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2022 Update on Case Law

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2022 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 on June 18, 2021. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Affidavits

A. Cross-Examination on Affidavits

a. *Stephens v. Altria Group, Inc., 2021 BCCA 396*, per Fenlon J.A. (Fitch and Griffin JJ.A. concurring)

The court of appeal upheld a case management judge's order that there be cross-examination on two affidavits filed in an application addressing a jurisdictional issue in a class proceeding. In doing so, the court clarified that there need not be a conflict in the affidavit evidence.

The court of appeal confirmed that the test for ordering cross-examination on an affidavit is whether there are conflicting material facts, which may be grounded in the pleadings in addition to affidavit evidence. Whether there are "material facts in issue" is not synonymous with "a conflict in the affidavit evidence." The factors to be considered by the judge exercising their discretion remains the same (i.e., are there conflicting material facts), but their application "must be sensitive to the context in which the application is brought."

III. Appeals

a. *Escape 101 Ventures v. March of Dimes,* 2021 BCCA 313, per DeWitt-Van Oosten J.A. (In Chambers)

The appellant sought leave to appeal an arbitral award, alleging extricable errors of law. Leave to appeal was granted but limited to the arbitrator's resolution of the parties' dispute over the interpretation and application of "Earnout" provisions in an asset purchase agreement. The Earnout condition required the respondent to pay the appellant 10% of gross revenue earned over a five year period running from the date of the agreement. Paragraphs 19-23 provide a summary of the test and legal principles. At paragraph 19, the court states that section 59(4) of the *Arbitration Act* provides that leave to appeal may be granted if the court determines that:

a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

b) the point of law is of importance to some class or body of persons of which the appellant is a member, or

c) the point of law is of general or public importance.

At paragraph 20, the court confirms that as contractual interpretation involves questions of mixed fact and law, an arbitral award that is dependent on contractual interpretation is appealable under the *Arbitration Act* only where the applicant for leave identifies an extricable question of law. Paragraph 21 indicates that the application of an incorrect legal principle by an arbitrator, a failure to consider an element of a legal test, or a failure to consider a relevant factor will generally meet the test for an extricable question of law.

A question of law may also arise where an arbitrator has forgotten, ignored or misconceived evidence and that error is shown to have affected the result of the arbitration. However, at paragraph 22 the court states that

> [e]ven where an applicant for leave is able to identify an error of law, a court should consider the reasons of the arbitrator as a whole in assessing that error and deny leave to appeal unless satisfied that the error was material to the result and has arguable merit.

The court also states that there is reluctance to grant leave on an issue that was not before the arbitrator. The court held that the arbitrator's rejection of the appellant's position regarding the Earnout payment failed to appreciate, overlooked, or ignored information in the appellant's statement.

The court found that the interpretation of the Earnout provision carried significant financial implications so the importance of the result of the arbitration to the appellant justified the intervention of the court, and the determination of the point of law may prevent a miscarriage of justice.

b. *Ledwon v. Baines,* 2021 BCCA 239, per Saunders J.A. (Frankel and DeWitt-Van Oosten JJ.A. concurring)

The appellant appealed the damages award for personal injuries suffered in a motor vehicle accident that occurred in June 2012 seeking to adduce fresh evidence (evidence that existed before the trial judgment but was not adduced) and new evidence (evidence that relates to events that occurred subsequent to the trial judgment). At the time of the accident, the appellant had been receiving disability benefits in relation to injuries from a prior accident that occurred in 1982, although benefits were not started until 2002. The appellant had moved to Ontario, practiced law until 1997 when she was found incapable of practicing law because of mental illness, but the Law Society of Ontario left open the possibility of reinstatement. The appellant moved back to British Columbia in 1998. On appeal, the appellant argued that the judge erred in assessing her past wage loss by failing to reflect a change to the disability benefits program of British Columbia by which she could have earned around $10,000 per annum without being disqualified from her disability benefits. The appellant argued that this was an increase in her earning capacity such that the judge ought to have awarded an increased amount of $10,000 per

year for seven years, less her actual earnings. The court of appeal found no error in failing to find that but for the accident the appellant would have earned up to $10,000 a year from employment.

The appellant sought to have her 2017 income tax assessment and additional housekeeping receipts admitted as fresh evidence. The court confirmed the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 ("*Palmer*") which states that fresh evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, the evidence must be relevant, the evidence must be credible, and must be reasonably expected to have affected the result at trial. The court held that the 2017 income tax return could have, with due diligence, been adduced at trial and that it would not have affected the result at trial as the judge had the appellant's T1 form, so the fresh evidence was not admitted.

The appellant also sought to adduce documents regarding her reinstatement application to the Law Society of Ontario and transfer to the Law Society of British Columbia and the court found those were new evidence. At paragraph 51, the court held that the *Palmer* test does not fully apply to new evidence as the criterion of due diligence is inapplicable. At paragraph 53 the court states that *"[a]dmission of new evidence is a rare event, more rare than admission of fresh evidence."* The appellant's reinstatement documents were not admitted as new evidence as it fell short of "*meeting the high bar of being likely to affect the trial result"* regarding the appellant's future earnings. The appellant argued that as the judge awarded future care of counseling for five years it was an error not to award any future loss of earning capacity, but this ground of appeal was also dismissed as there was no established connection between the need for psychological counsel and vocational disability arising from the accident. The appeal was allowed only with respect to the limited extent of adding a term in favour of providing court order interest on the pecuniary damages.

IV. Assault

a. *Ahluwalia v. Ahluwalia,* 2022 ONSC 1303, Mandhane J.

The parties were married in 1999 and separated in 2016, with two children. The marriage was full of family violence and in September 2021 the respondent father was charged with two counts of assault against the applicant mother and one count of uttering death threats, which related to events during the marriage. The applicant sought damages and the court awarded $150,000 in compensatory, aggravated, and punitive damages for the tort of family violence. At paragraphs 41-42, the court found that when deciding whether the court should consider the applicant's tort claim as part of the family law proceedings, the judge noted "*…that the Divorce Act creates a complete statutory scheme when it comes to resolving family issues post-separation and the court must be careful not to arm family law litigants to overly complicate litigation."* However, the court found that the *Divorce Act* does not address all legal issues that arise in a situation of alleged family violence. Spousal support is compensatory not punitive, and the *Divorce Act* does not provide a direct avenue for a "victim/survivor" to obtain reparations for harms that flow directly from family violence. At paragraph 46 the court states that "*[i]n unusual cases like this one, where there is a long-term pattern of violence, coercion, and control, only an award in tort can properly compensate for the true harms and financial barriers associated with family violence."*

To establish the tort of family violence (see paragraph 52), a plaintiff must establish conduct by a family member towards the plaintiff, within the context of a family relationship, that:

1. is violent or threatening, or
2. constitutes a pattern of coercive and controlling behaviour, or
3. causes the plaintiff to fear for their own safety or that of another person.

The court held that as family violence is relevant to the issue of parenting, allowing a family law litigant to pursue damages for family violence is a matter of access to justice. At paragraph 54 the judge noted that existing torts do not fully capture the cumulative harm associated with the pattern of coercion and control which is at the heart of these cases.

b. *Schuetze v. Pyper,* 2021 BCSC 2209, Fleming J.

The plaintiff and defendant were separated spouses, both seeking damages from one another based on the intentional tort of battery, commonly understood as assault. Both parties alleged a violent incident occurred in the presence of their two young children. The court held that the critical issue in determining liability was the credibility of the parties' testimony. At paragraph 338, the court reviewed the factors to consider when assessing credibility as identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para.186, aff'd 2012 BCCA 296 as follows:

- the capacity and opportunity of the witness to observe the events at issue;
- the witness's ability to remember those events;
- the ability of the witness to resist being influenced by their interest in recalling those events;
- inconsistency in the witness's evidence;
- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- the witness's demeanor, meaning the way they presented while testifying.

The court found the plaintiff to be credible and that her evidence regarding her injuries and the assault harmonized with other evidence. The court found that the defendant presented quite well in some ways but found it difficult to reconcile his "*remarkably relaxed appearance*" on the witness stand with his alleged experience and circumstances discussed during his testimony. In addition, the defendant never displayed feelings of empathy for his children in relation to their exposure to the violent incident. The court also placed considerable weight on the defendant's guilty plea and the inconsistencies between an agreed statement of facts in the criminal matter and his evidence at trial.

The court accepted that the plaintiff suffered a concussion/mild traumatic brain injury and PTSD and that her psychological and emotional suffering had been profound. The court found the plaintiff's expert evidence was "*… consistent, uncontradicted and persuasive."* The court held that the plaintiff had proven a real and substantial possibility of a future event leading to a loss of income by reason of her injuries, but that she may be able to return to full time work as a

developmental director for a gaming company in the future if her symptoms improved substantially. The plaintiff was awarded damages of $795,029.68, based on $100,000 for non-pecuniary damages, $22,271.45 for future cost of care, $239,485 for past loss of earning capacity, $425,000 for future loss of earning capacity, and $8,273.23 special damages. The court did not award punitive damages on the basis that the very significant damages awards were sufficient to accomplish the objectives of denunciation, deterrence, and retribution.

V. Costs

A. Disbursements

a. *Knowles v. Brown*, 2022 BCSC 154, Blake J.

The plaintiff applied for an order to settle the terms of a settlement and an order that the costs of the action be assessed by the Registrar without application of s. 5 of the *Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020.* It was a term of the settlement that the plaintiff was entitled to her costs of the action at Scale B and necessary and reasonable disbursements assessed in accordance with *Rule 14-1.* Blake J. held that given the language of the term of settlement on costs, such an assessment of costs and disbursements must be in accordance not only with the *Supreme Court Civil Rules,* but all other applicable legislation and case law relevant to the determination of the assessed costs. This includes s. 5 of the *Disbursements and Expert Evidence Regulation.* If the parties did not intend for that law to apply, there would have to be an agreed term to that effect.

B. Fast Track

a. *Costello v. ITB Marine Group Ltd.*, 2021 BCCA 154, per Voith J.A. (Newbury and Grauer JJ.A. concurring)

This was a wrongful dismissal claim brought as a fast-track action under *Rule 15-1.* The plaintiff's claim was dismissed following a summary trial, and the trial judge awarded costs at Scale B in favour of the successful defendant, subject to the parties making further submissions on costs. No such additional submissions were made, and the formal order was entered. The court of appeal found that the trial judge erred in deviating from the costs provisions of *Rule 15-1(15)* without identifying any special circumstances that warranted doing so, and the error was not insulated from review by the plaintiff's failure to raise the issue before the judge. There were no special circumstances in the case justifying a departure from the fixed costs under *Rule 15-1(15)* and costs were awarded accordingly.

C. Special and Increased Costs

a. *Berthin v. Berthin*, 2021 BCSC 1480, Master Harper (sitting as Registrar)

Following a registrar's assessment of special costs, the plaintiff sought double special costs of the assessment hearing on the basis of her formal offer to settle the special costs. Costs for the assessment were awarded as special costs which were close to the amount of her actual legal expenses on a fair fee basis. Double special costs are not available as the authorities have

established that double costs only apply to party and party costs. There were no circumstances supporting an award of special costs at an amount higher that the fair fee basis.

b. *Dunn v. Heise*, 2021 BCSC 2215, Matthews J.

The defendant conceded that the plaintiff was entitled to double costs under *Rule 9-1,* but the plaintiff also sought increased costs under Appendix B, s. 2(5). The plaintiff argued that he required two counsel, one from Alberta where he resided, and local counsel. While Matthews J. held that it was understandable that he retained out-of-providence counsel, it was not necessary in the sense that a failure to address it through an increased costs award would result in a costs award that was grossly inadequate or unjust. By virtue of modern communication technology, out-of-province litigants are well equipped to instruct counsel in a difference province. That the defendants also had two counsel was not, on its own, indicative of any unusual circumstances.

The plaintiff argued, relying on *Johnson v. Heer,* 2020 BCSC 1751, that the defendants "forced" him to go to trial during the pandemic, despite his mental health issues and the extensive reasonable efforts to resolve the matter. Matthews J. held that settlement efforts were not relevant to an analysis under Appendix B s. 2(5). Instead, she focused on whether the compelling evidence of the plaintiff's post-traumatic stress disorder, his emotional fragility and the global pandemic were unusual circumstances for the purposes of increased costs. She found that the global pandemic was an unusual circumstance. There was risk in attending a courthouse which was enhanced because of the plaintiff's PTSD. However, those circumstances did not rise to the level where increased costs were necessary to avoid a grossly inadequate or unjust costs award.

c. *Economou v. Zoppa*, 2021 BCSC 2182, Master Harper (application for leave to appeal filed)

Master Harper awarded special costs against the defendant for the defendant's application for an independent medical examination after the 84-day deadline for service of expert reports had passed. Master Harper held that the application "was all about timing." At a 2018 examination for discovery, the plaintiff testified that she was to consult with an orthopaedic surgeon. The 2019 trial was adjourned for the plaintiff to engage in that consultation. In 2020, the plaintiff reduced her work hours due to back and leg symptoms alleged to have been caused by the accident. In December 2020, her surgery was cancelled. She underwent surgery in March 2021. Counsel for the plaintiff advised the defence that the plaintiff had her surgery and in June 2021, plaintiff's counsel advised the defence that the plaintiff had a poor response to the surgery, and she was off work. By the end of July 2021, the surgery records had been provided to the defence.

Master Harper held that the circumstances revealed a "wait and see approach" by the defence whereby the defence waited to see what the plaintiff served as initiating reports and then determined whether there was anything sufficiently concerning to seek an IME. Master Harper concluded that the application for the IME was too late. In awarding special costs against the defendant, she held that:

> The position of the Insurance Corporation of British Columbia – and I say that advisedly because this application is driven by the decision-making of the ICBC adjuster…was simply to sit back, bide its time, and see what evidence the plaintiff produced at the 84-day deadline, notwithstanding that plaintiff's counsel kept the adjuster up to date on a real-time basis as to the plaintiff's surgery and the sequelae from that surgery.

> The defence knew exactly when the 84-day deadline was and took no steps whatsoever to even provisionally book IMEs that could later be cancelled. That kind of strategy is incomprehensible. The plaintiff has been put to a great deal of inconvenience on this application close to trial. If special costs are needed to change the practice that Master Muir and others, including myself, deplore, then that is what is required.

d. *Foster v. McMillan*, 2021 BCSC 2355, Master Bouck

The defendants applied for an order that appointments for examinations for discovery of the defendants be "set aside." The application arose in the context of a change of counsel for the defence. While not specifically identifying legal authority to grant the order sought, Master Bouck dismissed the application on the ground of prejudice to the plaintiff in the circumstances. The plaintiff sought special costs against the defendants for bringing the application on short notice after a change of counsel. Master Bouck declined to order special costs, finding that the court must find evidence of misconduct deserving of rebuke. The plaintiff argued that the late assignment of new defence counsel was intentional and designed to orchestrate an adjournment of the examinations with resulting prejudice in her counsel's preparation for trial. The plaintiff argued that the defence's conduct was intended to "wear down plaintiff's counsel." Master Bouck found no evidence upon which to conclude that the late application was intentionally strategic or "intentional sabotage of the plaintiff's trial preparation." Instead, Master Bouck ordered fixed costs payable to the plaintiff of $750 in each action for her counsel's preparation and attendance at the applications.

e. *Gichuru v. Purewal*, 2021 BCCA 91, per Voith J.A. (Abrioux and Grauer JJ.A. concurring)

This was an appeal of the costs orders made following the plaintiff's successful defamation action against two defendants. The trial judge denied the plaintiff's application for special costs and decreased his entitlement to his costs at Scale B. While acknowledging that the highly discretionary nature of costs awards is generally afforded considerable deference by the appellate court, the court in this case overturned the findings and remitted the issues of costs back to the trial judge.

Voith J.A. held firstly that the trial judge erred in considering the plaintiff's own pre-trial conduct in denying him special costs against the defendant. The court held that just as the pre-litigation conduct of the party against whom special costs are sought is irrelevant, so too is the pre-litigation conduct of the party seeking those costs, relying on *Smithies Holdings Inc. v. RCV Holdings ltd.,* 2017 BCCA 177.

The court also found that her reference to the fact that the plaintiff was legally trained was not, in itself, a reason to deny special costs if they were otherwise warranted on the basis of the defendants' misconduct.

f. *Gill v. Borutski*, 2021 BCSC 1762, Gomery J.

The plaintiff sought increased costs on the basis that the case required two counsel at trial. While there were complexities to the case involving credibility in particular, the court held that it did not fall outside the ordinary run of cases involving plaintiffs seeking significant damages for injuries from a motor vehicle accident. Gomery J. held that very often senior counsel is assisted

by junior counsel who plays an important role in preparing and presenting the case at trial. The circumstances are simply not "unusual."

g. *Kringhaug v. Men*, 2022 BCSC 185, McDonald J.

The plaintiff sought special and increased costs against the defendant following trial. The defendant conceded that the plaintiff was entitled to double costs under *Rule 9-1.* The plaintiff sought special costs on the bases of: the conduct of the defence undertaken by ICBC on behalf of the defendant; ICBC being a Crown Corporation and a sophisticated, institutional litigant; and the *Rule 9-1* offers to settle exchanged between the parties.

Liability for the accident was denied by the defendant but the defendant was ultimately unsuccessful in arguing various defences including that the plaintiff was contributorily negligent. This fact alone did not amount to reprehensible conduct. McDonald J. held that "a defence that merely fails to deliver hoped for results is not tantamount to reprehensible conduct deserving of rebuke."

The plaintiff also argued that ICBC, as the controlling mind of the defence, acted reprehensibly by: (a) failing to provide the dash-camera footage of the accident to the defence medical expert; (b) abandoning its reliance on expert reports it had served; and (c) calling no witnesses to testify at the trial. The plaintiff tendered the report of the defence expert at trial who viewed the dash cam footage during his evidence. He testified that it did not change his opinion and, in fact, found that it confirmed his opinion that the plaintiff sustained injuries. McDonald J. held the defendant's conduct in not proving the video to the expert and deciding not to tender the expert's report was not "reprehensible" conduct. She further held that there was fertile ground for challenging the plaintiff's credibility and found that ICBC did not behave reprehensibly by proceeding to trial without calling its own witnesses.

On the issue of ICBC's involvement in the defence, McDonald J. held that the authorities relied on by the plaintiff involved different facts and circumstances, and they did not amount to admissible evidence of a general litigation strategy on the part of ICBC that is reprehensible. She found that there was insufficient evidence in this case to establish the allegation that there was "a kind of institutionalized pattern of reprehensible conduct at play on the part of ICBC necessary to justify an award of special costs."

On a point of evidence, McDonald J. held that the plaintiff could only refer to her own formal offer made under *Rule 9-1*. Any formal offer made by the defendant under *Rule 9-1* was inadmissible as the defendant did not waive privilege over it.

The plaintiff sought increased costs on the basis of "ICBC's recent litigation strategy" and the fact that the trial was held during the pandemic, relying on *Johnson v. Heer,* 2020 BCSC 1751. McDonald distinguished *Johnson* on the bases that liability was in issue, and the defence argued that the plaintiff was not credible. In addition, McDonald J. would not conclude, as the court had done in *Johnson* that it appeared that the only reason the defendant did not settle was to force the plaintiff to go to trial. She also held that as the COVID-19 pandemic has developed, the notion of a trial having to proceed in the midst of indeterminate health and safety precautions becomes less of a factor.

h. *Neil v. Martin*, 2022 BCSC 134, Watchuk J.

The plaintiff sought increased costs in this fast-track action. The defendants conceded that the plaintiff was entitled to double costs under *Rule 15-1* and agreed that costs for a fourth day of trial were appropriate. The issue before Watchuk J. was whether the court had jurisdiction to award increased costs in a fast-track action, and if so, by what mechanism.

The court noted that pursuant to *Rule 14-1(1)* costs are ordinarily assessed in accordance with Appendix B where tariff items are assigned units and quantified by Scales A, B or C. Appendix B s. 2(5) allows for increased costs at 1.5 times the value that would otherwise apply where unusual circumstances would render the costs fixed inadequate or unjust. *Rule 14-1(1)* also provides for exceptions from the application of Appendix B, including a fast-track action, in which case costs are governed by *Rule 15-1(15).*

Watchuk J. held that the clear wording of s. 2(5) applied to an adjustment of costs made under Appendix B only, and that it was not open to the court to award 1.5 the value of *Rule 15-1(15)* fixed costs under this section. However, *Rule 15-1(15)* allows the court to depart from the capped amounts in "special circumstances." The award is then calculated using the fixed costs amounts.

The plaintiff argued that special circumstances existed on the bases that: the defendants "insisted" on disputing liability; the defendants refused to attend a mediation; the defendants refused to substantially increase their settlement offer after their IME with an orthopaedic surgeon; and the defendants were inadequately prepared, resulting in a fourth and unnecessary trial day. Watchuk J. held that the first two reasons, while frustrating to the plaintiff, did not amount to special circumstances. The defendant admitted liability. The defendants had already agreed to double costs and a fourth trial day which addressed the latter two issues.

Watchuk J. disagreed with the plaintiff's characterization of the issues that the defence was "obstructionist and an example of an institutionalized policy of forcing injury victims to endure the stress and uncertainty of a trial." She also declined to consider the stress of the trial on the plaintiff as a factor.

i. *Pang v. Burns*, 2021 BCSC 2430, Choi J.

The defendants were awarded costs following the date of their formal offer to settle under *Rule 9-1.* However, no additional costs were awarded on the basis that they had two counsel. Choi J. held that in the absence of special costs, there is no recognition for additional counsel. Costs are awarded for steps in a litigation, rather than the number of counsel.

j. *Purewal v. Uriarte*, 2021 BCSC 1935, Baker (W.A.) J. (leave to appeal granted 25 March 2022)

Baker J. (W.A.) awarded special costs against the defendant for the hearing conducted post-trial under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 231 on the bases that (1) the defendant's delay in bringing the application was "egregious"; (2) counsel for the defendant underestimated the time required for the hearing, leading to a further adjournment; and (3) delay on the part of ICBC in paying those portions of the judgment which were unaffected by the s. 83 application.

k. *Valand v. Campbell*, 2021 BCSC 2503, Thompson J.

Thompson J. dismissed the plaintiff's application for double costs under *Rule 9-1* on the basis that there were a number of circumstances known to the defendant during the time the offer was open for acceptance that supported the decision not to accept it, including that the plaintiff was disabled from working at the time of the accident due to a shoulder injury, he returned to work full time in a physically demanding job following the accident, and there was a significant gap in time between his return to work and a later disability on account of his low back. In addition, the plaintiff's formal offer was less than 2% greater than the trial award which factored against double costs.

Thompson J. also dismissed the application for increased costs which was made relying on *Johnson v. Heer*, 2020 BCSC 1751 where the court ordered increased costs, in part, because the "defendant forced the plaintiff to trial to obtain what the defendant itself obviously considered to be a fair result." Thompson J. rejected that contention in this case because he concluded that this was a case where the parties held different but reasonable and good faith views of the proper assessment of damages. The plaintiff also argued that increased costs were warranted on the basis that two counsel were required at trial. The court rejected this argument, finding that there was nothing particularly complex about the case that made the costs award at Scale B inadequate or unjust.

l. *Yeomans v. Buttar*, 2021 BCSC 1394, Kent J.

The plaintiff sought special costs for the preparation for and the trial day on which the defendant's expert, Dr. Sovio, testified. The trial judge was critical of Dr. Sovio's evidence in his Reasons for Judgment and the plaintiff argued that ICBC's continued use of Dr. Sovio as an expert amounted to reprehensible conduct worthy of the court's rebuke. Kent J. commented that ICBC is the "most prolific litigant in this Court" which generally has complete control over the defence of any litigation against its insured. This includes complete control over the selection and instruction of expert witnesses, many of whom derive a substantial annual professional income from ICBC. However, in dismissing the claim for special costs, he held:

> While these "optics" might trigger cynical inferences regarding the propensity of an insurer to retain experts friendly to their cause, there is no room for such cynicism in a court of law. Rather, the court is required to make findings of fact based on admissible evidence. [at para. 17]

In the case at bar, there was no evidence presented supporting the possibility of reprehensible conduct on the part of ICBC related to its relationship with Dr. Sovio.

In awarding double costs to the plaintiff under *Rule 9-1*, Kent J. referred to this type of case where liability had been admitted as "best your offer" litigation. He found that the defendant had enough evidence to evaluate the offer and the strength of the case, and ought to have accepted the offer.

