THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

PERSONAL INJURY CONFERENCE
PAPER 1.1

# 2021 Update on Case Law

These materials were prepared by Alison Murray, QC, Karen Jamieson, Helene Walford, Sarah Walker, Alecia Haynes, Joanne Wiebe and Mia Stewart, Articled Student all of Murray Jamieson for the Continuing Legal Education Society of British Columbia, June, 2021.

# 2021 UPDATE ON CASE LAW

# 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 2019. 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. *Constantinescu v. Van Ryk*, 2021 BCSC 18, Wilson J.

This is a recent case in which a trial judge declined to draw an adverse inference from the plaintiff's failure to tender opinion evidence from a rheumatologist, Dr. Teo, who was treating the plaintiff for an autoimmune disorder which had been recently diagnosed and was unrelated to the accident. It had caused the plaintiff to be on disability for the nine months prior to trial.

The court agreed with the defence's characterization that the plaintiff's autoimmune disorder was the "elephant in the room" as it related to her future prognosis.

In declining to draw an adverse inference, the court noted Dr. Teo's involvement in the plaintiff's care and treatment was known to the defendant since at least the summer of 2020, her full clinical records had been recently provided (although exactly when the records had been requested was not disclosed) and it was not known whether the defence had ever taken any steps to interview Dr. Teo pursuant to *Swirski*. The defendant argued that although both parties could issue a subpoena to the doctor, the defence would not be able to elicit opinion evidence and the factual evidence from Dr. Teo would be of limited assistance. The court found that Dr. Teo could have given factual testimony about the physiological components of the disorder, treatment and medications but the court was not in a position to know whether this evidence would have been helpful or would have left many unanswered questions. This case could be distinguished from the cases in which an adverse inference was drawn because the diagnosis was recent and not inextricably interwoven with the plaintiff's accident related complaints. It was

also important that the court was not in a position to know whether Dr. Teo could provide a long term prognosis or even a definitive diagnosis as her involvement with the plaintiff may still be at the investigative phase. Accordingly, it would be unfair to draw an adverse inference against the plaintiff for failing to tender an opinion that may not be available. It had been open to either party to undertake further investigations into the disorder but neither party chose to and although this left a gap in the evidence, the judge declined to draw an adverse inference.

### b. *Forster v. Kidd,* 2020 BCSC 220, MacDonald J.

The plaintiff suffered injuries in a motor vehicle accident and after the accident did not return to work as a registered nurse with Vancouver Coastal Health. The plaintiff testified she met with her union and a workability employee after the accident and they determined she was unable to return to any work within Vancouver Coastal Health. The defendants asked that an adverse inference be drawn because the plaintiff did not call her family doctor or workability employee. After reviewing the authorities, MacDonald J.did draw an adverse inference from the plaintiff's failure to call the workability employee as the plaintiff also did not provide any records from the workability department and therefore the defendants were unable to assess the evidence.

On the issue of the plaintiff's failure to call her family doctor, the plaintiff did provide her the physician's clinical records. MacDonald J. declined to draw an adverse inference, stating that it was equally open to the defendant to have called the physician.

### c. *Jantzi v. Moore,* 2020 BCSC 1489, Wilkinson J.

In a personal injury action, the defence requested an adverse inference be drawn for the plaintiff's failure to call any evidence from three family physicians who treated her before and after the accident, a clinical counsellor the plaintiff attended prior to the accident, and a psychologist who treated the plaintiff following the accident. The clinical records were fully disclosed, except for one family doctor who did not provide records. The clinical records were incorporated into a document agreement at trial. Plaintiff's counsel stated he was not alerted to any concern about the plaintiff's pre-existing injuries and causation being an issue. Plaintiff's counsel believed the issue at trial was the loss of future earnings claimed. The plaintiff submitted that the defendant's adverse inference argument was an attempt to conduct defence by ambush.

The plaintiff's memory was flawed about her pill-taking but otherwise her testimony was consistent with the records. Wilkinson J. considered the extensive disclosure of medical records, the reasonable explanation for not calling the witnesses and found that the treatment providers would be unlikely to provide harmful testimony to the plaintiff. As such, Wilkinson J. declined to draw an adverse inference.

### d. *Singh v. Reddy,* 2019 BCCA 79, per Newbury J.A. (Fenlon and Butler JJ.A. concurring)

This was an appeal from an order holding the defendant liable for intentionally pushing the plaintiff to the floor at a dinner-dance. The defendant maintained that the plaintiff had fallen accidentally. The defendant appealed solely on the basis that Warren J. erred in declining to draw an adverse inference by reason of the plaintiff's failure to call her friend, a likely witness to the incident. The plaintiff declined to call the witness, because the witness was no longer

cooperating with the plaintiff. The trial judge found that the witness was at least equally available to the defendant to call.

The court of appeal confirmed that, at least where the witness is not under the 'control' of the party against whom the inference is sought, the fact he or she was uncooperative may be an acceptable reason for not calling him or her as a witness. Importantly, the trial judge considered whether the witness was under the "exclusive control" or "availability" of a party and found the witness was equally available to the defendant to call. An adverse inference is not to be drawn where a witness is available to both parties. The appeal was dismissed.

## III. Affidavits

### a. *I.A.L. v. Y.C.*, 2019 BCSC 714, Tindale J., in Chambers

This case involved a personal injury claim brought by an infant seeking damages for injuries that allegedly occurred while the infant was in the care of a daycare provider. The plaintiffs alleged that the defendant Province of British Columbia was negligent on account of two child protection reports that had been made prior to the incident. The plaintiff brought an application seeking an order pursuant to *Rule 7-5* of the *Supreme Court Civil Rules* to examine on oath a number of witnesses. The defendant opposed the application and as a preliminary objection sought a ruling that three affidavits relied on by the plaintiffs were inadmissible and should be struck in their entirety. The defendant argued that the three affidavits contained inadmissible argument, opinions, and conclusory legal statements.

Tindale J. agreed that portions of the affidavits outlined the position of the parties, but found that the specific claims made and the nature of the plaintiff's injuries were not irrelevant as the plaintiff was required by *Rule 7-5* to set out the matter in question in the action. Some background information is required. The information was not found to be prejudicial to the defendant and so it was not struck from the affidavits. Tindal J. further agreed that the affidavits contained hearsay, double hearsay, and drew opinions and legal conclusions from documents made by third parties. He stated that these paragraphs, strictly speaking, were not admissible, but that the documents attached as exhibits were relevant. The offending paragraphs contained summaries of documents or parts of documents which also included opinions. Affidavits should contain evidence, not argument. Given the nature of the case, the fact that liability was highly contested and many of the documents were from social workers, police, or other professionals, it was accepted that some exhibits would contain hearsay. Most of the exhibits were relevant to the narrow issue of whether or not certain witnesses may have material information. The irrelevant and inadmissible evidence contained in the affidavits was interspersed amongst relevant information.

In consideration of the foregoing, Tindale J. chose to "exercise[e] [his] discretion to ignore the inadmissible evidence" (at para. 20) contained in the affidavits which included opinions, conclusions, and legal conclusions drawn from the materials reviewed by the affiant.

### b. *Wood-Tod v. The Superintendent of Motor Vehicles*, 2020 BCSC 155, Crerar J.

The petitioner brought an application for judicial review to set aside the decision of Superintendent of Motor Vehicles confirming the petitioners driving prohibition, a monetary penalty and vehicle impoundment issued pursuant to s. 215.41 of the *Motor Vehicle Act*. The petitioner's affidavit contained considerable amounts of boilerplate language that was identical to or near-identical to those of petitioners in two other judicial reviews of immediate roadside prohibitions.

Crerar J. commented at paras. 93 - 94:

> While a lawyer may assist in drafting the affidavit and may select the relevant evidence to include, affidavits should carefully set out the personal evidence of the affiant in the words of the affiant. They should not use boilerplate language: *R. v. Araujo*, 2000 SCC 65 at para. 47; *Lee v. Transamerica Life Canada*, 2017 BCSC 843 at para. 105; *Wilson v. Naut'sa Mawt Tribal Council*, 2014 BCSC 1432 at para. 26; *Nguyen v. Dang*, 2017 BCSC 1409 at paras. 17-18.
>
> At worst, as set out in *Araujo,* boilerplate language may mislead the court. At a minimum, boilerplate language undermines the credibility of the affiant. An affidavit containing language identical to that of another witness may be given less weight: *Petrov v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 486 at para. 33. The court or tribunal will inevitably ask itself whether the copied-and-pasted language truly reflects the true experienced evidence of the witness. Or is the client nodding his or her head to a stock checklist of suggested favourable facts in a template affidavit provided by the lawyer? In such circumstances, has the affiant directed his or her mind to the solemnity of the oath with respect to each fact in the affidavit?

## IV. Assault

### a. *Lapshinoshoff v. Wray*, 2020 BCCA 31, per Groberman J.A. (Hunter and Griffin JJ.A. concurring)

The trial judge dismissed a personal injury claim against a police offer and municipality for using excessive force in making an arrest on the grounds that timely notice was not given under the *Local Government Act*. The trial judge also dismissed the claim against the police officer under s. 21 of the *Police Act*, which insulates police officers from personal liability unless the conduct was the result of "dishonesty, gross negligence or malicious or wilful misconduct". The trial judge found that the tort of assault was made out, but that the case against the officer was dismissed as gross negligence had not been proven and the plaintiff had failed to plead or argue wilful misconduct.

The court of appeal agreed with the trial judge that, despite the use of excessive force, the officer was nonetheless acting in the performance of his duties and was immune from personal liability unless gross negligence or wilful misconduct is made out. However, the court allowed the appeal and ordered a new trial on grounds that the issue of wilful misconduct was not addressed by the trial judge. The court held that this was a live issue despite it not being pleaded or argued. The plaintiff's amended notice of civil claim included a reference to wilful misconduct in the facts, but

not in the legal basis. The court of appeal held this was sufficient to put the parties on notice and should have been considered by the trial judge.

### b. *Thompson v. Fraser*, 2021 BCSC 541, Baird J.

The plaintiff was a security guard at a hotel and 21 years old at the time of the incident. The defendant was 50 years old, and drunk and disorderly at the hotel bar. The plaintiff was asked to escort him out and the defendant sucker-punched him the face causing serious injury including injury to the bony structure around his left eye requiring surgery and facial hardware which continued to cause him pain and discomfort. The plaintiff was criminally charged and pleaded guilty to assault. The court was satisfied that, but for the assault, the plaintiff would have likely joined the RCMP. The ultimate award was for $226,000 comprising of $50,000 in non-pecuniary damages, $10,000 in aggravated damages and $166,000 in loss of income earning capacity.

## A. Abuse of Process

### a. *Siegerist v. Tilton,* 2020 BCSC 549, Walker J.

This case involves a no-evidence motion brought by the defendant at the close of the plaintiff's case. The defendant had instructed two adult males and his son to carry out an attack on the plaintiff when he was 14 years old. The defendant was convicted of two counts of assault causing bodily harm for his role as a directing mind. The plaintiff brought an action in battery seeking damages for injuries suffered in the attack. The defendant argued that he could not be liable in battery since the tort requires direct physical contact. The defendant also argued that the pleadings did not allege that he was a joint tortfeasor or co-conspirator or otherwise liable for the tort of assault. The defendant's no-evidence motion was dismissed.

The doctrine of abuse of process barred the defendant from re-litigating his role in and culpability for the battery as it would have amounted to a collateral attack on the decisions of the provincial court and the court of appeal. The exceptions to the application of the doctrine of abuse of process – that the prior proceeding was tainted by fraud or dishonesty, that fresh evidence previously unavailable conclusively impeaches the original result, or that fairness dictates the original results should not be binding – were not shown to be engaged in this case.

There was no merit to the defendant's submission that he could not be found liable because he did not strike the plaintiff. The criminal trial judge convicted the defendant of two counts of assault causing bodily harm for his role as the directing mind. The defendant drove the assailants to carry out the attack, he encouraged them to carry out the attack with a metal baton, and he instructed them to stop the attack in order to allow his son to participate. He was not only the directing mind, but he acted throughout in a concerted action to a common end. In light of the clear articulation of the nature of the tort of battery found in the case law, and the absence of a demand for particulars, it was not necessary for the plaintiff to specifically plead additional facts in the notice of civil claim concerning the defendant's role in the battery.

## b. *Thatcher v. Lowe*, 2021 BCSC 590, Marchand J., in Chambers.

The plaintiff pursued a tort claim for damages as a result of an assault he suffered at the hands of two members of the Hells Angels. The two defendants were charged criminally and ultimately pled guilty. At their guilty plea, the crown read in the circumstances surrounding the assault which included the actions of a group of eight men in threatening the plaintiff and punching him. The two defendants admitted the essential elements of the three counts against them.

In this civil action, the two defendants denied any involvement in the assault. The plaintiff brought on a summary judgment application on the issue of liability arguing that their denials in the civil action amounted to an abuse of process by virtue of the criminal convictions. The defendants conceded that their convictions were admissible under s. 71 of the *Evidence Act*. They argued, however, that to allow them to defend the action would not constitute "re-litigation" since there was no trial in the criminal proceedings and the allegations in the notice of civil claim were inconsistent with the circumstances put to the sentencing judge. In finding that there was an abuse of process the court said:

> *[61] Mr. Lowe and Mr. Mansfield were charged with serious offences. If convicted, they were facing jail time and a substantial restitution order. They carefully and deliberately entered guilty pleas understanding that, in addition to their sentences, they may also be held civilly liable. They explicitly admitted the circumstances alleged by the Crown.*
>
> *[62] The criminal proceedings were not tainted by fraud or dishonesty, there is no fresh evidence and the stakes were not so minor as to provide an inadequate incentive for Mr. Lowe and Mr. Mansfield to defend themselves.*
>
> *[63] The position now being taken by Mr. Lowe and Mr. Mansfield is the very thing the doctrine of abuse of process is designed to address. It would wholly undermine the administration of justice to permit Mr. Lowe and Mr. Mansfield to derive the substantial benefits of their guilty pleas and then permit them to resile from their unequivocal admissions in these proceedings.*

Accordingly, the court found that there was no genuine issue for trial with respect to liability for assault, battery and false imprisonment. The issues of intentional infliction of mental suffering and the assessment of damages were referred to the trial list.

# V. Civil Resolution Tribunal

## a. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 348 Hinkson C.J.S.C.

This case considered the constitutionality of the grant of jurisdiction over certain motor vehicle accident claims to the Civil Resolution Tribunal ("CRT"). In particular, the CRT was given jurisdiction over the determination of (a) entitlement to no-fault accident benefits paid or payable under the *Insurance (Vehicle) Act*, (b) whether an injury is a "minor injury" under the *Insurance (Vehicle) Act*, (c) liability and damages for personal injury of $50,000 or less.

The court declared that ss. 133(1)(b) and (c) of the *Civil Resolution Tribunal Act* granting the CRT jurisdiction over whether an injury is a minor injury and liability and damages for personal injury of $50,000 or less were unconstitutional and of no force and effect. Section 16.1 which stated

that the court must dismiss a proceeding if the court determined that all matters were within the jurisdiction of the CRT was also declared unconstitutional and should be read down insofar as it applies to accident claims, except for determination of accident benefits under s. 133(1)(a). The CRT maintains it jurisdiction over entitlement to accident benefits and no order was granted with respect to the *Accident Regulations.*

The case is currently under appeal.

This case is canvassed in detail in the presentation by Ryan Dalziel, QC, counsel for the plaintiff in this Personal Injury Conference 2021.

## VI. Costs

### a. *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.,* 2020 BCCA 69, per Goepel J.A. (Newbury and Willcock JJ.A. concurring)

This appeal deals with several important points of practice concerning costs orders:

- A trial judge may not change or vary an earlier costs order made in a proceeding; such orders can only be varied on appeal;
- A trial judge's costs order is limited to the costs of the action apart from such costs as may already have been awarded during the course of the ligation;
- If a prior order is silent as to costs, the entitlement of costs is determined by *Rule 14-1(12);*
- If the prior order sets the scale of costs for the application or summarily assesses those costs, those order are similarly binding and are not impacted by any costs order that the trial judge may make;
- If the earlier costs order is silent as to the scale of costs, s. 2(4) of Appendix B applies: if no scale is fixed, the costs must be assessed under Scale B, unless a party, on application, obtains an order of the court that the costs be assessed under another scale;
- An application under s. 2(4) of Appendix B does not need to be heard by the presider who made the original cost order and may be heard by the trial judge;
- When a trial judge orders the cost of the proceedings at a specific scale, the trial judge's order as to scale attaches to it all orders made in the proceedings, other than those in which the scale had already been set;
- If a party is of the view that costs of a particular application should be at a different scale, they can apply to the trial judge for such an order;
- If a case is discontinued or settled on terms that include the payment of costs, the application to determine the scale of costs can be brought before any judge or master;
- A party seeking an order under s. 2(4) of Appendix B must bring the application prior to the assessment of costs. The registrar has no authority to determine the scale of costs

of a court application. In the absence of an application, the scale established by the trial judge governs or, if no scale has been determined, the costs are assessed at Scale B;

- The trial judge's cost order cannot vary an earlier order that expressly addressed the scale of costs;
- A registrar has the power to assess costs regardless of whether the order is silent as to costs or has not been entered;
- A registrar has a discretion whether to assess the costs of an unentered order and can refuse to assess the costs when there is no entered order;
- When a trial judge orders special costs of a proceeding, the award of special costs includes the cost of any subsequent proceedings to assess costs unless the court orders otherwise;
- A registrar's jurisdiction is limited to assessing costs on the basis ordered by the trial judge;
- A registrar is not permitted to reconsider or disregard the terms of a costs order; and
- Conduct in a trial should not be considered in determining the costs of an appeal.

## b. *Assadimofrad v. Cowan*, 2020 1961, Baker W.A. J.

Following an eight-day jury trial, Baker J. declined to award costs for two counsel. Liability and quantum were in issue, the plaintiff called three experts and six lay witnesses while the defendant called two experts and four lay witnesses. Baker J. held that the number of experts and lay witnesses was not particularly unusual for a motor vehicle case. The case did not stand out as unduly complex.

## c. *Gorst v. British Columbia (Public Safety and Solicitor General)*, 2020 BCSC 1238, Hori J.

The plaintiff succeeded in establishing that the accident in issue was caused by the negligence of an unidentified motorist. However, the action was dismissed on the basis that the plaintiff did not make all reasonable efforts to identify the motorist. The court held that divided success on these issues was not a sufficient reason to depart from the usual rule to award the successful defendant its costs.

## d. *Healy v. Chung,* 2020 BCSC 783, Armstrong J.

The case contains a helpful summary of the law where a second trial is ordered on appeal. The usual rule governing costs of multiple trials favours an award to the successful party in the second trial. The court retains discretion to depart from the usual rule in special or unusual circumstances, such as a plaintiff's excessive damages claim, or misconduct. Despite the fact that the plaintiff claimed damages well in excess of the ultimate award at the second trial, that did not justify depriving the plaintiff of costs for the first trial in this case. An interesting twist in this case was that at the costs hearing following the second trial, the defendant unsuccessfully sought costs of the first trial because her formal offer exceeded the first trial award.

### e. *Tanious v. The Empire Life Insurance Company,* 2019 BCCA 329, per Dickson J.A. (Bauman CJBC and Hunter J.A. concurring)

This case was originally reviewed in our 2017 paper. It is of import because the trial judge awarded the plaintiff special costs when successful in her claim for long term disability benefits on the grounds that the interests of justice required full, rather than partial, indemnification of her legal costs. The insurer appealed from the costs award arguing that in the absence of bad faith or reprehensible conduct, the award departs from the established principles that govern costs and holds that a disability insurance contract confers a contractual right to full indemnity costs.

The appeal was dismissed. It was apparent that the trial judge exercised his discretion to award special costs on his assessment of interests of justice and not based on contractual obligations. In this unique litigation, the judge did not err by concluding that it was just for the unsuccessful institutional defendant to indemnify an impoverished and disabled claimant in full for reasonable costs of pursuing claim for subsistence-level disability benefits. The law of costs had evolved to the point that a judge might consider a litigant's challenging personal and financial circumstances, including availability and nature of counsel's services in a disability insurance claim.

Leave to appeal to the Supreme Court of Canada was dismissed, 2020 CarswellBC 422.

### f. *Whaley v. Bryant,* 2020 BCSC 797, Donegan J.

The plaintiff sought costs of two counsel following a ten-day jury trial. Donegan J. agreed with the decisions in *Thom v. Canada Safeway Ltd., 2015 BCSC 2026* and *Pinch (Guardian ad litem of) v. Morwood, 2016 BCSC 1907* that to the extent that complexity of a case supports the involvement of two counsel, that complexity may be recognized in an award of costs under Scale C. The only other provision in the *Rules* under which an additional costs award for two counsel might be granted is the increased costs provision of s. 2(5) of Appendix B. Donegan J. held that "even if authority for such an award could be found to exist", she did not consider the case at bar to be overly complex.

## A. Civil Resolution Tribunal

### a. *Bergeron v. Anderson,* 2020 BCCRT 1076, A. Ritchie Vice Chair

The tribunal may apportion recovery of fees and expenses according to a claimant's degree of success.

### b. *Cruz v. ICBC, Cruz v. Bains*, 2020 BCCRT 1394 and 1396, K. Gardner Tribunal Member

Where a claimant pays one CRT fee for both a tort and a Part 7 benefits claim, the tribunal may split the fee equally between the two disputes so that recovery of the proportionate fee is dependent upon whether the claimant is substantially successful in each dispute.

## B. Disbursements

### a. *Thomanek v. McCusker*, 2019 BCSC 618 Master McDiarmid

The plaintiff claimed over $7,000 for visual aids consisting of posters: prepared from CT scans and x-rays; depicting the bodily locations of the imaging; and showing the plaintiff's medications. The medication poster was disallowed as extravagant as it was no different than having a paralegal add up the medications and prepare a table. Half of the invoice for the imaging poster was allowed as a proper tool to be used in conjunction with the medical expert's report to demonstrate the extent of the fractures with more clarity.

## C. Increased Costs

### a. *Godbout v. Notter,* 2019 BCSC 1481, Jenkins J.

The plaintiff was awarded increased costs for two counsel following a 10-day trial. Liability and quantum were in issue. Jenkins J. agreed that it was necessary for the plaintiff to have two counsel due to the number of witnesses, the nature of the considerable expert testimony and reports, the length of the trial and the contribution of second counsel to the efficient conduct of the trial. The plaintiff's injuries were not "run-of-the-mill". These reasons amounted to "unusual circumstances" and the court held that it would be "grossly inadequate and unjust" to not award additional costs where both counsel were necessary and useful to the court.

