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SPEED - WORDS, NUMBERS AND RELATIVITY

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I appreciate the title of this article may sound like a card game. Unfortunately, litigation often carries similar and unpredictable risks. Much of the uncertainty arises from the introduction of evidence on material issues, and how that evidence is received by a Trial Judge and/or jury.

One of the first questions asked by motorists and their lawyers in relation to the cyclist's conduct is whether or not the cyclist was travelling too fast. Regrettably, cyclists travelling at the same speed as cars, regardless of what that speed is, always appear to be travelling faster. No doubt there is a scientific explanation for this optical phenomenon well beyond the scope of this article. But comments such as "he seemed to be going very fast" are, in terms of their popularity, on par with "she came out of nowhere".

Speed is often the first underpinning of any allegation of contributory negligence on the part of the cyclist. For that reason, it is important to know what evidence is considered in relation to speed. Unfortunately, many cyclists harbour the mistaken view that the only relevant consideration is whether they are riding above or below the posted speed limit. This is by no means the end of the inquiry.

The *Motor Vehicle Act* provides that "a person must not drive a motor vehicle...at a speed that is excessive relative to the road, traffic, visibility or weather conditions". We all know that the *Motor Vehicle Act* imposes on a bicyclist the same duties as the driver of a motor vehicle. Accordingly, the question that Trial Judges must address is not confined to whether or not the cyclist was travelling at a speed which might result in the cyclist being given a traffic ticket. The question is whether, in all of the circumstances, a cyclist was taking reasonable care for his/her own safety. One of those circumstances is the speed at which the cyclist was travelling.

The British Columbia Court of Appeal has recently restated this proposition in a case involving an appeal from a Trial Judgment by the motorist and The Township of Langley, both of whom had been found liable in negligence. The case involved catastrophic injuries and a significant award in damages was at stake.



The accident which gave rise to the case occurred on a steep and winding road in Langley. The cyclist, an accomplished triathlete, was riding down a hill when he swerved to his right to avoid a cube van which he perceived to be coming over the centre line and encroaching on his path of travel. He lost control of the bicycle and travelled through a gap between two barriers on the side of the road.

The Trial took 33 days. A judgment was rendered in the cyclist's favour in which the driver was found 25% liable and the Township of Langley was found 75% liable. Langley's liability was based on the construction of the roadside barrier and the negligent creation of a gap. No liability was apportioned to the cyclist.

On appeal by the defendants, the Court of Appeal remitted the matter back to Trial for an assessment of the cyclist's liability. The Court of Appeal found that the Trial Judge erred in ending the inquiry as to speed after finding that the cyclist had committed no ticketable speeding offence. In an unanimous judgment, the Court noted that the Trial Judge made no specific findings as to how fast the cyclist was going down the hill, and that these were important issues which could not be addressed by a simple finding that the cyclist was not speeding, in the sense he could be ticketed. The Court found that the cyclist had exceeded the "advisory" speed limit, as opposed to the posted speed limit, and that his speed should have begged further questions relating to whether or not he took reasonable care for his own safety and created "an unreasonable risk of harm to himself as he rounded the curve".

One of the factors in this sad case was that the cyclist could not say how fast he was travelling. The finding at Trial was that he had exceeded the advisory speed limit (30 kilometres per hour). But that, on its own, absent specific cyclist directed speed limit signs on the designated bike route, was not (so said the Trial Judge) evidence of negligence.

It seems one of the key considerations governing the Court of Appeal's thinking was that the cyclist himself could not give clear evidence as to how far the motorist encroached on his lane of travel. As is so often the case, it all "happened in an instant". Without good evidence as to encroachment, the Court of Appeal felt the Trial Judge needed to inquire further into speed.

The judgment represents another illustration of how courts are loath to consider specific facts in isolation, but prefer contextual considerations as to whether reasonable care was taken by the parties. The case is also a reminder of the principle that a breach of a statute is not necessarily negligence per se. That proposition has a flip side - conduct which is not in breach of the statute is not for that reason immune to legal scrutiny. Where cyclists are concerned, speed is always fertile ground for considerations of contributory negligence.

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