THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

PERSONAL INJURY CONFERENCE

PAPER 1.1

2023 Update on Case Law

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

II. APPEALS

a. *Taylor v. Peters, 2022 BCCA 254,* Griffin, J.A. (in Chambers)

The appellant sought an extension of time to file the appeal record, transcripts, appeal book and factum on the basis that the court reporting service could not prepare the record within the time limits. The respondent argued that the appellant ought to have taken steps to file the appeal record and bring the application for an extension of time earlier.

Griffin, J.A. found that the appellant had communicated a bona fide intention to appeal by filing the notice of appeal on time and that the respondents were informed of that intention. The court found that it was reasonable for the appellant to have tried two transcription services and not many others. In granting the extension Griffin, J.A. found that it was in the interests of justice to grant the application. While the appellant could have taken steps to bring the application earlier, there were outstanding issues to be decided by the trial judge, and there was no additional prejudice to the respondent as a result of the delay.

III. ARBITRATION

a. *Escape 101 Ventures Inc. v. March of Dimes,* 2022 BCCA 294, per Voith, J.A. (Fitch and Abrioux, JJ.A. concurring)

The appellant appealed a commercial arbitration award on the basis that the arbitrator misapprehended the evidence about the appellant's principal's post-contract conduct, which laid the foundation for an extricable error of law. While the respondents argued that recent authorities narrowed the range of questions that can be raised in the appeal of an arbitral award, the court held that the authorities cautioned courts about attempting to extricate questions of law from what are really questions of mixed fact and law and the cases emphasize the importance of deference to arbitral awards. The court found that there was a misapprehension of evidence that was patent from the record but was not apparent in the Arbitration's reasons.

The court held that a material misapprehension of evidence is an extricable error of law under s. 59(2) of the *Arbitration Act,* S.B.C. 2020, c.2 and is therefore a basis to appeal the arbitral award. The court also held that the appeal it not limited to an error of law within the formal arbitration decision and that a court may consider the evidence before the arbitrator as well.

IV. CONTINGENCY

a. *McIntosh v. Zhang,* 2022 BCSC 1232, Master Muir

The issues at this hearing were whether the contingency fee agreements (CFAs) signed by the client in relation to two personal injury claims entitled the lawyer to 25% of the amount assessed at trial or to

25% of the judgment net of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 section 83 deductions, and whether interest at 10% per annum on disbursements and file charges were reasonable.

Master Muir agreed with the law firm that the 25% contingency fee should attach to the total award recovered for the client, which included past disability payments, an advance on wage loss, and the amount that the client would receive from ICBC in future care. Master Muir held that the CFAs were intended to apply to the full judgment, being the full amount recovered for the client. The purpose for s.83 deductions being made is not engaged on an analysis of a contingency fee agreement and making such deductions would deprive the lawyer of fees for significant work that they undertook for the client.

b. *Tong v. Canofari*, 2023 BCSC 1083, Registrar Muir

The plaintiff challenged a contingency fee agreement she entered into with a lawyer to pursue a motor vehicle accident claim on her behalf and for a review of the account. The matter was settled prior to the commencement of trial. The client was very difficult and there were serious credibility issues arising in the underlying action. The case is of interest because the client had a multitude of complaints against her lawyer, all of which were rejected by the court after detailed analysis. The contingency agreement was allowed with minor adjustment for the lawyer's failure to have deducted the cost of past medical care and any amount for tariff costs before calculating the fee.

V. COSTS

a. *Bolduc v. Stratton*, 2022 BCSC 1319, Iyer J.

This decision deals with competing claims for costs of a *voir dire.* The plaintiff sought costs at Scale C for a three-day *voir dire* on the admissibility of single photon emission captured tomography ("SPECT") evidence. The plaintiff was unsuccessful on the *voir dire* with the trial judge finding that the evidence did not meet the basic *Mohan* requirement of necessity. The defendants sought costs at Scale B for the *voir dire* under *Rule 14-1(14) and (15)* on the basis that they conceded pre-trial that the plaintiff suffered a mild traumatic brain injury. The trial judge found that the plaintiff's insistence on proceeding with a *voir dire* respecting evidence that was no longer necessary is the type of conduct that should be recognized in an adverse costs award and awarded the defendants their costs of the *voir dire.*

b. *Carrero v. Park 2022,* BCSC 1523, Milman J

At trial, the plaintiff was found 65% at fault for the accident in question and his damages were reduced accordingly. He sought 100% of his costs. The trial judge awarded 80% of his costs on the following bases: his injuries were serious, permanent and would impact his ability to work for the rest of his life; he faced significant hurdles in establishing liability; he was forced to go to trial to obtain recovery; and the apportionment would lead to a costs shortfall of $32,000, reducing his overall damage award by 13%. Overall, the trial judge concluded that an award of only 35% of his costs would give rise to an injustice.

Of interest, while the *Moses v. Kim* factors to consider on costs apportionment include settlement negotiations generally, the court declined to consider a series of "without prejudice" settlement offers made by the plaintiff, confirming that such communications remain inadmissible under settlement privilege.

c. *Cook v. Kang*, 2022 BCSC 1255, Riley J.

In this case, four actions were heard at the same time, resulting in damage awards in three actions and a dismissal of the fourth. The defendants sought costs for the dismissed action. The trial judge held that

even in a joint trial of multiple proceedings, *Rule 14-1(9)* prevails which states that costs of "a proceeding" must be awarded to the successful party, unless the court otherwise orders. Independent steps such as pleadings, document disclosure and some discovery can be ascertained per proceeding. Where it is possible to ascertain the allocation of trial time to the particular proceeding, that should be included in a costs award. The trial judge found that there was no reason to depart from the general rule in this case and awarded costs of the dismissed action, including one day of trial time, to ICBC as nominal defendant.

The defendants also sought costs under *Rule 14-1 (15)* for costs associated with the claim for loss of past and future earning capacity. The trial judge declined, finding that they were not sufficiently discrete to warrant apportionment. The evidence on those issues was interwoven with other aspects of the case and there was no basis to find that this was one of the "exceptional" or "rare" cases where such an apportionment should be made.

Additionally, the defendants sought costs against the plaintiff under *Rule 14-1(14)* for the portion of the trial proceedings dealing with the admissibility of surreptitious audio recordings made by the plaintiff during two IMEs. The recording were ruled inadmissible on the bases that they were not properly disclosed on a list of documents and that the surreptitious recording without seeking leave of the court amounted to an abuse of process. In the result, the plaintiff was deprived of the cost of one trial day.

See Offers to Settle for additional reasons.

d. *Lee v. MacLean*, 2022 BCSC 833, Adair J.

Following trial, the defendants agreed to pay the plaintiff double costs in view of the fact that the trial judgment exceeded her formal offer. The plaintiff sought increased costs for trial preparation and the trial itself on the basis that: she was willing to settle on reasonable terms and ICBC failed to negotiate in good faith; the trial inconvenienced the plaintiff's colleagues, both physicians, who should have been operating and saving lives, rather than testifying; and the rise of the omicron wave of the pandemic.

Adair J. noted that the plaintiff's affidavit concerning settlement offers made by the defendant came very close to breaching the privilege that attaches to settlement communications, citing *Kringhaug v. Men,* 2022 BCSC 185 where E. McDonald J. confirmed a defendant's right to maintain privilege over their own formal offers and not have them disclosed by a plaintiff. The trial judge held that the plaintiff's personal experience as a plaintiff did not constitute an unusual circumstance for the purposes of an award of increased costs. In addition, she applied *Martel Building Ltd. v. Canada,* 2000 SCC 60 that the law currently does not impose a free-standing duty to "negotiate in good faith."

Adair J. held that a newspaper article purporting to establish that ICBC's litigation strategy was to force plaintiff to trial was not admissible for that purpose. There was no evidence that the plaintiff's colleagues were forced by the intransigence of the defendant and ICBC to abandon patients awaiting life-saving surgery to attend trial. The trial took place in December 2021, some 18 months after in person civil trials were reinstated. In the result, increased costs were not awarded.

e. *Neural Capital GP, LLC v. 1156062 B.C. Ltd.*, 2022 BCSC 1800, Fitzpatrick J.

The plaintiff's action alleging breach of trust, breach of fiduciary duty, fraudulent and negligent misrepresentation, breach of duty of good faith and misappropriation of funds was dismissed following trial. In addition to finding that serious and unproven allegations were deserving of an award of special

costs, the trial judge found the plaintiff's main witness to be "evasive, sly and deliberately non-responsive" in an attempt to deceive the court. That conduct alone was found to be a basis to award special costs.

Of interest, the court confirmed the principle that self-represented litigants can be awarded special costs but noted that the methodology for assessment is not well developed in the case law. After reviewing available authorities, the trial judge declined to "dictate" the methodology and referred the matter of assessment to the Registrar.

f. *Palmer v. Pozniak*, 2022 BCSC 513, Majawa J.

The plaintiff applied for, but was denied, special or increased costs of this personal injury proceeding. The plaintiff sought special costs on the basis that the defendant advanced submissions that were akin to alleging that the plaintiff had engaged in dishonesty or fraudulent conduct by bringing this claim. The court rejected this contention, finding that the defence theory of an intervening event was speculative but not recklessly pursued. There was no evidence of an improper motive. Furthermore, the defendant's "aggressive attack" on credibility and "unhelpful hyperbole" in his submissions did not amount to reprehensible conduct for the purposes of an award of special costs. Increased costs were denied on the basis that the case was a fairly routine quantification of damages with credibility in issue.

A. Disbursements

a. *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, per Harris and Voith JJ.A. (Newbury J.A. dissenting in part)

This appeal concerned the validity of section 5 of the *Disbursement and Expert Evidence Regulation* which imposed a limit on the amount a litigant could recover for disbursements fixed at 6% of the amount of the judgment. The lower court held that the *Regulation* was both invalid on administrative law grounds and unconstitutional as an impermissible infringement of the core jurisdiction of superior courts at 2022 BCSC 1146.

The court of appeal unanimously recognized that it was not asked to weigh in on the political, economic, or policy decisions made by the legislature. The role of the court was to determine whether the impugned regulation is consistent with the enabling statute and the constitution.

The appeal was dismissed with all justices concurring that the *Regulation* was invalid on administrative law grounds.

The judgment overall is an incisive review of the expert evidence scheme introduced by s. 12.1 of the *Evidence Act* with the majority identifying that the "animating purpose" of s. 12.1 of the *Evidence Act* is proportionality. The majority reasoned that proportionality is central to the very fabric of civil litigation in British Columbia, is inherently flexible and sensitive to the potential for prejudice. The court noted on the one hand that the section 12.1 presumptive limit on the number of expert reports was balanced by the provision for judicial discretion by allowing a party to apply to increase the number of reports they can tender. However, section 5 of the *Regulation* provided only an inflexible ceiling on the recovery of disbursements without regard to the nature of the plaintiff's case, the complexity of the issues involved, or the quantity of evidence required to advance reasonable and potentially meritorious claims. In many cases, the *Regulation* reflected a disregard for proportionality itself.

The majority held that the *Regulation* could not be justified on any reasonable interpretation of the purpose and object of the authorizing statute, being the *Evidence Act*.

The majority ruled that section 5 of the *Regulation* did not infringe upon the courts' constitutionally protected core jurisdiction, an issue on which Newbury J.A. dissented. In the result, the appeal was dismissed on the administrative law ground with the court not giving effect to the argument that s. 5 of the *Regulation* is an unconstitutional infringement of s. 96 of the *Constitution Act, 1867.*

B. Fast Track

a. *Dhillon v. Labelle*, 2023 BCSC 32, Verhoeven J.

After a 14-day trial, a jury awarded the plaintiff $5,100 for non-pecuniary damages and $2,415.02 for special damages. The defendant applied to limit the plaintiff's costs recovery to the fixed fast track costs pursuant to *Rule 14-1(1)(f)*. The trial judge noted that the action was not conducted under *Rule 15-1* and, indeed, *Rule 15-1(10)* precludes a fast track file from being heard by a jury. He held that it would be anomalous to apply the fast track cost rules to an action in which *Rule 15-1* never applied and only for the reason that the jury awarded less than $100,000. He further held that *Rule 14-1(1)(f)* places actions that *should* have been fast tracked, but were not, under the fast track costs schema. The case at bar was more complicated than that contemplated by the combination of *Rules 14-1(1)(f)* and *15-1.*

b. *Repa v. Geil*, 2022 BCSC 1366, E. McDonald J.

This case concerned a costs award for two fast track actions where the trials were heard at the same time and lasted five days. There was no order consolidating the actions. The trial judge awarded two sets of costs: $9,500 under *Rule 15-1(15)(b)* for the less serious accident where the judge accepted that the trial time spent on that action was two days or less but more than one day, and $11,000 under *Rule 15-1(15)(c)* where the trial time spent on the more serious claim was more than two days. The trial judge declined to reduce the costs due to some efficiencies in hearing the two actions together.

Also at issue was the plaintiff's application for costs of a pre-trial application abandoned by the defendants. The defendant filed and served a notice of application, the parties agreed on a hearing date, and the plaintiff filed an application response. The hearing did not proceed because the defendants' counsel did not file an application record. In declining to award the plaintiff costs, the trial judge emphasized that the lump sum costs regime under *Rule 15-1(15)* is meant to eliminate the need for calculating costs under the tariff and potentially proceeding to a costs hearing. There was nothing unusual or special which justified departing from the lump sum costs.

The plaintiff also sought increased costs on the basis that the defendants raised a defence of a failure to mitigate and abandoned it in closing submissions. The trial judge declined to award increased costs. She held that the defendants' failure to formally notify of their abandonment of the mitigation defence did not constitute the kind of special circumstances that supported such an award.

VI. CREDIBILITY

a. *Basra v. Shew,* 2023 BCSC 1056, G.P. Weatherill, J.

The 55-year-old plaintiff sought damages for injuries sustained in a motor vehicle accident but assessment was complicated as the plaintiff had already been off work for about 16 months due to a work-related hip injury which required surgery and was the subject of a WorkSafe BC claim. The plaintiff claimed that the hip injury had resolved prior to the accident and he was contemplating a return to work

but that the accident aggravated the hip injury and caused new injuries to his right shoulder, neck and back, as well as psychological injuries.