The plaintiff also sought increased costs, relying heavily on *Johnson v. Heer,* 2020 BCSC 1751. Kent J. declined to award increased costs, distinguishing *Johnson* on the bases that the defendant in *Johnson* called no evidence and conceded that the plaintiff was credible, circumstances which did not exist in the case before him.

VI. CREDIBILITY

a. *Bains v. Innes*, 2021 BCSC 2037, Giaschi J.

The plaintiff was involved in a motor vehicle accident in 2016 and was claiming damages of $1.6 to $1.8 million for injuries sustained in the accident. Giaschi J. found that the plaintiff was not credible or reliable based on inconsistencies between her evidence and other contemporaneous documents, her vague and evasive answers at trial, her failure to make reasonable concessions and repeatedly exaggerating or embellishing her evidence. Giaschi J. found that not only was the plaintiff's evidence unreliable but that she was deliberately untruthful and attempting to mislead the court.

In considering inconsistencies between the clinical records and the plaintiff's testimony, Giaschi J. considered that not all of the inconsistencies were put to the plaintiff consistent with the rule in *Browne v. Dunn*, but that he could nonetheless consider the statements made by the plaintiff noted in the clinical records because the records were entered into evidence pursuant to a document agreement admitting as much. The plaintiff's evidence was, at times, inconsistent with surveillance footage that was entered into evidence by agreement and was often inconsistent with the evidence of lay witnesses. Giaschi J. did not accept the lay witnesses were entirely truthful.

The plaintiff was laid off from her job due to a restructuring. She commenced a complaint with the Human Rights Tribunal for severance that settled prior to the trial. The amount was not disclosed at trial, but Giaschi J. ordered that the amount of the settlement be disclosed and deducted from the past wage loss amount to prevent double recovery.

Giaschi J. concluded that the plaintiff's injuries were essentially resolved by 2020 and the final judgment was modest: $68,000 in non-pecuniary damages, past wage loss of $33,660 less the settlement amount, and special damages of $5,535.19.

b. *Jenkins v. Casey*, 2022 BCCA 64, per Wilcock J.A. (Bauman and Voith JJ.A. concurring)

The plaintiff appealed the assessment of damages following a motor vehicle accident arguing, in part, that the trial judge erred his assessment the plaintiff's credibility. The plaintiff alleged a number of errors including consideration of irrelevant factors, misperceiving evidence, improper assessment of demeanour, and failing to consider critical evidence.

The plaintiff was a lawyer who worked in civil litigation. She continued to work following the accident and was laid off shortly afterwards for reasons unrelated to the accident. The trial judge found that the plaintiff tended to minimise her pre-accident health issues - which included a history of depression and social anxiety.

In dismissing the appeal, the court reasoned that the trial judge assessed credibility according to the *Bradshaw* factors and that small errors did not override the entire assessment. The court held there was sufficient evidence to support the trial judge's findings that she was not entirely forthright.

c. *Skinner v. Dhillon*, 2021 BCSC 984, Branch J.

The plaintiff sought compensation for injuries sustained in a motor vehicle accident. The court generally found the plaintiff to be credible, but her functional capacity evaluation revealed that her perceived incapacity was greater than that revealed by testing and that she "did not reasonably push herself forward in her recovery, making it difficult to simply accept her own evidence as to her limitations." While a failure to mitigate was not proven by the defence, the court considered the plaintiff's reluctance to take medication, get nerve block injections, or pursue surgery. Similarly, the court considered that with appropriate psychological treatment the plaintiff's quality of life may improve as her perception of her limitations is reduced.

VII. Damages

a. *Antignani v. Heaney*, 2022 BCSC 228, Smith J.

The plaintiff suffered injuries in a motor vehicle accident including neck, back and shoulder injuries, with permanent chronic pain. He also sustained a concussion in the accident and continued to suffer from post-concussion syndrome and depression at the time of trial. He was awarded $200,000 in non-pecuniary damages.

The plaintiff was off work for over 4 months, after which he began a graduated return to work. He struggled with returning to work and eventually left for a new job. The award for past income loss was $70,000. The defendants argued that the past income award should be subject to a deduction for Employment Insurance sickness benefits the plaintiff received. Smith J. declined to make the deduction, referring to *Wright v. Mastin*, 2009 BCSC 414 for the principle that "…Employment Insurance benefits are not deductible from an award for past wage loss because they are a collateral benefit for which the plaintiff has paid."

With respect to special damages, the defendants disputed the plaintiff's claim for reimbursement of $6,535 for private MRI scans, arranged through the office of plaintiff's counsel. The costs of specific medical investigations arranged by counsel are normally not covered under special damages, but are potentially recoverable as disbursements to be included in a bill of costs. In this case, the scans were used for diagnosis and treatment, as opposed to pure litigation purposes, and were therefore recoverable as special damages.

b. *Barkhuizen v. Leguerrier,* 2022 BCSC 153, Slade J.

The plaintiff physician claimed injuries from a motor vehicle accident including a brain injury that resulted in him giving up his private practice due to cognitive changes that prevented him from carrying out the tasks of a family practitioner. The court did not accept the defendants' position that the plaintiff's departure from his family practice was pre-planned and unrelated to the accident, or that that the plaintiff's periodic pre-existing depression led to the departure.

The court found that the plaintiff's move from private practice was caused by the injuries sustained in the accident and the plaintiff was not able to work at the same capacity as prior to the accident. At paragraph 255 the court held that the loss of earning capacity must focus on the differences in pre and post-accident earning capacity, taking contingencies into account, and awarded $988,848 for future wage loss.

The court found that the plaintiff had worked uninterrupted by any pre-existing medical problems well into mid-life, so the court did not accept that a further reduction beyond the general contingencies in the economist's opinion was required for specific health-related contingencies.

c. *Chavez-Salinas v. Tower*, 2022 BCCA 43, Abrioux J.A. (Saunders and Griffin JJ.A. concurring)

Following a judgment for damages resulting from a motor vehicle accident, the appellant challenged the trial judge's finding of contributory negligence and the assessment of damages. The respondent cross-appealed the assessment of certain heads of damage. The trial judge had awarded $180,000 for non-pecuniary damages (reduced by 10% for contingencies), $60,000 for loss of past income, $35,000 for future income and earning capacity, and $90,000 for cost of future care.

The appellant argued that the non-pecuniary award was inordinately low and the respondent argued that it was inordinately high. The plaintiff was 58 years old at the time of the accident. Her injuries included long-standing chronic pain; incontinence; minor whiplash symptoms; left-hand pain; and a triggering of her major depressive disorder. She had a significant pre-accident medical history, including prior degenerative disc disease, chronic pain, ongoing minor back pain, and major depressive disorder which was in partial remission at the time of trial. The trial judge found that the authorities provided by both counsel clearly over or underestimated the range of damages. The trial judge relied on authorities he considered most similar to the circumstances of the case. The court of appeal therefore upheld the trial judge's finding.

The award for cost of future care was reduced on appeal. The awards for both an exercise program with a kinesiologist and one year of physiotherapy resulted in double recovery of costs for physiotherapy.

d. *Cox v. Craig*, 2022 BCSC 53, Choi J.

The plaintiff claimed damages for injuries including chronic pain and depression, resulting from a motor vehicle accident. As a result of his injuries, the plaintiff struggled with the physical demands of his job and was less active. The plaintiff only missed two or three days of work and did not claim for past wage loss, but the court found that the evidence clearly established a real and substantial possibility that the plaintiff would lose his job or be demoted and have his salary halved because of his incapacity, awarding $500,00 for loss of income earning capacity.

The plaintiff sought future cost of care of $25,000 for psychological counseling, physiotherapy, kinesiology, and intramuscular stimulation or dry needling. While the court accepted that the plaintiff would benefit from the recommended treatments, there was no evidence that the plaintiff intended to make use of the recommended treatment and no evidence of the recommended treatment costs. The court declined to award future cost of care.

e. *Heffernan v. Charlish*, 2021 BCSC 1882, Hinkson C.J.S.C.

The plaintiff was claiming damages for injuries sustained in two motor vehicle accidents in 2014 and 2015. One of the main issues was the effect of the plaintiff's drug use on her life and whether her substance use could be attributed to either or both accidents, or whether it was a pre-existing or inevitable condition.

The court determined that the plaintiff's addiction to crystal meth and heroin was not caused by the accidents but was a combination of her pre-existing drug use and the bad influence of her boyfriend who supplied her with drugs. In coming to this conclusion, the court considered the evidence of the plaintiff's pre-accident drug use and her conviction for trafficking in drugs for which she was arrested only two months after the accident. The court awarded modest non-pecuniary damages of $20,000 and $10,000 for her injuries sustained in the first and second accidents, respectively.

f. *Palmer v. Pozniak,* 2021 BCSC 1703, Majawa J.

The plaintiff claimed damages for injuries to his neck, lower back and hip from a motor vehicle accident in March 2016, that caused him ongoing pain, discomfort and sleep disturbances. The defendant argued that the plaintiff was not injured, or in the alternative, his injuries were so minimal that they did not affect him beyond a "de minimus" level such that he was not entitled to any compensation. The plaintiff did not seek medical treatment until some six to eight months post-accident and the defendant argued that causation was an issue. The court found, at paragraph 77, that the delay in treatment "*…does not inevitably lead to the conclusion that he did not sustain injuries as a result of the accident.*" The court accepted the plaintiff's testimony that the reason he did not seek medical attention earlier was because he believed that his injuries would resolve on their own. The court also accepted the fact that the plaintiff's not having a general practitioner at the time of the accident played a role in the delay in obtaining treatment. The court also held that while the plaintiff continued to engage in various activities such as travel and scuba diving, that did not equate to a finding that he was not injured in the accident. The court found that the plaintiff's participation in his activities was consistent with a relatively minor injury that requires some relatively minor accommodations. The court awarded $51,258 based on non-pecuniary damages of $35,000, cost of future care of $7,000 and special damages of $10,158.

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

This is an appeal of a judgment arising out of injuries sustained by an RCMP officer in a motor vehicle accident. The only issue on appeal was the inclusion of $36,995 in benefits paid by the RCMP to the plaintiff. The benefits were not paid pursuant to an agreement but on a longstanding practice or policy of the RCMP to pay injured officers their full wage benefits. At trial, the parties agreed that the voluntary or gratuitous payment exception did not apply and the only ground for deduction was the common law right of subrogation.

On appeal, the court held that the appropriate standard of appeal was correctness as it was a question of law whether the equitable right of subrogation may arise without a payment under a contract of indemnity.

The court decided that it was bound by previous decisions of the court of appeal that a right of subrogation cannot exist without a contract of indemnification, and previous decisions – *Tomas v. Sticha,* 2019 1204 and *Rix v. Koch*, 2020 BCSC 1976 – were wrongly decided. An equitable right of subrogation can only exist where there is an underlying contract for indemnification.

The court strongly indicated that the charitable gift exception would likely apply but was not willing to consider it in the absence of a proper evidentiary foundation.

h. *Singh v. De Santis,* 2022 BCSC 35, Majawa J.

The plaintiff was injured in two motor vehicle accidents in 2012. The first accident caused injuries to her neck, back, hip, and jaw causing headaches, anxiety, and sleep disturbance that were aggravated by the second accident. The court found the plaintiff's description of the severity of her pain was somewhat unreliable when compared with the objective evidence of her lifestyle which included a fairly active social life, but still found the plaintiff credible overall. The plaintiff sought non-pecuniary damages of $140,000 and the defendants argued that $50,000 was appropriate and the court awarded $115,000, noting that the plaintiff was young at the time of both accidents, had suffered injuries including chronic pain that persisted for nine years and that the myofascial pain was expected to persist at some level for the rest of her life.

The plaintiff missed little time off from her work as a paralegal but alleged that she quit her part-time job at a gym because of the accidents. She did however obtain a second job as a promotional model and then later started her own aesthetician business. The plaintiff alleged that she turned down one promotional model job and turned down approximately three to four clients per month from 2019 to January 2021 in her aesthetics business. The court found there was a real and substantial possibility that the plaintiff's injuries led to a loss of a moderate amount of past income earning capacity and that she would have continued to work at the gym but for a change in duties that were incompatible with her injuries. The plaintiff was awarded gross past loss of income earning capacity of $12,000. The court also found that the plaintiff's chronic pain had impaired her capital income earning asset to work both as a legal assistant/paralegal and pursue a full time load of aesthetician clients. The plaintiff had relocated to California and the court factored that it would take four to six years to get her business to a similar point that it was in Canada. The court assessed the plaintiff's future loss of earning capacity to 2½ years of income at $187,500 then reduced it by 55% to take into account the relative possibility of the loss occurring, resulting in an award of $84,375.

A. Apportionment

a. *Alragheb v. Francis*, 2021 BCCA 457, per Willcock J.A. (Frankel and Fenlon JJ.A. concurring)

This appeal deals squarely with the principles governing the apportionment of liability for concurrent independent torts involving contributory negligence and an indivisible injury.

The plaintiff was involved in two accidents: the first being a bicycle and vehicle accident where the plaintiff and defendant agreed that each were equally at fault; and the second being a rear end collision which the defendant admitted she was solely at fault. The trial was a quantification of damages.

The trial judge found that the plaintiff suffered an indivisible injury arising from both accidents and the reasons for judgment on appeal summarize the applicable principles of apportionment:

1. The law does not *apportion liability* for damages between tortious and non-tortious conduct: *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 22 – 23
2. The rule that damages are assessed with a view toward putting the plaintiff in the position they would have occupied but for the tort is a rule that governs the *assessment of damages*, not the *apportionment of liability*. It is a means by which allowance is made

for non-tortious causes. Cases in which pre-existing conditions or prior injuries are weighed in the assessment of damages are not of assistance in understanding the *principles of apportionment*.

3. Where by the fault of two or more persons damage or loss is caused to one or more of them (as is the case where concurrent torts cause an indivisible injury), the liability to make good the damage or loss is in proportion to the degree to which each person was at fault. That is the statutory regime in British Columbia.

4. Where the plaintiff is one of the persons at fault, the liability of all parties at fault (which in the absence of contributory negligence would have been joint and several) is severed. Contributory negligence severs the liability of the separate tortfeasors, in effect causing the plaintiff to bear the pain caused by absent, impecunious or uninsured tortfeasors. The *Negligence Act* does not otherwise call for the application of distinct rules of apportionment where there is contributory negligence (except that where there is several rather than joint liability the court may have to determine the extent to which non-parties may have been at fault).

5. Where liability and damages arising from a prior tort have been finally assessed, that effectively severs liability, even where a subsequent tort causes aggravation and contributes to what might otherwise have been considered to be an indivisible, cumulative injury. The issue was addressed in *Ashcroft v. Dhaliwal,* 2008 BCCA 352. In such a case, the first judgment is taken to have effectively apportioned damages between accidents. It does not assist in identifying the guiding principles of apportionment to consider how rules of apportionment may unsettle or be inconsistent with prior assessment of liability.

Section 2 of the *Negligence Act* does not call for the apportionment of liability for an indivisible injury on an "accident by accident" basis – i.e., by looking at each cause of action. Rather, it governs the awarding of damages in every action to which section 1 of the *Negligence Act* applies. Here, the two accidents were in one action. The court held that the necessary inquiry is to determine the degree of fault of each of the tortfeasors and the plaintiff in respect of the indivisible injury based on the extent to which each party departed from the standard of care owed in the circumstances. The apportionment is to be based upon the relative blameworthiness of the persons responsible for the damage, not the degree to which they are found to be responsible for the injuries. The court held that the trial judge failed to apply the correct principles of apportionment. However, on appeal when the correct analysis of blameworthiness was applied, the result was the same and liability for the injury was apportioned 25% to the plaintiff (arising from fault in the first accident), 25% to the first defendant and 50% to the second defendant.

B. Causation

a. *Coulombe v. Morris,* 2021 BCSC 2034, Jackson J.

The plaintiff was injured in two motor vehicle accidents in 2012 with injuries to her neck, shoulders, back, and left knee. Shortly after settling those claims, the plaintiff was involved in another accident in 2017 which the court found caused a temporary aggravation to the plaintiff's pre-existing pain in her neck, shoulders and back, as well as new injuries of photosensitivity and

visual-vestibular mismatch. The plaintiff argued that the only way she could be fully compensated for her losses was to restore her to her original position, which was her condition prior to the 2012 accidents, assessing damages on a global basis, and then deducting the settlement amount she received for the 2012 accidents.

At paragraph 9, the court held that the plaintiff's approach to the issues of causation and assessment of damages was flawed, and that the jurisprudence did not support the plaintiff's proposition that a defendant is liable for an injury that predates the tortious acts. At paragraph 14 the court confirmed the appropriate approach is to consider that compromised state to be inherent in the plaintiff's original position which establishes the baseline for assessing damages for which a defendant will be responsible. The court awarded $102,572.32 based on non-pecuniary damages of $85,000, special damages of $2,462.85, net loss of earning capacity of $8,500 and cost of future care of $6,609.47. The court found that the nature of the plaintiff's injuries did not warrant a discrete award of damages for loss of housekeeping capacity as although some friends assisted her with certain household chores for a period of time, the plaintiff remained able to perform household chores, albeit with some pain, and did not have to pay for household services she could not perform herself.

b. *Gylytiuk v. Krause*, 2021 BCSC 2056, Hori J.

The plaintiff was involved in an accident in 2017 while riding his motorcycle. He had been involved in a previous accident in 2014 from which he sustained a concussion and injuries to his neck, back, and left arm. In the 2017 accident, the plaintiff further injured his neck and back and started experiencing symptoms in his right arm. Following the 2017 accident, the plaintiff had a surgery on his neck.

Hori J. found it was unnecessary to determine if the plaintiff's injuries were divisible or indivisible because there was only one tortfeasor before the court in this action, he was not required to apportion damages. Rather, in assessing damages, the court must restore the plaintiff to the original position immediately before the 2017 accident. Damage Assessments

C. Cost of Future Care

a. *McHollister v. Ma*, 2021 BCSC 1667, McDonald J.

In an action arising out of injuries sustained in two motor vehicle accidents, the court rejected the plaintiff's claims for $6,400 and $77,000 for past and future loss of housekeeping capacity, respectively. No evidence was led of the housekeeping tasks performed by the plaintiff prior to the accidents and the court was not satisfied that the plaintiff's lack of motivation to perform housekeeping tasks was the result of his injuries sustained in the accident. This was, in part, supported by the court's dim view of the plaintiff's functional capacity evaluation which the plaintiff did not complete due to fatigue. Evidence about the plaintiff's gym routine also cast doubt on the results of the evaluation.

The plaintiff was seeking $665,000 under cost of future care for Botox, prolotherapy, ketamine infusions, medications, rehabilitation services, support services and assistive equipment. The court summarised of the law that an award under this head of damage must (1) have medical justification, and (2) be reasonable.

The court awarded only $8,000 of the plaintiff's claim of $122,543 for Botox injections for treatment of headaches which amounted to two years of injections. The cost of the prolotherapy assessment and treatment was accepted because it was supported by the medical opinion of Dr. Lau and the cost was provided by Ms. Petra, an occupational therapist. Ketamine treatments for depression and pain were not allowed because the plaintiff had not received standard psychological treatment as recommended by the plaintiff's psychiatrist.

The court awarded $75,000 of the $138,970 sought by the plaintiff for medications, noting that there were likely to be changes to the plaintiff's medication regime, as suggested by the plaintiff's psychiatrist, and that there was no opinion that the medications would be required indefinitely.

The court refused to make an award for the cost of treatments already received including a functional capacity evaluation, neuropsychological evaluation, and occupational therapy, but noted these costs were recoverable as special damages.

The court refused an award for ongoing physiotherapy for flare-ups as the defence successfully argued that the plaintiff used self-directed exercises to manage his flare-ups and had not attended physiotherapy for several years prior to the trial.

The court also refused the cost of a functional driving evaluation and driver rehabilitation program as the driving anxiety could be treated with counselling services already awarded and because of the plaintiff's evidence of doing significant driving following the accidents.

The court did not make an award for housekeeping support, assistive equipment, or specialised glasses as the plaintiff led insufficient evidence to support these claims. The court did not award compensation for the cost of a gym or yoga pass as this was an expense the plaintiff would have incurred in any event.

D. Contingencies and Hypothetical Events

The "Trilogy"

a. *Dornan v. Silva*, 2021 BCCA 228, per Grauer J.A. (Newbury and Voith JJ.A. concurring)

This appeal arose from interesting facts involving an athletic plaintiff who had a history of concussions, including a concussion from a skiing accident six months before the motor vehicle collision in issue. The plaintiff was diagnosed with a mild traumatic brain injury as a result of the car accident with chronic post-concussion syndrome. The trial judge applied a 30% reduction in his awards for non-pecuniary damages, past wage loss, loss of future earning capacity and future care costs on the basis that the plaintiff was at risk – because of his lifestyle and history of suffering concussions with serious consequences – of suffering an additional concussion within one to three years of the skiing accident even without the car accident.

On appeal, the court concluded that there was no principled reason why the combination of vulnerability inherent in the plaintiff's pre-existing condition with the enhanced potential for repeat trauma arising from his lifestyle could not support a contingency deduction, even if the pre-existing state itself would not lead to debilitating problems in the absence of any future trauma. The exercise was properly a matter of assessing the evidence to determine whether the hypothetical in question is a real and substantial possibility.

The court went on to explain that in the vast majority of cases, the risks commonly encountered "on this rather dangerous planet will not suffice to establish a real and substantial possibility." Any affect they might have on an individual's pre-existing condition would be speculative, not real and substantial possibilities. As such, they would not give rise to a measurable risk, at least in the absence of being combined with some extreme vulnerability. However, on the evidence in this case, the plaintiff's pre-existing condition gave rise to a risk of further injury that was measurable because of his intention to continue the very same type of activity that had caused the pre-accident concussions. This would make further injury a real and substantial possibility.

The reasons of the court provide useful guidance on the process for analyzing a real and substantial possibility, acknowledging that it can be a difficult task. The findings on the issue must be tethered to the evidence and based upon a meaningful analysis. On appeal, the contingencies were reduced to 10% from the award for past loss of income-earning capacity, and 15% from the awards for non-pecuniary damages, loss of future earning capacity and future care costs. The trial judge was found to have erred in his findings of fact underpinning the without-accident risk scenario, and to have failed to give weight to the evidence of the consequences of his with accident-injury outcome.

b. *Rab v. Prescott*, 2021 BCCA 345, per Grauer J.A. (Fenlon and Butler JJ.A. concurring)

The court of appeal provided further clarification of the process for analyzing and quantifying hypothetical events leading to income loss. The plaintiff was a retired consultant who was pursuing two unrelated entrepreneurial ventures at the time of the accident, neither of which had produced income. The trial judge concluded that her chronic pain impaired her earning capacity on a *Brown v. Golaiy* analysis and used her previous consulting income as a guide to quantify her loss.

However, the court of appeal determined that the trial judge erred by concluding there was a real and substantial possibility of a future event leading to an income loss solely by finding that there was a loss of capacity. The test requires that the loss of capacity give rise to a real and substantial possibility of a future loss. The trial judge also failed to assess the relative likelihood of the event giving rise to the loss.

After reviewing the leading authorities of *Perren, Pallos, Brown, and Steward*, the court held that from these cases, there is a three-step process for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial.

The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring. On this issue, the court referenced the discussion in *Dornan* at paras. 93 – 95.

On appeal, the $150,000 loss of future earning capacity award was reduced to $40,000. The court of appeal found that the only evidence that could provide a rational and useful tool in assessing the lost capacity found by the judge was the record of the plaintiff's income from her one

previous entrepreneurial venture. The court took an average of those earnings, multiplied it by two (for the two ventures) and awarded two years loss (the *Pallos* approach). This amount was then reduced by 60% to take into account the relative likelihood of the possibility of loss occurring, citing the absence of any history of income from these ventures, the lack of any evidence of what kind of profitability might be expected from such ventures, and the prospect that the ventures could as easily fail as succeed.

c. *Lo v. Vos*, 2021 BCCA 421, per Grauer J.A. (Wilcock and DeWitt-Van Oosten JJ.A. concurring)

This was the third case where the court was asked to review the process for analyzing hypothetical future events as future contingencies. The trial judge found that as a result of the plaintiff's accident injuries of chronic pain and significant psychological conditions, she was totally disabled from working. However, the trial judge also found that there was a measurable risk that the plaintiff would have developed major depressive disorder consequent on chronic lower back pain even without the accident, and reduced the damages for non-pecuniary loss, loss of future income capacity and future care costs by 20%.