### b. *Johnson v. Heer*, 2020 BCSC 1168, Majawa J.

Increased costs were awarded in this case where the defendant conceded that he should have accepted the plaintiff's formal offer before trial. This concession formed the foundation for unusual circumstances justifying the costs uplift. The court also compared the defendant's submissions on damages at trial to the formal offers of both parties, noting that the defendant argued that the plaintiff was entitled to damages that exceeded his own formal and the formal offer of the plaintiff. By making the concession that he ought to have accepted the plaintiff's formal offer prior to trial and arguing for damages in excess of his own formal and that of the plaintiff, the court held that the defendant forced the plaintiff to trial to obtain what the defendant himself obviously considered to be a fair result. The trial judge also specifically mentioned that the trial proceeded a few weeks after the court resumed limited operations following its closure due to COVID-19. By forcing the matter to trial in these circumstances, the defendant unnecessarily exposed the plaintiff and her witnesses to an increased risk of exposure to the virus. All of these factors warranted increased costs to the plaintiff.

### c. *Sidhu v. Alton*, 2021 BCSC 265, Forth J.

The plaintiff unsuccessfully argued for increased costs in this case where the plaintiff argued, *inter alia,* that the defendants: made too low of a formal offer and "played chicken" with a vulnerable plaintiff; forced the plaintiff to proceed to trial during COVID-19; and made trial submissions on damages that exceeded the defence formal offer. The court held that the evidence going into trial supported the defence view of the case and that the defendants acted reasonably in proceeding to trial on that evidence. The defendants had legitimate reasons for

not accepting the plaintiff's offer. Forth J. did not find that the offers and quantum argued by the defendants were akin to the 'unusual circumstances' found in *Johnson v. Heer*, 2020 BCSC 1168, referencing the fact that the defence quantum at trial did not exceed the plaintiff's formal offer (as was the case in *Johnson*).

## D. Special Costs

### a. *DLC Holdings Corp. v. Payne,* 2021 BCCA 31, per Grauer J.A. (Groberman and Harris JJ.A. concurring)

Where a plaintiff discontinues an action under *Rule 9-8,* the plaintiff pays the ordinary costs of the defendant pursuant to *Rule 9-8(4)* and *Rule 14-1*. By filing the Notice of Discontinuance, the proceeding is forever brought to an end. Neither *Rule 9-8(8)* nor the combination of *Rules 9-8(4)* and *14-1(1)(b)* provides the court with jurisdiction to depart from the default provisions for costs where an action is wholly discontinued as of right, so that leave of the court is not required. In this case, the chambers judge erred in awarding special costs where the plaintiff filed a Notice of Discontinuance as of right under *Rule 9-8(1)* because there was no jurisdiction to do so. It is only where the action is not wholly discontinued or where leave is required, the court retains jurisdiction to make other costs orders.

### b. *Sull v. Pengelly,* 2019 BCSC 1565, Voith J.

Special costs were not awarded against a self-represented litigant even where she was found to have been less than forthright as a witness and her failure to disclose material documents was found to be "egregious".

### c. *Williams v. Sekhon,* 2019 BCSC 1511, Voith J.

The plaintiff sought special costs on the basis that investigators retained by the defendant's insurer "grossly exceeded" the legitimate interests of an insured defendant to conduct an investigation into the validity of a personal injury claim and the consequential harm to the plaintiff's mental health. The court declined to award special costs in these circumstances, finding that there were various aspects of the investigation work that was appropriate. None of the investigation that was undertaken was done with the object of causing the plaintiff upset or distress. To the extent that it had that effect, that consequence was inadvertent. In the result, the court offered some guidelines for the conduct of investigations and cautioned that investigators who act in a manner that warrants the courts rebuke would be subject to an award of special costs.

### d. *Zhang v. 328633 B.C. Ltd*., 2021 BCSC 650, Branch J.

The plaintiff was a passenger on a bus which braked forcefully to avoid a rogue pickup truck that was never identified. The plaintiff was flung 15 feet from her seat and sustained fractures to her neck and ribs, and a head injury. Liability was in issue at trial. In addition, ICBC alleged until the close of evidence that the plaintiff failed in her duty under s. 24 to make reasonable efforts to ascertain the identity of the pickup truck owner and driver. The accident was captured by an array of video cameras within the bus. The video had embedded event data, including the speed

of the bus. The defendant bus driver used the video to argue that his reaction time was within the standard of care required. However, the defence did not disclose the video until a few months before trial (and seven years after the accident). The defence offered no explanation for the delay at the costs hearing. The video was "clear and overwhelming" evidence as to what actually occurred in the accident and was so integral to the case on liability that the production delay amounted to reprehensible conduct attracting special costs. The video was also integral as to whether the requirements of s. 24 were met at it showed the pickup truck failing to stop at the scene. ICBC's delay in withdrawing the s. 24 defence until the close of evidence caused unnecessary time and expense in dealing with the matter. Limited special costs were awarded, but the court declined to assess the special costs summarily, deferring the assessment to the registrar.

## VII. Damages

### a. *Radacina v. Aquino*, 2020 BCSC 1143, Skolrood J.

The plaintiff was involved in two motor vehicle accidents and was claiming numerous injuries including chronic pain. The plaintiff had a pre-accident history of pelvic pain that required multiple surgeries, chronic pain from previous motor vehicle accidents, and periods of anxiety and depression. The court reduced her damages by 40% to take into account the risk that the plaintiff's pre-accident conditions would have deteriorated in the event even absent the accident. In coming to its conclusion, the court placed significant weight on the opinion evidence of Dr. Squire who treated the plaintiff post-accident. Dr. Squire opined that the plaintiff's physical injuries had largely recovered, but that her ongoing psychological state – some of which pre-dated the accident – caused her to continue to feel pain.

## A. Accelerated Depreciation

### a. *Dual Mechanical Ltd. v. Vincencio*, 2020 BCCRT 1460, L. Scrivener, Tribunal Member

This decision is of interest because it appears to be the first determination that accelerated depreciation claims are not limited to vehicle owner/operators but to others with an interest in the vehicle. The subject vehicle was leased by Dual Mechanic from Gold Key Sales and both sought damages. ICBC opposed the claim on the basis that the claim was not established by the evidence and that Dual Mechanic does not have any claim for damages in any event. Under the terms of the lease, the title remained with Gold Key, which retained the right to sell the vehicle at the end of the lease and Gold Key would bear any loss associated with a decreased sale price at the end of the lease. Gold Key was found to be entitled to $2,253.90 in damages for accelerated depreciation.

## B. Aggravated and Punitive Damages

### a. *Batanova v. London Life Insurance Company*, 2019 BCSC 1147, Fitzpatrick J.

The plaintiff advanced a claim for a death benefit under a policy of life insurance purchased by her brother, which was denied because the brother had made material misrepresentations in his application for the policy. The claim was dismissed on that basis, but the decision is of interest because the court addressed the claim for mental distress. A claim for mental distress suffered by a beneficiary arising from the denial of payment under a life insurance policy has yet to be recognized in Canada. The principles that support awards for mental distress do not apply because this is not a disability benefits contract (i.e., a "peace of mind" contract) nor is the plaintiff a party to the insurance contract and thus it could not be within the reasonable contemplation of the actual parties to the contract that the denial of the claim could result in damages. Regardless, the plaintiff failed to demonstrate that she had suffered any damages causally linked to the denial of the claim.

### b. *Gascoigne v. Desjardins Financial Security Life Assurance Company*, 2020 BCCA 316, per Willcock J.A. (Saunders and Butler JJ.A. concurring)

This appeal arises out of a claim for long term disability benefits under a group policy of insurance. At trial, the plaintiff was found to be disabled and entitled to disability benefits to the date of trial and awarded aggravated damages in the amount of $30,000. The plaintiff appealed the dismissal of her claims for punitive damages and a lump sum payment of her future disability benefits.

The court of appeal upheld the trial judge's dismissal of the plaintiff's claim for punitive damages finding that the defendant's conduct was a breach of the duty of utmost good faith owed to an insured was not sufficiently high-handed, malicious, arbitrary or highly reprehensible so as to warrant the court's denunciation by way of such an award. The trial judge had not erred in adopting the view that not every breach of good faith will give rise to an award of punitive damages. The trial judge had properly considered whether the respondent's conduct was sufficiently egregious to warrant such an award.

The court also upheld the trial judge's finding that the court was bound by case law to dismiss the plaintiff's claim for a lump sum award of future disability benefits based on an argument that there had been a fundamental breach of the policy. A non-contracting beneficiary of a group policy is entitled to enforce benefits but not entitled to terminate the group policy or to accept an insurer's repudiation.

### c. *Greig v. Desjardins Financial Security Life Assurance Company*, 2019 BCSC 1758, Young J.

This case is of interest because it is the high water mark for an award for mental distress ($50,000) in a disability claim in British Columbia. In addition, the plaintiff was awarded $200,000 for punitive damages.

Benefits had been reinstated about three years prior to trial so the trial addressed only the extra-contractual claims. There was also an issue as to whether the court had jurisdiction over the

dispute between the parties because the plaintiff was a unionized employee subject to the terms of a collective agreement and the defendant was a policy administrator for a benefits trust program funded by the government. The jurisdictional issue was resolved in favour of the plaintiff.

The plaintiff was denied disability benefits for a 17-month period (from April 2015 to September 2016) resulting in financial disaster. The plaintiff and his wife had to assign themselves into bankruptcy, their farm was sold in foreclosure and they had no funds and nowhere to go. The plaintiff's pre-existing depression and anxiety was exacerbated by the denial of benefits. They lived in a minivan following the termination of his benefits and lied to family members because the plaintiff was humiliated by his predicament. The court noted that damages for mental distress in disability cases had been modest in British Columbia with awards ranging from $10,000 to $35,000 and referenced a $75,000 award in Ontario in *Clarfield v. Crown Life Insurance Co*., (2000), 50 O.R. (3d) 696. In making the award of $50,000 the court took into consideration that the plaintiff was already vulnerable because of his injuries.

The court found that the defendant had acted in bad faith by: requiring the plaintiff to show objective proof of disability and deciding that the plaintiff had to attend his doctor every month or two which was not a standard of proof required under the policy; requiring him to seek optimal treatment but refusing to fund such treatment knowing he could not afford it; inappropriately emphasizing a comment from the union that motivation may be a factor for the plaintiff's return to work; placing too little emphasis on his psychological symptoms; failing to have the file reviewed by a psychiatrist; failing to review the family doctor's records; and, focusing on the litigation process and ignoring the plaintiff's file and new medical evidence being submitted by plaintiff's counsel.

The court reviewed the recent awards in punitive damages across Canada and referenced Saunders J.'s comments in *Godwin v. Desjardins Financial Security Investments Inc*., 2018 BCSC 690 (reviewed in our 2018 paper) outlining that he would have awarded higher punitive damages to indemnify a litigant for the costs of having to pursue litigation had he known that he was precluded from awarding special costs pursuant to *Smithies Holdings Inc v. RCV Holdings Ltd*., 2017 BCCA 177. The court awarded Mr. Greig $200,000 because: the conduct of the defendant was worse than in *Godwin*; this was not the first time that this defendant had been found to have acted in bad faith for "remarkably similar conduct"; and, the plaintiff had to incur costs in pursuing the claim for punitive damages.

This matter is under appeal.

## d. *Stewart v. Lloyd's Underwriters*, 2019 BCSC 1582, Norell J.

This case is of interest because it involved a travel insurance policy. The plaintiff sought recovery of medical expenses incurred while he was on a vacation in the United States from his travel insurer. He experienced a brief loss of consciousness while in a bar and fell to the floor suffering an injury to his spine. He had to have a pacemaker inserted and surgery to his spine. Initially the claims were denied based on their position that the injuries were due to alcohol intoxication. Prior to trial, the insurer advised that they were no longer denying coverage. The insurer settled the outstanding medical claims totalling $274,052.97 US directly with the health care providers

for the sum of $56,429.81 US and without advising them that they made a decision to accept the claim.

The plaintiff proceeded to trial and recovered $100,000 in punitive damages and $10,000 for mental distress. There had been an overwhelmingly inadequate investigation into the circumstances of the plaintiff's injuries; it was as incumbent that they investigate non-alcohol related causes as it was open to them to investigate alcohol-related causes. It was also a breach of the duty of good faith not to tell the health care providers that they had reversed their decision on coverage. The failure to make this disclosure was motivated by the defendant's financial interests. The court ordered that if the health care providers attempted to pursue the plaintiff, the defendant had to indemnify him. The plaintiff had endured the worry of financial ruin as he was recovering from his injuries and that worry had hung over his head for four years.

The plaintiff had sought his legal fees as a head of damages for breach of the policy and breach of the duty of good faith. That claim was dismissed. There was no term in the policy that indicated legal fees would be payable to ta successful party in a coverage disputes and there is no basis upon which to imply such a term.

The plaintiff subsequently sought special costs which were denied. The fact that the plaintiff was not made whole by party and party costs was not an injustice and the plaintiff had failed to establish reprehensible conduct in the course of the litigation: 2020 BCSC 669.

## C. Causation

### a. *Andreas v. Vu*, 2020 BCSC 1144, Skolrood J.

In assessing damages in a personal injury action, the court compensated the plaintiff for further mental injury caused by the examination for discovery. The plaintiff testified that she found the litigation process stressful and had a panic attack shortly after the discovery and had to take time off work. A psychiatrist gave expert evidence on behalf of the plaintiff that the discovery resulted in PTSD-type symptoms. The plaintiff had a history of depression and anxiety that pre-dated the accident and the evidence supported an aggravation of her pre-existing condition as a result of the accident. The defendants argued that the plaintiff's reaction to the examination for discovery did not meet the test of foreseeability as articulated in *Mustapha*. The court rejected that argument as conflating the principles of remoteness with the principles of causation and damages. The court held that the plaintiff was already emotionally and psychologically vulnerable at the discovery because the accident had aggravated her pre-existing anxiety, and that the accident was more likely than not a necessary cause of her reaction.

### b. *Chagnon v. Clover Trading Co. Ltd.*, 2019 BCSC 2397, Francis J.

The plaintiff claimed soft tissue injuries to her neck and back resulting from a rear-end accident. She had previously had a disc bulge and was on the road to recovery at the time of the accident. The defendant argued that the plaintiff had not proven causation since no expert evidence was tendered. The court rejected the defendant's argument and awarded $30,000 in non-pecuniary

damages despite that fact that no expert evidence was tendered noting that credibility was not an issue at trial.

## D. Cost of Future Care

### a. *Quigley v. Cymbalisty,* 2021 BCCA, 33 per Butler J.A. (Fenlon and Hunter JJ.A. concurring)

At trial, the appellant sought $200,000 for cost of future care and was awarded $64,558. The appellant argued that the trial judge erred in finding that massage therapy should be paid from non-pecuniary damages. Butler J.A. found that the judge did not find that medically necessary massage therapy should be funded from non-pecuniary damages but based his pecuniary award on what was medically necessary and stated that any further massage therapy would have to be funded from other sources. Butler J.A. held that the judge did not err in his discussion of non-pecuniary damages or in his assessment of a reasonable award for massage therapy.

The trial judge awarded future costs for medications based on a two-year period, given the plaintiff's pattern of usage and his expectation that the plaintiff would experience some improvement. The appellant argued that there was no basis for the selection of a two-year period but Butler J.A. found that the judge's inference that the appellant would experience some improvement and the award for medications was reasonably supported by the evidence.

## E. Housekeeping Capacity

### a. *Quigley v. Cymbalisty,* 2021 BCCA 33, per Butler J.A. (Fenlon and Hunter JJ.A. concurring)

The trial judge had concluded that the claim for housekeeping services was not shown to be medically required or justified, and that he was "quite sure" that the appellant would not make use of such services but made a slight upward adjustment to the non-pecuniary damages award for impairment of her housekeeping capacity. The appellant argued that the evidence demonstrated a significant impairment to her functioning at home supporting an award for loss of housekeeping capacity. At trial, the appellant testified that she was able to perform the necessary household work but with some increase to her symptoms, but that she chose to do that work herself rather than have others perform it. In addition, there was no medical or other expert evidence recommending housekeeping assistance. Butler J.A. found that there was no error in the judge's appreciation of the evidence.

### b. *Roemer v. Shafi,* 2020 BCSC 1, Verhoeven J.

The plaintiff claimed damages for personal injuries suffered in a motor vehicle accident, including $25,000 for loss of housekeeping capacity. She resided alone in a basement suite and had no responsibility for yard work. The plaintiff's expert occupational therapist's testing indicated that the plaintiff was slightly restricted for some household chores such as washing dishes, shopping and vacuuming, moderately restricted for heavier work such as cleaning bathrooms, and severely restricted for washing floors.

Verhoeven J. held that the plaintiff's restrictions and difficulties were considered within the assessment of non-pecuniary damages, so no separate pecuniary award for loss of homemaking capacity was warranted.

## F. Income Loss

### a. *Doberstein v. Zhao*, 2020 BCSC 1788, MacKenzie J.

The plaintiff was 50 years old at trial and was claiming for multiple physical and psychological injuries as a result of two motor vehicle accidents resulting in chronic pain. In the ten years before the accidents, the plaintiff ran a massage therapy and reflexology clinic out of her home. The plaintiff was claiming she was rendered completely unemployable by the accidents. The plaintiff testified that she only reported 80% of her earnings on her tax returns and misrepresented her income to the provincial government to get funding to care for her disabled son. Referring to earlier case law, the court held that improperly declaring income is not, in itself, the determining factor when determining loss of capacity.

Apart from her income tax returns, the plaintiff relied on client calendars that she maintained for some, but not all, of the years that she ran her clinic. The plaintiff had to estimate the length and type of appointment, as this information was not specified in the calendars. Additionally, a few of the plaintiff's clients testified as to the type and frequency of treatment they received from the plaintiff, the cost, and the typical form of payment (cash or cheque).

The court awarded a portion of the amount claimed by the plaintiff, but more than was indicated by the plaintiff's income tax returns. The court awarded $80,000 in past loss of capacity.

Loss of future capacity was calculated based on an annual income of $25,000, slightly less than that claimed by the plaintiff ($30,500), but much more than she claimed on her income tax returns ($5,700). After taking into account residual capacity, the court awarded $129,000 in loss of future earning capacity.

### b. *Provost v. Dueck Downtown Chevrolet Buick GMC Limited,* 2021 BCCA 164, per Abrioux J.A. (Goepel and Griffin JJ.A. concurring)

The plaintiff was a corporal in the RCMP and was paid almost $37,000 by the RCMP when he was off work following a motor vehicle accident. At the trial to assess damages the plaintiff suffered as a result of the accident, the court found the defendants were liable to pay the plaintiff the full amount of wage loss that the RCMP had already paid to the plaintiff without deduction. The payments were made by the RCMP pursuant to their long-standing policy of continuing wages of injured officers, not as a binding obligation or contract. The trial judge found that the RCMP had an equitable right of subrogation arising from the mere payment of the indemnity and therefore the amount was not deductible from the award of damages. The defendants appealed the award and maintained that the amount was deductible because the RCMP did not have the right of subrogation.

The court of appeal accepted the plaintiff's position as correct that "contractual" and "equitable" subrogation are not distinguished by the presence or absence of a contract, but rather by the presence or absence of a contractual term delineating the subrogation rights of the payer. The

right of subrogation requires an underlying contract of indemnity. To the extent that other decisions have found a common law right of subrogation to exist in the absence of a contract of indemnity, they were wrongly decided.

At trial, neither party argued the charitable or voluntary payments exception to the rule against double recovery and the court declined to consider the issue on appeal.

## 1. Future Income Loss

### a. *Akhtarkhavari v. Griffith*, 2020 BCSC 926, McDonald J.

The parties sought clarification about the loss of future income earning capacity award of $546,448 as the plaintiff points out that it was a net amount after tax and ought to have been expressed as a gross amount. Defence counsel took the position that the word "net" may have meant income net of business expenses, rather than net of income tax. McDonald J. confirmed that the award was stated as a net amount after deducting for income tax and clarified that the total award for future loss of income earning capacity, as a gross amount, was $940,212, not the $546,448.

### b. *Banic-Govc v. Timm,* 2019 BCCA 413, per Fenlon J.A. (Dewitt-Van Oosten and Groberman JJ.A. concurring)

The plaintiff was injured in a car accident in 2014 when she was 61 years old. She returned to full-time work one week later but never fully recovered and by 2016 had cut back to four days per week. In March 2018 about six weeks before trial the plaintiff retired at age 65 and began working part-time for another employer, just three to four hours, one day per week. The plaintiff claimed that absent the accident, she would have worked full time to age 70 then four days per week to age 75.

The plaintiff's expert reports opined that the plaintiff would likely have been able to continue working three days per week after age 65 but at trial, their testimony moved away from that position to say that the plaintiff may not be able to work beyond age 65 except on a very part-time basis. At paragraph 15, the decision states that *"[d]espite the radical change in the plaintiff's work hours six weeks before trial, it was in my view open to the judge to accept that the plaintiff's capacity had fallen to seeing three to four clients over one day each week*". In dismissing the appeal, Fenlon J.A. found that the trial judge had not ignored or misapprehended the medical evidence and that his reasons adequately explained the basis of his assessment.

### c. *Bhumrah v. McLeary*, 2021 BCSC 285, Winteringham J.

As a result of injuries sustained in a motor vehicle accident, the 33 year old plaintiff claimed that her work as a psychiatric nurse would be reduced by 30%. The court considered positive and negative contingencies and held that the plaintiff would be able to work at approximately 95% full-time capacity after completing her education. As the plaintiff had not yet worked as a psychiatric nurse, was motivated, prepared to engage with treatment, and would not enter the workforce until 2022, the court held that a 5% disability to age 65 fairly and accurately reflected

the totality of the evidence about functional capacity and ongoing limitations. The plaintiff was awarded $80,000 for future wage loss.

### d. *Jenkins v. Oliver,* 2020 BCSC 773, Funt J.

The plaintiff claimed a future loss of earning capacity on the basis that she required two hours of breaks per day because of injuries from two accidents. The plaintiff sought an award of $1,356,322.56. The court held that there were discrepancies between the plaintiff's calculations of her income compared to her documented net income and the amount she would have worked, such that the plaintiff's calculations were not reliable.

The court also found that the plaintiff had not shown that her earning capacity was affected in the way she claimed. The court awarded $40,000 which represented roughly one-half of current net income.

