with intent to do harm to the person or damage to the person's property, or act with reckless disregard to the safety of the person or integrity of the person's property. In fact, that is no more onerous than the common law duty of care owed to trespassers. There is no liability for negligent conduct, but only intentional conduct.

Lest any of my readers think this is an abstract esoteric legal proposition, consider the case of *Mr. Hindlay*. In 1999, he set off on a ride along the Top Bridge Trail in Parksville. The trail cut across a vacant and largely undeveloped parcel of land owned by Waterfront properties Corporation and Pacific Canadian Investments. It was within the boundaries of Parksville and the Defendants allowed cyclists to use the trail without charge. Mr. Hindlay rode into a completely obscured ditch and as a result was an incomplete quadriplegic. Mr. Hindlay brought his case against the corporate land owners. However, Mr. Justice Groberman of the BC Supreme Court determined that the land in question was indeed rural and discussed the purpose of the amendments to the *Occupier's Liability Act*. He said that a land use analysis should be applied to the question of whether the premise is rural under the Act, rather than examining what use the land had been put to in the past, or what use it could be put to in the future. Despite the fact that the land was within municipal boundaries, he did not regard that as important to its classification under the Act.

Mr. Justice Groberman refused to confine his comments to the land in issue. He stated that land on the periphery of urban areas, such as farm lands of Saanich, and Delta, and the mountains of North Vancouver would come within the term "rural premises" under the law. Because the land on which Mr. Hindlay was injured fell into the classification of rural premises, and because there was no evidence of intention to harm, the land owners enjoyed statutory immunity, despite Mr. Hindlay's allegations of negligence against them.

So if you are grievously injured on public land in this province which is either rural in character are marked for a recreational use (the North Shore, UBC trails), you will likely have no legal recourse against those in possession and/or control of the land, even if you can establish negligence.

How can this be a good thing? Perhaps "good" is the wrong word. It is difficult to see any good coming from zero recovery against a background of catastrophic loss. But without legislative immunity on recreational lands, litigation will eventually force restricted access and ultimately closure of lands normally enjoyed by recreational cyclists. Conversely, litigation and the threat of litigation arising from street accidents is insured against by users of automobiles and municipalities. Foreseeable harm arising from

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automobile use is a risk which must be carried by the motoring public and municipalities which support it. In the final analysis, the question always is: who can best bear the cost of negligent conduct?

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