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THAT WAS NO ACCIDENT

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When a cyclist is a victim of a motorist's negligence, damages arise from the cyclist's injuries. Any assessment of those damages must integrate concepts of civil responsibility between members of a civilized community. If an accident occurs and negligence is established the compensation owed to the victim is based on the foreseeable harm or injury suffered by the victim. Accordingly, damages typically include an assessment of pain and suffering, anxiety, inconvenience, disruption, income loss, loss of capacity to work and care for one's home and out of pocket expenses. All of these items are said to be the direct or probable consequence of the act complained of.

What happens if the act complained of is not negligent, but intentional, such that it can no longer be characterized as accidental. Unfortunately, driving is often another form of aggression. Road rage involving cyclists is unfortunately not uncommon. In these cases, the courts must access an exceptional tool called "punitive" damages. Punitive damages are exceptional because they are designed to punish the wrongdoer rather than compensate the injured. They have their root in the actions of the wrongdoer. These damages are also "exemplary" damages because they are awarded to punish the wrongdoer and also to deter others from similar conduct. Punitive damages can be awarded even if the victim suffers no actual loss at all, though the victim must be directly involved. Again, this is because they are not meant to address the injuries of the victim, but the conduct of the assailant.

Conduct which gives rise to an award of punitive damages is typically criminal in behaviour. However, as many cyclists have sadly experienced, the Police and the Crown will often not bring charges in circumstances where they can not establish what was in the mind of the assailant. This is called mens rea, a fundamental component of criminal behaviour. If it cannot be demonstrated beyond a reasonable doubt in a criminal court investigation that the accused intended to do what he or she did, that is, that they had the requisite mens rea, the charges will be dismissed. However, in a civil case, the civil burden of proof is on a balance of probabilities and not beyond a reasonable doubt. Accordingly, it is much easier to establish on a balance of probabilities that a motorist intended to do what he or she did, based on the circumstances of the



event.

Naturally, in light of the easier burden of proof, the courts take a restrictive approach to an award of punitive damages and exercise the discretion to make those awards extremely cautiously. The behaviour usually needs to be harsh, vindictive, reprehensible and malicious, or at the very least extreme, in its nature. In cycling cases, once it is established that a motorist deliberately collided with a cyclist, this is usually sufficient to meet the criteria, given the potential for serious injury.

One regrettable phenomenon in these cases is the correlation between outrageous behaviour and subsequent denial. It is rare for malicious assailants to come clean. Rather, in my experience, the intentional wrong doer has a tendency to conjure fanciful reconstructions in order to somehow explain the conduct. These cases not only involve intentional harm but intentional misstatements and omissions, and a reckless regard for the truth approaching fraudulent behaviour. It should come as no surprise that a defendant's complete lack of credibility can often lead to a higher award of punitive damages against a defendant.

Intentional conduct is of course not insured. Therefore, in order to recover punitive damages, a cyclist usually needs to go all the way to trial for that relief, whereas, in a simpler case involving the principles of negligence and compensation, a just result can and often is achieved by way of a negotiated settlement. There is an inescapable irony that intentional harm often leads to a more protracted process than harm caused by a motorist's negligence. Intuitively, society should be quicker to remedy intentional conduct. However, unless charges are laid, and they are often not, a civil claim for punitive damages may lead to a longer legal journey. One wonders whether or not insurers should start selling Third Party protection against road rage and intentionally inflicted harm. This may sound radical, but it does invite important considerations relating to the nature of the human driving experience, and the conduct it inspires.

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