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PAPER 1.1

Update on Case Law & Legislation

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UPDATE ON CASE LAW & LEGISLATION

I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference held in June 2018. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Adverse Inference

a. *Jang v. Andrade,* 2018 BCSC 1516, Verhoeven J.

A failure to produce business records prejudiced the defendant's ability to investigate and defend the business loss claim. It is appropriate for an adverse inference to be drawn where a party fails to call material evidence which is particularly and uniquely available to that party. The court drew an adverse inference that the documents not produced would have been detrimental to the plaintiff's claims.

b. *Ranahan v. Oceguera*, 2019 BCSC 228, Mayer J.

The defendant asked the court to draw an adverse inference for the plaintiff's failure to lead evidence from her family doctor since he was in a unique position to assess her pre-accident medical history and her condition afterwards. It had been the plaintiff's plan to call the general practitioner but as a result of changes to the timing of witnesses, it was no longer possible to schedule her testimony. The court declined to draw an adverse inference because: the general practitioner's clinical records were available; some of the records were canvassed, or available to be canvassed, during the cross examination of the plaintiff; there was an explanation for why the general practitioner was not called; when the court was advised that the general practitioner would no longer be called, the defence did not suggest that it would ask for an adverse inference; and, there were other witnesses that could have provided evidence about

the plaintiff's pre-accident condition and none of them were seriously challenged on cross-examination.

The court also declined to draw an adverse inference from the defence's decision to not call evidence from its IME doctors, a neurologist and a psychiatrist. It does not follow that an adverse inference should be presumed when the defendant decides not to call an expert witness, particularly where evidence from the same expertise has already been called by the plaintiff. An adverse inference should generally only be made against the party who bears the onus of proof.

c. *Sekhon v. Gill*, 2019 BCSC 811, Smith N. J.

The defendant invited the court to draw an adverse inference against the plaintiff for failing to provide an opinion from her long-time family doctor. After determining that there was no basis to do so, Mr. Justice Smith referred to the new expert rule, *Rule 11-8* as being a further emerging reason for the court to be cautious about drawing an adverse inference against any party for failing to call specific or additional medical experts and made the following comments:

> [61] This new rule does not apply to cases coming to trial before December 31, 2019 (see Rule 11-8(11)(a)(ii) of the *Supreme Court Civil Rules*), so does not directly govern this case. However, it clearly indicates a policy to place limits on the number of experts appearing in these kind of cases and the associated expense to the parties. The Attorney-General has publicly stated that the rule was introduced as part of an effort to control the Insurance Corporation of British Columbia's litigation costs. In the circumstances, it is more than a little ironic to hear defence counsel argue that the plaintiff has failed to call enough experts.
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> [62] In *Mohamud*, Fisher J. referred to a plaintiff being expected to call "all doctors" who attended her for important aspects of her injuries. To the extent that was intended to refer to those doctors being called to give expert opinion, that is an expectation the court will no longer be able to have under the new rule. Indeed, plaintiffs who have been treated by multiple doctors will be *prima facie* barred from calling all of them as experts, no matter how much assistance they may have to offer the court.
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> [63] Where a case requires opinions from specialists who assess the plaintiff for medical legal purposes only, a plaintiff may be barred from introducing any opinions from day-to-day treating physicians. The circumstances in which the court can be asked to draw an adverse inference may therefore become even more limited when the new rule comes into effect.
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> [68] This also provides a precursor to the new expert evidence regime that the court will have to adjust to when Rule 11-8 of the *Supreme Court Civil Rules* comes into full force. The court will always require medical expert evidence, but parties will not necessarily be able to call the best possible expert evidence on every point. Parties and the court will often have to rely on the overlap that frequently exists between areas of expertise.
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> [69] Although a functional capacity evaluator may be able to provide greater detail, a physiatrist such as Dr. Giantomaso has sufficient expertise to comment on a patient's general ability to perform day-to-day work or household tasks. Although a psychiatrist may have deeper insight into a plaintiff's mental wellbeing, a chronic pain specialist such as Dr. Arsenau has sufficient expertise to comment on the emotional and psychological effects of chronic pain. While it might be ideal to have additional experts, this will not always be possible in the face of an overall limit on the number of experts. The court will have to do the best it can with the evidence available.

III. Appeals

a. *Sharifpour v. Rostami*, 2019 BCCA 61, Hunter J.A., in Chambers

This was an application by an in person litigant to waive the requirement that he file a transcript of the trial evidence for the appeal. The transcripts were estimated to cost $20,000. The appellant advised the court that he did not intend to rely on any oral evidence from trial but on only documentary evidence. The appellant's statement is not relevant to the question of excluding evidence from the transcript. What is significant is the manner in which the appeal is framed and whether recourse to the oral evidence may be required by the court in its consideration of the appeal. It is a misconception that an appellant need only obtain those portions of the transcript that are necessary to advance arguments within their factum and then leave a respondent to obtain whatever else they require at their expense. The appellant's responsibility is to ensure the transcript is sufficient to allow an appeal to be considered in its proper context. The appellant has the responsibility and expense of obtaining the transcript in the discharge of that obligation, given it is their appeal.

IV. Contingency Fee Agreements

a. *Radic v. Bosch*, 2019 BCSC 602, Registrar Nielsen

The client challenged his previous counsel's entitlement to any contingency fee in respect of a settlement that was reached after the previous lawyer withdrew due to a breakdown in the client-lawyer relationship.

The lawyer agreed to represent the client in respect of serious injuries suffered by her in a car accident and to do so on a 20% contingency fee basis. The lawyer valued the claim in excess of $1,000,000, which was the limit of the motorist's insurance policy. The client experienced mental health issues and committed herself for treatment. The lawyer took steps to adjourn the trial without his client's instructions which upset the client. The parties then proceeded to a mediation, where the relationship broke down and the lawyer withdrew from his retainer. The lawyer believed that the client was not being reasonable in her assessment of the claim and, contrary to his advice, instructed him to demand $4 million. Subsequently the matter settled for $1.126 million and the client took the position that the lawyer should not be entitled to any fees.

A lawyer-client relationship is a one of good faith and the lawyer had violated the good faith by acting without his client's instructions. The lawyer should have made further inquiries regarding his client's mental health before adjourning the trial. Further, the lawyer had not adequately investigated whether the motorist had any other assets.

The lawyer had also demanded that the plaintiff provide $50,000 retainer to fund disbursements before he would reset the trial after the adjournment. This was contrary to the contingency fee agreement which provided that the law firm would carry disbursements until the conclusion of the matter subject to a demand for the client to pay same within 30 days of demand. No demand was made during the terms of the retainer.

After the retainer was terminated, the client asked for, and the lawyer refused to provide, copies of the disbursements incurred so that she could claim them on her bill of costs at a

subsequent mediation. Demanding payment of future disbursements before carrying out the client's instructions was a breach of the contingency. Registrar Nielsen was critical of the lawyer for doing so when the client was not working and had only CPP for income and after the firm had terminated its compassionate interest-free loan to her of $1,500/month. Demanding money before setting the matter for trial guaranteed that there would be no trial and the client would be held hostage in the interim.

The lawyer was justified in withdrawing when he did because the lawyer-client relationship was unable to be repaired due to the client's loss of faith and threat to report the lawyer to the Law Society. Despite the lawyer's transgressions, significant work had been done by the lawyer, which assisted the client in achieving the results. The client was a demanding one and required extra care and attention by the lawyer during the retainer. The circumstances warranted a reduction of the fee rather than a denial of the fee. The lawyer's fee was reduced to 10% of the settlement funds.

V. Costs and Disbursements

a. *Almasri v. Saska*, 2019 BCCA 10, Supplementary Reasons of the Court to *Almasri v. Saska*, 2018 BCCA 351 per Hunter J.A. (Bauman CJBC and MacKenzie J.A. concurring)

The application respondent in *Almasri v. Saska* was granted costs of two applications: one dismissing the application for leave to appeal and the other the review application. Even though the review order was entered without a reference to costs, the court of appeal has the jurisdiction under s. 9(6) of the *Court of Appeal Act* to vary the order in relation to costs. The court clarified that where leave to appeal is not granted, the party is not an appellant. Where an appeal is not perfected, there are no costs of the appeal to allocate. What is left, are the costs of two applications.

b. *Gichuru v. Purewal*, 2018 BCCA 267, per Fenlon J.A. (Bennett and Griffin JJA. concurring)

The appellant successfully appealed a costs order made against him at a hearing where, at the end of the submissions, the chambers judge recused himself on the application of the appellant. Having done so, however, he ordered costs against the appellant at Scale C as a punitive measure. The judge had lost patience with the appellant and stated that he had refused to follow the judge's instructions during submissions. The court of appeal found that the statement of the chambers judge was not borne out by the transcript. In addition, the court of appeal confirmed that increased costs cannot be used to punish a party for improper conduct.

c. *J.M.C. v. Y.S.*, 2018 BCSC 1861, District Registrar Nielson

The applicant sought pre and post-judgment interest on an award of special costs. Pre judgement interest was disallowed by operation of section 2(c) of the *Court Order Interest Act*. Post-judgment interest was allowed on the basis that a certificate for special costs is a judgment for the purpose of the *Court Order Interest Act.* Therefore, interest was payable from the date of pronouncement pursuant to section 7 and 9 of the *Court Order Interest Act*.

d. *Ma v. Haniak*, 2018 BCSC 1000, Armstrong J.

The plaintiffs in the actions were awarded substantially less at trial than their large claims for permanent disabling injuries. The court declined to award one plaintiff her costs up to the date of the defendants' first offer on the basis that this was one of "the most extreme cases where the court is satisfied that a plaintiff has attempted to perpetrate a fraud on the court". The plaintiff endeavoured to manipulate professional witnesses; she was repeatedly contradicted in cross-examination; she was untruthful; and she was cunning in her effort to deceive the court. The defendants were awarded their costs from the date of their formal offer to the conclusion of the trial.

In addition, special costs were awarded against the plaintiffs for the costs application for their post-judgment conduct. The plaintiffs were self-represented at trial and alleged at the costs hearing, without providing any evidence, that ICBC had used covert agents to impair their ability to retain counsel. They made serious allegations against defence counsel for committing "a crime of obstruction of justice" by deliberately deleting trial transcripts and destroying witness evidence. They also accused the court of unfairly favouring statements of defence counsel, causing a miscarriage of justice.

e. *Nuttal v. Krekovic*, 2018 BCCA 341, per Fisher J.A. (Willcock and Fenlon JJA. concurring)

This case involved an appeal of an order for special costs made against a plaintiff's lawyer personally in the underlying personal injury action. The order arose from an application to add an individual, Mr. Dhillon, to the action in place of an unidentified driver. Mr. Dhillon turned out not to be the driver and a discontinuance was then filed. Mr. Dhillon was awarded special costs against counsel personally for the application.

Counsel's own investigations into the identity of the unknown driver resulted in insufficient, inconsistent and unreliable information. The RCMP investigation did not yield results. However, defence counsel for a defendant pub in the action advised plaintiff's counsel that their investigations identified Mr. Dhillon as the driver. The judge on the costs application was critical of counsel for not disclosing on the application to add Mr. Dhillon the substance of the inconclusive investigations as that would have cast doubt on the likelihood of Mr. Dhillon's involvement. He found the conduct indefensible and an abuse of process meriting special costs.

In allowing the appeal, Fisher J.A. found that failure to disclose the entire circumstances of the investigation was in itself not sufficient to justify an order for special costs which is meant to be punitive in nature and ordered only in "very special circumstances". Counsel had advised the court at the application to add that he was relying only on the information received from defence counsel. There was no finding of dishonesty on his part. The issue of the sufficiency of the information was squarely before the court. The disclosure of further information would not likely have changed the result. In addition, counsel conducted additional investigations after the order adding Mr. Dhillon was granted in a prudent effort to ensure he had identified the correct Mr. Dhillon. It was during those additional investigations that the case of mistaken identity was revealed. Fisher J.A. held that counsel's conduct was "far from being characterized as reprehensible."

f. *Sarkari v. Carew*, 2019 BCSC 137, Riley J.

The trial judge assessed costs following a motor vehicle accident trial in which he apportioned 20% liability to the plaintiff and 80% to the defendant for the subject accident. The reasons contain a convenient recitation of the recent relevant authorities on the point. In the end, he followed the general rule as set out in section 3(1) of the *Negligence Act* in awarding costs in the same proportion as their respective liability to make good the damage or loss. He determined that in so doing, there would be no injustice. Both parties made offers to settle before trial on terms that were more favourable to their positions than the outcome determined by the court. The trial was "commendably focused" and the conduct of the parties was reasonable. The apportionment of costs would also not defeat the plaintiff's damages award.

g. *True v. Vedder Transport,* 2018 BCCA 463, Kirkpatrick J.A. (in chambers)

This was an application for leave to appeal an order that denied the applicant his costs under *Rule 14-1(1)* of the *Supreme Court Civil Rules*. In a claim for wrongful dismissal the plaintiff was awarded damages of approximately $14,000 and disbursements only. The trial judge found that there were not sufficient reasons for bringing the proceedings in supreme court. Leave to appeal was denied. Kirkpatrick J.A. stated that although the availability of a summary trial is a factor to be considered in the "sufficient reason" analysis, it does not invariably establish a sufficient reason for costs purposes.

h. *Wang v. Shao*, 2018 BCSC 790, Pearlman J.

The *Supreme Court Civil Rules* do not provide the court with authority to award double special costs.

i. *Waters v. Michie*, 2018 BCSC 1206, Crossin J. (leave to appeal granted on other grounds 2018 BCCA 403)

This was a family law case in which the plaintiff appealed an order of the registrar granting costs to the defendant for an interlocutory application in the absence of an entered order. *Rule 16-1* of the *Supreme Court Family Rules* is identical to *Rule 14-1* of the *Supreme Court Civil Rules* and states that the successful party on an interlocutory application is entitled to their costs if they are awarded costs at trial. Only the court hearing an application may make a contrary order. (Recall that in *Kondor v. Shea*, 2016 BCCA 15, the court held that the trial judge does not have the discretion to supplant this entitlement established by the rules).

The issue to be determined was the registrar's jurisdiction to assess costs in the absence of an entered order. Relying on the reasons in *Kondor*, the court held that a successful party's entitlement to interlocutory costs crystallizes at the moment costs are awarded by a trial judge unless the court hearing the application had ordered otherwise. Therefore, jurisdiction to assess costs is not tethered to the presence of an entered order.

However, Crossin J. stated that registrars should be slow to assess the costs of interlocutory application in the absence of entered orders and should only do so in unusual or exceptional circumstances. Litigants should be encouraged to enter the court order as it presents finality and certainty of the order absent an appeal.

A. Assessments and Disbursements

a. *Antulov v. Emery*, 2018 BCSC 898, Master McDiarmid as Registrar

At the pre-hearing conference, the master made an order pursuant to the provisions of the *Law Society of B.C. Code of Professional Conduct*, c. 5.2-1(a)(c) that both lawyers were granted leave to testify and/or submit affidavits and to advocate/speak to their own affidavits.

Each counsel swore their respective affidavits which were both found to contain "admissible evidence intertwined at times with submissions/argument". He stated that he had no difficulty in separating out those aspects of the affidavit which, strictly speaking, could have been struck (neither counsel made such an application).

The reasons contain a helpful summary of the significant principles binding upon the registrar in an assessment of costs, noting the fact-specific nature of the exercise and the wide discretion to allow or disallow disbursements based on a variety of factors such as extravagance, negligence, mistake or unjustified charges. All of the circumstances of the case must be considered and balanced. These reasons are likely to become one of the go-to cases for a compendious recitation of the law.

b. *Grady v. Riviere*, 2018 BCSC 1103, District Registrar Nielson

This case discusses tariff items in the context of a "typical motor vehicle action". In respect of tariff item 6 "all process for which provision is not made elsewhere ...for commencing and prosecuting a proceeding", he noted that when comparing motor vehicle accident pleadings to other forms of litigation, they are often reproduced from precedents and do not require the investment of significant time or resources in addressing complex and nuanced issues. He awarded four units in this case.

The court allowed the costs of three psychiatric reports from two different psychiatrists, finding that each report covered different and discrete periods of time, and one also responded to the defendant's expert. Each of the three reports stood alone within a separate and specific window of time. The court, however, did find that there was significant duplication and overlap between the two physiatrists for the plaintiff and reduced the amount allowable.

The defendant also disputed the disbursements related to Dr. Armstrong, arguing that he had embarked upon "a forensic feeding frenzy", generating four reports at a cost of $14,000. While plaintiff's counsel described him as a neurologist specializing in complex chronic pain, cross-examination of Dr. Armstrong at the assessment revealed that he had not written a final exam and was not, in fact, a neurologist. He also was not a certified pain specialist. He is a general practitioner with experience in treating chronic pain. Despite having already allowed for two physiatrists, the court allowed amounts for all four reports but discounted the first two to reflect a more reasonable rate proportionate to the work of a general practitioner.

The court disallowed the disbursement of an engineering report from MEA Forensic. The plaintiff sought an opinion on the speed change and angular velocity change that occurred to the plaintiff's vehicle during the collision. Liability was admitted and the defendant admitted in notices to admit the facts of the catastrophic nature of the impact and forces involved. The admissions were made prior to the commissioning of the report and a police officer was

subpoenaed to testify. The report was not given to a medical expert to consider. In the result, the report was neither proper nor necessary.

c. *Luis v. Marchiori*, 2018 BCCA 317, per Fenlon J.A. (Frankel and Groberman JJA. concurring)

The plaintiff sought to recover a disbursement for the attendance of her general practitioner at trial beyond the $20.00 witness fee. The general practitioner had charged for his time for attending the trial. The court distinguished between expert fact evidence and expert opinion evidence, noting that witnesses who become involved in litigation due to their profession such as a treating doctor or an engineer overseeing a construction project may be called to testify about their observations. The testimony comes from an expert but is not opinion evidence. As such, expert fact witnesses are limited to the $20 fee set out in Schedule 3 and *Rule 14-1(5)* does not authorize recovery of attendance fees beyond that. Furthermore, the phrase in Schedule 3 "unless otherwise ordered" applies only to the requirement of tendering the fees in advance and does not apply to the amount. As a matter of practice, a party may agree to pay a general practitioner for his time in attending the trial but it is not a recoverable disbursement.

d. *Luis v. Marchiori*, 2018 BCCA 364, per Fenlon J.A. (Frankel and Groberman JJA. concurring)

Following her unsuccessful appeal noted above, the appellant sought to have each party bear its own costs, arguing that the appeal served the public interest. Even though the chambers judge below had commented that the issue was one of interest to the legal profession and that a ruling from the court of appeal might be helpful, the court denied the appellant's application. While the issue had not been the subject of an appellate decision before, there was a prevailing practice in the trial court of not allowing attendance fees charged by expert fact witnesses in excess of $20 to be recovered as a disbursement. Further, the absence of a binding authority directly on point does not justify depriving a successful part of their costs, and the subject matter did not rise to the level of public importance such that the usual costs order should not follow.

e. *More v. Rutledge*, 2019 BCSC 40, Master McDiarmid

This case provides a useful review of how tariff items are assessed in motor vehicle actions. It reviews the analysis behind assigning units to Tariff Items 1, 2, 10, 11, 17, 34, and 44.

The defendants were successful in reducing the charges of two OTs who each prepared a functional evaluation report and a cost of future care report (life care plan). The OTs were both from the same facility and the master noted the usual overlap between each assessment. Having two separate report writers with similar qualifications from the same facility was an extravagance.

The account of the plaintiff's neurosurgeon was reduced for duplication in time spent reviewing his past assessment for the medical legal report. The doctor charged for his initial assessment, a follow up, an initial 30-page opinion letter and then a medical legal report two years later. The account for the medical legal report was reduced by $1,000 (2 hours) to account for the length of time he likely spent reviewing his old assessment.

f. *Moreira v. Crichton*, 2019 BCSC 372, Master McDiarmid

Master McDiarmid reduced the amount allowable by almost $1,000 for a psychologist who specializes in rehabilitation employment, finding that much of the report was a summary of the evidence. He found that it was unreasonable to require the defendant to pay the entirety of the cost. He reduced the cancellation fee of Dr. Giantomaso from $2,375 to $1,000. Dr. Giantomaso had been scheduled to testify through videoconferencing for .75 of an hour commencing at 2:00 pm. His cancellation fee was held to be disproportionate to what might reasonably be expected for a cancellation fee.

The court also reduced the account of Dr. Etheridge, a general practitioner with experience in anesthesia and pain management. He found his hourly rate too high, considering that he was not a specialist and that the rate exceeded the B.C. Medical Association Fee Guidelines. He held that the Guidelines serve as some indication of what might be reasonable for a general practitioner to charge and a losing party to pay.

g. *Murray Purcha & Son Ltd. v. Barriere (District)*, 2018 BCSC 1445, Master McDiarmid

In this case, the court considered the costs of out of town counsel in a petition proceeding. The respondent District of Barrier (60 km north of Kamloops) retained Vancouver counsel with significant experience in municipal law. The case included novel issues of whether evidence from a councillor of an *in camera* meeting was admissible; whether a councillor was a compellable witness and whether an elected official has authority to bind a municipality in an examination for discovery. On the one hand, the respondent argued that it required counsel with considerable knowledge of the controversial issues but in its bill of costs, also submitted a significant disbursement for online research because the issues were unique.

Master McDiarmid disallowed the cost of out of town counsel on the basis that there was no connection between the place of business of the respondent's law firm and any factor relevant to the issues in the Petition. He found that the main issue in the case was the law of tendering and there were numerous law firms and lawyers with experience in that area (as it often arises in construction litigation) located in the Kamloops area. He did, however, allow the cost of online research because there were somewhat novel legal issues involved which had apparently not been previously decided in BC.

h. *Rahmatian v. Tisdall*, 2018 BCSC 1504, Master Taylor (as Registrar)

In this case, defence counsel objected to the costs incurred by the plaintiff for medical reports because: her credibility was a problem; she had a pre-accident disability attributable to many pre-existing conditions which made the retainer of experts disproportionate to the case; the plaintiff's pre-accident functioning and activities were not significantly altered by the accident; and the claim was modest (and plaintiff's counsel should have known that). In the face of these objections, the registrar reiterated that there is only one test for allowing a disbursement and that is whether at the time it was incurred, it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursements was incurred.

The registrar allowed the disbursements of all experts in full. He declined to consider the defendant's offers to settle in assessing whether they were properly incurred. He declined to make a retrospective assessment of proportionality after final judgment or settlement.

i. *Senner v. GE Canada Leasing Services Company*, 2018 BCSC 1256, Master McDiarmid

The reasons address an important practice point for adducing evidence at an assessment of costs. At the pre-hearing conference, the master made an order pursuant to the provisions of the *Law Society of B.C. Code of Professional Conduct*, c. 5.2-1(a)(c) that both lawyers are granted leave to testify and/or submit affidavits and to advocate/speak to their own affidavits.

In addition, Master McDiarmid comments favourably on the presentation of evidence of the matters in dispute. The legal assistant swore an affidavit which exhibited a Bill of Costs which was annotated by defence counsel, setting out the defendants' position with respect to the tariff items and disbursements in dispute. The disputed disbursements were numbered. She appended numbered tabs which corresponded to the numbered disbursements and behind which were found the evidence to prove the disbursement. Excitingly, she also colour coded the tabs. For example, all disbursements that had been initially disputed but had since been agreed upon were coded green. The court could then easily make an order with respect to those exhibits.

B. Fast Track

a. *Avelin v. Aya Lasers Inc.*, 2019 BCSC 42, Gomery J.

This was a wrongful dismissal action tried under *Rule 15-1* Fast Track. The matter was hard fought with few concessions, involved changes in counsel for the defendant and proceeded to trial with the corporate defendant unrepresented. The court rejected these factors as "special circumstances" which would justify a departure from the presumptive costs under *Rule 15-1(15)*. In the result, fixed costs were awarded at $11,000.

b. *Greenway-Brown v. Kyung*, 2018 BCSC 846, Macintosh J.

This case outlines the calculation of costs for multiple fast track actions in the face of an offer to settle which reasonably ought to have been accepted. The defendant sought costs following the dismissal of five fast track actions, the trials of which were heard together over six days.

Of interest, the plaintiff argued that the offer was not one that ought reasonably to have been accepted because the master presiding at a judicial settlement conference apparently expressed a view as to a suitable settlement number at more than twice the offer to settle. Following *J.D. v. Chandra*, 2014 BCSC 1272, the court held that judicial comments at a settlement conference are not to be considered in deciding whether an offer to settle ought to have been accepted. The court also reaffirmed that impecuniosity, standing alone, is not enough to overcome the normal costs analysis.

In calculating costs, Macintosh J. assigned $6,500 for pre-trial work for each of the five actions and added $1,500 per day for the six trial days for a total of $41,500. He reduced this amount to $30,000 to account for trial efficiencies (primarily due to a resourceful approach taken by the

plaintiff). Of the $30,000, double costs were awarded on $10,000 (a rough estimate of the fast-track costs allocated to six trial days plus a small portion of pre-trial preparation). The total costs awarded were $40,000.

c. *Vuong v. Lindsay*, 2018 BCSC 916, District Registrar Nielsen

The trial involved three motor vehicle actions ordered heard at the same time. They settled three months prior to trial with costs to be agreed or assessed. While case law supported the notion that a reduction in costs awarded may be made for efficiencies when actions are heard at the same time, efficiencies cannot be presumed. In this case, the notices of civil claim were almost identical; the medical expert opined on the injuries in a single report; document disclosure was done on one list; there would have been one trial brief and one trial management conference; and there was one discovery in the first action (with another to follow failing settlement).