### e. *Johnstone v. Rogic,* 2019 BCCA 469, per Griffin J.A. (Saunders and Stromberg-Stein JJ.A. concurring)

Prior to trial, the plaintiff, a quality assurance manager at a large engineering company, had not suffered a loss of income. At trial, she was awarded $1.5 million for loss of future earning capacity, in part on the basis that the plaintiff was stoic, would not have cut back on her work hours absent the accident and would not be able to continue working full-time as she had. In particular, there was a risk that due to a merger, the plaintiff would have to choose between two new positions, both with additional responsibilities, and if she was not able to do so, she would be "made redundant" or laid off. The plaintiff hoped to do some part-time consulting work but said she did not have the energy to look for a new job.

The defendants' appeal was dismissed. At paragraph 26, the court states that "*[j]ust because a stoic plaintiff makes sacrifices to be able to stay working for a time, and therefore does not claim a past income loss at trial, does not necessarily mean that the person will be able to continue in that vein and so does not have a valid claim for future loss of earning capacity*."

At paragraph 38, Griffin J.A. notes that the trial judge was not making findings of what would happen in the future with certainty, but what was a real and substantial possibility, and the evidence supported a finding that the plaintiff would not be able to continue to work full-time, because of the pain from her accident injuries. Griffin J.A. also found that the trial judge's inference that the plaintiff would work approximately 40% less that she did in the past was a capable inference on the evidence. Griffin J.A. also found that the trial judge used multipliers from an economist's evidence to assess the present value of loss of future earning capacity and set off the positive contingencies of future raises against negative contingencies.

### f. *Lewis v. Wang,* 2020 BCSC 16, Macintosh J.

The plaintiff sought the equivalent of two years of income for loss of future earning capacity based on a capital asset approach. The defendant argued that the plaintiff had not proven any a real and substantial possibility of a future event leading to an income loss. Alternatively, the defendant argued that a reasonable award would represent half of one year's income. The plaintiff had earned more as a jewelry salesperson after the accident than at any other time in

her life, but the court held that there was a real and substantial possibility that the plaintiff's pain would eventually impair her earning capacity which could arise from needing to take days off, selling less while working, or retiring early, and awarded the equivalent of one year's income, using the capital asset approach.

At paragraph 47, the court notes that there is a risk of "double counting" compensation for pain but "…*with the right facts, there is no inconsistency in awarding compensation related to pain under non-pecuniary damages, damages for delay in becoming a manager, and damages for diminished earning capacity*.

## g. *Matheos v. Scott,* 2019 BCSC 1738, Murray J.

In a personal injury claim, Murray J. assessed no damages for loss of future earning capacity. It was accepted that the plaintiff was unable to continue in her chosen career full-time or to the degree she hoped, but there was no evidence that she was incapable of working at a different job. The inability to pursue your chosen field, on its own, is not a basis for an award under the heading of loss of future earning capacity.

## h. *Mollica-Lazzaro v. Leung,* 2021 BCSC 4, Weatherill G.P. J.

The plaintiff sought damages for personal injuries arising from a motor vehicle accident, claiming soft tissue chronic pain that had significant ongoing impact on her domestic, vocational, and social life. The defendant's position was that the accident was minor and at worst, caused a short-term aggravation of the plaintiff's pre-existing chronic pain issues. In reviewing relevant case law, Weatherill J. confirmed that:

- The plaintiff has the onus of showing "a real and substantial possibility" that the accident may have an impact on her ability to earn income in the future
- A future or hypothetical possibility will be considered as long as it meets this threshold and is not mere speculation; and
- A claim for loss of earning capacity cannot be based on subjective theoretical speculation that employment may change without a factual background that rises to the level of a realistic and substantial possibility

Weatherill J. noted that while the plaintiff's manager felt that the plaintiff had taken excessive time off work for various treatments, there was no suggestion that the plaintiff's job was in jeopardy, and arrangements could be made to attend treatment outside work hours.

Weatherill J. accepted that the plaintiff's job could be physically demanding and may cause symptom flare-up from time to time but that the flare-ups were not much different than what the plaintiff experienced before the accident. Accommodations had been made at the plaintiff's work and the experts agreed that the plaintiff should be able to carry on with her work duties into the future.

Weatherill J. held that the plaintiff had not shown a real and substantial possibility of a future loss of earnings related to the accident and declined to make an award of damages for future loss of earning capacity.

## i. *Orregaard v. Clapci*, 2020 BCSC 1726, MacNaughton J.

At paragraph 229, MacNaughton J. stated: "It is now uncontroversial that using female statistics in determining earnings for female plaintiffs is not appropriate". She reviewed a number of authorities in support of her determination that to use female statistics would be "inherently discriminatory".

## j. *Quigley v. Cymbalisty,* 2021 BCCA 33, per Butler J.A. (Fenlon and Hunter JJ.A. concurring)

The appellant artist and art teacher was injured in three motor vehicle accidents. She appealed the judge's damages awards for her future loss of earning capacity, cost of future care, and loss of housekeeping capacity, alleging that the judge erred in applying the relevant legal tests and in misapprehending or ignoring the evidence.

The trial judge determined that the assessment should not focus on the appellant's theoretical capacity but on the appellant's particular circumstances, given her "singular goal" of establishing her art school business. The trial judge awarded damages for future loss of capacity on the basis that the plaintiff would continue her business but at a reduced capacity, with an annual loss of $7,000 annual loss and a multiplier to age 70 for a loss of capacity of $120,000 which was then adjusted upward to $150,000 to account various contingencies. The appellant argued that a "replacement cost" approach suggested that the judge inappropriately performed a calculation rather than assessing the factors that would demonstrate the magnitude of her loss, such as the impairment of her ability to work to full capacity and grow the business.

Butler J.A. held that the judge's reasons clearly showed that he assessed the appellant's loss of capacity taking into account the evidence and the arguments at trial. In dismissing the appeal, Butler J.A. found that the judge's conclusions on future loss of earning capacity were reasonably supported by the evidence and made in accordance with the applicable legal principles, and it was not the court's role to reweigh the evidence on appeal.

## k. *Roemer v. Shafi,* 2020 BCSC 1, Verhoeven J.

Subsequent to an accident, the plaintiff's income had steadily risen each year and she had been promoted from a receptionist to an accounts payable clerk. The plaintiff alleged that she was at risk of losing her employment and could end up in a lower paying position elsewhere. She also alleged that due to the accident injuries, she had an increased risk of unemployment or of being limited to reduced working hours. The court found that the plaintiff had worked as an accounts payable clerk for the past three years and was capable of continuing in her job, with accommodations as may be necessary, and did not accept that she had proven a real and substantial possibility that she could lose her job.

However, the court held that there was a more general risk that her accident injuries had resulted in a real and substantial possibility of an increased risk of unemployment and could limit her tolerance for working full-time, with occasional overtime, and she could find it difficult to secure similar accommodations with another employer. The court noted that the plaintiff had limited employment skills, no formal training, and that when combined with her accident injuries, she had been rendered more vulnerable to unemployment in the future. In addition, although she

was unlikely to do so, the plaintiff's injuries would prevent her from returning to work she had done in the past, such as childcare worker or restaurant server.

The plaintiff claimed a loss of one working day per week over her lifetime would be $185,000. The court awarded $90,000.

## l. *Sehra v. Randhawa,* 2020 BCSC 752, Douglas J.

The plaintiff sought damages from an alleged two-year delay in obtaining his CPA designation, but the court held that the plaintiff was not on track to complete the necessary professional work experience on time even absent the accident. The plaintiff also sought loss of future income earning capacity equivalent to three or four years of his net income on the basis that his injuries prevented him from commuting long distances and working overtime, and that he was less marketable as an employee in a competitive marketplace.

The plaintiff could sit two to three hours, his mild driving anxiety did not prevent him from driving, and there was possibility of further improvement with both his anxiety and back pain, so the court did not accept that the plaintiff was unable to commute to work because of the accidents. The court accepted that the plaintiff's lifting capacity was limited but that it was unlikely the plaintiff would abandon his dream job as an accountant, which was sedentary, to work as a manual laborer in a physically demanding position. The court held that the evidence was not sufficient to establish a compensable loss of capacity to earn an income.

## m. *Shrieves v. Smith,* 2020 BCSC 710, Jenkins J.

The plaintiff claimed that he intended to work to age 70 but retired 2.5 years early because of injuries from a motor vehicle accident including cognitive problems, anxiety/nervousness and forgetfulness. The defendant argued that the plaintiff chose to retire early, wanting to move to Victoria to be closer to family, but that position was not accepted. Jenkins J. held that the decision to retire early was reasonable in the circumstances due to the accident injuries.

Given the nature of his business, supplying and installing commercial and residential window blinds, the court made no deduction for the likelihood that he might have retired before age 70 absent the accident.

## n. *Winick v. Goddard,* 2020 BCSC 4, Branch J.

The plaintiff sustained soft tissue injuries to her neck and back as well as headaches in an accident which were aggravated by two subsequent accidents. She also sustained thoracic outlet syndrome in one arm. Her mood was adversely affected by the accidents, but she was not formally diagnosed with any psychiatric or psychological condition.

At the time of the first accident, the plaintiff was in college and had worked as a lifeguard. After the first accident, she never returned to lifeguarding work, but was able to complete her undergraduate degree and become a teacher. The plaintiff sought damages for loss of future earning capacity of $500,000 on the basis that she did not have the capacity for full time teaching work and was going to work as a teacher on call ("TOC") to provide greater flexibility. The plaintiff also claimed damages for loss of ability to perform future lifeguarding work. The expert evidence

indicated that the plaintiff should be able to work full time as a teacher but likely with some accommodations and microbreaks.

At paragraph 105, the court notes that Mr. Chew's functional capacity assessment was completed before the plaintiff had completed her practicum and the plaintiff argued that even if Mr. Chew did not recommend part-time work, the plaintiff's own assessment should now be accepted as the best evidence. The court notes that it must be cautious regarding the plaintiff's self-assessment of her capabilities in light of competing evidence. The court held that although the plaintiff had made her own decision to pursue only a part-time TOC position and had not tested the availability and suitability of the necessary accommodations, there was a material risk the plaintiff would not have the capacity to perform full time work. The court held that the real risk that the plaintiff would need to reduce her workload to her targeted 75% level was 50%, such that an appropriate award for loss of future earning capacity was $225,000.

The court did not accept that the plaintiff would have continued to do lifeguarding work after becoming a full-time teacher.

## G. Indivisible Injuries

### a. *Alragheb v. Francis*, 2020 BCSC 1712, Funt J.

In this personal injury action, the plaintiff was involved in two separate accidents causing indivisible injuries. For the first accident the plaintiff admitted he was 50% at fault and the first defendant was 50% at fault. The second defendant admitted to being 100% at fault for the second accident. An important question was to what extent should the plaintiff's damages be reduced after the second accident as a result of the plaintiff being 50% at fault for the first accident.

Funt J. provided a helpful summary of the law related to apportionment of damages starting at paragraph 15. The *Negligence Act* requires apportionment of liability be made on the basis of "the degree to which each person was at fault". The assessment to be made is of degrees of fault, not degrees of causation, with "fault" meaning blameworthiness.

Fault is determined by looking at the initial and successive accident separately. Funt J. states the appropriate rule to follow: where an initial accident and a successive accident result in indivisible injuries to an at-fault plaintiff, the damages or loss relating to the time after the successive accident are apportioned on the basis that each accident was a cause of the plaintiff's indivisible injuries with the relative fault determined on the basis that each accident is given equal weight.

In this case, Funt J. determined that damages following the second accident should be reduced by 25%. This 25% reduction in the plaintiff's damages after the second accident recognized that the plaintiff was involved in two accidents causing indivisible injuries and was 50% at fault for the first accident.

### b. *Bagri v. Heran,* 2020 BCSC 2002, Gomery J.

The plaintiff was involved in three motor vehicle accidents and suffered indivisible injuries. The plaintiff was not at fault for the first or third accident, but she was found to be 50% at fault for

the second accident. Gomery J. followed the analysis of Funt J. in *Alragheb v. Francis,* 2020 BCSC 1712 to calculate the proper apportionment of damages.

The first accident was the most serious of the three accidents and the period following the first accident was when the plaintiff had the most acute suffering. The plaintiff's damages were attributed 50% to the first accident and 25% each to the second and third accident. Accordingly the plaintiff's 50% contributory negligence for the second accident makes her 12.5% responsible for her total loss. Therefore the plaintiff's total damages award was reduced by 12.5%.

## H. Management Fees

### a. *Pearson v. Savage*, 2020 BCCA 133, per Fitch J.A. (Willcock and Hunter JJ.A. concurring)

This appeal included the issue of management fees. The defendants appealed and the plaintiff cross-appealed. The plaintiff was awarded damages of $1,871,561.53, including $278,500 for management fees. The appeal was allowed and the management fee was reduced to $25,000. The cross-appeal was dismissed.

The defendants did not argue that investment management assistance was unnecessary, but rather that a substantial reduction in the award for management fees was necessary. Fitch J.A. stated that, like damages generally, a decision to grant management fees is a factual finding subject to a deferential standard. Fitch J.A. found that there was no evidence upon which the trial judge could conclude that the management fees she awarded were necessary to achieve the statutory rate of return. Further, he found the approach wholly erroneous because the trial judge accepted calculations based on an error in methodology. Counsel for the plaintiff calculated the total loss to the fund by applying the same differential to both the cost of future care and the loss of earning potential. This is wrong because the required rates of return are different for these types of awards. The real discount rate that the plaintiff must obtain is 2.0% of her future cost of care award and 1.5% on her loss of future earnings award. The forecasted bond yields were actually higher than the required rate of return (1.8% as opposed to 1.5%)

Fitch J.A. further held that it was unreasonable for the trial judge to focus on the most pessimistic scenario that might arise only in the short term. The only evidence on this point was that the required rate of return "could perhaps" be obtained with a portfolio of interest-bearing security, and that the required rate of return would be "readily attainable" with a mixed portfolio. There was no evidence that the plaintiff would need full investment management services on a continuous basis to maintain a mixed portfolio. Since this evidence was contradicted, the issue became whether the plaintiff had the capacity to obtain and follow financial advice. There was no evidence that would justify a conclusion that the plaintiff was incapable of seeking out and acting upon investment advice such as to require what amounts to a Level 3/4 investment management service. Fitch J.A. held that Level 2 management fees, which provide for a review of the plan every five years, were sufficient.

The plaintiff cross-appealed on the issue of management fees alleging that the trial judge had erred by making a reduction of her award for anticipated legal fees and disbursements. The defendants conceded that the trial judge erred in this regard. Management fees are to be

assessed at the time of trial and not according to what might happen in the future. However, Fitch J.A. dismissed the cross-appeal on the basis that it was inconsequential given the way he proposed the management fees be dealt with in the appeal.

### b. *Sillett v. Diguistini*, 2020 BCSC 937, Myers J.

The plaintiff was awarded damages in a personal injury action by a jury. Post-trial, the plaintiff sought an order for a management fee and for a tax gross-up on damages for the cost of future care.

Counsel had agreed that the jury would not be asked to deal with taxation for past income loss. The jury was therefore instructed not to make any adjustments for taxation for past income loss, and was instructed "that will be done by counsel afterwards." The economist's report filed by the plaintiff contained a section explaining the tax gross-up and how the jury could calculate it. The jury was instructed to determine any award for future care in terms of present value with reference to evidence prepared by the economist.

After the jury returned its verdict, counsel agreed that judgment would not be entered so that they could reach an agreement on the taxation amount for the past income loss, prejudgment interest "and those sorts of things". Counsel later agreed to an order setting out the amounts awarded by the jury for various heads of damages and taxation for past income loss. The order contained a provision that "The issue of tax gross up and management fees is to be determined."

Myers J. held that this provision in the order was not an agreement that the plaintiff was entitled to those items. Rather, the issue of whether a tax gross-up or management fee should be awarded at all, and if so, the amounts, was left for determination. Myers J. held that it was now too late for the issue to be raised after the verdict. Absent an agreement regarding management fees, the issue should have been decided by the jury. There was no evidence directly led on the issue, it was not argued, and it was not something requested to be put in the jury charge. With respect to the tax gross-up, given that one of the expert's reports dealt with the issue, there was no way to know whether the jury took it into account in deciding its award for future care.

## I. Mitigation

### a. *Pearson v. Savage*, 2020 BCCA 133, per Fitch J.A. (Willcock and Hunter JJ.A. concurring)

The defendants appealed the award of damages and the finding of the trial judge that the plaintiff did not fail to mitigate her damages. The trial judge accepted evidence establishing that the plaintiff suffered ongoing emotional struggles with depression, self-isolation, PTSD and feelings of personal worthlessness. There was expert evidence that certain cognitive deficits, including complaints relating to memory, are common symptoms of major depressive disorder. Fitch J.A. stated that it was a finding of fact that the plaintiff did not have the capacity to engage in the treatment the appellants said she should have following the accident. The court of appeal upheld the trial judge's finding that the plaintiff was, as a consequence of her depression and related cognitive symptoms, incapable of following treatment recommendations of which she was aware.

## b. *Rutkowski v. Nadarajab*, 2020 BCSC 583, Francis J.

The plaintiff brought an action seeking damages for injuries suffered when he was struck by a motor vehicle while riding his bicycle. Among other injuries, the plaintiff suffered a tear to his left anterior cruciate ligament ("ACL"). He was referred to Dr. Tarazi, an orthopaedic surgeon, who scheduled him for knee surgery. The knee surgery was ultimately unsuccessful as the plaintiff's pre-existing osteoarthritis had advanced to a level at which there was too much degeneration for ACL surgery to be successful. Dr. Tarazi terminated the plaintiff's knee surgery without repairing his ACL. Dr. Tarazi was concerned that if the ACL was repaired, it may actually increase the plaintiff's pain from his osteoarthritis.

The defendant retained Dr. Day as an expert in orthopedics. Dr. Day was of the opinion that the plaintiff would benefit from a second knee surgery. Dr. Day testified at trial that he agreed with Dr. Tarazi that one needs to be careful operating on an ACL tear when osteoarthritis is present in the knee. However, he testified that the protocol for ACL repairs on patients with osteoarthritis had changed in recent years and such surgeries were becoming more common and having better results than in the past. Dr. Day opined that ACL repair surgery would likely increase the plaintiff's stability and reduce his pain and he recommended that the plaintiff try surgery again. The plaintiff testified on cross-examination after Dr. Day's testimony that, notwithstanding Dr. Day's recommendation, he would not pursue ACL repair surgery as he could not bear the risk of unsuccessful operation.

The defendant argued that the plaintiff's refusal to try a second surgery was unreasonable and must be considered in the damages assessment for ongoing knee pain. The court held that the plaintiff's position was not unreasonable based on three reasons. First, until his consultation with Dr. Day, the plaintiff had received consistent medical advice that ACL repair surgery would not assist him. It was not unreasonable for the plaintiff to prefer Dr. Tarazi's opinion to the opinion of Dr. Day. Second, it would be unfair to the plaintiff to find a failure to mitigate on the basis of evidence he gave about his future plans on cross-examination without allowing him the opportunity to consult another orthopaedic surgeon about Dr. Day's recommendation. Third, Dr. Day was not the plaintiff's treating physician and there was some uncertainty about whether the surgery was indeed available to the plaintiff.

## c. *Stenner v. Mohr,* 2020 BCSC 1492, Masuhara J.

In a claim for damages arising from a motor vehicle accident, the plaintiff relied on expert witnesses of a physiatrist, psychiatrist, and occupational therapist. The defendant argued that the plaintiff suffered minor injuries without ongoing impact, in part on the basis that the family physician's notes indicated that despite regular contact, there were no complaints of mood issues, and very few complaints regarding physical injuries. The court noted that while there was only one complaint to the family physician in the year following the accident, there were concerns and complaints noted to the plaintiff's subsequent family physician. The court accepted that the plaintiff's injuries had become chronic and while recognizing the argument that the plaintiff had a level of stoicism, Masuhara J. found that the plaintiff's condition was not as severe as submitted. Masuhara J. held that it would have been of assistance to his determination to have heard from the plaintiff's primary family doctors who had provided the plaintiff with consistent, ongoing care.

Masuhara J. held that the plaintiff did not act reasonably by not addressing the recommendations of the physiatrist and occupational therapist such as trialing medications, seeing a neurologist or pursuing kinesiology services. Masuhara J. also notes that the plaintiff did not discuss the expert reports with her family doctor. The plaintiff's damages were reduced by 10% for lack of mitigation.

### d. *Ueland v. Lynch,* 2019 BCCA 431, per Newbury J.A. (Dickson and Hunter JJ.A. concurring)

The plaintiff successfully sued his former counsel in negligence relating to a tort claim for damages for injuries suffered in a motor vehicle accident. In the underlying motor vehicle tort action, the plaintiff's claim was dismissed following his non-attendance at a court-ordered IME, and a defence application to find him in contempt and dismiss the claim. In the solicitor's negligence action, the defendants admitted that their negligence resulted in the dismissal of the plaintiff's tort claim and that, had an application to set aside the dismissal order been made promptly, it would have been successful. The quantum of damages was agreed upon and the only issue to be determined at trial was whether the plaintiff had properly mitigated his loss. The plaintiff had doggedly pursued a claim against his former counsel instead of focussing on overturning the dismissal order which the parties agreed would have been successful. The trial judge found that the plaintiff's conduct was objectively unreasonable and, as a result, had failed to mitigate his damages. He reduced the damages by only 50%, however, because of the plaintiff's difficult personality. The defendants appealed on the basis that the trial judge erred in including subjective aspects of the plaintiff's personality in his analysis. The defendants argued that since it had been established that the plaintiff had the capacity to make "subjectively reasoned decisions" regarding the tort claim, the issue of whether he failed to take reasonable steps in mitigation was a purely objective one.

Newbury J.A. confirmed that a plaintiff's personal circumstances may properly play a role in assessing the reasonableness of his or her mitigation efforts and that personal circumstances can include a plaintiff's pre-existing health (including a psychological 'thin skull'), family and employment circumstances, religious beliefs, financial situation, and age and physical condition. The 'objective/subjective test' is to be applied "to a person *in the plaintiff's shoes*". However, this does not mean that personal circumstances should be interpreted so as to permit a plaintiff to conduct himself in a manner that is objectively unreasonable because of a stubborn wish for reprisal of some kind or because he simply chooses for some personal reason to act unreasonably. The law does not accept that a plaintiff may, as a matter of free will, make unreasonable choices concerning mitigation and look to the defendant for compensation. The point of an objective test is to ensure that a plaintiff does not fail unreasonably to take steps in mitigation. In the result, ordered a 100% reduction of damages.