The court again emphasized that a specific contingency (here, the development of a major depressive disorder without the accident) must be proven by evidence that is capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility as opposed to speculation. On appeal, the court found that the evidence was not capable of establishing a measurable risk that the appellant would have developed a major depression. This being the first step of the analysis, the trial decision could not stand, and the appeal was allowed.

On the quantification of the future loss of earnings, the court found that the trial judge erred by failing to properly assess the real and substantial possibility that that her anxiety and depression would continue to affect her work indefinitely. Her analysis was limited to a four-year period during which the plaintiff would be off work, and it failed to grapple with the effects of her finding that symptoms may continue indefinitely and what impact that may have. Her award therefore amounted to a wholly erroneous estimate of the loss. In addition, the requirement of the court to assess the reasonableness and fairness of the award is to be undertaken at the end of the assessment once the relative likelihood has been applied to the reasonable possibility and a conclusion has been reached. Here, the trial judge considered this at the beginning of the process which was in error.

Assessments

d. *Dugas v. Kebede*, 2021 BCSC 2336, Warren J.

This case considered the issue of whether a pre-existing condition would have led to a loss absent the accident. Warren J. confirmed that the court must first determine whether the plaintiff suffered from a pre-existing condition and then determine whether there is a measurable risk that it would have detrimentally affected the plaintiff in the future regardless of the defendant's negligence. A hypothetical event is taken into consideration as long as it is a real and substantial possibility and not mere speculation. A risk that is a real and substantial possibility is measurable. Once established that a risk is a real and substantial possibility, it is then necessary to assess its relative likelihood.

In this case, the court accepted evidence of the neurosurgeon and neurologist that the plaintiff's rotator cuff issues would have developed if he were subject to another traumatic event or would have worsened over time with degeneration and with repetitive physical work. Warren J. then went on to assess the likelihood of the risk occurring at 15%.

Warren J. agreed that future surgery would give rise to a risk of pecuniary loss. However, she rejected the contention that the chronic nature of his symptoms was a measurable risk of a future loss of income. On that issue, the plaintiff had missed virtually no work, completed several courses, and worked overtime. His work performance was not questioned and there was no medical evidence that his condition would worsen.

In this case, the court declined to award the plaintiff damages for a private MRI, even though it was prescribed by his physician. There was no evidence of any medical necessity or urgency to justify incurring the expense. The plaintiff testified only that he did not want to wait for a public one. This was insufficient to justify the recovery of this expense.

e. *Masellis v. Diamond*, 2021 BCSC 790, Verhoeven J.

The plaintiff sustained a concussion and injuries to his neck and back in a motor vehicle accident. The plaintiff had a pre-existing degenerative disc disease in his lumbar spine revealed but no complaints of low back pain prior to the accident. The medical evidence was that he would likely have worsened at some uncertain time in the future. The court took this into account but did not attach too much weight to this factor in awarding non-pecuniary damages of $80,000.

f. *Meckic v. Chan*, 2022 BCSC 182, Kent J.

Kent J. held that the 2021 trilogy has shifted the paradigm insofar as the evaluation of contingencies and hypotheticals are concerned in personal injury cases. The court has effectively mandated a process for evaluation based on the evidence adduced at trial. It also requires the trial court to make a specific finding as to the relative likelihood/chance of the hypothetical/contingency and its consequences materializing, and the scaling or adjustment of the damage award proportionate to that likelihood (usually but not necessarily determined with reference to percentages).

The trial judge approached the plaintiff's loss of earning capacity on an arithmetical basis given that she had been disabled since the accident. On the issue of contingencies, he was satisfied that the evidence established a high probability that she would have worked past age 65 and used her 67th birthday for the purposes of the calculations. At the date of trial, employees at the plaintiff's employer were locked out. He found that there was a real and substantial possibility that it would continue for quite some time after trial. The defence argued that this ought to be factored as a negative contingency. However, there was some evidence that absent the accident, the plaintiff would have replaced at least part of her lost income during the lock out which reduced the impact of that negative contingency. Lastly, Kent J. applied a 10% contingency to the possibility of part-time future employment.

E. Divisible and Indivisible Injuries

a. *Engelhart v. Day*, 2022 BCSC 224, Branch J.

The plaintiff was injured in two motor vehicle accidents for which he was claiming compensation. He had tripped and fallen a few weeks prior to the first accident injuring his right upper shoulder, back, and neck. He had attended the hospital on at least two occasions for arm and shoulder pain and was taking oxycodone. These injuries were aggravated by the first accident and the plaintiff had a right arm injury and weakness in his right leg for which he used a cane and leg brace on occasion. The plaintiff did not return to work following the first accident.

The second accident was a hit and run when the plaintiff was crossing a crosswalk. He reported pain in his right lower back and right hip that resolved within a few weeks, and aggravated left arm pain. The court determined that the areas of injury in the second accident were distinct from those injured in the first accident and so were divisible.

The court assessed non-pecuniary damages attributable to the first accident of $160,000 and then applied a 30% negative contingency deduction to account for the previous injuries from the trip and fall, short-term pain caused by an altercation, and the likelihood that the plaintiff's leg problems would have arisen in any event of the accident. Non-pecuniary damages for the second accident were fixed at only $5,000.

b. *Grabovac v. Fazio*, 2021 BCSC 2362, Hinkson C.J.S.C.

The plaintiff commenced two actions for injuries sustained in two separate motor vehicle accidents: the first in 2015 and the second in 2018. The plaintiff sustained soft tissue injuries to her neck and back as well as anxiety and depression in the first accident that were essentially resolved by mid-2017. At the time of the first accident, the plaintiff was in a dental hygiene program. She did not miss any time from school following the first accident. She graduated on time and had started working as a dental hygienist for approximately a year before the second accident.

The second accident resulted in significant injuries to the plaintiff's neck and back that resulted in chronic pain and significant psychological issues including a new diagnoses of somatic symptom disorder. The plaintiff had not returned to work following the second accident at the time of trial and the court found that it was unlikely that she would be able to have children in the future due to her injuries.

The court found that the plaintiff's injuries were divisible as the plaintiff had recovered from the injuries from the first accident at the time of the second accident. The court awarded $350,00 in non-pecuniary damages: $40,000 attributed to the first accident and $310,000 attributed to the second accident, which was more than the plaintiff's counsel had argued at trial. The plaintiff's total award was approximately $2.6 million.

c. *Jajcaj v. Bevans*, 2021 BCSC 834, Ball J.

The plaintiff was involved in two motor vehicle accidents: the first, in 2013 that proceeded to a liability-only trial, and the second in 2015 that was the subject of this litigation. The plaintiff sustained injuries to his left lower back, left hip, and left leg in the first accident which were aggravated in the second accident. The plaintiff argued that his injuries from the first accident were resolved at the time of the second accident and, therefore, were divisible injuries. The court

expressed significant concern with the reliability and credibility of the plaintiff's testimony. Importantly, the plaintiff's family doctor wrote a medical legal report that did not differentiate between the two accidents as causes of the plaintiff's ongoing complaints and opined that the plaintiff's injuries from the first accident were ongoing at the time of the second. Based on this the court determined that the injuries were indivisible.

In assessing damages, the court took into account the result of the liability-only trial for the 2013 accident that attributed contributory negligence of 65% on the plaintiff. The court followed the law in *Alragheb v. Francis*, 2020 BCSC 1712 in assessing a 65% reduction of damages following the first accident and a 32.5% reduction following the second accident. This was applied to all heads of damage.

d. *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327, per Willcock J.A. (Fisher and Abrioux JJ.A. concurring)

The appellant in this case successfully appealed the trial judge's finding that the injuries suffered by the respondent in two motor vehicle accidents were indivisible. In the first accident, the respondent sustained back and neck injuries and ongoing headaches. The injuries sustained in the first accident had not entirely resolved and were aggravated by the second accident. It was not an error to find the back and neck injuries suffered by the respondent as a result of the two accidents to be indivisible.

However, the respondent also developed a constellation of traumatic brain injury symptoms that were first experienced after the second accident. The trial judge erroneously failed to grapple with the question of whether the mild traumatic brain injury and its symptoms were a distinct, divisible injury, for which the first tortfeasor could not be held liable. The judge permitted an expert to testify beyond the opinions included in the expert report, and then denied the appellants an opportunity for cross-examination. Willcock J.A. stated that in cases where there are sequential injuries and, in particular, in cases where there is a body of evidence supporting the view there were divisible injuries, that evidence must be addressed to ensure the most basic principles of tort law are given effect. The trial judge found the defendants to be jointly and severally liable for damages without adequately addressing the causation in fact question. The failure to engage in that analysis undermined the judgment, which was set aside.

Additionally, the trial judge should have assessed the damages occasioned by the traumatic brain injury, if it were divisible. Where divisible injuries combine to cause damages, even damages that overlap, the court must engage in the difficult task of assessing the damages associated with each injury. The analytic approach to be followed in assessing damages where injuries are divisible is set out at paras. 80 – 89.

F. Housekeeping Capacity

a. *Cheema v. Bains*, 2021 BCSC 1766, Gomery J.

The 21-year-old plaintiff long-haul truck driver was injured in a rear-end accident, for which liability was admitted. He suffered soft tissue injuries to his lower back, neck and shoulders with associated headaches. He later suffered from left leg pain radiating to the knee. He took 10 days off work while recovering from the acute phase of his injuries. His neck and shoulder pain and the associated headaches resolved within three to five months of the accident. His lower back

pain and the leg pain persisted to trial. He was awarded $50,000 in non-pecuniary damages, $1,257.26 for past wage loss, and $50,000 for future earning capacity.

In the analysis of housekeeping capacity, the court found that the allocation of chores in the plaintiff's home was informal and flexible. The plaintiff had been responsible for sharing in outside chores and cleaning his own room and laundry. After the accident, he was doing less than he did previously, but not less than his share, taking his work schedule into account. The court noted that shared living arrangements among family members involve a certain amount of give and take. Pain associated with the plaintiff's performance of chores was compensated by the award for non-pecuniary loss, and a separate award for loss of housekeeping capacity was not justified.

There was also no award granted for future care costs. Although the plaintiff's expert recommended funding for a gym pass, this was found to be unnecessary as he had home machines and weights, and his practice was to work out at home.

G. Income Loss

a. *Hoffman v. Luan*, 2021 BCSC 811, Baker (W.A.) J.

The 23-year-old plaintiff was injured in two motor vehicle accidents. Prior to the first accident, he was working as a sheet metal apprentice. He suffered soft tissue injuries in both accidents which continued to affect him daily some six years after the first accident. His pain continued to limit the range of work he could do, and he worried that his back would not allow him to perform sheet metal work for the next 40 years. His past income loss was $1,800 and he had not sought any accommodations at work. The evidence revealed that the sheet metal fabrication profession is a "macho industry" with no room for someone who could not pull their own weight. Baker J. assessed the plaintiff's future loss of capacity to earn income on the capital asset approach. She found that he suffered a loss equal to 15% of his lifetime earnings as a sheet metal fabricator, amounting to $335,000.

b. *McColl v. Sullivan*, 2021 BCSC 2246, Baker (W.A.) J.

This decision is the reconsideration of the future earning capacity award, following the successful appeal on this issue at 2021 BCCA 181. On appeal, the court found that the trial judge wrongly treated the use of male statistics as a "default" position without an evidentiary base justifying the use in the case. Additionally, she failed to assess the overall fairness of the award in her final assessment of the damages.

On reconsideration, the court reviewed the economist's evidence that the primary difference between male and female economic factors was that compared to men, women tend to take more significant amounts of time off from the workforce for family-related reasons. In the result, female multipliers would be understated for a woman who did not take significant time off for family reasons. At bar, there was nothing in the evidence to suggest that the plaintiff would take time out of the workforce in the future such that her income would be reduced. The plaintiff testified that she did not intend to stop working once she became a parent. There was no real and substantial possibility that the plaintiff would be unemployed or without income for any meaningful length of time due to her future family circumstances. On the evidence, the court

found that the statistics relating to labour participation for males was more appropriate for the assessment of her income loss.

c. *Thabrkay v. Cecchin*, 2021 BCSC 1413, Macintosh J.

The plaintiff was left with mild but chronic soft tissue injuries to her neck and back with headaches; however, the court concluded that her pain level was "far from trivial." Full recovery was unlikely. Physiatry evidence indicated that she would be limited to part-time work at a beauty salon. Using the capital asset approach, the court awarded the equivalent of 2.5 years' salary.

H. Management Fees

a. *Lester v. Alley*, 2022 BCSC 121, Basran J.

The plaintiff was granted awards under various heads of damages. In this application, she argued that she was entitled to management fees in respect of her awards for future loss of earning capacity and cost of future care, as she claimed she was unable to manage her affairs or lacked the acumen to invest the funds awarded. Basran J. found that she was not entitled to management fees. While the accident caused a reduction in her ability to manage the cognitive demands of operating her landscaping business, she did continue to operate it. It was therefore not established that she was unable to make straightforward investment decisions, which were comparatively uncomplicated.

I. Mental Distress

a. *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47, per DeWitt-Van Oosten J.A. (Frankel and Goepel JJ.A. concurring)

The plaintiffs appealed the order striking their Amended Notice of Civil Claim arising out of a child apprehension and related protection proceeding. The plaintiffs included a claim for mental distress for themselves against foster parents who had allegedly mistreated their child.

The chambers judge recognized that Canadian case law accepts that a claimant may recover damages for mental injury arising from harm caused to a family member but noted that in British Columbia, those cases have generally limited recovery to persons who actually witnessed or were present at the traumatic event, or in its immediate aftermath. Relying on *Saadiati v. Moorhead*, 2017 SCC 28, the plaintiffs argued that the tort is now sufficiently broad to allow a claim for damages that were not discovered until the child resumed living with them. On appeal, the court declined to weigh into the issue as it was satisfied that the chambers judge correctly struck the claim on the basis that insufficient material facts were pleaded to support it. The court held that even if *Saadati* does offer a possible basis to re-visit and overrule the court's rulings in *Rhodes Estate v. CNR, and Devji v. District of Burnaby et al.* which limit such claims, that would require a five-member division on appeal.

J. Punitive Damages

a. *Chhina v. Rebecca L. Darnell Law Corporation*, 2021 BCCA 430, per Fisher J.A. (Bauman C.J.A. and Abrioux J.A. concurring)

The underlying action arises from a purported purchase and sale of a law practice. The trial judge found that there was a meeting of the minds and that the appellants breached a binding agreement. He awarded damages and punitive damages. The court dismissed the appeal with respect to the agreement, finding that it was binding.

On the issue of punitive damages, the appellate argued that the trial judge erred in considering conduct of the appellate during the course of litigation, rather than conduct giving rise to the cause of action, in awarding punitive damages.

The court adopted a purposeful approach: judges should consider whether the misconduct of a party is rationally connected to the cause of action, or to the manner in which the litigation is conducted. The former may ground an award for punitive damages and the latter is relevant to an award of special costs.

In this case, the trial judge failed to set out the specific misconduct that was being sanctioned, so the matter was remitted back the court below for a reassessment.

VIII. Document Discovery

a. *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322, per Dickson J.A. (Fisher and Griffin JJ.A. concurring)

The province appealed an order striking its defence for non-compliance with its document disclosure obligations under *Rule 7-1*. The decision was overturned on appeal except the order for special costs.

The court reviewed the requirements for document disclosure under the *Supreme Court Civil Rules* and the rationale underlying the two-tiered approach to document disclosure. The court acknowledged that the remedy of striking pleadings due to non-compliance with the *Rules* is draconian and should be used sparingly.

The court of appeal found that it was fair and appropriate for the chambers judge to consider the imbalance between the parties, and, while it would not be appropriate to punish a litigant twice for the same conduct, it was nonetheless proper to consider the entirety of the province's conduct in coming to a decision. The court of appeal rejected the province's argument that the "slate was wiped clean" by previous sanctions.

In overturning the decision of the chambers judge, the court of appeal relied on several factual errors. The chambers judge referenced "numerous applications and directions" for document production when, in fact, there had only been one prior application. In addition, the court was careful to differentiate between the province's first tier versus second tier disclosure obligations as the obligation for second tier disclosure was only triggered after a request was made.

The decision contains useful language relating to the purpose of the document disclosure rule and a party's obligations thereunder at paras. 92 to 101.

b. *Chow v. Cheung*, 2022 BCSC 26, Master Elwood

The defendant successfully brought an application for disclosure of medical legal reports from an accident 18 years earlier. Master Elwood found that these reports were disclosable under first tier disclosure, and that they could be used to prove or disprove a material fact. In this case, the reports were relevant to the issue of causation and divisibility of injuries. Master Elwood noted that while the reports were not admissible as evidence in the subsequent accident, this did not exempt them from the disclosure. Master Elwood limited the order to reports over which litigation privilege had been waived in the previous action as he determined that the current action was a "related proceeding" so litigation privilege from the earlier accident was still attached.

Master Elwood also ordered that the Notice of Civil Claim and Response from the previous accident be disclosed as they were relevant to issues of divisibility. Master Elwood refused to order that the amount of the previous settlement be disclosed on the grounds that there needs to be some evidence that there is a real risk of overcompensation or that the injuries in the current proceedings and settled proceedings are actually indivisible.

c. *Choy v. Stimpson*, 2021 BCSC 1071, Master Vos

In this application, the defendants sought production of various clinical records from the plaintiff. The orders sought were not appropriate. Pursuant to *Seller v. Grizzle*, [1994] B.C.J. No. 1565, at para. 17, records created and in the possession of a doctor or a hospital are not within a patient/plaintiff's power or control. They do not have to be acquired by the plaintiff and do not have to be disclosed on the list of documents the plaintiff must provide pursuant to *Rule 7-1(1)*. Parties often agree that records should be obtained from third parties and the plaintiff volunteers to get the records pursuant to an authorization. When plaintiffs obtain those records, they have to disclose them on a list of documents, as long as they fit within the relevancy requirements in *Rule 7-1*. If the plaintiff elects to not obtain such records, the defendant can apply under *Rule 7-1(18)* for production directly from the doctor or hospital holding the records.

d. *Cobalt Construction Inc. v. Parsons Inc.*, 2021 YKSC 31, Duncan J.

The plaintiff applied for orders regarding document production in an action arising out of a tendering process. Specifically, the plaintiff was seeking unredacted, third-party records from the other unsuccessful bidder on the tender and the successful bidder. Both companies were opposing the order on the grounds that it included commercially sensitive information.

The court relied on *Rule 25* of Yukon's *Rules of Court*, similar to B.C.'s *Rule 7-1*. Relevancy is assessed on the *Peruvian Guano* standard requiring every document which directly or indirectly may enable a party to advance its own case or destroy that of its adversary, or that fairly lead on a train of enquiry. However, the court noted that "modern realities" have limited the broad *Peruvian Guano* test and the court may exercise its discretion to relieve a litigant from the requirements of the *Rules* so long as that discretion is exercised justly and balancing the interests of the parties.

The court concluded that the documents sought by the plaintiff were of marginal relevance and the third parties had legitimate confidentiality concerns.

e. *Lamont-Caputo v. Hay*, 2021 BCSC 1713, Master Muir

The defendants made two applications, one for production of employment records and one for medical records. Master Muir noted that it is incumbent on the party seeking the records to bring an application promptly. The party should not delay in bringing an application for documents, and should not make serial demands for documents in letters that are not responded to and then bring an application on the eve of trial.

With respect to medical documents, the defendants sought several authorizations for clinical records, relying on *Nikolic v. Olson*, 2011 BCSC 125. The application for authorizations was denied, as production by consent order is the preferable route where a third party record holder has not complied with a request for production of records.

With respect to the majority of the remaining clinical records sought, the plaintiff stated that they would make them available should the defendants make the payment required for them. The plaintiff had an obligation to comply with a demand for the records within 35 days of it being made, and should have responded with a request for payment if their position was that they had to be paid for. This was not done. Nevertheless, Master Muir ordered that the plaintiff produce the records on the condition that the defendants make reasonable payment for production.

f. *Meghji v. British Columbia (Minister of Public Safety and Solicitor General)*, 2021 BCSC 2153, Funt J.

The defendant applied for relief from the implied undertaking of confidentiality with respect to the plaintiff's records from her psychiatrist which the defendant sought to use in a related action involving the plaintiff's daughter and arising out of the same motor vehicle accident. The court refused to make the order but left it open to the trial judge to relieve the implied undertaking at trial. In balancing the competing interests, the chamber's judge considered they warranted a "wait and see" approach.

A. Privilege

a. *Abdul-Ahad v. Challa*, 2021 BCSC 795, Jenkins J.

The defendants alleged that the plaintiff was in contempt of court for breaching the implied undertaking rule and settlement privilege. The plaintiff made a complaint against the defendant to a third party, the College of Physicians and Surgeons of British Columbia, disclosing a "without prejudice" letter from counsel for the defendant, without authorization or consent.

The court found that settlement privilege did not apply to the letter. Settlement privilege extends to communications between parties made in an effort to resolve outstanding issues. Although the letter was connected to a litigious dispute and was marked "without prejudice," it did not invite a compromise that evinced an attempt to settle.

The implied undertaking rule also did not apply to the letter. The implied undertaking rule dictates that information obtained through oral or documentary disclosure in litigation, not otherwise independently obtainable through legitimate means, cannot be used for collateral or ulterior purposes absent the consent of the producing party or leave of the court. As the letter was created to be sent to counsel and was not a document which arose from the process of discovery, the rule did not apply.

b. *Association de mediation familiale du Québec v. Bouvier*, 2021 SCC 54, Kasirer J. (Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. concurring)

The parties to the underlying family dispute, Ms. Bisaillon and Mr. Bouvier, participated in a mediation. They signed a mediation agreement in which they agreed not to use mediation documents in court without consent. Later, Ms. Bisaillon sought equal partition of their residence in court and, in defence, Mr. Bouvier argued that the matter had been settled in mediation. Ms. Bisaillon argued that the mediation documents were inadmissible due to the agreement and that the matter was never settled in mediation.

The trial judge dismissed Ms. Bisaillon's objection to disclosure of the mediation documents, relying in part on the exception to settlement privilege recognized in *Union Carbide Canada Inc. v. Bombardier Inc*., 2014 SCC 35, which allows protected communications to be disclosed in order to prove the existence and terms of a settlement. The judge found that there was a contract between the parties. Ms. Bisaillon appealed, and the court of appeal unanimously dismissed the appeal. A third party appealed to the supreme court of Canada. The appeal was dismissed.

Kasirer J. held that the exception to the general rule of settlement privilege can apply in the context of a family mediation. An exception to settlement privilege may be made out where a defendant shows that, on balance, "a competing public interest outweighs the public interest in encouraging settlement." The exception may apply in order to prove the existence of a settlement agreement during subsequent court proceedings.

c. *Insurance Corporation of British Columbia v. Teck Metals Ltd.*, 2021 BCSC 1477, Riley J.

The action involved a claim by the Insurance Corporation of British Columbia (ICBC) on its own behalf and on behalf of insured vehicle owners, for damages to 520 vehicles arising from exposure of vehicles to sulfuric acid that was spilled on a highway in two separate spill incidents in 2018. There was a prior spill in 2010 and a prior action was commenced against the defendant but resolved by way of a consent dismissal order in 2013. The defendants sought a ruling under *Rule 7-1(17)* of the *Supreme Court Civil Rules* that the expert file relating to an expert forensic engineering report obtained in relation to the 2010 spill was not protected by litigation privilege.

The court reviewed *Blank v. Canada (Minister of Justice)* 2006 SCC 39 which held that litigation privilege ensures the "*efficacy of the adversarial process*" by creating a "*privacy zone*" around information created for the dominant purpose of litigation, so that the parties can "*prepare their positions in private.*" However, in *Blank*, the majority also held that the privilege does not operate indefinitely, and it expires when the litigation comes to an end unless it was "*related litigation*": i.e. involves the same or related parties, arises from a related cause of action or raises issues in common to the initial action, or shares the same essential purpose. At paragraph 22, Riley J. states that the "*…ultimate question is whether the subsequent proceeding qualifies as "related litigation" such that the litigation privilege continues."* At paragraph 23, the court notes that the prior and current litigation involve some of the same parties, both were civil actions for damage to vehicles, both proceedings involve strikingly similar factual or evidentiary issues about the extent to which sulfuric acid spills can affect the roadworthiness of vehicles, so despite the temporal gap between the proceedings, the court held that the two actions qualified as related litigation, such that the litigation privilege still applied.