The court found that the plaintiff's evidence about his pre-accident hip injury was not convincing, and that his hip injury symptoms were significant at the time of the accident. Weatherill, J. also found that the plaintiff attempted to minimize his hip injury symptoms in order to maximize the effect of the accident for the purpose of his case. The court noted that WorkSafe BC had accepted the plaintiff's right hip condition as a permanent limitation, and that WorkSafe BC, his union, and his employer had concluded that he was likely permanently restricted from labour-intensive longshoreman work but that he could perform less labor-intensive checker and other jobs. The court also noted that at trial the plaintiff was observed sitting in the witness box for over one hour without visible discomfort of shifting and without requesting a break which did not align with his reported inability to sit for more than 20 to 30 minutes.

Weatherill, J. states that the plaintiff's experts relied almost exclusively on his self-reporting and assumed that reporting to be correct and unexaggerated. However, the records from WorkSafe BC provided a useful baseline of the plaintiff's pain and tolerance levels which revealed that he had continued to report significant hip pain and restrictions in the weeks and months leading up to the accident. The court held that the plaintiff's expert reports were undermined to the extent that they assumed the plaintiff's subjective complaints to be true.

The court also found that the plaintiff was not a particularly impressive witness and on cross-examination there were problems to the point of affecting his credibility, particularly due to an inability to explain the inconsistencies between his direct evidence that his return to work as a longshoreman was imminent and the documentation suggesting otherwise. The court awarded non-pecuniary damages of $50,000.

The plaintiff had continued to receive WorkSafe BC benefits since the pre-accident hip injury which continued uninterrupted after the accident. The court did not accept that the plaintiff would have returned to work absent the accident and dismissed his claim for past loss of earnings. The court also dismissed the claim for future loss of earning capacity on the basis that any limitations the plaintiff may have arose from the pre-existing hip injury and not from the accident.

b. *Campbell v. The Bloom Group,* 2023 BCCA 84, per Voith J.A. (Newbury and Hunter, JJ.A. concurring)

The appellant appealed an order dismissing her petition for judicial review concerning a notice to end tenancy issued to the appellant by her landlord following numerous complaints from other tenants regarding her allegedly abusive and discriminatory behavior at the residence.

At a residential tenancy branch hearing, the appellant requested an adjournment in part, on the basis that she had a hearing impairment which caused her to have difficulty communicating over the phone. The arbitrator denied the request, expressing skepticism about whether her adjournment request was genuinely necessary or merely a delay tactic. The arbitrator observed that the appellant had not provided any medical documentation to corroborate any hearing impairment, exhibited no difficulties or delays in answering questions as her responses were immediate and forthright, and often interjected without being addressed directly. The arbitrator found the appellant had been able to fully participate in the hearing and those findings were not challenged, but the appellant argued that the adjournment request played a crucial role in the arbitrator's assessment of her credibility which was fundamentally wrong.

The appellant argued that her case was analogous to instances where a litigant requests an interpreter to increase their confidence during court proceedings, and the court agreed that a person with a hearing impairment may require some accommodation to abate a concern that their impairment will interfere with their ability to respond to questions or otherwise participate in the process. The court states that decision-makers should be wary about impugning, or appearing to impugn, the credibility of the person on the basis of the accommodation sought.

However, the court also stated that a litigant who asserts that they have a physical disability is not insulated from having that assertion challenged or tested by another party and there is no impediment to an adjudicator addressing and then ruling on that challenge. The court held that the question of whether the appellant advanced her hearing impairment in good faith or as a delay tactic was squarely in issue. The court found that the arbitrator had not acted unfairly in concluding that the arbitrator was dubious of the truthfulness and reliability of the appellant's submissions. The appeal was dismissed.

c. *Fernandez v. Beltran,* 2022 BCSC 1482, Masuhara J.

The plaintiff was injured in a motor vehicle accident and sought damages for physical injuries, psychological injuries, chronic pain, and chronic fatigue. The plaintiff relied, *inter alia*, on a functional capacity evaluation (FCE) in which the evaluator opined that the plaintiff was capable of light work on a part-time basis with accommodations, but that she was not capable of full-time work as a pharmacy assistant/technician. The FCE also indicated that the plaintiff was observed to be limping consistently through the assessment.

Surveillance showed the plaintiff swimming lengths at a public school, (pushing off the wall with strength, pulls/lift herself out of the pool, and walking without difficulty on the pool deck), entering and exiting her SUV, opening the car door while holding cartons, pushing herself upright from a seated position with one hand, bending over at the hips freely, pointing with her arms upward, standing and working at a pharmacy, and shopping at a supermarket without any expressions of pain or movements that were guarded. The plaintiff's daughter testified that her mother did not walk with a limp and the video surveillance did not reveal any limping.

The court found that the plaintiff's refusal to agree that the video did not show her having difficulty was not credible and that the plaintiff's evidence was undermined by her inconsistencies and conflicting statements.

The court also noted that in a questionnaire for the physiatrist, the plaintiff reported that she could not cook at all, but later in the same questionnaire she responded that she could "with help", but during cross-examination the plaintiff indicated that she hosted a full thanksgiving dinner for her family.

The court found that the expert evidence of the psychiatrist, physiatrist, and the FCE were not a sufficient answer to the incongruencies in the plaintiff's evidence and found that the plaintiff had greater function to perform day to day activities both in and outside of the home than she claimed. The court also found that the plaintiff had the ability to work full-time and perform full duties as a dental assistant or pharmacy assistant.

VII. DAMAGES

A. Aggravated and Punitive Damages

a. *Brar v. Feng,* 2022 BCSC 1719, Elwood, J.

The plaintiff claimed damages from an ICBC claims examiner, claiming that the defendant committed negligence, bad faith, and tortious conduct in relation to the administration of her no-fault accident benefit coverage. The plaintiff also claimed that the defendant intentionally induced a breach of contract or interfered with the performance of the contract between the plaintiff and ICBC. The court held that the claims in negligence were barred by section 30(2) of the *Insurance Corporation Act*, [RSBC 1996] c.228*,* which bars an action against any person except ICBC for claims arising out of the discharge of their duties in the ordinary course of their employment. The court held that the plaintiff could bring those claims against ICBC, but not against the claims examiner personally.

b. *Brown v. Ponton*, 2022 BCSC 2248, Stephens, J.

The plaintiff claimed for injuries and aggravated damages resulting from a motor vehicle accident. The defendant argued that the plaintiff instigated an altercation that led to the accident, where tempers between the parties caused them to both act in a dangerous manner, leading to the plaintiff's injuries, and that liability should be apportioned.

The court held that a plaintiff must give notice to a defendant in order to claim aggravated damages at trial and the plaintiff's notice of civil claim, stating that the defendant caused his motor vehicle to collide with the person of the plaintiff and the plaintiff's motor vehicle, was not sufficient to support a claim for aggravated damages. The court found that there was no notice in the notice of civil claim of the type of conduct nor injuries such as distress, humiliation, wounded pride, diminished self-confidence or self-esteem, or loss of faith in friends or colleagues caused by high-handed and reckless indifference to the plaintiff that would give rise to a claim for aggravated damages.

c. *Hartling v. Pitman*, 2022 BCSC 1894, Hardwick J.

The plaintiff was injured after falling down stairs at the defendants' residence after an evening of socializing and drinking alcohol. The plaintiff filed a notice of civil claim, an amended notice of civil claim, and then sought leave to file a further amended notice of civil claim to include claims for punitive and aggravated damages. No trial date had been set. The court stated that the plaintiff's case on liability was not an easy one and simple negligence, if proven, would not lead to an award of punitive or aggravated damages.

However, the court found that there was no evidence to indicate that the claims were inherently frivolous, vexatious, or wholly doomed to fail, so there was nothing to support the conclusion that they were clearly invalid. The application to amend the pleadings was granted.

d. *Terehoff v. PBC Health Benefits Society dba Pacific Blue Cross*, 2022 BCCRT 1031, C. McCarthy, Tribunal Member

The applicant had extended health benefits under a plan administered by PBC Health Benefits Society dba Pacific Blue Cross (PBC). PBC reimbursed the applicant for health care treatments, then later determined they were not covered and charged back that amount to the applicant's health care coverage account against his future benefit claims. The applicant sued PBC and the PBC's president/CEO claiming punitive damages against both respondents to deter unfair practices they allegedly established against health benefit plan members, including himself.

The civil resolution tribunal found that there was no evidence to show that the respondent president/CEO personally established any benefit plan practices affecting the applicant that he directly participated in events that led to the dispute, or that he acted outside his employment role, so all claims against the personal respondent were dismissed.

B. Failure to Mitigate

a. *Haug v. Funk,* 2023 BCCA 110*,* per Bauman J.A. (Harris and Willcock, JJ.A. concurring)

The appellant suffered soft tissue injuries to her neck and back from a motor vehicle accident but appealed her damages award, in part on the basis that in making a 25% reduction for failing to mitigate her damages, the trial judge misapprehended evidence and misapplied the legal test.

The case of *Chiu v. Chiu*, 2022 BCCA 618 sets out a two-step test to analyze a reduction in damages award due to the plaintiff's failure to mitigate her losses. The defendant must prove: *"(1) that the plaintiff acted unreasonably in eschewing the recommended treatment; and (2) the extent, if any, to which the plaintiff's damages would have been reduced had they acted reasonably*".

The plaintiff argued at trial that her expert had not made an official recommendation for treatment and that he had "*no qualms*" about her discontinuing massage therapy and instead finding relief with a TENS machine. The court found no merit in those submissions as the trial judge had found that the expert had made a recommendation for treatment, and that the plaintiff could have moved from massage therapy to physiotherapy, another option in the expert's recommendation list. The trial judge stated that *"[i]f her decision to forgo treatment was based on her objection to the particular massage therapist she saw, or even if it was an objection to massage therapy based on that experienced, there were plenty of options remaining. Forgoing all treatment was an unreasonable decision*".

The trial judge had also found that treatment would have made a significant difference and that it would have at the very least, prevented the deconditioning and muscle imbalance that were contributing to the plaintiff's symptoms at the time of trial. The court found that it was open for the trial judge to make that finding on the basis of Dr. Paramonoff's expert evidence that "*timely treatment … would have, to a significant degree, prevented the plaintiff's symptoms from crystallizing in their present form*". The court found that the trial judge's conclusion was entirely supported by the evidence and amply explained.

The judge concluded that there was a "*real and substantial possibility*" that the plaintiff would have been in a better condition had she taken timely treatment and that the probability of this was "*very high*". At paragraph 61, the court confirmed the principles of the test for failure to mitigate, that the defendant "*…must prove on a balance of probabilities that the plaintiff's injuries would have been reduced to some degree had they acted reasonably. Only once this is established does the Court go on to assess the reduction to the damages award based on the extent to which the injuries would have been avoided, which is the true hypothetical*".

The court reviewed case law regarding failure to mitigate and concluded that the cases made it clear that the "*real and substantial possibility*" standard has no application in the second part of the mitigation test and that other cases in the court below that apply this standard are in error, as this lightens the defendant's burden of proof to something less than a balance of probabilities.

The court found that the judge's use of the real and substantial possibility language was problematic, but that while the judge misarticulated the legal test, that had not affected the result and intervention in the plaintiff's decision regarding the deduction for failure to mitigate was not warranted.

b. *Murphy v. Snippa*, 2022 BCSC 1418, Walkem J.

The plaintiff passenger in a motor vehicle accident suffered injuries to her dominant right hand as well as ongoing pain, depressive order, and driving anxiety. Just before the accident the plaintiff sold a wine store that she had worked at for years to establish herself in the British Columbia wine industry. The plaintiff then purchased a commercial space with the intent of transforming it into a restaurant specializing in pairing wine with food. Very shortly after, the plaintiff was involved in the accident and public heath shutdowns and restrictions due to the COVID-19 pandemic negatively impacted the restaurant.

The issues in assessing damages included teasing apart the impact related to the accident from those other factors. In addition, there was an issue as to whether the accident caused the plaintiff's alcohol use disorder or whether the accident worsened a pre-existing alcohol use disorder.

The plaintiff had ongoing hand limitations and pain in her back, but had delayed seeking treatment and had a history of spotty attendance at medical treatment appointments. Defence experts Dr. Paramonoff and Dr. Gatha opined that the plaintiff's prognosis would have been better had she undertaken treatment earlier, particularly for her hand.

At paragraph 96, the court states that the "*standard required for mitigation efforts is reasonableness and sincerity in pursuing treatments to address injuries suffered*". The court found if the plaintiff had sought treatment earlier when it was clear that her hand was not healing, or had she been diligent in pursuing the hand therapy she was prescribed, her outcome would have been better. The court found that the plaintiff did not undertake the full course of treatment for her hand or back injuries recommended by medical professionals which led to a poorer prognosis for recovery than she otherwise would have had. The court also found that the plaintiff's pre-existing alcohol use disorder, worsened due to the accident and other life events, and co-morbid depression, had impacted the plaintiff's ability to participate in treatments necessary to address her physical injuries.

The court reduced the damages award by 20% for failure to mitigate.

c. *Rickards v. Turre,* 2023 BCSC 439, Norell J.

The plaintiff sought damages for injuries he suffered as a pedestrian when struck by a motor vehicle. He was 12 years old at the time of the accident and 23 years old at trial. The defendant sought a 25% reduction in damages on the basis that : the plaintiff only attended two physiotherapy sessions in the first four years after the accident and fewer than 20 sessions in total; he failed to follow his physiotherapist's advice to do home exercise; and he failed to follow the advice of multiple physicians to lose weight and exercise.

The court confirmed that a defendant has the burden of establishing that a plaintiff acted unreasonably in not following a certain course of conduct and that damages would have been reduced if the plaintiff followed that course. The court accepted that the plaintiff's mother had taken the plaintiff to more physiotherapy sessions which were more than 10 years prior, but that she did not have the receipts for all of them. More importantly though, the court found that there was no evidence from any expert that further physiotherapy would have prevented the plaintiff's knee pain or osteoarthritis, and if so, what amount of physiotherapy would have prevented it.