## J. Non-Pecuniary

### a. *Purewal v. Uriatrte,* 2020 BCSC 1798, Baker W.A. J.

In this personal injury action, ICBC conducted extensive surveillance of the plaintiff. At trial, the plaintiff argued that the impact of the surveillance on her ought to be taken into account in the

non-pecuniary award. She said the surveillance, which took place over several years and at times up to six hours in duration, was unwarranted and extremely distressing to her. She felt like a criminal.

Baker J. agreed that the surveillance conducted by ICBC was excessive and unwarranted. The extensive surveillance did not reveal anything contradictory to the plaintiff's evidence; however, he found it was not appropriate to award the plaintiff non-pecuniary damages in relation to the surveillance. Non-pecuniary damages are awarded to compensate the plaintiff for damages suffered as a result of the negligence of the defendant. The impact on the plaintiff from the surveillance is not a proper basis for an award of non-pecuniary damages.

### b. *Szostakiwskj v. Launay*, 2020 BCSC 653, Marzari J.

The court awarded the plaintiff nominal, non-pecuniary damages of $100 for the first of two rear-end accidents. The plaintiff suffered minor injuries and had fully recovered prior to the second accident. He did not miss any time from work and did not seek any medical attention following the first accident. No expert evidence was tendered in respect of injuries from the first accident.

## K. Pre-Existing Condition

### a. *Radacina v. Aquino*, 2020 BCSC 1143, Skolrood J.

The plaintiff was involved in two motor vehicle accidents and was claiming numerous injuries including chronic pain. The plaintiff had a pre-accident history of pelvic pain that required multiple surgeries, chronic pain from previous motor vehicle accidents, and periods of anxiety and depression. The court reduced her damages by 40% to take into account the risk that the plaintiff's pre-accident conditions would have deteriorated in the event even absent the accident. In coming to its conclusion, the court placed significant weight on the opinion evidence of Dr. Squire who treated the plaintiff post-accident. Dr. Squire opined that the plaintiff's physical injuries had largely recovered, but that her ongoing psychological state – some of which pre-dated the accident – caused her to continue to feel pain.

# VIII. Document Production

### a. *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 205, per Goepel J.A. (MacKenzie and Savage JJ.A. concurring), leave to appeal refused 2020 CanLII 216 (SCC)

The underlying action involved allegations that the defendants were complicit in the Eritrea government engaging in forced labour, slavery, torture, inhumane treatment, and crimes against humanity. In response to a limitation defence raised by the defendants, the plaintiffs pled that the limitation period was postponed until they met with Canadian legal counsel and had the requisite understanding of their legal rights. In response, the defendants claimed that the plaintiffs had waived solicitor-client privilege and sought production of documents related to their lawyer's engagement of a third party to assist in the litigation. The case management judge's decision, upheld by the court of appeal, was that there had been a waiver of privilege, which extended to the legal advice the plaintiffs had received prior to and including the first

meeting with Canadian counsel. The information was relevant to assess whether new legal information was imparted in the first meeting that would justify the postponement of the limitation period.

### b. *Holmberg v. McMullen*, 2019 BCSC 1434, Johnston J., leave to appeal refused 2019 BCCA 475

The court dismissed an appeal from Master Bouck's decision refusing to order pre-accident clinical records in an action brought by the plaintiff following two motor vehicle accidents. In so doing, the court held that pleadings alone are not a sufficient basis for such a request; the applicant must provide some evidence to support a connection between the records sought and the issue between the parties.

### c. *Kang v. Sahota*, 2020 BCSC 828, Riley J.

In a personal injury action, the defendant applied for production of Medical Services Plan ("MSP") and Pharmanet printouts that were in the possession of the plaintiff. The plaintiff opposed on a number of grounds, one of which was that the copies of the MSP and Pharmanet printouts in his possession were protected by litigation privilege. Plaintiff's counsel filed an affidavit from a legal assistant attesting that in an action such as this, counsel's practice is to obtain copies of the client's MSP and Pharmanet records to determine what medical records and reports to obtain for the purposes of proving the plaintiff's case.

Riley J. concluded that the plaintiff is technically correct and the copies of the MSP and Pharmanet printouts in the possession of plaintiff's counsel are privileged; however, the original MSP and Pharmanet records created and maintained by British Columbia Ministry of Health would not be protected by any privilege. The application was dismissed with the observation that the defendant is still free to seek production of the relevant MSP and Pharmanet records directly from the Ministry of Health under *Rule 7-1(18)*.

## A. Implied Undertaking

### a. *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2020 BCSC 309, Giaschi J.

This case provides a useful review of the law on the implied undertaking of confidentially. The rationale underlying the rule is to encourage complete and candid discovery while protecting the privacy rights of litigants compelled to disclose private information. The implied undertaking continues to bind the parties until such time as the evidence is included in part of the court record. If a matter is settled, the obligation continues to bind. Further, the implied undertaking is not spent when the opposing party files the documents in an interlocutory application, but is spent if the producing party does so. This ensures that the opposing party cannot simply circumvent the implied undertaking through an interlocutory application.

### b. *Manning v. Dhalla*, 2019 BCSC 1067, Branch J.

The plaintiffs lost several million dollars in a Ponzi scheme. They sued their former bookkeeper for allegedly taking commission from the fraudster. The action was dismissed at trial. The plaintiffs then sought to re-open the case and adduce fresh evidence – a spreadsheet and a fax – that were disclosed by the plaintiffs in a related class action law and appeared to be a "smoking

gun". The court accepted that the implied undertaking was not breached because there was an order in the class action law suit that allowed for the sharing of documents related to the Ponzi scheme. The court went on to say that, even without this order, it was willing to waive the implied undertaking of confidentially retroactively to allow for disclosure of documents between the related actions.

## IX. Evidence

### a. *Hamman v. ICBC*, 2020 BCCA 170, per Fitch J.A. (Groberman and Grauer JJ.A. concurring)

ICBC denied insurance coverage on the ground that the plaintiff was intoxicated at the time of the accident. One of the grounds of appeal was that the defendant had breached the rule in *Browne v. Dunn* by adducing evidence of the breathalyzer technician's observations of the plaintiff that had not been put to him in cross-examination. The court of appeal rejected this argument on the ground that the plaintiff ought not to have been taken by surprise by the evidence of the technician. The technician's notes of his observations of the plaintiff were disclosed well before trial. In addition, the court of appeal was critical of the appellant's choice to not object to the technician's evidence right away but to wait to address it in closing argument, which prevented the court from employing any potential remedies to maintain trial fairness.

### b. *Reddy v. Enokson,* (unreported), 18 June 2020, New Westminster Registry M194345, BCSC, Blok J.

During a personal injury trial, the plaintiff sought to admit data published by Statistics Canada concerning the average hourly wage rate of persons 15 years and over in Canada. The defendant did not dispute the document was admissible as a public document and met the admissibility provision of s. 29 of the *Evidence Act*, R.S.B.C. 1996 c. 124; however, the defendant objected to the admissibility of the document on the basis of relevance. The defendant argued that the statistics in the document were categorized in the broadest of terms and only show the average wage over several broad industrial sectors.

Blok J. agreed that the document would likely be given very limited weight at most, but that the figures may turn out to be of some assistance and thus passed the relatively low bar of relevance test. The Statistics Canada data was ruled admissible without an introductory witness.

## A. Hearsay – Admissibility of Statement

### a. *Findlay v. George*, 2021 BCCA 12, per DeWitt-Van Oosten J.A. (Saunders and Dickson JJ.A. concurring)

This is an appeal from the dismissal of a negligence claim by a jury. One of the issues on appeal was the trial judge's determination to exclude a portion of a statement from an accident witness, Mr. Gowan, who had passed away prior to trial. The following statement was provided to the police at the scene of the accident:

> [Mr. Gowan] Ok. . . . It, ah, this is a guess but it happened close to about 9:15, maybe 9:25 at the most. My friend Glen and I were driving down the road the

> ah victim . . . passed us about 2 kilometres maybe before the accident happened. I didn't see the point of impact itself but I saw the 2 vehicles approaching each other and it looked like there was plenty of space and then all of a sudden the pickup ah . . . hit the logging truck[,] went out of control and ah crossed the road and rolled . . . once (inaudible)
>
> . . .
>
> [Police officer] Ok. Um . . . so . . . you said that ah the pickup when it was ah . . . it was southbound, it appeared that it had lots of room to go by the trailer or the logging truck.
>
> [Mr. Gowan] yeah, yeah neither myself nor Glen thought much about it and all of a sudden Glen was saying whoa, whoa, whoa and . . . I saw it at the same time but I never actually saw the point of impact so I don't, I just don't know how it happened because it looked like there was plenty of room but neither myself nor my friend were even thinking about accident. [Emphasis added.]

At trial, the respondent conceded that the appellant satisfied the admissibility criteria of "necessity" under the principled exception to the hearsay rule. The statement was made within 30 to 40 minutes of the accident, was made to a police officer in circumstances where there was an expectation of truth from a "non-biased" witness and the gravity of the accident gave rise to the presumption that the officer was expecting the truth. Accordingly, cross-examination was unlikely to change the witnesses' evidence.

However, the trial judge excluded the underlined portion of the statement as it did not meet the threshold "reliability". The answers given by the witness were in response to a leading question and the answer given was ambiguous. It was clear in the initial description that he had not seen the point of impact but had seen the two vehicles approaching and it looked like there was plenty of space. It was only in response to the officer's question that it seemed that Mr. Gowan was agreeing. Yet he clarified that he had not seen the impact, so he did not know what had happened even though it appeared that there was plenty of room.

The court of appeal upheld the trial judge's decision on the basis that the question may not have been leading in the technical sense but it did misstate what Mr. Gowan had told the officer and since he never saw the impact he would be guessing as to where the pickup and the logging truck hit. It was open for the trial judge to find the impugned portion of the statement was ambiguous, of insufficient reliability and potentially prejudicial, and accordingly that it should not be placed before the jury. The court also found that had the full statement been admitted it would not have made any difference to the verdict.

## X. Experts

### a. *Cartagena Aguino v. Betts*, 2019 BCSC 1583, McEwan J.

The court held that great care should be taken in relying upon the medical-legal report of Dr. Chow, a physiatrist called by the plaintiff. This was, in part, because the identical wording relating to prognosis in two separate reports suggested that it may be a standard phrase and not based on the medical evidence of that particular case. The court also relied on the commentary from *Lauriente v. Schoonhoven*, 2017 BCSC 2246 at paras 42-52, which was critical of his practice,

commenting that this process had "a 'mill' like air to it"- and critical of his "bold" prognosis that was objectively unreasonable and for which the basis was not clear.

## b. *Frankson v. Neely,* 2020 BCSC 786, Ross J.

In this action arising from a motor vehicle accident, the defendant relied on an expert physiatrist report. The expert saw the plaintiff on one occasion then prepared a report. As counsel was preparing for trial, he noted that the expert had not addressed the "intake" documents of a physician and massage therapist, upon which the defendant's argument placed significant weight. Ross J. noted that the expert had the intake documents and pre-accident clinical records, but failed to review them before deriving her opinion and writing her report. At defence counsel's request, the expert reviewed the plaintiff's pre-accident record and wrote a second report with a revised opinion regarding the causation of the plaintiff's condition, indicating that the plaintiff's thoracolumbar pain was an exacerbation of a pre-existing injury.

In cross-examination, the expert advised that an independent assessor completes a checklist of questions and pre-interviewed the plaintiff, then the expert interviewed the plaintiff and asked about the relevant portions in the assessor's notes. In this case however, the notes were not clear and did not indicate that the plaintiff was asked about any pre-accident conditions. The independent assessor did not testify, so there was no evidence to contradict the plaintiff's testimony that she answered all of the questions put to her.

Ross J. admitted the expert's second report into evidence, it was given little weight and the expert's opinion that the plaintiff's current condition might be the same as her pre-accident baseline was not accepted. Ross J. found that as the expert missed reviewing relevant and critical documents prior to preparing her report, there was not a sufficient level of thoroughness. Ross J. held that *"[e]ach plaintiff is entitled to have his or her case assessed on the basis of well-considered medical opinions*" and *"[i]t does not assist either party, or the Court, when opinions are provided with less than full examination of the underlying facts".*

## c. *Gardner v. Yoo,* 2019 BCSC 2230, Weatherill G.P. J.

The plaintiff sought damages for injuries suffered in a motor vehicle accident including injuries to his left chest, low back, mid-back, and neck. The plaintiff underwent medical examinations by a physiatrist retained by his counsel and an orthopaedic surgeon retained by defence counsel. The physiatrist diagnosed the plaintiff with mechanical mid and low back pain caused by structural damage to the tissues of the spinal column as the result of the accident. He opined that the plaintiff was permanently partially disabled as a result of his injuries. The orthopaedic surgeon opined that there was an absence of physical findings to explain the plaintiff's ongoing complaints and accordingly he was unable to substantiate an ongoing disability. He was not asked to provide an opinion on the physiatrist's report. The physiatrist provided a rebuttal of the orthopaedic surgeon's opinion that the plaintiff's physical impairment was temporary.

The court preferred the opinion of the physiatrist over that of the orthopaedic surgeon. Weatherill J. cited the decision of Saunders J. in *Khudabux v. McClary*, 2016 BCSC 1886 wherein the opinion of an orthopaedic surgeon regarding soft tissue injuries was considered inferior to that of a physiatrist specializing in rehabilitative medicine. Saunders J. drew the comparison of

using the opinion of an orthopaedic surgeon to rebut that of a physiatrist regarding soft tissue injuries as "bringing a knife to a gunfight". Weatherill J. held that the physiatrist's ability to diagnose and prognosticate outweighed an orthopaedic focus.

## d. *Hawkins v. Kumar,* 2019 BCSC 1896, Giaschi J.

The plaintiff suffered cognitive impairments as a consequence of a mild traumatic brain injury, soft tissue injuries, and anxiety as the result of two motor vehicle accidents. The court held that a neuropsychologist is not qualified to give an opinion as to whether a plaintiff has suffered a mild traumatic brain injury. The trial judge did, however, allow the neuropsychologist to give her opinion on the cognitive and behavioural sequelae of brain injuries and indicate the relative likelihood of any cognitive and behavioural abnormalities being the consequence of a traumatic brain injury.

## e. *Parliament v. Conley*, 2021 ONCA 261, per Young J.A. (Huscroft and Nordheimer JJ.A. concurring)

This appeal addresses the issue of a failure of the trial judge to properly instruct the jury to ignore inadmissible evidence given by an expert during cross-examination of the credibility and reliability of the parties.

In this medical malpractice action, the plaintiff's action was dismissed by a jury following a lengthy trial during which 27 experts testified. The plaintiff was diagnosed with hydrocephalus as an infant. He sued two physicians for delay in diagnosing and treating this condition which led to significant brain damage. On appeal, the plaintiff sought a new trial on the basis that the only expert on the standard of care for the defendants, Dr. Bruce, failed to demonstrate impartiality, and usurped the jury's proper role in opining on core credibility and factual questions which included what the doctors had actually told the plaintiff's mother and whether she had followed the advice she was given.

The credibility and reliability of the plaintiff's mother and the defendant physicians were key issues for the jury at trial. Liability turned, in large measure, on whether the jury found that the defendants failed to advise the mother that the size of her son's head was a matter of concern; whether they advised her to take him to the emergency room; and whether she failed to follow instructions she was given by them. The plaintiff' mother testified that she raised the concern of her son's head size, and that she was repeatedly reassured that his head size was within normal range and that she should not worry.

Dr. Bruce prepared an opinion that stated that the defendants had met the standard of care. He admitted in cross-examination that he ignored the mother's evidence when he wrote his report "because he did not think it was relevant". He also testified that the mother's evidence was untruthful and expressed his opinion that he did not think her memory was accurate. He put more weight on the defendants' evidence because the defendant had taken some notes and that "it was inconceivable that Dr. Park had not told Ms. York to take Cole to the emergency room."

There were no objections to the admissibility of Dr. Bruce's evidence at the outset or in the course of his testimony and cross-examination. At the pre-charge conference, counsel for the appellants

did not make submissions on Dr. Bruce's evidence in respect of his testimony regarding the credibility and reliability of the parties.

In allowing the appeal, Young J.A. noted that with a jury, credibility is a "notoriously difficult problem" and there is a risk that a jury may readily accept an expert's opinion as a convenient basis upon which to resolve these difficulties. It is well established that a trial judge's role as gatekeeper is not exhausted once a particular expert has been permitted to testify on the basis of their qualifications and content of their report. Rather, the trial judge must protect the integrity of the process by ensuring that the expert does not overstep the acceptable boundaries in giving evidence.

> [47] The continuing gatekeeping role means that trial judges must not only continue to ensure that the expert's actual testimony does not overstep the appropriate scope of the expert evidence; they must also ensure that the expert's testimony continues to be independent in the sense that the expert does not become an advocate for the party by whom they are called.
>
> [48] As Hourigan J.A. made clear in *Bruff-Murphy*, the continuing gatekeeper role of a trial judge includes the continuation of the residual discretion to exclude evidence when they are not satisfied that the testimony's probative value exceeds its prejudicial effect: at paras. 65-66; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 50; and *R. v. Bingley*, 2017 SCC 12, [2017] 1 S.C.R. 170, at para. 30.

Young J.A. held that the trial judge should have, in the absence of the jury, invited submissions from the parties as to the content of a mid-trial instruction that the jury ignore any and all of Dr. Bruce's expressions as to the credibility or reliability of witnesses. She also should have included a very clear and specific instruction in the final charge on that point. The general charge given was wholly inadequate given the risk that the jury would place undue weight on Dr. Bruce's opinion. Young J.A. found that this failure to so instruct was a serious error on the part of the trial judge, despite the fact that plaintiff's counsel did not ask for either a mid-trial or a closing instruction (which is usually fatal to an appeal on that point). In this case, failing to address this error would result in a miscarriage of justice:

> [70] As Hourigan J.A. wrote in *Bruff-Murphy* at para. 72, "[t]his court has a responsibility to protect the integrity of the justice system. This is not a 'no harm, no foul' situation." The sole witness for the respondents on the issue of standard of care exceeded the admissible scope of his evidence and opined on the credibility of the witnesses, which was highly prejudicial to the appellants. The impugned evidence tainted the jury's verdict and the verdict must be set aside.

## f. *Reid v. Robinson,* 2020 BCSC 574, Mayer J.

In an action arising from a motor vehicle accident, the plaintiff called an orthopedic surgeon as an expert witness to provide opinion evidence regarding his knee injury. The expert's written report stated that he was "*solely responsible for the preparation and content of the report*", but in testimony, the expert advised that he relied on a summary of the clinical and other medical records that his brother had prepared for him. The expert's report stated that the "*…facts and assumptions on which the report is based include information obtained from written materials as well as by the history and physical examination that I performed myself*", but as the expert had

not completed a review of the plaintiff's clinical history himself and could not say with certainty whether the history extracted by his brother included all relevant history, Mayer J. declined to admit the expert's evidence with respect to causation.

At paragraph 50, Mayer J. states that the expert's "…*practice of using his brother to review and summarize clinical history was inappropriate and should be strongly discouraged*" and that the expert should "…*think carefully before allowing his brother, who was not a medical doctor or directly affiliated with the expert's clinical practice, from doing so again*".

### g. *Uy v. Dhillon,* 2019 BCSC 2435, Marzari J.

The plaintiff was injured in an accident that occurred on the Coquihalla Highway when his vehicle collided with the defendants' tractor trailer. Liability was an issue, and the plaintiff objected to portions of the defendant's expert engineering reports on the basis that some portions went to the ultimate issue at trial, usurped the role of the trier of fact, and were ultimately advocacy in the guise of opinion. Marzari J. found that the evidence was fact-driven and highly relevant and portions of the report were relevant, necessary, and properly within the expertise of the engineer and did not improperly usurp the role of the trier of fact. Marzari J. also concluded that as the expert was not in the same position as the trial judge in that he only had access to a small subset of evidence, it was too early in the process to determine the ultimate weight or usefulness of the evidence.

### h. *Uy v. Dhillon,* 2019 BCSC 1136, Marzari J., aff'd 2020 BCCA 163

At trial, the defendants were found 100% liable, a finding confirmed by the court of appeal. Portions of the expert engineering report such as assessment of the lane configuration were relied upon at trial. Some weight was given to the engineer's opinion as to the impact location, to be considered in light of all of the other evidence. However, the court held that the engineer's conclusions regarding the tractor-trailer alignment with the lanes of travel was not consistent on the location of the impact and photo modeling, so portions of the engineer's conclusion as to how the defendant was travelling was rejected. Marzari J. noted that the engineer was not advised of the fact that the defendant was in the process of attempting to overtake a Super B tractor-trailer on the right side of the highway at the time of impact, which may have impacted the engineer's opinion.

## XI. Health Care Costs Recovery Act

### a. *Woo v. Crème De La Crumb Bakeshop & Catering Ltd*., 2020 BCSC 42, Skolrood J.

The plaintiff suffered catastrophic injuries when he fell from a ladder on premises leased by the defendant. Following reasons for judgment awarding damages for the injuries suffered by the plaintiff, the parties appeared at a hearing to deal with the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*") claim.

The plaintiff advanced a claim under the HCCRA and sought to introduce a Minister's Certificate issued under s. 16 of the *HCCRA* as evidence. Section 16(1) addresses health care services

received, or likely to be received in the future, by a beneficiary as a result of a wrongful act and the Certificate creates a rebuttable presumption that the listed services are attributable to the wrongful act. Section 16(2) deals with the costs of the past and future health care services attributable to the wrongful act and the Certificate constitutes conclusive, irrebuttable, proof of those costs. The defendant objected to the language and form of the Certificate. Skolrood J. found that the "somewhat unartfully" drafted Minister's Certificate conveyed the information required by the *HCCRA* and was admissible.

## XII. Independent Medical Examinations

### a. *Cook v. Kang*, 2020 BCSC 575, Riley J.

The plaintiff surreptitiously made an audio recording of two IMEs that she attended at the request of the defence and later provided the recordings to his counsel. The defence learned of the existence of the recordings during cross-examination of the plaintiff. Plaintiff's counsel then disclosed the existence of the recordings on an amended list of documents and advised that he may use the recordings in the cross-examination of the two doctors. The defence sought a ruling excluding the recordings.

The recordings were ruled inadmissible for two reasons.

Firstly, the recordings were not disclosed on a list of documents as required under *Rule 7-1* and the court determined that it was not a proper case to exercise its discretion to allow their use at trial pursuant to *Rule 7-1(12)*. The plaintiff argued that the recordings fell outside of *Rule 7-1(1)*. The court disagreed and found that the recordings were not extraneous material of which the only conceivable use would be for cross-examination of defence witnesses on a collateral issue as the recordings also contained statements by plaintiff on facts material to his case. Even if the sole utility of the recordings were for potential cross-examination of defence experts, that would not take them outside the scope of *Rule 7-1(1)*. Admission of the recordings would cause prejudice to the defendants. The plaintiff had not furnished a reasonable explanation for failing to make timely disclosure and there was no reason to believe that refusal to permit the use of the recordings would impose impediment to deciding the merits of the case. The interest of justice did not weigh in favour of allowing the use of the recordings. To allow the plaintiff to use them would be contrary to the objective of *Rule 7-1* and undermine the fairness of trial.