The defendants also argued that as the expert report had been produced in the prior action, ICBC had waived litigation privilege in respect of the expert file. While the court agreed that ICBC had waived privilege over the expert report by serving it in the prior action, service of the expert report did not create an immediate waiver of privilege over the expert file. At paragraph 28 the court states that while service of the expert report triggered a potential obligation to produce the expert file in due course under *Rule 11-6(8)(b),* the litigation never reached the point where the expert file was produced. The court held that ICBC had not waived privilege over the associated expert file. The court also held that by listing and disclosing the expert report in the current action, ICBC had not waived privilege over the expert's file. At paragraph 32 the court held that "*…there is a continuing litigation privilege over the expert file, and the timing of any future waiver is governed by Rule 11-6(8).*"

d. *McCarthy v. City of North Vancouver*, 2021 BCSC 2517, Master Elwood

The plaintiff applied for production of a number of records from one of the defendants in this action, including video footage and photographs of the wedding which gave rise to the litigation. The defendant withheld the records sought, claiming litigation and settlement privilege. The plaintiff disputed the claim of privilege, as the records were created before litigation was in contemplation. Additionally, the plaintiff argued that litigation privilege was waived when the defendant's agent relied on the documents in support of an argument that the plaintiff ought to drop the claim against the defendant.

The videos and photographs sought were not the originals from the wedding, but copies, which the defendant sought out from her guests after litigation was in reasonable contemplation. The documents were also created solely for the dominant purpose of litigation by the defendant's agent. They were therefore protected by litigation privilege.

The defendant's agent relied on the records at issue in emails to the plaintiff's counsel attempting to convince him to remove the defendant from the litigation. The emails were one-sided and described as "puffery". They were not communications which the parties reasonably intended to lead to a compromise or settlement, and therefore not protected by settlement privilege.

Partial disclosure of a privileged document will not invariably result in a deemed waiver of privilege over the entire document. In this case, the defendant did not disclose any of the statements, photographs or videos referred to in her agent's emails. Nor did she seek to rely on any of those documents in the proceedings. The defendant therefore did not inappropriately use litigation privilege as both a sword and a shield, and the privilege was not waived.

e. *Ralmax Properties Ltd. v. Pt. Ellice Properties Ltd.*, 2021 BCSC 2454, Saunders J.

This action involved a failed real estate transaction. The plaintiff sought production of email correspondence over which the defendants asserted claims of solicitor-client privilege. The defendants listed many documents in their list of documents over which they claimed privilege, including email chains that passed amongst the defendants' counsel and various advisors during a period of negotiation between the parties with respect to the transaction. The defendants claimed that these emails were privileged on the basis that the advisors, including legal counsel, communicated frequently about the negotiations which included legal advice and opinions from legal counsel.

In the case of claims of privilege over communications with third parties, such as accountants, there must be affidavit evidence which describes how the relationship of the third party to the client, or the solicitor, or the circumstances in which the communication was made, brings each communication within the scope of the privilege as described in *Bilfinger* and *Redhead*. If the affidavit evidence establishes *prima facie* grounds, the court may then proceed to exercise its jurisdiction under *Rule 7-1(20)*. Each particular third party communication over which privilege is claimed must be shown to have arisen as a consequence of the third party having served a function essential or integral to the solicitor-client relationship, and the giving or receipt of legal advice.

In this case, the defendants rested their privilege claim on characterizing the role of the advisors as members of a "team", rather than submitting that the privilege over the communications would be inferred from a review of the documents themselves. The defendants' affidavit evidence therefore did not establish the *prima facie* grounds for the claim of privilege the defendants asserted.

B. Redactions

a. *Chow v. Wichacz*, 2022 BCSC 9, Master Bilawich

In this case, the plaintiff alleged domestic violence and trespass against the defendant. The defendant's clinical records were produced by consent *Halliday* orders on the basis that they may have included information relevant to the plaintiff's claim. The defendant produced heavily redacted copies of his clinical records. The plaintiff applied to compel the defendant to produce all unredacted copies of the clinical records.

Per *North American Trust Co. v. Mercer International Inc.* (2000), 71 B.C.L.R. (3d) 72 (BCSC), the defendant was required to establish that the redacted portions of the medical records were irrelevant and that there was a good reason why they should not have been disclosed. The defendant satisfied both parts of the *Mercer* test with respect to the redacted portions of medical records from and after the accident date, at least for the purposes of the first tier of document discovery. The plaintiff still had the option of pursuing those issues during her examination for discovery of the defendant, and could later apply for production of unredacted copies based on the second tier of document production.

However, the defendant did not offer a good reason for his redaction of pre-Accident medical records. Those were described as being irrelevant, but irrelevance alone is not sufficient to justify redaction. Master Bilawich ordered that they be produced in unredacted form.

b. *Minchin v. Movsessian*, 2021 BCSC 1303, Master Elwood

In this application, the defendants applied for production of complete copies of unredacted medical records. The plaintiff had produced the records, but redacted portions with notations including "Irrelevant – lifestyle", "Irrelevant test results", "Transient aches and pains", or "Bacterial" or "Hematology". The plaintiff opposed the applications on the basis of relevance and privacy.

Master Elwood noted that while the records of a medical professional are not to be treated as a single document, there is no authority for the proposition that a listing party may redact medical

records by treating every medical condition, test result or topic of conversation within a single interaction as a separate document allowing for a separate analysis of relevance. The process of withholding information by redaction must follow the guidelines laid down by the court (set out in paras. 31 – 37). The onus is on the party making redactions to establish a basis for doing so. Master Elwood discussed the relevancy of each category of documents in dispute, and ruled on whether they should be disclosed based on whether they could be used to prove or disprove a material fact. Certain records which were not within the plaintiff's initial obligation to list and produce could be further explored on an examination for discovery.

Certain non-party records were ordered to be produced on a *Halliday* format. While a *Halliday* order is not automatic, generally requiring affidavit evidence that there is likely to be irrelevant personal information in the production, there were legitimate privacy concerns in this case warranting the order.

IX. Evidence

a. *Carnival Corporation v. Vancouver Fraser Port Authority*, 2021 BCSC 643, Gomery J.

The plaintiff owner of a ship claimed that its ship was damaged as the defendant failed to provide a safe berth. The parties agreed that the actions of the captain who was directly engaged in manoeuvring the ship at the time of the collision were crucial to deciding the case, but the captain had since died. The plaintiff applied for an order that *Rule 12-4(54)* of the *Supreme Court Civil Rules* affords the court discretion to permit the use of the deceased's discovery evidence to fill the evidentiary gap arising from his death. The defendant opposed the application on the basis that *Rule 12-5(46)* provides that the examination evidence may only be tendered by a party adverse in interest, unless the court otherwise orders, but the evidence is admissible only against the adverse party who was examined or the adverse party whose status as a party entitled the examining party to conduct the examination.

The parties agreed that the evidence was necessary, and the court held that the evidence was reliable as it was taken under oath and the deceased had been cross-examined by counsel for three defendants, lasting more than five hours in total, and nothing in the transcript to suggest that the captain was a partisan witness. The court also found that the trial judge would be able to rationally evaluate and weigh the accuracy of the deceased's discovery evidence with the other evidence, both corroborative and contradictory. The presence of corroborative independent evidence provided a basis for rational evaluation of the evidence as well as providing a basis for rejection of alternative explanations. The court held that the interests of justice would be best served by admission of the evidence.

b. *Casbohm v. Winacott Spring Western Star Trucks*, 2021 SKCA 21, per Jeurer J.A. (Caldwell and Whitmore JJ.A. concurring)

The appellant was injured when he fell from a ladder while working at the defendants' business. He claimed in occupier's liability that the defendants breached their duty to keep their property and premises reasonably safe. He alleged that the ladder provided by one of the defendants was faulty. Liability was determined using the summary judgment procedure and the claim dismissed.

The appellant appealed, arguing the judge committed several errors, most in relation to the treatment of the expert evidence.

One of the main issues was spoliation regarding the defendants' destruction of the ladder. At chambers, the judge stated that *"[o]ne factor that impacts significantly on the quality of the expert evidence in this case – for both sides – is the fact that the experts were not able to inspect the ladder*" that was used at the time of the fall. However, the judge was not prepared to draw an adverse inference against the defendants based on the disposal of the ladder as the ladder was damaged beyond repair and the court accepted that at the time of disposal, the defendants were not contemplating litigation.

At paragraph 46, the court notes that the operative question regarding spoliation is whether the circumstances justify the reasonable inference that the evidence was destroyed to affect the outcome of litigation. However even if spoliation did occur, the other party may be able to rebut that inference by leading evidence that there is an innocent explanation for the destruction of the evidence.

The court of appeal found that the chambers judge did not err, and the appeal was dismissed.

c. *Cowichan Tribes v. Canada (Attorney General)*, 2021 BCSC 980, Young J.

The plaintiff served a response report on one of the defendant's experts in cultural anthropology. The defendant then attempted to rely on a reply report to the plaintiff's expert's response report. The plaintiff argued that the *Rules* did not allow for reply reports and noted that if these types of reports were allowed the exchange of expert reports could go on forever with each party trying to get in the last word.

The court held that the *Rules* related to expert reports are mandatory and are a complete code. There is no common law exception for admitting expert reports. An expert's report must comply with *Rule 11-*7 or the litigant can obtain leave for admission of non-compliant reports under *Rule 11-6*.

The court found that in this case none of the requirements under *Rule 11-7* were met and the court refused to exercise its discretion under *Rule 11-6* since the reply report simply stated that the defendant's expert's opinion had not changed.

d. *Guilbert v. Economical Mutual Insurance Company*, 2022 MBCA 1, Beard J.A.

The plaintiff applied to extend the time for filing a notice of appeal of the trial order which found that he set a fire destroying his business premises, thus voiding his insurance with the defendant. The plaintiff raised three grounds of appeal: (a) an error in admitting the plaintiff's polygraph results relating to the fire investigation into evidence; (b) an error in giving any weight to expert evidence based on unproven hearsay evidence; and (c) an error in applying the test for fraudulent misrepresentation.

The trial judge admitted the plaintiff's polygraph test report, but only for the limited purpose of the insurer's defence to the plaintiffs' claim alleging the insurer's breach of good faith. The jurisprudence states that the fact or results of a polygraph test are not admissible in a trial to prove the credibility of a witness or a party. They may, however, be admissible for other purposes, such as to explain conduct or the reason for actions or decisions, where those matters

become issues in a trial or proceeding. Examples from the jurisprudence include addressing allegations of both good and bad faith and whether there was reasonable cause. The trial judge was clear in his decision to include the evidence only on that limited basis, and this proposed ground of appeal was denied.

Additionally, the expert evidence was not based on inadmissible hearsay evidence. Although the expert did refer to hearsay evidence, that evidence was also contained in the statements of several other witnesses, and was repeated in their *viva voce* evidence during the trial. The trial judge was also not mistaken in applying the test of whether the misrepresentation had "the capacity to affect the mind of [the insurer]." The plaintiff's motion to appeal was dismissed.

e. *Meckic v. Chan*, 2022 BCSC 182, Kent J.

Kent J. was critical of clinical and hospital records "being shovelled wholesale into evidence" under a document agreement that permitted their use for the truth of their contents including the accuracy of diagnoses made and treatments provided. This was apparently done by counsel in response to legislation limiting expert reports. Kent J. noted he had no intension of scouring through this evidence and that it is the role of counsel to organise and present the relevant evidence as efficiently as possible.

f. *Nagy v. William L. Rutherford (B.C.) Limited,* 2021 BCCA 62, per Dickson J.A. (Goepel and Butler JJ.A. concurring)

At a summary trial on a wrongful dismissal action, the judge concluded that the appellant had not been wrongfully dismissed. This conclusion was based on an email sent by the appellant that the judge determined constituted after-acquired just cause. The appeal was allowed as the court found that the judge's conclusion that the email was discovered by the respondent employer after the appellant was dismissed was not supported by the evidence. As the judge had not considered other grounds for just cause alleged, the issues of condonation, and the sufficiency of any warnings, the court held that the matter should be remitted to the trial court for determination.

Of note are the court's comments regarding rules for examination for discovery evidence on a summary trial application. The defendant filed an affidavit that appended the transcript of the plaintiff's entire examination for discovery. The affidavit did not identify the specific questions and answers upon which the defendant relied, and they were not identified in the chambers record placed before the judge. At paragraph 31, Dickson, J.A. states that "[*t]his was a procedural error and a practice that should be avoided by counsel."*

The court refers to *Newton v. Newton and Newton,* 2002 BCSC 14 setting out that the proper procedure for a party relying on evidence from an examination for discovery in a summary trial is to "*…file an affidavit that attaches the salient parts of the discovery transcript and sets out the questions and answers upon which it relies.*" At paragraph 32, the court states that although not strictly compliant with the *Supreme Court Civil Rules*, a common practice is where parties list the questions and answers upon which they rely on a cover page in the chambers record rather than in an affidavit that appends the discovery transcript. Dickson, J.A. states that "*…it is unlikely that the court would accept discovery evidence on a summary trial unless the introducing party has provided some form of advance notice of the specific questions and answers relied upon to the*

opposing party. The key consideration is that advance notice was provided in a manner sufficient to render introduction of the evidence fair to the other side…"

g. *N.M. v. Contreras-Ramirez*, 2021 BCSC 1341, Punnett J.

The plaintiff sought damages for a sexual assault. The defendants had been convicted of sexual assault in criminal proceedings. The court concluded that a verdict in a criminal case and the findings essential to that verdict are conclusive in civil proceedings, particularly where guilt is determined by a higher standard than in civil proceedings. See also *Schuetze v. Pyper*, 2021 BCSC 2209, in which the court was not bound by an agreed statement of facts entered in criminal proceedings in which the defendant pleaded guilty.

X. Examination for Discovery

a. *Bockhold v. Richardson GMP Limited*, 2021 BCSC 2581, Master Elwood

The plaintiff successfully brought an application ordering that he be permitted to attend his examination for discovery by video. His counsel worked in Toronto and the plaintiff did not want to incur the costs of their travelling and attending the discovery in person, nor did he want to attend without counsel present. The defendant argued that the plaintiff's counsel could attend by video and the plaintiff would be in-person with the examining counsel. The court noted that the discovery process could be intimidating, and it was beneficial of having a lawyer in-person. In addition, since the pandemic, counsel have become skilled, by necessity, in conducting virtual discoveries; therefore, there was little prejudice to the defendant.

b. *Janmohamed v. Sunderji*, 2021 BCSC 1144, Skolrood J.

The defendant brought an application in a defamation action to compel answers to several discovery questions that were objected to by counsel. The court reviewed some of the applicable principles from *Kendall v. Sunlife Assurance Company of Canada*, 2010 BCSC 1556, and noted that while the pleadings define the scope of discovery, this should be applied flexibly, keeping in mind that pleadings can be amended.

c. *O'Mara v. Chuang*, 2021 BCSC 925, Master Muir

The defendant brought an application to compel responses to questions made at the plaintiff's examination for discovery, specifically, for the full names and contact information of one of the plaintiff's supervisors and two co-workers. The plaintiff opposed production, arguing that he did not know their last names and did not have their contact information. The plaintiff further argued that he was not required to look beyond his own records in fulfilling these requests and relied on Master Elwood's decision in *TCC Mortgage Holding Inc. v. Rohland*, 2020 BCSC 1399.

In allowing the defendant's application, Master Muir noted that *TCC* dealt with *Rule 7-2(18)(a)*, and that *7-2(18)(b)*, when read in context with *Rule 7-2(22)*, is not limited to the plaintiff searching only their own records, finding that the plaintiff has the most direct knowledge and access to the information requested and he must take reasonable steps to ascertain the addresses and full names of the potential witnesses.

XI. Expert Evidence

a. *Didyuk v. Redlick*, 2021 BCSC 2272, Ahmad J.

After a *voir dire* regarding the admissibility of expert evidence (a physiatrist's report prepared for the defence), Ahmad J. ruled that the report was not admissible.

Under a subheading in the report titled "physical examination", the expert set out observations he made of the plaintiff, not during the formal physical examination that he conducted, but while the plaintiff was in the waiting room of his office. The plaintiff was unaware that he was being observed at the time. The plaintiff argued that the report failed to meet three of the four *Mohan* criteria, being that: (a) it included findings of credibility which did not require expert assistance, (b) the expert assessment of credibility fell within the purview of the trier of fact, and (c) the expert was not impartial, independent, or unbiased.

The report usurped the court's role by making very clear assessments of credibility. The report disclosed a willingness of the expert to substitute objective data with his own subjective view of the plaintiff. The report was therefore inadmissible in its entirety.

b. *Dunn v. Heise*, 2021 BCSC 754, Matthews J.

The plaintiff, a 24-year-old retail manager, suffered from chronic pain and entrenched psychological health problems as a result of a motor vehicle accident. In the assessment of loss of future earning capacity, the court used the capital asset approach due to the plaintiff's young age and uncertainty about his future career.

The plaintiff proposed that the court use the *Civil Jury Instructions* multipliers in lieu of expert economist evidence on the discount rate applied to the present value of the loss assessed over time. The defendants submitted this was not appropriate because the *CIVJI* multipliers do not take into account positive or negative contingencies. Most importantly, they also do not take into account negative labour force participation contingencies, such as reduction in a future stream of income due to disability, economic downturns resulting job loss, family responsibilities, or early retirement.

Contingencies are applied by the court based on evidence. Where there is no specific evidence of contingencies, the court often assesses a negative contingency of 20%. Where there is evidence, the deduction is tailored or eliminated in accordance with the evidence. In this case, the court found it appropriate to use the *CIVJI* multipliers and to apply contingencies separately.

The plaintiff's future loss of earning capacity was assessed as a loss of 30% of the mean of the estimates for his lifetime earnings, before contingencies. Matthews J. then applied a 25% reduction for likely contingencies that would reduce the award.

c. *Johal v. Fazli*, 2021 BCSC 1368, Matthews J.

At paragraphs 7 to 12, the court summarizes the law regarding response reports. The court confirms that "…*response expert evidence does not permit fresh opinion evidence to masquerade as an answer to the opposition's reports*", that they must "…*engage with the report to which it responds*", and "…*[r]eports that do not make an effort to respond directly to the other party's opinion evidence are "freestanding" opinion evidence in the sense that they are evidence on a key*

issue in the litigation that is not responsive, except to be a flat-out disagreement on the key issue, a stated response to a position of the party, as opposed to a response to the opinion of an expert."

At paragraph 17, the court states that it is not enough to provide an opinion that is inconsistent with the report it is said to respond to. "*A response report must provide specifics as to why the opinion it responds to should not be accepted or otherwise engaged with such opinion.*"

The court found occupational therapist Mr. Pakulak's response report to Dr. Kokan's report to be freestanding. The court held that Mr. Pakulak provided opinions on an issue that Dr. Kokan had not expressly opined on regarding the impact of limits of range of motion on the plaintiff's ability to pursue employment. Neurosurgeon Dr. Sahjpaul's response report to Dr. Kokan's report was held to be freestanding and not truly responsive, as he did not reference Dr. Kokan's opinion, criticize his assessment or methodology, or directly engage with Dr. Kokan's report in any way. Neither response report was admitted.

d. *Johnson v. Avis Rent a Car*, 2021 BCSC 1081, Milman J.

The plaintiff sought damages for injuries sustained in a motor vehicle accident. Dr. Giantomaso provided an expert report stating that "…*causation, is not straightforward and, in this case, not clearly majorly related to the accident in question at a 50 + 1% probability or likelihood*." Paragraph 51 notes that Dr. Giantomaso opined that the plaintiff would have required treatments for her neck and back had the accident not occurred, "…*however, t*he *accident likely accelerated some of her pain features especially in the neck and back but not so clearly the low back but is also not wholly responsible for her posttraumatic treatments including in all probability her post-traumatic surgical management.*" At paragraph 53 the court states that it is not entirely clear what Dr. Giantomaso meant by the phrase "*not clearly majorly related to the accident in question at a 50 + 1% probability or likelihood*" but that "…*whatever he meant, it does not appear to coincide precisely with the legal test for causation.*"

The court confirmed that the test in *Athey v. Leonati*, [1996] 3 S.C.R. 458 requires the plaintiff to show that the injuries would not have occurred absent the accident. The court also referred to *Resurfice Corp. v. Hanke*, 2007 SCC 7 (para 23) and the "but for" test which recognizes that compensation for negligent conduct is warranted where a substantial connection between the injury and the defendant's conduct is present but ensures that a defendant will not be held liable where there are factors unconnected to the defendant and not the fault of anyone. At paragraph 54, the court found that the medical evidence did demonstrate that the plaintiff's injuries from the accident "…*caused certain symptoms to appear and others to appear sooner or differently than they otherwise would have*" which satisfied the legal test for causation and entitled her to an award of damages.

e. *Lucas v. Canniff*, 2021 BCSC 1014, Horsman J.

The plaintiff, a 37-year-old farm manger, sought damages for indivisible injuries sustained in 4 accidents. There was found to be a real and substantial possibility that the plaintiff's capacity to earn income was impaired. The was no economic evidence before the court with respect to loss of future earning capacity.

Horsman J. accepted the expert physiatrist's opinion that the plaintiff was, at the time of trial, working at her maximum capacity at 32 hours per week, 80% of full-time hours. Using the *CIVJI*

multipliers, Horsman J. calculated the plaintiff's income for the next 10 years if she were limited to working 80% of full-time hours as compared to full-time. The income difference was $103,583. Taking into account positive and negative contingencies, including that her symptoms would improve and that she would switch jobs, $80,000 was awarded for loss of future earning capacity.

This decision is under appeal.

f. *Raniga v. Kang*, 2021 BCSC 2340, Master Elwood

The plaintiff applied for leave under s. 12.1(5) of the *Evidence Act* to tender two additional expert reports, over and above the limit of three. The two conditions in subsection (6) must both be met in this assessment. The first condition requires that the specific subject matter of the proposed additional report is not already addressed in other reports. The second condition requires a weighing exercise to balance the prejudice to the party of not having the benefit of the report against the impact of allowing the report on the cost and complexity of the case. In this case, the plaintiff had a complex injury and the additional OT report did not result in "piling on" of evidence. The additional family practitioner report did not meet the first condition of subsection (6), as the material had been addressed in other reports.

g. *Vespaziani v. Lau*, 2021 BCSC 1224, Kirchner J.

The plaintiff served ten expert reports and the defendant opposed their admission as s. 12.1(2) of the *Evidence Act,* R.S.B.C. 1996, c. 124 prohibits more than three expert reports on the issue of vehicle injury damages at trial. Section 12.1(5) provides that the court may allow expert evidence of one or more additional experts to be tendered despite the limit if the following conditions set out in s. 12.1(6) are met:

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.

A question arose whether the conditions were conjunctive or disjunctive, as there is neither an "and" nor an "or" after paragraph (a). At paragraph 22 the court held that as subsection 5 requires that the "conditions" (plural) in subsection 6 be met, the court held them to be conjunctive such that both conditions must be met.

At paragraph 30, the court indicates that the first condition is to avoid duplication or "piling on" of expert evidence. The second condition is a "…*weighing exercise to balance the prejudice to the party of not having the benefit of the expert report against the impact of the expert report on the cost and complexity of the case*." The court found that while there was some overlap between the neurologist, physiatrist, and psychologist, the specific subject matter was not addressed in the other expert reports as each dealt with three different disciplines. While the report of vocational consultant Derek Nordin relied heavily on the other medical opinions, his report provided additional information and a vocational test battery. The economist also relied on Mr. Nordin's report to some extent, to arrive at his opinion on future loss of income but there was not such duplication as to render the reports inadmissible. The court held that denying the

plaintiff the ability to tender all expert reports would prejudice her ability to prove essential elements of her claim. The court held that the prejudice in not being able to rely on the expert reports was disproportional to any cost saving or reduction in complexity by potentially saving a day and a half of trial.

The court also addressed the issue of more than one report by the same expert. There were three reports from the physiatrist and two from the economist. Dr. Finlayson's first two reports were two years apart, so the court was satisfied that it was appropriate to obtain an updated opinion closer to trial. The third report was also admitted as it was one page and dealt solely with the benefits of a particular treatment. The economist's reports were admitted because they were sought to quantify two separate types of losses. The court also noted that both the physiatrist and the economist's reports could have each been combined into one, but this would be a "*victory of form over substance*" and would result in additional costs for the experts' time to do so. The plaintiff was granted leave to tender all the expert reports at trial.