While all expert opinions agreed that losing weight and exercise would help the plaintiff, the court did not accept that the defendant had established that the plaintiff failed to mitigate by failing to diet and exercise. The court found that the plaintiff had not acted unreasonably as he was only 12 and living in difficult family circumstances with little control over meals served in the home or ability to arrange physiotherapy or an exercise program.

The plaintiff testified that he did diet and lose weight with his mother's assistance as a teenager, but gained it back. The plaintiff testified that he had tried to diet and exercise multiple times but failed. The evidence indicated that the plaintiff had struggled with mental health issues and the court did not find it reasonable to expect someone with a major depressive disorder to have the ability to embark upon and consistently follow a program that would be difficult even with assistance. The court found that the plaintiff needed structured professional help to get onto a diet and exercise program. No deduction was made for failure to mitigate.

C. Future Care

a. *Chen v. Crystal Computer Ltd.,* 2022 BCSC 1051, Baird J.

The plaintiff sustained serious and permanent physical and psychological injuries as a result of a motor vehicle accident and claimed future care costs of $520,137.47. At paragraphs 49 to 51, the court reviewed the legal framework confirming an award for future care must have medical justification and be reasonable, that the plaintiff would make use of the particular care item, be an item made necessary from the injury, and that there is not significant overlap in the various care items sought. The court also confirmed that it is an assessment, not a precise accounting, but one that should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the accident.

The court found that the plaintiff was seeking too much housekeeping assistance and accepted the defendant's option of regular housekeeping twice per month and seasonal housekeeping twice per year for a total of $68,250 to age 80. The plaintiff sought massage, physiotherapy and chiropractic treatments to age 110 but the court awarded fewer sessions per year to age 80. The plaintiff sought Botox injections to age 110 for a total cost of $111,770. Defence counsel relied on Dr. Salvian's statement that "*this is not typically a curative treatment and eventually the Botox will typically lose its effect after several sessions*". The court awarded injections for one year at a cost of $1,716.

The plaintiff sought the cost to attend a private clinic but the court accepted Dr. Cabrita's evidence that the wait time for a MSP funded pain clinic was only three to six months and as the plaintiff could have enrolled at any time in the years since the accident but had not done so, the court made no award for a pain clinic. The defendant argued that medication costs to age 75 was sufficient but the court awarded the medication costs to age 80 as claimed. Of the total claimed, the court awarded $235,474.47.

b. *Deegan v. L'Heureux*, 2023 BCCA 159, per Marchand J.A. (Saunders and Horsman JJ.A. concurring)

This appeal concerned an award for the cost of future care in unusual circumstances. The trial judge awarded the value of two chiropractic visits per month to age 65. However, the reasons for judgment stated that plaintiff's counsel agreed that this head of damage would not be included in the award for damages and would continue to be paid by ICBC. On appeal, the court noted that this contravened s.

83(4) of the *Insurance (Vehicle) Act* by disclosing the amount of Part 7 benefits before damages had been assessed, and that under s. 83(5), an application to deduct Part 7 benefits was to be made only after damages have been assessed. There was no evidence as to whether and to what extent Part 7 benefits would cover the treatments in issue and the judgment implicitly found that ICBC, not a party to the litigation, was obliged to cover this treatment on the "understanding" of her trial counsel. The reasons provided no method by which the plaintiff could compel the defendants or ICBC to cover the cost of these treatments. However, given the nature of the ruling, the entered order did not contain a term requiring the defendants to pay the future care costs. In the absence of such an order, neither party was in a position to appeal the assessment of this aspect of her claim. The parties were required to re-appear before the trial judge on this issue and rectify the order to allow for appellate review.

After the order was rectified, the defendants were able to appeal the award. They argued that the award for chiropractic treatment was not medically justified. No medical expert expressly recommended this treatment or its duration. However, the court found that there was sufficient evidence to justify the award based on: the medical evidence of the plaintiff's chronic pain and headaches; the plaintiff testimony that chiropractic treatment provided her with temporary relief; an expert report that said that she needed further help such as chiropractic treatments to help her alleviate her symptoms; and Dr. Hershler's recognition that chiropractic treatments effectively eliminated her headaches.

c. *Kim v. Baldonero,* 2022 BCSC 167, Horsman J.

The plaintiff claimed damages for injuries from a motor vehicle accident including soft tissue injuries, chronic neck and back pain, post-traumatic headaches, and an anxiety disorder. The plaintiff sought future care for cognitive behavioral therapy, physiotherapy, gym pass, medications, household and yard assistance, household repairs and maintenance. Several of the future care items were not significantly in dispute but the plaintiff claimed $74,000 for various household and yard services.

The court found that that the evidence did not establish that the plaintiff required paid household cleaning services to assist with routine household tasks, or a real and substantial possibility that he would require them in the future. The court found that there was a realistic and substantial possibility that the plaintiff may incur expenses in the future to assist with more physical household tasks, such as yard and garden care, seasonal cleaning, and home repairs and maintenance. However, the court found that any award must account for the significant contingency that the plaintiff lived in a strata and may never live in a house and would possibly never incur such costs. The award also had to account for the contingency that the plaintiff's condition would improve with active rehabilitation, and that the plaintiff might not incur the costs at all, or at the frequency assumed by his expert. The court awarded 30% for an award of $22,000.

The plaintiff claimed the cost of a gym membership to age 75 of $11,500 but the court found that the expert's recommendation for "*liberal access to an exercise facility*" was temporally tied to the six to eight months of sessions with a kinesiologist. The court concluded that the plaintiff did not require a lifetime gym membership or that he was likely to incur the cost of a gym membership over such an extended period of time. The court awarded the cost of membership for five years in the amount of $2,300.

The plaintiff claimed $11,300 for the cost of Robaxacet, Tylenol, Advil, and P3 Muscle and Joint Cream for the remainder of his life. Horsman J. found that a deduction was required to account for the contingency that the plaintiff's symptoms may improve with active rehabilitation to the point that he does not need the medications or needs them less frequently. The court awarded $4,500.

d. *Sidhu v. Hiebert,* 2023 BCSC 813, Forth J.

The plaintiff was catastrophically injured in a motor vehicle accident at the age of nine years, following which he received benefits under Choices in Supports for Independent Living ("CSIL") and the Provincial Respiratory Outreach Program ("PROP"). At issue was the deductibility of benefits from these programs. The parties agreed that the sum of $436,990 already received by the plaintiff since the commencement of trial in CSIL benefits would be taken into account in assessing the cost of future care claim.

The defendants sought to deduct the present value of future CSIL benefits ($4,789,560) from the award of future care costs ($13 million). Forth J. declined to do so. CSIL is a Ministry of Health program offered through the Home and Community Care program funded by the BC Government through the *Continuing Care Act*. CSIL is not 24/7 support. Forth J. determined that CSIL benefits are discretionary, not mandatory, and that that they were funding the plaintiff on an interim basis at their discretion. The health authority retained the discretion to discontinue benefits to the extent they are provided for in the judgment and monies are received by the plaintiff. Forth J. held that clarification from the court of appeal as to which party had the onus to prove the benefits would be helpful and found that the onus lay with the defendants.

The court also grappled with the issue of whether the plaintiff would place the judgment award in a discretionary trust (as it did with settlement funds pre-trial from one defendant) where the funds are not in his direct or indirect control, and would then argue that he had no control over receiving funds to pay for his care needs. This would allow him double recovery. Forth J. held that the plaintiff receives funds when payment is made into his lawyer's trust account, thus triggering the policy of the health authority to stop public funds until the award for future care is depleted. Therefore, it could not be said that the plaintiff would be receiving double compensation.

The evidence established that the plaintiff would continue to receive certain equipment, services and supplies from PROP after receiving his judgement proceeds. After conducting a valuation of those benefits for the purposes of a reduction, Forth J. applied a 20% contingency to reflect the possibility that the benefits may be reduced or eliminated in the future.

D. Loss of Earning Capacity

a. *Bains v. Cheema*, 2022 BCCA 430, per Fitch J.A. (MacKenzie and Horsman JJ.A. concurring)

The plaintiff was 21 and worked in a lumber yard and part-time in his family's trucking business. His pre-accident goal was to be a long-haul truck driver in the family business. The trial judge awarded $50,000 in loss of future earning capacity. On appeal by the defendant, the court agreed that the trial judge committed an error in principle by concluding that a real and substantial possibility of a future income loss flowed from demonstration of impairment of a capital asset. What was required was an analysis of whether his loss of capacity would cause a pecuniary loss in the future.

The court also found that the trial judge engaged in impermissible speculation as to the nature of the future event giving rise to a real and substantial possibility of a pecuniary loss. The judge considered it "possible" that technological and economic change might result in long-haul driving ceasing to be a viable career. If this came to pass and the plaintiff were required to change careers, his accident injuries would disqualify him from pursuing other vocations. However, the anticipated future event, being the

decline of the commercial trucking industry, was unsupported by any evidence and was not a matter about which the judge could take judicial notice. Future hypothetical possibilities can be considered as long as they are real and substantial possibilities – they cannot be based on mere speculation.

However, the court held that even though the judge erred in principle, it does not inevitably follow that the appeal should be allowed and the award set aside. One remedy was for the court on appeal to consider whether an award for loss of future earning capacity was justified despite the error and, if necessary, proceed to quantify the loss. In this case, the court found that given the plaintiff's young age and inclination toward hard work, he would have taken on additional driving trips that paid a premium, which he will not likely do on account of his injuries - a future event giving rise to a loss. On this basis future income loss due to the respondent's loss of capacity was established and the quantum of the award was reasonable.

b. *Baylis v. Laybolt,* 2022 BCCA 423, per Harris, J.A. (Saunders and Groberman, JJ.A. concurring)

The appellant appealed the damages award for past and future income loss arising from a personal injury trial. The appellants argued that the trial judge erroneously concluded that the plaintiff retired because of her accident injuries as opposed to another medical condition and awarded an inordinately high amount for past and future income loss. The court of appeal held that the trial judge found the necessary causal connection between the plaintiff's accident-related injuries and her decision to retire, and that the trial judge's finding was entitled to deference.

The trial judge found that the side effects of the plaintiff's cancer treatment had dissipated and rejected the defendant's argument that the cancer diagnosis and treatment prevented the plaintiff from returning to work. The court of appeal held that it was open to the trial judge to reject the defendant's contention and to weigh the impact of cancer on the plaintiff's future ability to work as a contingency, given the finding that the side effects of her treatment had dissipated. At paragraph 50, the court of appeal states that *"[t]he judge was in a privileged position to assess the various factors affecting her health and capacity to work*", and the appeal was dismissed.

c. *Bolduc v. Stratton*, 2022 BCSC 1168, Iyer J.

The plaintiff was a university student at the time of the accident with plans to become and nurse and then apply to medical school. Her loss of future earning capacity claim was based upon a percentage reduction of a combination of lifetime earnings from specialty medicine, family medicine and nursing income. The trial judge was satisfied that there was a real and substantial possibility that her reduced capacity (established in the evidence) will cause a pecuniary loss from working as a nurse and as a doctor, despite the fact that she had not written her MCAT yet. The plaintiff tendered evidence of medical school admissions through published materials and witnesses who had gone to medical school. The court accepted that she had demonstrated a real and substantial probability that she would succeed in getting into medical school both with and without the accident. The trial judge did not accept, however, that there was a real and substantial probability that she would have become a specialist.

Without the accident, the trial judge found that there was a 75% likelihood that the plaintiff would have been accepted into medical school within her first three years of eligibility to apply and would have successfully completed it within the allotted time. There was a corresponding 25% likelihood that she would have worked as a registered nurse. Post-accident, the plaintiff was found to have a 65% chance of becoming a doctor and 35% chance of working as a nurse. She is now 50% more likely to work part-time and the present value of lifetime earnings was calculated accordingly.

d. *Deegan v. L'Heureux*, 2023 BCCA 159, per Marchand J.A. (Saunders and Horsman JJ.A. concurring)

The plaintiff was 20 years old at the time of the accident and had not yet established herself in a career. She was awarded $250,000 at trial for future loss of capacity to earn income. The defendants appealed this award, arguing that the trial judge conflated a finding of chronic pain with an impairment of her earning capacity. There was no medical evidence of a loss of capacity with her experts opining that she could continue working, she had a "good prospect for a complete recovery" and there was "no residual disability." On appeal, the court held that the trial judge was entitled to rely on the medical evidence that the plaintiff continued to suffer from chronic pain. In addition, the lay evidence established that she had left a waitressing job and struggled in other jobs on account of her pain. This was a sufficient evidentiary foundation for a finding that there was a real and substantial possibility of a future event leading to a loss of income.

However, the trial judge fell into error in quantifying the loss. There was a paucity of evidence on the issue and the loss was presented on the basis that she would have successfully run an in-home day care. The plaintiff had not adduced any evidence to establish that her home was suitable for an in-home licensed day care for five children, no evidence to assist in establishing how profitable she expected her day care to be, and her theory did not account for the fact that she had proven herself capable of maintaining reasonably remunerative employment in an administrative basis. The court found that there was no way to know whether the respondent would earn more or less in an administrative role as compared to running an in-home licensed day care. In the result, the court substituted an award based on two-years of the plaintiff's pre-trial annual income.

e. *Dunn v. Heise*, 2022 BCCA 242, per Marchand J.A. (Harris and Stromberg-Stein JJ.A. concurring)

The award for future earning capacity was set aside on this appeal on the basis that the trial judge's assessment was not grounded in the evidence. The plaintiff was 24 years old at the time of the accident and worked full time installing audio visual equipment. His long-term goal was to become an owner in the business. The trial judge concluded that his accident injuries reduced his earning capacity by 25% to 35% as audio-visual installation was now closed to him. She then estimated the low and high end of the present value of his lifetime earnings, using his pre-accident income to anchor the low end. She held that he would have had annual increases of $5,000 per year to age 50 to earn an annual income of $149,000 which would remain steady until age 65. The trial judge used the mean of the low and high end of these lifetime earnings, and awarded 30% of that amount, less 25% for contingencies.