Secondly, the recordings and their transcripts are prima facie inadmissible on the basis that they were obtained or created in a manner which is contrary to *Rule 7-6* and, in that sense "unlawful", and it was not in the interests of justice to permit their admission at trial.

### b. *Broumand v. McEdwards,* 2020 BCSC 803, Smith N. J.

The defendants applied for an independent medical examination ("IME") by a neurologist. The plaintiff opposed on the basis that the neurological IME should be limited to the issue of whether he suffered a concussion. The plaintiff had already agreed to attend an IME by an orthopaedic surgeon. The plaintiff argued that a "full" neurological IME would overlap considerably with the orthopaedic IME.

Smith J. noted that the plaintiff pled injuries to a number of areas of the body without specifying the precise nature or etiology of those injuries. His lordship further noted that he would not expect the plaintiff to plead a specific etiology, given the limited medical information that was likely available when the action was commenced. "But neither would I expect the plaintiff to now abandon his claim for any accident-related injuries that are found to have a neurological rather than an orthopedic explanation." (at para. 10).

On the issue of deciding entitlement to the neurological IME without the report of the orthopaedic IME, Smith J. held:

> [13] It would certainly have been preferable to have had the orthopaedic surgeon's report in order to determine if a further IME by a neurologist is necessary. But in view of the timing of the orthopedic examination, the upcoming trial date, and the deadline for service of expert reports, that does not appear to be practical. Counsel for the plaintiff has not agreed to any extension of time for service of expert reports. I adopt what was said by Master Elwood in *Shannon v. Cook*, 2019 BCSC 1139 at para 28:
>
> > [28] This case would be easier to decide if the existing independent examiners had indicated that some aspect of Ms. Shannon's condition was outside their expertise. However, such evidence is not in my view a requirement of the case law. Nor does the case law require in every case that the defendants submit the reports of the agreed upon experts, first, to demonstrate that a further examination is justified.

## c. *Chahal v. Sandhu,* 2020 BCSC 879, Jenkins J.

The defendant applied to have the plaintiff attend an independent medical examination ("IME") by a physiatrist. The plaintiff had already agreed to attend an IME with a neurologist which appointment had not yet taken place at the time of the application. The instruction letter to the neurologist indicated that he was asked to opine on diagnosis, prognosis, and causation with respect to neurological injuries. Jenkins J. ordered the physiatry IME on the basis that the variety of injuries pled justified an additional examination. The neurologist could comment on the etiology of the head injuries and "may" comment on the physical injuries. A physiatrist would be qualified to opine on the soft tissue injuries to the right shoulder, leg and foot, and any rehabilitation required for those injuries.

## d. *Debruyn v. Kim*, 2020 BCSC 1773, Veenstra J.

The defendant sought an order that the plaintiff attend an independent medical examination ("IME") with three experts: an orthopedic surgeon, neurologist, and a psychiatrist. The plaintiff disputed the IME with the neurologist, arguing that the plaintiff had not been referred to a neurologist and the plaintiff did not intend to obtain a neurologist's report. The plaintiff was relying on three experts being the family physician, an orthopedic surgeon, and a psychiatrist.

The plaintiff argued that the defendant should obtain the reports from the other IME's and then apply for a neurology IME if warranted. The court held that while it would have been helpful to have reports from the other IME's before deciding whether to order an IME by the neurologist, it was not a requirement.

Veenstra J. found that there was a real basis for the request for the neurological IME given the plaintiff's past history of neurological complaints, complaints arising from the accident claim that could have a neurological source, and a linkage in the evidence of those complaints to a potential claim for loss of earning capacity.

## e. *Shannon v. Cook,* 2019 BCSC 1139, Master Elwood, in Chambers

The defendant brought an application in a personal injury claim for an order compelling the plaintiff to attend an additional independent medical examination ("IME") with a neurologist. The plaintiff alleged physical, neurological, and psychological injuries including headaches, dizziness, light sensitivity, nausea, neck and back pain, a blockage of her right arm, memory loss and difficulty concentrating as the result of a motor vehicle accident. At the time of the application, the plaintiff remained unemployed with a potentially significant future wage loss claim. The defendant had already requested the plaintiff's attendance at IMEs with an occupational therapist, a physiatrist, and a psychiatrist. The plaintiff did not consent to the assessment with a neurologist. Master Elwood ordered the plaintiff to attend the IME.

Although Master Elwood found that there was some overlap in expertise, he found that there were sufficient distinctions between them:

> [32] However, I am satisfied that there are also distinct areas of focus of these three medical specialties. The focus of a neurologist is on diagnosis of problems with the nervous system, whereas the focus of a physiatrist is on physical injuries, rehabilitation and the prognosis of recovery, and the focus of a psychiatrist is on diagnosing and treating secondary psychiatric disorders.

The plaintiff's condition was multi-factorial. It was unclear whether the causes and consequences of her injuries were neurological and there was a possibility that she had suffered a traumatic brain injury. Master Elwood stated that it was notable that the defendant requested the plaintiff's attendance at the neurologist's examination at the same time as he requested her attendance at the examinations with the physiatrist and psychiatrist and prior to obtaining any expert reports. It was evident that the defendant identified the need for a neurological assessment early on. As such, he did not need to demonstrate that unforeseeable circumstances arose after the first two assessments which made the neurological assessment necessary.

## f. *Shannon v. Cook,* 2019 BCSC 2297, Macintosh J., in Chambers

The IME dispute continued in this case following Master Elwood's order for the examination by a neurologist. At the time of that earlier application, the plaintiff had agreed to attend IMEs with an occupational therapist, a psychiatrist and a physiatrist. Circumstances unfolded such that the IME with the physiatrist was scheduled but did not take place. The neurology IME occurred and the defendant served the neurologist's report. The plaintiff then refused to attend the rescheduled physiatry IME. The defendant unsuccessfully applied for an order requiring his attendance (2019 BCSC 1975). The defendant appealed the Master's order which proceeded as a *de novo* hearing. Macintosh J. stated that the pleadings provided evidence that a physiatrist's opinion would be relevant and he noted that the claim was potentially significant. Macintosh J. ordered the plaintiff to attend the physiatry IME on the bases that: the report of the neurologist tendered by the defendant did not displace the opportunity for the defendant to have the

physiatrist's report; in the circumstances, such a report was not merely for bolstering the neurologist's report; and there no risk of "excessive overlap" between the reports.

### g. *Usmon v. Masi*, 2020 BCSC 958, Riley J.

The defendant applied to have the plaintiff attend an independent medical examination ("IME") by a physiatrist after the 84-day deadline for service of reports had passed. Two prior appointments scheduled for this IME had been cancelled due to concerns about the COVID-19 public health emergency. The plaintiff opposed on the basis that the defendant "could and should" have done more, including arranging for an IME by videoconference.

Riley J. found that there were compelling reasons to justify an abridgement of the 84-day time limit. Riley J. was satisfied that the defendant made repeated efforts to arrangement for an IME in sufficient time for a report to be completed within the time limit, but these efforts were frustrated by the fallout from the pandemic. The situation was more or less entirely beyond the control of counsel. His lordship specifically rejected the contention that the IME should have proceeded earlier by video. While some assessments could be done in such a fashion, for example by a psychiatrist, a physiatry examination could not, given the physical injuries alleged to the plaintiff's neck, shoulders, arms, back and chest. Riley J. stated that the plaintiff's "general assertion of prejudice" without any evidence of a specific form of prejudice to the plaintiff was insufficient to overcome the objective of providing a level playing field with respect to expert medical evidence.

## XIII. *Insurance (Vehicle) Act*, Section. 83 Deductions

### a. *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953, MacDonald J.

This case contains a comprehensive summary of the law concerning applications for deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*"). The plaintiff opposed a number of deductions sought by the defendants pursuant to s. 83 and sought to rely on a number of media reports on the financial position of ICBC to establish uncertainty of the ability of ICBC to pay benefits to the plaintiff in the long term. MacDonald J.held this evidence to be inadmissible.

The plaintiff disputed that she was entitled to receive all the future care benefits awarded at trial as Part 7 benefits given the language of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the "*Regulation*"). MacDonald J. noted that an ICBC claims specialist cannot bind ICBC beyond the provisions of the *Act* and *Regulation* because the claims specialist cannot authorize deductions beyond what the statute permits. Affidavit evidence from ICBC is permissible to reduce or eliminate any contingencies associated with its exercise of discretion if there is entitlement.

Macdonald J. considered the applicable statutory language and found the plaintiff was entitled to receive the benefits, therefore a deduction was appropriate. The future care cost deduction was allowed but reduced to account for contingencies. The contingencies included (1) that some of the plaintiff's Part 7 benefits allotment is used for MSP payments and other expenses, (2) that ICBC cannot pay for treatment costs beyond the fee limit prescribed by the *Regulation*, and (3) to account for the fact that the plaintiff

will likely benefit from some treatments shortly after trial (to offset the discount rate applied to the award at trial). In the result, the future care cost deduction was allowed but reduced by 25%.

## b. *Boparai v. Dhami,* 2020 BCSC 1813, Davies J.

Following a jury trial, the jury's verdict included an award of $39,000 for cost of future care. The defendants applied to deduct the full amount pursuant to s. 83 of the *Insurance (Vehicle) Act*, RSBC 1996, c. 231. Neither party had requested the jury particularize the components of the future care award.

Davies J. dismissed the defendant's application, in part because it was impossible to determine what aspects of the plaintiff's multi-faceted claims for the cost of her future care were accepted by the jury. Davies J. also considered the affidavit from the ICBC claims specialist concerning ICBC's obligation to the pay the Part 7 benefits to be deficient. The affidavit did not include what amount ICBC was willing to pay per item and the summary of medical evidence from trial was somewhat inaccurate and not comprehensive. Davies J. provides a helpful summary of the applicable law at paragraph 30 of his decision.

## c. *Del Bianco v. Yang,* 2020 BCSC 410, Groves J.

This decision is currently under appeal. The plaintiff was 35 years old at the time of trial and was awarded the cost of annual massage therapy to the age of 75. Groves J. noted that the maximum rate at which ICBC was permitted to pay for such treatments under the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 was lower than what was determined to be the cost of those services. He also referred to the plaintiff's evidence of concern, based on media reports, about the future of ICBC. He found the uncertainty of payment was too high over a 40-year period and placed too much of a requirement on the plaintiff to seek weekly reimbursement of out-of-pocket funds. Groves J. declined to deduct any amount awarded for future massage therapy.

## d. *Kim v. Sodhi,* 2020 BCSC 2023, Smith N. J.

The plaintiff was awarded $170,000 in cost of future care for treatments and benefits, some of which he would require over the next twenty-five to thirty-five years. The defendant applied to deduct most of this amount pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*"). A claims specialist for ICBC filed an affidavit confirming ICBC would pay for a number of the discretionary future care items per the court's decision. The plaintiff opposed the application and filed an affidavit citing the financial difficulty of ICBC and the historical difficulty he had in obtaining payment from ICBC.

In light of the legislation and the case law, Smith J. held he was bound to assume ICBC would honour its commitment and give effect to s. 83 of the *Act*. Nonetheless, the principle remains that the plaintiff is not required to bear the risk of any uncertainty concerning future payments. The contingencies include that the plaintiff's Part 7 benefit allotment also covers payment for basic medical services and that some of the rates ICBC pays for services pursuant to the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 do not match the amounts the court found necessary. Also, the court acknowledged that regulations and policies are subject to change over time. The future care cost deduction was reduced by 40% to take into account the various contingencies.

## e. *McColl v. Sullivan,* 2020 BCSC 2041, Baker W.A. J.

The court relied on the affidavit evidence of an ICBC claims specialist confirming ICBC would pay the discretionary amounts available pursuant to s. 88 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the "*Regulation*"). The future cost of care deduction was allowed but reduced to reflect some discrepancy between the amount payable pursuant to the *Regulation* compared with the actual cost for the services in evidence at trial. The plaintiff sought a further reduction of 20% on a global basis due to contingencies. In this case, each treatment was addressed separately in the trial decision and individually analyzed in the application. As well, Baker J. found it would be inappropriate, on the evidence before her, to speculate that ICBC would not honour its commitment to pay the benefits, even those that are to be paid over the plaintiff's lifetime. A global contingency reduction was not applied.

## f. *Safdari v. Buckland,* 2020 BCSC 2019, Winteringham J.

The defendant sought to deduct the entirety of the future care cost award pursuant to s. 83 of the *Insurance (Vehicle) Act*, RSBC 1996, c. 231. A portion of the award was given as lump sum for multiple treatments and was not broken down. The plaintiff submitted that little weight should be placed on ICBC's assurances to pay for the items that were considered discretionary, as opposed to mandatory, under s. 88 of *Insurance (Vehicle) Regulation*, B.C. Reg. 447 because of the history of nonpayment of the discretionary benefits to the plaintiff prior to trial. Winteringham J. found that the affidavit filed by a claims specialist at ICBC removed any discretion from ICBC and obligates ICBC to pay for the items. The full amount of the future cost of care award was deducted without reduction.

## g. *Siverston v. Griffin*, 2020 BCSC 528, Jackson J.

Following a jury trial, the defendants applied for an order to have the plaintiff's damages reduced pursuant to s.83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the *"Act"*). Neither party proposed particularized questions on the issues of special damages or cost of future care award. The jury awarded lump-sum amounts that were not broken down.

The plaintiff was awarded $38,000 in special damages at trial, but only a portion of it, less than $5,000, was payable by ICBC as Part 7 benefits. The remainder was interest accrued at a rate of 2% to finance the treatments. The plaintiff argued that the special damages amount was the subject of agreement from the parties. The charge to the jury included "the defendant have admitted those expenditures were incurred and as such the plaintiff need not prove them with receipts, the plaintiff must just prove the expenditures arose as a consequence of the accident". The defendants did not deny the agreement but maintained that despite the agreement, special damages are not to include the cost of borrowing money to finance them. The defendants sought to have the entire special damages award deducted. Jackson J. agreed that typically special damages are not to include the financing cost, but declined to deduct any amount of the special damages award given the agreement the parties reached.

To establish a basis for deduction under s.83(5) of the *Act* of a future care costs award, the defendants have the burden of establishing a correlation between the plaintiff's claim (as determined by the court) and treatments and services available as Part 7 benefits. In this case, Jackson J. held the lump sum nature of the jury's cost of future care award made it impossible

for him to ascertain whether, and to what degree there is a correlation. The defendants' application was dismissed.

### h. *Tench v. Van Bugnum*, 2021 BCSC 501, Fleming J.

This case is under appeal. At trial, Fleming J. awarded items for the cost of future care and the defendants applied for deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*"). In her reasons, Fleming J. addressed the Insurance Corporation of British Columbia's ("ICBC") legal authority to waive the requirements for Part 7 benefits as contained in the affidavit of a claims specialist. She held that ICBC did have the authority under section 85 of the *Act* which states that "an insurer may for a particular case waive a term or condition of the plan or an optional insurance contract." This section provides ICBC with limited authority to waive regulatory requirements that establish terms and condition of the plan.

Fleming J. held further that when considering discretionary benefits under s. 88(2) of the *Regulation*, the waiver power of ICBC under s. 85 of the *Act* is limited to waiving the requirement for a medical opinion. ICBC does not have the authority to waive the requirement that the discretionary benefits are likely to promote rehabilitation. Where ICBC waives the requirement for the opinion of its medical advisor, the rehabilitative purpose can be established by the court's findings or by other evidence. In this case, neither the reasons for judgment nor the ICBC affidavit established that the care items were for a rehabilitative purpose. Fleming J. found that the plaintiff's injuries caused chronic pain and ongoing psychological symptoms. The care items that fall under the s. 88(2) discretionary category were awarded to <u>manage</u> her permanent conditions and maintain the status quo, not to <u>rehabilitate</u> her or restore her to a high level of employment or self-sufficiency (emphasis in the original). The affidavit of ICBC fell short of the evidentiary burden required to establish that the discretionary benefits would promote rehabilitation and the deductions for active rehabilitation, gym passes, body pillows, heating pads and housekeeping were not allowed.

## XIV. Judicial Review

### a. *Wood-Tod v. The Superintendent of Motor Vehicles*, 2020 BCSC 155, Crerar J.

The petitioner brought an application for judicial review to set aside the decision of Superintendent of Motor Vehicles confirming the petitioners driving prohibition, a monetary penalty and vehicle impoundment issued pursuant to s. 215.41 of the *Motor Vehicle Act*. The petitioner's application was dismissed.

The decision was reviewed on the standard of reasonableness. This case was the first review by this court of a notice of driving prohibition after the recent Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) [*Vavilov*]. The parties agreed that the relevant portions of the *Vavilov* decision did not affect the principles set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) [*Dunsmuir*] with respect to this case. However, *Vavilov* sets out in greater detail the process by which a court is to conduct the reasonableness review. At paragraphs 33 to 44, Crerar J. set out the key *Vavilov* passages that govern the standard of reasonableness.

- Reasonableness review is a deferential standard…it still "finds its starting point in judicial restraint";
- The petitioner bears the onus of establishing the decision under review was unreasonable. It is a high standard. Minor flaws in reasoning will not suffice;
- The reasons of the tribunal are the starting point of the judicial review;
- The reviewing court considers both the outcome of the decision and the reasoning process that led to that outcome;
- A reasonable decision is one based on reasoning that is both rational and logical. A failure in either may lead the reviewing court to conclude that a decision must be set aside;
- The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived";
- Alleged errors in reasoning should not be read in isolation. Reasonableness review is not a "line-by-line treasure hunt for error";
- The reasons themselves should not be read in isolation, but must be read in light of the record and with due sensitivity to the administrative regime in which they were given;
- Examples of unreasonableness which may prompt the setting aside of a decision:
    a) if the reasons, read holistically, fail to reveal a rational chain of analysis;
    b) if the reasons reveal that the decision was based on an irrational chain of analysis;
    c) if the conclusion reached cannot follow from the analysis undertaken;
    d) if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point;
    e) if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations, or an absurd premise.
- To be reasonable, the decision must also be justified in light of the legal and factual constraints that bear on the decision. A non-exhaustive list of such considerations:
    a) governing statutory scheme;
    b) other statutory or common law;
    c) principles of statutory interpretation;
    d) evidence before the decision maker;
    e) submissions of the parties;
    f) past practices and decisions;
    g) impact of the decision on the affected individual.

- The reviewing court is not to impose the decision that it would have made had it been in the administrative decision maker's shoes…the role of the courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves;
- The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker";

Crerar J. considered the application of the reasonableness standard, as set out in *Dunsmuir* and confirmed in *Vavilov*, in the specific context of the review of decisions of adjudicators reviewing notices of driving prohibition. On a judicial review, the court should not parse or dissect the reasoning. In order to set aside the decision, any flaw in reasoning should be obvious and should be fundamental to the conclusion reached by the adjudicator. Examples of "manifestly flawed" reasoning processes in the context of a judicial review of the notice of prohibition are found in *Kirby v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCSC 1625:

a) the adjudicator, in assessing credibility, according a presumption of reliability to the police officer's report and requiring the respondent to refute the statements in the report;

b) the failure to resolve conflicts in the evidence that go to the heart of the dispute;

c) failing to assess the weight that should be accorded to the officer's evidence in light of legitimate credibility considerations;

d) the failure to account for or consider cogent evidence;

e) the reliance on facts not supported by evidence;

f) the failure to address the lack of any evidence on a crucial point;

g) making negative credibility findings on the basis of a manifestly flawed rationale including where the written record does not permit the adjudicator to decide which version of events is true; and

presuming compliance with the statutory requirements, sometimes referred to as a "presumption of regularity".

## XV. Jury

### a. *Brown v. Goodacre,* 2020 BCCA 26, Hunter J.A. (Harris and Fisher JJ.A. concurring)

The defendant appealed the decision of a jury awarding damages to the plaintiff for injuries suffered in a motor vehicle accident. The appellant's position was that counsel for the plaintiff expressed personal opinions and personalized the case when addressing the jury in both his opening statement and closing submissions to the extent that when taken cumulatively, the trial was rendered unfair. At trial, defence counsel did not object to the statements made by plaintiff's counsel and the trial judge cautioned the jury with respect to the statements on his own motion. The appeal was dismissed.

In reaching his decision, Hunter J.A. reviewed the relevant authorities and legal principles:

- "the expression by counsel of personal opinions, beliefs or feelings regarding the merits of a case has no place in either an opening or a closing address to a jury" (at para. 11);
- "counsel is afforded greater scope in the closing address to the jury, so long as the submissions made to the jury are not so prejudicial as to cause an injustice" (at para. 12);
- "where objection is made to a jury address as exceeding permissible limits, the trial judge as a matter of discretion may give a cautionary instruction to the jury, or in a serious case strike the jury and conduct the trial by judge alone, or declare a mistrial" (at para. 13); and
- "failure of counsel to object in a timely way to an improper jury address is a significant consideration in deciding whether to order a new trial" (at para. 14).

Hunter J.A. stated that it is rare for appellate courts to allow an appeal on the grounds that counsel made improper statements if these issues could have been raised at trial but were not. He declined to give effect to the appeal on the grounds that the trial judge properly instructed the jury regarding plaintiff's counsel's personal opinions on two separate occasions and defence counsel failed to object or to request the judge take stronger steps than his cautionary charge. Hunter J.A. found that "the failure to object weighs heavily against appellate intervention" (at para. 44). In the absence of exceptional circumstances, Hunter J.A. held that it was inappropriate for the appellate court to interfere with the trial decision when counsel failed to address the issue or to seek a stronger remedy at the time.

## XVI. Legal Fees

### a. *British Columbia (Public Guardian and Trustee) v. Child 3,* 2019 BCCA 171, per Fisher J.A. (Savage and Griffin JJ.A. concurring)

The chambers judge ordered an interim distribution from an estate be made to the mother of a minor beneficiary where there was no trustee, rejecting the submissions of the Public Guardian and Trustee (PGT) that the funds be paid to the PGT in trust for the minor. The court of appeal held that where a minor is a beneficiary and there is no trustee, distribution of the minor's interest in an estate is to be paid to the PGT in trust for the minor. The mother was required to provide an accounting for the distribution already paid to her in trust for the child.