XII. *Family Compensation Act*

a. *Smith v. Vance*, 2022 BCSC 12, Betton J.

The plaintiffs sought damages from the defendants pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126, arguing that their daughter, who was killed in a motor vehicle accident, would have provided financial assistance to them. They argued that they had planned for their daughter to purchase their home, after which she would have allowed them to occupy it for up to 25 years at a fixed rental rate.

Betton J. agreed that the plaintiff's daughter would have provided assistance to them and that her death resulted in a pecuniary loss to them. However, a precise calculation of loss was not possible, as there was a wide range of potential scenarios the daughter might have followed. Betton J. reviewed similar cases at paras. 104 to 109. Having regard to the authorities discussed, the loss was assessed at $90,000.

XIII. Fast Track

a. *Bean v. Emco Corporation*, 2021 BCSC 2047, Master Elwood

The defendant applied to have this action removed from fast track. It arose out of a claim of wrongful or constructive dismissal following the plaintiff's attempted return to work after a prolonged medical leave. The court held that the appropriate test for whether an action qualifies as fast track is whether there is a "rational possibility" that the trial can be completed in three days or the award will be $100,000 or less; however, an application under *Rule 15-1(6)* for an order that the *Rule* ceases to apply requires a more holistic examination of potential prejudice to the other parties. The analysis includes consideration of:

- the number of documents in the case and the ability of the parties to obtain meaningful early discovery;
- the length of examinations for discovery the parties reasonably require;

- whether it is realistic the case can be ready for trial within four months after a trial date is set (or within eight months after the notice of fast track litigation was first issued);
- whether there is doubt the trial can realistically be completed within three days (as this may prejudice the successful party's entitlement to costs); and
- any other prejudice the party seeking the order removing the case may suffer if the order is not made and any prejudice the party resisting its removal may suffer if it is not made.

Master Elwood found that damages were likely to exceed $100,000 but that there was a realistic possibility that the case could be completed in three days. Master Elwood also found that the interest of justice favoured that the matter be brought quickly. He noted that, as the case progresses, there may be additional information that may bring the matter out of fast track.

b. *Burt v. Tamesis*, 2021 BCSC 2195, Master Vos (appeal dismissed 2021 BCSC 2195)

In this case, the plaintiff applied to have a personal injury action removed from fast track a few months before trial. Shortly after filing the Notice of Civil Claim, the plaintiff filed a notice of fast track action. The case had proceeded as a fast track action through examinations for discovery. The plaintiff had served four expert reports from two experts. The defendant did not serve any expert reports.

The defence successfully argued that the limits on expert reports in fast track actions under the *Evidence Act* was a consideration in the decision not to serve any reports. Master Vos dismissed the plaintiff's application primarily on the grounds that the application was brought late in the proceedings without any excuse for the delay. Notably, the plaintiff's counsel's office had emailed defence counsel 10 months before filing the application enquiring if the defence would consent to removing the case from fast track. The court noted concern that this may have been a strategic choice to "lull the defendant into believing that the plaintiff would rely on limited expert evidence" at trial.

c. *Lavoie v. Purwonegoro*, 2021 BCSC 1511, Tucker J.

The court awarded a $1.14 million judgment in this action, which was in fast track by agreement of the parties. At trial, the plaintiff sought approximately $1.16 million while the defendant argued the damages should be assessed around $60,000. The plaintiff was 37 years old and suffered chronic pain as a result of a motor vehicle accident. She had not returned to any type of employment at the time of trial. The trial took place over five days and the plaintiff relied on three expert witnesses. The court ordered that costs be awarded in the cause in accordance with *Rule 15-1*.

XIV. Human Rights Complaint

a. *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158, A. Price, Tribunal Member

Ms. K was awarded over $95,000 after filing a complaint with the Human Rights Tribunal against her former employer.Mr. Joung owned Deep Creek Store where Ms. K worked. He did not participate in the hearing despite having full notice.

Ms. K gave evidence that when she was hired, she was 21 years old, and Mr. Joung was in his mid-40s. Shortly after she was hired, Mr. Joung took her to lunch and offered her $2,000 to have sex with him, which she refused. Ms. K continued working at the store, but Mr. Joung continued to bring up the previous encounter, cut her shifts, acted jealously, complained about her work performance, and eventually terminated her. After Ms. K filed the complaint, Mr. Joung further harassed her by trespassing at her home in the middle of the night, which Ms. K discovered after setting up security cameras.

Ms. K was awarded $53,000 in wage loss and $45,000 as compensation for her mental injuries.

XV. Independent Medical Examinations

a. *Gonzalez v. Element Fleet Management Inc.*, 2021 BCSC 2604, Edelmann J.

This was an appeal of a decision of Master Elwood denying an application by the defendants for an additional IME of the plaintiff by a physiatrist. The plaintiff had already attended an IME with a neurologist at the request of the defendants. Before Master Elwood, there was evidence that a treating neurologist had made a referral to a physiatrist 6 years prior. Master Elwood was not persuaded that the past referral was sufficient to support a further IME by a physiatrist. After the application, the plaintiff served expert reports, including a report by a physiatrist.

On appeal, a further IME with a physiatrist was ordered. The further assessment was warranted by the nature of the injuries. This was confirmed by the plaintiff's own decision to obtain and serve a report from a physiatrist in addition to a report from a neurologist.

b. *Hoang v. Dean*, 2021 BCSC 537, Veenstra J.

The defendants applied for adjournment of the upcoming trial and that the plaintiff be required to attend IMEs with an occupational therapist and a physiatrist. The plaintiff opposed the applications, arguing that the defendants waited too late to begin scheduling IMEs. The plaintiff had failed to attend an IME scheduled two months prior.

In this case, there were delays attributable to both parties. Veenstra J. found that it would not be reasonable to require the defendants to proceed with the trial without the benefit of the two IMEs sought. Veenstra J. ordered that the plaintiff attend the two IMEs and that the deadline for delivery of expert reports by the defendants be extended so they could be delivered before the trial. The application for adjournment was to be heard on a later date in order to give the parties time to determine their positions with respect to additional accidents to be added to the action.

c. *Hunter v. Martell*, 2021 BCSC 1962, Master Harper

The defendant sought an order that the plaintiff submit to a vocational assessment and a functional capacity evaluation. The defence had already arranged for two previous IMEs, one with a psychiatrist and one with a physiatrist. The defence did not obtain those reports.

No evidence was before the court which was sufficient to establish the necessity of the two further IMEs. Further, the court concluded that both the defence IME doctors, whose reports were not obtained, had expertise in the areas that would otherwise be examined at the functional capacity evaluation and the vocational assessment. The application was dismissed.

d. *Parent v. Krystal*, 2021 BCSC 988, Master Keighley

The defendant applied to have the plaintiff attend for audiology testing, an assessment by an otolaryngologist, and a vocational assessment. This was a relatively complicated case. The plaintiff had served reports of a family physician, a physiatrist, a psychiatrist, a neurosurgeon, and an otolaryngologist. The plaintiff also served a physical capacity evaluation, cost of future care report, a vocational assessment, and two reports calculating the present value of cost of future care and loss of earnings and other non-wage benefits. The plaintiff had to that point attended four medical assessments requested by defence counsel.

Master Keighley found that both assessments sought were necessary to achieve reasonable equality in the medical evidence to be placed before the trial judge. The plaintiff was 61-years-old and had not worked for the last six or seven years. There was significant doubt regarding his ability to work. Given the nature of this case, the age of the plaintiff, the size of the potential damage award, and the length of the trial, the principles of proportionality justified the order.

e. *Zhang v. Srott*, 2021 BCSC 1971, Master Elwood

The defendant sought an order requiring the plaintiff to attend an IME by a psychiatrist. The plaintiff opposed the IME on the basis of the recently enacted *Disbursements and Expert Evidence Regulation*, *B.C. Reg. 31/2021*, which limits the disbursements that can be recovered from an unsuccessful party in motor vehicle litigation to 6% of the judgment or a settlement. The plaintiff argued that the new limit on recoverable disbursements would prevent him from recovering the expense of reviewing and responding to a report by the defence expert.

Masted Elwood stated that in an appropriate case, it might be argued that the limit on recoverable disbursements weighs against an additional IME by the defence. However, this was not such a case. The psychological condition of the plaintiff was clearly an issue and the plaintiff intended to tender an expert report by a psychiatrist. An examination by a psychiatrist retained by the defendants would tend to put the parties on an equal footing. The plaintiff did not provide evidence of the disbursements he incurred to support an argument based on fairness and equality. The defendant's application was granted.

XVI. Insurance

a. *Polzin v. ICBC*, 2021 BCCRT 888, E. Regehr, Tribunal Member

The dispute was about whether the applicant was entitled to retain accident benefits provided by the respondent ICBC arising from inability to work as a result of injuries sustained in a motor

vehicle accident. ICBC argued that the applicant had forfeited his accident benefits by making a wilfully false statement that he was not working when ICBC says he was working. At paragraph 19, the tribunal, referring to *Peterson v. Bannon*, CanLII 4719 (BCCA), states that a "*wilfully false statement is a false statement made purposefully and with no justifiable excuse*." The tribunal found video surveillance to be key evidence as it showed the applicant driving in a company truck with two employees, and then helped the two employees unload a shipping container into the residence. The tribunal found that the applicant performed physical labour to assist his employer then one month later falsely denied doing so. The tribunal found that as only a month passed between the move and the statement, the applicant knew his answers were false, so the false statements were wilful.

At paragraph 28, the tribunal notes that a false statement is material if it is "*capable of affecting the mind of the insurer*" which means that ICBC did not need to prove that it would have handled the applicant's claim differently but for the false statements. The tribunal found that because the applicant was working, even part-time or with modified duties, that fact could have affected how ICBC handled his wage loss claim, so his false statements were material. The tribunal found that the applicant's right to accident benefits was forfeited.

b. *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, per Moldaver and Brown JJ. (Wagner, C.J. and Cote, Rowe and Kasirer JJ. concurring, with concurring reasons Karakatsanis, J.)

Steven Devecseri ("D") was insured by the respondent Royal & Sun Alliance Insurance Company of Canada ("RSA") under a standard motor vehicle policy which prohibited him from operating a motorcycle with any alcohol in his bloodstream. In 2006, D and another motorcyclist were riding their motorcycles when D rode on the wrong side of the road and struck a car, injuring the driver, Mr. Bradfield (B). D was killed in the accident. The investigating adjuster retained by RSA obtained the police report which made no mention of alcohol. The adjuster noted that the coroner's report would confirm whether alcohol had been a factor, but neither the adjuster nor RSA took steps to obtain the report. B commenced and later settled an action against D's estate and his own insurer for uninsured and underinsured coverage. The other motorcyclist then brought a personal injury action against D and B and three years later, RSA became aware that D had consumed beer before the accident. It then took steps to obtain the coroner's report, which confirmed blood alcohol level above zero at the time of death. RSA took the position that the matter was off-coverage and it stopped defending D's estate. B commenced an action against RSA (*Bradfield v. Royal & Sun Alliance Insurance Company of Canada*, 2019 ONCA 800), alleging that it was too late for RSA to take an off-coverage position. B argued that having defended the claim to the point of examinations for discovery even though it was or should have been aware of the policy breach, RSA had waived D's policy breach, or was estopped from denying the coverage. The chambers judge granted the application, finding that RSA's defence of the claim amounted to a waiver of the policy breach.

The court of appeal allowed RSA's appeal and dismissed B's action. The court held that the trial judge erred by imputing knowledge of the breach to the insurer based on the coroner's report. The court held that the knowledge requirement is not based on whether the insurer could obtain the material facts, but whether it did have the material facts necessary to enable it to know of

the policy breach. The court found that the insurer had no knowledge of the breach until 2009. The court also found that there was no evidence of detrimental reliance.

At paragraph 42 the court sets out the essential elements of estoppel as follows:

1) "as in the case of waiver, the insurer must have knowledge of the facts that support a lack of coverage; and

2) unlike waiver, there must be "a course of conduct by the insurer upon which the insured relied to its detriment." *Rosenblood Estate v. Law Society of Upper Canada* [1989] O.J. No. 240."

At paragraph 46, the court notes that the trial judge did not address the issue of estoppel, as he found that RSA had waived its right to rely on the policy breach. At paragraph 47, the court found that RSA was not estopped from asserting a breach of the policy as it had no knowledge of the breach until 2009. The court also found that RSA expended time, effort and money to investigate and defend the action until July 2009. There was no evidence that any of the steps taken by RSA to defend the case operated to the prejudice of the estate. There was no difference in the defence of the action whether RSA added itself as a statutory third party or was a defendant in the action, so any presumption of prejudice was rebutted and the court found that there was no detrimental reliance in the case.

B sought to appeal the decision, but after being granted leave, he reached a settlement agreement with RSA and discontinued his appeal. Trial Lawyers Association of British Columbia ("TLABC") asked and was permitted to be substituted as the appellant, and the Ontario Trial Lawyers Association was granted intervener status. The court confirmed that there is no duty to investigate thoroughly and diligently as that is at odds with the duty owed to the insured to investigate fairly, in a balanced and reasonable manner. There is no basis in law for a third-party claimant to be able to ground an estoppel argument in any alleged breaches of an insurer's duty to its insured. The duty to investigate is owed only to the insured, not third parties. The court held that RSA could not intend to alter a relationship by promising to refrain from acting on information that it did not have. As RSA lacked knowledge of the policy breach at the time it provided a defence to D's estate, that was "*fatal to the argument that RSA is estopped from denying coverage."* The court also stated that "*knowledge of the facts demonstrating D's breach cannot be imputed to RSA, and RSA therefore cannot be taken to have intended to assure D's estate, or B, or anyone else, that it would not be relying upon that breach to deny coverage*." While RSA was under a duty to D to investigate the claim against him fairly, "*…RSA was under no additional duty to Mr. Bradfield or other third party claimants to investigate policy breaches at all, much less on a different and more rigorous standard than that owed to its insured*."

c. *Vincent et al v. Red River Mutual,* 2021 MBCA 53, per Beard J.A. (Steel and Mainella JJ.A. concurring)

The applicants' house was damaged in a fire and the respondent insurer arranged for repairs to the house and for the restoration of, or payment for, the contents, but the applicants were not satisfied with the work and the offer. No action was commenced within the two year period but on the last day, the applicants submitted a demand to initiate the dispute resolution process, as well as a proof of loss form three weeks later. The respondent refused both on the basis that the claim was statute barred so the dispute resolution process was no longer obligatory. The

applicants sought appointment of a dispute resolution representative pursuant to section 121(9)(a) of the *Insurance Act*, CCSM c 140 (the "*Act*") but their application was dismissed.

The main issue on appeal was one of statutory interpretation, being whether the right to access the dispute resolution process is subject to the two-year limitation period set out in section 136.2 of the *Act* and incorporated into the insurance policy. As an issue of statutory interpretation is a question of law, the standard of review was correctness.

The appellants argued that as long as notice of their intention to use the dispute resolution process was given before the limitation date, their right to utilize the process and recover the value of their loss was preserved. The court dismissed the appeal, finding that the application judge correctly adopted the interpretation of the *Act* as explained in *Terroco Industries Ltd. v. Sovereign General Insurance Company*, 2007 ABCA 149. At paragraph 8, the court summarizes from *Terroco* (para 25), noting that *"… [t]he demand for, and participation in an appraisal, does not obligate an insurer to pay the claim, and without something more, the insured must commence an enforcement action on the policy within the limitation period to avoid being statute barred.*"

XVII. Liability

a. *Blackburn v. Lattimore*, 2021 BCSC 1417, Wilkinson J.

The plaintiff was a passenger on a bus driven by the defendant bus driver. A van driven by an unidentified driver changed lanes in front of the bus, causing the bus driver to brake hard. The plaintiff slid across the empty seat next to her and hit her head on a metal railing.

The standard of care owed by a bus driver to a passenger is a high one. In assessing whether the standard has been breached, the court is to take into account the experience of the average bus driver, and anything the defendant driver knew or should have known. In this case, the bus driver had been driving busses full-time for a month and a half, including his training period. The evidence suggested that the bus driver ought to have been reducing his speed prior to the moment the accident occurred. Had he been operating the bus with due care and attention, and in accordance with his training, a hard brake application would not have been necessary to avoid a collision. The bus driver was negligent, bearing 40% liability for the accident.

b. *Chavez-Salinas v. Tower*, 2022 BCCA 43, per Abrioux J.A. (Saunders and Griffin JJ.A. concurring)

Following a judgement for damages resulting from a motor vehicle accident, the appellant challenged the trial judge's finding of contributory negligence and the assessment of damages. The court of appeal reversed the finding of contributory negligence. The accident occurred at a controlled intersection, which the appellant drove straight through in a southbound direction. The respondent, travelling northbound into the intersection, turned left in front of the plaintiff, causing the accident. The trial judge found that the traffic light turned from green to yellow when the appellant was approximately 4 meters from entering the intersection, and she was the dominant driver. The judge declined to speculate as to the appellant's stopping time to avoid the accident, but then found that she "might" or "may" have been able to avoid the accident. The

trial judge's conclusion that the appellant could have taken reasonable steps to lessen or avoid the impact was erroneous, as it was based on speculation.

With respect to damages, the award for cost of future care was reduced on appeal. The awards for both an exercise program with a kinesiologist and one year of physiotherapy resulted in double recovery of costs for physiotherapy.

c. *Ding v. Prévost, A Division of Volvo Group Canada Inc.*, 2022 BCSC 215, Myers J.

In this case, the passengers of a tour bus were injured when the bus crashed. The driver and the company operating the bus admitted liability. This trial concerned the liability of the other defendants: the bus manufacturer, the tour operator, another bus company who sub-contracted the bus charter, and the tour guide.

The plaintiffs claimed that the bus was negligently designed by the manufacturer because it did not have seatbelts. A requirement for seatbelts for newly manufactured motor coaches did not come into force in Canada until September 2020. In considering whether the practices of a manufacturer are negligent, the courts defer to industry standards where the practice is the result of a balancing of factors and the matter is technical. The multiple studies conducted on the matter of seatbelts showed that the matter was technical. To find that the manufacturer was negligent, the court would also have to conclude that several other bus manufacturers in North America were equally negligent. The court held that the manufacturer acted reasonably in its design and manufacture of the bus without seatbelts. The decision followed industry and regulatory standards. The plaintiffs did not show that those standards were negligent or unreasonable or that another industry standard existed.

In light of the court's decision regarding the manufacturer's liability, the defendants who subcontracted with the bus operating company were not negligent in engaging a bus that did not have seatbelts. The tour guide was not negligent in failing to keep an eye out for driver fatigue, as there was no proof that the driver exhibited any visible signs of fatigue. The plaintiffs' action was dismissed.

d. *Dutton v. Schwab*, 2021 BCSC 1314, Iyer J.

The plaintiff's case proceeded on one issue: the identity of the driver at the time of the accident. The plaintiff and defendant had been drinking together. The plaintiff had no memory of the accident or parts of the evening before. The defendant recalled the plaintiff was driving. After the accident, the plaintiff was in the back seat and the defendant was in the passenger seat. The court admitted DNA evidence that the blood on the driver's air bag was the defendant's. The court was not prepared to infer from the presence of blood alone, without more, that the defendant was the driver.

e. *Fennell v. Mikulasik*, 2021 BCSC 2102, McDonald J.

This action arose out of a motor vehicle accident just past the intersection of Lansdowne Street and 2nd Avenue (the "Intersection") in Kamloops, B.C. The plaintiff was driving her Toyota Corolla behind the defendant's truck on Lansdowne Street; both were in the middle left non-curb lane, with a dedicated left turn lane to their left. The plaintiff testified that the defendant drove through the Intersection with his left turn signal activated. The plaintiff testified that

approximately five car lengths past the cross walk of the Intersection, she turned on her left turn signal and moved into the left curb lane. She stated that she began to overtake the defendant's truck as she was traveling 50-60 km/hr and he was traveling slowly. The plaintiff testified that when her vehicle was about half-way past the defendant's truck, the defendant started to change in the left curb lane where she was driving, and he collided with the front passenger side of her vehicle. The plaintiff did not honk her horn at the defendant to warn him that she had changed lanes as she assumed that he was not intending to move left as he had driven through the Intersection with the signal on.

The defendant's evidence was that he did not turn his left turn signal on until after he passed through the Intersection, as he was intending to turn into the second entrance of a parking lot on the left side of the Lansdowne Street just past 2nd Avenue. The defendant testified that before he changed lanes, he checked his mirrors, did a left shoulder check, saw that the lane was "wide open" and began to change lanes, but in cross-examination he admitted that he failed to check his rear view mirror and he did not see the plaintiff's vehicle before impact.

The court found that both parties provided honest and credible evidence regarding the circumstances. However, the court found the plaintiff to be mainly at fault for the accident as she had seen the defendant's left turn signal activated, she overtook his vehicle while his left indicator continued to blink, and she had the ability to delay her own entry into the left curb lane. At paragraphs 21-22, the court found that the plaintiff made a quick lane change to the left curb lane seconds after passing through the Intersection and that she was likely frustrated by the presence of the defendant's slow moving truck in front of her, and she wanted to get by him as quickly as possible. At paragraph 26, the court held that the plaintiff's actions were not reasonable or safe in the circumstances and she "…*bears a greater share of the blameworthiness for the accident*". The court held the plaintiff 60% at fault for the accident.

f. *Hakimpour v. Grimm*, 2021 BCSC 1701, Tucker J.

This action arose when the plaintiff and her infant son were walking along the gravel shoulder of Dorset Road in Port Coquitlam, B.C. and were struck by the defendant's vehicle. The plaintiff alleged that the defendant drove out of her lane of travel and struck them. The plaintiff testified that she saw the defendant's vehicle lights coming toward them but there was no time to take evasive action before the car hit them. The defendant testified that she was not in a rush and was paying attention but did not see the plaintiff until the moment of impact. The defendant's evidence was that the accident occurred on the asphalt road and entirely within her lane of travel.

A police officer testified that she interviewed the plaintiff at the hospital and the plaintiff had indicated that she and her son were crossing Dorset Avenue. The plaintiff testified that was not correct, as they were walking along the north side of Dorset when they were hit. The plaintiff's first language was Kurdish but she also spoke Farsi and learned English after she came to Canada in 2002. The plaintiff testified that she confused "crossing" and "alongside" in English resulting in the misinformation in her statement to the police officer. The plaintiff's counselor testified that the plaintiff made references to "crossing the street" in counseling, although she never asked the plaintiff exactly what she meant by that. The counselor described the plaintiff's English language skill as limited, but functional.

The court held that the evidence supported a finding that the plaintiff was crossing Dorset Road and that the accident occurred in the defendant's proper lane of travel. The court found the plaintiff to be evasive under cross-examination and her assertion that she was hit while she was on the shoulder to be untrue. At paragraph 40, the court found it noteworthy that the plaintiff had taken and passed her learner's license in English, where *"[t]he concept of "crossing" is patently material to a driving test.*"

The court held that the defendant had the right of way, but she also had a duty to other users of the road. The court referred to *Plett v. ICBC* (1987), 12 B.C.L.R., (2d) 336 (C.A.), noting that the "*mere fact that a driver did not see a pedestrian before hitting her is not, in itself, sufficient to establish that the driver kept an inadequate lookout.*" However, the court found that the defendant was keeping an eye out, had no reason to expect people to be crossing Dorset Road in the middle of the block, and no evidence to suggest the defendant was speeding. The court found that the plaintiff was not crossing the street in a reasonable manner as she was jaywalking in heavy rain, in the middle of a dark block, in dark clothes, and carrying a dark umbrella, so she was not visible until the last moment. The plaintiff's claim was dismissed, as the plaintiff had not established that the defendant failed to exercise the care and attention of a reasonably prudent driver.

g. *Matthews v. Reed*, 2021 BCSC 2131, Harvey J.

The plaintiff was riding as a passenger on the defendant's motorcycle when the motorcycle hit a deer, causing it to slide out from the under the defendant and the plaintiff. The plaintiff was thrown off the motorcycle and sustained injuries. She sought damages, alleging negligence against the defendant, which he denied.

The plaintiff admitted that the defendant had both hands on the handlebars and was focused on the roadway immediately prior to the accident. There was no evidence that the accident was caused or contributed to by the condition of the motorcycle. The evidence did not disclose a want of vigilance on the part of the defendant. He was scanning the roadway and area ahead of him in accordance with his practice as an experienced touring motorcyclist. The plaintiff thus failed to discharge the burden of establishing that the defendant's driving fell below the standard of care.

h. *McLaughlin v. Cerda*, 2021 BCSC 979, Kirchner J.