On appeal, the court held that the trial judge followed the correct analytical framework in assessing the loss of capacity but fell into error in projecting the high end of the plaintiff's without accident earnings. Her projection of the high end was not grounded in any evidence and demonstrably wrong given the economic evidence. In the result, her analysis was impermissibly speculative and the court substituted an award based on the evidentiary record.

f. *Fatla v. McCarthy*, 2022 BCSC 577, Steeves J.

This case involved an assessment of loss of future capacity where the plaintiff was earning more than she had pre-accident, noting that the court must assess the likelihood of an impairment giving rise to a

loss. The plaintiff was working full time but testified that she was contemplating reducing to four days per week on account of her injuries. The court concluded that there was a real and substantial possibility that she would reduce her hours in the future. The court rejected the plaintiff's proposals to use the average earnings of men or a combination of the earnings of women and men. These figures were argued by the plaintiff to be necessary to reach a "gender earning convergence" to offset the historically low earnings of women compared to men. The trial judge found that the novel argument made in closing submissions "to right historical disadvantages of women in the workforce" lacked proper pleading, evidence and argument. Such a significant human rights challenge without full litigation engagement on the issue was not appropriate in this case.

g. *Helgason v. Rondeau*, 2022 BCSC 1330, Skolrood J.

The plaintiff was a young lawyer at the beginning of her career and claimed damages for, *inter alia*, a permanent impairment of her ability to work full time. Skolrood J. (as he then was) expressed caution in relying on female-based statistics, finding that they do not necessarily reflect the reality of the modern practice of law. "Common knowledge and experience tell us that more women are going to law school and coming into and excelling in the profession." This was reflected in the evidence at trial where a partner of the firm where the plaintiff was employed testified that the majority of the top applicants to the firm have been women. That said, statistical averages and normal contingencies were still applicable in the assessment process.

h. *Henry v. Fontaine*, 2022 BCSC 930, G.C. Weatherill J.

The trial judge found that the plaintiff's chronic pain was manifest and continuing at the time of trial and would continue into the future. Quoting from *Morlan v. Barrett,* 2012 BCCA 66, he held that "it is a matter of common sense that constant and continuous pain takes a toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations are made." On the second step of the *Rab* test, he summarized that factors relevant to determining whether there is a real and substantial risk of pecuniary loss include:

a) the plaintiff's intention to keep working and what they intend to do for work;

b) where the potential event precludes income from a particular occupation the plaintiff does not intend to pursue, there will not be a real and substantial possibility, because that income would never have been earned;

c) inability to devote the same energy or hours to her pre-accident occupation;

d) work history;

e) medical condition; and

f) the plaintiff's intentions concerning their future lifestyle, and the risk inherent in those plans.

At the second stage, the fact that the amount by which the plaintiff's income may be reduced by a future event is speculative does not mean there is no real and substantial possibility of that future event leading to pecuniary loss. It is a question of relative likelihood of a loss at this stage. The plaintiff satisfied this stage because his ongoing whiplash injury will likely cause him to miss work days for the rest of his working life as a welder.

On the issue of the relative likelihood of the future pecuniary loss occurring, the following factors are relevant:

a) history and nature of the sources of past income;

b) profitability and nature of the plaintiff's intended future economic activities;

c) plaintiff's pre-existing limitations concerning capacity to work due to age or health;

d) strength of the evidentiary basis for the amount whereby the plaintiff's income is alleged to have been reduced; and

e) level of continuing exposure to risk given the plaintiff's intentions concerning their future activities, and the risk inherent in those plans.

Weatherill J. noted that it is the plaintiff's burden to demonstrate a real and substantial possibility that he would have maintained a particular work schedule for a particular length of time. "Plaintiff's counsel's bald assertions" do not suffice. The plaintiff was awarded loss of future capacity based upon a loss of one day of work per month.

i. *Kringhaug v. Men,* 2022 BCCA 186, per Marchand J.A. (Willcock and Dickson JJ.A. concurring)

The defendant unsuccessfully appealed the trial award of loss of future earning capacity. While the trial reasons were sparse, they were sufficient for appellate review. This case provides a succinct and helpful roadmap of the proper analysis for this head of damage at paras. 42 – 48. The defendants emphasized that various factual findings were not expressed in the judgment such that she could discern the basis upon which the award was made. However, the court found that such claims are to be assessed and not calculated and that the judge was not required to "show the math."

j. *McLean v. Redenbach*, 2023 BCSC 8, Hinkson C.J.S.C.

The plaintiff made no claim for past income loss in 2020 on account of obtaining alternative employment and her receipt of the Canada Emergency Response Benefit ("CERB"). Hinkson C.J.S.C. found, however, that her concession was inconsistent with *Yates v. Langley Motor Sport Center Ltd.,* 2022 BCCA 398 where the court found that CERB payments should not be deducted from a wrongful dismissal damages award. Applying *Yates,* Hinkson C.J.S.C. stated that he would not deduct CERB payment from her lost income award.

k. *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, per Harris J.A. (Stromberg-Stein and Voith JJ.A. concurring)

This appeal decision sets out the operative principles for the determination of a loss of future earning capacity in clear and succinct reasons. The court of appeal set aside the loss of future earning capacity award in this case, finding that the trial judge did not undertake the requisite steps when assessing damages and did not make the findings of fact necessary to quantify an award. The reasons set out an analysis of circumstances where an income loss is not clear-cut, including where a plaintiff's injuries have led to continuing deficits but their income at trial is similar to what it was at the time of the accident. In these cases, the *Brown v. Goilay* factors assist in determining whether there has been an impairment of the capital asset. Even where *Brown* factors exist, this does not necessarily mean the plaintiff has made out a real and substantial possibility that the diminished earning capacity would lead to a loss of income. A separate analysis is required on that point. In conducting a valuation of the loss,

the capital asset approach should generally be used where there is no loss of income at the time of trial or the plaintiff has yet to establish a settled career path.

In this case, the trial judge fell into error by failing to undertake the second step which is to assess whether there was a real and substantial possibility that the loss of capacity would cause a pecuniary loss in the future. He did not adequately demonstrate in his reasons how the plaintiff's injuries would restrict her future earning capacity. He failed to examine what opportunities were realistically open to her given the accident and did no analysis of comparing the likely future if the accident had not occurred with her likely future working life after the accident.

The trial judge also did not assess the relative likelihood of any of the possible return to work scenarios as required in step three. He did not analyze the likelihood that the plaintiff would return to full-time work, or what work that might be. He also failed to conduct the fact-intensive inquiry of possibility and negative contingencies. It was not enough to make a broad reference to such contingencies. A case-specific inquiry was required.

The errors meant that there was an insufficient foundation for the $255,000 award for future loss of earning capacity. The reasons had no analysis of the general level of earnings the plaintiff realistically would have achieved or projection of her likely earnings with her injuries and other contingencies. He appeared to have "plucked a number from the air". The court of appeal substituted an award $75,000 based on the evidentiary record.

l. *Ricketts v. Tatla*, 2023 BCSC 314, Basran J.

The plaintiff was a bathtub reglazer and argued that he suffered a 25% reduction in his income-earning capacity after the accident. The plaintiff's claim for past loss of earning capacity was significantly undermined by his failure to produce invoices for the work he did for the complete post- accident period. The information was in his control, and he did not provide an explanation for his failure to produce it. In the absence of the relevant documents, the court did not accept his bald assertion of a 25% reduction in capacity.

On the future loss of earning capacity, Basran J. accepted that the plaintiff's chronic pain will cause him to retire earlier than expected from work as a reglazer, thereby causing a pecuniary loss. Basran accepted that he would have worked to age 70 based upon: his enjoyment of the physical work; his role as the sole income earner; his father's history of working into his seventies. On the medical evidence, the plaintiff was likely to retire now at the age of 62 years. The loss was calculated with a 20% reduction for the possibility that he may not have worked to age 70.

m. *Sidhu v. Hiebert*, 2023 BCSC 813, Forth J.

The plaintiff was catastrophically injured in a motor vehicle accident at the age of nine years. This portion of the trial dealt with issues including the final calculation of the loss of future earning capacity. The plaintiff was awarded $2,212,229 on the basis that he would have earned a bachelor's degree and that his life expectancy was reduced to age fifty.

The plaintiff received persons with disability ("PWD") benefits which the defendants sought to have deducted from the loss of future income award. The parties agreed that past benefits received were deductible. The evidence established that PWD benefits are not available to a person with assets in excess of $100,000. The trial judge concluded that the plaintiff would not place the judgment award into a discretionary trust in order to continue to qualify for benefits. If he did so, that would be contrary to the principle of double recovery. Accordingly, no deduction was made for the future PWD benefits from the award of loss of future earnings.

The court also considered the reduction for "the lost years" in which personal living expenses for what would otherwise represent the award for loss of earning capacity during the years between the plaintiff's reduced life expectancy and their former anticipated age of retirement. The reasons for judgment reflect a historical review of the case law on the issue. In this case, Forth J. concluded that income taxes should be included when considering the lost years deduction and determined that the applicable deduction is 75%, based on the specific evidence presented of the expenses the plaintiff would have likely incurred in order to earn a living.

She further awarded $125,000 for the loss of interdependency as part of the future loss of capacity award. In this analysis, she held that using an average of both male and female statistics when considering the plaintiff's hypothetical partner was reasonable. She used after-tax income and included the costs attributed to raising children.

n. *Simms v. Alzwad*, 2022 BCSC 2125, Blok, J.

The primary issue on damages was the degree to which the plaintiff's injuries including neck pain and headaches had impaired and would continue to impair his earning capacity. The plaintiff was 56 years old at the time of trial. He had a diverse work history having worked in a mine, at ski resorts, in security work, as an ambulance attendant, stocker, forklift driver, store department manager, zone manager, first aid attendant, and supervisor. Prior to the accident he was employed as a lead driver for a hospital transport company, earning $21.47 per hour.

After the accident, the plaintiff was off work for approximately four months then had a few gradual return to work attempts that were unsuccessful. He eventually worked for another year as a driver but left that job after about one year. WorkSafe BC funded a computer course to retrain to office administration, but the plaintiff had difficulty completing the course because of his injuries. The plaintiff then moved to Newfoundland, tried work as a grocery store clerk but quit after two shifts due to a flare-up of symptoms. He then obtained work as a care aide for an adult autistic person and was working 30 hours per week, earning $15.55 per hour, at the time of trial.

The plaintiff argued that all time off from work after the accident to trial was caused by the accident. The defendants accepted the initial period of time off work but argued that any subsequent time off was not attributable to the accident as the plaintiff had managed to work for one year at his pre-accident vocation as a driver.

The court held that neither approach was appropriate. The court noted that the plaintiff had pre-accident work-related stress and workplace conflict that had resulted in a three-month stress leave, dismissal from one employer in 2008, stress-related headaches caused by workplace conflict in 2015, and notes from his employer just months before the accident indicating that the plaintiff was complaining a lot and not willing to do extra hours. The court held that the plaintiff's approach failed to address the plaintiff's residual earning capacity and periods of largely unexplained employment while the defendant's approach failed to address the plaintiff's manifest loss of earning capacity.

The court held that the plaintiff was capable of working more than the 30 hours per week that he was at the time of trial, and that he had unreasonably restricted the scope of jobs available to him by moving to a location with fewer employment opportunities, so the court awarded 70% of the losses assessed for the 17-month period of time at issue.

In awarding future loss of earning capacity award, the court reduced the future loss from $94,011 to $85,000 for contingencies related to the likelihood that the plaintiff would have had occasional problems with back spasms, headaches, and work-related stress, which had impacted his prior earnings to some degree.

Blok J. stated that a thorough chronology would have assisted the court given the plaintiff's various jobs and time periods away from work both before and after the accident.

o. *Torrance v. Davies*, 2022 BCSC 1630, Kirchner J.

The plaintiff suffered chronic daily neck pain, right trapezius pain, headaches, driving anxiety and generalized anxiety, as a result of two accidents. The conditions impaired her sleep and impacted her physical activity, social life, and personal relationships. The court accepted that there was some hope for improvement but that the prospects were no better than 50%. The court found that the plaintiff was stoic and tended to work through her pain with stretching breaks to manage it. She was awarded $110,000 for non-pecuniary damages.

The plaintiff had not suffered any income loss at the time of trial, apart from missing a few days work around the accidents and she continued to work full time with no immediate prospect of that changing. She had also been promoted with a pay raise and received a strong performance review from her employer. The court accepted Dr. O'Connor's evidence that due to her ongoing neck pain, there was a real and substantial possibility, though not a likelihood, that the plaintiff's chronic neck pain which affected her at work could cause her to reduce her working hours in the future as time passes and as she grows older. The court found that she was rendered less capable overall of earning an income from all types of employment, was less valuable in herself as a person capable of earning income in a competitive market and was somewhat less capable or attractive to potential employers.

The plaintiff sought $250,000 based on a capital asset approach of just over two years' salary. The court found that one year's income of $120,000 was a reasonable starting point but as the relative likelihood of the loss was fairly low and accounting for some improvement in her condition, the award was discounted by 75% for a loss of future earning capacity award of $30,000.

p. *Wood v. Kim*, 2023 BCCA 156, per Fenlon J.A. (Newbury and Fisher JJ.A. concurring)

The defendants appealed the award for future earning capacity where there was no expert evidence that the plaintiff was not capable of the sedentary office work she had planned to return to when her youngest child entered school full-time. The court of appeal rejected this argument, stating that expert evidence was not required to establish damages for loss of future earning capacity and, in this case, the plaintiff provided a sufficient evidentiary basis for such an award.

However, the award of future earning capacity was set aside on the basis that the trial judge erred in failing to apply an appropriate contingency discount to account for the possibility that the plaintiff could work a more physically demanding job following treatment or could obtain a higher paying sedentary position. In substituting an award on appeal, the court applied a 25% reduction to the award to account for these possibilities.

q. *Note*

The following are further cases in which the court of appeal varied loss of future earning capacity claims by increasing the awards (*McHatten v. ICBC*, 2023 BCCA 271) and by decreasing the awards (*Davies v. Penner*, 2023 BCCA 300).