While noting that the efficiencies overall outweighed any complicating factors in having the actions heard together, the court awarded two full sets of fast track costs and 50% costs for the third action.

VI. Credibility

a. *Telford v. School District No. 42*, 2018 BCSC 2165, Voith, J.

At paragraphs 13 to 18 of this historic abuse claim, Mr. Justice Voith sets out a convenient summary of the law around the distinction between credibility and reliability and how those concepts are applied in assessing testimony. Credibility has to do with a witness' veracity or sincerity and reliability relates to the accuracy of the testimony. Accuracy engages the witness' ability to observe, recall and recount. Assessing credibility relates to the internal consistency of the witness' testimony, consistency over time, corroboration or external consistency with other evidence, any interest the witness may have including motive to lie, whether the witness is independent and prior criminal convictions are relevant. Assessing credibility cannot be gauged solely on the person's demeanour.

VII. Damages

a. *Hans v. Volvo Trucks North American Inc.*, 2018 BCCA 410, per Saunders J.A. (MacKenzie and Hunter JJ.A concurring)

The trial decision of this case is reviewed in our 2017 paper in respect of the significant in trust award. There was no appeal taken from the in trust award and the court of appeal's decision is of interest for its comments regarding the cost of future care award.

The husband and wife plaintiffs were involved in an accident in which the wife suffered minor injury but the husband developed severe disabling PTSD. The husband was awarded $4,893,887 in damages including $1,684,000 for the cost of constant supervision, $2,442,826 for his diminished capacity to earn as well as the loss of income from an unrealized trucking venture that the plaintiffs had intended to pursue and $265,000 for non-pecuniary damages. The defendant appealed both the liability and damages findings. The appeal was dismissed.

The court found that the non-pecuniary award was appropriate given the seriousness of his psychological injuries and their impact on his quality of life.

Of particular interest is the court's upholding of the cost of future care award which provided for the constant 24-hours-a-day supervision by a third party of the plaintiff to ensure that he did not take his own life over the next 25 years. The respondent argued that the award lies far outside the range of common sense. It was contended that: one of the psychiatrists who opined that he needed constant supervision learned during cross-examination that the plaintiff had travelled to India unsupervised following the accident and so his opinion should be rejected; the judge contradicted himself about the risk of suicide; the plaintiff saw his psychiatrist weekly and so his psychiatrist could commit him if the need should arise; the judge's application of a 20% negative contingency to account for future trips to India defied common sense; the judge failed to consider whether the plaintiff would actually pay for constant supervision; the plaintiff had a history of not following treatment regimes; and, the judge failed to sufficiently discount the award for the risk that the plaintiff may successfully take his own life.

Although the award for constant supervision was highly unusual based on the plaintiff being a relatively young adult male, was residing with his wife and undergoing regular psychiatric treatment, the judge's conclusions were supported by evidence and there was no basis to interfere with the factual conclusions. The court confirmed that the plaintiff was not required to establish that he would submit to 24-hour supervision. All that is required is for a plaintiff to prove their case based on *Lo v. Matsumoto*, 2015 BCCA 84. The court rejected the argument that *Coulter (Guardian ad litem of) v. Ball*, 2005 BCCA 199 and *O'Connell (Litigation Guardian of) v. Yung*, 2021 BCCA 57 stood for the proposition that a plaintiff is required to establish that they would accept the care as awarded. Mr. Hans did not have to show that he would spend all of the award on the item sought. The court confirmed that all a plaintiff is required to prove is the need and the utility of the item. Mr. Hans had demonstrated that he accepted help in the past thereby satisfying the onus.

The court also held that there is no principle that a trial judge must apply a negative contingency for the possibility of suicide, particularly where the suicidal ideation stems from the injuries caused by the defendant and the trial judge had put into place a plan to prevent that possibility.

b. *Henry v. Her Majesty the Queen in Right of the Province of British Columbia*, 2018 CanLII 99647 (SCC), per curiam

The plaintiff's application for leave to appeal the judgment of the Court of Appeal, 2017 BCCA 420, was dismissed without costs. The court of appeal had dismissed the plaintiff's appeal that settlement money paid by the City and Canada should be deducted from the award against the province. The City and Canada settled with the plaintiff mid-trial and entered into "B.C. Ferries agreements". The trial judge found that any amount of the settlement funds not identified as exclusively for costs must be deducted from the award based on the rule against double recovery. The court of appeal upheld the trial judge's conclusion that the damages flowing from the cause of action against the province were indivisible from the damages flowing from the causes of action against the City and Canada such that the settlement money would constitute double recovery if not deducted from the award at trial.

c. *Isbister v. Delong*, 2018 CarswellBC 1871, per curiam

The court of appeal decision was reviewed in our paper last year. Leave to appeal to the Supreme Court of Canada was dismissed.

The case was of interest for two points. The first being that the trial judge had not erred in allowing the expert reports served out of time. The second being the plaintiff's claim to recover interest on money she borrowed from her lawyer was dismissed at trial because there was scanty evidence of the loan and interest on funds borrowed for general living expenses are not recoverable as damages when they are not reasonably foreseeable and did not arise from the plaintiff's impecuniosity. The court of appeal had found that there was no need to decide whether the plaintiff could recover the interest as special damages because she failed to establish a causal link between the need for the loan and the accident.

d. *Riley v. Ritsco*, 2018 BCCA 366, per Groberman J.A. (Frankel and Fenlon JJ.A. concurring)

The plaintiff suffered injuries in a motor vehicle accident. The trial judge held that the absence of expert evidence precluded any finding that the plaintiff was adversely affected emotionally or mentally by the accident. The trial judge also found that the plaintiff did not retire early as a result of his injuries, despite the parties' agreement to the contrary. The trial judge awarded non-pecuniary damages of $65,000 and upon appeal damages were re-assessed at $85,000.

On appeal, at paragraph 54, the court concluded that there is no "legal impediment that obliges a claimant to advance expert medical evidence in order to advance a claim for mental injuries." The court held that there was no basis for the judge to ignore the harm to the plaintiff's emotional and mental state in assessing non-pecuniary damages as the plaintiff's testimony, as supported by other witnesses, clearly linked his emotional suffering to the accident.

The court also held that the trial judge was bound by the parties' agreement that the plaintiff would not have retired early but for his injuries so the issue was not what caused the plaintiff to retire, but whether his decision to do so was reasonable or necessary. At paragraph 83 the court concluded that the test articulated in *Barr v. Accurate Transmission and Driveline,* 2016 BCSC 2432 requiring that early retirement be necessary was too stringent, and that a plaintiff only needs to demonstrate that she or he acted reasonably in making lifestyle accommodations.

The plaintiff also sought a "segregated" head of damages for loss of housekeeping capacity. The court upheld the trial judge's finding rejecting the idea of a segregated damages award as there was no evidence that any incapacity on the plaintiff's part would result in actual expenditures, or of family members/friends routinely undertaking functions that would otherwise have to be paid for. The court held that where there is no pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages. The court held, at paragraph 102, that segregated non-pecuniary awards should be avoided in the absence of special circumstances as an assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff.

The court also held that while the plaintiff had an agreement to repay disability benefits, the plaintiff was only entitled to recover his net past income loss as per sections 95 and 98 of the *Insurance (Vehicle) Act*, even if the amount he had to repay was more than he recovered. The

court held, at paragraph 115, that "a plaintiff cannot, by agreement to pay a third party insurer more than the amount recoverable from the tortfeasor, thereby increase the amount that the tortfeasor is required to pay. The limitation in the Insurance (Vehicle) Act governs the damages award."

A. Accelerated Depreciation

a. *Chiang v. Kumar*, 2018 BCPC 127, Arthur-Leung K. Prov. J.

The court awarded $20,700 for an accelerated depreciation claim. The plaintiff's 2014 Mercedes Benz CLA45 suffered in excess of $34,000 in damages as a result of a February 2015 accident about ten months after the plaintiff had purchased the vehicle. The Mercedes was one of a handful available at the time. The plaintiff had spent further funds to "kit out" the vehicle so that the total purchase price was almost $69,000.

Despite taking until August 2015 to be repaired, one window was misaligned, there was a wind noise at speeds over 50 km, the B pillar rattled, there remained damage to a leather seat and the sunroof was still broken. By October 2015, the vehicle leaked and the noise still persisted.

The plaintiff attempted to trade in the vehicle in November 2015, but no dealerships were prepared to accept the vehicle due to the extensive damage. In December 2015, a Mercedes dealership estimated the vehicle to have a trade-in value of about $36,000 plus taxes.

There was conflicting expert evidence regarding whether the vehicle was a luxury vehicle and the defendant argued that only actual loss should be compensated and the plaintiff had not sold the vehicle. Judge Arthur-Leung was satisfied that the vehicle had sustained accelerated depreciation because there was no market for the vehicle. The vehicle had also sustained actual loss in that it was not back to its pre-accident condition and it is not necessary, in law, for the plaintiff to have sold the vehicle to recover damages.

The court also ordered general damages of $1,990.08 for the inordinate time that it took for the vehicle to be repaired. The amount was based on the 15 hours spent by the plaintiff to address the vehicle and repair issues.

B. Aggravated/Punitive

a. *Azak v. Chisholm*, 2018 BCSC 1051, Weatherill G.C. J.

The plaintiff sued for bodily injuries which occurred in a physical confrontation with his neighbour's contractor who was alleged to have constructed a retaining wall on the plaintiff's property. The defendant contractor argued that the incident was provoked by the plaintiff spitting on and verbally abusing him, and that the ensuing brawl was a matter of self-defence. The plaintiff also sued the neighbour in trespass for the retaining wall and breach of privacy for installing surveillance video cameras that were directed toward the plaintiff's property.

The parties were residents of a small village north of Terrace. The plaintiff and defendant neighbour had a frosty relationship. When the plaintiff discovered the partially constructed retaining wall, he angrily confronted the contractor and expletives were exchanged. The plaintiff alleged that the defendant contractor then jumped down from the wall on him and assaulted him.

In an interesting comment, Weatherill G.C. J. noted that he cautioned defence counsel of the need to cross-examine the plaintiff under the rule in *Browne v. Dunn* but counsel did not do so in any meaningful way. Counsel was "a solicitor with little to no experience in the courtroom and stated he was doing his best to assist the defendant on a *pro bono* basis."

In the result, Weatherill G.C. J. found that regardless of the harassment and insults the plaintiff had levied at him and regardless of their heated exchanges, the defendant contractor's reaction was unreasonable and disproportionate to the circumstances, and he rejected the argument of self-defence. He added an award of aggravated damages of $2,500 on account of the humiliation the plaintiff suffered in the aftermath.

The claim in trespass failed by virtue of the evidence of the property line. The claim for invasion of privacy failed as Weatherill G.C. J. accepted the defendant neighbour's evidence that the cameras were never directed toward the plaintiff's property.

b. *Basic v. Barjaktarovic*, 2019 BCSC 142, Hinkson C.J.S.C.

The plaintiff sued for damages arising from an assault by the defendant, Mr. Barjaktarovic, and suffered a fractured rib, injury to his temporo-mandibular joint, left chest wall pain, exacerbation of pre-existing osteoarthritis, dizziness, and nausea. The plaintiff was 78 years old at the time of trial and argued that his award should take into account his advanced age. At paragraphs 84 to 85 the court reviewed the "Golden Years" doctrine, which suggests that injuries may have a greater impact on an older person, whose activities are already constrained by age. The doctrine suggests that the enjoyment of retirement can be severely diminished, with less opportunity to replace activities or other interests in life, for an older person than a younger person who may be active in other respects.

The court found that with the exception of his chest pain, most of the plaintiff's injuries resolved within a matter of weeks. He was awarded $30,000 for non-pecuniary damages. As the assault did cause the plaintiff some element of mental distress, the court also awarded $2,500 for aggravated damages. The court also awarded $5,000 for punitive damages to address the reprehensible aspect or the need for specific and general deterrence and denunciation of the defendant Mr. Barjaktarovic's conduct.

c. *Godwin v. Desjardins Financial Security Investments Inc.*, 2018 BCCA 426, per Harris J.A. (Garson and Savage JJ.A. concurring)

This was an application to vary an order refusing leave to appeal from a trial decision allowing special costs arising out of a disability claim. The trial decision was included in our paper last year.

The respondent insured had succeeded in a claim for disability benefits and aggravated and punitive damages. Special costs were subsequently awarded against the appellant based on its bad faith conduct prior to the action being commenced. The trial judge recognized that the recent authority of *Smithies Holdings Inc. v. RCV Holdings Ld*., 2017 BCCA 177, precluded special costs being awarded for pre-litigation conduct. However, the trial judge considered that the issue of special costs arose in "unusual circumstances" being that he would have awarded a higher amount for punitive damages had he been aware of *Smithies* when he made the punitive damage award. Since the court did not have an opportunity to address the legal expense as

part of the award for punitive damages it awarded special costs to indemnify the insured for the costs of litigation.

In refusing leave, the chambers judge came to the conclusion that it was not in the interest of justice to grant leave. Although there was merit to the appeal, the point of practice was not of particular significance to the practice at large nor to the parties as the law is settled regarding costs and the amount in issue did not warrant an appeal.

In refusing leave, the chambers judge commented that the trial judge's conclusion that he could award special costs in lieu of punitive damages so as to punish such pre-litigation conduct was highly questionable in the face of *Smithies* and the law on punitive damages.

In dismissing the application to vary, Mr. Justice Harris confirmed that the principles governing awards of punitive damages and their relation to special costs are established in such cases as *Whiten v. Pilot Insurance Co*., 2002 SCC 18 and *Smithies* and that the trial decision did not create an exception to the rule in *Smithies*.

C. Causation

a. *McKenzie v. Lloyd*, 2018 BCCA 289, per Harris J.A. (Newbury and Smith D. JJ.A. concurring)

The appellants were defendants in three of four actions arising out of motor vehicle accidents. The key finding of the trial judge in issue was her conclusion that the first accident (a minor collision) caused the plaintiff to suffer a stroke, resulting in serious personal injuries which were aggravated by the third and fourth accidents.

The appellants argued that the trial judge failed to adequately consider the plaintiff's credibility and reliability. However, the appellate court found that it was not necessary for the trial judge to analyze the minutiae of the whole scale attack launched by the defence at trial. Furthermore, there was a great deal of consistent evidence beyond that given by the plaintiff as an interested witness which was open for the trial judge to accept which supported his position.

The appellants successfully argued that the trial judge fell into error by applying the "material contribution" test for causation instead of the standard "but for" test. However, this ground of appeal failed because the court concluded that this error did not affect the outcome. Despite the trial judge's language that the first accident caused a distinct injury and that motor vehicle accident #3 and #4 caused a "separate, indivisible injury" (at para.49), the court of appeal cast the findings a different way. Harris J.A. stated that her findings of fact were that the first motor vehicle accident caused an "initial constellation of injuries" and the stroke which were then aggravated by motor vehicle accidents #3 and #4. The court stated that although the trial judge framed the causation issue in relation to motor vehicle accident #3 and #4 in terms of the material contribution test, she made findings of fact about the aggravation and exacerbation of those injuries that demonstrated that the "but for" test was satisfied. Therefore, even though she erred to applying the material contribution test, it was immaterial to the outcome given her findings of fact.

D. Divisibility

a. *Brundige v. Bolton*, 2018 BCSC 1843, Butler J.

This was a highly contested assessment of damages following a determination of liability in the related action of *Provost v. Bolton*, 2017 BCSC 1608. The plaintiff's psychiatric condition was a key issue at trial, including how it intertwined with the psychological factors of her chronic pain presentation. In this case, the plaintiff had a history of "repeated horrific" childhood abuse and significant life stressors. Butler J. reiterated that the defendants must take their victim as they find them and that this was a classic "thin skull" situation. The medical experts did not opine that the plaintiff would have suffered psychological symptoms absent the subject accident, and, therefore the "crumbling skull" analysis did not apply.

b. *Friesen v. Moo*, 2018 BCSC 1866, Armstrong J.

This assessment of damages for three motor vehicle accidents involved a plaintiff with a significant pre-accident background of addictions, incarcerations for attempted murder and other offences, and workplace injuries resulting in disability. In between the subject accidents, he resumed criminal activities, including a dial-a-dope business and fencing gun parts. Following the third accident, he was convicted of various offences, and incarcerated. Whilst in the Pretrial Centre, he was involved in two significant physical altercations. He was still in prison at the time of trial, awaiting parole. The plaintiff's expert, Dr. Le Nobel opined that but for the motor vehicle accidents, the plaintiff would not have been vulnerable to injury from the prison fights.

The court found the plaintiff's credibility seriously wanting and, because of Dr. Le Nobel's reliance upon the plaintiff's reports, the court rejected Dr. Le Nobel's opinion regarding the effect of the prison assaults. Armstrong J. held that the fights caused injuries to the plaintiff's head, neck and teeth and worsened his condition. These incidents would have affected his physical condition in any event and damages were reduced accordingly.

On the issue of psychological injury, the court found that the plaintiff's psychological well-being before and after the accidents was compromised by many factors, including: a disability from working which made him unable to support his family, the death of his brother, drug addiction, serious criminal activity, a lengthy jail term, several altercations in prison, and the effects of his injuries from the subject accidents. Armstrong J. held that the plaintiff did not adduce sufficient evidence to support mental injury or a loss in this regard. He accepted that the accidents played a role affecting his psychological well-being in the early stages following each collision but the evidence did not support a psychological injury beyond this normal reaction.

The court accepted that past behaviours are predictors of future behaviours and so the court must take into account that the plaintiff's future income may also be affected by future criminal behaviour resulting in imprisonment. The court found the residual effects of his injuries would cause a very modest but real and substantial possibility that, upon release from prison, the plaintiff's income would be temporarily limited due to his accident-related injuries and awarded him $25,000 for damages for future income impairment.

c. *Khudabux v. McClary*, 2018 BCCA 234, per Stromberg-Stein J.A. (Saunders and Frankel JJ.A. concurring)

This was an appeal by the plaintiff in which she alleged that the trial judge erred in applying the legal framework for, *inter alia,* divisibility of injuries in the context of pre-existing conditions, other tortious and non tortious events, and contributory negligence. There were two accidents which were the subject of the trial.

The facts were complex. The plaintiff had a significant pre-accident history including ongoing physical injuries from two historical motor vehicle accidents, cognitive issues and psychiatric conditions. The first of the subject accidents involved two separate collisions. The plaintiff was found 100% at fault for the first collision in which she erratically changed lanes and struck another vehicle. In the aftermath of that collision, she blocked the HOV lane and a second collision occurred. The plaintiff was found 20% at fault for that event. The trial judge found that she was contributorily negligent in respect of her injuries from the second collision both for blocking the lane and undoing her seatbelt before it was safe to do so. Liability was admitted for the second of the subject accidents. The plaintiff suffered injuries in each of these three collisions.

In between the two subject accidents, the plaintiff was injured in two non-tortious slip and fall incidents; a rear-end collision; and a non-tortious fall out of a chair. She also had an involuntary psychiatric hospitalization following a family conflict. Each of these events contributed to her chronic pain and depression.

The court upheld the trial judge's finding that the injuries suffered by the plaintiff were divisible because it was possible to determine the extent to which the two subject accidents caused additional injury (in the form of temporary aggravation) to the plaintiff. Furthermore, the court noted that even if the injuries were indivisible, joint liability was not available due to the plaintiff's contributory negligence.

To assess respective liability for damages of each defendant, the trial judge made a global assessment of the plaintiff's injuries taking into account her pre-existing condition and then separated out the amounts for injuries the respective defendant did not cause. The trial judge found the defendant for the second accident was not responsible for all additional injuries as some were caused or overtaken by later tortious and non-tortious accidents. He reduced the damage award to reflect this. The court found there were other methods the trial judge could have chosen to assess damages, but this method was not wrong; he relied on the correct principles.

d. *Murphy v. Hofer*, 2018 BCSC 869, Sewell J.

This case considered an analysis of the plaintiff's original position in an assessment of damages where the plaintiff had a significant pre-accident history including serious childhood abuse, numerous workplace injuries, and pain in his shoulder and spine. The defence argued that the plaintiff would have suffered various difficulties as a result of this history even without the accident. The court found that the plaintiff's physical injuries from the accident were serious but not severe, and that he developed a severe somatic symptom disorder as a result of the accident. The psychological injuries were most profoundly affecting his quality of life.

On the evidence, Sewell J. concluded that the plaintiff's unrelated life stressors and risk factors made him more vulnerable to develop psychiatric difficulties after a traumatic event. However, his vulnerability was not sufficient to affect the assessment of damages because there was not a measurable or material risk he would have developed those psychiatric issues without the subject accident. In assessing his loss of earning capacity, however, the court took into account the hazardous nature of his work that lead to injuries in the past which may have lead to earnings interruptions.

E. Future Cost of Care

a. *Carrillo v. Deschutter,* 2018 BCSC 2134, Dardi J.

In this case, the plaintiff claimed for the future cost of medical cannabis in the amount of $96,753.00. Dr. Herschler, an experienced physical medicine and rehabilitation doctor, independently assessed the plaintiff and opined that he would remain symptomatic indefinitely and that it was unlikely physical treatment would be beneficial. He recommended that the plaintiff be put on a medical cannabis program, to be supervised by a medical practitioner.

The defendant argued a myriad of issues opposing a future care award for medical cannabis including: the plaintiff suffered from psychological illnesses that precluded his consideration for medical cannabis per the standards of the B.C. College of Physicians and Surgeons; he had used illegal substances and had been involved in criminal activities related to cocaine which should be considered a "red flag"; his own treating physicians had not recommended it; his chronic pain was controlled by conventional prescription drugs; the evidence surrounding the efficacy of medical cannabis as a treatment for pain was not robust and none of the alleged evidence supporting its use was before the court; and, the plaintiff had failed to follow Dr. Herschler's recommendations and had not purchased medical cannabis from a licenced producer.

Madam Justice Dardi found that the plaintiff had been forthright in acknowledging that he had purchased cannabis at various dispensaries without authorization. Although this was misguided, he was not deliberately trying to breach Health Canada rules and regulations. He testified that he was resolved to be supervised by a primary care physician and would purchase the medical cannabis through a Health Canada supplier. Her Ladyship found it was important that the plaintiff testified the cannabis products were helpful and effective and had provided him with some pain relief and there was no evidence of any negative side effects.

There was no evidence about what the medical cannabis would cost through a Health Canada provider, which may be different from what the plaintiff had paid from other dispensaries. The court took this shortcoming into consideration as well as the lack of evidence from Dr. Herschler as to how long he would be on the medical cannabis program and awarded $12,000 for future care relating to medical cannabis.

b. *Culver v. Skrypnyk*, 2019 BCSC 807, Davies J.

The court declined to include in a future care award the costs for CBD (cannabis) oil because the prescribing doctor was not able to testify as to the benefits to the plaintiff for his future care. However, the court did allow for the CBD oil expenses, totalling $18,091, paid to the date of trial on the basis that the lack of proof of medical necessity for future care does not preclude reimbursement for costs already incurred. The doctor had suggested that it would be beneficial

and the plaintiff had received benefit from its use. Therefore, the expense was reasonable and incurred as a result of the injuries and recoverable.

c. *MacLeod v. Whittemore,* 2018 BCSC 1082, Young J.

The plaintiff was a 28 year-old dental assistant who was not able to return to her profession because of her injuries and had to retrain for a new career. The case is of interest for the $80,000 award for future child care assistance. The plaintiff had recently given birth and did not feel safe with the baby on her own. She experienced a vicious cycle of pain associated with lifting and carrying her baby and required that the baby be "dropped off" to her when she breast fed. The court accepted that she would require assistance after her husband's parental leave and while she would still be at home. However, she would have had to pay for child care after her own maternity leave ended. The court allowed two years of child care costs at $40,000/year based on what she would be paying a nanny while on maternity leave, an expense she would not have otherwise incurred.

d. *Noori v. Hughes*, 2018 BCSC 965, Milman J.

The plaintiff sought damages for injuries sustained in two motor vehicle accidents. At paragraph 143, the court summarizes the principles applicable to the assessment of claims and award for the cost of future care, previously set out at paragraph 244 in *Dzumhur v. Davoody*, 2015 BCSC 2316 as follows:

- "...the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party ... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts ...It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event".

F. Housekeeping Capacity

a. *Elpell v. Glover*, 2018 BCSC 1404, Pearlman J.

The plaintiff was injured in a motor vehicle accident and continued to suffer chronic pain which disabled her from most of the housekeeping duties she did prior to the accident. She was 46 at the time of the accident and 53 at the time of trial. The plaintiff sought $60,000 for past loss of housekeeping capacity and $85,000 for future housekeeping capacity based on quantification to age 75. The evidence established that before the accident, the plaintiff did most of the cleaning, cooking, shopping, and gardening, while her husband did routine house maintenance. After the accident, the plaintiff's husband dedicated one to two hours per week to heavier housekeeping tasks, 4 to 5 hours to cooking, 2 to 3 hours on laundry, 3 to 4 hours on shopping, and he took on seasonal tasks such as cutting grass and washing their car.

All of the medical evidence supported the plaintiff's claim that her chronic pain disabled her from heavier housekeeping duties; however, the court did not find medical evidence to support the position that she was incapable of cooking.