The primary dispute on appeal was the PGT's entitlement to costs. The PGT was awarded costs in the appeal and special costs in the court below, as the PGT was acting akin to an ordinary trustee and the PGT's participation was necessary given its statutory duty to protect the interests of minor beneficiaries.

## A. Contingency Fees

### a. *MacAlpine v. Funk*, 2020 BCSC 1225, District Registrar Nielson

Partway through his personal injury action, the plaintiff changed law firms because his counsel of choice had moved firms. After the action settled, the first law firm sought a fair fee on a quantum meruit basis even though this was not provided for in the contingency fee agreement

("CFA") entered into with the client. The terms of the CFA required that the client immediately pay the first firm on an hourly basis if he chose to terminate the agreement. The first firm argued that the second firm would get a windfall if the terms of the CFA were followed.

In refusing to grant the first firm a quantum meruit fee, Registrar Nielson noted that the CFA had the potential effect of limiting the client's choice of counsel. Requiring the client to immediately pay on an hourly rate undermined the purpose of contingency agreements and may force a client to stay at a firm, with whom they have lost faith, if the client could not finance a change of lawyer. Registrar Neilson refused to vary the termination clause, as it applied to payment on an hourly basis, when the clause was drafted to the sole benefit of the firm.

> [73] The law firm has become ensnared in its own tether. It would be inappropriate to cut that tether in the circumstances arising, to the law firm's sole benefit. It would condone continued use of outdated contractual terms calling for immediate payment on termination. It would transfer all risk of the litigation to the subsequent law firm, allowing the prior firm advance reimbursement its disbursements, and the option of hourly fees if the lawsuit went awry, and a quantum meruit analysis if it went well. Finally, the terms of the CFA limit a client's access to counsel of their choice by creating a financial hurdle through the false belief that immediate payment is due.

## XVII. Limitation Periods

### a. *Borek v. Dr. Derek Stirling Hopkins*, 2020 BCSC 304, Marzari J.

The court held that the plaintiff's claim was not discoverable until after she had stopped being treated by the doctor who had committed the alleged tort. The plaintiff was told by her doctor that her pain and discomfort following a dental procedure was expected. Only later did she realise that the procedure had not gone correctly and her continued pain was due to the doctor's negligence and not a usual side-effect or due to her underlying condition.

### b. *Janus v. The Central Park Citizen Society*, 2019 BCCA 173 per Fenlon J.A. (Harris and Hunter JJ.A. concurring)

The plaintiff argued that the limitation period was postponed because he was not aware of the extent of his injuries or magnitude of a damage award arising out of a fire in a rental building until years afterwards. The plaintiff was diagnosed with cancer three years after the fire that he alleged was caused by smoke and asbestos inhalation. The court of appeal overturned the chambers judge's finding that the limitation period was postponed on the grounds that the plaintiff was aware that he was injured before the cancer diagnoses and was of the opinion that his injuries were serious enough to be actionable.

## XVIII. Negligence

### a. *Provost v. Dueck Downtown Chevrolet Buick GMC Limited,* 2020 BCCA 86, per Butler J.A. (MacKenzie and DeWitt-Van Oosten JJ.A. concurring)

The Dueck defendant, a car dealership, appealed the trial decision where it was held 15% liable for accidents caused by a stolen vehicle. An employee of the dealership had left the vehicle

outside of a detail bay of the dealership with the keys in the ignition, engine running, and doors unlocked for approximately 40 minutes before it was stolen. The accidents occurred while the police were attempting to apprehend the culprit more than an hour after the thief had driven off with the car.

The court of appeal agreed that the evidence at trial was sufficient to establish it was reasonably foreseeable by the defendant car dealership that a thief could cause injury or damage to other motorists while being pursued in the course of the theft of a vehicle from the dealership or in the immediate flight therefrom. However, the foreseeability is not extended to include risk of harm from police actions, including active pursuit or a collision involving the stolen vehicle more than an hour after the theft. The duty of care imposed on a car dealership for negligent storage of a vehicle is constrained by the time and the physical closeness to the location of the theft. The appeal was allowed.

### b. *Randhawa v. Evans*, 2020 BCCA 292, per Goepel J.A. (Groberman and Fisher JJ.A. concurring)

The action arose out of a motor vehicle accident involving a left-turning vehicle and a straight-through vehicle at an uncontrolled intersection. The trial judge apportioned liability 90% against the straight-through vehicle and 10% against the left-turning vehicle. On appeal, the court apportioned liability 60% against the left-turning vehicle and 40% against the straight-through vehicle, emphasising that it is not the degree to which each driver's negligence caused the accident, but the degree to which each driver departed from the applicable standard of care. The court of appeal relied on *Nerval v. Khehra*, 2012 BCCA 436, for the proposition that s. 174 of the *Motor Vehicle Act*, governing left-turning vehicle, supersedes s. 158, which governs when vehicles can pass on the right. In this case, the departure from the standard of care of both parties was substantially similar: neither had paid adequate attention to other vehicles on the roadway.

### c. *Sack v. Lange*, 2020 ABCA 95 per Costigan J.A. (for the court)

The court of appeal upheld the trial judge's dismissal of a claim in negligence arising out of a slo-pitch tournament. The respondent had lost his grip on the bat which flew out of his hand and hit the appellant, causing injury. The trial judge held that the inherent risk in a sport modified the standard of care and the mere presence of an injury is not enough to find the respondent negligent. The respondent had not done anything outside of his normal and reasonable practice.

## A. Causation

### a. *Clarkson v. Elding*, 2020 BCSC 72, Horsman J.

This was a hearing of liability arising out of a bus accident where the bus driver had stopped suddenly for a jaywalker, injuring several passengers. The bus was travelling at 42km/hr approaching the intersection where the jaywalker crossed. The speed limit in the area was 50 km/hr. The plaintiffs argued that the bus driver ought to have been going 34 km/hr, which – according to the plaintiffs' expert – would have allowed him to stop at the same point at a reduced risk of injury to passengers. The court rejected the argument finding that the theory

was based on an *ex post facto* analysis of what steps the driver could have taken to avoid the accident rather than what steps were reasonably expected.

## B. Contributory Negligence

### a. *Dostal v. McLeod* 2020 BCSC 1145, Thompson J.

The plaintiff claimed damages from injuries sustained in a motor vehicle accident when he was a passenger in a pickup truck driven by his friend, the defendant driver. ICBC as third party argued that the plaintiff and defendant driver were drinking together in the hours leading up to the accident such that the plaintiff had knowledge of the driver's overconsumption. Thompson J. held that although the plaintiff admitted that the defendant driver's ability to drive was sufficiently impaired to support guilty pleas to a charge of impaired driving, that was not sufficient to prove that the plaintiff was contributorily negligent for failing to take reasonable care for his own safety.

The plaintiff testified that the defendant driver could "hold his liquor well", had seen him drink to excess on previous occasions, and that when he was intoxicated, he slurred his words and mumbled. Although they had been drinking together in the hours leading up to the accident, the plaintiff was not certain how much the defendant driver had to drink, and he had no concerns about his friend's ability to drive.

Thompson J. held that the impairment admissions carried ICBC's case *"… some distance but not nearly far enough*". As the defendant driver's blood alcohol content was not approaching a very high level of intoxication and as he was likely not displaying overt signs of impairment, ICBC had not proven that the plaintiff new or ought to have known about the driver's state of impairment. As the evidence of contributory negligence was not sufficiently "*clear, convincing, and cogent*" as required by *F.H. v. McDougall*, 2008 SCC 53, the balance of probabilities standard had not been met.

### b. *Uy v. Dhillon,* 2019 BCSC 1136, Marzari J. aff'd 2020 BCCA 163

The plaintiff was driving his motor vehicle when he lost control and struck the rear end of the defendant's tractor-trailer. At trial, the cause of the plaintiff's loss of control was the sole issue. The court found that the defendant's tractor-trailer encroached on the plaintiff's lane of travel suddenly and without warning. In reaction, and in order to evade this sudden and unexpected hazard, the plaintiff steered aggressively to the right in the opposite direction and lost control of his vehicle which led to his vehicle colliding with the rear of the defendant's tractor-trailer. The plaintiff made out all of the elements of negligence against the defendant by establishing that the cause of the collision was the sudden encroachment of the defendant's tractor-trailer combination into the plaintiff's established path of travel.

The onus then fell on the defendant to establish whether the plaintiff was contributorily negligent. Typically there is a presumption or onus in rear-end collisions that the following driver is at fault for failing to keep a safe distance for the conditions. However, given the circumstances that the defendant caused the collision by moving into the plaintiff's lane of travel, there was no reasonable basis to suggest that the plaintiff should have been keeping a safe distance from the rear of the defendant's trailer while he was in a different path of travel. Accordingly, the

presumption of liability in rear-end collisions was rebutted on the proven facts. The defendant led no other evidence of inattentiveness or carelessness on the plaintiff's part other than to say that the plaintiff was contributorily negligent for going too fast for the conditions. There was no evidence to suggest that the plaintiff's speed was careless or negligent nor was there any evidentiary foundation upon which to find that the plaintiff would have avoided the accident at any speed lower than the one he was driving at. While evidence on the standard of care is not necessary in order to determine what the appropriate standard is, it is not enough for a defendant to point at the plaintiff and allege wrongdoing. It is critical that the defendant also prove that a plaintiff's failure to take reasonable care contributed to the injuries suffered. The defendant did not establish that the plaintiff was contributorily negligent or that he contributed to his passenger's injuries.

## C. Vicarious Liability

### a. *Megaro v. Insurance Corporation of British Columbia,* 2020 BCCA 273, per Saunders J.A. (Fitch and Grauer J.J.A. concurring)

Prior to trial, the defendant registered owner ("RO") admitted that he had given consent to a friend to operate his vehicle and that he was vicariously liable for the collision pursuant to section 86 of the *Motor Vehicle Act*. Notwithstanding the admission, the trial judge found that the plaintiff had not proven that the friend was the driver at the time of the accident and did not decide whether the RO's admission was binding on ICBC.

The trial judge found the RO vicariously liable for the operation of his vehicle based on inferences that the RO had given his keys to one of three friends and that the driver at the time of the accident was one of the three friends. Neither the registered owner nor any of the three friends thought to be in the vehicle at the time of the collision, testified at trial.

On appeal, ICBC argued that the judge erred in finding the owner vicariously liable by drawing inferences on identity and consent that could only be supported by inadmissible evidence. In dismissing the appeal, the court of appeal held that the evidence reasonably supported the trial judge's conclusion, as it was based on accepted facts and reasonably supported by the evidence. The court of appeal held that the trial judge reasonably relied on uncontradicted evidence from two witnesses as to statements from the RO that had circumstantial, rather than testimonial, value. There was also evidence that reasonably supported an inference as to the RO's vehicle being in the vicinity of the nightclub where the plaintiff, the RO, and the RO's friends had been prior to the collision.

# XIX. Occupiers Liability

### a. *Der v. Zhao*, 2021 BCCA 82, per Butler J.A. (Fenlon and Griffin JJ.A. concurring)

This slip and fall case is of interest because it upheld the trial judge's decision following a summary trial application that residential property owners do not owe a general duty of care to pedestrians to clear their adjacent sidewalks of snow and ice.

On appeal the appellant recast the nature of the duty owed to focus on the obligation of a property owner to clear snow and ice from sidewalks to comply with a municipal bylaw. The court recognized that the majority of authorities concluded that a property owner owed no such duty of care at common law but thus far there had not been any *Anns/Cooper* analysis. Applying the *Anns/Cooper* analysis, the court found that the risk of harm was foreseeable but the appellant was unable to establish a sufficient relationship of proximity and it would be unfair to impose a duty of care in the circumstances. The appeal was dismissed.

### b. *Marchi v. Nelson (City of)*, 2020 BCCA 1, per Willock J.A. (Fitch and Hunter JJ.A. concurring), leave to appeal granted 2020 CanLII 57554

The plaintiff brought a claim that the defendant city was negligent for inadequate snow removal after she was injured trying to cross a snow bank to reach the sidewalk. The trial judge dismissed the action on the grounds that snow removal decisions were bona fide policy decisions. In overturning the trial judge's decision, the court of appeal held that there is a subtle distinction between policy and operational decisions and the trial judge is required to engage in the analysis from *Just v. British Columbia*. In addition, the trial judge did not correctly apply the standard tort analysis required by s. 8 of the *Negligence Act*, when he concluded that the plaintiff was "the author of her own misfortune".

## XX. Offers To Settle

### a. *Assadimofrad v. Cowan*, 2020 1276, Baker W.A. J.

Following an eight-day jury trial, the plaintiff was awarded damages in an amount less than the defendant's formal offer. Despite the defendant's formal offer, Baker J. awarded the plaintiff costs for the entire proceeding. The court noted that at the time the plaintiff received the defendant's offer, she had "strong evidence" that her income would have increased further had she been able to work as she did pre-accident, and a "strong report" from a qualified occupational therapist who had spent hours examining and assessing her and concluded that she was incapable of returning to work full time. There was no indication that her credibility was under attack. Further, there was no medical evidence that the plaintiff had fully recovered from her injuries yet the jury made no award for future income loss. As such, the amount of the trial award was not something which the plaintiff could have anticipated.

### b. *Bains v. Antle*, 2019 BCCA 383, per Dickson J.A. (Newbury and Saunders JJ.A. Concurring)

This appeal dealt with the scope of judicial discretion to award costs to a successful plaintiff who rejected a formal offer to settle for a sum substantially in excess of the jury award. In the court below, the trial judge awarded the plaintiff costs for the entire proceeding and dismissed the defendants' application for costs consequences as a result of their *Rule 9-1* offer. The defendants offered the plaintiff $185,000. The jury award was $37,800. The trial judge held that an order requiring the plaintiff to either pay "the well-funded" appellants' costs or denying her costs after the date of a formal offer would result in a pyrrhic victory "and could have the effect of discouraging plaintiffs from pursuing valid claims."

The court confirmed the well-established principle that the standard of review of costs decisions is highly deferential. Dickson J.A. noted that the case was unusual in that no costs consequences flowed from rejection of the formal offer, but concluded that the trial judge exercised her discretion in a judicial and principled manner and made an order expressly contemplated by *Rule 9-1.* Dickson J.A. held that the trial judge was in the best position to assess the reasonableness of the plaintiff's rejection of the offer: she sat through the 10-day trial and had the benefit of a deep appreciation of the evidence available to the plaintiff at the time her decision was made. The trial judge did not treat the plaintiff's subjective assessment of her case as determinative of whether she ought reasonably to have accepted the offer. There was objective support in the evidence. There was no error in the trial judge's conclusion that there was no obvious reason for the jury to negatively assess the plaintiff's credibility. There was objective evidence of injury and no suggestion that she misled any of the experts.

### c. *Degen v. British Columbia*, 2019 BCSC 1216, Harvey J.

The defendants' formal offer was not given effect as it required an executed release, a copy of which was not provided with the offer. The plaintiff had no opportunity to consider the terms required or its possible impact on the action as it continued with the remaining defendants.

### d. *Duarte v. McMillan,* 2020 BCSC 899, McDonald J.

The plaintiff was awarded costs of the entire proceeding even though the jury verdict was for an amount less than the defendant's formal offer. However, the court declined to consider ICBC's public statements regarding the rising cost of insurance premiums ICBC's finances, and the introduction of a no-fault scheme. These public statements were not in evidence and it could not be simply assumed that they would have influenced the jury negatively. The court did place weight on the fact that the defendants filed the jury notice and assessing the decision to accept a settlement offer is more nuanced in cases involving jury trials.

### e. *Fines v. Johnston,* 2020 BCSC 1045, Mayer J.

The court in this case was critical of the timing of the revocation of the plaintiff's formal offer and subsequent conduct and declined to award her double costs. The plaintiff revoked her formal offer two years before trial and made a without prejudice offer one year later for an amount more than two times the formal offer. The court concluded that this conduct placed a chill on settlement discussions. The defendant later made a final offer to settle a few weeks before trial for an amount close the judgment, demonstrating a reasonable willingness to negotiate.

### f. *Healy v. Chung,* 2020 BCSC 783, Armstrong J.

This pedestrian and motor vehicle accident occurred in December 2005. After losing two trial dates, the matter proceeded to trial in February and August 2013. The plaintiff made a formal offer of $225,000 shortly before trial in February 2013 which did not have an expiry date. The plaintiff successfully appealed the 2013 judgment of $52,652 and a new trial was ordered. Shortly before the second trial, the plaintiff withdrew his 2013 offer and made another formal offer of $173,300. The plaintiff recovered damages of $246,729 following the second trial in 2019.

In granting the plaintiff double costs, the court reviewed the conduct of the defendant in making and failing to make offers to settle. The court was critical of the fact that the defendant did not revisit her $101,000 formal offer made before the 2013 trial. The court found that the defendant should have reassessed of the claim and her risks on proceeding to trial in the face of new medical opinions. The plaintiff's offer was open for acceptance for over five years during which time the defendant made no adjustment to her proposal notwithstanding the results of the appeal and additional evidence tendered by the plaintiff. Armstrong J. held that "offers to settle must be taken seriously if they are to promote early settlement and avoid litigation costs. Much would have been saved if the defendant had accepted either of the plaintiff's offers. The fact that the defendant did not revisit her assessment is a decision that ought to be repudiated by the court; the resulting costs and consequences of the 2019 trial could easily have been avoided. The defendant did not take into account the court's directions in *Hartshorne*."

## g. *Kaban Resources Inc. v. Goldcorp Inc*., 2020 BCSC 1982, Voith J.

Voith J. revisited the issue as to whether a party can recover double disbursements under *Rule 9-1(5)(b).* In following *Moore v. Kyba,* 2012 BCSC 577, the court noted that within the context of the *Rules*, a "step taken in the proceeding" means a formal step expressly permitted or required by the *Rules* that moves the action forward. Incurring a disbursement is not a step in the proceeding. Furthermore, awarding double the amount of the actual disbursements would amount to a windfall, a result not contemplated in a costs award. An award of double costs is intended to incentivize litigants to act reasonably and to penalize unreasonable litigants; its object is "not to bludgeon one of the parties".

## h. *McPhail v. Ross,* 2019 BCSC 896 Adair J.

The self-represented plaintiff sought damages of $6 million for moderate soft tissue injuries. The court awarded $35,000 general damages and $2,475 special damages. The defendants made three formal offers ranging from $37,550 to $100,000 before trial. Adair J. noted that the first two offers contained no explanation of the defendant's view of the case and issues, and they were not ones that ought reasonably to have been accepted. The third offer followed a mediation and Adair J. found it inconceivable that the weaknesses in the plaintiff's case and risks of proceeding to trial would not have been fully explored in that context. Causation was raised as an issue in the defendant's trial brief and the plaintiff ought to have made a careful assessment of the weaknesses in his case. The plaintiff maintained unrealistic views of his case and ought reasonably to have accepted the third offer. The trial judge noted, however, that the plaintiff's mental health issues likely had some impact on his response to the offers. In the unique circumstances of the case, Adair J. awarded the defendant costs and disbursements for court hearing fees and copying but no other disbursements.

## i. *Miller v. Resurreccion,* 2019 BCSC 2066, Baker W.A. J.

The court rejected the defendant's position that the plaintiff's formal offer was unclear and ambiguous because it contained the phrase "new money". The wording of the offer was clear that the sum offered was a sum after taking into account Part 7 benefit and any advances. The court also pointed out that the defendant himself used the phrase "new money" in his letter

enclosing his own formal offer. In these circumstances, the defendant clearly understood the meaning of the phrase.

## j. *Mitchell v. Fonseca,* 2020 BCSC 395, Mayer J.

The defence formal offer was given no effect in this case following a jury trial where the award was less than the defendant's offer. Mayer J. held that assessing whether a plaintiff's decision to reject a settlement offer is more nuanced in the context of a jury trial. The plaintiff did not file the jury notice and, therefore, when she rejected the defendants' offer, it could not be said that she willingly took the chance that a jury award would not be comparable to his assessment of his potential damages award. The fact that the jury awarded $6,600 in non-pecuniary damages highlights the complexity for a party in evaluating the reasonableness of an offer. In the context of a jury trial, a party should be given more latitude in forecasting a potential range of damages.

## k. *Owen v. Folster,* 2019 BCSC 407, Watchuk J.

The plaintiff sought double costs from the date of her formal offer to settle which was for an amount less than but very close to, the amount of the final judgment. Liability was in issue in circumstances where the plaintiff was a cyclist who fell at an intersection. The defendant was at a stop sign and there was no impact with the cyclist. The court found that the offer was not one that the defendant ought reasonably to have accepted because it did not take into account that there was a real possibility that the claim would be dismissed. Credibility issues weighed heavily in the resolution of the liability issue.

## l. *Patterson v. Solymosi ,* 2020 BCSC 948, Skolrood J.

In considering whether the defendant ought reasonably to have accepted the plaintiff's formal offer, the court rejected the defendant's submission that it did not have sufficient time to evaluate the offer. Skolrood J. held that ICBC's internal administrative procedures do not provide an excuse for the defendant's failure to evaluate the plaintiff's offer in a timely manner. The evidence presented was vague about how or why these procedures impeded ICBC's ability to evaluate the offer.

## m. *Sangha v. Inverter Technologies Ltd*., 2019 BCSC 1174, Riley J.

The plaintiff was diagnosed with depression and somatic symptom disorder at the time she received the defendant's formal offer. The court accepted that this led to a lack of insight into her situation but still found that the defence offer ought to have been accepted. The court revisited the issue of her mental health as an "other factor" to be taken into account in determining the costs order. The extent to which a party who declined settlement is penalized should depend to some extent on that party's subjective state of mind. Where a party is found to have had a clear appreciation of the weaknesses in their case, but still chose to "plow ahead", this should weigh heavily in favour of penalizing that party. By contrast, where a party lacks subjective awareness of the weaknesses in their case, this suggests that the party should not be visited with an unduly punitive costs award. In the result, the plaintiff was denied her costs following the last formal offer but no costs were awarded to the defendant.

## n. *Sidhu v. Alton*, 2021 BCSC 265, Forth J.

The plaintiff argued as a factor in seeking double costs that she was required to run a trial during COVID-19 which necessitated calling 13 witnesses and putting them at risk. The court held that the defendants do not bear the responsibility for the number of witnesses the plaintiff called. Furthermore, COVID-19 protocols were in place and the parties were given liberty at the Trial Management Conference to identify witnesses whose evidence would be proffered by Affidavit or videoconferencing. The court found that the defendant's approach to the case was reasonable based on the evidence and Forth J. rejected the plaintiff's submission that the defendants were "playing chicken" by making a low formal offer and forcing her to trial. In the result, the court did not award double costs.