E. Loss of Housekeeping Capacity

a. *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, per Harris J.A. (Stromberg-Stein and Voith JJ.A. concurring)

The $42,200 award for past and future loss of housekeeping capacity was set aside as inordinately high. On appeal, the court found that the amount of the award was not grounded in the evidence and appeared to be a number chosen at random without explanation. The plaintiff had incurred housekeeping costs up to the time of trial. However, the court of appeal held that it would be excessive simply to extrapolate the past cost into the future. The plaintiff did not testify as to how long or at what scale she might need the services into the future. The expert evidence lacked detail in this regard. The plaintiff's condition was improving and would continue to do so. Her children were likely to contribute as they matured. The court of appeal substituted an award equal to two years' worth of housekeeping costs.

b. *Deng v. Malhotra*, 2022 BCSC 101, Betton J.

The plaintiff claimed personal injuries arising out of a motor vehicle accident. There was unclear and inconsistent evidence about the plaintiff's level of contribution to household chores prior to the accident and what he was able to do following the accident. The trial judge accepted that, because of the accident, the plaintiff was limited from participating to the same level that he did prior to the accident and made a "moderate award" of $7,500.

c. *Howes v. Liu*, 2023 BCCA 316, per Hunter J.A. (Groberman and Abrioux, JJ.A. concurring)

The court of appeal varied a loss of housekeeping capacity award. The decision is of interest because of Mr. Justice Hunter's comments that the court adjusted the standard $25 an hour rate for housekeeping assistance upward since it was established in 2014.

d. *Kim v. Basi*, 2022 BCSC 1793, N. Smith J.

The plaintiff was 72 years old when she was injured in a motor vehicle accident and 78 years old at the time of trial. In accident, the plaintiff sustained fractures to her back and ribs. She continued to have significant daily pain. Her evidence was that most of the housework was impossible and she was just barely able to cook simple meals. The court applied the golden years doctrine and awarded $215,000 in non-pecuniary damages including loss of housekeeping.

e. *Ker v. Sidhu*, 2023 BCCA 158, per Abrioux J.A. (Voith and Skolrood JJ.A. concurring)

At trial, the plaintiff was awarded $50,000 in loss of housekeeping capacity representing the loss of his unpaid contributions to the family's blueberry farm. The award was based on a loss of $10,000 per year for five years. The award was set aside on the grounds that work for a business, even unpaid work, is not included in definition of housekeeping services. Housekeeping must be related to the needs of the family, and does not include labour in service of a family business.

f. *McKee v. Hicks*, 2023 BCCA 109, per Marchand J.A. (Groberman and Hunter JJ.A. concurring)

This was a medical negligence case arising out of an arm surgery when the plaintiff was five years old. The plaintiff appealed trial judge's decision to not make a separate award for loss of housekeeping capacity.

In dismissing the appeal, the court reviewed the development of the law of damages for loss of housekeeping capacity and succinctly summarised the law:

> …pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities. (para 112)

g. *Steinlauf v. Deol*, 2022 BCCA 96, per Grauer J.A. (MacKenzie and Fenlon JJ.A. concurring)

The court of appeal upheld the trial judgment of $18,000 and $164,000 for past and future loss of homemaking capacity, respectively, based on five hours of assistance per week at $20 per hour. The appellant argued that the award was arbitrary and not supported by the evidence. The plaintiff had not led any evidence at trial as to the hours required or the cost of the assistance. Because the trial judge concluded that the plaintiff had no residual housekeeping capacity, it was reasonable of the trial judge to endorse five hours of assistance per week and use a reasonable market rate as discussed in other cases.

F. Management Fee and Tax Gross Up

a. *D.J.W. v. Biswal*, 2023 BCSC 1274, Veenstra J.

An infant plaintiff sought a management fee of $218,900 following a trial judgment which awarded $976,046.02 including $700,000 for future loss of earning and $31,000 for loss of housekeeping capacity. He was awarded $30,000.

The case contains a helpful review of the legal principles relating to management fees at paragraphs 17 to 29.

The plaintiff suffered ongoing soft tissue complaints and some concussion symptoms, but he did not suffer a cognitive disorder. His father was not highly educated and his mother, seriously injured in the same accident, was unable to provide financial advice. The court was not persuaded that the plaintiff required services at the highest level. Despite his anxiety and mental health struggles, the court found he would be able to understand finances with some proper guidance. Taking into account the plaintiff's condition, including anxiety and his mental health struggles, the court found that a version of level 2 management services (an initial investment plan and a review of the plan approximately every five years) was appropriate.

b. *Sidhu v. Hiebert*, 2023 BCSC 1021, Forth J.

The parties appeared before the trial judge on the continuation of trial respecting two outstanding damages issues: tax gross-up and management fees. The plaintiff was nine years old when he was rendered a quadriplegic in a motor vehicle accident.

Regarding management fees, the judge observed that the rationale for awarding fees for fund/investment management services is that the fund will be exhausted prematurely if the plaintiff must pay others to do this, therefore the award ensures that the value of the damages is maintained over time in adherence to the principle of full and fair compensation. The making of such an award is not automatic. The question of whether the services are necessary and, if so, at what costs, relates to what services are required to achieve a rate of return equal to the statutory discount rate, being 2%. The plaintiff claimed $2,393,400 and the defendant said it should be no more than $22,000.

The judge accepted that plaintiff was cognitively intact, but unable to make investment decisions because of the extensive nature of his day-to-day care needs. However, there was no evidence from the plaintiff that he could not achieve a 2% return if investing in low-risk fixed income securities through a bank. At the same time, because of his unique needs, he was entitled to some objective financial advice from an advisor other than the bank manager where his funds might be held, in the range of ten hours per year. This was calculated at $55,000.

Regarding tax gross-up, the judge noted the purpose of the award is to compensate the plaintiff on the investment income earned from the lump sum awards for costs of future care. Both parties' experts agreed that the proper approach was to use a mixed portfolio, the only discrepancy being which inflation rate to use: 2% or 2.5%. Relying on the Bank of Canada and Government of Canada policies, along with long-term historical rate of price inflation, the judge used the 2% rate, which the trial judge fixed at $1,613,599.

G. Non-Pecuniary

a. *Alvarado v. KCP Heavy Industries Co. Ltd.*, 2022 BCSC 1668, Mayer J.

The plaintiff sought damages of $4.7 million from the defendant for psychological trauma he claims caused by witnessing an industrial accident that occurred when a metal outrigger on a concrete pump truck failed, causing an outstretched boom laden with concrete to fall. One of the plaintiff's co-workers was killed instantly and another was crushed, resulting in paralysis from the chest down.

The plaintiff was sprayed with blood and passed out, woke up in an ambulance and was taken to hospital. The plaintiff was diagnosed with post-traumatic stress disorder and major depressive disorder. The depression had improved somewhat but, he continued to experience depressive symptoms, flashbacks, hallucinations of his former co-worker, sleep disruption with nightmares, and he blamed himself for the death and injuries to his co-workers. The plaintiff had attempted or contemplated suicide nine times and had been committed to mental institutions on several occasions. The expert psychiatrist opined that the plaintiff would require medications and psychotherapeutic treatment for the rest of his life. The court was not convinced that the impacts of the injuries were devastating and would attract an award at the rough upper limit for non-pecuniary damages but did find the impacts were significant and awarded $260,000 for non-pecuniary damages. The court declined to award a separate amount for loss of housekeeping capacity.

The plaintiff tried to return to work with another concrete pumping business but was unable to continue as a result of on-going trauma symptoms. He attempted other work as an operations manager, unsuccessfully attempted to retrain as a boiler maker, and testified that being on construction sites and experiencing various triggers, revived his trauma from the accident. The plaintiff then moved to Newfoundland, and unsuccessfully attempted to return to work in restaurants, as a dockworker, as a taxi driver, and in trucking. He was unemployed at the time of trial.

The court accepted that the plaintiff had a significant past loss of earning capacity given his failed attempts to return to work and after applying contingencies to account for some periods of unemployment, he was awarded $706,069.

The court found that the evidence established a real and substantial possibility of 25% that the plaintiff would have continued to work as a concrete pump operator until he was 70, and a 75% chance that he would have obtained other higher paying employment in the concrete pumping industry or in sales, with potential annual income of $150,000 to $200,000 respectively. Considering the plaintiff's limited earnings in the six years since the accident, but recognizing he had residual earning capacity, the court assessed that the plaintiff had a 50% chance that at some point he would be able to earn average earnings for males in British Columbia without formal training or education. However, the court also found that the plaintiff would likely not immediately return to full time work. The plaintiff was awarded loss of future income earning capacity of $2,630,000.

WorkSafe BC had paid out various costs of $102,857.07 for healthcare and vocational rehabilitation costs which were recoverable as well as the plaintiff's out of pocket expenses of $2,000. The court accepted that the plaintiff would require psychological counselling and pharmacotherapy for the rest of his life, as well as psychiatric re-evaluation, occupational therapy and case management, kinesiology, and counselling for the plaintiff's wife for a total cost of future care award of $470,948. The plaintiff's total award was $4,177,875 plus pre-judgment interest and costs.

b. *Brown v. Ponton*, 2022 BCSC 2248, Stephens, J.

The plaintiff claimed for injuries resulting from a motor vehicle accident. The court relied on Dr. Filbey's expert evidence in finding that the plaintiff's chronic pain syndrome was directly caused by the accident. The court also accepted that the plaintiff's diabetes and meralgia paresthetica were indirectly caused by the accident as a result of the plaintiff's physical injuries adversely affecting his mood, body weight, and blood sugar. The court further found that due to the plaintiff's pain and numbness, he was no longer able to work safely and effectively in the same manner as before the accident in gutter installation. The court found that the plaintiff's condition was unlikely to improve in a significant way in the future, and the plaintiff was awarded $115,000 for non-pecuniary damages.

c. *Fillo v. Yoshime*, 2022 BCSC 1578, Stephens J.

The plaintiff sought damages for injuries to his neck, shoulder and back sustained in a motor vehicle accident, seeking non-pecuniary damages of $75,000. The plaintiff did not rely on an expert report so credibility was a main issue, as the defendants argued that the plaintiff's evidence should be given only limited weight.

The court stated that credibility has two components, honesty and reliability. The court found that the plaintiff testified in a forthright manner and that his evidence was corroborated by a former partner with whom he shared two grandchildren. While there were some inconsistencies between the plaintiff's evidence at examination for discovery and trial, the plaintiff was, on re-examination able to provide a

reasonable reconciliation between his evidence. The court found the plaintiff's evidence credible and awarded non-pecuniary damages of $63,000.

d. *Gustafson v. MacFarlane*, 2022 BCSC 1872, Gomery J.

The 57-year-old plaintiff suffered catastrophic injuries while working on the defendant's farm when the defendant reversed over the plaintiff with a utility vehicle.

The plaintiff broke bones in her neck, ribs, sternum, and pelvis, as well as sustaining a spinal cord injury, liver laceration, and a collapsed lung. Moments after the accident, the plaintiff lost consciousness and went into cardiac arrest, with a witness performing CPR until emergency responders arrived. The plaintiff lost the use of her legs and was left with only partial use of her arms. She could use a powered wheelchair, but only in a very limited way. She had various surgical procedures, including a colostomy and catheter insertion. She was left needing 24-hour care to address an unpredictable and life-threatening blood pressure condition and to provide for her day-to-day needs.

The trial judge found the defendant entirely at fault, despite her arguments that the accident resulted from an emergency and that the plaintiff was contributorily negligent.

The parties agreed to, and the judge awarded, the rough upper limit of $435,000 for non-pecuniary damages.

The trial judge awarded $4,440,000 for cost of future care, including for paid personal care, a van, rehabilitation services, counselling, and other care items such as a wheelchair, medication, a bed, a shower frame, a lift apparatus, and a standing frame.

He also made an in-trust award of $315,000 in recognition of the care and services provided to her by her common law husband, equivalent to $300 per day.

For past income loss and loss of future earning capacity, the judge awarded $47,000 and $43,000, respectively.

With special damages of $89,670.36, the total judgment was $5,369,670.36. The judge granted the parties leave to continue the trial to adduce further evidence limited to the issues of accommodative housing as a cost of future care, tax gross-up, management fee, and a subrogation claim pursuant to the *Health Care Costs Recovery Act*.

In supplementary reasons indexed at 2023 BCSC 1524, the trial judge awarded a further $493,000 for an accommodative housing allowance and a management fee of $100,000.

e. *McCliggot v. Elliott*, 2022 BCCA 315, per Dickson J.A. (Marchand J.A. concurring and Groberman JJ.A. dissenting)

This was an appeal by the defendant of a civil jury award of $350,000 in non-pecuniary damages, $6,500 for past income loss and $15,000 for the cost of future care. The central issue on appeal was the correct approach to appellate review of a jury award and whether the comparative approach was appropriate. The majority held that the comparative approach is firmly established in the jurisprudence and a three-member appeal division cannot discard it. However, comparing the plaintiff's non-pecuniary award to other cases had minimal value in this case due to the unique impacts of the plaintiff's injuries in her specific circumstances. The majority held that the need to ensure fairness and uniformity in the

administration of civil justice and to respect the proper function of juries is balanced by using the comparative approach and then accounting for the additional unique aspects of the loss, considered at their highest from the perspective of the plaintiff. The court should do this in a generous manner, bearing in mind the perspective of the jury as reflected by its award. In the result, the non-pecuniary award was reduced to $250,000. The court found no error in the other awards.

In his dissent, Groberman J.A. held that the substituted award of $250,000 was too high and stated that he would have substituted an award of $200,000. In addition to defending the comparative approach in appellate review of jury awards, he decried the lack of guidance given to juries as to the appropriate level of non-pecuniary damages, stating that it "is unfortunate that we fail to provide juries with information about the range of non-pecuniary damages awarded in similar cases." He stated that there is a need for that to occur by legislative change or the overruling of *Brisson v. Brisson.* "Juries must be furnished with the appropriate tools to allow them to make their assessments if they are to treat litigants justly."

f. *Murray v. Doe*, 2023 BCSC 918, Kirchner, J.