Following *McTavish v. MacGillivray*, 2000 BCCA 164, the court held that a plaintiff whose housekeeping capacity is diminished is entitled to compensation when family members have gratuitously provided assistance. The cost of replacement services provides some measure of the plaintiff's loss. The court awarded $35,000 in past loss of capacity based on seven hours per week at $15 per hour for 338 weeks of pre-trial housekeeping that the plaintiff's husband performed beyond what he would have normally done. The court awarded $45,000 for future housekeeping capacity after taking into account a number of contingencies including improvement in the plaintiff's function, the plaintiff's children leaving home, and the possibility of downsizing to a home that requires less yard work.

b. *Forghani-Esfahani v. Lester*, 2019 BCSC 332, Verhoeven J.

The primary issue in this case was whether the plaintiff had sustained a loss of future capacity as a dentist as a result of injuries sustained in a motor vehicle accident. The plaintiff's primary complaint was her right hand. She was diagnosed with soft tissue sprain in her right hand and complex regional pain syndrome.

The court adopted the reasoning in *Firman v. Asadi*, 2019 BCSC 270, stating that the court has discretion to award loss of housekeeping capacity as a separate head of damage or as part of non-pecuniary damages depending on the circumstances. In declining to make a discreet award for loss of housekeeping capacity, the court concluded that the plaintiff was somewhat limited in her housework and yard work, but had not incurred any additional expense and was not likely to do so in the future.

The plaintiff also sought $55,121 for housekeeping assistance, which was supported by an occupational therapist report. The court did not find it likely that the plaintiff would hire housekeeping assistance while she and her husband were still able to perform these tasks. The court awarded $25,000 for housekeeping assistance, which represented the cost of doing heavier tasks that her husband would likely be unable to do as he got older. The court also declined to award $60,000 as an in-trust claim for the plaintiff's husband due to a lack of evidence that his help went above and beyond his contribution before the accident.

c. *Jo v. Morpurgo et al*, 2019 BCSC 194, Skolrood J.

The plaintiff was involved in a motor vehicle accident in which she suffered soft tissue injuries to her neck, right shoulder, and low back. The court awarded $80,000 in non-pecuniary damages, which included the plaintiff's claim for loss of housekeeping capacity. The Plaintiff testified that she did 80% of the housekeeping and all the cooking prior to the accident. After the accident, the plaintiff said her husband did 80% of the household chores.

In refusing to award an amount for loss of housekeeping as a separate head of damage, the court relied on *Kim v. Lin*, 2018 BCCA 77, and *Riley v. Ritsco*, 2018 BCCA 366. The court concluded that there had been a realignment of household duties and there was no evidence that the plaintiff had or intended to hire outside help, nor was there any evidence about the value of the services provided by the plaintiff's husband. Furthermore, the medical evidence identified heavy lifting as the plaintiff's principal limitation. The evidence was that housework that required lifting was performed by the plaintiff's husband and son even before the accident.

d. Riley v. Ritsco, 2018 BCCA 366, per Groberman J.A. (Frankel and Fenlon JJ.A. concurring)

See Damages

e. *Tsai v. Murdoch*, 2019 BCSC 179, Sharma J.

The defendant contested the plaintiff's claim for loss of housekeeping capacity on the ground that she had not adduced sufficient evidence.

The plaintiff testified that she kept a very clean and tidy home prior to the accident. She vacuumed every day to keep her hardwood floors clean. She did laundry very frequently. On the weekends, she attended to a more thorough cleaning of her bathroom and kitchen. The plaintiff had difficulty with laundry and lifting groceries for approximately a year and a half after the accident. She completely avoided housework for a number of weeks.

The court did not accept the defendant's argument that an award was not appropriate if extra costs had not been incurred; however, due to the lack of evidence as to the cost of replacement housekeeping, the trial judge included the loss of housekeeping as part of the non-pecuniary damages instead of under a discreet head of damage.

The plaintiff sought an award based on a rate of $15/hr for replacement services. There was no evidence on the cost of housekeeping, and no argument on the trial judge's ability to take judicial notice of the cost of housekeeping. The plaintiff referred to *Kellet v. Stam*, [2018] B.C.J. No. 1321, for the proposition that the court did not need to hear evidence of rate of replacement services. Sharma J. did not accept that this was the appropriate reading of *Kellet* and refused to rely on case law alone for the rate of replacement services without some evidence.

Also of note, the court concluded that the parties cannot agree that a particular expert is qualified as that is a matter exclusively for the trial judge. Parties can agree that they do not contest the expert's qualifications, but the trial judge makes the ultimate ruling.

G. Income Loss:

1. Future Income Loss

a. *Audet v. Chen*, 2018 BCSC 1123, Forth J.

The plaintiff was seven years old at the time of the motor vehicle accident. At the time of trial, she had graduated from high school and had just completed her first semester at the Southern Alberta Institute of Technology in a two-year business administration diploma. She had plans to return to school for a four-year business degree if she liked the work. She also worked part time at HomeSense and volunteered at a summer camp for Diabetes Canada. As a result of the accident, the plaintiff suffered a mild concussion, soft tissue injuries to her neck, back, and shoulders with ongoing discomfort, emotional distress, and headaches. The plaintiff was diagnosed with diabetes in grade 3, which was unrelated to the accident.

The court cited *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 for the applicable leading principles on the assessment of loss of future earning capacity:

a) to the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;

b) the central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;

c) the assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;

d) the two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;

e) under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;

f) the earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.

g) when relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

The court considered the education and career of the plaintiff's parents. The court was satisfied that the evidence supported minor restrictions during her part-time work at HomeSense with

overhead lifting and warehouse work. The court awarded $75,000 in future capacity loss, taking into account the plaintiff's chosen career that drew on her leadership and interpersonal skills and not physically-demanding work.

b. *Broad v. Clark*, 2018 BCSC 1068, DeWitt-Van Oosten J.

This case is of interest because the court awarded a 28-year-old plaintiff (who was 23 at the time of the accident) a future loss of earning capacity based on the assumption that she would have worked, full-time, to age 70 rather than the average retirement age. There was evidence that Statistics Canada showed the average age of Canadian female retirees in 2017 was 62.8 years.

In making the award, Madam Justice DeWitt-Van Oosten held:

> 299 I furthermore accept, based on her pre-collision circumstances, that had the injuries not occurred, the plaintiff would have formed a strong attachment to the workforce and likely worked full time until age 70. In her written submissions, plaintiff's counsel identified various factors in support of this determination, most of which I accept, including: a demonstrated determination and drive in the face of hardship, including completing high school and upgrading her office skills; the plaintiff was already working by the age of 14; she returned to the workforce full time after the birth of Caleb; she does not plan on having more children; and, the plaintiff has asserted a desire to work, role model this choice for her children and maintain independence through economic self-sufficiency and attachment outside of the home. The credibility of this assertion was not undermined at trial.

There are two other recent cases in which future income loss was assessed based on the plaintiff working to an age greater than 65. In *Thomson v. Thiessen*, 2018 BCSC 1353, a 67-year-old plaintiff (61-years-old at the time of the accident) was awarded a diminished earning capacity to his 75th birthday. In *De La Garza v. Carson*, 2018 BCSC 1858, the plaintiff, age 52, was awarded his income loss to age 70 based on his evidence rather than the lower ages supported by labor market studies.

c. *Gao v. Dietrich*, 2018 BCCA 372, per Savage J.A. (Frankel and Stromberg-Stein JJ.A. concurring)

The defendant appealed the trial judge's awards for non-pecuniary damages, loss of earning capacity, and future cost of care. The court of appeal found no basis to interfere with the award of non-pecuniary damages. At paragraph 34, the court states that with respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility", which is a lower threshold than a balance of probabilities, but a higher threshold than something that is only possible and speculative. The court found that the plaintiff's evidence about the likelihood that she would have changed employment from a senior financial services representative to a financial advisor, including her ability to obtain the necessary training for that position, was speculative and did not rise to the necessary threshold of a real and substantial possibility. The court varied the order below to dismiss the loss of past earnings claim.

The court of appeal overturned the trial judge's award of $1,300 for the plaintiff to attend a weight loss clinic because although there was a recommendation that the plaintiff lose weight, there was no recommendation that she attend a weight loss clinic to do so.

d. *Harry v. Power*, 2018 BCSC 845, Winteringham J.

The plaintiff was injured in two motor vehicle accidents: the first, as she was crossing the street as a pedestrian and the second as a passenger in a vehicle that was rear-ended. Liability was admitted for both accidents. The plaintiff suffered a number of injuries, including headaches, chronic myofascial pain syndrome, cervical facet joint syndrome, and lumbar facet joint syndrome.

The plaintiff was a new lawyer at the time the accidents occurred. The defendants argued that the plaintiff was not entitled to any amount for past wage loss or capacity loss as her income steadily increased every year since the accidents.

After the first accident, the plaintiff missed one day of work, but quickly returned as she was preparing for trial. She took her yoga mat to work in order to stretch during the day. The plaintiff missed one day of work after the second accident, and often left work early to attend medical appointments. She said she sacrificed billable hours to attend appointments, and because she did not have the stamina to work the long hours she worked prior to the accidents. The plaintiff testified that, although, she was able to meet the firm's billable target, she was not able to work the hours she wanted to work.

The court found that the plaintiff had proven a real and substantial possibility of a future event leading to income loss based on the plaintiff's own evidence that she could have billed more had she not needed to rest or attend medical appointments. Additionally, she testified that she intended to try medial block treatment which would require her to take some time off work, and there was medical evidence that she may experience an earlier than average physical decline as she aged.

Using a capital asset approach, the court based the award on the plaintiff making $6,000 less per year starting from the date of trial until age 64, for a total award of $105,000 after applying the applicable multiplier.

e. *Layes v. Stevens*, 2018 BCCA 415, per Goepel J.A. (Newbury and Groberman JJ.A. concurring)

The plaintiff appealed the trial decision on the grounds that the $200,000 award for loss of future earning capacity was made with reference to other case law instead of the facts of the particular case, and, alternatively, that it was inordinately low. The plaintiff argued that the figure for future income loss did not reflect the award for past wage loss, and that the trial judge should have taken the annual award for past wage loss and extended it to the end of the plaintiff's working life.

The court of appeal dismissed both of the grounds of appeal. In addressing the plaintiff's second argument, the court of appeal, at para. 37, underscores that the different tests for past wage loss and loss of future earning capacity mean that the awards under these two heads of damage do not need to have a numerical or proportional relationship to each other. The award

for future earning capacity does not need to presume the past wage loss will continue, indefinitely into the future.

f. *MacGregor v. Bergen*, 2019 BCSC 315, Branch J.

In calculating the plaintiff's future loss of capacity, the court found that it was under an obligation to account for the present value of future losses under s.56 of the *Law and Equity Act*, even though neither party had provided expert testimony as to the appropriate multipliers. Instead, the court relied on the multipliers provided at Appendix E of the *Civil Jury Instructions*, and noted that this had been used in other cases as well. (See footnote to judgment)

g. *Moreira v. Crichton*, 2018 BCSC 1281, Betton J.

This 41-year-old plaintiff suffered soft tissue injuries to her neck and back with lasting chronic pain. Betton J. provided a detailed consideration of her chronic pain, indentifying the severity of pain as the physical element, and the plaintiff's capacity to cope with pain, as the psychological element. In this case, the severity of the pain was a consideration in general damages, and the plaintiff's ability to cope with pain was significant to her employment. The court underlined that because the experience of pain is subjective, it is difficult to assess the impact on a plaintiff's life, even with the aid of expert evidence.

Betton J. confirmed that medical examinations and opinions are of assistance because of the examiner's expertise, which allows them to conduct tests and examinations that insert some greater objectivity to the assessment of the person who subjectively experiences pain. However, he noted that several types of testing rely on subjective concepts or perceptions. He concluded that:

> ...in the context of an adversarial trial process where the experience of pain is the primary issue in dispute, the credibility of the plaintiff is crucial to the trier of fact's determination of what the person is actually experiencing. The positions of the parties here demonstrate that even where there is universal agreement that the plaintiff is experiencing pain, there can be wide disagreement about the impact that experience is likely to have on her into the future.

The defence argued that the plaintiff's reported pain symptoms increased after she retained counsel and became involved in litigation which reflected negatively on her credibility. However Betton J. held:

> I do agree with the defendant that there are examples of situations where the plaintiff may have become too willing to attribute absences to the MVC. Despite this and the other noted frailties in her evidence, when considered as a whole, I accept that the plaintiff is dealing with persistent activity-limiting pain. To the extent that decisions she has made based on advice from her general practitioner or the existence of this litigation might have caused her to have a greater focus on her pain, I view this as helpful information as to what her future course may look like as opposed to an adverse reflection on her credibility. In other words, focus on the pain may be an unintended and unfortunate consequence of the litigation but not an indication of a lack of effort to reduce symptoms, or effort to magnify symptoms for gain. It reveals what can happen when she is not distracted from her symptoms. Hopefully

> with the conclusion of the litigation, the focus will end and life's distractions will again assist in minimizing the effects of her conditions.

Betton J. ultimately awarded $130,000 in non-pecuniary damages.

This case is significant for a large future capacity award despite the small amount of time that the plaintiff was off work after the accident. She worked as a manager of clinical operations with Independent Respiratory Services ("IRS"), with an annual salary of over $100,000. The plaintiff joined IRS in 2002 when it was a fledgling business with only 5 employees. At the time of trial, the business had grown to 85 employees and 45 locations in British Columbia. The plaintiff was promoted soon after the accident.

The plaintiff initially took some time off work after the accident due to medical appointments and pain, but had no sustained absences. Over a year after the accident, the plaintiff began to take multiple weeks off work, or work periods of reduced hours. The court found that these delayed absences were caused by a decrease in the plaintiff's ability to cope with her chronic pain.

The court found that there was a real and substantial possibility that the plaintiff would not be able to advance as far as she would have absent the accident, may even be demoted as a result of her injuries, and that she is less marketable as a prospective employee.

The plaintiff was able to continue working, but the court found that her injuries inserted an element of uncertainty into her career that did not exist before. The plaintiff led evidence from the CEO of IRS, who testified that he had previously intended to promote the plaintiff into his position when he retired, but that since the accident, she had been less hands-on, which led to some problems with the company and uncertainty as to her future advancement in the company.

Using a capital asset approach, the plaintiff submitted that a range of around $1 million to $1.3 million was reasonable based on a number of possible future career paths. The court found that her risk of loss would well exceed this amount if she lost her job at IRS, but that there was also a possibility that she would still become acting director as previously planned. The court awarded $500,000.

h. *Parker v. Martin*, 2018 BCCA 488, Dickson J.A. (Saunders and Fitch JJ.A. concurring)

At trial, the plaintiff was seeking an award for loss of future earning capacity, but not past income loss as the plaintiff had not missed any work up to the date of trial. The plaintiff relied on medical evidence and the evidence of an occupational therapist that he would likely suffer from ongoing chronic pain. The trial judge did not accept that there was a real and substantial possibility that the plaintiff would lose future income as a result of his injuries.

The court of appeal concluded that the trial judge did not err in his assessment, citing the following cases as "key authorities on loss future earning capacity" (at para 10): *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.), *Morgan v. Galbraith*, 2013 BCCA 305, and *Steward v. Berezan*, 2007 BCCA 150.

2. Past Income Loss

a. *McGonigle v. Parada*, 2018 BCSC 1017, Bracken J.

The plaintiff suffered from chronic pain, headaches, anxiety and depression following a motor vehicle accident. The plaintiff was 38 years old at the time of the accident and was not working outside the home at the time. She had not graduated from high school. In the past, she had worked as a dishwasher and flagger, but had left the workforce to raise her two children, who were born in 2005 and 2007. The plaintiff made some money selling carvings and smaller crafts, but this income was not well documented. The plaintiff attempted to return to work as a flagger after the accident, but found that it was too painful. Similarly, she testified that she was physically incapable of working as a waitress.

The court characterised the plaintiff's claim for "past loss of income" as a component of the loss of earning capacity, citing *Falati v. Smith*¸2010 BCSC 465, *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, and *Bradley v. Bath*, 2010 BCCA 10. The Plaintiff was seeking $30,000 in past income loss. In awarding, $15,000 under this head of damage, the court noted that the plaintiff may have earned some income from her crafts and limited work as a flagger had she not been injured, but her history of earnings and employment was not sufficient to justify an award of $30,000.

b. *Provost v. Bolton*, 2018 BCSC 1090, Butler J.

The plaintiff advanced a subrogated claim for past wage loss claim of $36,995, which was paid to him by the RCMP while he was off work. There was little evidence before the court regarding the Attorney General of Canada's right of subrogation; there was no collective agreement, or employment agreement in evidence. It was accepted as common practice for the RCMP to pay officers who were off work. After reviewing the leading authorities of *Ratych v. Bloomer*, [1990] 1 SCR 940, *Cunningham v. Wheeler*, [1994] 1 SCR 359, and *IBM Canada Limited v. Waterman*, 2013 SCC 70, the court concluded that the benefits paid did not fit within the private insurance exception and the key issue was whether the Attorney General of Canada had the right of subrogation. The applicable framework was outlined at para 54:

> If the employer does not have a right of subrogation that is the end of the enquiry because the wage benefit would be deductible. If the AG Canada does have a right of subrogation, then the benefit is not deductible, unless that right has been waived. Waiver produces that result because it is only the existence of the right of subrogation that prevents the benefit from being treated as collateral and deductible.

The court confirmed that the right of subrogation is an equitable right that does not depend on the existence of contractual rights. Ultimately, the court held that the Attorney General of Canada had a right of subrogation, since the amounts paid to the plaintiff were in the nature of an indemnity for the loss suffered by the defendants' tortuous actions, and that the right had not been waived.

In the course of final submissions, the court allowed an amendment to the notice of civil claim to include an in-trust claim for the plaintiff's wife. The claim was clearly supported by the evidence, but had not been pled and was first raised in the plaintiff's closing submissions. After reviewing the cases of *X. v. Y.*, 2011 BCSC 944, and *Ellis v. Star*, 2008 BCCA 164, the court found

that any potential prejudice to the defendants was avoided by allowing them to re-call the plaintiff's wife for cross-examination on this issue during the trial of the companion case.

c. Wiles v. Seabrook, 2019 BCSC 13, McEwan J.

The plaintiff was injured in a car accident and, as a unionized employee, received disability benefits through his employer's long term disability plan provided pursuant to a collective bargaining agreement. The court reviewed *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 and *Thompson v. Helgeson*, 2017 BCSC 927, which addressed the deductibility of pension benefits from a tort income loss claim. In *Cunningham*, the court found that benefits which are the direct result of a collective bargaining agreement have been, in effect, "paid for by the plaintiff" and so are not deductible from an award. As was done in *Thompson*, Mr. Wiles called evidence from a witness who was involved in the negotiation of the collective agreement. The witness testified that the union's goal in negotiating the collective agreement was to obtain the best agreement possible and that the final compensation package was the result of trade-offs between wages and other benefits. Accordingly, there should not be any deduction for the disability amounts paid to the plaintiff from the damages for loss of earning capacity.

H. Management Fee

a. *Pestano v. Wong,* 2019 BCCA 141, per Dickson J.A. (Fenlon J.A. concurring; concurring reasons by Saunders J.A.)

The trial reasons were summarized in the 2018 Case Law Update and involve the legal principles and methods of calculation to be applied in assessing trustee and investment management fees, and tax gross-up awards. On appeal, the management fee award of $1,738,400 was reduced to $50,000.

A central issue on appeal was the extent of a defendant's obligation, if any, to pay for additional investment management services when a trustee is charged with managing an incapable plaintiff's award for future pecuniary loss. The court confirmed that where a trustee is responsible for fund management, the analysis shifts from the plaintiff's ability to achieve a rate of return equal to the statutory discount rate to the trustee's ability to do so. Dickson J.A. found that there was no evidence to support the trial judge's conclusion that the trustee in this case could not achieve the requisite rate of return without investment management assistance.

Both of the economists who provided expert evidence assumed for the purposes of the tax gross-up calculation that the fund would be invested in a mixed portfolio rather than entirely in secure long-term fixed-income securities. Their assumptions related to the tax gross-up and not to a purported need for active and continuous investment management of a mixed portfolio to achieve the statutory rate of return. Furthermore, the experts' assumptions could not provide an evidentiary basis upon which to find that investment management assistance was required. The statutory discount rate is based on long-term historic rates, and it is assumed to reflect reality. There was no evidence which displaced that position.

While the trustee's intention to retain external investment assistance to maximize returns was in the plaintiff's best interests (and accorded with its fiduciary obligations), it would violate the compensatory principle to require the defendants to pay for that assistance unless it was required to achieve the statutory discount rate.

In her concurring reasons, Saunders J.A. rejected the plaintiff's argument that management fees are recoverable because a trustee's fiduciary obligations to manage the fund includes the need for diversification of the type and class of investments. She held that there was no statutory direction compelling diversification and the requisite standard is that of a prudent investor in the context of the particular trust instrument.

The court of appeal upheld the tax gross-up award, finding that it was properly based upon the actual lump sum award.

b. *Turner v. Dionne*, 2018 BCSC 1075, Adair J.

The plaintiff was awarded $1,426,002.83 in damages arising from a motor vehicle accident which included $950,000 for future loss of earning capacity and $145,489 for cost of future care.

The plaintiff sought a management fee in the range of $148,199 to $247,353 depending on the type of portfolio. The defendant argued that the plaintiff failed to demonstrate that she needed any management or investment assistance and that financial advice entirely appropriate to the plaintiff is available at no charge through banks and other similar financial institutions that would yield a rate of return equal to the discount rate.

The court awarded a management fee of $15,000 on the basis that: 1. there was no evidence about what the plaintiff had done with the judgment award in the eight months since the trial; and, 2. the plaintiff was a thoughtful and mature woman in her late 20s and there was no evidence that, despite struggles with math and science, she had ever, either before or after the accident, had any problems managing money responsibly. In particular, there was no evidence that she had struggled in any way to decide what to do with the award to that point.

I. Mitigation

a. *Gill v. Lai*, 2019 BCCA 103, per Willcock J.A. (Newbury and Frankel. JJ.A. concurring)

This appeal is of particular interest for two issues: the summary of the law relating to failure to mitigate; and, the upholding of the trial judge's use of male labour market statistics to assess the contingencies affecting the female respondent's loss of income-earning capacity.

The respondent was a pharmacist and mother of two children who suffered from chronic neck, shoulder and back pain as a result of two accidents.

The court found that there was no basis to interfere with the trial judge's rejection of the argument that the respondent had failed to mitigate her damages by not following advice to engage in an exercise regime. At trial, it was found that the she had attempted to follow the medical advice while balancing her profession, her chosen career path, the needs of a young family and the needs of a spouse building a dental practice. Under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable.

The subjective component of the test allows a court to look beyond just whether the individual understood, appreciated and was capable of following the advice given and to look to their personal circumstances and ability to follow that advice. The objective component of the test entitles the judge to look at what a reasonable person in that plaintiff's circumstances would do. The plaintiff had been constrained by her personal circumstances from being able to fully engage in the recommended exercise program. The court of appeal upheld the trial judge's mitigation findings.

The trial judge had relied upon male labour market statistics for negative contingencies of part-time employment and non-participation in the workforce. The trial judge had not applied the female statistics for two reasons. The first being factors relating to the respondent; she had a particular adherence to the work force, she valued financial independence and her parents were in their mid-sixties and both still working. The second was that the judge was reticent to give weight to female statistics which may have embedded discrimination.

The appellants argued that there was no evidence of embedded discrimination and that the female statistics accurately reflect the real and substantial possibilities for the respondent.

In upholding the trial judgment, the court of appeal referred to its previous decisions in *Crimeni v. Chandra*, 2015 BCCA 131 and *Steinebach v. O'Brien*, 2011 BCCA 302, which recognized that income statistics may incorporate historic and inequitable gender-based pay differences. It was appropriate for the trial judge to have recognized the bias in the statistics and to view the evidence as conservative. Accordingly, a cautious approach should have been taken towards gender-based income statistics.

Gender-specific historical income figures may be useful when it is the most accurate predictor of income. The court must remain mindful that the quantification of damages necessitates an individual approach.

b. *Hrnic v. Bero Investments Ltd.*, 2018 BCSC 1880, Saunders J.

The plaintiff alleged severe and somewhat unusual nerve and muscular pain that became chronic. The defendants argued that the plaintiff failed to mitigate by not following the advice of her treating practitioner to take Nortriptyline and Robaxin to treat her headaches, neck and back pain.

The trial judge found the defendants failed to establish a failure to mitigate in two respects. First, the plaintiff was suffering from a pre-existing somatic symptom disorder and was not fully able to make a rational decision as to treatment. As the defendants had proven that the plaintiff was suffering from a psychiatric disorder that severely impacted her perception of her injuries, the defendants bore, but failed to meet the additional burden of proving the disorder had no impact on her ability to act reasonably in making decisions as to her treatment. Secondly, the defendants had failed to establish that the recommended treatments would have led to an improved outcome of her somatic symptom disorder or her degree of disability.

c. *Lewis v. Gibson*, 2018 BCSC 1713, Russell J.

The plaintiff suffered serious and permanent injuries to his foot, ankle and knee, as well as aggravation of his chronic depression and anxiety. One of the issues to be determined was whether the plaintiff had failed to mitigate his damages. The plaintiff used Percocet and

cocaine throughout his adult life. The plaintiff acknowledged that he had to stop using drugs and alcohol and that he had not taken any steps to address his addictions, either before or after the accident. His damages were reduced by 20% for failing to pursue psychological counseling as recommended by three separate doctors and, by failing to take steps to address his Percocet and cocaine addiction.

d. *Noori v. Hughes*, 2018 BCSC 965, Milman J.

