

news

# Blame shifts from negligent driver to injured victim

I have written previously about the critically important goal, for car crash victims, of actively pursuing as full and quick a recovery as possible.

And of course, isn't that the goal of anyone who has sustained an injury, regardless of the cause?

Only a car crash victim, though, will end up sitting across from an ICBC defence lawyer at an examination for discovery.

With the 20/20 vision of sometimes sarcastic hindsight, the defence lawyer will go step by step through the clinical history asking why this or that further step wasn't taken to try to get better.

The ICBC defence lawyer is hoping to shift at least some of the blame from the negligent driver to the injured victim.

It's along the lines of other "Yeah, but" defence tactics: "Yes,

## Achieving Justice

PAUL HERGOTT



I hurt you, but it's your own fault you still have symptoms because you didn't do enough to get better."

The legal terminology is a "failure to mitigate."

Our civil justice system imposes a duty on those seeking to recover fair compensation for their losses, to take reasonable steps to keep those losses to a minimum. It's a common sense and fair notion.

This common sense and fair notion can be warped to the point that it is horribly unfair, though. One example is obesity.

Your weight has always been a challenge for you. You have tried this and that diet; bought gym memberships; tried

psychological counseling. You have tried your very best.

You are then the victim of a car crash.

Your injuries leave you with lower back pain that you never had before the crash. You undergo all sorts of therapy.

You participate in "active rehabilitation" of stretching and strengthening exercises.

Your back pain lingers. You are sent by ICBC to a medical specialist who comes up with the answer—by losing weight, your back pain will be reduced or even eliminated.

The blaming finger starts pointing in your direction. All you have to do to get better is to lose weight.

Why are you not doing more to lose weight?

Before the crash, you tried every diet in the book and struggled to be

active to burn calories. Since the crash you've gained even more weight because of even less activity, and you are now dealing with back pain.

How grossly unfair to use this against you as a "failure to mitigate."

Fortunately, our court system is there to protect us from common sense and fair notions being twisted by ICBC defence lawyers to be used in grossly unfair ways.

In the 2012 case of Delgiglio v. British

Columbia (Public Safety and Solicitor General) 2012 BCSC 480, the court considered and rejected the defence argument that Mr. Delgiglio, who had struggled with lifelong obesity, had failed to mitigate his losses.

In doing so, Madam Justice Gropper quoted from and relied on the following legal principles that had been set out in a previous case: "The law does not require a plaintiff to do that which cannot

be controlled, nor does it require perfection in the pursuit of rehabilitation. In addition, the defendant must take the victim as found, which may affect what is to be reasonably expected.

"For example, a person who has struggled with life-long obesity may not be expected to lose substantial weight to discharge the duty to mitigate, even though weight loss would assist recovery. What the law requires is that

the plaintiff makes contextually reasonable and sincere efforts to limit his or her damages and loss."

*This column is intended to provide general information about injury claims. It is not a substitute for retaining a lawyer to provide legal advice specifically pertaining to your case. Paul Hergott is a personal injury lawyer at Hergott Law in West Kelowna. paul@hlaw.ca*

## ROCK CREEK/BOUNDARY FAIR

### Wildfire won't stop annual fair

The Rock Creek and Boundary Fair Association wants the public to know the Rock Creek Fairgrounds have been untouched by the Rock Creek wildfire, which means the Rock Creek Fall Fair will carry on as planned, Sept. 19 and 20.

"Our hearts and hands are with our friends and neighbours right now, but we are still working away to bring about another 'best ever' Rock Creek Fall Fair," said the event organizers this week.

"Our line up of entertainment and activities has not changed. The Rock Creek Fall Fair is a yearly reminder to locals and visitors what a great area this is, full of great people—it will be no different this year."

As well, in response to calls offering help for local residents who lost their homes to the fire, the fair association has set up a donation fund on its website, rockcreekfallfair.ca.