The plaintiff was sitting in her parked Jeep when the defendant backed a rental van into the Jeep. The plaintiff claimed injuries for chronic neck pain, shoulder pain and headaches that had not improved in the five-and-a-half years since the accident, which resulted in depression. She also suffered from driving anxiety.

The plaintiff continued working full time after the accident but gave up activities such as golfing, running, going to the gym, and renovation work, at least for some period of time, and adjusted household activities.

The court found the plaintiff to be a credible and sincere witness and her complaints of a depressed mood were genuine. The court accepted that the plaintiff's depressed mood was largely attributable to the accident as it began to emerge as her neck and shoulder pain became chronic. However, while the court notes that a medical diagnosis is not required for a court to find that a plaintiff is suffering from a mental affliction relating to an accident, it is difficult to understand the full cause and extent of the condition without some assistance from a medical professional.

The court was unable to assess the extent to which the plaintiff's depressed mood was connected to her pain or pre-existing features of her personality or to determine the extent to which it could be managed or improved with some treatment, which the plaintiff declined to pursue. The court found that the evidence only permitted him to find it as a relatively minor component of her pain, suffering and loss of enjoyment of life arising from the accident.

The court made a relatively modest accommodation for the plaintiff's depressed mood. Kirchner, J. also noted, at paragraph 55, that if he had made the depression a larger component of the plaintiff's non-pecuniary damages, "…*a substantial discount would have been in order for the plaintiff's lack of mitigation for this condition, having not discussed it with her doctor let alone sought out treatment*".

The plaintiff sought non-pecuniary damages of $90,000 and the defendants argued that the range was $30,000 to $60,000. The court awarded non-pecuniary damages of $80,000. The defendants argued that there should be a further discount for the plaintiff's failure to take steps to mitigate her depressed mood, but the court found that a further discount was unnecessary given that her mood was not a significant part of the award.

g. *Plett v. Davis*, 2022 BCSC 789, Kirchner J.

The plaintiff claimed damages for injuries sustained in a motor vehicle accident that had significantly affected her both physically and cognitively. The plaintiff argued that the decision in *Grabovac v. Fazio*, 2021 BCSC 2362 ("*Grabovac*") was now the standard of non-pecuniary damages for injuries like those she suffered, and she sought non-pecuniary damages of $300,000 or $350,000 if loss of housekeeping was not awarded as a separate head. The court reviewed *Grabovac*, in which the plaintiff had been in two accidents sustaining physical, psychological, and cognitive injuries. The plaintiff in *Grabovac* was awarded non-pecuniary damages of $40,000 in the first accident and $310,000 in the second accident, but a significant component of the award for the second accident was based on the finding that the plaintiff would be unable to have children because of the accident.

At paragraph 285, Kirchner, J. states that if that very significant factor was removed, the range proposed by the plaintiff in *Grabovac*, being $225,000 globally for both accidents, was more in line with the range of non-pecuniary damages of the nature suffered by the plaintiff that paralleled those by Ms. Plett. The court also noted that the award in *Grabovac* included loss of housekeeping capacity.

Kirchner, J. awarded $210,000 for Ms. Plett's non-pecuniary damages.

h. *Sandhu v. Morris*, 2023 BCSC 35, Funt J.

In June 2016, the plaintiff was a passenger on a bus waiting to disembark when the bus stopped suddenly, rear-ending a car, and the plaintiff suffered injuries (the "2016 accident"). The plaintiff claimed damages of $5,385,701 of which $5,000,000 was for future loss of income earning capacity. The defendant argued that the appropriate award was $32,669. The court awarded $40,000 non-pecuniary damages and $2,857 in special damages for a total of $42,857.

The plaintiff had suffered neck pain and headaches for several months before the 2016 accident but claimed that they were significantly worse after the 2016 accident.

The plaintiff was involved in a subsequent accident in April 2018 when she was changing lanes and was sideswiped. The plaintiff described the 2018 accident as minor, and she missed two days of work.

The court notes that there was no objective evidence of injury and that in that situation, where a person is not reliable in describing their injuries, the usefulness of a medical expert's report may be affected. The court did not accept Dr. Sangha's evidence as to the impact of the 2016 accident as it was based on mild pre-existing headaches whereas the evidence indicated that the plaintiff's pre-2016 accident headaches were moderate to severe. The court accepted Dr. Heran's expert opinion that the plaintiff had observable pre-existing degenerative changes to the cervical spine, and that the 2016 accident caused cervicogenic headaches.

The court awarded $40,000 non-pecuniary damages for the transient exacerbation of the plaintiff's pre-existing neck pain, headaches, tingling or numbness, and any soft tissue injuries from the 2016 accident, on the basis that the plaintiff had not proven that her injuries lasted more than a year or so. The court did not find the plaintiff particularly reliable and found that the most probable explanation for the plaintiff's ongoing neck pain, headaches, numbness, and tingling were the degenerative changes to her cervical spine and possibly other events, such as the 2018 accident.

i. *Steenhuisen v. Francis*, 2023 BCSC 362, Chan J.

The plaintiff sought damages for injuries including neck pain, headaches, hand cramping and shaking with some loss of control of his fingers and loss of some independence as he could not always drive. The plaintiff sought non-pecuniary damages in the range of $130,000 to $150,000. The court found that the accident seemed to increase the severity of the plaintiff's pre-existing symptoms, but that both the accident and the plaintiff's pre-existing degenerative conditions materially contributed to the plaintiff's symptoms as such the likelihood of the plaintiff having the symptoms he did absent the accident was moderate to high. The court reduced the damages by 50% to reflect the negative contingency of the plaintiff's pre-existing condition. The court awarded non-pecuniary damages of $100,000 reduced by 50% to reflect the plaintiff's pre-existing condition. The reduction also applied to the plaintiff's past loss of earning capacity claim.

H. Special Damages

a. *Trafford v. Byron*, 2022 BCSC 1896, Wilkinson J.

The plaintiff was injured in two motor vehicle accidents and claimed damages, including special damages, with mileage to attend treatments at $1 per kilometre. The defendant agreed to the mileage but at the rate of $0.50 per kilometre.

The plaintiff asked the court to take judicial notice that the cost of operating a vehicle has increased since the $0.50 rate was recognized in *Grewal-Cheema v. Tassone*, 2010 BCSC 1182.

At paragraph 121, the court noted that the rate of $0.50 per kilometre had been applied in cases as recent as 2018, that the plaintiff's treatments were in 2021 and 2022, and agreed that "…*it is a notorious fact that automobile fuel costs and the price of vehicles generally have increased since 2018*. *In particular in 2021 and 2022 fuel costs have significantly increased such that $0.50 does not reflect reality*". The court declined to award the $1.00 per kilometre claimed but awarded $0.60 per kilometre.

VIII. DOCUMENT DISCOVERY

a. *Brown v. Steffler,* 2022 BCSC 2214, Master Robertson

The defendant sought clinical records dating back to 2009 relating to a prior injury the plaintiff had sustained. The plaintiff opposed the application on the basis that he was not symptomatic in the two years prior to the subject accident and argued that expert evidence is required for the court to make an order for disclosure going back further than the usual two-year period. Master Robertson noted that expert evidence can certainly be of assistance to the court but it is not a necessity. The appropriate consideration is whether the evidence is sufficient to establish that the previous injury for which the record is sought is connected to the subject injury beyond a mere possibility. In this case, the defendant was successful in establishing the connection and the order sought was granted.

b. *Carleton v. Cepuran*, 2023 BCSC 578, Veenstra J.

This was an application for production of various medical and financial records from the defendant. The underlying claims related to the administration of a trust and in issue was one of the defendant's legal capacity. The court reviewed the current state of the law as it related to document production and determined that some of the categories of documents sought were overly broad. As a result, the court limited many of the document requests to the time periods squarely at issue between the parties.

c. *Chan v. Pham*, 2022 BCSC 2394, Master Robertson

The court ordered production of a video from a third party's door camera, which showed the subject motor vehicle accident. The defendant had hired an independent adjuster to obtain a copy of the video which was provided to counsel for the defendant attached to a report. The defendant was claiming litigation privilege over its contents.

The court held that litigation privilege likely would extend to the video if the independent adjuster obtained it after counsel was appointed, but there was insufficient evidence on this point. In addition, the defendant was deceased, and the plaintiff apparently had no other way of obtaining the video.

d. *Franco v. Nissan Canada Inc,* 2022 BCSC 1710, Master Hughes

The defendants asserted litigation privilege over an independent adjuster's report commissioned to investigate the plaintiff's alleged head injury following a second accident. The investigation took place about 16 months after the accident and seven months before litigation was commenced. There was no objective evidence to establish that the report was commissioned for anything other than a basic assessment of the plaintiff's injuries. Although the report included the writer's opinions on whether the individuals interviewed would make good trial witnesses, that did not necessarily mean that the report's dominant purpose was litigation. The plaintiff was entitled to a copy of the report.

e. *Harper v. Sheppard*, 2023 BCSC 443, Master Bilawich

This was an application for production of medical records extending eight years prior to the subject motor vehicle accident. The plaintiff had a previous lung infection that had mostly resolved by the time of the accident. The plaintiff had consented to produce records for the two-year period prior to the accident, but not before. The court ordered production of records that the plaintiff had consented to but declined production prior to that on the basis that there was insufficient evidence that the previous lung problem played any role in her ongoing problems from the motor vehicle accident.

f. *Liu v. The Canada Life Assurance Company*, 2022 BCSC 2379, Master Robertson

This was an application for an amended list of documents listing the life insurance policy that was the subject of the dispute, which was no longer in the possession of the defendant. The plaintiff argued that, under the *Supreme Court Civil Rules*, a party is required to list not only documents currently in their possession, but also documents that were previously in their possession.

Master Robertson made the order sought on the basis that there were no grounds to refuse the order but did not award cost to the plaintiff because "applications for orders which do not advance the litigation in any way ought to be discouraged as an unnecessary drain on the already severely limited court resources" (at para 17).

g. *Lo v. Penticton (City),* 2022 BCSC 2230, D. MacDonald J.

The applicant sought disclosure of documents over which the respondent had claimed litigation privilege. The two issues were (1) whether the respondent must produce an affidavit from the original author of the document or if an affidavit from another person within the organization is sufficient; and (2) whether a portion of a document can be redacted to preserve litigation privilege.

Justice MacDonald held that portions of a document that meet the test for litigation privilege may be severed; it is not an all or nothing requirement. However, the respondent was required to provide further affidavit evidence from the documents' creators describing the circumstances and purpose(s) for the creation of the documents. The affidavit from another person employed by the respondent City was insufficient.

h. *Stewner v. Sawires,* 2022 BCSC 1495, Master Robertson

The plaintiff was involved in a prior litigated motor vehicle accident and the defendants in the current action sought production of records from the prior litigation including discovery transcripts and expert reports.

The defendants followed the process set out by Master Keighley in an unreported decision *Denney v. Wong* (27 November 2012) New Westminster 137581 (BCSC). The defendants' counsel had received the prior expert reports from ICBC. The defendants sent the reports to the plaintiff asking they be disclosed on the plaintiff's List of Documents and seeking the plaintiff's agreement to waive the implied undertaking. The plaintiff refused. The reports were submitted to the court in a sealed envelope with the subject application.

The Notice of Civil Claim in the prior action plead similar injuries to the one at bar but the plaintiff maintained she recovered fully and did not experience any symptoms in the two years prior to the subject accident. The defendants provided evidence to the contrary and submitted a letter from their expert that the records sought would be of assistance. Master Robertson granted the order for production of the records from the previous litigation.

The defendants also sought an authorization to direct the plaintiff's previous family doctor to release records. Master Robertson noted the defendants only sought the authorization because they did not know the name of the plaintiff's prior family doctor because they did not ask for it at the examination for discovery. Master Robertson declined to order the authorization be executed but did note the other disclosure ordered would reveal the name of the family doctor.

i. *Travis v. Bittner,* 2022 BCSC 839, Master Robertson

The defendant sought disclosure of a variety of photos, videos, screen shots, and social media posts. The defendant had located a few social media photographs of the plaintiff which arguably depicted her engaging in activities which contradicted her evidence at discovery and her reports to medical practitioners. Given the significant claims of the plaintiff, Master Roberston deemed it appropriate to order disclosure, however, he limited the scope of the disclosure. Part of the reason for limiting the disclosure sought was the defendant had not fully canvassed the issue of social media at the plaintiff's examination for discovery. The defendant could not say the number and type of social media accounts the plaintiff continued to operate, if any.

IX. EVIDENCE

a. *Davis v. Jeyaratnam*, 2022 BCCA 273, per Bennett J.A (Fenlon and Grauer JJ.A. concurring)

The plaintiff appealed the dismissal of his claim from a motor vehicle accident. The plaintiff alleged that the defendant's vehicle struck him while he was riding his bicycle while the defendants' claimed that they only struck the bicycle, and that the plaintiff had jumped off of it before impact.

At trial, the plaintiff sought to adduce a written statement from a taxi driver who witnessed the collision, Abdi Isse. One month after the accident, the plaintiff had retained Ian Carter, a retired police officer, to interview Mr. Isse. Mr. Carter did so, taking handwritten notes and recording the interview. Mr. Carter subsequently drafted a statement and sent it to Mr. Isse. Mr. Isse returned a signed copy with several handwritten changes. The statement included Mr. Isse's observations of the collision. It concluded with a statement to the effect that Mr. Isse understood it may be used in legal proceedings and was accurate to the best of his knowledge.