The plaintiff sought damages for injuries sustained in two motor vehicle accidents. The defendants alleged that the plaintiff failed to mitigate his losses by refusing to follow the advice of his treating physicians. The plaintiff acknowledged that additional physiotherapy may have benefited him, but he testified that he had difficulty affording the ongoing therapy and at times he was busy with work. At paragraph 101, Milman J. states that there was ample evidence of the plaintiff's financial difficulties, and that in assessing the reasonableness of the plaintiff's failure to consistently attend physiotherapy, it was appropriate to consider his financial limitations. The court was not persuaded that the plaintiff's general damages should be reduced due to alleged failure to mitigate those damages.

e. *Ranahan v. Iron Horse & Logistics Inc. et al*, 2018 BCCA 75, Fenlon J.A. (Saunders and Dickson JJ.A. concurring)

The plaintiff was 55 years old and worked as a tree faller in the forest industry as well in the oil and gas industry in a small community in northern British Columbia. At trial, the defendants argued that the plaintiff failed to mitigate his losses by obtaining a less physically-demanding job. They relied on the opinion of an occupational therapist that the plaintiff was capable of limited strength and light strength jobs. The trial judge dismissed this argument because there was no evidence that alternate employment was available in the plaintiff's community.

The court of appeal upheld the trial decision that the plaintiff had done what he could to find work given the circumstances, stating that "[w]hether reasonable efforts to mitigate include moving from a community to find work will depend on the particular circumstances of the plaintiff" (at para. 29).

f. *Rhodes v. Surrey (City)*, 2018 BCCA 281, per Goepel J.A. (Saunders and Fenlon, JJ.A. concurring)

In this case the court of appeal overturned a jury's verdict reducing the plaintiff's award by 75% for her failure to mitigate her damages by: failing to take anti-depressants on two occasions; avoiding active physical treatments preferring passive treatment; and, failing to undergo behavioural therapy.

The court of appeal found there was no evidence that the plaintiff failed to follow medical treatment. The plaintiff had stopped taking her antidepressant medication on two occasions because of side effects and she had so advised her treating physician. Further, there was no evidence that the plaintiff's damages would have been reduced had she continued her medication on those two occasions.

Although there was some evidence that there was a potential treatment that might have assisted the plaintiff, those treatments were recommendations made by an expert during cross-

examination at trial. There was no evidence that those treatments had been recommended to the plaintiff.

g. *Sangha v. Inverter Technologies Ltd*., 2019 BCSC 466, Riley J.

In this case, the plaintiff's awards for non-pecuniary damages and past income loss were reduced by 10% for her failure to mitigate by failing to seek out volunteer work as recommended by doctors. The plaintiff had suffered pre-existing depression that was deepened and prolonged by her injuries and by her inability to work. There was evidence that she had enjoyed her work and that she missed her colleagues and was frustrated and depressed by not being able to return to work. Her feelings of unproductiveness and social isolation could have been assisted through her pursuing a volunteer position.

h. *Vine v. Taylor,* 2018 BCSC 493, Greyell J.

In this case, the defence was unable to prove a failure to mitigate based on the plaintiff's pre-existing drug and alcohol abuse. Firstly, the defence failed to establish that the plaintiff had the capacity to make a decision to seek out medical care rather than purchase cocaine. Secondly, the defence failed to call evidence to support their argument that the plaintiff was "acting self destructively" when the plaintiff did not have the capacity to act in a rational manner in making a choice to consume or not consume alcohol or cocaine. The defence also failed to call evidence that earlier treatment would have improved his symptoms.

However, the court reduced the plaintiff's claim for past loss of earnings by 50% based on the real and substantial possibility that his pre-existing substance abuse problem might have worsened notwithstanding the accident with a consequent loss of income.

VIII. Document Disclosure and Production

a. *British Columbia v. Philip Morris International Inc.,* 2018 SCC 36, per Brown J. (Abella, Moldaver, Karakatsanisn, Gascon, Rowe, Martin JJ. concurring)

The Province successfully appealed an order requiring them to produce databases collected by the Province containing coded health care information about individual B.C. residents. At issue was the interpretation of s. 2(5)(b) of the *Tobacco Damages and Health Care Costs Recovery Act* which provides generally that the health care records and documents of particular individual insured persons or documents relating to the provision of health care benefits for particular individual insured persons are not compellable. Both the application judge and the B.C. Court of Appeal held that once anonymized, the databases fell outside of the scope of s. 2(5)(b) and were therefore compellable.

Brown J. confirmed that databases, as means of storing information, fit both the definition of a "record" under the *Interpretation Act*, R.S.B.C. 1996, c. 238 and "document" under the *Supreme Court Civil Rules*. The databases therefore fall under the scope of s. 2(5)(b).

Section 5 of the *Tobacco Damages and Health Care Costs Recovery Act* allows the Province to use certain statistical information to establish causation and quantify damages. That statistical information is derived from databases identifying particular individuals and information coded to the characteristic of the medical service provided. This information was gleaned from a

particular individual's clinical records. Since the Province was relying upon such statistics, the defendant sought the databases underlying the information. Brown J. held that the mere alteration of the method by which that health care information is stored does not change the nature of the information itself. The databases contained both health care records of an individual and documents relating to the provision of health care benefits for an individual and were therefore not compellable under s. 2(5)(b).

The application judge and court of appeal held that the databases were "highly relevant" and, as such, could not have been intended by the legislature to be exempt from production. However, Brown J. held that the courts below were in error by allowing relevance of the documents to supplant the meaning of s. 2(5)(b).

Brown J. rejected the contention that once anonymized, the records were compellable because they no longer identified the individual whose information was contained in the database. On principles of statutory interpretation and the ordinary meaning of the word "particular" in section 2, he held that databases, even once anonymized, contain records of and documents relating to each distinct and specific individual.

b. *Dupas v. City of Richmond,* 2018 BCSC 1059, Weatherill G.C. J.

This was an application for various outstanding records and information arsing from an examination for discovery in a slip and fall claim.

The plaintiff's pleadings alleged, *inter alia*, that he sustained and continues to sustain loss of earnings, including loss of income, loss of earning capacity and that he is precluded from returning to work or, alternatively, has a diminished capacity to work. The plaintiff suffered from significant pre-accident health issues which were intertwined with his condition before and after the fall.

Following a discovery at which documents relating to the plaintiff's income was requested, the defendant requested the documents a second time. Plaintiff's counsel responded by email saying that the plaintiff was dropping his income loss claim on the advice of counsel "at least for now" and that she would notify him and agree to further discovery if that position changed. In that same email, plaintiff's counsel took the position that his CPP disability records were not relevant.

Further correspondence was exchanged in which defence counsel took the position that the requested documents were relevant and plaintiff's counsel responded saying that "My client is not claiming for past loss income or any further capacity at this time. At this time he has no factual basis to do so. Accordingly I will object to all questions you may ask on these topics." On a subsequent discovery, the plaintiff was, at best, equivocal on whether or not he was pursuing a past or future loss of earnings.

On the defence's application, the court was critical of plaintiff counsel for failing to amend her pleadings to formally and unequivocally drop the claims for income loss, past and future. Instead, she chose to rely entirely on her statements to defence counsel. The court determined that this was not good enough.

The court also disagreed with plaintiff's position that the CPP records were irrelevant because they only related to loss of earning capacity. The court ordered the CPP records be produced because the records were "plainly relevant" to the claim for non-pecuniary damages as well.

The defence also sought unredacted psychiatric records, which the plaintiff opposed based on an affidavit sworn by a paralegal and plaintiff counsel's representations to the court that redactions related to privilege or were irrelevant. Counsel failed to have unredacted copies available for the court to review. The court noted that the plaintiff's evidence was "woefully inadequate", but allowed her to provide the court with unredacted copies which he would review and give his decision at a later date.

Mr. Justice Weatherill commented that he was "deeply troubled" by the position taken by plaintiff's counsel which included seeking an order for special costs against counsel for the defendant where there was no basis for doing so. As a consequence, the defendant had to retain special counsel. Instead, the court ordered that counsel for the plaintiff personally pay defence counsel's costs, assessed at $2,000, forthwith and that the defendant is entitled to his costs at scale B.

c. *Kim v. Samuel*, 2018 BCSC 1483, Myers J.

The plaintiff, a refugee who had fled North Korea, suffered physical and mental injuries in a car accident. The defendant sought production of the plaintiff's immigration file on the basis that it was necessary to ascertain the plaintiff's pre-accident psychological state. Mr. Justice Myers dismissed the application. Although the plaintiff's pre-accident psychological state was relevant, the plaintiff had already disclosed 1,650 pages of medical records. The defendant had failed to provide an affidavit from a medical expert indicating that further information on the plaintiff's pre-accident psychological state was necessary. The immigration file would shed marginal, if any light, on the action and it was a disproportionate invasion of privacy.

A. Affidavit Verifying List of Documents

a. *Araya v. Nevsun Resources Ltd.*, 2019 BCSC 262, Abrioux J.

In a class action involving allegations by refugees that a mine was built using forced labour obtained from the plaintiffs coercively and under threat of torture, the court outlined the applicable principles governing when an affidavit verifying a list of documents is to be ordered:

> (a) in *Foundation Co. of Canada Co. v. District of Burnaby*, [1978] B.C.J. No. 557 (S.C.) at para. 7, Justice Legg (as he then was) stated the following:
>
> > …When some documents which are significant to the defence or claim of one party, have, for whatever reason, been omitted from any list delivered under Rule 26(1), in the absence of any adequate explanation or reason for such omission, an order directing the delinquent party to deliver an affidavit verifying the list of discovered documents ought, in my view, to be made.
>
> (b) furthermore, if there are plain and obvious gaps in document disclosure that suggest the search for documents may have been less diligent than required, a party may be required to produce an affidavit verifying their list of documents, or verifying any further or amended list they might consider

appropriate to produce pursuant to R. 7-1(1): *Sysco Victoria Inc. v. Wilfert Holdings Corp.,* 2011 BCSC 1359 at para. 28. Equally, an order may also be made when the opposing party has displayed a "dilatory or casual attitude" to document production: *Gardner v. Viridis Energy Inc.,* 2012 BCSC 1816 at para. 52.

(c) an affidavit verifying a list of documents may also be ordered where there is an unwarranted delay in the delivery of a list of documents: *Morel v. Insurance Corp. of British Columbia,* [1996] B.C.J. No. 1198 at para. 19 (S.C.) and *Guzzo v. Catlin Estate,* [1986] B.C.J. No. 2385 (S.C.) at para. 10;

(d) where lawyers have taken control of the listing and production process, one of the fundamental considerations is whether or not they have been provided with complete access to sources where relevant documents may be found. Only the party can verify that its solicitor has been provided with or directed to all relevant documents: *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.,* [1991] B.C.J. No. 2630 (S.C.); and

(e) the fact a case is large or complex in nature does not mean a party will not be ordered to produce an affidavit of documents. In such cases, the court may order an affidavit of documents if it is not satisfied that original document searches have been diligent or that there is a sufficient explanation for material omissions: *Copithorne v. Benoit,* 2010 BCSC 130 at paras. 13-19.

B. Privilege

a. *Burns v. Hall,* 2018 BCSC 968, Master Wilson

This non-personal injury case addressed issues around privilege between third party professionals and solicitors.

There is no equivalent to solicitor-client privilege with respect to communications between parties and third party professionals such as accountants; the only privilege that may attach to such communications is litigation privilege.

In addressing whether litigation privilege attached in the context of advice from a non-practicing lawyer, Master Wilson referred to the test as set out in the Ontario Court of Appeal case, *General Accident Assurance Co. v. Chrusz*, which is as follows:

1. does the professional stand as a line of communication between the solicitor and the client, either as an "agent of transmission" or to provide his expertise in order to enable the solicitor to interpret information from the client.
2. is it a situation where the professional was essential or integral to the solicitor client relationship such that privilege attaches to the communications between the professional third party and the client's solicitor.
3. was the professional's role to assist the solicitor in formulating legal advice to the client.

b. *Coburn and Watson's Metropolitan Home v. Bank of Montreal*, 2018 BCSC 897, Weatherill G.C. J.

This class action case confirms that the law on the subject of litigation privilege in British Columbia remains as set out in *Hodgkins v. Simms* (1988), 33 B.C.L.R. (2d) 129 and is different from the rest of Canada. Specifically, documents collected by a party's solicitor from third parties and made part of the solicitor's brief are privileged even though the original documents had not been created for the purposes of litigation. In the rest of Canada, a pre-existing document obtained by a solicitor for the purpose of litigation is not privileged from production.

c. *Janson Estate v. Kvist*, 2018 BCSC 1701, A. Saunders J.

In the contest of a claim for damages under the *Family Compensation Act*, the plaintiff brought an application challenging the claim of litigation privilege asserted over the defendant driver's statement and the adjuster's second report. The master upheld the claim of privilege and an appeal was undertaken.

The appeal was allowed in part. Justice Saunders found the master's reasons were simply conclusory and that no reasoning was given to support the finding that the driver's statement was for the dominant purpose of litigation. It could be inferred that the master had relied on an affidavit from defence counsel in making the decision, which was an error as the affidavit failed to specifically state the source of information, contained speculative and inadmissible opinion evidence as to the insurer's intent and did not answer the question of dominant purpose. Accordingly, the claim of privilege over the driver's statement was not made out.

The claim of privilege over the adjuster's second report was upheld. The conclusion in the first report that there was little basis for denial of coverage and likely concerns about the insurer's potential liability led to a reasonable inference that the litigation defence became the dominant purpose shortly after the first report was issued.

The court also addressed a preliminary objection by the defendant to the plaintiff having filed a supplemental written argument out of time and exceeding 10 pages contrary to Practice Direction PD-54. Mr. Justice Saunders found that PD-54 did not forbid supplemental arguments so long as there was no prejudice. Section 10 of PD-54 implicitly contemplates a liberal approach to interpreting and applying the practice directive consistent with the objective of a just, speedy and inexpensive determination on the merits. Any prejudice was overcome by an order made that permitted the defendant to file their own supplemental argument.

Janson Estate was recently applied in *Canning v. Mann*, 2019 BCSC 841, where production of a statement was ordered because there was insufficient evidence to establish litigation privilege. The defendant filed an affidavit from a legal assistant and not the person who had personal knowledge of the circumstances giving rise to the privilege.

C. Surveillance

a. *Brundige v. Bolton*, 2017 BCSC 2664, Butler J.

The defendant Bolton used surveillance of the plaintiff obtained by the defendant Dueck to inform questions at the plaintiff's examination for discovery. Dueck had listed the surveillance

video on its list of documents but Bolton had not listed the surveillance video until after the plaintiff's examination for discovery, due to an inadvertent error on the part of counsel.

The court found that while it is not necessary for a party to list or relist documents it has received from other parties when those documents were listed in Parts 1 or 2 of a list of documents, the situation is different for a privileged documents listed in Part 4 that comes into another party's possession when privilege is claimed over the document. As a document that has been listed in Part 4 has not been physically produced, other parties will not be aware of the contents of the document or whether it has been obtained by another party who also claims privilege over the document. A separate party who obtains a privileged document, even if it is the subject of common interest privilege, is required to comply with *Rule 7-1(9)* of the *Supreme Court Civil Rules* and list the document on her or his list of documents.

Defence counsel for Bolton sought to rely on the surveillance video at trial and although plaintiff counsel objected, the court admitted the surveillance video given that Dueck had listed it well in advance of the trial, finding that there was little prejudice to the plaintiff in admitting the evidence. However, the court excluded one portion of the video evidence which was used by the defendant Bolton before he had listed the surveillance documents in accordance with *Rule 7-1(9)*. At paragraph 33 the court adopts the comments in *Carol v. Gabriel* (1997), 14 C.P.C. (4th) 376, stating that "…to hold otherwise would be to dilute the disclosure obligation and tempt counsel to refrain from disclosing in situations where they do not expect any prejudice to result."

b. *Karpowicz v. Glessing*, 2018 BCSC 887, MacNaughton J.

The defendant obtained a short surveillance video of the plaintiff and provided it to plaintiff counsel in advance of mediation, but had not listed it on the defendant's list of documents. Plaintiff counsel objected to its admission arguing that he had not been provided with the videographer's file or all of the video obtained by the defendant. The court accepted that the video had not been redacted and the videographer's reports and timesheets had been disclosed to plaintiff counsel. The court found that although the defendant failed to list the video evidence as required by *Rule 7-1(9)* due to an oversight by defence counsel, the late listing of the video had not caused the plaintiff any prejudice. The court found that the plaintiff had time to consider the video and to prepare to address it in his evidence at trial.

IX. Evidence

a. *Dahl v. South Coast British Columbia Transportation Authority*, 2018 BCCA 184, per Kirkpatrick J.A. (Tysoe and Dickson JJ.A. concurring)

The plaintiff appealed the dismissal of her claim for damages she suffered as a result of a fall on a city bus. The plaintiff argued, *inter alia*, that the trial judge erred in admitting evidence collateral to the incident at issue. Specifically, that the plaintiff was cross-examined about an incident that occurred four months after the subject fall on a different bus. The surveillance of that subsequent incident was played and the plaintiff was challenged on her initial reporting of the incident which was inconsistent with the surveillance.

The court of appeal found that the trial judge had erred in admitting the evidence and in using that evidence in her negative assessment of the plaintiff. The evidence had been admitted in breach of the collateral fact rule.

The court of appeal stated that in order for the evidence of the subsequent fall to be admitted, it had to be relevant beyond the plaintiff's general credibility. That is, "it had to be relevant to a substantive or material issue in this case." While the evidence may have had this kind of relevance, that proposition was not put to the judge. Instead, it was clear that the evidence was introduced solely to impugn the plaintiff's credibility.

The respondents argued that the evidence could have been tendered to show that the plaintiff had a propensity to bring an unsupported bus accident claim. However, the court of appeal determined it was apparent the evidence was introduced solely for the purpose of impugning the plaintiff's credibility and had no material connection to the case. Accordingly, it was admitted in breach of the collateral fact rule and so the appeal was allowed and a new trial ordered.

b. *Lensu v. Victorio*, 2019 BCSC 59, DeWitt-Van Oosten J.

The plaintiff sought to introduce a re-enactment of the pedestrian/vehicle accident, with experimental components. The defendant had not retained an accident re-construction expert but rather counsel for the defendant, the defendant and a PI attended the scene and conducted four re-enactment scenarios to determine whether the plaintiff's version was physically possible and to test the defendant's theory of the case. They prepared a 24-page report setting out their observations, which report was disclosed about a month before the trial. The report attached photographs, videos and diagrams.

The overriding principle which governs the admissibility of re-enactments is whether the prejudice flowing from its admission would outweigh its value. The re-enactment report was ruled inadmissible.

The report contained observations of the scene of the accident about three years after the accident. There was no demonstration of technical expertise in the taking of the photographs or measurements and conclusions of slope. A different vehicle was used and there was no information about the similarities to the defendant's vehicle. The re-enactment took place during the day whereas the accident occurred at night. The scenario which focused on the defendant's version of events was a biased account of matters that were in significant dispute. The re-enactment put the defendant's version of the accident before the court in a manner that he would not otherwise be entitled to lead. Defence counsel had participated in the re-enactment which could possibly subject him to cross-examination.

Instead, the court would have an understanding of the scene of the accident through photographs of the scene which had been admitted, by consent, as part of the plaintiff's case.

c. *Owen v. Folster*, 2018 BCSC 143, Watchuk J.

The plaintiff claimed damages for injuries, including a brain injury, arising from an accident that occurred while he was riding his bicycle. Liability was denied on behalf of the defendant. On the day of the accident, the plaintiff made statements to his co-workers and his wife about how the accident occurred. Prior consistent statement evidence was introduced at trial and both parties

agreed to admit the prior consistent statements, although the defendant submitted that all witnesses were not telling the truth. The defendant also submitted that the plaintiff reconstructed what happened after the fact in a manner that favoured his desired outcome.

At paragraph 108 the court states that while "[p]rior consistent statements are not admissible for the truth of their contents or to conclude the witness is telling the truth" they "…can be used to remove a potential motive to fabricate when assessing credibility. If the prior statement was made before a motive to lie existed, then it can rebut a suggestion that the evidence given by witness at trial is fabricated."

The court found that at the time the plaintiff made the statements to his co-workers and his wife he was not motivated by seeking damages in the action. The court also found that while there were minor inconsistencies in the testimony of the lay witnesses as to the words the plaintiff had said, there was no reason to doubt their evidence. The court found that the plaintiff was a credible witness but that the defendant's evidence as to how the accident occurred had not been consistent over time. The defendant was found 100% liable for the accident.

X. Examination for Discovery

a. *Saltman v. Sharples Contracting Ltd.*, 2018 BCSC 883, Thompson J.

In chambers, the defendant's application seeking an order that the examination of each plaintiff take place in the absence of the other was dismissed. Thomson J. stated that the leading case on excluding parties from examinations for discovery is *Sissons v. Olson* (1951), 1 W.W.R. (N.S.) 507 B.C.C.A. ("*Sissons*"), which held that an exclusion order may be made where the examinations are expected to cover the same ground, or if it can be said that a violation of an essential of justice is threatened (such as creating a disturbance or failing to follow accepted procedure). Thompson J. reviewed the case law regarding this issue and concluded that while the subsequent decisions of *O'Neal v. Murphy* (1964), 50 W.W.R. (N.S.) 252 *("O'Neal") and Bronson v. Hewitt,* 2007 BCSC 1477 *("Bronson")* expressed different opinions on the meaning of the majority judgment in *Sissons*, he preferred the interpretation in *O'Neal.* Thompson J. concluded that there is a heavy onus on the applicant seeking to exclude a party from attending another party's examination and the option of exclusion for only a portion of the discovery remains a viable option in appropriate cases to minimize a party's absence from an examination for discovery. Thompson J. also indicated that there is room for the exercise of discretion to exclude a co-party from an examination for discovery on grounds other than disruption or apprehended misbehaviour.

A list of factors to be considered on such an application includes, at paragraph 43, whether: the co-parties have common interests; they are represented by the same counsel; the examinations will cover the same ground; credibility is an issue; there is a risk that evidence will be tailored or parroted; a party is likely to be intimidated; the proceedings are likely to be disturbed or disrupted; whether there would be prejudice to the excluded party; and the ends of justice require the exclusion.

At paragraph 44, the court found that "...the plaintiffs had identical interests, were represented by the same counsel, that a large portion of the examinations for discovery would cover the

same ground, and the reliability and veracity of their evidence about what was said during some three-way meetings would be critical to the outcome of what was the most important issue in the case. There is nothing to show that tailoring or parroting is planned by the plaintiffs, but spousal loyalty and the possibility of an unconscious impulse to maintain consistency create that potential. Exclusion would not cause any discernible prejudice."

There was nothing in the defendant's material to establish that either plaintiff would be intimidated or disruptive but on balance the court held that the defendant had met the heavy onus of establishing that a violation of an essential of justice was threatened if exclusion was not directed.

XI. Experts

a. *Karpowicz v. Glessing*, 2018 BCSC 887, MacNaughton J.

Prior to trial, defence counsel served an expert report and listed the expert as a witness on the defendant's trial brief. Just before trial, defence counsel advised that she would not be calling the expert at trial. Plaintiff counsel had not re-served the expert's report nor had he served it as a response report but argued that as the expert report had been served by defence counsel, *Rule 11-7(3)(b)* of the *Supreme Court Civil Rules* entitled plaintiff counsel to demand that the expert be made available for cross-examination at trial.

Plaintiff counsel also argued that the court should waive the 84-day deadline for delivery of the expert's report to allow the plaintiff to rely on the defence expert report and call the expert as a witness on the basis that the defendant would not be prejudiced by the late delivery.

The court held that it is the decision of a party to tender an expert's evidence at trial which triggers the right of the other party to demand the attendance of an expert for cross-examination, not the fact that the report had been served. The court accepted that the defendant would not be prejudiced if the report was admitted, but MacNaughton J. declined to exercise her discretion to waive the 84-day deadline on the basis that the "...discretion in Rule 11-7(6) was intended to abridge the timelines in the rules and not to waive them entirely."

b. *Kobetitch v. Belski*, 2018 BCSC 2214, Gomery J.

Defence counsel objected to the admission of expert reports and the court determined that it was sufficient to strike the offending portions of the reports rather than declare the entire reports inadmissible given that it was relevant and necessary to have the other expert evidence to assist the jury. At paragraph 8, Gomery J. outlined various principles applicable to the admissibility of expert reports. In particular, he stated that experts may rely on hearsay material in forming their opinions and the correct response is not to withdraw the evidence from the trier of fact unless there is prejudice to one party. He also stated that there is a distinction to be drawn between the facts relied upon by an expert and summaries of material considered by the expert as pertinent. A summary containing information that appears peripheral or collateral to the opinion expressed may not be necessary to the jury's understanding of the opinion offered and there is a risk that it may be taken as evidence.

The court found that the expert's summary of documents equivalent to an appendix, to be in the nature of a working paper, and collateral and peripheral to the expert's opinion. The court

found that it was not material for the jury to understand and evaluate the expert's opinion, so the court ordered it to be redacted. The court also held that a portion of another expert's report setting out a history and report of symptomology obtained from the plaintiff during an interview, some of which was a narrative of the plaintiff's current complaints, was oath helping and was not material to which the jury could give proper weight.

Counsel mistakenly served two expert economists reports late, at 72 days before trial. The court admitted the late expert reports, finding that there was no prejudice and because it would not be in the interests of justice to have the case decided without the expert evidence.

c. *Noftle v. Bartosch*, 2018 BCSC 766, Brown J.