## o. *Singh v. Chand,* 2020 BCSC 1268, Watchuk J.

Prior to trial, the defendants made an advance payment to the plaintiff in an amount that exceeded the final judgment at trial. This result entitled the defendants to a dismissal of the action. The plaintiff argued that the advance should not be taken into account because the agreement under which the funds were advanced failed to indicate that it could have future costs consequences. The court rejected this argument, stating that the potential costs consequences of an advance payment are inherent in the acceptance of such a payment. The agreement does not need to expressly address the possibility of costs consequences.

## p. *Stevens v. Creusot*, 2020 BCSC 1263, Fitzpatrick J.

The plaintiff argued that he did not purchase any "After-the-Event" insurance that would have saved him from any adverse costs consequences as a factor against giving effect to the defence formal offer. Fitzpatrick J. rejected this submission and held that this was not a factor upon which he could rely to avoid the objectives of *Rule 9-1* and the salutary effects that are intended to be achieved by it.

## q. *Sull v. Pengelly,* 2019 BCSC 1565, Voith J.

Double costs were awarded to the plaintiff in circumstances where the defendant failed to respond at all to the first formal offer and the defendant's response to the second formal offer was "Best of luck on Monday [the start of trial], as you will need it." The defendant also did not make a settlement offer or counter-offer of any kind to the plaintiff.

## r. *Tanaka v. London Drugs*, 2019 BCSC 1924, Horsman J.

The defendant applied for double costs following the dismissal of the plaintiff's case relating to an assault that occurred in a London Drugs store. The defendant made a formal offer of $10,000 inclusive of costs. The court viewed the offer as a genuine effort at settlement despite its relatively low monetary value. Horsman J. also noted that while the plaintiff had a strongly held view in that he suffered a significant wrong and significant injury, the question of whether the offer ought reasonably to have been accepted is not a purely subjective one. The reasons for not accepting the offer must be objectively reasonable. In this case, they were not and the plaintiff ought to have realized after his examination for discovery that his case was weak. The plaintiff's financial circumstances weighed heavily against imposing a double costs award as there was a

risk that he would lose his home. Under the category of other factors, the court noted that the plaintiff was self-represented when he received the offer and remained so through the trial. The offer did not explain that the plaintiff risked an award of double costs against him if the offer was not accepted. It was only open for acceptance for ten days. The plaintiff had cognitive impairments which likely affected his ability to objectively assess the offer. In all of the circumstances, the court declined to award double costs.

## XXI. Part 7 Benefits

### a. *Lindblad v. Insurance Corporation of British Columbia*, 2020 BCCA 306, per Abrioux J.A. (Harris and Dickson JJ.A. concurring)

The respondent suffered injuries in a car accident in 2013 which caused her to miss time from work. She received long-term disability benefits ("LTD") from Great-West Life Assurance Company through a group policy of insurance as well as Part 7 benefits from ICBC. In 2015, she settled her tort claim for the balance of the available policy limits. The settlement had the effect of reducing her entitlement to benefits under the Great-West Life policy but did not affect her entitlement to Part 7 benefits. ICBC took the position that the LTD benefit amount should form the basis for the calculation of her Part 7 TTD benefit amount. The plaintiff argued that the net amount she received following her payment to Great-West Life as part of the proceeds she received from the settlement of her claim was the appropriate basis for the calculation (i.e., and not the initial amount she was entitled to receive under that policy prior to settlement). The chambers judge accepted the plaintiff's argument and ICBC appealed.

The appeal was dismissed. The chambers judge was correct in concluding that the net amount under the group policy was the proper basis for the calculation of the Part 7 benefit payable pursuant to ss. 81(1) and 81(2) of the *Insurance (Vehicle) Regulation.*

### b. *Shin v. ICBC*, 2020 BCCRT 1101 per A. Ritchie, Vice Chair

The Civil Resolution Tribunal dismissed the applicant's claim due to non-compliance with the tribunal's processes. The applicant had filed a "place holder" notice to dispute claiming generic entitlement to Part 7 benefits from ICBC. The applicant failed to particularise her claim when requested by the case manager. There were no allegations or evidence that ICBC had denied any requests by the applicant for Part 7 benefits. The tribunal held that once a notice of dispute is filed, the dispute resolution process will continue in accordance with the tribunal's mandate to move disputes through the process in a timely manner.

### c. *Smith v. ICBC*, 2020 BCCRT 1365, K. Gardner, Tribunal Member

The applicant sought an order that he be entitled to have his future Part 7 benefits paid in a lump sum of $12,000. ICBC had been paying Mr. Smith's Part 7 benefits as they occurred. The tribunal dismissed the applicant's claim noting that s. 102 of the *Insurance (Vehicle) Regulations* provides that ICBC may make a lump sum payment of benefits; it is within ICBC's discretion to do so. The applicant made no submissions as to why a lump sum payment was necessary, reasonable or

otherwise to his benefit nor had he demonstrated that he was entitled to more benefits at that time.

## XXII. Practice

### a. *Pritchard v. Patterson*, 2020 BCSC 1937, Thompson J. in Chambers

This case reinforces the principle that an application for severance must go further than showing that severance would be just and convenient. The case for severance requires evidence and must be compelling. In this case, the plaintiffs in three separate actions arising from one motor vehicle accident brought applications in each to sever liability and quantum and to have one liability trial heard together in all three actions. One defendant opposed the applications and sought to have all issues in each action heard at the same time.

The events giving rise to these actions were as follows: the plaintiff Pritchard lost control of her vehicle on a slippery road which then slid into a ditch; a vehicle occupied by the two other plaintiffs pulled over to the shoulder to provide assistance to Pritchard; the defendant Patterson came along and lost control of his vehicle, striking the three plaintiffs. The plaintiffs proposed a three-week trial for liability issues for all three actions and separate trials for damages issues if the defendants were found liable. On the evidence, Thompson J. held that the proposed severance would best promote the just, speedy, and inexpensive determination of all issues in each of these actions. Thompson J. noted that an applicant for severance must go further than showing that severance would be just and convenient. He considered the case for severance in these actions to be compelling.

In making his decision, Thompson J. relied on the principles that severance orders should be made infrequently and carefully, and that conducting litigation in slices is usually best avoided. Thompson J. determined that there was an excellent chance that a liability determination would directly put an end to the actions of at least one party, and a good chance that it would directly put an end to the actions for more than one party. With respect to the effect on settlement in advance of trial, Thompson J. held that given the nature of the issues and the presence of multiple plaintiffs, defendants and third parties, and the possibility of insurance policy limit considerations, the chances of success in settlement negotiations were likely to be promoted by resolution of the liability issues. Thompson J. considered the high likelihood that a liability determination would be followed by the settlement of all three actions when balancing factors on account of the large amount of savings of time and expense. Thompson J. held that any concerns that there may be overlap between liability and damages issues may be addressed by having the same judge who presides over the liability determination hear the damages assessments, with the evidence heard at the first part of the trial applying to the second part.

## A. Adjournment

### a. *Raniga v. Poirier,* 2020 BCSC 780, Kent J.

One month before trial, the plaintiff applied to adjourn the trial of a personal injury action due to a "*comedy of errors on the part of plaintiff's counsel and the failure to produce any expert*

*medical opinion for the purposes of trial*". The defendant opposed the application. Kent J. reviewed the factors to consider at adjournment set out in *Navarro v. Doig River First Nation,* 2015 BCSC 2173, emphasizing that in considering adjournments, one of the paramount considerations is the interests of justice in ensuring that there will remain a fair trial on the merits, and that to ensure the interests of justice must prevail, courts are generous rather than overly strict in granting adjournments. Kent J. also emphasized that failure of a party's lawyer to take appropriate and/or timely steps should not irrevocably jeopardize the client provided that relief can be given on terms that protect the innocent adversary as to costs thrown away.

Kent J. accepted that an independent medical examination of the plaintiff was necessary so that expert medical evidence could be tendered at trial. The defendant did not provide evidence of any prejudice that an adjournment would cause and while there was some speculation that an adjournment might result in increased expert witness costs, the court found that the overall interests of justice militated in favor of a trial adjournment. Costs were not awarded to either party. Kent J. stated that "*[t]his is a situation where the defendant was seeking to visit the sins of the lawyer upon a blameless plaintiff client to whom liability has been admitted and in the absence of any meaningful evidentiary prejudice. It should have been obvious from the outset than an adjournment would be granted*".

## B. BC Ferry Agreements

### a. *Conarroe v. Tallack*, 2020 BCSC 310, Marzari J.

After the hearing of the trial, the defendant attempted to rely on two expert reports and make submissions regarding apportionment of liability against two former defendants who had settled with the plaintiff under a BC Ferries agreement. Significantly, the parties had entered a consent dismissal order signed by the defendant that dismissed all claims against the settling defendants *on the merits*. The court held that the issue of negligence of the former defendants was *res judicata* and there was no room to argue or find an apportionment.

The remaining defendant had not filed a third party notice against the settling defendant. His response to civil claim had adopted the particulars of negligence set out in the notice of civil claim, which were omitted by way of an amended notice of civil claim during negotiation of the BC Ferries agreement. The defendant had subsequently amended his response to civil claim pleading particulars of negligence against the former defendants, but this had never been served on the former defendants. The court found that the two expert reports were not admissible as the former defendants had no notice of the defendant's intention to rely on these reports until the hearing of the trial.

### b. *Sidhu v. Hiebert*, 2020 BCSC 1548, Forth J.

The defendant, Nissan, settled with the plaintiff under a BC Ferries agreement, but remained a third party in the action. The court granted Nissan's proposed bar order which contained a provision that Nissan was allowed to attend at the trial of the action, but was required to seek leave from the trial judge before it could "make submissions" or "take other steps". The other

parties had opposed the wording on the grounds that it was overly broad. However, because Nissan was required to seek leave from the trial judge, the provision was allowed.

## C. Conduct of Counsel

### a. *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341, per Voith J.A. (Griffin and Fisher JJ.A. concurring)

The court of appeal made the following comments regarding the conduct of counsel in the context of an appeal from an application for default judgment:

> 21 In this case, the conduct of both counsel was unfortunate. As it relates to counsel for the appellant, the chambers judge rightly concluded that "default judgment should not have been sought or taken. "Counsel for the appellant was aware that the Insurer intended to defend the appellant's claim. He had been provided with a witness statement from Ms. Merx that formed the basis for one aspect of the Insurer's defence, and he had had conversations with counsel for the Insurer about other aspects of the Insurer's intended defence. Importantly, counsel for the appellant agreed to a date on which the Insurer's application for particulars would be heard, and he delivered a response to that application while he was, at the same time, attempting to file the materials necessary to secure default judgment. There was, in such circumstances, little prospect of concluding that the Insurer's failure to file a response had been wilful or deliberate.
>
> 22 At the same time, the conduct of counsel for the Insurer was unreasonable and obdurate. Shortly after receipt of the appellant's notice of civil claim, he determined that the Insurer required particulars in order to provide a substantive defence to the appellant's claim. This appears, at least in part, to have been based on his "practice" of seeking particulars in such cases. Counsel for the appellant communicated that he did not agree, and he explained why that was so. The fact that the chambers judge ultimately decided that the Insurer was not entitled to such particulars, and that the Insurer was thereafter able to provide a response without any further particulars, helps define the difficulty.
>
> 23 It is not open to a defendant to unilaterally decide when and how it will advance its defence. Some aspects of those decisions are, absent agreement with opposing counsel, determined by the *Supreme Court Civil Rules*. Rule 1-3(1) establishes that the object of the *Rules* "is to secure the just, speedy and inexpensive determination of every proceeding on its merits." Rule 3-3(3) prescribes the time within which a response to civil claim "*must* be filed and served" (emphasis added). When counsel for the Insurer was told that the appellant would not provide particulars, and that it required the Insurer to file a response by a given date, counsel had various options open to him. He could have, as he recognized in an early communication, filed a response, then applied for particulars and, if successful on that application, amended the Insurer's initial response.
>
> 24 Alternatively, it was open to him to rely on R. 3-7(24), which is designed to address the very impasse that existed between the parties, and which provides:
>
> Demand for particulars not a stay of proceedings

> (24) A demand for particulars does not operate as a stay of proceedings or give an extension of time, but a party may apply for an extension of time for serving a responding pleading on the ground that the party cannot answer the original pleading until particulars are provided.
>
> 25 In the present case, more than six months passed between when the appellant first filed its notice of civil claim and when the parties agreed to schedule what was ultimately an unsuccessful application for particulars. In that time, apart from any other difficulties with the appellant's conduct, counsel for the appellant provided the Insurer with two extensions to file a response and expressly communicated, on at least two occasions, that the appellant would thereafter take default judgment without further notice. None of this was efficient, economical, or consonant with the object of the *Rules*. Instead, the Insurer's conduct was both purposeful and unreasonable and it might, in different circumstances, constitute "blameworthy" or "wilful" conduct.

## D. Document Agreement/Clinical records

### a. *Shrieves v. Smith,* 2020 BCSC 710, Jenkins J.

The parties were unable to agree to the terms of a document agreement and the use to be made of clinical records of treating practitioners. The defendant provided drafts of document agreements which had been exchanged and suggested the last draft should have been agreed to by the plaintiff. At paragraph 51, the court declined to determine the reasonableness of the draft agreements stating that it is *"[t]he court's function to apply the law to the circumstances before it including the clinical records and testimony respecting the same and then determine what records may be admitted as exhibits at trial*".

At paragraph 56 the court held that any opinions reflected in the clinical notes are not admissible where the recorder of the clinical notes was not called as a witness and qualified as an expert in his or her particular specialty.

## E. Examinations for Discovery

### a. *Feng v. Antifaev,* 2020 BCSC 83, Master Muir

The plaintiff purchased a property intending to reside in it for a few years, then subdivide and develop it. The plaintiff alleged that the defendants, two real estate agents and a real estate corporation, breached contractual duties and were negligent in acting as the plaintiff's real estate agents. The plaintiff also alleged that one of the defendant's and the realty corporation were negligent in training the other real estate agent. At the initial examination for discovery of one defendant, there were numerous objections, particularly to the issue of training the other real estate agent and hypothetical questions regarding questions relating to the realtor's experience as a professional.

The plaintiff sought an order for a further examination for discovery of a defendant, that the defendant answer "all proper questions", including questions objected to at the initial examination, that the time spent at the initial examination would not be considered in the total time calculation, and an order for special costs for the preparation and attendance at the initial

examination. At paragraph 25, Master Muir noted that *"…objections and interruptions in examinations for discovery are to be discouraged, except in the clearest circumstances, as they often do no more than prolong the inevitable, and waste discovery and, eventually, court time*".

Master Muir held that given the allegations of negligence, the issue of training was an appropriate avenue to pursue on discovery. At paragraph 36, Master Muir stated that "*…hypothetical questions designed to elicit an opinion relevant to some issue in the case from an expert witness are permissible providing they go to that witnesses' conduct and competence and with the caveat that they must not be too broad or vague".* Given the allegations of professional negligence, Master Muir held that the questions directed to the defendant's opinion as to his professional conduct or competence and hypothetical questions related to his own obligations and actions were acceptable, but hypothetical questions about the actions of the other defendant were not acceptable.

Master Muir granted additional time for the examination for discovery but declined to order that the defendant "answer all proper questions" as that type of order was not necessary. Master Muir did not consider the actions of counsel sufficient to award special costs for the preparation and attendance of the initial examination.

## F. Notice of Applications

### a. *Anonson v. Insurance of British Columbia*, 2020 BCSC 2039, Master Harper

The court declined to award a party their costs of an application because they had breached *Rule 8-1(14)* which limits a notice of application and application response to a maximum of ten pages saying at paragraph 25:

> [25] The fact that experienced counsel are unaware of that rule causes me concern. In particular, as we move forward in hearing applications remotely by various means, whether it is videoconferencing or telephone, where materials are emailed or filed electronically, it makes it extraordinarily difficult for the court to access all of the evidence that is required, which makes it even more important that materials are drafted in a succinct manner. If it is impossible to keep a notice of application to ten pages, that indicates to me that the application should be set for more than two hours, which then permits written submissions to be exchanged.

## G. Notice of Discontinuance

### a. *DLC Holdings Corp. v. Payne*, 2021 BCCA 31, per Grauer J.A. (Groberman and Harris JJ.A. concurring)

At 4:42 p.m. on the day before the defendants' summary dismissal application, plaintiff's counsel sent an email advising that the plaintiff would be discontinuing its action and attached an unfiled notice of discontinuance with the advice that it would be filed first thing in the morning. The defendants responded, advising that they would proceed the next day and seek an order that the notice of discontinuance would stand as a complete defence to any future proceedings commenced by the plaintiff against the defendants and for special costs. The defendants were successful. The plaintiff appealed. The appeal was allowed and the orders set aside.

Once a plaintiff wholly discontinues its action without leave pursuant to *Rule 9-8(1)* of the *Supreme Court Civil Rules*, there is no jurisdiction to make any order in a discontinued action; the court can only set aside the notice of discontinuance in an exercise of its inherent jurisdiction. Once the plaintiff's notice of discontinuance was filed, the proceeding no longer existed. Neither *Rule 9-8(8)* nor *Rule 14-1(b)* provided the court with any jurisdiction to depart from the default proceedings set out in those rules where an action was discontinued as of right. The chambers judge had no jurisdiction to make the orders.

## H. Summary Trial

### a. *Ferrer v. 589557 B.C. Ltd.,* 2020 BCCA 83, per Groberman J.A. (MacKenzie and Stromberg-Stein JJ.A. concurring)

The court provides a helpful review of factors to determine whether a summary trial pursuant to *Rule 9-7* of the *Supreme Court Civil Rules* is appropriate. The cases suitable for summary trial are not limited to those exhibiting extraordinary, exceptional, or compelling reasons for severance. One of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues.

## I. Surveillance

### a. *Cavouras v. Moscrop*, 2019 BCSC 1762, Master Muir

An order was made following a TMC (and after written submissions on the issues) shortly prior to trial preventing the defendant from being able to use any surveillance at trial. The defendant's TMC brief did not list any witnesses associated with the surveillance and the defendant only provided an amended list of documents after the TMC which referenced investigation reports but no video. The defendant had failed to properly list the video surveillance that had been produced two years earlier. There must be proper disclosure of surveillance prior to the TMC if it is to be used at trial. This allows the court at a TMC to address whether there needs to be earlier disclosure of the surveillance in the interests of justice so that the plaintiff can review the surveillance with their experts and witnesses. Further, it is necessary from the trial management perspective that the time needed for the testimony is set aside and to address any special technological needs are addressed.

### b. *Williams v. Sekhon*, 2019 BCSC 1511, Voith J.

The plaintiff sought special costs against the defendant for a "troublesome" amount of surveillance conducted by ICBC. The court declined to award special costs but provided guidance regarding what is a proper or, alternatively, an unreasonable and intrusive level of investigation as follows:

- The object of an investigation should be limited to ascertaining whether the plaintiff's claim is forthright and reasonable. Its purpose must be fact-finding in nature and it cannot be to intimidate or embarrass a plaintiff.

- The investigation should be proportionate to the magnitude and nature of the claim being advanced including the size of the claim and the activities that are impacted by the injuries.
- There must be "discretion and common sense" used "regarding the amount of information gathered". For example, if there is a loss of earnings capacity it is appropriate speak to the plaintiff's employer or former employers and to a few past or present co-workers. If such enquiries support some reason for concern, further investigation may be appropriate.
- It is not appropriate to repeatedly speak to an employer or to an unreasonable number of a plaintiff's co-workers. This could be seen as intimidation. It could also cast a plaintiff in a poor light with others, as someone who is not honest or who is malingering. This is true with respect to interviews with a plaintiff's friends or acquaintances.
- It is appropriate for ICBC to conduct "Open Source Investigation" such as public internet and social media searches of the plaintiff or their immediate family, friends or media sites that relate to the plaintiff's activities. This investigation should never breach any social media privacy settings. This could include searches of other public information sources such as the Land Title Office or motor vehicle searches.
- It is appropriate for surreptitious surveillance to be undertaken to ascertain the plaintiff's actual or observed level of function and activity. However, if the investigator becomes aware that their presences is known, further surveillance should not persist if it could be taken as intended to communicate to a plaintiff that he or she is being watched or followed and cause a plaintiff to feel harassed.
- It is appropriate for there to be investigation through witness interviews. This is the form of investigation "most fraught with risk". The plaintiff will likely learn that friends and colleagues are being contacted about them. Such interviews can affect a third-party's perception of a plaintiff. A plaintiff's awareness that he or she is being investigated, particularly where that plaintiff is emotionally fragile or anxious or depressed can be particularly distressing. Accordingly, judgment and discretion must be exercised by the investigator.
- A witness should feel free to decline to speak to the investigator and the witness should never be harassed in any way.
- If information from two or three individuals is generally consistent, it is probably unnecessary to contact further witnesses on that issue. Generally speaking the investigator should make efforts to contact some witnesses and then wait for them to get back to him rather than contacting a great number of witnesses in the space of a few days. Investigations ought to be done in the "least obtrusive way possible".
- Generally, attending unannounced at a witness' home is more intrusive and more invasive than an attempt to reach them first by phone. Even if done politely it has the air of being more aggressive.
- The investigator should never mispresent who they are or the purpose of their enquiries.

## J. Third Party Notices

### a. *Sohal v. Lezama*, 2021 BCCA 40, Grauer J.A. ( Saunders and DeWitt-Van Oosten, JJ.A. concurring)

The defendants in a motor vehicle accident claim applied for leave to file third party notices claiming contribution and indemnity from the defendant driver's employer. The master granted leave, and the proposed third parties appealed. Kent J. allowed the appeal and set aside the order on the basis that the claims for contribution and indemnity were time-barred by application of sections 6(1) and 22(2) of the new *Limitation Act*, SBC 2012, c.13 ("the new Act").

The appellants argued that the judge erred in interpreting the transition provisions of the new Act in finding that the transition provisions of the new Act applied. The appellants argued that the old *Limitation Act*, RSBC 1979, c 266 (the "Act") should apply, such that the proposed third party claims were not time-barred.

The appellants also argued that if the new Act applies, the judge erred in his interpretation of section 22(2) which they asserted, properly interpreted, does not apply to a claim for contribution or indemnity brought by way of third party notice as opposed to a separate action.

In dismissing the appeal, Grauer J.A. held that the appellants' third party claims were time-barred under the new Act. The court found that the judge interpreted and applied section 22(2) correctly and that the wording of the provision and principles of statutory interpretation supported the judge's conclusion that section 22 of the new Act does not permit proceedings for contribution or indemnity to be brought by way of third party notice or counterclaim after the applicable limitation period has expired. The court also held that it follows that the master had no discretion to grant the appellants leave to file third party notices.