By the time of trial eight years later, Mr. Isse had moved back to Somalia and could not be reached. The plaintiff sought to introduce the written statement under the principled exception to hearsay. The judge observed that to be admissible the statement had to meet the thresholds of necessity and reliability. Necessity was met because Mr. Isse was unreachable. However, the judge concluded that the statement failed to meet the reliability threshold and excluded the contentious portions of the statement. The judge's reasoning was that the statement was not a contemporaneous recording of Mr. Isse's impressions, but was a statement drafted by Mr. Carter one month later. Mr. Carter had subsequently lost the tape recording of his interview with Mr. Isse, so there was no way of knowing what Mr. Isse had said in the interview. Furthermore, Mr. Carter was unable to reconcile aspects of his written notes with the final statement. The judge was also concerned with Mr. Carter's independence, as he acted as an agent for the plaintiff's benefit.

The court of appeal held that the trial judge erred in her assessment of the statement. Specifically, the trial judge erred by focusing on the reliability of Mr. Carter as the narrator rather than the threshold reliability of the statement itself. The credibility of the narrator of an out-of-court statement may be relevant to assessing a statement's ultimate reliability (i.e. how much weight should be given to it), but will rarely be relevant to the issue of threshold reliability (i.e. whether it is admissible). None of the circumstances which would make Mr. Carter's credibility relevant to threshold reliability—such as the declarant being young or vulnerable—was present.

As the other ground of appeal necessitated a new trial, the court of appeal did not assess whether threshold reliability was, in fact, met.

The court also concluded that the trial judge failed to consider material evidence when drawing conclusions regarding liability, deciding the issue almost exclusively on the plaintiff's and defendants' conflicting versions of events in oral testimony. In doing so, the trial judge overlooked a "significant body" of medical and circumstantial evidence that could have weighed in favour of the plaintiff's version of events. While a trial judge need not refer to every witness or piece of evidence called at trial, the judge in this case simply failed to refer to broad swathes of it, which was a reversible error. It was not possible for the court of appeal to make its own determination from the record, so a new trial was ordered.

b. *Parmar v. Stokes*, 2022 BCSC 252, Majawa J.

The plaintiff alleged injuries when she was rear-ended by the defendant's vehicle. Liability was admitted. Only causation and damages were at issue.

At trial, the plaintiff asked the judge to draw an adverse inference against the defendant for the defendant's failure to tender a report from an IME that the plaintiff had attended at the defendant's request. The plaintiff argued that the inference should be drawn because the physician who conducted

the IME was in the exclusive control of the defendant, no explanation was offered as to why a report was not tendered, and the physician had material evidence to give and was the only one who could give it.

The judge declined to draw an adverse inference. It would not have been fair to the defendant, because there were numerous inferences that could be drawn from the decision not to call the examining doctor and not all of them were adverse. Furthermore, such an inference could only be drawn against a defendant, as a plaintiff will always know how many IMEs he or she has attended at a defendant's request, but the inverse would not be true. As such, it would not be fair to draw an adverse inference against a defendant in circumstances where the plaintiff could attend as many IMEs as he or she wanted without a defendant knowing. The risk that a defendant runs in not tendering expert evidence is not that an adverse inference will be drawn, but that the plaintiff's expert evidence will be unchallenged.

c. *Panchal v. Wal-Mart Canada Corp.*, 2022 BCSC 1040, Norell J.

The plaintiff appealed a master's order denying her application for leave to amend her notice of civil claim ("NOCC"). The underlying action involved a slip-and-fall injury at the defendant's store. When the defendant destroyed a video recording of the incident contrary to an agreement between the parties, the plaintiff attempted to amend her NOCC to plead spoliation of evidence as a cause of action. The master denied the portion of the plaintiff's application to plead spoliation as a cause of action, treating it instead as a rule of evidence. That was the sole issue on appeal.

The judge denied the appeal. It is well-settled law in British Columbia that spoliation does not exist as an independent cause of action, and nothing about the plaintiff's case distinguished it from those authorities. Furthermore, there was no authority for the plaintiff's contention that it would be open to the trial judge to allow an action for punitive damages for spoliation in British Columbia. The master's decision also left it open for the plaintiff to argue that punitive damages were available because of the defendant's breach of their agreement that it would not destroy the video.

X. EXAMINATION FOR DISCOVERY

a. *A.B. v. Henry*, 2021 BCSC 2562, Skolrood J.

The five plaintiffs were suing the defendant for sexual assault. The plaintiffs applied for orders that they were each entitled to treatment from a counsellor or psychologist who would not be able be called to give evidence in the action, and that the defendant be prohibited from attending examinations for discovery of the plaintiffs in person.

The chambers judge denied the application for a treatment provider who could not be called to give evidence. It was not open to the court to order that certain unnamed treatment providers be precluded from giving evidence. Rather a judge would need to determine a properly constituted privilege application.

The judge did order that the examinations for discovery take place without the defendant present in-person, but that he may view them electronically from a different location, as long as neither his image nor his voice could be broadcast into the examination room, and he was not entitled to photograph or record the examinations. While the evidence of actual intimidation was weak, the circumstances of this case warranted accommodations. The judge was clear that this order did not constitute a rule of general application. It was based on the specific circumstances of this case.

b. *Andrist v. Bryant*, 2023 BCSC 490, Tindale J.

The defendant applied to compel the plaintiff to answer questions at her examination for discovery relating to her medical history without any restriction to a two-year period prior to the motor vehicle accident in question.

At discovery, the plaintiff testified that she had been taking medication for her low back just before the accident. Defendant's counsel asked how long her back had been bothering her before trial, and plaintiff's counsel objected, requesting that defendant's counsel restrict his question to two years before the accident. Defendant's counsel disagreed, and that issue formed the basis of the chambers application.

There was evidence of pre-existing health issues and the chambers judge found the plaintiff's pre-MVA medical history was likely relevant to her damages assessment. Reviewing the jurisprudence, the chambers judge found that the plaintiff's position that there should be a blanket prohibition against asking anything beyond two years was unreasonable.

However, the chambers judge denied the application because of the way it was framed. The defendant's application was framed to pre-empt the plaintiff from objecting to any question relating to her medical history, full stop. The defendant did not ask the court to determine whether they should be allowed to ask the questions which were objected to at the examination for discovery, which is what the *Rules* contemplate. For that reason, the application was overly broad and premature.

c. *Chen v. Tan*, 2022 BCSC 2104, Edelmann J.

The infant plaintiff brought an action through his father as litigation guardian against the defendants, alleging they were negligent in the provision of medical care to him and his mother. Counsel for the defendant doctor who provided prenatal care for the infant plaintiff's mother conducted an examination for discovery of the litigation guardian but the litigation guardian had almost no knowledge of what occurred during the prenatal care, labour, and delivery that was the subject of the lawsuit. The defendant applied for an order that the infant's mother attend for examination for discovery. The application was allowed.

Rule 7-2(8) of the *Supreme Court Civil Rules* provides that if a party to be examined for discovery is an infant, the infant, his or her guardian, and his or her litigation guardian may be examined for discovery. The court found that the rule is conjunctive which allows for the discovery of an infant, his guardian, and his litigation guardian. The court noted that unlike *Rule 7-2(6)* relating to corporate parties, there is no restriction to a single examination for discovery. The court further stated that this view was consistent with the principles of discovery, particularly as in this case, where the father had taken on the role of litigation guardian, despite having little or any knowledge of the central aspects of the claim.

Edelmann J. also stated that if his reading of *Rule 7-2(8)* was incorrect, he would exercise his discretion to order the examination for discovery of the infant plaintiff's mother because of her central role in the allegations against the defendant and the almost complete lack of knowledge on the part of the father/litigation guardian. At paragraph 13 the court states: "*I find that the selection of a litigation guardian with no meaningful knowledge of the material facts of the case should not be allowed to frustrate the role of examination for discovery in the litigation process*".

d. *Manson v. Mitchell*, 2022 BCSC 617, Mayer J.

The defendants applied for an order to compel the plaintiff to attend a continuation of his examination for discovery.

The crux of the decision turned on whether the amount of time taken for lunch and other breaks during an examination for discovery should be deducted from the seven-hour time limit in *Rule 7-2(2)*. The chambers judge concluded that the seven hours should be interpreted to refer to the period during which an examination for discovery remains on the record, when questions can be posed and answers provided. Reasonable periods of time taken for breaks and lunch should not be included in the calculation. What is reasonable will depend on the circumstances.

The chambers judge also ordered one additional hour of discovery to account for delay by the plaintiff because of his behaviour while giving evidence, including asking for unnecessary clarification and writing questions down before answering. An additional 30 minutes was also added as a result of technical difficulties.

e. *Pacific Granite Manufacturing Ltd. v. Jacob Bros. Construction Inc*., 2022 BCSC 2141, Master Hughes

The action arose over a construction dispute where the plaintiff subcontractor alleged the defendant general contractor owed him for unpaid work, plus interests and costs. The defendant counterclaimed and alleged that the plaintiff breached the terms of the contract and performed the work negligently and pleaded a set-off for expenses it incurred in correcting and completing the work. The plaintiff had completed 9 hours over two days of discovery of the defendant's representative but applied for an additional 4 hours to complete its examination for discovery, claiming that the representative was evasive, non-responsive, and failed to properly inform himself prior to the discoveries.

Rule 7-2(2) of the *Supreme Court Civil Rules* limits an examination for discovery to 7 hours, or any greater period to which the person to be examined consents. The court reviewed portions of the transcript and found that some of the examples referred to demonstrated counsel's inability to ask clear questions and keep the witness on track rather than any evasiveness on the part of the defendant's representative. The court also noted that there were no allegations of interference by the defendant's counsel. The court found that plaintiff's counsel had asked too many questions about marginally relevant matters leaving insufficient time to address the balance of questions that counsel wished to ask.

At paragraph 13, Master Hughes states that *"[a]n examination for discovery is not an opportunity for limitless questioning, even on relevant matters. There is a reason for the time limit set out in the Rules*". The plaintiff's application was dismissed.

f. *Saloojee v. Gibsons (Town)*, 2023 BCSC 249, Adair J.

The plaintiff suffered catastrophic injuries when he and one of the defendant's ("Kelly") were pushing on a dead tree in a forested area of a park in the Town of Gibsons, British Columbia ("Gibsons"), when part of the tree broke and hit the plaintiff's back and neck, severing his spine, rendering him tetraplegic. At trial there were issues as to what use counsel could make of examination for discovery evidence.

Kelly did not appear at trial and plaintiff's counsel read in questions and answers from his examination for discovery which was conducted by counsel for the Gibsons. Counsel for Gibsons objected on the basis that the plaintiff had not adopted Gibsons's discovery transcript and the court sustained those objections.

Plaintiff's counsel also wanted to read in questions and answers from another defendant Whitmore's examination for discovery as part of the plaintiff's case but prior to trial an order was made discontinuing the action against Whitmore. At paragraph 11 the court states that *"[t]his was not permitted, since (based on DLC Holdings Corp. v. Payne, 2021 BCCA 31), once the order discontinuing the action against Mr. Whitmore was pronounced, he was no longer a party to the action and there was no basis to read in any of his discovery evidence*".

Plaintiff's counsel called another of the defendants, Mr. MacKenzie, as a witness in the plaintiff's case then subsequently sought to read into evidence questions and answers from his examination for discovery. Counsel for Gibsons objected on the basis that it was improper to allow counsel to read into evidence questions and answers from a party's discovery evidence after counsel had called that party as a witness and the court upheld that objection.

g. *Singh v. Shoker*, 2023 BCSC 616, Master Hughes

The plaintiff was involved in two motor vehicle accidents that were tried together pursuant to a consent order agreeing that the implied undertaking of confidentiality for discovery evidence and documents obtained through the discovery process in each action was waived insofar as counsel may produce and use such discovery evidence and documents in either or both actions.

Counsel for the defendants in the second action conducted an examination for discovery of the plaintiff which ran until 3:33 pm leaving insufficient time for counsel in the other action to conduct his discovery. The parties agreed, off the record, that they would reschedule the examination for discovery to a later date. Plaintiff's counsel subsequently took the position that the examination for discovery of the plaintiff was concluded and that no further discovery was warranted.

Rule 7-2 of the *Supreme Court Civil Rules* governs examination of parties. At paragraph 9, the court states that the plain reading of the rule is clear: "*each party must make themselves available for examinations for discovery by the parties of record to the action who are adverse in interest; not one examination, but multiple examination if there are multiple other parties of record who are adverse in interest" The limitation in R.7-2(2), which the court may modify, relates only to the length of the examination"*.

The court found that while there was some commonality of interest between the defendants, there was greater divergence. Liability was in dispute in both actions, and each of the responses to civil claim plead in the alternative that the plaintiff's injuries, if any, were attributable to a previous or subsequent accident or event. In both actions, the defendants also sought contribution and indemnity from the third parties, and apportionment of any liability. The court ordered the plaintiff to attend for the examination for discovery sought, up to seven hours, and the scope of the examination was not limited to questions not covered in the examination by the defence counsel who conducted the initial examination.

XI. EXPERTS

a. *Aulakh v. Singh*, 2023 BCSC 863, Thomas J.

The court granted leave for the plaintiff to rely on two expert reports from two different physiatrists. The plaintiff saw the first physiatrist several years prior to trial. That physiatrist retired and so was unable to provide an updated assessment. The plaintiff then retained a different physiatrist who provided an updated report. There were some minor differences between the two opinions. In allowing

the two reports, the court noted that this was not analogous to a case where a party is "piling on" duplicative opinion evidence given the need for an updated report.

b. *Dussiaume v. Sandoz Canada Inc.*, 2023 BCSC 797, Wilkinson J.

This case related to the admissibility of an affidavit and appended expert report by Dr. Reutter that was filed in support of a certification application to certify a class action. The class action related to heartburn medication, Zantac, containing the carcinogen, Ranitidine.

Dr. Reutter is an economist who was retained to assess the extent to which Canadians who used pharmaceuticals containing Ranitidine were impacted by Health Canada's recall of Ranitidine products. His opinion was based on survey results for emotional distress experienced after the recall. Dr. Reutter did not have any special expertise in psychology, or psychiatry; nor did he have expertise in survey design or methodology. It came out in cross-examination that his survey was mostly drafted by plaintiff's counsel along with literature supporting the survey's design.