Plaintiff counsel argued that the defendant's expert vocational consultant response report was unlikely to assist the court in any material way as the expert had not met with, examined, or interviewed the plaintiff; reviewing only documents and information provided by counsel. Plaintiff counsel also argued that the defence expert did not provide any reasoning to support her conclusions and did not give pointed criticism of the plaintiff's expert vocational consultant's reasoning and methodology.

The court states, at paragraph 182, that "… a rebuttal report should be populated mostly with highlighted empirical information supporting the expert rebuttal opinion and undercutting the other expert's opinion, clearly reasoned." Brown J. confirmed that obtaining a personal history is important to providing an accurate and complete assessment. However, the court admitted the defence expert report but accorded it less weight and found the plaintiff's expert report more persuasive.

d. *Owimar v. Warnett*, 2018 BCSC 2310, Murray J.

The plaintiff alleged that both defence counsel and defence expert Dr. McGraw were negligent and fraudulent in their respective capacities. In particular, the plaintiff alleged that they substituted his lumbar spine x-ray with an x-ray that would disprove his claims of being injured in several motor vehicle accidents. The action against defence counsel was dismissed as statute barred. The court found that the doctrine of witness immunity applied to Dr. McGraw such that under that doctrine, witnesses are immune from civil liability. In addition, as for expert witnesses, the doctrine applied to anything the expert said in court as well as pre-trial activities including assessments and reports.

At paragraph 36, Murray J. held that as "...a result of the witness immunity defence I am satisfied that the plaintiff's allegations against Dr. McGraw will fail. Accordingly, there is no genuine issue to be tried and claim must be dismissed under *Rule 9-6*."

e. *Wark v. Kang*, 2018 BCSC 1733, Forth J.

Plaintiff's consel objected to the defendant's response reports. Forth J. stated, at paragraph 43, that "...responsive reports are not distinct from reply evidence called once the plaintiff closes her or his case" and that "...the reports may discuss the documents, reports, and opinions that their criticism is based on, provided that in essence, their reports are responsive to the opinions offered by the plaintiff's experts."

One of plaintiff counsel's objections was that the defence experts Dr. Samad and Dr. Heran had not examined, interviewed, or tested the plaintiff. With respect to Dr. Samad, the court accepted that his report made it clear what records were relied upon, and as Dr. Samad had accepted the plaintiff's expert's examination results, there was no need for a further examination of the plaintiff.

In respect of Dr. Heran's report, Forth J. held that plaintiff counsel could cross-examine Dr. Heran on the issue of whether a physical examination and an opportunity to question the plaintiff about various issues would have assisted or impacted his opinion. She also held that the lack of physical examination would go to the weight given to the expert report, but that it was in the interests of justice to admit the reports.

XII. Independent Medical Examinations ("IME")

a. *Balingoay v. Dhindsa,* 2018 BCSC 2307, Matthews J.

The defence sought an order to compel the plaintiff to attend a late IME and to abridge the time for service. Despite there being a compelling case for an IME on the equal-footing basis, the application was denied due to a lack of acceptable reason for the delay in seeking the IME or in bringing the application. It was not a case of there being late information that could not have been discovered that would necessitate an IME. In denying the application, Madam Justice Matthews commented that counsel must be mindful that one or both of the parties may seek conditions for the IME. Thus, counsel must start planning for the IME with enough time to identify the examiner, propose dates, deal with the negotiations of any IME conditions, make an application, if necessary, and for an IME date that allows for the report to be produced before the 84-day deadline.

b. *Cook v. Kang*, 2019 BCSC 12, Master Vos

In the context of an application to compel an IME, Master Vos addressed the conditions being sought by the plaintiff some of which included:

1. the plaintiff wanted to be accompanied by a person of his choice to merely observe the examination. The plaintiff argued that he needed a chaperone because he may be nervous or suspicious about some of the questions and he wanted a witness for whatever happened at the examination. Master Vos denied this term as these are not reasons to support a chaperone.
2. the IME commence within 15 minutes of the appointed time. The court, acknowledged that delays can occur and a term arbitrarily setting a rigid time within which an expert examination must begin is unnecessary and unwarranted. If a delay occurred, the examiner and the plaintiff must act reasonably.
3. the examination last no more than two hours total. This condition was denied. An expert should have sufficient time to obtain the information required to provide his or her opinion evidence and it is unwise and improper to set a time limit.
4. the plaintiff not be required to sign or fill out any releases, waivers consents or any other documents whatsoever. The court was satisfied with the form of consent

proposed by the examiner and required the plaintiff to sign it based on the authority of *Gill v. Wal-Mart Canada Corp,/Cie Wal-Mart du Canada*, 2017 BCSC 135.

5. the examiner only ask questions within the examiner's area of expertise. This condition was denied based on *Rule 7-6(3)* which allows an examiner to ask relevant question concerning the medical condition or history of the person being examined.
6. the examiner not use, in the report, in deposition or in trial, the term "independent" to describe his role. This was denied by the Master. The examiner could provide his evidence as he deemed appropriate and any argument regarding terminology would be an issue for trial.
7. in the event ICBC decides to rely on the examiner's report, he be subpoenaed by ICBC for the trial of this matter, at a date convenient to ICBC, to be available for cross-examination on any report he produces. If no report is produced to the plaintiff pursuant to Rule 11-6, he need not be subpoenaed by ICBC. This condition was denied as the condition was seeking to impose obligations on ICBC when ICBC was not a party to the litigation. Further, Rule 11-7(2) and (3) sets out a party's obligations to produce an expert at trial for cross-examination and those provisions apply without need for restatement or amendment.
8. ICBC be barred from seeking any further defence medical examination on any issue where the examiner has already provided an opinion, or where he could have provided an opinion. Master Vos relied on *Tran v. Abbott*, 2018 BCCA 365, in denying this term.

The defence had also sought an order that the plaintiff provide a list of special damages with supporting receipts. Rule 7-1 addresses a party's obligation to disclose and produce documents that exist or are in the party's possession or control, it does not require a party to create a document. The plaintiff was not required to create a list of his special damage claims, but was ordered to produce copies of all receipts for expenses he would claim as special damages.

c. *Forbes v. Batenburg*, 2018 BCSC 862, Master Keighley

The plaintiff alleged that she suffered a mild traumatic brain injury and had undergone IMEs at the request of the defendant with a neuropsychologist, a psychiatrist, and an orthopedic surgeon. The defence brought on an application on January 9 seeking to have the plaintiff examined by a neurologist on January 11, four days before the 84-day deadline for expert reports.

Although the case was "very much on the line", Master Keighley allowed the application despite being concerned about: the timeliness of the application and whether the doctor could prepare his report in time for the 84-day deadline; the fairly limited evidence before the court about whether the plaintiff suffered a mild traumatic brain injury; and, the fact that there were three defence experts, which had not been served.

d. *Irvine v. Bradley*, (unreported, February 22, 2019, Vancouver Registry, M172655), Skolrood J.

In this pre -*Tran v. Abbott* application, Mr. Justice Skolrood ordered an IME with a neurologist, after the plaintiff, who alleged a brain injury, had been examined by a psychiatrist and an orthopedic surgeon. The IME was opposed on the basis that the IME from the psychiatrist

would likely address the brain injury and that there would be overlap with a neurological report.

In granting the order, His Lordship said:

> [5] I also approach this from the perspective of a trial judge, who will prefer to have the best available evidence before him or her as to the nature of the injuries and the consequences of those injuries. To my mind, this additional report is likely to help in that respect. If indeed it turns out that there is overlap, or there is redundancy or one of more of the doctors has gone beyond his or her sphere of expertise, that is something for the trial judge. For present purposes, I am satisfied on the evidence that a neurological examination is in order, and so I will allow the application.

e. *McNeill v. Saunders*, 2019 BCSC 520, Master McDiarmid

The plaintiff alleged physical injuries as well as a mild traumatic brain injury, depression, mood and sleep disturbances. On discovery, she testified to a pre-accident history of panic attacks which were under control. The plaintiff agreed to undergo a neurological IME but objected to a psychiatric IME arguing that she did not intend to submit reports from a psychologist or psychiatrist and that the psychiatric element of her claim was of less significance to her than the physical aspects.

The defendant succeeded in an application to compel the plaintiff to attend a psychiatric IME. The court acknowledged that there was some overlap with a neurologist IME and that a psychiatric examination would be invasive. The plaintiff's pleadings tipped the balance in favour of the order being granted. However, the examination would be limited to the pleaded claims of irritability, poor mood, depression and psychiatric component to her sleep disturbances.

At paragraph 28, Master McDiarmid observed:

> I have concerns that this IME will not be of much assistance. It flies in the face of the insurer's stated public opposition to too many expensive medical reports. It is odd that the defendant, through its insurers, focuses on what would appear to be a relatively minor component of the plaintiff's claim. However, that is the defendant's choice.

f. *Miller v. Deerenberg*, 2018 BCSC 1872, Master Bouck

The plaintiff, age 57, was a paramedic injured in an accident. He missed very little time from work however alleged past and future loss of earnings and a loss of earning capacity. He agreed to attend an IME by an orthopedic surgeon but refused to attend a FCE. Master Bouck declined to order the FCE on the basis that a medical legal report from the plaintiff's physiatrist and the defence orthopedic surgeon both opined that the plaintiff continued to be able to perform his job as a paramedic, but he might miss occasional days from work in the future. The plaintiff had also obtained a FCE from an OT, who had opined that he was not able to safely perform the full duties of a paramedic, but she agreed with the doctors that he was presently capable of working as a paramedic. The defendant argued that the FCE was warranted based on the pleadings and defence counsel's statement that a substantial claim for loss of earning capacity was expected. However, there was no evidence that the plaintiff intended to take early retirement or that he was not capable of performing his duties as a paramedic.

Master Bouck concluded that a FCE was not necessary to put the parties on an equal footing regarding the issue of the plaintiff's future loss claim. She also held that the FCE could only be intended to bolster the existing medical opinion.

g. *Tran v. Abbott*, 2018 BCCA 365, per Savage J.A. (Frankel and Stromberg-Stein JJ.A concurring)

This case stands for the proposition that there is no requirement for exceptional circumstances to found a second medical examination

The plaintiff alleged physical, neurological and psychological injuries. She had attended an IME at the request of the defendant with a neurologist, Dr. Prout, who gave various opinions including about the plaintiff's musculoskeletal issues. The plaintiff refused to attend an IME with an orthopedic surgeon. The application to compel her to attend the orthopedic IME was denied, in chambers, on the basis that Dr. Prout's opinion had addressed the plaintiff's physical injuries and although those opinions were outside of Dr. Prout's expertise, a second IME should be denied because it was seeking to bolster Dr. Prout's opinion. The chambers judge had relied upon *Hamilton v. Pavlova*, 2010 BCSC 493 for the proposition that there is a higher standard required to compel attendance at a subsequent IME.

The appeal was allowed. The court rejected the rationale of *Hamilton* requiring a higher standard for a second IME, instead finding:

> [32] In my view, it is well-established that the purpose of an IME is to put the parties on equal footing with respect to the medical evidence and *Rule 7-6* specifically contemplates more than one IME: *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 31.
>
> [33] Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward. In exercising its discretion on an application pursuant to *Rule 7-6*, the court must consider the effect of refusing the order sought on the conduct of the trial.
>
> ...
>
> [37] In this case, the judge concluded that parts of the neurologist's report went beyond his expertise, and thus a report from an expert with appropriate and different expertise would "bolster" the first report (at para. 26). Without opinion on whether that view is correct, the practical effect of the ruling is to preclude the defendant from obtaining a report from an expert with appropriate qualifications on a live issue, the etiology of the plaintiff's complaints.
>
> ...
>
> [40] The primary purpose of Rule 7-6 is to put the parties on equal footing with respect to medical evidence. Although, in general, what steps are necessary to achieve that end is a matter of discretion for the chambers judge, the ruling in this case would preclude that equality...

h. *White v. Fan*, 2019 BCSC 785, Iyer J.

In the context of an appeal from a master's decision granting an IME with a neurologist after the plaintiff had already attended IMEs with an orthopedic surgeon and an occupational

therapist, the plaintiff submitted that a party must support an application for a subsequent IME with medical evidence. In rejecting that argument, the court said:

> [17] It follows that I reject the plaintiff's submission that a party seeking a subsequent IME must tender medical evidence demonstrating that there are issues – here, neurological issues – that require an examination by someone with that expertise. That would impose too high a burden on a defendant, contrary to the reasoning in *Tran*. While there must be a real basis for the request in that it is grounded in the pleadings and supported by evidence, "medical" evidence is not an independent requirement.

XIII. Insurance

a. *Brown v. Insurance Corporation of British Columbia*, 2018 BCSC 2089, DeWitt-Van Oosten J.

The plaintiffs sought damages in negligence and for breach of contract against the Insurance Corporation of British Columbia and a repair shop for inadequate and faulty repairs to their logging truck. The plaintiffs alleged that the repairs following an accident were underestimated and not properly completed. The plaintiffs alleged they had not been able to use the logging truck since the accident and had left it sitting at the repair shop.

At trial, the defendants brought a no evidence motion at the close of the plaintiffs' case. On the allegation of negligence, the defendants argued the plaintiffs failed to provide evidence to establish the standard of care, breach of that standard and proximate cause between the alleged loss and the breach. On the allegation of breach of contract, ICBC argued there was no evidence of terms of the contract, extent of the plaintiff's entitlement under the contract, whether a term was breached, or of a nexus between the alleged losses and the breach.

DeWitt-Van Oosten J. allowed the no evidence motion. The plaintiffs were self-represented and while the court appreciated that they thought it obvious that the defendants were liable for the damages, as plaintiffs advancing a lawsuit, they had a responsibility to call evidence to support each legal and factual element required to prove their cause of action. The plaintiffs did not call expert evidence to prove the applicable standards of care and breach of those standards. Furthermore, the plaintiffs did not tender evidence of conduct so egregious that the general rule on the necessity of expert evidence would not apply.

b. *Budget Rent A Car System, Inc. v. Philadelphia Indemnity Insurance Company*, 2018 BCSC 1564, Iyer J.

The parties in the action were a number of insurance companies. The dispute concerned their respective responsibilities to contribute to defence and indemnity costs arising from actions filed in British Columbia by people injured in an accident involving a rental van in Vancouver. On this application, the parties sought a ruling as to whether California or British Columbia law applied to the proceeding.

The rental agreement was signed in California by the First Presbyterian Church which had various insurance covering the driver and passengers. The driver also had personal auto insurance. In an earlier ruling in this action, Sharma J. determined that the BC Supreme Court

had jurisdiction over the insurance dispute (2018 BCSC 163). She did not address which law governed the dispute at that hearing.

The court first characterized the nature of the dispute in order to select the applicable choice of law rule. In this case, the claim was for declarations and indemnity to contribute to defence costs and settlement monies. As such, the court characterized the true nature of the dispute as restitutionary and not contractual.

The court's analysis then turned to the proper law of the restitutionary obligation. On that issue, Iyer J. held that the obligation that is the basis of the claim rests both on the applicable insurance policies (entered into in California but underwritten in different states) and the personal injury actions (British Columbia). All of the factors connecting the insurance policies and the actions to the competing legal systems must be examined in order to determine what place had the closest and most real connection to the obligation claimed by the plaintiffs.

In the result, Iyer J. found that British Columbia had the closest and most real connection to the obligation in issue. In so finding, she placed considerable weight on the fact that the bodily injury actions were commenced in British Columbia and these actions triggered the interaction of the various insurance policies. The insurance policies all expressly contemplated liability arising from accidents outside the jurisdiction where they were purchased, yet none of them included a term that the law of California would apply. Had they intended that law to so apply, they could have included that term in the policy.

c. *Sherrell v. Insurance Corporation of British Columbia*, 2019 BCSC 103, Weatherill G.C. J.

The plaintiff sought a declaration that she be indemnified under an insurance policy with the Insurance Corporation of British Columbia. ICBC denied coverage on the basis the plaintiff permitted her vehicle to be operated by a person she knew was impaired by drugs or alcohol in breach of s. 55(5) of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83. The plaintiff was a passenger in a vehicle involved in a single-vehicle accident in which her then boyfriend was also a passenger and suffered injuries. ICBC sought to recover from the plaintiff approximately $200,000 that it had paid to settle his bodily injury claim.

As ICBC was seeking to void the policy, the parties agreed that it had the burden of proof to show that the plaintiff permitted her vehicle to be operated by an intoxicated driver and that she knew he was intoxicated when she permitted him to drive. Neither the driver nor the other passenger gave evidence at trial; ICBC advised that they could not be located (a position that the court found troubling given ICBC's vast resources and the evidence at trial from witnesses who had seen the passenger in recent days). The plaintiff denied giving consent, but she was not found to be a credible witness. Relying on her statements to police given the night of the accident, Weatherill G.C. J. found it clear that she allowed the intoxicated person to drive her vehicle and knew of his intoxication. The plaintiff’s action was dismissed with costs.

d. *Valentyne Estate v. The Canada Life Assurance Company*, 2018 BCCA 484, per Bennett J.A. (Stromberg-Stein and Savage JJ.A. concurring)

This appeal concerned the interpretation of a criminal offense exclusion clause in a life insurance policy. The policy contained a term that the life insurance benefit would not be paid

out if the death was a result of or occurred while the insured was committing a criminal offence.

Mr. Valentyne was a drug-dealer who disappeared after entering the home of two other drug dealers. On the application of his mother, his estate administrator, the court declared that he was presumed dead. She then applied for his life insurance which application was denied under the criminal offense exclusion. Her action on the policy was dismissed on a summary trial application brought by Canada Life. The chambers judge ruled that the only rational conclusion in considering all of the evidence was that the deceased was murdered as a result of his involvement in drug trafficking.

On appeal, the court held that the chambers judge fell into error when she broadened the exclusion clause to include death "as a result of his involvement in criminal activity". In order for a death to be the result of the commission of a criminal offence, there must be a causal connection between the death and the commission of the crime. The plaintiff made several concessions at trial which allowed the court on appeal to find the facts necessary to decide the issue. Despite the errors of the trial judge, the appeal was dismissed because the "inescapable inference" was that the insured died while committing the criminal offence of possession, trafficking or possession for the purpose of trafficking illicit drugs.

e. *Winterbottom v. Insurance Corporation of British Columbia*, 2018 BCSC 1638, Blok J.

The plaintiff claimed against the defendant Insurance Corporation of British Columbia ("ICBC") for the loss of his truck. The plaintiff reported his truck stolen and a few days later it was located by the police and found to have been destroyed by a fire. ICBC denied the plaintiff's claim on the grounds that he was involved in the destruction of his truck and did not prove that it was stolen. ICBC also maintained that he forfeited his coverage by making wilfully false statements with respect to the claim. The plaintiff testified that on the night the truck was "stolen", he left his truck parked at a pub where he had been drinking and was given a ride home.

Key evidence at trial concerned calls the plaintiff made on his cell phone on the night in question. The defence tendered fact evidence from Bruce Funk, a licenced security consultant who had worked for BC Telephone Company and Telus. He gave evidence concerning cell service areas, and the nature of and interaction between cell phones and cell phone sites or towers. He was able to give evidence as to the accuracy of the call detail reports and the general location of a cell phone during the noted call.

Amongst other evidence, the plaintiff's cell phone use undermined his credibility and his case. For example, his cell phone utilized a cell phone tower at a location that was not his residence at a time when he said that he was at home; two calls utilized a tower that served the area where his burned-out truck was found; calls utilized towers that suggested movement and indicated that he was not at his home or the pub at times when he said that he was at the pub or at home; and several calls were made between the plaintiff and his friend at a time when they were supposed to have been at the pub together.

In this case, the burden was first on the plaintiff to show a loss falling within the scope of the insurance coverage. Blok J. noted that the only evidence of theft came from the plaintiff and

that he could not rely on the plaintiff's evidence given the numerous inconsistencies. The plaintiff therefore failed to prove a loss [the theft] falling within the scope of coverage and the claim was dismissed. Blok J. also found that the plaintiff made several statements concerning the claim which were false, wilfully made and material, including: his whereabouts and activities on the night of the theft; his location after midnight; and his whereabouts in the morning after the theft.

A. Disability Insurance

a. Greenidge v. Allstate Insurance Company, 2019 ABCA 52, per curiam, Costigan, Schutz and Crighton JJ.A.

The insurer sought an IME of a plaintiff being paid benefits under an automobile insurance policy. The plaintiff refused to attend the IME unless she could video tape the IME (as provided for in the *Alberta Rules of Court*), but the IME doctor would not allow her to do so and the insurer would not agree to a different doctor. As a result of her refusal, the insurer declined further coverage. The plaintiff sued alleging bad faith. Her claim was dismissed and the dismissal upheld on appeal. The policy provided that "the Insurer has the right and the claimant shall afford to a duly qualified medical practitioner named by the Insurer an opportunity to examine the person of the Insured's person when and as often as it reasonably requires while the claim is pending. . . .". The policy did not incorporate the Rules, nor did the words "afford an opportunity" give an insured a right to decline an IME, select the practitioner or dictate the manner in which the examination would take place. It is not a breach of the duty of utmost good faith by an insurer to rely on a term of the policy nor was there anything unfair about insisting that an insured must comply with the terms of the policy.

b. *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110, per Goepel J.A. (Fenlon and Dickson, JJ.A. concurring)

This decision is of import because it, in effect, reversed *Tanious v. Empire Life Insurance Co*., 2017 BCSC 85, in which special costs were awarded to achieve full indemnity to an insured denied disability benefits. The *Tanious* appeal has been argued but the matter is still under reserve. In this appeal, the court found that the recent supreme court cases in which special costs were awarded against an unsuccessful insured were wrongly decided and should not be followed.

This appeal arises out of a duty to defend case rather than a disability claim. The respondents' insurers refused to defend the respondents when they were sued by neighbours for contamination of their land. The respondents succeeded in obtaining a declaration that the insurers were required to defend them and were awarded special costs of that application on a full indemnity basis. The insurer appealed both the finding that it had a duty to defend and the order for special costs.

The appeal was allowed and the action dismissed but the court went on to address the order for special costs because of the importance of the issue generally.

The order for special costs was an error in principle. An award of special costs, in the absence of litigation conduct deserving of rebuke, in a duty to defend claim, is not consistent with the guiding principles upon which costs awards are made. The insurance contract was silent as to

cost of enforcing coverage. The policy set out the amounts the insurer agreed to pay and its language could not be extended to cover legal fees and expenses that might occur in enforcing the insured's obligations under the policy. If an insurers' failure to defend an insured constituted a breach of duty of good faith, remedies were available to compensate the insured for any losses, but the special nature of insurance did not justify creation of different costs regime governing insurance claimants.

XIV. Law Enforcement

a. *Lapshinoff v. Wray,* 2018 BCSC 2315, Meiklem J.

The plaintiff brought an action seeking damages against a Saanich police officer for being forcibly arrested and causing injuries to his right shoulder and arm.

The first issue was whether the plaintiff's claim was barred by s. 286 of the *Local Government Act*, which requires that a party give written notice within two months of the incident. The case contains a good summary of the law on the nature of the onus in respect of who must prove a reasonable or unreasonable excuse and who bears the onus to demonstrate prejudice or absence of prejudice.

The plaintiff did not provide any notice to Saanich prior to commencing his action two years after the incident. However, the plaintiff did seek legal advice regarding suing the police for damages during the statutory notice period, and the law deems shared responsibility by plaintiff and lawyer to ensure compliance with the notice requirements. Saanich conceded they were not prejudiced in its defence by the failure to give notice. The case is essentially one of the plaintiff’s ignorance in the statutory requirement to provide notice. The court found, taking all of the evidence into consideration, it was unable to state that it was reasonable to excuse the plaintiff from the failure to comply with the section 286(1) requirement to provide notice.

The court went on to consider the merits of the claim finding that there had been excessive force used during the arrest and the defendants failed to meet the requirement of justification.

The plaintiff and officers had two starkly different versions of events at trial. The court also found inconsistencies between the two defendant officers' version of events.

The court accepted the plaintiff’s evidence that after he pulled over when the officers were stopping him, he felt one of them strike the rear of his truck. He asked the officer, Constable Wray what that was about, but he was not belligerent or loud. The plaintiff had no concern about damage to his very dilapidated truck. The next exchange included the plaintiff asking the officer for his ID, which the officer did not produce. The trial judge noted this likely contributed to an antagonistic atmosphere.

Constable Wray then demanded the plaintiff get out of his vehicle, the plaintiff unlatched his seatbelt but did not get out promptly. Constable Wray repeated the demand with profanity. The plaintiff was in the process of complying, perhaps reluctantly, with his left foot partially out the door, and at the same time repeating that he would like to see the officer’s ID. At this point, Constable Wray reached over and yanked the plaintiff forcefully out of the vehicle. The plaintiff’s right shoulder or arm struck the truck door as he was yanked out, causing it to fly open. The plaintiff remembered his knees, elbows and head slamming on the ground.

The test to establish the lawfulness of arrest is that the arresting officer must subjectively believe that there are reasonable and probable grounds for the arrest and this belief must be objectively reasonable.

If the arrest was unlawful, the police officer defendants have the protection of s. 25(1) of the *Criminal Code*, R.S.C. c. C-46 which reads:

> 25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
>
> (b) as a peace officer or public officer,
>
> (c) in aid of a peace officer or public officer, or
>
> (d) by virtue of his office,
>
> is, if he acts on reasonable grounds, justified in doing what he is required to do and in using as much force as is necessary for that purpose.

The court found Constable Wray's testimony downplayed his own heightened aggressiveness and overstated the plaintiff's responses. The very forceful removal was completely unnecessary and is only explainable as Constable Wray acting out of a loss of self control and anger, rather than necessity. Constable Wray acknowledged that he did not consider any less violent means of dealing with the situation. The use of force was unnecessary and disproportionate to the exigencies of the arrest.