In a summary trial application, the court dismissed a claim of social host liability made against a restaurant and bar in a third party notice. Two other social hosts had also been added and the allegations against all three were that they had overserved the defendant driver who was allegedly intoxicated at the time of a single-vehicle accident. The plaintiff was passenger in the defendant's vehicle and was seeking compensation for injuries sustained in the accident.

The defendant and the plaintiff were both servers of the applicant's establishment. On the night of the accident, a group of servers had one drink at the applicant's establishment before going together to dinner at a related establishment where wine and other drinks were served. After dinner, the defendant and plaintiff went to a third establishment and the accident occurred on the drive home.

The issue on summary trial was whether the applicant was liable for serving the defendant one drink knowing she would be driving. The evidence supported that the defendant was not intoxicated when she left the applicant's establishment.

The plaintiff argued that the applicant had a duty to warn the second location that the women were driving and would need to get home safely. However, the pleadings only included the allegation that the defendant was intoxicated when she left the establishment and not that the applicant had a novel "duty to warn" the second establishment of the group of servers' plans. The plaintiff relied entirely on the trial decision in *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 215 DLR (4th) 193 (Ont. CA), which was both overturned on appeal, and did not assist the plaintiff as the trial judge, in that case, found that the employee was intoxicated on leaving the employer's establishment.

The court found that the defendant did not leave the applicant's establishment intoxicated so it had met the standard of care. The other two social hosts remained defendants and third parties to the action.

i. *Nelson (City) v. Marchi*, 2021 SCC 41, Karakatsanis and Martin JJ. (Wagner C.J. and Moldaver, Côté, Rowe and Kasirer JJ. concurring)

A trial, 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." The city appealed to the supreme court of Canada, which appeal was dismissed.

The SCC agreed that the impugned city decision was not a core policy decision and the city therefore owed the plaintiff a duty of care. The factors to consider in identifying core policy decisions are: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria. The underlying rationale — protecting the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers — serves as an overarching guiding principle for how to weigh the factors in the analysis.

j. *Pevach v. McGuigan Estate*, 2021 BCSC 1505, Funt J.

Liability was assessed wholly against a driver who struck an intoxicated pedestrian. Interestingly, neither the plaintiff nor defendant could testify at trial. The defendant had died prior to trial but excerpts from his examination for discovery transcript was read in including when he admitted he was not looking out for pedestrians and was only focused on the road ahead of him. The plaintiff could not testify due to her injuries sustained in the accident including a concussion. At trial, the defendant argued that the plaintiff was jay-walking. However, the court relied on the admission in the defendant's response to civil claim that the accident occurred "at or near the crosswalk." The court also held that the plaintiff's level of intoxication was not relevant as there was no evidence that "an unimpaired pedestrian would have acted differently."

k. *Senecal v. Nishikham*, 2021 BCSC 2189, Norell J.

The sole issue in this case was liability. The parties collided in a motor vehicle accident while travelling in opposite directions. The defendant was turning left across a solid double center line into the entrance of a parking lot, and the plaintiff was passing a line of stopped vehicles to the right of those vehicles, in a single lane. Liability was apportioned at 60% to the plaintiff and 40% to the defendant.

The plaintiff was passing vehicles on the right when he was prohibited from doing so. None of the three exceptions to the prohibition in s. 158 applied in this case. The plaintiff's view of the whole width of the lane ahead of him was blocked, so he was proceeding blindly.

The defendant was crossing a solid double line, and it was incumbent on him not to make a left turn until he had first ascertained it could be made safely. While drivers are generally entitled to assume that others will obey the rules of the road, this does not mean the defendant may make a blind turn.

l. *Sharp v. Paterson*, 2021 BCSC 2399, Murray J.

The plaintiff was hit by a car driven by one defendant while crossing the street as a pedestrian. The defendants denied liability, arguing that the plaintiff put himself in an unsafe position by crossing the street in a dark, dangerous area, where pedestrians would not be expected, wearing dark clothing.

The plaintiff argued that an adverse inference should be drawn from the defendant's failure to call his former girlfriend, who had been a passenger in the car. An adverse inference may be drawn where a party fails to call a witness who would be assumed to be willing to assist that party. The decision to draw the inference is discretionary, requiring the court to consider circumstances including: (a) whether there is a legitimate explanation for failing to call the witness; (b) whether the witness is within the exclusive control of the party or is equally available to both parties; and (c) whether the witness has key evidence to provide or is the best person to provide the evidence. The defendant and the passenger did not separate on good terms and he did not know where she was. The plaintiff made no effort to locate the passenger himself. Murray J. therefore declined to draw an inference.

The standard required of drivers in responding to pedestrian-created hazards, such as jaywalking, is one of reasonable prudence in all of the circumstances, not one of perfection. The mere fact that a driver did not see a pedestrian before striking them is not, in itself, sufficient to establish that the driver kept an inadequate lookout. In this case, the defendant was driving carefully at 15 – 20 km/h. It was not possible for the defendant to see the plaintiff until one to two seconds before impact. The plaintiff did not establish that the defendant was negligent.

m. *Smith v. Narula*, 2021 BCSC 1721, Ball J.

The plaintiff was traveling along 96th Avenue near 126th Street in Langley, B.C. behind an SUV. The SUV changed lanes to the right, and the plaintiff saw the defendant's vehicle, approximately two car lengths in front of him, stopped on the road. The plaintiff tried to change lanes to avoid an accident, but due to winter conditions, he was unable to avoid a collision and struck the rear of the defendant's vehicle. The defendant testified that her vehicle was struck from behind by the plaintiff's vehicle. The defendant testified that she was driving slowly, approximately 20-25

km/hr because of snowy conditions, but that she did not stop her vehicle prior to the collision. The defendant's passenger testified that it was snowing but most of the main streets were clear of snow.

A witness called on the plaintiff's behalf, testified that the defendant's vehicle did not have its hazard lights on when it was stopped, but its brake lights were on periodically prior to its stop, and following its stop, the brake lights were on when the collision occurred 4-5 seconds later. The plaintiff placed a lot of emphasis that the SUV had blocked his view of the defendant's vehicle but one of the plaintiff's witnesses testified that he did not see the SUV. The court found that if the SUV were ahead of the plaintiff's vehicle, it would have prevented the witness from seeing the defendant's vehicle. The court also found the evidence of the plaintiff's witness regarding the amount of snow to be "wholly inconsistent" with the photos of the amount of snow. The court also found that the plaintiff's witness evidence was in direct conflict with the plaintiff's evidence, and there was no corroborating evidence to support the testimony of either of them. The court found that the plaintiff was neither a reliable nor credible witness.

The court notes that pursuant to sections 162(1) and 144(1) of the *Motor Vehicle Act,* R.S.B.C., 1996, c. 318, the plaintiff had a duty to follow other vehicles safely. The court also reviewed *Uy v. Dhillon*, 2019 BCSC 1136 (paras.22-26), confirming that in a rear-end collision, an inference of negligence is usually drawn if there is no explanation as to how the collision could have occurred in the absence of the following driver's negligence. The court found that there was no evidence of any reason for the defendant to illuminate her hazard lights before the accident, that her brake lights were displayed when she braked before the accident, and that the plaintiff was driving too close to the defendant's vehicle and too fast given the weather and road conditions. The plaintiff was found wholly at fault for the accident.

n. *Tam v. Allard*, 2022 BCSC 274, Wilkinson J.

The defendant driver rear-ended a vehicle which then collided with the plaintiffs' vehicle. The defendants argued that the accident was inevitable due to brake failure, and that they had no warning of the hazard of the vehicle's faulty brakes. The plaintiffs argued that if brake failure occurred, the defendant failed in his duty to operate the vehicle in a reasonably careful and skillful manner.

When a defendant rear-ends another vehicle, the court may draw an inference of negligence. However, Wilkinson J. found that the defendant driver experienced a sudden and unexplained loss of braking ability, of which he had no warning. He did not have sufficient opportunity to avoid the accident or take evasive action. The defendant owner's maintenance of the vehicle was not regular in that he did not keep to a scheduled service regimen, but he did conduct regular visual inspections of the brake system on the vehicle. The brake failure was likely caused by a rare simultaneous sequential leakage of brake fluid from at least two brake lines. The plaintiff did not prove that any of the defendants were liable for the accident.

A. Vicarious Liability

a. *Bowe v. Bowe*, 2022 BCCA 35, per Fitch J.A. (Frankel and DeWitt-Van Oosten JJ.A. concurring)

This case concerned the application of s. 86(1)(a) and (b) of the *Motor Vehicle Act*, which creates vicarious liability for vehicle owners who are members of the same household with, or give consent to someone who drives their vehicle. The vehicle owner's stepson, with whom he lived, had taken the keys without consent and given them to his cousin, who took them on a "joyride". The stepson was seriously injured in a resulting accident.

The two issues on appeal were (1) whether the trial judge erred in concluding that the plaintiff stepson was "operating" the vehicle when he was a front seat passenger; and (2) whether the vehicle owner was vicariously liable for the driver's negligence by operation of s. 86 (1). There were deficiencies in pleadings and confusion regarding concessions made at the court below such that the issues dealt with by the court of appeal had been neither pleaded nor argued at trial.

On appeal, the plaintiff argued that he was "operating" the motor vehicle as used in s. 86 because he and his cousin were in a joint venture, and he had "care, custody, or control" of the vehicle. The court of appeal rejected this argument writing, "to include a passenger who neither directs nor counsels the driver to operate the vehicle in a negligent manner … runs too far afield from the ordinary meaning ascribed to the operation of a motor vehicle" and held that "operating" must refer in some way to controlling the functioning of the vehicle.

The plaintiff stepson unsuccessfully argued, on appeal, that because he lived in the same household as the vehicle owner, he became the owner's agent by virtue of s. 86(1) (a). As the owner's agent, the plaintiff then gave consent to the cousin to drive the vehicle and vicariously liability was founded for the cousin's negligence under s. 86(1)(b). The court included a visual representation of this relationship at paragraph 52.

The court reviewed the history of s. 86 (1), which imposes vicarious liability where, at common law, there was none, and identified two purposes of s. 86 (1): to expand the availability of compensation to injured plaintiffs beyond drivers who may be under-insured or judgment proof, and to incentivize motor vehicle owners to control access to their vehicle. The court referred to the two branches of establishing vicarious liability as the "family branch" and the "consent branch". The court held that the s. 86 (1) (a) and (b) are disjunctive, not conjunctive. The legislation plainly contemplates the wrongdoing falling into either the "family branch" or the "consent branch". In addition, policy dictates against the plaintiff's construction of the statute which has been criticized as "harsh and unreasonable."

b. *Sambuev v. Handley*, 2021 BCSC 1499, Branch J.

The plaintiff brought a summary judgment motion seeking a finding that the defendant company (the "employer") was vicariously liable for the conduct of its employee, the defendant driver (the "driver'), in a road rage incident, where the defendant driver yelled at the plaintiff, punched him through the open window of his truck, and then pulled him out of his truck, and continued to beat him (the "assault"). At paragraphs 18-19 the court confirms that vicarious liability imposes strict liability on a party, holding one person responsible for the misconduct of another because of the relationship between them. "*The policy considerations supporting vicarious liability for employers are: (1) the need for a just and practical remedy for people who suffer harm as a*

consequence of wrongs perpetrated by an employee; and (2) deterrence of future harm: Bazley v. Curry, [1999] 2 S.C.R. 534 at para. 29." Following *Bazley*, the court notes that *"…a court should first determine whether there are precedents that unambiguously determine on which side of the line the case falls between, vicarious liability and no liability. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales.*"

At paragraph 24 the court reviewed the policy considerations set out in *Bazley* which "… *may include, but are not limited to the following:*

a) *the opportunity that the enterprise afforded the employee to abuse his or her power;*

b) *the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);*

c) *the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;*

d) *the extent of power conferred on the employee in relation to the victim;*

e) *the vulnerability of potential victims to wrongful exercise of the employee's power…."*

The court found that while the case of *Sirois v. Guastafson*, 2002 SKQB 452 was similar and persuasive, it could not be relied upon as it was from another province. The court found that the employer did not authorize the driver to use force, the nature of the work performed by the driver did not produce an inherent risk of an assault or other intention tort by him, the assault was not part of the driver's duties, the employer did not afford the driver the opportunity to perform the assault, the plaintiff was not a customer of the employer, the employer did not train its drivers to assault other drivers who did not respect the rules of the road, the assault took place outside of the vehicle the driver was driving, there was no evidence that the assault was related to friction, confrontation or intimacy inherent in the employer's enterprise, the driver did not stand in a position of respect "vis a vis" the plaintiff, and in the normal course, there would be no reason for the driver to touch or interfere with others drivers on the road in order to complete his assigned tasks. The court found that the considerations weighed against a finding of vicarious liability.

The plaintiff argued that the employer's manual referred to road rage so that supported a finding that such conduct was within the employer's contemplation, but the court found that advising drivers not to engage in road rage was

> …weak support for a finding that the company should be held vicariously responsible for such incidents. From a policy perspective, a finding that discouraging employees from engaging in certain acts means that you will be vicariously liable for those acts, would not be a positive development. It would simply discourage employers from warning employees about the limits on their authority.

The plaintiff's claim was dismissed.

XVIII. Limitation

a. *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, per Moldaver J.A. (Karakatsanis, Cote, Brown, Rowe, Martin and Kasirer JJ. concurring)

In 2008, a New Brunswick based company sought loans from a bank but needed loan guarantees from the province. The province agreed to $50 million in loan guarantees conditional upon the company subjecting itself to an external review of its assets by its auditor. The auditor opined that the company's financial statements presented fairly, in all material respects, the company's financial position in accordance with generally accepted accounting principles. Relying on that report, the province delivered the loan guarantees which enabled the company to borrow money from the bank. Four months later the company ran out of working capital, so the bank called on the province to pay the loan guarantees which it did in March 2010. The province retained another accounting firm to review the company's financial position and that firm provided a draft opinion in February 2011, opining that the company's financial statements had not been prepared in conformity with generally accepted accounting principles. The second accounting firm estimated that the company's assets and net earnings were overstated by a material amount.

In June 2014 the province commenced a claim against the first auditor, alleging negligence. The auditor moved for summary judgment to have the claim dismissed as statute-barred on the basis that section 5(1) of the *Limitation of Actions Act* ("LAA") provides that no claim shall be brought after two years from the day on which the claim was discovered. The motions judge held that s.5(2) of the *LAA*, which sets out when a claim is discovered, required that the province knew or ought to have known that it had *prima facie* grounds to infer that it had a potential cause of action against the auditor. The motions judge granted summary judgment and struck the province's action, finding that the province had the requisite knowledge by March 2010, more than two years before it commenced its claim. The court of appeal allowed the province's appeal. It rejected the standard used by the motions judge and held that the governing standard was whether a plaintiff knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy, which the court found can only exist if the plaintiff has knowledge of each constituent element of the claim. Applying that standard, the court of appeal found that the limitation period had not been triggered because the province had not yet discovered its claim.

At paragraphs 42 to 43, the court held that the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim under s.5(2) of the *LAA*, thereby triggering the two year limitation period in s.5(1)(a), is whether the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. The court held that the province discovered its claim against the auditor in February 2011 when the second auditor's draft opinion was released. The court held that by then, the province knew or ought to have known that a loss occurred, and that the loss was caused in whole or in part by conduct which the first auditor had been retained to detect. The court found that this was sufficient to draw a plausible inference that the auditor had been negligent. As the province did not brings its claim until June 2014, more than two years later, its claim was statute-barred.

b. *Khan v. School District No. 39*, 2021 BCSC 49, Majawa J.

The plaintiff alleged that more than 30 years previously, her Grade 1 schoolteacher physically, emotionally, and verbally abused her and that the defendant School District was vicariously liable for the teacher's conduct. The court notes that the *Limitations Act*, S.B.C., 2012, c.13 (the "*Act*") underwent significant amendments that came into force in June 2013, which removed the time limitations for civil claims for damages arising out of an assault or battery against a minor. The court found that pursuant to s.3(1)(k) of the *Act*, the plaintiff was not statute-barred from bringing her actions grounded in assault or battery.

Relying on *B.G. v. HMTQ*, 2003 BCSC 1890 (*B.G.*), the plaintiff argued that the allegations of conduct that amounted to the torts of wrongful imprisonment, and the intentional infliction of nervous shock, are also not statute-barred as when the perpetrator is the same person, the court should not draw too fine a distinction between conduct that is statute-barred and conduct that is not. At paragraph 13, the court states that the law in *B.G*. could apply to exempt certain claims for intentional infliction of nervous shock and wrongful imprisonment from the *Act* when coupled with physical or sexual abuse claims in narrow circumstances, the torts must be properly pled so the defendants know the case they would have to meet. The court found that the plaintiff had not pled any torts other than assault and battery, so it was too late to raise, for the first time at closing submissions, that the defendants were liable for the torts of intentional infliction of nervous shock and wrongful imprisonment.

The court held that to be exempt from the *Act*, the conduct may be integrally linked to the physical assaults and while many of the alleged incidents contained elements of concurrent physical, verbal, and emotional abuse, the plaintiff also described some incidents where there was no physical abuse. At paragraph 16 the court held that the plaintiff's allegations were limited to incidents that could properly give rise to the torts of assault and battery. The court found that the plaintiff had not met her burden of proving that the alleged abuse occurred, so her claim was dismissed.

c. *Ross v. Insurance Corporation of British Columbia*, 2021 BCSC 1659, Donegan J.

The plaintiff was an infant at the time of the subject accident and filed her Notice of Claim two months after the two-year anniversary of her 19th birthday. The defendant brought a summary trial application to dismiss the claim on the grounds it is statute barred by the *Limitation Act*. The plaintiff opposed the application, relying on the doctrine of estoppel, or s. 24 of the *Limitation Act*.

The court reviewed the law of estoppel by representation, estoppel by convention, promissory estoppel and confirmation of cause of action and found that none of these applied in this case. The plaintiff relied heavily on one letter from ICBC asking that she contact ICBC as soon possible, or the outcome of her claim may be affected. Notably, there was no evidence from the plaintiff that this letter nor any of the other interactions she had with ICBC lead her to believe that ICBC would not rely on the limitation period. She deposed that she believed ICBC wanted to resolve her claim and if she called them, which she did 11 months later, her claim would not be affected.

XIX. Mitigation

a. *Bernatchez v. Chisholm*, 2022 BCSC 105, MacDonald J.

The plaintiff had gained approximately 115 lbs since the accident and the defendant argued that he failed to mitigate his damages because of the weight gain. The court rejected this argument stating that the plaintiff had struggled with his weight his entire life, and this was a pre-existing condition under the thin skull doctrine. Further, the plaintiff had pursued all recommended treatment and had continued to stay active. The plaintiff's injuries from the accident had also contributed to his being unable to remain as active as he had been prior to the accident.

b. *Gill v. Dhaliwal*, 2021 BCSC 1562, Duncan J.

The defence unsuccessfully argued that the plaintiff failed to mitigate his damages for not pursuing spinal surgery. The evidence at trial from two medical experts was that there was a 50 to 60% chance of improvement with surgery and a 40 to 50% chance that there would be little improvement. The court did not find that this was sufficient to discharge the defendant's burden of proving a failure to mitigate.

c. *Johal v. Fazil*, 2021 BCSC 1896, Matthews J.

The plaintiff claimed damages from a motor vehicle accident in 2013 causing injuries to neck and back as well as a depressive disorder and headaches, all of which were aggravated by a second accident in 2017. The defendants argued that the plaintiff failed to mitigate her damages by failing to take Trintillex, not following up with a psychiatrist, failing to take cognitive behavior therapy, and failing to undertake active rehabilitation as recommended. The court found that the plaintiff acted unreasonably by not taking the medication consistently as prescribed but not by failing to attend the cognitive behavioral therapy. The court also found that the defendants had not proven a failure to mitigate by not attending active rehabilitation. While the plaintiff's psychiatrist had recommended "vigorous" exercise, the plaintiff testified that she did some home exercises and walks and was attending chiropractic treatment. While the court accepted that the plaintiff had not done all the recommended physical therapy as soon as it was recommended, and that her exercise may not be optimal in terms of vigor or frequency, *"these propositions were not squarely put to Ms. Johal in cross-examination so I did not hear clear evidence about them.*" At paragraph 146, the court confirms that reasonable compliance is the standard that avoids a finding of failure to mitigate. The court held that an appropriate deduction for failure to mitigate by failing to take the anti-depressant as required was 15% applied to the plaintiff's non-pecuniary damages ($125,000 before reduction) and her past loss of earning capacity. The court held that the failure to mitigate did not affect the plaintiff's future loss of earning capacity because the plaintiff was now following the recommended treatment. It also did not affect cost of future care or special damages as there was no evidence that those damages would have been different if the plaintiff had followed the advice to take the anti-depressants earlier.

The court found that given the plaintiff's pre-accident academic struggles she would not have been able to continue to work 12 hours per week while studying to become a teacher and fulfilling her household and childcare duties, but the court accepted that she had to withdraw from some courses and her education was delayed one year due to her injuries for a loss of $55,000 before reduction for failing to mitigate. The court also accepted that the plaintiff's injuries caused a six month delay in entering the workforce and may cause her to miss work or

be unable to sustain work in the long term. The court awarded $22,500 for the six month delay and $200,000 for a loss of capital asset, for a total loss of future earning capacity award of $222,500.

The court found that the plaintiff remained restricted in terms of household activities such as cooking/food preparation, vacuuming, cleaning bathtubs and laundry. Dr. Hershler opined that the plaintiff needed four hours per week assistance with household chores. While the plaintiff claimed $25,000 for past loss of housekeeping capacity and argued that future loss should be assessed as part of the cost of future care, the court held, at paragraph 245, that "… *the loss is a loss to be assessed based on the evidence of what has occurred in the past and what is likely to occur in the future."* The court awarded $25,000 for loss of housekeeping capacity less 15% reduction for failure to mitigate on the past loss for an award of $24,000.

d. *Lal v. Singh*, 2021 BCSC 2378, Taylor J.

The defence successfully argued for a 20% reduction in the plaintiff's damages for failing to mitigate by failing to seek Botox treatment for migraine headaches, failing to commit herself to an exercise and active rehabilitation program, and failing to consistently take anti-depressant medications and attend psychological counselling.

The court found that these recommendations had been made early and often by many different doctors. The plaintiff's explanation for not pursuing the treatment was not sufficient to explain the sheer amount of time that had passed without her pursuing these treatments. There was also evidence from the plaintiff and/or medical experts about the likelihood of improvement with these treatments.

e. *Pepe v. Barker*, 2021 BCSC 2298, Lyster J.

In an action for compensation for injuries sustained in a motor vehicle accident, the defence successfully argued that the plaintiff failed to mitigate his damages and a reduction of 10% was applied. The plaintiff had previously had physiotherapy treatment that improved his symptoms. Since moving to Ontario, three years before the trial, the plaintiff had not sought out any further treatment despite his doctor's advice to do so and provided no explanation. The court did not consider a failure to follow recommendations made in an expert report only three months before trial as unreasonable.

f. *Steinlauf v. Deol*, 2021 BCSC 1118, Basran J.

The court rejected the defendant's' submissions in closing that the plaintiff failed to mitigate his damages for not undergoing all recommended treatment, finding that there was no evidence "beyond mere speculation" that further treatment would have reduced the plaintiff's damages.

XX. Occupiers Liability

a. *Rivers v. North Vancouver (District),* 2021 BCCA 407, per Fitch J.A. (Fenlon and Griffin JJ.A. concurring)

The plaintiff appellant appealed the dismissal of his action under the *Occupiers Liability Act*, R.S.B.C., 1996, c.337 and in negligence for a head injury he suffered when struck by a foul ball at

a baseball field owned and operated by the District of North Vancouver and used by the respondent Little Leagues. The appellant argued that the trial judge erred by incorporating into his negligence analysis the risks inherent in watching a baseball game. The appellant submitted that in doing so, the judge incorrectly invoked the *volenti* doctrine.

The court found that the trial judge did not invoke the *volenti* doctrine. At paragraph 29, the court reviewed s. 3(1) of the *OLA* which states that *"[a]n occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises"*.