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<p><b>Kelowna North &amp; Glenmore</b></p> <p>#KC04000301 - 49 Papers Woodpark Cres, Woodpark Cr.</p> <p>#KC04000303 - 73 Papers Rio Dr. S 309 to 417, Woodcrest Cr, Woodwind Cr.</p> <p>#KC04000305 - 51 Papers Avonlea Way, Knightsbridge Way, Lambeth Cr, Rio Dr. S 288 to 308</p> <p>#KC04000600 - 44 Papers Rialto Dr, Rio Dr N. 1252 to 1257, Rodondo Pl. Clear Pond Cr, Clear Pond Pl.</p> <p>#KC04000701 - 60 Papers Altura Rd, Caramillo Cr, Caramillo Rd. 31 to 57, Monte Rd, San Cabrio Cr, Spruceglen Dr. 1628 to 1709</p> <p>#KC04000702 - 24 Papers Cara Glen Way 1501 to 1533, Caramillo Rd. 8 to 20 EVEN, Clifton Rd. S. 523 to 599</p> <p>#KC04002702 - 43 Papers Montrose Pl, Mountain Ave. 1110 to 1250, Waidie Cr.</p> <p>#KC04003700 - 38 Papers Augusta Cr, Ryder Cr, Walker Dr.</p> <p>#KC02006501 - 77 Papers Borden Ave, Ethel St. 1775 to 1893 ODD, Gagnon Pl, Gordon Dr. 1740 to 1824 EVEN, Harvey Ave. 900 to 1099 ODD, Laurier Ave.</p>	<p>#KC03010503 - 27 Papers Windermere Cr, Wintergreen Cres. 1110 to 1200, Wintergreen Dr. 1105 to 1165</p> <p>#KC03011701 - 57 Papers Dunvegan Cr, Edinburgh Cr, Kensington Dr, Kirkby Cr, Lysons Cres, Metcalfe Ave.</p> <p>#KC03011901 - 29 Papers Duke Cr, Eldorado Cr, Eldorado Rd. 402 to 467, Walker Rd. 4508 to 4529.</p> <p>#KC03012000 - 38 Papers Brome Cres, Eldorado Rd. 471 to 569, Swaisland Cr, Swaisland Rd.</p> <p>#KC03012100 - 63 Papers Lakeshore Rd. 4429 to 4489, Nottingham Rd, Rattenbury Cr, Sherwood Rd, Sherwood Cr.</p> <p>#KC03012500 - 48 Papers Gordon Dr. 4260 to 4346 EVEN, Paret Pl, San Juan Cr, San Michelle Cr, San Michelle Rd.</p> <p>#KC03012700 - 58 Papers Coryell Rd. 500 to 599, Greene Rd, Lakeshore Rd. 4201 to 4399 ODD, Lakeshore Rd. 4254 to 4388 EVEN, Simeon Cr, Wilms Rd.</p> <p>#KC03013400 - 34 Papers Blueridge Rd, Mission Ridge Cr, Westridge Dr. 4600 to 4650</p> <p>#KC03013402 - 46 Papers Crawford Rd. 1415 to 1535, Mission Ridge Dr. 1383 to 1549, Mission Ridge Rd, Westridge Dr. 4570 to 4590</p>	<p><b>Rutland South &amp; Rutland North</b></p> <p>#KC05021701 - 63 Papers Hwy. 33 W 735 to 815 ODD, Balmoral Rd, Barber Rd, Hollywood Rd. S 215 to 285 ODD, Hollywood Rd. S 270 to 546 EVEN, Petch Rd.</p> <p>#KC06027502 - 55 Papers Aldon Rd. 1000 to 1099, Dalgleish Cr, Sanborn Cr, Schell Cr, Sumac Rd. W 150 to 365</p> <p>#KC06028200 - 84 Papers Alin Cr, Klassen Rd. 110 to 216, Kriese Rd, Maple Rd. 100 to 308, Rains Rd, Rutland Rd. N 1345 to 1665</p> <p>#KC06028700 - 60 Papers Hayashi Rd. 1625 to 1700, Homing Rd, McKenzie Rd. 1551 to 1775, Panorama Lane, Stayman Rd.</p>