Once a plaintiff has proven that excessive force was applied against him, the onus shifts to the defendants to prove that the assault was justified. Justification means that the use of the particular force applied was necessary to effect the arrest. The defendants failed to prove justification. Therefore the officers' actions constituted the tort of assault.

b. *Russell v. British Columbia (Public Safety and Solicitor General)*, 2018 BCSC 1757, Butler J.

The plaintiff got in a heated argument with his girlfriend while they were out shopping. The girlfriend called 911 and said that the plaintiff had threatened to kill her and was damaging her car as she was on the phone. By the time the police arrived, the plaintiff was in another vehicle getting a ride home from someone else.

Upon arrival, the officer told the plaintiff that he was under arrest and to get out of the car. The plaintiff was belligerent and not co-operative and a struggle ensued. The plaintiff was handcuffed and taken to the local detachment and charged with four offences: threatening his girlfriend, assault with a weapon, mischief, and obstruction of a police officer in the course of his duties. The plaintiff was informed of his Charter rights including the right to retain counsel but because he remained aggressive and hostile, he was not allowed to speak to a lawyer until the following day, about 13 hours later. He spent the night in jail.

The crown dropped three of the charges and the plaintiff was acquitted of the charge of obstructing a police officer. He sued for damages for false arrest and imprisonment and for breach of s. 10 of his Charter rights.

There were reasonable and probable grounds for the plaintiff's arrest and so his claims for false arrest and false imprisonment were dismissed.

The evidence was insufficient to establish that the circumstances made it impractical or unsafe for the officers to facilitate the plaintiff's right to retain and instruct counsel for the entire time he was in his cell. Justice Butler found that the plaintiff suffered damages as a result of a violation of his Charter rights in denying his right to retain and instruct counsel without delay after his arrest. General damages in the amount of $1,000 were awarded to serve the function of vindication and deterrence. Justice Butler went on to say that the plaintiff did bear some responsibility as well for his actions, but that it did not excuse the officers from observing their constitutional obligations.

c. *Sweeney v. British Columbia*, 2018 BCSC 1832, Matthews J.

Two sheriffs were found to have physically assaulted a member of the public entering a courthouse.

The plaintiff, with a backpack, entered the Victoria Courthouse to file some papers pertaining to a residential tenancy matter. Upon entering, two sheriffs approached him and asked to search his backpack. After some miscommunication about whether the plaintiff was willing to allow a search of his backpack, the sheriffs forcibly began to escort him to the courthouse exit and, within 15 seconds, while being escorted towards the exit, one of the sheriffs executed a takedown of the plaintiff. The plaintiff suffered injury and sued.

Under s. 6.1(3)(a) of the *Sheriff Act*, a sheriff may search a person for weapons before they enter or while they are in a court facility and subsection 6.1(5)(b) provides a sheriff may use reasonable force in evicting a person from a court facility. The Sheriff Policy Manual provides that force may only be justifiably applied: when required to maintain or regain control; where there is imminent potential for the commission of a criminal offence; where there is imminent danger of persons injury or serious damage to property; or, there is the threat of escape.

The standard of care is that of a reasonable officer in all of the circumstances. Where the circumstances provide a range of options, the standard of care affords a degree of discretion and the court will not determine the optimal choice in considering whether the standard of care has been met. The court must determine whether the conduct was within the range of options or discretion. In doing so, the court must also be aware that the work of keeping the peace and security in the courthouse is challenging and that the actions of an unfolding event be considered in that context and not skewed by the general calmness and decorum of a courtroom.

The sheriffs testified that they believed the plaintiff was trying to break free and that they were in a dangerous situation as they were at the top of two sets of cement stairs separated by a set of glass doors. Both sheriffs testified that they were concerned that they might lose control of him and that would be dangerous to both of them. They were also concerned about a woman coming up the stairs. The court held that they had created a dangerous situation by marching him towards the stairs and when the plaintiff was struggling from the onset.

The Sheriff Policy Manual requires the sheriffs to use the minimum amount of force necessary to gain control of a subject and it would have been far safer to put the plaintiff against a wall rather than a takedown on a very hard surface, as the stairs. The takedown was not a minimal use of force nor within the reasonable options available to the sheriffs.

Both sheriffs had breached the standard of care from the outset when they took control of the plaintiff, in not communicating with each other about what they were going to do in the face of a danger that they both recognized as soon as they took control of him and in not changing course prior to being in the dangerous position on the stairs.

After finding the sheriffs at fault, the court found the plaintiff partly at fault for resisting his arrest and in considering the relative blameworthiness apportioned liability five percent to the plaintiff.

XV. Mediation

a. *Vicencia v. Gradley*, 2018 BCSC 1338, Master Nielsen (as Registrar)

A client sought a review of a lawyer's bill pursuant to the *Legal Profession Act*, S.B.C. 1998, c.9. At the hearing, the lawyer, the mediator, and the client gave oral evidence. The mediator testified under the compulsion of a subpoena and drew the court's attention to the provision of the confidentiality clause existing in the mediation agreement. However, District Registrar Nielsen found that a specific exemption to privilege is the exception where negotiations resulted in a consensual agreement and the existence or interpretation of the agreement is put in issue in later litigation, such that the communications of the negotiations may be tendered in proof of the settlement. District Registrar Nielson found that at the heart of the dispute was whether the client made an informed decision to settle the terms of her divorce; the subpoena of the mediator was upheld.

District Registrar Neilson held that the client had agreed to the terms of settlement negotiated at the mediation and that the lawyer acted on the client's instructions in that regard. Both the lawyer and the mediator expressed no doubt that the client both understood and agreed to the terms of settlement. The fact that the client was no longer happy with those terms and was suffering from post-settlement remorse did not change the fact that she settled the matter on the terms outlined in the mediation agreement.

District Registrar Neilson found the lawyer's bill reasonable and that the client had received good value, and was not prepared to reduce the bill.

XVI. Negligence

a. *Gorman v. Meghji*, 2018 BCSC 1904, Butler J.

This was a trial to assess liability for five separate plaintiff actions arising from a motor vehicle accident. The accident occurred when a police officer was responding to the highest priority level of emergency call with his vehicle's lights and sirens activated, and was travelling in excess of 140km/hr. The police vehicle was travelling straight on Fraser Highway when a van left a stop sign to cross Fraser Highway. The collision was significant with both vehicles destroyed.

Butler J. apportioned liability 80% to the police officer and 20% to the van driver. Although s.122 of the *Motor Vehicle Act* permits the driver of an emergency vehicle to disregard speed limits, they must do so with due regard for safety. Despite the fact that the officer was responding to a call of a man chasing someone with a gun, Butler J. found that he breached the

standard of care of a reasonable police officer by driving in excess of 90 km/hr over the speed limit. The police officer was found to have failed to properly balance the utility of his conduct with the risk to public safety.

The other driver was contributorily negligent for driving through the intersection in the manner he did. He knew one emergency vehicle had just passed at a high speed and he accelerated immediately after his first assessment of the situation rather than slowly continuing through the intersection and continuing to reassess. He had five lanes to cross in a vehicle that did not accelerate quickly. He should have proceeded at a slower speed which would have given him an opportunity to react.

b. *McInnis v. Lenz*, 2018 BCSC 1727, Choi J.

Choi J. dismissed the plaintiff's claim for injuries sustained in a fall on a city bus as a result of a sudden and powerful acceleration. The plaintiff testified that she stood up to exit the bus and was holding a vertical bar when the bus pulled away from the curb, causing her to lose her grip and fall backwards into another passengers lap. The bus then suddenly stopped, causing her to fall forward onto the floor.

The court reviewed the following principals governing the standard of care applicable to a bus driver from *Benavides v. ICBC*, 2017 BCCA 15:

- the mere fact that a passenger is injured while riding on a public carrier does not establish a *prima facie* case of negligence.
- the plaintiff bears the burden of proving on a balance of probabilities that the defendant breached the standard of care owed to the plaintiff.
- once the plaintiff establishes a *prima facie* case of negligence, in practical terms the burden shifts to the defendant to answer the case against him and to show that he was not negligent.

The court also cited the following comments of Madam Justice Fenlon from *Patoma v. Clarke*, 2009 BCSC 1069:

> It is clear that bus drivers owe a duty of care to their passengers based on the reasonable foreseeability test. The standard of care is the conduct or behaviour that would be expected of the reasonably prudent bus driver in the circumstances. This is an objective test that takes into consideration both the experience of the average bus driver, and what the driver knew or should have known: *Wang v. Horrod* (1998), 48 B.C.L.R. (3d) 199 (C.A.).

Choi J. rejected the plaintiff's argument that the standard of care of a bus driver was higher at a bus stop than when between stops, concluding that a bus driver's standard of care is the same regardless of the location of the bus. She accepted the evidence of the bus driver and the plaintiff's co-worker that the bus driver had warned the passengers to "hold on" and the movement of the bus at the time of the incident was nothing outside of the ordinary. She found that the bus was not moving quickly and may have made some abrupt or jerky movements, but such movements were within the normal movement of city buses. As a result, the plaintiff's claim was dismissed.

c. *Nguyen v. Busink*, 2018 BCSC 913, Skolrood J.

In this liability only trial, the court assessed fault for a collision which took place in a dedicated left turn lane. The only witnesses to the accident were the plaintiff and defendant, the drivers of the two vehicles involved.

The plaintiff was travelling behind the defendant. Each intended to turn left at the approaching intersection from the left turn lane. The court found that the plaintiff moved to the left before the commencement of the left turn lane and drove over a cross-hatch median in order to enter the left turn lane. In contrast, the defendant entered the left turn lane as the lane opened. She did not shoulder check or check her side or rear view mirrors before so moving. The defendant's vehicle collided with the plaintiff's vehicle which came up on her left side out of the cross-hatched median. The plaintiff's vehicle was found to have been overtaking the defendant's.

The plaintiff was found 100% at fault for the collision. Skolrood J. held that the duty of care imposed upon the defendant did not require her to anticipate the illegal or negligent actions of the plaintiff. Although a mirror or shoulder check likely would have alerted the defendant to the plaintiff's illegal maneuver, he found that requiring the defendant to take such actions would impose an unreasonable and unfair burden on a driver who was driving in a proper fashion and in accordance with the rules of the road. The plaintiff was driving where she was not supposed to be and was overtaking the defendant on the left when it was unsafe to do so.

d. *Vandendorpel v. Evoy*, 2018 BCCA 442, per Harris J.A. (Frankel and MacKenzie JJ.A. concurring)

This was an appeal of a judgment apportioning liability for a motor vehicle accident at 80% to the pedestrian plaintiff and 20% to the defendant driver. The driver struck the pedestrian in a crosswalk on a dark, early morning. The pedestrian was wearing all dark clothing (although the trial judge confirmed this is not in and of itself contributory negligence) and was wearing headphones listening to music. The pedestrian had entered the crosswalk against a raised hand signalling not to cross and when he noticed the approaching vehicle, he began to run directly across the vehicle’s path. The driver did not see the pedestrian until it was too late to avoid the collision. The driver was travelling slightly over the speed limit at approximately 50-55 km/hr.

This accident had previously been appealed when the trial judge assessed the plaintiff to be 100% liable for the accident. The court of appeal held the trial judge had failed to consider applicable statutory provisions of the *Motor Vehicle Act* related to the driver’s duty of care and that the trial judge failed to consider expert evidence about the driver’s stopping distance if he had travelled at 50 km/hr. Following the first appeal, the case was remitted to the trial judge for reconsideration resulting in a liability apportionment of 80/20 and this second appeal. The trial judge provided reasons considering every point outlined by the court of appeal’s first judgment. On this second appeal, the court of appeal found no error of the trial judge and held the apportionment of liability was proportionate to the fault of the parties, even if the judge may have erred in not finding additional breaches of duty of the driver as contended by the pedestrian. This second appeal was dismissed.

Agony of Collision/Doctrine of Emergency

e. *Dorsett v. Sahib*, 2018 BCSC 1884, Matthews J.

This trial was for an assessment of liability of three parties involved in an accident in two related actions. One aspect of the liability assessment was whether one defendant was negligent for rear-ending the plaintiff after the plaintiff was impacted by another vehicle.

In this case, the defendant S alleged that he had lost control of his vehicle as a result of avoiding an unidentified vehicle and crossed the median into oncoming traffic colliding with plaintiff's vehicle. The plaintiff was then rear-ended by the defendant O. Neither the plaintiff nor O saw any other vehicle travelling with S.

The trial judge addressed the principles of whether an inference of negligence should be drawn against the defendants and, if so, whether those inferences were negated by the evidence. The plaintiff also argued that the agony of collision doctrine applied to the question of whether he had been negligent in colliding with the S's vehicle.

A trial judge is not required to make an inference of negligence where a vehicle crosses the center line, but may do so if such an inference is supported by an assessment of all of the evidence adduced. S argued that he had been cut off by another vehicle and that there was no other evidence such as excessive speed or distracted driving that could account for him losing control and, therefore, there was no basis on which to draw an inference of negligence. In deciding that the plaintiff made out a *prima facie* case of negligence, Matthews J. noted there were cases in which proof of loss of control of a vehicle is proof of negligence without establishing why the driver lost control and that a judge is not required to make an inference of negligence. Her Ladyship determined that she would address S's argument that he lost control because he was cut off in determining whether he had negated the inference.

The court concluded that there was no unidentified vehicle on the bases that: there were inconsistencies in S's statements to the police and ICBC and his evidence at trial; and both the plaintiff and O should have been able to see the unidentified vehicle but had not. S was not able to negate the inference and the claim of negligence was made out against S.

At paragraph 15, the court confirms that a party relying on the agony of collision doctrine must plead it.

Matthews J. considered that an inference of negligence is often drawn in cases involving rear-end collisions due to the duty a driver owes to drive at a safe distance from the leading vehicle. However, an inference of negligence will still be highly dependent on the facts of each particular case. The plaintiff and S were involved in a sudden and unexpected collision in the middle of the road. The rear-ending defendant attempted to avoid impacting the plaintiff’s vehicle, but was unable to do so. Matthews J. held it was not appropriate to draw an inference of negligence against the rear-ending defendant on these facts and the plaintiff’s claim against the rear-ending defendant was dismissed.

f. *Isaac Estate v. Matuszynska,* 2018 ONCA 177, per Huscroft J.A. (Lauwers J.A. concurring and Pepall J.A. dissenting)

This case addressed the doctrine of emergency.

Following adispute over a drug deal, G left his own car and got into the passenger seat of a vehicle driven by L. G then got out, walked around to the driver's side, broke the driver's side window and reached into the car. L drove away, swerving trying to dislodge G who was trying to get into L's car. G fell, hit his head and died. L was charged with and pleaded guilty to driving while prohibited and to breach of recognizance.

G's family brought an action in negligence. The defendant brought a summary judgment motion to dismiss which succeeded on the basis that the defendant acted reasonably in the context of the emergency. The application was allowed and the appeal was dismissed.

The appellants argued that the doctrine of emergency only applies if the emergent situation is imminent and unforeseen and could not have been reasonably anticipated. Here, it was suggested that the defendant was alert to the possibility of danger prior to his window being smashed. He could have left before anything happened and, in fact, his passengers had urged him to do so. It was also argued that he was still required to exercise the standard of care of a reasonable person notwithstanding an emergency situation. The defendant should not have sped off when the deceased was climbing into his car. Lastly, it was argued that the defendant could not take advantage of the emergency doctrine because it was his own negligence that brought about the emergency. He had consumed crack cocaine before getting behind the wheel of a car, when he was prohibited from driving, brought his crack cocaine with him, entered a dark parking lot and engaged with a person who was high and there to buy drugs.

The majority held that the doctrine of emergency applied.

It was implicit in the chambers judge's decision that she had considered that the defendant had not anticipated the aggressive action taken by the deceased. It was his sudden attack that caused the emergency. It was not enough that the defendant had reason to believe that "something" might happen. The appellants had failed to establish that the respondent should have foreseen what actually occurred.

The law is not so unreasonable as to hold people to a standard of perfection in determining the appropriate standard of conduct in an emergency. It was not an error to conclude that the defendant had not anticipated the deceased's actions. The deceased was the author of his own misfortune.

The dissenting judgment would have allowed the appeal on the grounds that the chambers judge had failed to address the credibility issues raised by the differing accounts.

Leave to appeal to the Supreme Court of Canada was refused (2018 CarswellOnt 18850).

D. Cyclists

a. *Dhanoya v. Stephens*, 2019 BCSC 723, Dhillon J.

A cyclist was found 100% at fault for an accident that occurred when he was struck by a vehicle while in a crosswalk. The cyclist had assumed that there was no traffic and cycled into the cross walk without looking.

In finding him solely liable, Madam Justice Dhillon acknowledged that a driver of a vehicle has a general duty to lookout for recognized hazards on the road and that the duty is heightened when approaching a marked crosswalk to take extreme care and maintain a vigilant lookout. A cyclist shares the same rights and duties as a motorist. The plaintiff was riding his bicycle in a crosswalk in contravention of s. 183(2)(b) of the *Motor Vehicle Act* and so he assumed a heightened duty to ensure his own safety including that he was seen by drivers of a vehicle. He did not have the statutory right of way when he bicycled across the crosswalk because he was not a pedestrian. He failed to yield the right of way and was unable to establish that the defendant had enough time to see the cyclist and avoid striking him.

E. Infant Settlement

a. *Deo v. Vancouver School District No. 39*, 2018 BCCA 464, per Garson J.A. (Fisher and Griffin JJ.A. concurring)

The infant plaintiff was injured on a school playground. At a liability only trial his occupier's negligence claim was dismissed, but he succeeded in his claim against the school district for their negligence in failing to respond adequately by calling an ambulance. The plaintiff appealed and the school district cross appealed.

The parties then reached a settlement for $35,000 all-inclusive of costs and sought approval from the court of appeal. Counsel had assessed the claim for damages in the range of $400,000 to $490,000 and that an adverse cost award, should the appeal fail, would exceed $100,000. The prospects that the infant plaintiff would succeed on appeal were less than 50%. A loss would result in serious financial consequences. In approving the settlement, Madam Justice Garson quoted from *Lotocky (Litigation Guardian of) v. Markle*, 2010 BCCA 75, that "it is ... artificial and misguided to judge the merits of the appeal in isolation from the financial ramifications that would flow from an unsuccessful appeal".

F. Standard of Care of Employer

a. *Commisso v. Teck Coal Limited,* 2018 BCSC 2283, Marzari J., in Chambers

The plaintiff was driving home from work when his car ran off the road and rolled over. The plaintiff sued his employer arguing that his employer knew or ought to have known that he was ill and that his ability to drive was compromised. The plaintiff argued that the employer owed him a duty of care to ensure that he had the ability to drive home safely or otherwise had a safe ride home.

The defendant brought an application for summary dismissal. The defendant had conceded that it had a duty of care to ensure that an employee was safe to drive home where the employer

caused the impairment and that it may have a duty of care to offer a safe ride home from a mine site in circumstances where it had knowledge that the employee's ability to drive was impaired. It argued that the mere knowledge that an employee was not feeling well does not give rise to such a duty of care. Ultimately, the application was dismissed as there was conflicting evidence on multiple issues going to the factual foundation for establishing a duty of care so the matter could not be resolved on a summary trial basis.

G. Waivers

a. *Peters v. Soares*, 2019 BCSC 189, Matthews, J.

The plaintiff was injured while engaging in a Brazilian Jiu Jitsu competition. He sued alleging that his instructor was negligent for allowing him to compete against a participant in a higher weight class and in a competition where stand up skills were required. The plaintiff had no experience or training in stand up skills.

The defendant denied negligence, claimed *non fit injuria* and relied on two waivers; one included in the membership agreement signed by the plaintiff when he enrolled in classes and the second was part of an on-line registration form completed to enrol in the competition.

Madam Justice Matthews heard the issue of the waiver on a summary trial application.

The waiver included in the membership agreement sought not to sue for injuries "in connection with my participating in the Classes". The waiver did not extend to a tournament. There was no evidence that a competition had been in either the plaintiff's or the instructor's contemplation at the time the agreement was signed. A release will only cover matters specifically in the contemplation of the parties at the time the release was given.

The plaintiff deposed that he believed the on-line registration form released the host from injury that was his own responsibility. However, the defendant failed to lead any evidence regarding the specific language of the online waiver form electronically signed by the plaintiff. The judge was satisfied that he signed some form of waiver, but without the terms, the defendant could not discharge his onus to prove that the waiver language of the online registration excluded the plaintiff's claim.

The application to dismiss the plaintiff's claim on the basis of a waiver and release was dismissed.

XVII. Occupiers Liability

a. *Goddard v. Bayside Property*, 2018 BCSC 1498, Ball J.

The plaintiff fell down an exterior wooden staircase of his condominium building and brought an action seeking damages for personal injury against the building management company and the condominium corporation. The plaintiff had no memory of what happened and no explanation of what caused him to fall, but rather presented a theory of what he believed happened. The stairs were cleaned on a weekly basis and periodically cleared of snow and ice. The defendants succeeded on a summary dismissal application. The plaintiff failed to establish the condition or hazard that caused his fall and so failed to prove negligence or a breach of duty

under the *Occupier's Liability Act*. The fact of a fall does not establish that an occupier failed to take reasonable steps to ensure the plaintiff's safety and the court cannot speculate in respect of a theory of why the plaintiff fell.

b. *Marchi v. Nelson (City of)*, 2019 BCSC 308, McEwan J.

This occupier's liability case confirms that governments do not owe a duty of care in tort, if it can be established that their actions are *bona fide*.

The plaintiff brought an action seeking damages when she was injured attempting to walk over a snowbank located on the side of the street in Nelson, B.C. where she parked her car. The snowbank was the result of plowing of the streets following three days of heavy snowfall. Rather than walk on the street to the corner, she decided to walk over the snow bank to get to the sidewalk. Her foot got stuck and she suffered a knee injury.

There was nothing in the evidence that showed that the city's long-standing practices around snowplowing were unreasonable or the result of a manifest lack of appreciation of the risks involved. Snowbanks are an unavoidable feature of winter in most of the province. Further, the court found that the plaintiff assumed the risk of crossing the snowbank and was the author of her own misfortune.

c. *Scheck v. Parkdale Place Housing Society*, 2018 BCSC 938, Johnston J.

The plaintiff slipped and fell from ice on a municipal sidewalk outside of a seniors' home operated by the Parkdale Place Housing Society (the "Housing Society"). The Housing Society successfully brought an application to dismiss the plaintiff's claim against them.

The court found the Housing Society owed no duty of care to the plaintiff with respect to a municipal sidewalk. The Housing Society did not assert any control over: activities conducted on the sidewalk; who might use the sidewalk, or cracks or other defects in the sidewalk. While the municipal by-law assigned responsibility to the Housing Society to remove snow and ice from the sidewalk outside it's building, that fell short of giving the Housing Society control over the sidewalk or those using it.

XVIII. Offers To Settle

a. *Bellinger v. Jones*, 2018 BCSC 894, Basran J.

The defendant sought double costs following the dismissal of the plaintiff's claim after a liability trial. The defendant had made a $1.00 offer to settle. The offer had been open for almost three years before trial. The plaintiff proceeded on his "right to his day in court". However, in choosing to do so, the court was mindful that such an approach must recognize the risk of a costs award.

While finding that there were many inconsistencies in the plaintiff's evidence, the court concluded that he was not intentionally untruthful or misleading. The plaintiff had counsel for much of the pre-trial period and could not reasonably claim complete ignorance of the implications of proceeding to trial. However, he did not have counsel for most of the time leading up to trial. Generally, a plaintiff cannot be expected to predict with certainty how their

credibility will be assessed by the trier of fact prior to trial. This is a relevant factor for determining whether an offer should reasonably have been accepted, particularly in circumstances where a plaintiff's testimony is the critical evidence. While the circumstances leading up to trial pointed to the conclusion that his case was weak, it was not unreasonable for him to pursue his claim based on his honestly held belief that his version of the events was credible. As a "nuisance offer", it did not encourage dialogue between the parties and was not one that the plaintiff should reasonably have accepted. The application for double costs was dismissed.

b. *Brar v. Ismail*, 2018 BCSC 1573, Meyers J.

The plaintiff's action was dismissed following a two-week jury trial. The accident involved a rear-end collision and the defendants admitted liability. The trial hinged on the plaintiff's credibility and the defendants did not call any expert evidence. The defence tendered video surveillance evidence of the plaintiff engaged in activities which she told her expert she could not do. Meyers J. noted that often video surveillance is not compelling but "here it was". The plaintiff should have known from at least the time the surveillance was delivered that her credibility was the key issue. In addition, she did not call her psychiatrist who treated her both before and after the accident as a witness at trial and the jury was instructed on adverse inference.

The plaintiff alleged that the defendants had improperly conducted surveillance of her leaving a settlement meeting. Mr. Justice Meyer did not provide any analysis but said that there was nothing that had been shown to merit the video not being shown to the jury during the trial and it was not a consideration for the costs application.

However, the court held that the defendants could have disclosed the video surveillance sooner and made the offer sooner in order to give the plaintiff more time to consider it. He awarded the defendants ordinary costs up to and including the first five days of trial and double costs thereafter.

c. *Clubine v. Paniagua*, 2018 BCSC 1076, Watchuk J.