The court found that under the *OLA* and at common law, the judge was required to consider all the circumstances in assessing what constituted reasonable care. In doing so, the court found that the trial judge was entitled to consider, as one factors in the analysis, the known risks associated with watching a baseball game in determining whether the occupier created an unreasonable risk of harm. The court held the appellant did not establish that the respondents failed to meet the standard of care under the *OLA* or at common law. The court held that this was a question of mixed fact and law to which deference was owed. The appeal was dismissed.

b. *Wheeler v. Doe*, 2021 BCSC 1457, Master Bilawich

The plaintiff was assaulted by an unidentified assailant (the defendant "John Doe") while at a gas station owned by the defendant 1088538 B.C. Ltd. (the "owner"), and operated by the defendant 7-Eleven Canada, Inc. (the "operator"). The plaintiff alleged that the owner and operator (the "defendants") were occupiers of the gas station for purposes of the *Occupiers Liability Act*, R.S.B.C., 1996, c.337 and that they fell below the standard of care to take reasonable steps to ensure that the plaintiff was safe while using their premises. The defendants applied for summary judgment dismissing the plaintiff's claim, arguing that the *OLA* and common law do not require them to guard against this type of incident, and it was not reasonably foreseeable that one customer would be assaulted by another. The defendants relied on *Tanaka v. London Drugs Limited*, 2019 BCSC 1182, a similar case where an unidentified customer had a verbal altercation with a plaintiff and then assaulted him in the defendant's store and the claim was dismissed.

At paragraph 34, the court notes that in *Tanaka*, the claim was dismissed after a four-day trial in which the defendant occupier tendered evidence of its policies concerning store safety and staff training. In the present case, the court found that the defendants did not provide any evidence concerning their safety policies, procedures, and staff training, if any, which was necessary to address the key issues raised by the plaintiff in the notice of civil claim. The defendants did not tender video evidence that was available and did not volunteer the detailed timing of the plaintiff's entry on the store, the verbal altercation, and the assault. There were gaps in the store cashier's evidence of the incident, and it was not clear whether the video might show any interaction between the plaintiff and John Doe before they both entered the store.

At paragraph 37 the court held that *"[t]he evidence is simply inadequate and does not provide the foundation necessary to conclude with confidence that the plaintiff's claim has no prospect of success against the applicant defendants*". The court states that occupier's liability claims are often "*fact intensive and require a careful consideration of relevant surrounding circumstances to determine whether the occupiers have conducted themselves reasonably*". The defendants did

not persuade the court that the plaintiffs claim was bound to fail so the application for summary judgment was dismissed.

XXI. Offers to Settle

a. *Bahniwal v. Johal*, 2021 BCSC 911, Weatherill (G.P.) J.

The trial judge gave effect to a defence offer to settle by depriving the plaintiff of her costs after the commencement of the trial even though the defendants' *Rule 9-1* offer was made fifteen months prior to trial. The trial judge found the plaintiff and her family lacking in credibility, and further held that after learning that her experts did not view her disability as permanent, she should have tempered her expectations about her loss of future earning capacity.

b. *Boyle v. Luc*, 2021 BCSC 589, Edelmann J.

The defendants made an offer under *Rule 9-1* after noon on the Friday before a long weekend after which the trial was scheduled to start. The offer was set to expire at the beginning of trial on the Tuesday. The court found that even assuming that plaintiff's counsel had been immediately aware of the offer, there was, at most, a half of a business day in which to assess the offer, contact the plaintiff, and explain the implications of the offer such that the plaintiff could make an informed decision. The issues were complex, involving liability, defence assertions of *ex turpi causa* and *volenti no fit injuria,* and significant pre-existing conditions and causation arguments. The defendants' offer made on the eve of trial was reasonably rejected by the plaintiff.

c. *Dhillon v. Robertson,* 2021 BCSC 160, Douglas J.

In this case, the plaintiff failed to serve one of the defendants with a copy of her *Rule 9-1* offer. The court found that this defendant was more than a "nominal defendant" and was one who had liability or damages at stake. Douglas J. confirmed that the service requirements under *Rule 9-1* were mandatory, and the court would not embark on a case-by-case investigation as to the impact of non-compliance.

d. *Enns v. Corbett*, 2021 BCSC 2, Riley J.

The case involved a contentious liability issue as well as quantum. The plaintiff sought double costs from the date of a *Rule 9-1* offer. However, Riley J. found that the plaintiff's offer rested on the premise that the defendant would be found fully liable for the collision and made no allowance for the contingent risk that the plaintiff might be found contributorily negligent. The offer was therefore not a genuine compromise or an incentive to settle. Further Riley J. held that the greater financial capacity of the defendant as an insured party only "marginally" favored the plaintiff. In the result, double costs were denied.

Of note is that Riley J. compared the plaintiff's offer to the final judgment net of the deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 231.

e. *Garland v. Newhouse*, 2021 BCSC 1998, Horsman J.

The plaintiff issued a formal offer after the commencement of a summary trial. Although the offer was dated May 5, 2021, it was not faxed to the defendant until the afternoon of May 6, 2021. The offer stated that it was open for acceptance until 8:30 am on May 6, 2021. The plaintiff argued that it was a typographical error and that the date for acceptance was not updated to reflect that. After finding that the defendants reasonably refused the offer in the context of the issues regarding the share in certain partnership property, the court also noted that the offer, on its face, was incapable of acceptance given that the deadline for acceptance had expired before it was delivered. The plaintiff argued that it was open to the defendant to seek clarification of the offer and the deadline for acceptance could have been corrected. Horsman J. held that it was neither fair nor appropriate to impose an obligation on a defendant to seek clarification of an offer that is apparently incapable of acceptance or risk an award of double costs.

f. *Gichuru v. Purewal,* 2021 BCCA 91, per Voith J.A. (Abrioux and Grauer JJ.A. concurring)

Part of this appeal of the costs orders following trial involved the analysis of the defendant's *Rule 9-1* offer which was "slightly less" than the amount awarded at trial. ($8,000 offer and a $10,000 trial award). The trial judge held that the plaintiff was "a professional litigant in the sense that he is legally trained" yet he appeared at trial at times unprepared, resulting in adjournment in order to give him additional time to prepare. The result was that the trial took longer than it needed. After deciding that she could not say that the plaintiff should have accepted the offer, she held that after considering how close the offer was to the judgment and the plaintiff's lack of preparation, she reduced the costs awarded to the plaintiff at Scale B by 50% following the date of the offer.

The court of appeal held that the trial judge erred by conflating the considerations relevant to weight whether an offer should have been accepted under *Rule 9-1* and the jurisdiction to reduce a costs award under *Rule 14-1(15)(b)-(c)* [apportioning costs], or for an act or omission under *Rule 14-1(14).* There is no principled basis to punish a successful plaintiff in costs where the formal offer rejected was less than the amount awarded at trial, even where the offer was "only slightly less." The circumstances of the plaintiff's unpreparedness were that on one occasion on the last day of trial he required a 15-minute recess to have his book of authorities bound. The issues were remitted to the trial judge for reconsideration.

g. *Gill v. Borutski*, 2021 BCSC 1762, Gomery J.

The plaintiff sought double costs for an offer that was open for acceptance for three weeks, half of which time was over the Christmas holiday period. The defendant argued that there was insufficient time to consider the offer as a result. However, Gomery J. held that the defendant, defended by ICBC, was a "sophisticated litigant" and had a reasonable opportunity to consider the offer. However, as credibility was in issue and there were still undisclosed clinical records, the defendant did not act unreasonably in rejecting the offer. The court held that the policy of encouraging settlement supplements and does not override considerations that are always present when costs are awarded. An important consideration is the integrity of the litigation process. The plaintiff's lack of candour in discovery made the case more difficult. In the result, the plaintiff's application for double costs was dismissed.

h. *Kim v. Dresser*, 2021 BCSC 1874, Baker (W.A.) J.

On the plaintiff's application for cost consequences on account of a *Rule 9-1* formal offer, the court ruled that the plaintiff's references to the defendants' offers to settle were inadmissible as the defendants had not waived privilege over them. The plaintiff also sought to rely on an offer to settle made to the ICBC adjuster prior to the commencement of litigation. Baker J. held that it was not an offer within the meaning of *Rule 9-1* and could not be used to engage the costs options under that *Rule.* The plaintiff was, however, entitled to double costs after the date of a formal offer made after examinations for discovery and an unsuccessful mediation on the basis that the defendants had ample time and evidence to evaluate the reasonableness of the offer.

i. *Pang v. Burns*, 2021 BCSC 2430, Choi J.

The trial judge found that the plaintiff ought to have accepted the defendant's formal offer under *Rule 9-1*. Choi J. also found that the plaintiff's subjective state of mind affected her ability to assess the reasonableness of the offer. However, the court held that there must be costs consequences where an offer was reasonable in all respects and open for two and a half weeks immediately before the trial when the strengths and weaknesses could be assessed. The plaintiff advanced unrealistic positions on future income earning capacity and cost of future care at trial. The defendants were awarded costs following the date of the formal offer up to a maximum of $20,000 plus disbursements.

j. *Rab v. Prescott*, 2021 BCSC 1206, Branch J.

When determining the final judgment against which the plaintiff's *Rule 9-1* offer would be compared, Branch J. held that it was the amount of the trial judgment less only the mandatory benefits deducted under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 231. His rationale for so doing was that when the plaintiff made the offer, she would not have had the benefit of ICBC's post-trial commitment to pay the discretionary items at the time the offer was made. He found that it was more equitable to compare the plaintiff's offer against the amount net of mandatory benefits only.

k. *Rhodes v. Surrey (City)*, 2021 BCSC 1274, Jenkins J.

This case revisited the issue of whether double disbursements are available to a plaintiff whose *Rule 9-1* offer exceeds the final judgment. Jenkins J. followed the reasoning of Voith J. in *Kaban Resources Inc. v. Goldcorp In.,* 2020 BCSC 1982 and held that an award of double disbursements would be a "complete and unreasonable windfall" for the plaintiff. Costs are intended to reward the successful party compensation for the costs of the litigation with an emphasis on double costs from the date of a formal offer to encourage parties to make and accept reasonable offers of settlement. When an offer of settlement is made, the recipient of the offer would not know the amount of disbursements which had been incurred by the offering party and could only estimate the amount of actual costs exclusive of disbursements in weighing an offer.

XXII. Part 7/Deductions Under S. 83 Of the *Insurance (Vehicle) Act*

a. *D'arcy v. Salimi*, 2021 BCSC 1610, McDonald J.

At trial, the plaintiff was awarded damages, including cost of future care of $25,700 for Botox treatments, medications, psychological therapy, vocational therapy assessment, occupational therapy assessment, physiotherapy, and kinesiology services. The defendants sought to deduct all but $432 from the cost of future care award pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") based on benefits available to the plaintiff under Part 7 of the *Insurance (Vehicle) Regulation,* B.C. Reg 447/83 (the "*Regulation*"). The defendants submitted an affidavit from an ICBC claims specialist deposing that ICBC irrevocably, unequivocally, and unconditionally agreed to pay up to certain specified amounts for the various items and waived the rights or requirements set out in s. 90, 98 and 99 of the *Regulation*. The defendant's request for deductions was based on the fee limits at the time and the claims specialist also deposed that ICBC would honour all future increases to the fee limits, but plaintiff's counsel argued that the claims specialist was not authorized to commit ICBC to honour future annual adjustments.

At paragraph 27, the court found that "*there was nothing to suggest that the indexing provided for in subsections 88(1.3) to (1.6) does not apply to the plaintiff, or to the fee limits for treatments that the plaintiff will be entitled to receive in the future.*" At paragraph 39, the court held that the *"… breadth of Mr. Della-Coletta's commitment on behalf of ICBC to pay for the Botox and vocational assessment costs, in addition to other benefits convinces me that 'there is little risk ICBC will dishonour its commitment.'"* However, the court concluded that "*…there was some uncertainty that if the plaintiff were to choose treatment with a counsellor, ICBC's fee limit could result in the plaintiff receiving Part 7 benefits of less than $4,000 for those treatments.* The court concluded *"…that the deduction sought for psychological treatment should be reduced by 25% from $4,000 to $3,000, to account for the risk that the plaintiff may not receive Part 7 benefits for psychological treatment up to the dollar amount that was awarded.*"

b. *Del Bianco v. Yang*, 2021 BCCA 315, per Frankel J.A. (Griffin and Grauer JJ.A. concurring)

After two motor vehicle accidents, the plaintiff was awarded damages, including cost of future care for massage therapy for 40 years ($54,898). The defendants applied to deduct this amount under s. 83(5) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") on the basis that ICBC would pay the treatments under Part 7 of the *Insurance (Vehicle) Regulation,* B.C. Reg 447/83 (the "*Regulation*"). ICBC provided an affidavit promising to pay and waiving the requirement in the *Regulation* for ongoing certification that the treatments were necessary. The trial judge declined to deduct the massage therapy treatment amounts, citing ICBC's past refusal to pay, the fact that ICBC's reimbursement rate per treatment was lower than the awarded rate of the treatment, uncertainty with respect to ICBC's future rates and ability to pay, and inconvenience to the plaintiff in having to submit reimbursement claims long-term. In particular, the trial judge accepted news articles from the Internet attached to the plaintiff's affidavit of ICBC's "*lack of financial viability*", and the trial judge found that there was uncertainty with respect to ICBC's future existence and its ability to pay.

On appeal, the defendants sought to have $51,688.57 of the award of $54,898 deducted. Paragraphs 30 to 40 include a helpful review of the case law surrounding s. 83 deductions. The court held that the judge misapprehended the evidence and that it was impossible to read the

ICBC affidavit in any way other than as stating a commitment by ICBC to reimburse the plaintiff in accordance with the payment schedule set in the *Regulation*. The court also found that the news articles that the judge relied on did not support an inference that "…*ICBC's insolvency or demise was on either the short-term or long-term horizon*" (see para 49). At paragraph 50, the court states that the judge ignored the fact that ICBC is a Crown corporation, stating "…*it would be speculative to suppose that a future government would abolish ICBC without taking steps to ensure it keeps the commitments it has made to insured persons and the courts.*" The fact that the plaintiff would need to submit reimbursement claims long-term was not a relevant consideration as the requirement to submit claim forms is a common feature of benefit plans. ICBC's pre-trial refusal to pay was also found not to be relevant "…*in light of its commitment to pay on a going-forward basis.*" The court also held that ICBC's waiver of the requirement for ongoing certification was valid and ICBC has the power to waive such a requirement pursuant to s. 85 of the *Act*.

At paragraph 69, the court found that ICBC accepted the trial judge's findings of fact and agreed that future massage therapy treatments were necessary health services, waived the requirement for continued medical certification, and "*irrevocably, unequivocally, and unconditionally*" agreed to pay for those treatments." That evidence provided the necessary certainty that the plaintiff would receive the no-fault benefits for future massage therapy treatments. The appeal was allowed and the deductions for massage therapy benefit amounts granted.

c. *Fatin v. Watson*, 2021 BCSC 1210, Milman J.

At trial, the plaintiff was awarded damages, including cost of future care of $55,000 and special damages of $51,957.81. The defendant then applied for deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") based on benefits available to the plaintiff under Part 7 of the *Insurance (Vehicle) Regulation,* B.C. Reg 447/83 (the "*Regulation*").The court accepted the affidavit evidence of an ICBC representative that ICBC would agree to pay the mandatory benefits of Botox, kinesiology, physiotherapy, and massage therapy so amounts were deducted for those items. For the discretionary amounts of aids and equipment, and gym and pool membership fees, with associated transportation costs, ICBC accepted that those items were likely to promote the rehabilitation of the plaintiff and undertook to pay them. However, the court reviewed *Tench v. Van Bugnum*, 2021 BCSC 501, which found that under s. 88(2) of the *Regulation*, ICBC can waive the requirement for a medical opinion but does not have the authority to waive the requirement that the discretionary benefits are "*likely to promote rehabilitation.*" At paragraph 39, Milman J. states that the "*requirement that a cost be likely to promote rehabilitation*" may be satisfied in other ways, such as the court's findings and ICBC's other evidence. In this case, the court found that the evidence supporting the need for the aids and equipment, and gym and pool membership fees, with associated transportation costs was intended to help the plaintiff manage her chronic pain symptoms rather than rehabilitate her, so no deduction was made.

d. *Hale v. Hill*, 2021 BCSC 1147, McDonald J.

At trial, the plaintiff was awarded damages, including $66,319 for future cost of care of snow removal/yard work, massage therapy, medication, and adaptive aids, and $4,268 for special damages. The defendant then applied for deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") based on benefits available to the plaintiff under Part 7 of the

Insurance (Vehicle) Regulation, B.C. Reg 447/83 ("Part 7"). ICBC did not seek to deduct any amount from the award for yard work and snow removal and agreed "*irrevocably, unequivocally and unconditionally*" to pay the amounts, whether discretionary or mandatory, to a specified amount for the other future cost of care items and special damages. The defendant argued that they had met the burden of showing that the plaintiff will receive payment for the amounts sought to be deducted and that there was no uncertainty as to what Part 7 benefits will be paid in the future. The court found that the affidavit of the ICBC claims specialist resolved any uncertainty that may exist as to what benefits would be paid so the deductions sought by the defendant were ordered to be made.

e. *L.A.F. v. G.M.F.C. Ltd.*, 2021 BCSC 2370, Shergill J.

At trial, the plaintiff was awarded damages, including cost of future care of $43,480 for various expenses. The defendant then applied for deductions of $41,676 under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") based on benefits available to the plaintiff under Part 7 of the *Insurance (Vehicle) Regulation,* B.C. Reg 447/83 (the "*Regulation*"). At paragraph 39, Shergill J. confirms that the parties are prevented from disclosing at trial the amount of benefits that have been paid or are owed to the plaintiff under Part 7 as while s. 83 acts to integrate Part 7 benefits with the tort damage awards, the tort action and the Part 7 action involve two distinctly separate matters.

> If it were known to the trier of fact (particularly a jury trial) that the plaintiff had received or could receive, benefits under Part 7, this may result in the trier of fact improperly taking those amounts into account and reducing the quantum of damages assessed against the defendant. On the other hand, such information could also undermine the defendant's position at trial that the plaintiff had suffered no injuries (or minimal injuries) from the subject accident.

However, Shergill J. confirms at paragraph 40 that evidence supporting the plaintiff's entitlement to Part 7 benefits does not have the same prejudicial impact, as it focuses on issues raised by s. 78 of the *Regulation.*

An ICBC representative swore an affidavit that ICBC agreed to "*irrevocably, unequivocally, and unconditionally*" pay the Part 7 mandatory and discretionary benefits up to specified amounts, and agreed that ICBC would waive the need for continued certification under s. 88(1.01) of the *Regulation*, and waive the requirements of ss. 90, 98 and 99 of the *Regulation*. Plaintiff's counsel argued that the affidavit had limited relevance as ICBC was not a party in the trial and only the defendants should be providing evidence about the plaintiff's entitlement to benefits and deemed release, but the court held that there is no "…*support in the legislation or the authorities for the plaintiff's proposition.*" At paragraph 68 Shergill, J. states that

> [s]ince the defendants are not liable to pay Part 7 benefits, they are not in a position to provide any direct evidence with respect to the matters under consideration in s. 83 applications. That evidence is quite properly the purview of a representative of ICBC.

At issue were the future costs for massage therapy, couples counselling, and medication. The court found that the commitments made by ICBC were sufficient to overcome any uncertainty with respect to massage therapy. However, the court found that the ICBC representative failed to account for the 20% contingency on the counselling award so, coupled with the per session cap in the *Regulations,* there was some uncertainty if the plaintiff would be reimbursed for the

full amount awarded. The court included $40 in the final judgment to be entered, to account for any shortfall. In terms of medications, the plaintiff had extended health coverage through her husband's employment. ICBC had agreed to reimburse the plaintiff for her medication expenses up to the maximum amount of $25,000, but the court found that pursuant to s. 88(6) of the *Regulation*, ICBC is not liable for any expenses paid or payable or recoverable by the plaintiff under a medical plan or payable by another insurer. The court found that to the extent the affidavit

> …purports to expand coverage for medication costs that are not payable under Part 7, it offends the principle that 'ICBC cannot undertake to do more than it was empowered to do under the legislative scheme.

No deduction was made for medication expenses.

f. *Purewal v. Uriarte*, 2021 BCSC 1935, Baker J.

The plaintiff was awarded damages as a result of a motor vehicle accident. The defendant applied to deduct certain benefit payments, including yoga costs, from the overall damages award, relying on s. 83 of the *Insurance (Vehicle) Act*.

Subsection 88(2) of the *Regulation* provides that discretionary benefits are payable by ICBC if they serve a "rehabilitative" purpose. At trial, the court found that yoga would assist the plaintiff in managing her pain but did not find that yoga had a rehabilitative purpose. There was no basis in the reasons or the evidence at trial to conclude that yoga would serve a rehabilitative purpose. Baker J. therefore declined to deduct costs of yoga from the future care award.

g. *Rab v. Prescott*, 2021 BCSC 1206, Branch J.

At trial, the plaintiff was awarded damages, including $100,000 for future cost of care for acupuncture, counselling, occupational therapy, and trigger point injections. The defendant then applied for deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") based on benefits available to the plaintiff under Part 7 of the *Insurance (Vehicle) Regulation,* B.C. Reg 447/83 ("Part 7"). Section 83(5) of the *Act* provides that after assessment of damages, the amount of Part 7 benefits paid or payable must be disclosed and taken into account by the court. At paragraph 12, the court reviewed the principles applicable to a s. 83 assessment as summarized in *Boparai v. Dhami*, 2020 BCSC 1813 (para 30) as follows:

1. Deductibility of benefits serves two purposes: one is to determine the sum the plaintiff receives when the tort claim is adjudicated and the second is to prevent the plaintiff from being compensated twice.
2. A defendant who seeks a deduction under s. 83 of the *Act* has the burden of establishing that a deduction should be made.
3. There must be strict compliance with the statute in determining what deductions, if any, should be made. Any uncertainty as to whether a Part 7 benefit will be paid must be resolved in favor of the plaintiff, and any uncertainty may lead the court to conclude that only a nominal deduction is appropriate.
4. Although there are substantial differences in ICBC's obligations to provide non-discretionary benefits under s. 88(1) of the *Regulation* and discretionary benefits under s. (2) both are liable to deduction from a tort award.

5. The filing of the affidavit of an adjuster authorized to "*irrevocably, unequivocally and unconditionally*" agree to pay for any treatment referenced in the reports of the medical experts who testified at trial up to the amount awarded by the jury may fully resolve uncertainty as to whether a benefit will be paid as a Part 7 benefit.
6. While the filing of an affidavit may carry considerable weight it does not relieve the court of its obligation to independently analyse the evidence and then determine to the extent that it is able to do so the Part 7 benefits which the plaintiff is likely to receive in the future.
7. Judges must be cautious when assessing a suitable amount to deduct from a cost of care award.
8. Deductibility under s. 83(5) of the *Act* of entitlement to Part 7 benefits is not to be determined based upon a plaintiff 'making' or 'advancing' a claim. Section 83(5) only reduces a defendant's liability to the amount of the Part 7 benefits to which a plaintiff is entitled that correlate to the claim as determined and assessed by the court. The defendants have the burden of establishing a correlation as to both the claim and the quantum of the award made.
9. Although such correlation may be readily ascertainable by factual findings when liability for and the quantum of entitlement for cost of future care are reduced to judgment by a trial judge sitting without a jury, when a lump sum award is made by a jury determining correlation of the award to the services and treatments available under Part 7 and the degree of correlation may not be possible.

The defendant relied on an affidavit of the ICBC claims specialist regarding benefits to be paid. In terms of mandatory benefits of acupuncture and counseling, the claims specialist agreed that ICBC would deem the treatments as medically necessary, waive the requirement for certification, and agreed to pay for these benefits up to a specified dollar amount. At paragraph 21, the court held that while the claims specialist did not include the words "irrevocably, unequivocally and unconditionally", the language in the affidavit was sufficient to relieve any uncertainty and was an "unqualified promise to pay no less than a precise dollar amount."

The claims specialist deposed that ICBC would waive the compliance conditions set out in sections 90, 98, and 99 of the *Regulation* with respect to the occupational therapy awarded but did not use the same language with respect to the acupuncture and counseling. The court found that while it was somewhat confusing as to why ICBC would expressly waive these rights for occupational therapy, but not for counseling and acupuncture, the commitment to deem the payments as medically necessary, coupled with the specified dollar amount commitment was sufficient to address any concern.

h. *Rix v. Koch*, 2021 BCSC 1526, MacDonald J.