At paragraphs 15 to 16 Grauer J.A. states that the new Act changed the starting point for the running of time by doing away with the relevance of cause of action accrual. Instead, by section 6(1) it starts the running of time from when a claim is discovered. Section 16 of the new Act expressly deals with claims for contribution and indemnity by specifying when such claims are deemed to be discovered, being the later of the following:

a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;

b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.

At paragraph 18, Grauer J.A. states that "[i]t follows from section 16 that a claim for contribution will generally be discovered, and time will begin to run, long before a cause of action for contribution accrues (which is when the party seeking to assert it is found liable to another party, and when time would have begun to run under the old Act).

The court also held that a claim for contribution and indemnity in an ongoing action does not fall under the definition of a "pre-existing claim" within the transitional provisions in section 30 of the new Act. This is because the "act or omission" on which the claim for contribution is based

is distinct from "act or omission" that gives rise to the underlying tort claim. The court found that the new Act applied, and, on the facts, the applicable limitation period had expired.

Grauer, J.A. also held that as the judge properly concluded, a third party claim for contribution constitutes a "court proceeding" under the new Act.

## K. Trial Management Conferences

### a. *Diaz v. Nowack*, 2020 BCSC 112, Choi J.

The plaintiff sought an order to prohibit the defendants from calling five witnesses, to exclude new witnesses except by court order and to prohibit the defendants from tendering documents into evidence on the first day of a ten day trial. The witnesses were not identified on the defence witness list nor were their "will say" statements provided by the deadline ordered at a TMC. The subject documents were not produced on any lists until the day before the trial. The trial was ordered adjourned with costs thrown away payable forthwith to the plaintiff. An adjournment was necessary because excluding the evidence might have prevented determination of the issues on the merits and the proposed evidence might have been important to fact-finding process. However, the plaintiff would have been prejudiced if the witnesses were allowed to testify because she did not have adequate time to prepare. At paragraph 8, the court commented:

> The defendants chose only to commence witness preparation at the last minute, only days before the TMC order deadline. This is a practice that deserves sanction and rebuke. Trial management conferences, the orders made there, and the deadlines set out in the *Supreme Court Civil Rules* are all designed to provide parties with time to prepare and to consider the strengths and weaknesses of their case, so a trial can proceed in an efficient manner.

## XXIII. Privacy

### a. *Universe v. Fraser Health Authority,* 2019 BCCA 234, per Butler J.A. (Smith D. and Harris JJ.A. concurring)

This is an appeal of an order made by a chambers judge striking the plaintiff's claim against counsel for the defendants. The plaintiff brought an action against the Fraser Health Authority and other individuals alleging that he was mistreated and assaulted by hospital staff while seeking treatment at the emergency ward of Burnaby General Hospital. Counsel for the defendants filed a response and served a list of documents on the plaintiff which listed the plaintiff's medical records covering a period of five years. Upon receipt of the list of documents, the plaintiff commenced an action against the lawyers alleging they had breached the *Privacy Act* and the *Legal Profession Act*, and committed the tort of intentional infliction of harm in preparing and serving the list of documents. He alleges that the lawyers wrongfully accessed his records without consent and without a court order. The lawyers did not file a response and instead brought an application to strike the plaintiff's claim for disclosing no reasonable cause of action. The chambers judge ordered that the action be struck against the lawyers. In the reasons for judgement, the chambers judge agreed that the medical records are "fundamentally private and contain important personal information" (at para. 6) and he declined to rule on whether they

were relevant. However, he concluded that the pleadings did not give rise to a cause of action. The list of documents was produced in the course of litigation pursuant to the *Supreme Court Civil Rules* and therefore did not constitute a breach of the *Privacy Act*. Further, the records were protected by the implied undertaking and thus the plaintiff's confidentiality was protected as they could only be used for the purpose of litigation.

The plaintiff appealed the judgment and claimed that the listed records were confidential and privileged and that most were not relevant. The appeal was dismissed. The standard of review to be applied to whether a pleading discloses no reasonable cause of action or has no reasonable prospect of success is one of correctness. It is a question of law and no deference is accorded to the chambers judge. Butler J.A. stated that the health care providers the plaintiff had sued were entitled to legal advice and their counsel was entitled to access the information relevant to the claim. The plaintiff had implicitly waived his right to privacy regarding medical records by commencing an action against his health care providers in relation to his medical care. Butler J.A. concluded that "the waiver of privilege is necessary to allow the defendant to make a full and complete defence" (at para. 12).

Butler J.A. further held that none of the plaintiff's claims had a reasonable chance of success: the lawyers did not breach the *Privacy Act* in obtaining and listing the medical records as they did so in the course of litigation and they were authorized by the *Rules*; the pleadings did not establish the elements of the tort of intentional infliction of harm as the actions the lawyers took were required steps in the litigation process and could not be considered flagrant, outrageous or calculated to produce harm; and the plaintiff's claim relating to the *Legal Profession Act* did not have any application to the claim alleged in the pleadings.

## XXIV. Unidentified Vehicles

### a. *Cook v. Kang*, 2020 BCSC 526, Riley J.

The plaintiff brought an action for damages suffered in four separate motor vehicle accidents. Liability was admitted for accidents 1, 3 and 4. The second accident was caused by an unidentified driver and the plaintiff commenced an action against ICBC as a nominal defendant. The court held that the plaintiff failed to make "all reasonable efforts" to ascertain the identity of the driver and owner of the other vehicle in the second accident as required by s. 24(5) of the *Insurance (Vehicle) Act*. The action against ICBC in the second accident was dismissed.

The second accident occurred when the plaintiff was making a left turn on an advance green arrow and collided with a red car that entered the intersection on a red light. Following the collision, the plaintiff exited his vehicle and spoke to the driver of the vehicle behind him, obtaining her name and phone number. The red car was on the opposite side of the road separated by a lane of traffic. The plaintiff did not feel it was safe to approach the red car as traffic was moving. The plaintiff returned to his vehicle with the intention of moving it out of the intersection. He drove his vehicle around the corner and up half a block, parking in a restaurant parking lot. When he attempted to locate the red car he found it had left. The plaintiff immediately called 9-1-1 and reported the incident.

It was established that both the plaintiff and the driver of the red car remained at the scene for more than a few minutes. There was evidence that a few by-standers interacted with the occupants of the red car at the scene, likely while the plaintiff was speaking to the driver of the vehicle behind him. The court accepted the plaintiff's evidence that he could not see the red car's license plate from where he was standing nor could he have safely positioned himself to view it. It was also established that the red car did not leave the scene of the collision until after the plaintiff drove away from the intersection and the plaintiff did not gesture or signal to the driver of the red car his intention to move his vehicle. In the aftermath of the second accident, the plaintiff attempted to locate the driver of the red car by arranging through his lawyer to post signs near the scene of the accident seeking witnesses.

The court accepted that the plaintiff acted honestly and had a genuine interest identifying the driver of the red car. However, the court did not find that the plaintiff acted reasonably: "the fact remains that [the plaintiff] left the scene without any apparent effort to communicate his intention to the other party" (at para. 184). The plaintiff's actions may have led the other driver to believe that the plaintiff did not intend to remain at the scene and in doing so, the plaintiff failed to meet the standard of what was reasonable in the circumstances. It was accepted that the plaintiff acted reasonably with respect to the steps he took after the red car left the scene of the accident. However, the plaintiff failed to discharge the burden imposed on him under s. 24(5) of the *Insurance (Vehicle) Act* and the action was dismissed.

### b. *Gorst v. British Columbia (Public Safety and Solicitor General)*, 2020 BCSC 813, Hori J.

This liability trial concerned a group of approximately 200 Hells Angels bikers riding in a pack on the highway while taking part in an annual event known as a "poker run". The plaintiff alleged that one of the Hells Angels bikers crossed into his lane of travel requiring him to take evasive action and resulted in him dropping his motorcycle and sustaining injuries. ICBC was named as a defendant pursuant to s. 24 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. ICBC argued that the plaintiff's efforts to identify the unknown Hells Angels biker were insufficient to satisfy the obligations under s. 24. The plaintiff testified that if the Hells Angels had not been involved, he would have done more to investigate the identity of the biker. Instead he relied on the RCMP and the Independent Investigations Office of British Columbia ("IIO") to investigate. Hori J. found that the plaintiff failed to make all reasonable efforts to ascertain the identity of the owner and driver of the motorbike following the accident. The plaintiff's claim that he feared retribution from the Hells Angels was not found to be compelling. There was no evidence led that making inquiries of the Hells Angels about one of their members being involved in a motor vehicle accident would lead to retribution. More importantly, the plaintiff did not follow up with the RCMP or the IIO to determine the status of their investigation and this was a minimum step that should have been taken. The plaintiff's action against ICBC was dismissed.

## XXV. Waivers

### a. *Apps v. Grouse Mountain Resorts Ltd.*, 2020 BCCA 78, per Grauer J.A. (Saunders and Fitch JJ.A. concurring)

The plaintiff sought compensation for a catastrophic injury he suffered while snowboarding at the defendant's terrain park. The plaintiff was from Australia and had moved to Canada only four months before the injury. The trial judge dismissed the plaintiff's claim summarily on the grounds that the exclusion of liability waiver was a complete defence. The waiver at issue contained a clause excluding liability for injuries arising out of the provider's own negligence. The trial judge correctly found that this is one of the more onerous exclusions and, therefore, requires significant notice. The issues under appeal were whether the trial judge was entitled to take into account notices posted after the purchase of the ticket and whether the trial judge was correct in taking into account the appellant's past experience on other ski hills.

The court of appeal set aside the dismissal on both grounds of appeal. On the first ground, the court of appeal found that the trial judge was not entitled to consider a notice posted at the terrain park when determining whether reasonable notice had been given of the contractual exclusion clause. Only notice given prior to or concurrent with the purchase of the ticket is relevant. On the second ground, the court of appeal held that the plaintiff's past experience with a different ski hill cannot be considered in determining whether he had reasonable notice of the exclusion clause. The court left open the possibility that it may apply where a plaintiff knows that such terms are standard and expected, but that did not apply in this case with the plaintiff's short time in Canada and experience at only two ski hills.

The trial judge erred by conflating two questions: the knowledge of risk and awareness of the exclusion clause. The court pointed out that notice at the terrain park as well as the plaintiff's previous experience is relevant to the question of whether the plaintiff had knowledge of the risks associated with the activity, but this was not a question before the court.

## XXVI. Wrongful Detention

### a. *Joseph v. Meier*, 2020 BCSC 778, Brown B.J. J.

The plaintiff brought an action against a police officer and the federal Attorney General for damages suffered as the result of false imprisonment, false arrest, and assault and battery. The plaintiff's action was allowed and she was awarded $50,000 in general damages. The plaintiff, who was 61 years old and used a walker for mobility, was shopping in a retail store when a young woman with whom she was speaking was caught by the store manager for shoplifting. The young woman fled and the manager assumed the she and the plaintiff were together. The manager called the police who attended at the store. After the plaintiff completed her purchases, the defendant officer tried to speak with the plaintiff. She refused to stop or provide information to him saying that she had done nothing wrong. The defendant called for backup and then attempted to put the plaintiff in handcuffs. He advised her that she was under arrest for theft. When she resisted, the defendant forced the plaintiff to the ground and a struggle ensued resulting in the plaintiff's injuries. The defendant backed off and when his partner arrived the

plaintiff's belongings were searched. They did not find stolen merchandise and the plaintiff was released.

The court found that the defendant did not have reasonable grounds for arresting the plaintiff as he did not pursue any inquiries to determine whether there were grounds, and he was acting on the store manager's mere suspicion of theft. The court further held that the defendant used more force than was necessary given the plaintiff's age and the fact that it was obvious she had limited mobility. The plaintiff was awarded damages for bruises and abrasions, soft tissue complaints, and headaches, many of which were aggravations of her pre-existing chronic pain and anxiety, arising from false imprisonment, false arrest, and assault and battery. The incident had significantly impacted the plaintiff both psychologically and physically by aggravating her chronic pain. The court found that although the defendant acted improperly, his actions were not malicious or high-handed so as to warrant aggravated or punitive damages.

## XXVII. Legislation

### A. *Evidence Act*, R.S.B.C. 1996, c. 124

Section 12.1 introduced limitations on expert evidence in vehicle injury proceedings:

(2) Except as provided under this section or the regulations,

(a) a party to a vehicle injury proceeding, other than a fast track vehicle injury proceeding, must not tender the following at trial:

(i) expert evidence on the issue of vehicle injury damages, of more than 3 experts;

(ii) more than one report on the issue of vehicle injury damages from each expert to in subparagraph (i),

(b) a party to a fast track vehicle injury proceeding must not tender the following at trial:

(i) expert evidence on the issue of vehicle injury damages, of more than one expert;

(ii) more than one report on the issue of vehicle injury damages from the expert referred to in subparagraph (i), and

(c) the court must not allow a party to tender expert evidence at the trial of a vehicle injury proceeding if doing so would result in exceeding the limits set out in this subsection.

(3) Despite subsection (2), if the parties to a vehicle injury proceeding appoint a joint expert, a party may tender at trial the expert evidence of that joint expert.

(4) With the consent of all other parties to a vehicle injury proceeding, a party may tender at trial

(a) expert evidence of one or more additional experts, despite the limit set out in subsection (2) (a) (i) or (b) (i), or

(b) one or more additional reports from an expert referred to in subsection (2) (a) (i) or (b) (i) or paragraph (a) of this subsection, despite the limit set out in subsection (2) (a) (ii) or (b) (ii), as applicable.

(5) On application by a party to a vehicle injury proceeding, the court may, if satisfied that the conditions set out in subsection (6) are met, grant leave to

(a) allow expert evidence of one or more additional experts to be tendered, despite the limit set out in subsection (2) (a) (i) or (b) (i), or

(b) allow the party to tender as evidence one or more additional reports from an expert referred to in subsection (2) (a) (i) or (b) (i), (4) (a) or paragraph (a) of this subsection, despite the limit set out in subsection (2) (a) (ii) or (b) (ii), as applicable.

(6) The following are the conditions for the purposes of subsection (5):

(a) the subject matter of the additional evidence to be tendered is not already addressed by expert evidence of the party making the application as permitted under subsection (2) or (4);

(b) without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.

(7) In an application under subsection (5), a party must include the following:

(a) the name of each expert whose evidence the party intends to tender at trial;

(b) the scope of expertise of each expert whose evidence the party intends to tender at trial;

(c) records that support the need for the additional evidence.

(8) Nothing in this section limits any authority of the court to appoint the court's own experts on the court's own initiative.

Section 12.2 outlines exceptions and states that the limits in 12.1 do not apply to:

(a) a report of an expert in respect of vehicle injury damages if the report was served

(i)before February 6, 2020, and

(ii)in accordance with all applicable rules of the Supreme Court Civil Rules;

(b) an action for which

(i) a notice of trial was filed and served before February 6, 2020, and

(ii) the trial date set out in the notice of trial, filed in relation to the vehicle injury proceeding, is before October 1, 2020.

Regulations limiting disbursements must not:

(a) limit the disbursements payable to a party for amounts that the party necessarily or properly incurred before February 6, 2020 for reports from experts in respect of vehicle injury damages;

(b) limit disbursements payable in respect of a vehicle injury proceeding if

(i) the notice of trial was filed and served before February 6, 2020, and

(ii) the trial date set out in the notice of trial, filed in relation to the vehicle injury proceeding, is before October 1, 2020.

## B. Evidence Act Disbursements and Expert Evidence Regulation B.C. Reg. 31/2021

Exemptions for certain expert evidence

**3** (1) In this section, "responding report" means a report served under Rule 11-6 (4) of the Supreme Court Civil Rules.

(2) The limits in relation to expert evidence set out in section 12.1 (2) of the Act do not apply to an expert or expert's responding report if a party serves the responding report to respond to a report that was served on the party within 126 days before the scheduled trial date for the vehicle injury proceeding.

(3) The limit in relation to reports from experts set out in section 12.1 (2) (a) (ii) or (b) (ii) of the Act does not apply to a supplementary report referred to in Rule 11-6 (5) or (6) of the Supreme Court Civil Rules.

**Disbursements allowed for expert reports in vehicle injury proceedings**

**4** (1) Subject to subsection (3) and section 5, only the following amounts may be allowed or awarded to a party in a vehicle injury proceeding, other than a fast track vehicle injury proceeding, as disbursements for reports from experts on the issue of vehicle injury damages:

(a) the amount incurred by the party for up to 3 reports, whether or not the reports were tendered at trial, provided that

(i) each report was served in accordance with all applicable rules of the Supreme Court Civil Rules, and

(ii) each report was prepared by a different expert;

(b) the amount incurred by the party for any of the following reports, provided the report was served in accordance with all applicable rules of the Supreme Court Civil Rules:

(i) a report referred to in section 3 (1) or (2) of this regulation;

(ii) a report allowed under section 12.1 (3), (4) or (5) of the Act;

(c) the amount incurred by the party for a report prepared by an expert appointed by the court on the court's own initiative under Rule 11-5 (1) of the Supreme Court Civil Rules.

(2) Subject to subsection (3) and section 5, only the following amounts may be allowed or awarded to a party in a fast track vehicle injury proceeding as disbursements for reports from experts on the issue of vehicle injury damages:

(a) the amount incurred by the party for one report, whether or not the report was tendered at trial, provided that the report was served in accordance with all applicable rules of the Supreme Court Civil Rules;

(b) the amount incurred by the party for a report referred to in subsection (1) (b);

(c) the amount incurred by the party for a report referred to in subsection (1) (c).

(3) The limits set out in subsections (1) and (2) do not apply

(a) to amounts that were necessarily or properly incurred before February 6, 2020 for a report from an expert, or

(b) to a vehicle injury proceeding if

(i) a notice of trial was filed and served before February 6, 2020, and

(ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding was before October 1, 2020.

**Limits on amount of disbursements**

**5** (1) In this section:

"disbursement limit" means, in relation to a vehicle injury proceeding,

(a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or

(b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;

"excluded disbursements" means the following:

(a) fees payable to the Crown under the Supreme Court Civil Rules;

(b) fees payable to the sheriff for non-refundable deposits in civil jury trials under the Supreme Court Civil Rules;

(c) disbursements incurred by a party if the court ordered the costs of the proceeding to be paid as special costs;

(d) disbursements incurred for an expert report on the issue of liability, if the court ordered that those expenses are excluded disbursements.

(2) Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:

(a) disbursements up to the disbursement limit;

(b) excluded disbursements.

(3)The limits set out in subsection (2) do not apply

(a) to a vehicle injury proceeding if

(i) a notice of trial was filed and served before August 12, 2020, and

(ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is before June 1, 2021, or

(b) to a vehicle injury proceeding if

(i) a notice of trial was filed and served before August 12, 2020,

(ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is on or after June 1, 2021, and

(iii) the court is satisfied that the party necessarily or properly incurred disbursements before August 12, 2020 in excess of the disbursement limit.

## C. *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231

Various amendments were made to the *Insurance (Vehicle) Act* by Bill 11 which received Royal Assent on August 14, 2020.

(1) Part 9 added Pre-Litigation Payments which may be made to a person who has a right of action against an insured or ICBC.

Sections 108 – 112 permits ICBC to make a payment, not to exceed its reasonable assessment of the value of the amount that the person could recover in the action. It must be in writing and contain a statement that the offer is made under this part. The offer or payment can only be made if ICBC is satisfied that the person has not commenced an action against the insured or ICBC. A pre-litigation payment is not an admission of liability, including for the purposes of the *Limitation Act*, and does not prejudice the rights of the insured or ICBC. Reference to a Pre-Litigation Payment must not be made until the court or jury assesses damages. After such an assessment, it must be disclosed to the court, the court must deduct the amount of the payment from the award of damages, and an order must be made or judgement entered for the difference only. If the difference is negative, the court must not make an order for the payment of damages, and ICBC is not entitled to repayment of the difference. The determination of whether a party is entitled to costs and the assessment of those costs must be based on the assessment of the award of damages and not the difference determined for the final entered order.

(2) Part 10 added Enhanced Accident Benefits and Limits on Actions and proceedings.

Under this part s. 115 states that a person has no right of action and must not commence or maintain proceedings respecting bodily injury caused by a vehicle arising out of an accident, and no action or proceeding may be commenced or maintained respecting bodily injury caused by a vehicle arising out of an accident. Exceptions apply in section 116(2) allowing actions against vehicle manufactures, businesses engaged in the sale of vehicles, makers or suppliers of vehicle parts respecting such business activities, garage service operators, licensees under the *Liquor Control and Licencing Act, and* persons convicted of prescribed *Criminal Code* offences.

(3) Part 11 outlines Basic Vehicle Damage Coverage and Limits on Actions and Proceedings

***Enhanced Accident Benefits Regulation B.C.*** **REG. 117/2021**

This Regulation outlines the new and extended coverage provided as accident benefits under the *Insurance (Vehicle) Act*. It includes Consumer Price Index adjustments, exclusions, notification process, entitlement requirements, health care, rehabilitation and related benefits, recreation benefit, caregiver benefits, death benefits, benefits for catastrophic injuries, expenses for volunteers, and claims and dispute procedures.

***Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation*** **B.C. REG. 117/2021**

This Regulation contains the new entitlements to income replacement benefits under the *Insurance (Vehicle) Act,* including a benefit for students and minors.

***Permanent Impairment Regulation*** **B.C. REG. 117/2021**

This regulation addresses benefits for compensation for permanent impairment for both catastrophic and non-catastrophic injuries.

## D. Policy on Use of Electronic Devices in Courtrooms amended May 18, 2021

This policy sets out the permitted and prohibited use of electronic devices in courtrooms of the Court of Appeal, the Supreme Court and the Provincial Court of British Columbia.

> Prohibitions on the Use of Electronic Devices
>
> 3. In addition, an electronic device may not be used in a courtroom:
>
> > e. to audio record or digitally transcribe the proceedings, including making a transcript using video conference software, except as permitted by this policy.

## E. Practice Direction PD- 59 Forms of Address for Parties and Counsel in Proceedings in Supreme Court effective December 21, 2020

This Practice Direction clarifies how parties and/or counsel can advise the Court, other parties, and counsel of their pronouns and form of address.

1. At the beginning of any in-person or virtual proceeding when parties or counsel are introducing themselves, their client, a witness, or another person, they should provide the judge or justice with each person's name, title (e.g. "Mr./Ms./Mx./Counsel Jones") and the correct pronouns to be used in the proceeding.
2. If a party or counsel do not provide this information in their introduction, they will be prompted by a court clerk to provide this information.