On the defendant's application for costs following a formal offer to settle, the court considered the fact that the plaintiff had purchased adverse cost insurance known as "after-the-event" insurance prior to trial. This insurance covered the defendant's costs and disbursements from the date of the offer if costs were awarded against the plaintiff and would also pay for the plaintiff's disbursements incurred but not awarded from the date of the offer. She agreed with the defendant's submission that such insurance effectively undermines the intent of the offer to settle rule. "It allows a plaintiff to avoid the punitive costs consequences of the rule, ignore reasonable offers to settle, and with impunity take their chance at trial. The winnowing function of the costs rules is obviated by ATE insurance; doubtful cases can proceed through litigation without risk of consequences."

d. *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26, (Goepel, Savage, Fisher JJA. Supplementary Reasons of the Court)

The plaintiff sued for wrongful dismissal and was awarded damages which were reduced on appeal. The defendant sought costs consequences for a formal offer to settle made one month

before trial when discoveries had been completed and trial briefs had been filed. The offer was for damages calculated under the employment contract which was the ultimate result after appeal. The defendant argued that it was one that ought to have been accepted.

The court of appeal agreed with the analysis of Gomery in *Kobetitch v. Belski*, 2018 BCSC 2247. It added that the fact that it may be reasonable for a party to refuse an offer does not necessarily immunize that party from the consequences of a reasonable offer, citing *Wafler v. Trinh,* and *A.E. v. D.W.J.* In each of the latter cases, the plaintiffs were sanctioned in costs notwithstanding that the trial judges in each case found that it was not unreasonable for them to reject the offer to settle.

In the result, the court found that it was not unreasonable for the plaintiff to refuse the offer and she did not act unreasonably by taking a chance and proceeding to trial. The offer did not offer a genuine compromise or an incentive to settle.

e. *Gill v. McChesney*, 2018 BCSC 1378, Abrioux J.

The defendants applied for costs consequences against the plaintiff following a trial in which the plaintiff was awarded damages of $87,250. She had sought damages in excess of $1 million. The defendants offered $105,000 "new money" and later $208,720 "new money".

At issue was the validity of the offers as formal offers under *Rule 9-1*. The plaintiff argued that the offers were unclear in that they: sought to settle the tort and Part 7 claim; stated that the settlement payment was offered "after taking into account Part 7 benefits paid or payable" but included a term that the plaintiff execute a release which included ICBC; and did not include a copy of the proposed release.

Abrioux J. held that the offers were valid offers to settle under *Rule 9-1*. He held that there is nothing which, at law, precludes an offer to settle relating to both the tort and Part 7 claim. Furthermore, the inclusion of ICBC in the release was unambiguous because it clearly means that past and future Part 7 claims were being released. The plaintiff did not raise this suggested ambiguity with the defendants upon receipt of the offer. This lack of contact reinforced the court's view that there was no ambiguity from the plaintiff's perspective as to the terms of the offers.

The court also held that the offers were not ambiguous because they did not append a copy of the proposed release itself. It was clear in the terms of the offer that the defendants and ICBC were the subject of the release. Citing *Ballen v. Ballen,* the court confirmed the proposition that it should be reticent to conclude ambiguity, particularly when the issue is only raised by the party after the trial. "The strength goes out of the protest when no response was made at all."

This was another case where the plaintiff's case was heavily dependent upon her credibility. Accordingly, she should have known when the offers were made that her exerts' opinions were based in large part upon the history she provided to them. She was also aware of the opinions of the defence experts. This was a case where the plaintiff was untruthful or misled experts, as opposed to the situation where the plaintiff cannot be expected to know in advance how the court might assess her credibility. The offers were ones that ought reasonably to have been accepted. The defendants were awarded their costs and disbursements after the date of their first offer.

As a final matter, Abrioux J. disallowed the disbursements relating to a report from Dr. Vondette, physiatrist, and his attendance a trial. The trial judge had found him to be an advocate for the plaintiff and placed no weight on his evidence regarding the cognitive testing done. He also questioned the need for the plaintiff's expert reports from a neurosurgeon, a neurologist and a psychiatrist on the issue of multiple traumatic brain injury. "Viewed from this context, it is perhaps not surprising that the court is often faced with situations where a bill of costs is greater than the award itself".

f. *Goguen v. Maddalena*, 2018 BCSC 696, Forth J.

The defendant sought costs where its formal offer to settle exceeded the trial judgment by $639.16. He argued that because the offer was for the tort claim only, the plaintiff was still entitled to collect Part 7 benefits. When considered together with those Part 7 benefits, the offer exceeded the trial award by a larger margin. No evidence of the value of those Part 7 benefits was submitted and the court refused to consider this factor in determining cost consequences. With regard to relative financial circumstances, the court gave weight to the fact that the plaintiff was a young adult at the beginning of his university career. In the result, the plaintiff was awarded his full costs.

g. *Kobetitch v. Belski*, 2018 BCSC 2247, Gomery J.

This case interpreted the language of *Rule 9-1(6)(a)*: "whether the offer to settle was one that ought reasonably to have been accepted either on the date that the offer to settle was delivered or served or on any later date."

Gomery J. stated at paras. 24-26:

> In my opinion, the wording of the sub rule stating this consideration is important. The consideration is not whether it would have been reasonable for the plaintiff to have accepted the offer. It is whether the plaintiff ought reasonably to have accepted the offer. The difference is this. An offer might be such that a reasonable plaintiff could choose to accept it or not. One might term it "a reasonable offer". On the other hand, to say that that an offer ought reasonably to have been accepted is to say that a reasonable person should have accepted it. It was unreasonable to refuse it.
>
> According to the distinction I am drawing, having regard to the wording of the sub rule, the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it.
>
> I should add that, independently of sub rule 9-1(6)(a), I think it may often be germane to consider whether the offer was a reasonable offer, that is, one that it would have been reasonable for the plaintiff to have accepted. That consideration falls to be addressed under sub rule 9-1(6)(d), "any other factor the court considers appropriate". [emphasis in the original]

In this case, the plaintiff was awarded approximately $27,000 less than the defendants' offers to settle. The offers were held to be well timed and substantive. The plaintiff was in a position to evaluate them within the time available. They offered a genuine compromise and a real incentive to settle. On the other hand, the plaintiff's claim was supported by expert evidence and the defendants had no evidence to the contrary. Liability was not really in issue. The offers

required the plaintiff to accept a fraction of what he might recover, if the evidence in his case was accepted. The plaintiff did not act unreasonably by taking a chance and proceeding to trial.

h. *Meade v. Armstrong (City)*, 2018 BCSC 528, Marchand J.

The plaintiff sued for damages when the city disposed some of his property after the city declared it a nuisance. The action was dismissed. Prior to trial, the city engaged in several efforts to discuss settlement and proposed a judicial settlement conference. The plaintiff declined and stated that he knew it would be costly to determine the facts behind the defendant's egregious wrongs. The city made two formal offers before trial.

The court held that neither the plaintiff's sympathetic personal circumstances nor the city's pre-litigation conduct supported a departure from the usual rule regarding costs. The plaintiff had been cautioned by a chambers judge before trial of potential difficulties in proving his damages and the risks of costs. The chambers judge also recommended that the parties pursue alternative dispute resolution, including a settlement conference. However, the plaintiff was determined to have his day in court to pursue a "noble cause". Having made that decision, he was subject to cost consequences of declining an offer that ought reasonably to have been accepted and double costs were awarded against him.

i. *Noori v. Hughes*, 2019 BCSC 139, Milman J.

The plaintiff sought double costs following a trial in which he was awarded $495,589.95 in damages. The plaintiff made two formal offers for $350,000 and $275,000 "new money" prior to trial. The defendants argued that the use of the term "new money" rendered the offers ambiguous because it did not make clear whether deductions must be made to account for monies paid or payable under Part 7. The court rejected that argument on the basis that the plaintiff was seeking to settle only his tort claim against the two personal defendants, not their insurer. An offer may include reference to other insurance benefits under Part 7 but such language is not required in order to make the offer clear and unambiguous.

Milman J. considered the issue of credibility, noting that the defendant had good reason to question the plaintiff's credibility prior to trial based upon his lack of candour in document disclosure, delay in producing relevant income documents and producing records found to be false or misleading. The defendants did not act unreasonably in proceeding to defend the case at trial where such credibility concerns could have (but ultimately did not) undermined the foundation of medical opinions which relied upon the subjective reporting of the plaintiff.

In the result, the credibility issues along with the plaintiff's late disclosure of relevant documents weighed against an award of double costs.

j. *Senger v. Graham*, 2018 BCSC 1446, Murray J.

The successful plaintiff applied for double costs. The defendant argued that the plaintiff's offer was not clear because it contained a term that ICBC would agree that the plaintiff could address the "uninsured driver fund". The court found that the offer was clear because the offer referenced "UMP" later in the terms of the offer and plaintiff's counsel clarified the proper reference to "UMP" in later correspondence. The defendant also unsuccessfully argued that his counsel was on a limited retainer with ICBC for only $200,000 (his policy limit) and, therefore, his counsel could not agree to the plaintiff being permitted to go to UMP for the remainder. He

argued that he was not in a position to accept a term that would bind ICBC to a policy to which he was not a party. Murray J. held that it defied logic to accept that defence counsel could not have worked with the adjuster to get the approval sought for UMP.

However, the court failed to give effect to the plaintiff's formal offer on the basis that it expired one month before the deadline for service of expert reports which meant that the defendants were missing information that was essential to their ability to evaluate the offer.

k. *Sherwood v. The Owners, Strata Plan VIS 1549*, Hinkson C.J.S.C.

The court retains the discretion to hear an application for costs after an order has been entered if the trial judge was unaware of and entitled to know about offers to settle or if the manifest intention of the court was not expressed regarding costs.

The reasons for judgment also serve as a reminder that to have an effect on a party's costs, the offer must be one that was capable of being accepted by that party without the necessity of obtaining the co-operation or consent of any other party.

l. *Vine v. Taylor*, 2018 BCSC 1025, Kelleher J.

The successful plaintiff sought double costs and increased costs following trial.

The court rejected the defence argument that they acted reasonably in refusing the offer because there were contentious issues that hinged on the credibility of the plaintiff. The court held that such argument could be made in every case and giving it effect would be inconsistent with the purpose of *Rule 9-1* in this case.

The defendants also argued that the offer was uncertain. It did not break down pecuniary and non pecuniary damages which would affect the calculation of interest; it required a Notice of Acceptance with settlement funds, the amount of which was not clear; and a term of the offer allowed the plaintiff to use the settlement as an admission of liability (when the release and consent dismissal order were premised on no admission of liability).

The court noted that the defendants did not seek to address these difficulties raised at the costs hearing and made an offer the following day. The strength goes out of the protest "when the only response is a counter offer." The offer was one that the defendants ought reasonably to have accepted.

The plaintiff also applied for increased costs on the basis that the defence substantially exceeded its time estimates of the cross-examinations of two of the plaintiff's experts. The court refused to award increased costs on this basis, noting that cross-examination is likely the least predictable area of a trial and estimates are made before the actual examination-in-chief. The length of cross-examinations is a product of various factors which are not necessarily predictable.

m. *Wiebe v. Wiebe*, 2018 BCSC 1062, Tindale J.

The court held that the defendant's offer was one that the plaintiff ought reasonably to have accepted once the pre-trial video deposition of her expert had taken place. The claim for loss of future earning capacity was highly contested and her expert opined that she was no longer competitively employable. However, the court determined that the expert did not have a

proper evidentiary foundation on which to base her opinion and she took on the role of an advocate. The court found that the plaintiff should have realized the frailties in this evidence, given the cross-examination and accepted the offer.

XIX. Part 7 Benefits, s.83 Deductions

a. *Wiebe v. Wiebe*, 2018 BCSC 1062, Tindale J.

At issue in this case was what deductions ought to be made in under s. 83 of the *Insurance (Vehicle) Act* for physiotherapy and massage therapy awarded as part of the plaintiff's cost of future care claim.

Previous authorities had held that the court ought not to rely on the opinion of counsel or an adjuster as to ICBC's position about payment of Part 7 claims in the future. In this case, the court accepted affidavit evidence of an adjuster who deposed that ICBC would ignore the opinion of their expert and accept the court's findings that the care costs sought were necessary and reasonable and the portion subject to Part 7 would be paid, thereby placing the benefits within the realm of mandatory benefits subject to Part 7 deductions. The court considered that the adjuster was bound by the pre-conditions to entitlement set out in the *Regulations* as in *Kelly v. Kotz*, 2014 BCSC 1022, but found the evidence supported that the adjuster intended to pay the Part 7 benefits and ordered their deductibility. In doing so, the court rejected the plaintiff's argument that in order for a deduction to be made, the treatment must be solely for rehabilitation purposes. The court held that this test applies only to the deductibility of discretionary benefits pursuant to s. 88(2) and not to the deductibility of mandatory benefits. However, the consideration of the likelihood in *Wiebe* is probably done away with by s. 83(5.1) of the *Insurance (Vehicle) Act*.

XX. Practice

a. *Aggressive Auto Towing Ltd. v. City of Abbotsford*, 2018 BCSC 1433, Master Keighley

The parties in the action were competitors in the auto towing business. The petitioner's application for pre-trial examinations of several witnesses was dismissed as the court found that the petitioner had not followed the procedure envisaged by *Rule 7-5(1), (3) and (4)*. While counsel had written to the witnesses seeking their consent to a deposition, the court held, at paragraph 35, that "[a] potential witness cannot be said to have refused to give a responsive statement when witnesses refused to meet with counsel for the purpose of a "discussion" and specific questions have not been addressed to the witness: *Sindaco v. Gilbey* 1991 B.C.J. number 3426".

b. *Brooks v. Leithoff*, 2018 BCSC 1906, Power J.

The defendant brought an application to have the notice civil of claim struck for lack of jurisdiction on the ground that there is no real and substantial connection between British Columbia and the facts on which the proceedings are based as required under section 3(e) of the *Court Jurisdiction and Proceedings Transfer Act*.

The defendant was an Alberta resident and the action arose out of a motor vehicle accident that occurred in Alberta.

The plaintiff argued that there was a real and substantial connection to British Columbia because the plaintiff was a British Columbia resident who was previously injured in British Columbia and who suffered indivisible injuries in the British Columbia and Alberta accidents. The plaintiff had been in five separate motor vehicle accidents: two in British Columbia, followed by one in Alberta, and then two subsequent accidents in British Columbia. The plaintiff argued the court should take a flexible approach to jurisdiction when the other jurisdiction is another Canadian province as opposed to a foreign jurisdiction.

The court held that the case law clearly establishes that the plaintiff's residence in British Columbia, the fact of indivisible injuries, and the fact that the plaintiff is suffering ongoing damages in British Columbia are not, by themselves, sufficient to establish jurisdiction. The court also determined that the combination of these three factors was not sufficient to establish jurisdiction. The difficulties of mounting two separate trials on the same evidence were concerns relevant only to the analysis of *forums conveniens*, which is only considered after it is determined that the court has territorial competence. As a result, the case was dismissed.

c. *Murray v. McIllmoyl*, 2018 BCSC 2269, Master Harper

The defendant applied for a trial adjournment on the grounds that the plaintiff was in a second motor vehicle accident for which a notice of civil claim had not been filed, and had delivered a psychiatric report diagnosing somatic symptom disorder and adjustment disorder when no psychiatric injuries were pleaded.

In allowing the adjournment on the first ground, Master Harper cited *Garcia v. Drinnan*, 2013 BCCA 53, in which the trial was adjourned for similar reasons. There was no issue that the injuries from the two accidents were indivisible. Master Harper noted that circumstances in which two trial judges may make different findings of fact on the same evidence causes embarrassment and should be avoided. It was also clear that the plaintiff's experts were instructed to deal with both accidents.

Master Harper commented that these applications should be avoided by an early exchange of correspondence with respect to the plaintiff's intentions.

On the second ground, Master Harper relied on *Strul v. Hunter*¸ 2018 BCSC 1559, in which the court stated:

> The defendants' actions are always to be guided by the pleadings, which dictate what is relevant in the documents and clinical records. Litigation should not be guesswork. Pleadings are designed to eliminate that. They did not do so in this case before they were amended very late in the day.

Master Harper concluded that he would have granted the trial adjournment on the second ground as well.

d. *Westeel Fabrication Ltd. v. Envoy Construction Services Ltd*., 2018 BCSC 2176, Ball J.

On an application to settle the terms of a draft order made by the court at a trial management conference, counsel for the plaintiff filed written submissions which raised new factual issues seeking to add matters not discussed at the trial management conference and challenged the court's jurisdiction to settle its own orders, arguing that the clerk's notes were authoritative.

The court held that it is not appropriate, when settling the terms of an order, for a party to include new matters not heard by the court when making the original order. Settling an order is not a second chance to advance new submissions. The notes of a court clerk are helpful in settling an order, but the clerk's notes are not the court's order. It is preferable to examine a recording or a transcript of the proceeding.

A. Admissions

a. *Bodnar v. Sobolik*, 2018 BCSC 2169, McEwan J.

This was an application to withdraw an admission of liability entered in a response to civil claim.

At the time of the admission, the defendants' insurer had video footage of the accident and successive adjusters working on the file had given instructions to admit liability. About two years later, the defendants obtained an expert report which opined that the plaintiff's vehicle was speeding and had it been travelling at the speed limit, the accident would not have happened. ICBC clearly understood the material contained in the video when it made the admission, which was not made hastily, inadvertently or without knowledge of the facts. Both of the cars were no longer available for inspection. Therefore, it was not in the interests of justice to allow a withdrawal of the admission of liability because there was now a difference of opinion about the cause of the accident. Although the application to withdraw the admission was dismissed, the judge commented that he was saying nothing about contributory negligence or whether it is possible to plead or amend the pleadings to raise that issue.

B. Fast Track

a. *Connatty v. Bone*, 2018 BCSC 2336 Donegan J. (in Chambers)

A three-day trial was scheduled to start the same week as this application by the plaintiff to have the matter removed from fast track.

Six weeks after the defendant filed her response, counsel agreed to a five day trial. A few months later, plaintiff’s counsel reconsidered and felt the trial could be completed in three days. The parties then agreed to put the matter into fast track in order to secure an earlier trial date. All of the pre-trial procedures were conducted in accordance with fast track rules, including the examination for discovery. The evidence of an expert retained by the plaintiff was taken at a pre-trial deposition to ensure that there would be sufficient time to hear the case. Defence counsel had served a comprehensive notice to admit to reduce the number of defence witnesses that would be required. Trial briefs filed by both parties indicated that the trial could be completed in three days.

At the trial management conference, the amount of time indicated by plaintiff's counsel for certain witnesses raised concerns that the trial could not be completed in three days; and the judge added a fourth day of trial. At this time, there was no discussion between the parties that the matter should be removed from fast track. After the trial management conference, the plaintiff sought consent from defence counsel to have the matter removed from fast track, which was denied, resulting in the application.

The plaintiff was clear that she wanted the matter removed from fast track solely to avoid the limited costs allowed under Rule 15-1. The plaintiff argued that she was seeking more than $100,000 at trial, the trial was set down for more than three days, and she had withdrawn her consent so none of the criteria for fast track applied. The plaintiff also argued that there is no discretionary basis upon which the court should order that the matter remain in fast track if these criteria are not met.

The court refused to remove the matter from fast track on the grounds that the plaintiff had consented to put the matter into fast track, benefited from the expedited process for earlier trial dates, and had reaffirmed her consent throughout all of the steps of the litigation. The court concluded at para 29:

> It is clear in this case, unlike the circumstances in some of the authorities provided, that both parties consented to be bound by the fast-track rule for their mutual benefit of a faster resolution of the case and conducted themselves accordingly throughout all of the steps in the litigation. To withdraw her explicit consent to this process three weeks before trial on the basis that the master at the TMC saw the trial might take four as opposed to three days, after all pre-trial procedures had been conducted and then seek to have the case removed from fast track on the eve of trial for the explicit purpose of having the opportunity to obtain costs over and above fast-track costs, is not something that can be condoned by the court.

The court also noted this does not mean consent to fast track cannot be withdrawn in appropriate circumstances.

C. Insufficient Evidence

a. *ICBC v. Mehat*, 2018 BCCA 242, per Griffin J.A. (Bennett and Harris JJ.A. concurring)

ICBC sued Mr. and Mrs. Mehat for insurance fraud arising out of a motor vehicle accident, alleging that the Mehats misrepresented the identity of the driver of the vehicle at the time of the accident. ICBC's evidence was largely circumstantial and the defendants brought an insufficient evidence motion at the end of the plaintiff's case. The motion was heard before closing arguments. The trial judge dismissed the insufficient evidence motion, and, after hearing closing argument, dismissed ICBC's action.

The court of appeal upheld the trial judge's decision, but held that the trial judge erred in applying the "*prima facie* case" test, applicable to a no evidence motion, to the insufficient evidence motion, reasoning that the two motions require a different analysis. The court of appeal concluded that:

> ....an insufficient evidence application is not a stepping stone midway between a no evidence application and final argument; rather, it is equivalent to final argument, and requires determination of whether the plaintiff has proven its case on a balance of probabilities. On an insufficient evidence application, the trier of fact is tasked with weighing all the evidence and determining whether the plaintiff has proven the facts necessary to succeed in its cause of action on a balance of probabilities.

D. Interrogatories

a. *Araya v. Nevsun*, 2018 BCSC 808, Abrioux J.

The defendant applied for answers to interrogatories under *Rule 7-3*. The proceedings involved a complex case in which a total of 89 plaintiffs were claiming personal injury and damages as a result of their treatment at a mine owned by the defendant in a number of law suits.

The court summarized the legal principals applicable to interrogatories and the changes under the new *Supreme Court Civil Rules*. The court identified the purposes of interrogatories as (1) to obtain information and admissions to be read in at trial or used for cross-examination; and (2) to assist in the preparation for discovery by providing basic information on which further questioning may be planned. Citing *Smith v. Global Plastics Ltd.*, 2001 BCCA 275, the test is whether the answers sought are relevant to the issues raised in the pleadings. Under the new *Rules*, a party requires consent or leave of the court to serve interrogatories. In granting such leave, the court will have regard for the object of the *Rules* set out in *Rule 1-3*.

The court specifically addressed the appropriateness of interrogatories before discovery. Interrogatories are not intended to provide a parallel means of obtaining information that can be obtained on discovery; however, they are appropriate in advance of discovery "when the responses will enable the party delivering the interrogatories to obtain admissions of fact in order to establish its case, and leaving the matters to discovery would require lengthy examination and likely adjournment" (para 24).

The court concluded that, in this case, the interrogatories should be allowed on a limited basis. At para. 38, the court reasoned that:

> ...the interrogatories are not overly broad, nor do they canvass irrelevant issues. I also do not accept that they are premature. In fact I conclude that they are necessary and appropriate at this time keeping in mind the principles of proportionality and having the parties proceed in an orderly way to the anticipated Bellwether application to be heard approximately a year from now.

Abrioux J. concluded that the court under the current *Rules* "may well have a broader discretion to order interrogatories and provide appropriate directions depending on the particular circumstances of a given proceeding than was the case under the pre-2010 *Rules* where leave of the court was not required."

E. Jury

a. *Forstved v. Kokabi*, 2018 BCSC 1878, Master Dick

The plaintiff applied to strike the defendant's jury notice. At paragraph 23, Master Dick stated that "[t]here is no dispute that the defendants have a presumptive right to a jury trial in this matter and that right should not be deprived unless there is cogent reason to do so." At paragraph 25, Master Dick outlined the factors to consider in determining whether to strike a jury notice as follows:

a) anticipated length of the trial;

b) the number of experts to be called;

c) the volume of expert evidence;

d) the nature and character of the expert evidence;

e) the extent to which there are conflicts in the expert evidence;

f) the nature of the inquiries the trier of fact will be asked to make to resolve those conflicts, including by having regard to scientific literature;

g) the extent to which the case necessarily involves reference to unfamiliar medical terminology;

h) the number of issues to be resolved by the jury;

i) the character of those issues; and

j) complexities which may arise as a consequence of the interaction between the issues.

At paragraph 26, Master Dick confirmed that to strike a jury notice, a party must satisfy the court that the issue requires prolonged examination of documents or accounts or scientific investigation and that the issue could not be conveniently decided by a jury.

The trial was set for 19 days with at least 22 expert reports to be considered as well as complex matters relating to the plaintiff's income and business losses. Master Dick concluded that the case would require a prolonged examination of documents and scientific matters going to many issues over a protracted period. Master Dick struck the jury notice, finding that a jury would be significantly challenged to retain, understand, and analyze the complex and conflicting evidence and reach factual and legal conclusions on the issues of causation and damages so the matter could not be conveniently heard by a jury.

b. *Gladwell v. Busletta*, 2018 BCSC 1934, Master McDiarmid

The plaintiff sought damages in a medical malpractice action. The matter was set for a 20 day trial and the defendants applied to strike the plaintiff's jury notice. The defendants argued that there would be at least 28 expert reports from 26 experts, totalling more than 562 pages. However, Master McDiarmid found that the examination of documents would not be prolonged and while there were some scientific investigations, they were not sufficiently intricate or complex to displace the presumptive right to a jury.

Master McDiarmid found it significant that there were no third parties and that there was one standard of care, that of a reasonably competent obstetrician. Master McDiarmid also found

that the differences in the various opinions can be explored by cross-examination in a manner which is as likely to be understood and intelligible by a juror as by a judge. The defendants' application to strike the jury was dismissed.

c. *Khan v. Tyler*, 2018 BCSC 1634, Master Harper

The plaintiff applied to strike a jury notice filed by the defendant. Master Harper found that the documents were voluminous and that the jury would be required to read and analyze several expert reports, so a prolonged examination of documents would be required. She also found that the jury would be required to make a "scientific investigation" into the plaintiff's claim of conversion disorder and other injury claims. However, Master Harper held that the jury is assumed to be intelligent and mindful of its duty to judge the case fairly, including assessing the plaintiff's credibility. She also found that the jury would be able to manage a 20 day trial including the assessment of clinical records and expert reports.