At trial, the plaintiff was awarded damages, including cost of future care for Botox treatments, ergonomic assessments, massage therapy, counselling, and medications. The defendant then applied for deductions under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*") based on benefits available to the plaintiff under Part 7 of the *Insurance (Vehicle) Regulation,* B.C. Reg 447/83 (the "*Regulation*"). At issue was whether ICBC could waive statutory requirements to remove the uncertainty of whether the discretionary payment would be made (for items such as

ergonomic equipment and medications). The plaintiff opposed the deductions on the basis that she had extended health benefits through her unionized employer and her spouse's extended health benefit plan and as ICBC was a second payer pursuant to s. 88(6) of the *Regulation* due to these plans, ICBC had not and could not waive those provisions.

The plaintiff also argued that she was concerned about the *"ever-changing landscape surrounding ICBC as well as public statements from Attorney General David Eby that ICBC is in a poor financial position. She is concerned regarding ICBC's ability to reimburse her over the next few years, let alone her lifetime, given the government's willingness to pass laws with retroactive effect."*

The ICBC claims specialist swore an affidavit that ICBC would "*irrevocably, unequivocally, and unconditionally*" agree to pay the plaintiff's medications in the future up to the amounts specified in the award, but as there was not a specific reference to the presence of the plaintiffs' other health plans, the court found, at paragraphs 52-53, that the waiver was not specifically tied to s. 88(6) of the *Regulation*. The court held that the uncertainty regarding future payments had not been removed. The defendants tried to argue that because ICBC had paid some Botox medication and treatments in the past, that should be sufficient to remove the uncertainty, but the court found that the plaintiff must exhaust her own insurance coverage prior to claiming coverage from ICBC so the court declined to deduct amounts for Botox, Rizatriptan and Effexor.

i. *Skinner v. Dhillon*, 2021 BCSC 1992, Branch J.

The defendant applied to make deductions under s. 83 of the *Insurance (Vehicle) Act*. The plaintiff contested certain deductions for home equipment, nutritionist, and gym expenses, arguing that they were not for rehabilitation purposes, and that payments under s. 88(2) can only to be made for services designed to promote rehabilitation.

Branch J. did not accept the plaintiff's submission. Section 1 of the *Act* provides that rehabilitation means: "the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self sufficiency that, allowing for the permanent effects of the injured person's injuries, is, with medical and vocational assistance, reasonably achievable by the injured person… " The home equipment, nutritionist, and gym expenses met the definition of rehabilitation on the facts of this case. The expenses were designed to restore the plaintiff to the "highest level of gainful employment or self-sufficiency", even if the purpose of such treatments is remedial or preservative, as opposed to curative.

XXIII. Pleadings

a. *A-Star Vinyl Window System Ltd. v. Sabharwal*, 2021 BCSC 2122, Francis J.

The defendant brought an application for summary dismissal of the plaintiff's claim for, *inter alia*, specific performance. The plaintiff argued that the application should be adjourned because of the early stage of the litigation, the requirements for discovery, and amendments it wished to make to its notice of civil claim (which included adding a party and making allegations inconsistent with the current NOCC). The plaintiff had not brought an application to amend its NOCC nor offered a draft amended NOCC. Claims are determined based on the pleadings and where a summary trial application is set, it is incumbent on the parties to take every reasonable

step to put themselves in the best position possible by the time of the hearing. The plaintiff had failed to do so, and the claim was dismissed.

b. *Chamberlin v. Insurance Corporation of British Columbia*, 2021 BCSC 390, Thompson J.

A self-represented plaintiff filed a civil claim alleging injuries from a car accident. He then filed a series of demands under Form 122, being the form to require another party to amend pleadings to conform with the "new rules." However, the plaintiff used the form to attempt to amend his original notice of civil claim to add defendants. He also filed a petition under the same docket number naming some of the same defendants as respondents. The defendants applied to have the plaintiff's irregularly filed documents struck. The court set aside the documents on the basis that it was not permissible to add parties by amending a notice of civil claim or by filing a petition in the same action. A party can only be joined after an action has been commenced by application under R. 6-2(7). The plaintiff appealed, and the appeal was quashed as being so devoid of merit as to constitute an abuse of process: 2021 BCCA 397, per MacKenzie J.A. (Voith and Marchand JJ.A. concurring).

c. *Cun v. Bateman*, 2021 BCSC 1512, Murray J.

Less than a month before trial, the plaintiff was allowed to amend her pleadings to add psychological/psychiatric/emotional injuries and to plead chronic pain, major depressive disorder, anxiety, somatization disorder, post-traumatic low mood and insomnia arising from accidents on February 6, 2012 and March 24, 2018. The application was being made late in the day because new counsel had been retained by the plaintiff.

The defendants opposed the application arguing delay and prejudice. The chambers judge determined that the amendments did not change the complexion of the case because the defendants had been aware of the injuries for years and had obtained an expert report in 2017 addressing the very injuries sought to be added. Further, the defendants would not suffer any insurmountable prejudice; although they would have to do additional work, they could conduct a further discovery of the plaintiff, seek further disclosure of documents, and speak to witnesses before trial. There was no evidence of prejudice resulting from destroyed evidence, or being unable to find witnesses, witnesses having died or memories having faded.

d. *Good v. Buljan,* 2021 BCSC 2255, Ball J.

The defendant argued that the plaintiff should not be entitled to recover damages for aggravated PTSD and anxiety arising from an accident because he had failed to plead them and did not seek an application to amend the pleadings. The clinical records revealed that the plaintiff had suffered mental health issues before the accident with no mention of aggravated symptoms because of the accident. The Plaintiff expressly denied any personality change following the accident and testified that he had no mental health impacts from the accident. The defence argued that this evidence led them to conclude these would not be issues at trial and the late disclosure prevented them from being able to respond with expert reports.

The pleadings alleged, inter alia, "headaches", "difficulties sleeping" and "such other injuries and conditions as will be particularized as they become known to the Plaintiff's counsel." The court

determined that broadly worded pleadings, such as in this case, provide sufficient notice relying on the supreme court of Canada in *Saadati v. Moorhead*, 2017 SCC 28.

The plaintiff's discovery evidence could be used to impeach his credibility regarding his mental health.

e. *Mercantile Office System Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, per Voith J.A. (Goepel and Butler JJ.A. concurring)

This case answers questions about what needs to be pled under each of the parts of a notice of civil claim and a response to civil claim.

The court addressed the requirements under the *Rules* for proper pleadings in the context of an application to strike a response and counterclaim in a commercial case. The chambers judge had refused to strike the respondent's pleadings holding that the application was "structure-driven" in that the plaintiffs were merely insisting that the defendant organize its pleading differently.

On appeal, the response and counterclaim were struck with leave to amend with the court commenting that the "formal and content-based requirements are neither anachronistic nor technical. Instead, they are necessary and serve to further the purposes of the *Rules*."

At paragraphs 21 to 23, the court stated:

> [21] Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.
>
> [22] Pleadings also give effect to the underlying policy objectives of the *Rules*, which are to ensure the litigation process is fair and to promote justice between the parties: *Wong v. Wong*, 2006 BCCA 540 at paras. 22–23. They enable the parties and the court "to ascertain with precision the matters on which parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision": *1076586 Alberta Ltd. v. Stoneset Equities Ltd.*, 2015 BCCA 182 at para. 55, citing D.B. Casson & I.H. Dennis, eds, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed (London: Stevens & Sons, 1975) at 75–76.
>
> [23] For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to fairly decide the issues before them, the pleadings must state the material facts succinctly: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 15–22; *Shoolestani v. Ichikawa*, 2018 BCCA 155 at para. 30; *Weaver v. Corcoran*, 2017 BCCA 160 at para. 63. They must be organized in such a way that the court can understand what issues the court will be called upon to decide: Frederick M. Irvine, ed., *McLachlin & Taylor, British Columbia Practice*, 3rd ed, vol 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) (loose-leaf updated 2021) at 3–6; *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at paras. 17–18, aff'd 2016 BCCA 52.

R. 3-3(2) and Form 2 mandate that the defendant must clearly identify whether a fact is admitted, denied or is outside the knowledge of that defendant under Part 1 of the response to civil claim. If a fact is denied, the defendant must concisely set out their version of that fact in Division 2.

There should not inconsistency nor any "evasive" denials. Any additional facts are to be addressed in Division 2. The defendant had conflated the requirements by including both its version of the facts and the additional facts under Division 2 and then indicating that Division 3 was "N/A" and its response was so long and disorganized that it was not possible to easily determine what facts were denied.

The court had the following comments regarding a proper counterclaim:

> [32] A counterclaim is an independent claim raised by the defendant, which is in the nature of a cross-claim. Rule 3-4(1) requires that a counterclaim be pleaded separately from a response to civil claim. Furthermore R. 3-4(6) indicates that, except to the extent that R. 3-4 provides otherwise, Rules 3-1, 3-7 (pleadings generally) and 3-8 (default judgment) apply to a counterclaim as if it were a notice of civil claim. Form 3, under Part 1: Statement of Facts, requires that the claimant "set out a concise statement of the material facts giving rise to the counterclaim."
>
> [33] Thus, though there may be instances where the material facts underlying a response and the material facts that underlie a counterclaim overlap or mirror each other, a counterclaim remains a distinct claim and the material facts that pertain to that claim must be concisely identified. There is no broad ability on the part of a defendant to include material facts in its response to civil claim that are simply irrelevant to that response. Similarly, there is no broad ability on the part of that same party to rely on material facts in its counterclaim that are adopted from a response to civil claim and that have nothing to do with the counterclaim itself. Otherwise both the response and counterclaim would contain material facts that have nothing to do with the defences and claims being advanced in the respective pleadings.

The court confirmed that "none of a notice of claim, a response to civil claim, and a counterclaim is a story" but rather "requires a reasonably disciplined exercise" including concisely setting out the material facts and none of the pleadings are to contain evidence or argument.

f. *Panchal v. Wal-Mart Canada Corp.*, 2022 BCSC 71, Master Harper

This case addressed the proper way to advance claims arising from allegations of spoliation of evidence in the context of applications by both parties. The action was a slip and fall claim in which the plaintiff alleged that the defendant had deliberately destroyed certain video evidence from the date of the incident. The plaintiff brought an application to amend her notice of civil claim to include the facts of the spoliation and to seek aggravated and punitive damages. The defendant brought an application to strike the plaintiff's reply to the response to civil claim which claimed relief arising from the spoliation. The defendant argued that because spoliation is an evidentiary issue and not an independent cause of action, spoliation should not be pled. Instead, the defendant submitted, the plaintiff ought to set out any allegation of spoliation by letter, to which the defendant could also respond by letter. Master Harper noted that there is no rule of court that allowed for the exchange of letters for claims that could not otherwise be contained in pleadings.

Master Harper found It was necessary for procedural fairness that a party know about a spoliation claim in advance and also to help frame the scope of oral and discovery disclosure. Accordingly, it was preferable to have claims arising from spoliation and the facts on which those

claims were made to be set out in a notice of civil claim so long as the pleading did not purport to advance a claim of spoliation as an independent tort.

Only those portions of the notice of civil claim that claimed spoliation as an "independent, actionable wrong" were ordered removed. The reply was found to contain impermissible claims for damages relating to spoliation and, although it would be overtaken by a new reply, it was also struck.

XXIV. Practice

a. *Cretu v. Cretu*, 2022 BCSC 305, Kent J.

In this family law proceeding, Kent J. remarked on judicial resources and counsels' need to improve on their time estimates and adhere to the rules of evidence:

> [17] The volume of material was such that it would have taken at least four hours just for the Court to read, let alone parse out the admissible from the inadmissible evidence, and to "match/compare" paragraphs in competing affidavits which purport to respond to each other.
>
> [18] And so it happened, as is unfortunately so often the case, the time allotted to the hearing proved to be woefully inadequate. Counsel rushed through their arguments in an attempt to finish on time, much of the documentary evidence was only referred to in passing, if not entirely ignored, and the supposedly governing case law (approximately 20 cases) went mostly unopened, presumably in the hope that the Court would read it all later in its "spare time".
>
> [19] It is remarkable that counsel have so little appreciation for the huge volume of work that is relentlessly pressed upon the bench. In that regard, *Chu v. Chen*, 2002 BCSC 906 should be mandatory reading for all members of the civil and family litigation bar. The onerous judicial sitting schedule and the very limited judicial support services referred to in that judgment remain exactly the same today even though the volume of application materials has grown exponentially in the last 20 years. Most judges have neither the capacity nor the appetite for reading such materials in their "spare time".
>
> [20] Clearly, some change is required. Greater discipline in the preparation of application materials and more realistic time estimates for the required hearing would be a great first step.

XXV. Privacy Issues

a. *ES v. Shillington*, 2021 ABQB 739, Inglis J.

The plaintiff and defendant had been in a romantic relationship and had two children together. The plaintiff provided explicit photos of herself to the defendant in the relationship as a gift, partly due to their separation caused by his military deployment, on the understanding that he would not distribute the images in any way. The defendant confessed to the plaintiff, near the end of their relationship, that he had posted many of the images on the internet at pornography sites. The relationship was also marred by physical and sexual abuse, some witnessed by other people. The plaintiff asked the court to recognize the tortious act of "Public Disclosure of Private

Facts" in Alberta based on the defendant's actions of publishing private images of the plaintiff on the internet. The plaintiff sought damages for the torts of Public Disclosure of Private Facts, breach of confidence, assault, sexual assault, battery, and intentional infliction of mental distress. She also sought injunctive relief requiring the defendant to remove from the public domain and not repost any of her private images.

At paragraph 24, the court reviewed *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 ("*Nevsun*"), which held that there are three required elements in order for a court to recognize a new tort:

1) the courts will not recognize a new tort where there are adequate alternative remedies;
2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another; and
3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial.

The plaintiff argued that she met the criteria in *Nevsun*, relying on *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607 which declared a cause of action based on privacy to exist, where the defendant had posted sexually explicit content of the plaintiff on a pornographic website without her knowledge or consent.

In considering *Nevsun*, the court found that the civil statute, *Protecting Victims of Non-Consensual Distribution of Intimate Images Act* SA 2017, c P-26.9 came into force in August 2017, but the rule against retrospective application of statutes prohibited the plaintiff from relying on that cause of action so there were no adequate alternative remedies. The court found that the defendant's actions were deliberate acts of wrongdoing with significant foreseeable harm as a consequence. At paragraph 55, the court notes that right to privacy is recognized internationally and within Canada. The court also noted that "…*the increased use of new technologies has created rapid societal change that has created new possibilities for privacy breaches that require adequate legal protection.*" At paragraph 66, the court also noted that provincial legislators have also recently recognized the need for legal response for this type of conduct. The court held that the defendant's conduct clearly met the requirement of being appropriate for judicial adjudication. At paragraph 63, the court states that the existence of a right of action for Public Disclosure of Private Facts was confirmed in Alberta.

At paragraph 68, the court sets out the factors a plaintiff must prove to establish the tort of Public Disclosure of Private Facts as follows:

a) the defendant publicized an aspect of the plaintiff's private life;
b) the plaintiff did not consent to the publication;
c) the matter publicized or its publication would be highly offensive to a reasonable person in the position of the plaintiff; and
d) the publication was not of legitimate concern to the public.

The court granted the injunctive relief sought and awarded general damages. The court also awarded punitive damages of $50,000, noting that the defendant's conduct was worthy of "significant condemnation". The court found that the defendant was motivated by malice and his conduct was intended to and did increase the plaintiff's humiliation and anxiety, so aggravated damages of $25,000 were also awarded.

XXVI. Releases

a. *Corner Brook (City) v. Bailey*, 2021 SCC 29, Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Martin and Kasirer JJ. concurring)

Mrs. Bailey, driving her husband's car, struck a city employee who was performing road work. The employee sued Mrs. Bailey for injuries he sustained in the accident. In a separate action, Mrs. Bailey and her husband sued the city for property damages to herself and the car. Mrs. Bailey and her husband settled with the city, and released the city from liability relating to the accident. Later, Mrs. Bailey brought a third party claim against the city in the action brought against her by the employee. The city argued that the release barred the third party claim. Mrs. Bailey's position was that it did not, because the third party claim was not specifically contemplated by the parties when they signed the release. The application judge held that the release barred Mrs. Bailey's third party claim against the city and stayed the claim. The court of appeal allowed the appeal and reinstated the third party notice.

The supreme court of Canada unanimously allowed the appeal and ordered that the order of the application judge be reinstated. A release is a contract, and the general principles of contractual interpretation apply. There is no special interpretive rule that applies to releases. The general principles of contract law in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, have overtaken the *Blackmore Rule*, which historically provided that the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given.

The ultimate question in interpreting a release is whether the claim is of the type of claim to which the release is directed. This will depend on the wording and surrounding circumstances of the release in each case. The third party claim came within the plain meaning of the words of the release, and the surrounding circumstances confirmed that the parties had objective knowledge of all the facts underlying Mrs. Bailey's third party claim when they executed the release.

XXVII. Settlement

a. *McClaughry v. Pollock*, 2021 BCSC 1913, Marzari J. (In Chambers)

The defendant applied for a declaration that the parties entered into a binding settlement of the action arising from a motor vehicle accident. The plaintiff filed a cross-application to set aside the settlement agreement on the basis that she was unduly pressured into accepting the defendant's settlement offer, and because the settlement amount was insufficient to address her injuries. In the application, the plaintiff acknowledged that she accepted the offer, but stated that she did so on the basis that no counsel would agree to represent her going forward if the offer were not accepted. he agreed that she instructed her counsel to accept the offer. Later the same day, the plaintiff stated that she wanted to "discharge the settlement offer." The plaintiff did not sign the Release and the settlement cheque was returned. Marzari J. applied the court of appeal decision in *Hawitt v. Campbell* 148 D.L.R. (3d) 341, that the amount of the settlement and whether it was too low is not, alone, a ground for setting aside the agreement.

On the issue of undue influence from her counsel, Marzari J. held that once her counsel had communicated the acceptance of the offer with the consent of the client, a binding settlement

was reached. The withdrawal of her consent did not constitute a basis for refusing to enforce a binding settlement. Claims of undue influence from one's own counsel may be grounds for claims against that counsel, but such conduct is not grounds for setting aside the agreement itself. The evidentiary record before the court did not establish any undue influence in any event.

XXVIII. Summary Trial

a. *Hudema v. Moore*, 2021 BCCA 482, MacKenzie J.A. (Fenlon and Grauer JJ. A. concurring)

This is an appeal from a two-day summary trial in a family law case on the ground that the judge erred in proceeding by way of summary trial. Paragraphs 49 to 55 contain a helpful and succinct summary of the principles applicable in determining suitability of a matter for summary disposition.

b. *Pollock v. Tonca*, 2021 BCSC 1446, Choi J.

The defendant applied for summary judgment dismissing the plaintiff's claim for civil fraud, conversion, or unjust enrichment based on misrepresentations made by the defendant or of which the defendant ought to have known. Although the plaintiff agreed the case was suitable for summary trial, Choi J. dismissed the application on the grounds that she could not make the necessary findings of fact on the evidence before her.

The affidavit evidence submitted was inconsistent and there were several evidentiary issues with other documentary evidence submitted. Choi J. determined that the facts that needed to be inferred from these documents was too difficult without assessing the reliability and credibility of the witnesses' testimony.

XXIX. Third Party Proceedings

a. *Sharma v. Mohammad*, 2022 BCSC 270, Kirchner J.

The case addressed whether the time limit for filing a third party notice had expired under the *Limitation Act*, S.B.C. 2012, c. 13.

The plaintiff was in two accidents: November 30, 2013 and April 26, 2017. The plaintiff commenced an action in respect of the first accident in November 2015. In December 2017, the defendant became aware of the second accident and the potential that it may have impacted the injuries from the first accident. The action arising from the second accident against Mr. Polyakov was filed in January 2019. In November 2020, Mr. Polyakov was granted leave to file and serve third party proceedings against the defendant, Mohammed. In May 2021, the defendant applied for leave to add Mr. Polyakov as a third party in the action arising from the first accident.

This was the appeal from the order of the Master granting leave to the defendant to file the third party notice against Mr. Polyakov. The Master relied upon *Sohal v. Lezama*, 2021 BCCA 40, holding that the time did not start to run on a claim for contribution or indemnity under s. 16 of the *Limitation Act* unless and until a pleading that alleges damages caused by the fault of two or more persons is served on a defendant in the original action (i.e., the pleading had to have been filed in the original action). Since the first action did not allege damage caused by the fault of two

or more persons (it could not have as the second accident had not occurred), the Master held that the time had not yet started to run on the third party claim.

The sole issue on the appeal was whether the Master had correctly interpreted s. 16(a) of the *Limitation Act*.: when is a claim for contribution or indemnity "discovered"? Mr. Polyakov argued that the "discovery" for the purpose of the limitation occurred upon service of the notice of civil claim in the original action. The defendant argued that the only pleading on which "discovery" could be based is the service of the third party proceeding in the second action on him by Mr. Polyakov because that is the only pleading that specifically alleges damages caused by two or more persons.

Although the circumstances were different in this case, Justice Kirchner determined that he was bound by the court of appeal decision in *Sohal* and Justice Power's recent decision in *0782484 B.C. Ltd. v. E-Pro Enterprises Inc.,* 2021 BCSC 1509. Both of these decisions determined that "pleading" as contemplated by s. 16(a) must be one that itself gives rise to a claim for contribution or indemnity. It must be a pleading that alleges damages caused by the fault of two or more persons such that one of those persons may then claim a contribution or indemnity from the other.

This matter is under appeal.

XXX.Workers' Compensation

a. *Jirasek v. Zhao*, 2020 BCCA 308, Fenlon J.A.

The appellant was injured in a workplace accident and applied to the Workers' Compensation Board, which awarded the appellant some compensation. The appellant filed a petition for judicial review seeking additional compensation, but did not pursue it. He instead filed and pursued a civil claim against the respondents, including his employer, for frustrating his efforts to obtain proper compensation from the Board. The chambers judge struck the claim on the basis that the appellant was barred from pursuing damages for work place injuries subject to the process in the *Workers Compensation Act*. The appeal of that decision was dismissed by the court of appeal.

Fenlon J.A. held that the claim against the employer did not disclose a valid cause of action and it dealt with the same matters the Board dealt with. The judge was correct to strike out the plaintiff's notice of civil claim.

XXXI. Legislation

a. B.C. Reg. 321/2021 Sch. 1 s. 2, Effective April 4, 2022

1. Definition of "document"

The definition of "document" in *Rule 1-1(1)* is amended by striking out "film" and substituting "video".

2. Time for Filing A Third Party Notice Without Leave

Rule 3-5(4)(b) is amended to allow a party to file a third party notice without leave of the court, within 42 days after the filing of the response; a change from the previous rule of filing within 42 days after being served with the notice of civil claim or counterclaim.

3. Case Plan Orders

Rule 5-3 is amended by adding subrule (8) which allows a party to apply to amend a case plan order (a) by consent under 8-1(2)(a) or (b) if not by consent, by a party of record under *Rule 5-1* requesting a subsequent case planning conference.

4. *Rule 5-4* Applications to Amend Case Plan Orders is Repealed.

The procedure set out under this rule for amending a case plan order is now replaced by *Rule 5-3(8).*

5. Exhibits to Affidavits

Rule 22-2(9) is repealed and replaced with the following:

> (9) The following applies to an exhibit referred to in an affidavit:
>
> (a) if the exhibit is a document that complies with *Rule 22-3 (2*) and does not exceed 10 pages, a true reproduction of the document must be attached to the affidavit and to all copies of the affidavit that are served;
>
> (b) if the exhibit is a document that complies with *Rule 22-3 (2*) and exceeds 10 pages, the exhibit need not be filed with the affidavit, but must be made available for the use of the court and for the prior inspection of a party to the proceeding;
>
> (c) if the exhibit is not a document that complies with *Rule 22-3 (2*), the exhibit must not be filed with the affidavit, but must be made available for the use of the court and for the prior inspection of a party to the proceeding.
>
> [*Rule 22-3(2)* states: Unless the nature of the document renders it impracticable, every document prepared for use in the court must be in the English language, legibly printed, typewritten, written or reproduced on 8 1/2 inch ' 11 inch durable white paper or durable off-white recycled paper.]

6. Rule 23-2(1) Amendment

Rule 23-2(1) is amended to include Prince Rupert in the fax filing rule.