<p><b>Kelowna South &amp; Mission</b></p> <p>#KC02007702 - 55 Papers Glenwood Ave. 500 to 699, Pandosy St. 2149 to 2291 ODD, Richter St. 1966 to 2286 EVEN, Rose Ave. 500 to 699, Royal Ave. 500 to 699, Speer St.</p> <p>#KC02009601 - 62 Papers Abbott St. 2520 to 2691, Bath St. 2630 to 2784, Gore St. 2627 to 2693, Morrison Ave. 433 to 494, Osprey Ave. 425 to 480, Pandosy St. 2518 to 2696, Patterson Ave. 368 to 496, Wardlaw Ave. 380 to 484.</p> <p>#KC02010100 - 68 Papers Conlin Cr, Groves Ave. 500 to 599, KLO Rd. 500 to 790 EVEN, Pandosy St. 2979 to 3099 ODD, Richter St. 2855 to 3099, Tull St. 3000 to 3099</p> <p>#KC03010502 - 58 Papers Athalmer Rd, Barnes Ave 1022-1088, Francescutti Cr, Invermere Cr, Invermere Rd, Windermere Rd.</p>	<p>#KC03014002 - 67 Papers Providence Ave 412-435, Quilchena Cres, Quilchena Dr. 351-453, Thalia St.</p> <p>#KC03014201 - 60 Papers Cantina Cr. 700 to 799, Southcrest Dr. 700 to 786, South Ridge Dr. 5026 to 5114</p> <p>#KC03014204 - 50 Papers Benmore Cr, Benmore Pl, Bunnell Cr, Dougherty Ave. 630 to 672, South Ridge Dr. 5161 to 5251</p> <p>#KC03014800 - 26 Papers Dunsmuir Rd, Maquinna Rd.</p> <p>#KC03016708 - 37 Papers Dillon Cr, Dillon Pl, Quarry Ave, Quarry Pl.</p> <p>#KC03017102 - 69 Papers Crozier Ave, Kuipers Cres, Kuipers Cr.</p>	<p><b>West Kelowna</b></p> <p>#KC07000919 - 56 Papers Marathon Cr, Olympus Way, Pinewood Pl.</p> <p>#KC08001610 - 34 Papers Hayman Rd. 2200 to 2377, Keefe Rd, Thacker Dr. 2210 to 2438, Thacker Dr. 2215 to 2469</p> <p>#KC08002210 - 34 Papers Britt Rd, Franwill Rd, Kerry Lane, Thacker Cr. 2815 to 2925</p> <p>#KC08002910 - 50 Papers Boucherie Rd. 3200 to 3299, Gregory Rd. 1100 to 1199, Mission View Cr, Sunnyview Rd, Vector Dr.</p> <p>#KC08003011 - 38 Papers Menu Rd. 1105 to 1181 ODD, Neale Rd, Ourland Rd. 3000 to 3099, Saturn Rd.</p> <p>#KC10004411 - 108 Papers Boucherie Rd. 1700 to 1999, Boucherie Rd. 1860, Qual Cr.</p> <p>#KC10005311 - 46 Papers Peters Rd. 2103 to 2177, Witt Rd. 2115 to 2215</p> <p>#KC10005312 - 33 Papers Carral Rd, Boucherie Rd. 2150 Only</p> <p>#KC10006914 - 43 Papers Bridlehill Dr. 3021 to 3037, Saddle Ridge Dr. 2539 to 2660</p> <p>#KC10009012 - 30 Papers Blue Jay Dr, Canary Cr, Onole Cr.</p> <p>#KC10009112 - 53 Papers Chetsea Cr, Corral Cr, Gates Cr, Gates Rd. 3267 to 3329, Regent Rd, Stonegate Cr.</p>