Master Harper held that while the issues were of an intricate or complex character, they were not so intricate or complex as to tip the balance in favour of striking the jury, especially since credibility would play such a central role in the trial. Master Harper concluded that if the trial judge determined, as the trial unfolded, that it was becoming unmanageable for the jury, such that the jury is unable to perform its duties, the judge has the discretion to consider discharging the jury based on the circumstances as they exist at the time.

d. *Lester v. Alley*, 2019 BCSC 736, Basran J.

The plaintiff soght to question potential jurors regarding potential bias against the plaintiffs in motor vehicle accidents due to the remarks made by the Attorney General, David Eby. In dismissing the application, the court referenced the following remarks from the Supreme Court of Canada in *R. v. Find*, 2001 SCC 32:

> [26] ...The Canadian system, however, starts from the presumption that jurors are capable of setting aside their views and prejudices and acting impartially...
> "

The court also identified that the Supreme Court of Canada set out the test to demonstrate a realistic potential for juror partiality requires that the court be satisfied that there is both widespread bias in the community and that some jurors may be incapable of setting aside that bias.

The court was not satisfied that there was widespread basis and was of the view that the jurors would be making a solemn oath to discharge their duties impartially so that any bias would be cleansed by the trial process. The court also referred to *Moreland v. Sutherland*, 1999 BCCA 586, which found that if this type of challenge were to be permitted, it would essentially preclude any ICBC policyholder from being indifferent and being a juror on a motor vehicle claim.

e. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324, per Bauman J.A. (Goepel and Fenlon JJ.A. concurring), leave to appeal to the Supreme Court of Canada dismissed, 2018 CanLII 68340 (SCC)

The appellant filed a claim challenging the constitutionality of provisions of the *Jury Act*, R.S.B.C. 1996, c.242 and *Supreme Court Civil Rules* providing for civil jury fees. The appellant argued that the provisions were vague, *ultra vires* the power of Sheriff Services and, wrongfully impede access to justice, thereby offending the rule of law and impinging on the court's jurisdiction under s.96 of the *Constitution Act*, 1867. After a summary trial, Hinkson, C.J.S.C. dismissed the claim. He held that the provisions are not unconstitutionally vague as a "sum sufficient to pay for the jury and the jury process" meets the requisite standard of precision.

On appeal, the court of appeal noted that there are many limitations on access to a civil jury in any particular case, so the critical question was whether civil jury fees infringe the core jurisdiction of the superior courts and thereby contravene s.96 of the *Constitution Act*. The court of appeal held that to succeed, the appellant would have to show that the jury fees bar access to the courts; and that the fees prevent some individuals from having their disputes resolved by the court. Although the appellant argued that the right to a civil jury trial lies at the heart of the superior court's jurisdiction, the court of appeal found that it does not follow, when a jury is not part of the trial process, that the court is anything less than "the court". The court of appeal found that access to the court remains notwithstanding the inability of some parties to fund a jury to hear their case.

At paragraph 69, the court of appeal confirmed that "[a] provision is unconstitutionally vague where it sets a standard that is not intelligible, that cannot provide the basis for coherent judicial interpretation, and that is not capable of guiding legal debate *(Canadian Foundation for Children, Youth & the Law v. Canada Attorney General), 2004* SCC 4 at paras.15-17)." The court of appeal held that a court must be able to give sensible meaning to a provision's terms, and both the government agent enforcing its terms and the person who is subject to those terms must be able to determine whether the fees in question are permissible or not. The court of appeal held that the provisions in question were not unconstitutionally vague as a "sum sufficient to pay for the jury and the jury process" meets the requisite standard of precision. The court held that the sum sufficient to pay for the jury and jury process is readily determinable through objective evidence as to the costs of administering the process and amounts paid to the jury.

At paragraph 67, the court of appeal stated that "[t]o the extent a litigant challenges the amount charged, he or she can make that argument and demand that the province provide evidence substantiating those charges." At paragraph 68, the court stated that the standard provides fair notice to citizens and imposes real limitations on the discretion of those charged with enforcement; namely whether the evidence substantiates that the amount charged is consistent with the actual expenses incurred.

The appellant's application for leave to appeal to the Supreme Court of Canada was dismissed.

F. Order of Witnesses

a. *Firman v. Asadi,* 2019 BCSC 270, Verhoeven J.

Mr. Justice Verhoeven concluded his judgement in this motor vehicle case with comments regarding the order of witnesses, document issues and agreed facts.

He was critical that the plaintiff's evidence was not called until later in the trial commenting that "this has been the subject of repeated adverse judicial comment". A judge should hear witnesses cross-examined on what the plaintiff had or had not said about her pre-accident condition without knowing what the plaintiff had to say on these matters. Further it is difficult for the judge to hear the expert evidence without having the proper context from the plaintiff. Further, the defence should be cross-examining the experts knowing what the actual evidence is from the plaintiff.

It is the "usual" and "best" practice to call the plaintiff first. To do otherwise, may have an effect on the weight to which his or her evidence is given.

Counsel should have, in every case, a comprehensive document agreement and have addressed the use or admissibility of documents, particularly clinical records. Any issues should be identified at the outset of trial and not later and counsel should have a plan for resolving the issues in a timely way though oral argument or *voir dire*.

The order of witnesses should be addressed at the trial management conference, it is too late to do so at the start of the trial.

In every personal injury action, the parties should strive to prepare an agreed statement of facts which includes an agreed chronology of facts. This will avoid confused and confusing testimony on non-contentious chronological matters.

b. *Smith v. Nabi,* 2018 BCSC 1492, Crabtree J.

This case stands for the proposition that *Rule 20-2* contains no provision to direct or compel the identification of a third party to be appointed as a litigation guardian where the defendant is an infant and the parents or guardians of the infant are unwilling to act as a litigation guardian.

Mr. Justice Crabtree commented that there may be relief under s. 7 of the *Public Guardian and Trustee Act*; however, the comments were obiter since the PGT did not have notice of the application.

G. Pleadings

a. *Strul v. Hunter*, 2018 BCSC 1559, Grauer J.

The plaintiff claimed damages for personal injuries suffered in three motor vehicle accidents. The plaintiff was permitted to amend her pleadings 18 days before the expiry of the time limit for the delivery of expert reports to add significant new injury allegations including concussion, tinnitus, cognitive impairment, thoracic outlet syndrome, chronic pain, psychological sequelae, including depression and anxiety, and visual and vestibular disturbance. The defendants sought an adjournment of the trial on the basis that there were entirely new injuries and because of the timing, the defendants would be prejudiced in their ability to respond adequately. Master

Vos dismissed the defendants' application on the basis that litigation has an evolutionary quality and that it is not uncommon for pleadings in a personal injury action to be amended before trial to particularize a plaintiff's alleged injury.

On appeal, the court held that the interests of justice required that the adjournment be granted. In particular, Grauer J. found that the amendments fundamentally altered the nature of the claim and the timing of the amendments significantly affected the defendants ability to obtain appropriate expert assistance and provide expert reports. He held that a real danger arose that there would not be a fair determination of the claim on the merits if the action were to proceed to trial at the scheduled time.

H. Waiver of Solicitor-Client Privilege

a. H.M.B. Holdings Limited v. Replay Resorts, 2018 BCCA 263, per Hunter J.A. (Bennett and Stromberg-Stein concurring)

This non-motor vehicle case is included as it is a reminder about the care which counsel ought to exercise when swearing affidavits in support of chambers applications.

In an application to strike a civil claim for abuse of process, a chambers judge made a declaration, *inter alia*, that the plaintiff had waived solicitor-client privilege over matters relating to the dispute between the parties by attaching a "statement" from counsel. The plaintiff appealed and the appeals (there were other orders under appeal) were allowed. The court of appeal found that the test the judge employed did not adequately protect solicitor-client privilege.

At paragraphs 53 to 55, Mr. Justice Hunter said:

> [53] The chambers judge relied on this Court's judgment in *Mayer v. Osborne Contracting Ltd.*, 2012 BCCA 77 (B.C.C.A.), and the concept of a lawyer "entering the fray" as a basis for implied waiver. These concepts were examined by Voith J. in *Concord Pacific Acquisitions Inc. v. Oei*, 2016 BCSC 2464 (B.C. S.C.). In *Concord*, all parties recognized that it was open to a lawyer to recount events the lawyer had witnessed without giving rise to implied waiver of solicitor-client privilege. The issue was "whether solicitor-client privilege is waived when a lawyer files an affidavit in which the lawyer goes beyond giving evidence about the events which he or she participated in or observed and, instead, acts as an advocate or is argumentative" (at para. 9).
>
> [54] Justice Voith reviewed *Mayer* and pointed out that in that judgment, Neilson J.A. had explained that "entering the fray" required providing evidence "that goes to a matter of substance in the client's litigation" and that what is a matter of substance "is defined by the material facts set out in the pleadings and by the law that governs a party's claim" (*Mayer* at paras. 179 — 80). He concluded at para. 23 that argumentative evidence from a lawyer that goes beyond recounting events observed by the lawyer does not constitute a waiver of the privilege.
>
> [55] I would add that while there are risks in relying on an affidavit from a lawyer who is aware of privileged communications, there are times when a lawyer is in the best position to recount events personally witnessed by the lawyer. If adducing relevant evidence from a lawyer based on the personal knowledge of the lawyer were sufficient to create a waiver of privileged

> communications, the privilege that is intended to be "as close to absolute as possible" would be considerably weakened.

Leave to appeal to the Supreme Court of Canada was denied (2019 CarswellBC 561).

XXI. Sexual Abuse

a. *B.E.S. v. MacDougall*, 2018 BCSC 2138, Duncan J.

The plaintiff alleged that while he was on probation as a youth in the late 1970s he was required to go on a tour of Oakalla Prison during which the corrections officer forced him into a cell with five inmates where he was subjected to a sexual assault. The plaintiff had not told anyone about the incident until decades later but maintained that the sexual assault had a significant negative impact on his life, affected his employment and his relationships, and caused him to abuse drugs. The plaintiff sought damages from the corrections officer and the Province of British Columbia.

In finding that the plaintiff was sexually assaulted as described, the court held that the plaintiff was credible and generally reliable. In particular, the court found that the plaintiff's evidence about the location of the sexual assault, the details about transgendered inmates, and the clothing of the inmates, were unusual details that supported the plaintiff's allegations.

The court found that while the province owed a duty of care to the plaintiff who was a visitor to Oakalla at the time of the tour, the evidence did not demonstrate that the province had the requisite foresight of the risks involved in the youth tour program. The claim of negligence as against the province was dismissed.

The court found that the plaintiff had not shown on balance of probabilities that it was the defendant Mr. MacDougall who was responsible for the harm done but found the province vicariously liable for the unidentified officer who was also an employee of the province who was responsible for the harm done.

Although the sexual assault was a single event, it was brutal and continued to have an impact on the plaintiff, so the court awarded non-pecuniary damages of $150,000. The plaintiff had worked full time as a shipper receiver and then as a truck driver. The court found that there was no evidence that the plaintiff could not continue to work full-time and earn income commensurate with an average male truck driver in British Columbia, so no award was made for income loss. The plaintiff was also awarded $25,000 for future cost of care.

XXII. Social Host Liabiilty

a. *Williams v. Richard*, 2018 ONCA 889, Hourigan J.A. (Miller and Trotter JJ.A. concurring)

This is a case out of Ontario that addresses social host liability. Mr. Williams had been drinking with Mr. Richard, his friend and colleague, at the home of Mr. Richard's mother which was a few doors down from Mr. William's own home. Mr. Williams consumed approximately 15 beers in three hours. A short time after leaving Mr. Richard's mother's home, Mr. Williams loaded his

children into his car to drive their babysitter home. On the way back, he was in a serious accident in which he was killed and his children were injured.

On a summary judgment motion, the judge dismissed the claim on the grounds that the requisite duty of care had not been established, or, alternatively, that such duty ended when Mr. Williams returned to his home.

In overturning the motion judge's decision, the court stated that the law on social host liability focuses on three issues: a social host's knowledge as to the relevant guest's level of intoxication, whether there were signs that the guest was intoxicated, and whether it was reasonably foreseeable that the guest would engage in certain acts and behaviours that subsequently led to an accident.

The court of appeal found that the motion judge's analysis on the issue of proximity did not consider all the relevant facts including that Mr. Richard and Mr. Williams had a pattern of getting together to drink, Mr. Richard knew that Mr. Williams was intoxicated and not in a condition to drive, and the two men had previously made a pact that if one was going to drive their children while intoxicated, the other would call the police. There was also incomplete and conflicting evidence on the issue of whether it was reasonably foreseeable that Mr. Williams would drive his children and babysitter under the influence of alcohol. The matter was remitted for a new trial.

XXIII. Tort Development

a. *Marrifield v. Canada (Attorney General),* 2019 ONCA 205, per curiam, Juriansz, Brown and Huscroft JJ.A.

This case is the first in Canada in which an appellate court was required to address whether a common law tort of harassment exists. The decision is particularly interesting because the court considered what is required in order for a new tort to be recognized.

The plaintiff, an RCMP officer, sought damages for mental distress suffered as a result of being bullied and harassed by his manager. The trial judge recognized a new freestanding tort of harassment and found that many of the managerial decisions constituted harassment. In addition, the RCMP was found liable for the intentional infliction of mental suffering in relation to one set of interactions.

The judgment was set aside by the Ontario Court of Appeal on the basis that the trial judge had erred in recognizing a tort of harassment, had erred in applying the test for the intentional infliction of mental suffering and had made palpable and overriding errors in much of the fact-finding.

The court's analysis of the nature of common law change begins with reference to the Supreme Court of Canada decision in *Watkins v. Olafson* [1989] 2 S.C.R. 750 and the principle that common law change is evolutionary in nature: it proceeds slowly and incrementally rather than quickly and dramatically and that significant change is best left to the legislature. The court of appeal quoted the following from pp. 760-761of *Watkins*:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to

> assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

The court also referenced *Jones v. Tsige*, 2012 ONCA 32 in which the tort of intrusion upon seclusion was first recognized:

> [25] Far from being created from whole cloth, the intrusion upon seclusion tort was grounded in what Sharpe J.A. identified as an emerging acceptance of claims for breach of privacy. He carefully reviewed Ontario and Canadian case law, in which he discerned both supportive dicta and a refusal to reject the existence of the tort, and provincial legislation that established a right to privacy while not foreclosing common law development. He also considered academic scholarship, much of which supported the existence of a right to privacy. He drew upon American tort law, which recognizes a right to privacy, as well as the law of the United Kingdom, Australia, and New Zealand. He also noted societal change — in particular, technological developments that pose a threat to personal privacy — and the impetus for reform that it created. "[M]ost importantly," he said, "we are presented in this case with facts that cry out for a remedy": at para. 69.

The trial judge had relied upon four trial-level decisions as supporting the recognition of the tort of harassment. This was an error as the cases confirm neither the existence of the tort nor its elements. The seminal case was a BC decision: *Mainland Sawmills Ltd. v. IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195. However, in that case, the court had done nothing more than assume for the purposes of addressing an application to dismiss the claim that the tort existed. *Mainland Sawmills Ltd*. specifically concluded that the law was unclear rather than confirming the existence of the tort. The subsequent Ontario trial decisions had also only gone as far as to assume rather than establish the existence of the tort.

In finding that there was no basis to recognize a new tort, the court of appeal wrote:

> [37] Given that authority does not support the existence of a tort of harassment, should this court nevertheless recognize such a new tort?
>
> [38] To pose the question in this way is to suggest that the recognition of new torts is, in essence, a matter of judicial discretion — that the court can create a new tort anytime it considers it appropriate to do so. But that is not how the common law works, nor is it the way the common law should work.
>
> [39] At the outset, it is important to recognize that this is not a case like *Tsige*, which, as we have said, is best understood as a culmination of a number of related legal developments. As we have explained, current Canadian legal authority does not support the recognition of a tort of harassment.

> [40] We were not provided with any foreign judicial authority that would support the recognition of a new tort. Nor were we provided with any academic authority or compelling policy rationale for recognizing a new tort and its requisite elements.
>
> [41] This is not a case whose facts cry out for the creation of a novel legal remedy, as in *Tsige*. That case concerned a highly significant intrusion into the plaintiff's personal information. The defendant, who was in a relationship with the plaintiff's former husband, used her workplace computer to gain access to the plaintiff's banking records and personal information over a period of several years — actions the court found to be deliberate, prolonged, and shocking. Discipline imposed on the defendant by her employer did not redress the wrong done to the plaintiff. In these circumstances, as Sharpe J.A. put it, "[T]he law of this province would be sadly deficient if we were required to send [the plaintiff] away without a legal remedy.

The court concluded that there was no justification for creating a new tort as the plaintiff had a legal remedy available in the form of the tort of intentional infliction of mental suffering.

XXIV. Unidentified Motorist

a. *Adam v. Insurance Corporation of British Columbia*, 2018 BCCA 482, per MacKenzie J.A. (Frankel and Harris JJ.A. concurring)

The plaintiff was struck by an unidentified vehicle on a long sandbar adjacent to the Fraser River and commenced an action under s. 24 of the *Insurance (Vehicle) Act* against the Insurance Corporation of British Columbia (ICBC). Section 24 creates a cause of action against ICBC for collisions involving unidentified vehicles if the damage arose out of the use or operation of a vehicle on a highway in British Columbia.

The court held that the trial judge erred in law in interpreting the sandbar to be a "highway" under the applicable statutory definitions. As a matter of statutory interpretation, a sandbar is not a "highway" for the purposes of the *Insurance (Vehicle) Act*.

b. *Ghuman v. Insurance Corporation of British Columbia*, 2019 BCSC 3, Donegan J.

This was a summary trial on a hit-and-run accident brought by the Insurance Corporation of British Columbia to have the plaintiff's claim dismissed. The issue to be determined was whether the plaintiff established that he made all reasonable efforts to ascertain the identity of the unknown owner and driver, as required by s. 24 of the *Insurance (Vehicle) Act*.

The accident occurred when the plaintiff's vehicle was in the left turning lane and he was stopped approximately three cars from the intersection for a red light. When the light turned green, the vehicle in front of him quickly reversed into his vehicle, drove around the vehicle in front of it, made the left turn and sped away. The plaintiff was stunned and got out of his vehicle. He looked around but did not observe any potential witnesses. The other vehicles who might have witnessed the collision had driven away. The plaintiff drove home but did not report the collision to the police and ICBC until the following day. Within a week of the collision, the plaintiff posted flyers around the area seeking witnesses. The plaintiff later retained counsel

who posted further flyers and arranged for an advertisement to run in the local newspaper. No witnesses came forward.

ICBC argued that the plaintiff did not act reasonably by waiting until the next day to call the police. Donegan J. considered the circumstances of the accident, including the minor impact of the accident; the lack of witnesses; lack of indentifying information about the hit-and-run vehicle; and lack of injuries. She found that it was reasonable for the plaintiff to assume that the RCMP would not conduct an investigation to find the unidentified vehicle and that calling earlier would not have made any difference.

Donegan J. considered the two applicable timeframes to assess whether the plaintiff discharged his onus to make all reasonable efforts to ascertain the unknown driver: the steps taken at the time of the collision and the steps taken in the days and weeks following. She determined that under the circumstances the plaintiff made "all reasonable efforts" in both timeframes within the meaning of s. 24(5) of the *Insurance (Vehicle) Act*.

c. *Greenway-Brown v. Mackenzie*, 2019 BCCA 137, per Fisher J.A. (Stromberg-Stein and Griffin JJ.A. concurring)

The plaintiff was bumped from behind while at a red light. The rear-ending driver pulled up beside the plaintiff and said something like "Don't worry, there is no damage" and then drove off when the light turned green. The plaintiff did not attempt to follow the vehicle nor record any information about the vehicle. The plaintiff or her daughter, who was a passenger in the vehicle, subsequently spoke to a police officer but otherwise took no steps to identify the other vehicle until the plaintiff spoke to a lawyer six weeks later. The claim against ICBC was dismissed at trial because the plaintiff had not taken all reasonable steps to identify the unidentified vehicle.

The plaintiff successfully appealed. In finding that the plaintiff took almost no steps to identify the unidentified vehicle, the trial judge failed to consider the subjective aspect of the reasonableness test and ignored relevant evidence. The trial judge had not considered what more the plaintiff could have done in circumstances, where her limited efforts to ascertain the unknown driver's identity were logical, sensible and fair. For example, there were no witnesses to the accident so posting a sign for witnesses would not have been of any assistance.

The trial judge also found that the plaintiff could not have suffered injuries in three other accidents (which occurred in parking lots), as the accidents were too minor to have caused injury. The court of appeal allowed a new trial on the basis that the trial judge's finding on credibility was based on an assumption, unsupported by evidence, that it was improbable for a person to sustain an injury in an accident with little damage to the vehicle. The requirement that a compensable injury must be serious and prolonged and rise above ordinary annoyances does not mean that the injury must be serious and prolonged. The injury claimed by the plaintiff was not too remote to allow for recovery in negligence in a motor vehicle accident.

d. *Rooplal v. Fodor*, 2018 ONSC 4985, Chiappetta J.

The issue in this case was whether the plaintiff's claim against the defendant insurance company for unidentified motorist coverage was statute barred in accordance with the *Limitations Act,* S.O. 2002, c. 24, Sch B. The plaintiff argued that the limitation period did not

begin until an indemnification demand was made and the responding insurer failed to satisfy that demand. The defendant disagreed and submitted the limitation period began when the insured knew or ought to have known about the unidentified driver's involvement.

Chiappetta J. concluded that the claimant for indemnity cannot be said to know there is a loss "caused" by an "omission" of an unidentified motorist insurer until she has asserted a claim against the insurer to trigger a legally enforceable obligation. The indemnity claimant suffers a loss "caused by" the unidentified coverage insurer's omission in failing to satisfy the indemnity claim the day after the indemnification demand is made. Therefore, the limitation period began on the first day of default after the demand for indemnification is made.

Section 5 of the Ontario *Limitations Act* regarding discoverability of a claim contains equivalent language to British Columbia's *Limitations Act* R.S.B.C. 2012, c. 13 section 8.

XXV. Vexatious Litigants

a. *Unrau v. National Dental Examining Board*, 2019 ABQB 283, Rooke, A.C.J.Q.B.

In this very lengthy and interesting case, the Alberta Court of Queen's Bench reviews the law relating to abusive and vexatious litigants and explores some of the mental health issues and ideological or political beliefs behind abusive litigation as well as setting out what abusive litigation is like for those caught up in it. The court recognizes that there are serious consequences to a defendant dragged into lengthy and costly litigation.

The case is specific to Alberta in that it addresses a procedure initiated under their Civil Practice Note No. 7, set up to end vexatious or abusive litigation before it has a chance to start through a "show case" procedure modeled after the *Ontario Rules of Court*. However, it has broad interest for those having to cope with vexatious litigation.

The court noted that the modern approach to abusive litigants needs to be proactive rather than reactive, including being initiated by the court itself.

In addressing the circumstances of this case, Rooke J. held that although pleadings are to be read generously to allow for drafting deficiencies, mere bald allegations that do not explain the basis of the claim and fail to provide sufficient detail to allow a party to substantially respond are not adequate to support an action and are vexatious and an abuse of the court's process.

XXVI. Workers Compensation Act, s. 8(1)

a. *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387, Groberman J.A. (Garson and Dickson JJ.A. concurring)

The plaintiff worked as a flight attendant for Air Canada. Most of her working hours were spent outside of British Columbia airspace. She was a resident of Manitoba, but her work was based out of Vancouver, British Columbia. She claimed psychological injury during a flight from Tokyo to Vancouver and submitted a claim under the *Workers Compensation Act*. The Workers' Compensation Board accepted the claim and awarded the plaintiff compensation for her lost income. On appeal, the WCAT, on its own initiative, raised the issue of whether the plaintiff was

covered under the British Columbia statute, as the incident occurred in international airspace. The WCAT concluded that she was not covered and overturned the compensation award based on the interpretation of s. 8(1) of the *Act*, which states:

> 8(1) Where the injury of a worker occurs while the worker is working elsewhere than in the province which would entitle the worker or the worker's dependants to compensation under this Part if it occurred in the Province, the Board must pay compensation under this Part if
>
> (a) a place of business of the employer is situate in the Province;
>
> (b) the residence and usual place of employment of the worker are in the Province;
>
> (c) the employment is such that the worker is required to work both in and out of the Province; and
>
> (d) the employment of the worker out of the Province has immediately followed the worker's employment by the same employer within the Province and has lasted less than 6 months,
>
> but not otherwise.

Both Air Canada and the plaintiff sought judicial review of this decision. The chambers judge held that the WCAT decision was patently unreasonable, and the court of appeal agreed.

In maintaining that the WCAT's decision was patently unreasonable, the court of appeal concluded that s. 8(1) of the *Act* is not a limitation on compensation, but an extension of the right to compensation by the Workers' Compensation Board for personal injury and mental disorder granted under ss. 5 and 5.1. However, the court of appeal overturned the chambers judge's conclusion that the WCAT's interpretation of the statute would lead to absurd results because of the different treatment of workers who lived inside and outside of the province. Instead, the court of appeal held that it is open to the WCAT to reach the same conclusion after engaging in an appropriate exercise of statutory interpretation. The matter was remitted to WCAT for reconsideration.