The court found that Dr. Reutter did not have the required expertise to provide psychiatric opinion evidence or to design the survey. The fact that the survey and supporting literature were supplied by counsel and that this was not obvious from the face of the report cast doubt on his independence. As a result, Dr. Ruetter's report was deemed inadmissible.

c. *Ford v. Lin*, 2022 BCCA 179, per Frankel J.A. (DeWitt-Van Oosten and Voith JJ.A. concurring)

This case concerns the interplay between expert opinion evidence and fact evidence from treating practitioners at trial.

In this case, the plaintiff served, *inter alia*, two expert reports from treating medical practitioners: her family doctor and her chiropractor. At the trial management conference, an order was made for parties to exchange will-say statements for non-party, lay witnesses by a specified date. No will-say statements were provided for either treating practitioner. At trial, in direct examination of the plaintiff's family doctor, her counsel attempted to elicit factual evidence about the plaintiff's complaints and how she presented at various clinical visits. The defendant objected and the trial judge ruled that for the time period contained in the doctor's expert report, the plaintiff could only ask clarifying questions consistent with the limitations on experts. However, for the time periods that were not contained in the expert report – in this case, there were periods both before and after the time period covered in the report – the plaintiff could only ask factual questions.

The court of appeal confirmed that a witness can be called as both an expert and a fact witness, but the party calling them must comply with the rules and procedures applicable to both types of evidence. In addition, a party cannot attempt to repeat or expand on the factual foundation of their opinion set out in expert report.

If the rules for expert reports have been followed, the party calling that expert can either

> (1) rely on the report and conduct a limited examination-in-chief for the purposes of the clarifying the report; or
>
> (2) elicit the expert opinion entirely through *vive voce* evidence.

In the latter case, the expert report will not be an exhibit at trial but may be used by the expert as an *aide memoire*.

The plaintiff also argued that she should be allowed to elicit her own hearsay statements from treating practitioners. The court maintained that the usual rules of hearsay apply to statements made to clinicians, and a party is not permitted to elicit their own out of court statements.

d. *Gutfriend v. Case*, 2022 BCSC 2055, Thomas J.

The plaintiff sought to introduce an expert report alleging that she sustained a traumatic brain injury which relied on a report interpreting a SPECT scan to confirm the clinical findings that the plaintiff was suffering from post-concussion syndrome. The defence objected to the admission of the report.

The court accepted that the SPECT scan met the threshold test for logical relevance, it was excluded on the basis that it remains characterized as novel science. Although SPECT scans are a sensitive tool for the diagnosis of traumatic brain injuries, its specificity is not sufficient to provide legally reliable information for diagnostic purposes in a setting where the issue was to determine whether the plaintiff had suffered a brain injury versus a psychiatric disorder or condition such as PTSD, depression and anxiety. Since the evidence did not meet the test for reliability, it was not necessary to consider benefits and risks of admission. Accordingly, the report interpreting the SPECT scan and any reference to the scan were not admissible.

e. *Lundgren v. Taylor*, 2023 BCSC 816, Chan J.

The plaintiff objected to the admissibility of an expert report by Dr. Hawkeswood, a physical medicine and rehabilitation specialist, who conducted an IME at the request of the defendant. The plaintiff argued that the expert attacked the plaintiff's credibility, was not impartial, and opined beyond his area of expertise.

The court set out the requirements for admissibility:

> (1) the threshold criteria from *R v. Mohan* that the expert evidence must be relevant, necessary, not subject to an exclusionary rule, and the expert be properly qualified; and
>
> (2) judicial discretion to exclude evidence if the risks of admitting it outweigh its benefits.

Ultimately, Dr. Hawkeswood's report was found to be admissible with minor alterations. The court held that Dr. Hawkeswood's comments – which related to the source of the plaintiff's pain being unclear, common explanations for the type of pain the plaintiff was experiencing, and noting the plaintiff had a low activity level – were not attacks on her credibility. Similarly, the court held that commenting on whether the plaintiff sustained a concussion and his word choice when opining on causation did not cross over the line to show partiality. Finally, the court found that that Dr. Hawkeswood commented on the plaintiff's mental health and effect of her mastectomy, but did not ultimately provide an opinion in these areas.

f. *Russell v. Christopherson*, 2023 BCSC 160, Jackson J.

Experts have good days and bad days. In this case, the plaintiff's psychiatric expert, Dr. Anderson, was found to be an unpersuasive witness by the trial judge. Dr. Anderson diagnosed the plaintiff with post-traumatic stress disorder but was found to have difficulty explaining what he meant by the term. He was noted to have done work almost exclusively for plaintiffs since approximately 1989. He resiled from

much of his opinion under cross-examination and at one point during his evidence, he became "agitated to the point" where it was necessary for the trial judge to ask him to calm down.

g. *Sehgal v. Lissimore*, 2023 BCSC 1506, Master Hughes

The plaintiff underwent a joint IME with an orthopedic surgeon pursuant to *Rule 11-3*. The expert was jointly instructed but for undisclosed reasons a copy of his report was not provided to the plaintiff for seven months.

The plaintiff applied, pursuant to *Rule 11-3(9)*, for leave to tender two additional expert reports on the issue of damages. The plaintiff argued that he was entitled to tender two additional expert reports from a physiatrist and a functional capacity evaluator on the issue of damages pursuant to section 12.1 of the *Evidence Act*.

The application was dismissed because the evidence failed to specify the issue or issues that the additional experts would be asked to address, and whether or why the joint expert could not address those issues.

h. *Sove v. Froment*, 2022 BCSC 735, MacNaughton J.

The defence sought leave to introduce a second supplementary report by the defendant's expert toxicologist halfway through trial under *Rule 11-6(6)* of the *Supreme Court Civil Rules*. The report addressed the plaintiff's level of intoxication at the time of the subject motor vehicle accident. The court did not allow the second supplementary report as it did not set out the material change in the expert's opinion or the reasons for it as required under the *Rules*. The report could not be admitted under *Rule 11-7(6)* as the additional assumptions in the report were available at the time of the writing of the initial report through due diligence and admission of the report after the plaintiff closed his case would lead to significant prejudice.

i. *Teal Cedar Products Ltd. v. British Columbia*, 2022 BCSC 539, Kirchner J.

Case plan orders were made regarding the timing of delivery of expert reports. Teal delivered an expert report six months after the deadline set by the case plan order. Teal argued that the report was necessary, would be of assistance to the court, and the defendants were not prejudiced because it was delivered 93 days prior to trial. The defendants sought a ruling that the report was inadmissible.

The court was critical of the defendants for not providing some evidence of the prejudice they faced due to the late delivery of the new report. The court ruled the report was admissible as it was delivered well in advance of trial even if not in accordance with the case plan order. The court emphasised that it was delivered prior to the 84-day deadline applicable to cases that do not have case plan orders.

XII. *FAMILY COMPENSATION ACT*

a. *Ghaly v. Mand,* 2023 BCSC 451, Burke J.

The plaintiffs sought damages from the defendants pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126. The deceased was wife/mother to the plaintiffs. Loss of financial support was a significant issue. Ms. Ghaly, the deceased, was a 42-year-old homemaker at the time of her death. The plaintiffs submitted she would have returned to the workforce when her youngest child graduated high school. The defendants argued there was a significant probability that Ms. Ghaly would not have returned to the workforce and the plaintiffs would have financially benefitted from her death. The defendants therefore asserted that there should be no award under this head. Justice Burke found the evidence established Ms. Ghaly would have returned to the workforce. Justice Burke also commented generally

on the argument of the impact of a net financial gain to the calculation of damages (effectively an argument that the plaintiffs are better off as result of the death of the deceased). Justice Burke adopted the reasoning of the court in *Daniels v. Jones*, [1961] 3 All E.R. 24 at 30, [1961] 1 W.L.R. 1103 (C.A.) where it was held that "such a result is so repugnant to common sense as to cast a good deal of suspicion on the validity of the argument which leads to it".

b. *Kim v. Murdoch*, 2023 BCSC 1647, Crerar J.

This was a family compensation claim brought by the parents of a 17-year-old son, Eric, who was about to graduate from high school when he was struck and killed by a motor vehicle. The family had moved from Korea in 2012 when the deceased was 10 years old. The court had to grapple with the difficult and inherently hypothetical question regarding what would have been the economic future of Eric and his parents had he not died. One of the main issues in that assessment is whether and to what extent Eric would have followed the traditional Korean practice of "hyodo" or filial piety, which compels children to provide economic and other support to their parents.

The case contains a very helpful review of the relevant case authorities.

XIII. FAST TRACK

a. *Apostolopoulos v. Cheung*, 2023 BCSC 166, Wilson J.

The defendant applied to restrict the plaintiff to relying on one expert report at the trial of this fast track action. The test for a party to rely on more than report requires the applicant to show that:

(1) the additional report is not a duplication of another report; and

(2) it would suffer prejudice that is disproportionate to the additional time and expense that will be incurred if the additional report is admitted.

Vespaziani v. Lau, 2021 BCSC 1224, resolved the ambiguity in the legislation and held that both requirements must be met.

The plaintiff relied on section 12.2 (2) of the *Evidence Act* as an exclusion for the first report that was served on the ICBC adjuster prior to February 6, 2020, as defence counsel had not been appointed. The applicable section says:

> (2) Despite section 12.1 and regulations made under that section, the limits set out in that section do not apply to the following:
>
> (a) a report of an expert in respect of vehicle injury damages if the report was served
>
> (i) before February 6, 2020, and
>
> (ii) in accordance with all applicable rules of the Supreme Court Civil Rules;
>
> (b) an action for which
>
> (i) a notice of trial was filed and served before February 6, 2020, and
>
> (ii) the trial date set out in the notice of trial, filed in relation to the vehicle injury proceeding, is before October 1, 2020.

The court held that service on the ICBC adjuster was sufficient to meet the criteria in s. 12.2(2)(a). The court further held that (a) and (b) were disjunctive, so that either criteria, but not both, needed to be fulfilled. One of the plaintiff's expert reports fell under the exclusion in s. 12.2(2)(a) so the plaintiff was entitled to rely on both expert reports at trial.

b. *Ghane v. Bhullar*, 2022 BCSC 929, Master Bilawich

The plaintiff applied to remove the action from fast track on the grounds that the four conditions under *Rule 15(1)* were no longer met. The plaintiff also sought to rely on two expert reports at trial.

The court reviewed the case law relating to fast track actions and confirmed that an action is not automatically ejected from fast track when underlying circumstances change; nor can a party unilaterally remove an action from fast track by withdrawing their consent. The application was brought after the expert report deadline had passed. The defendant argued that the defence was conducted with the limit on expert reports for fast track actions in mind such that they were unduly prejudiced if the action was removed from fast track so close to trial. The court noted that the timing of delivery of the second expert report and the application to remove it from fast track were substantially within the plaintiff's control and there were concerns about strategic delay. As a result, the court declined to remove the action from fast track.

The court allowed the plaintiff to rely on two expert reports, finding that both criteria in s. 12.1(6) of the *Evidence Act* were met. It was not necessary that the case be extraordinary or unusual in nature.

c. *Wong v. Tran*, 2023 BCSC 1230, Coval J.

The plaintiff was awarded damages totaling $411,522.73, Including $100,000 for pain and suffering and loss of earning capacity of $298,000 in a fast track action.

The court rejected defence counsel's submissions that the court should limit the damages to $100,000 rather than to exercise its jurisdiction under *Rule 15-1(3)* on the basis that it would be unfair as they prepared the case in reliance on the $100,000 limit.

At paragraph 104, the court summarized the *R 15-1(3)* discretionary issues arising in this case as:

a) It is unclear on what basis Mr. Wong proceeded under the fast track process, and he never formally took the position that he was claiming $100,000 or less.

b) The parties followed the fast track process, including in terms of length of discovery and number of experts.

c) The defendants were told Mr. Wong was seeking more than $100,000 around two weeks before trial in settlement negotiations. Mr. Wong offered no explanation for not advising of this earlier.

d) Neither party sought an adjournment of the trial to deal with this issue.

e) The assessed damages are $411,522.73.

f) The defendants did not rely to their material prejudice on the $100,000 limit in terms of how they prepared the case.

The court determined that there was much unfairness to the plaintiff if it were to limit the damages beyond the amount actually assessed and that it was less unfair to the defence because they were not materially prejudiced in the preparation of their case by reliance on the fast track process and the $100,000 limit was never expressly confirmed by Mr. Wong during the proceedings.

Accordingly, the court exercised its discretion under R 15-1(3) and awarded damages in the amount assessed.

At paragraph 98, the court noted that the notice of civil claim did not indicate which sub rule(s) was relied upon to qualify for fast track and that this uncertainty can lead to difficulties for the parties. Instead, counsel should always specify in their pleadings which sub rule(s) they rely on for fast track.

XIV. INDEPENDENT MEDICAL EXAMINATIONS

a. *Bowden v. Lund*, 2023 BCSC 869, Master Robertson

The defendant applied to compel the plaintiff to attend an IME with a vocational specialist. There was no issue with timeliness of the application. The only question was whether the defendant had established that the IME was necessary. Master Robertson succinctly summarised the law from *Tran v. Abbott*, 2018 BCCA 365:

> a) Rule 7-6 is a rule of discovery, designed to balance the plaintiff's advantage in obtaining expert opinions, by providing the defendant with access to the plaintiff for such prior to trial, consistent with the "modern philosophy" that such rules should work to promote settlement before trial, and ensure the speedy and inexpensive determination of each dispute on its merits;
>
> b) Rule 7-6 specifically contemplates that there can be more than one IME;
>
> c) A second examination may be necessary where the plaintiff's injuries fall outside the first examiner's expertise;
>
> d) Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, the etiology of illness is not straightforward, or there are a wide range of injuries;
>
> e) In exercising its discretion, the court must consider the effect of refusing the order sought on the conduct of the trial;
>
> f) Subject to questions of timeliness and proportionality, even if one examination concluded that a potential source of the plaintiff's symptoms can be eliminated, that should not necessary preclude a subsequent IME to consider other alternatives, even if they were commented upon by the author;
>
> g) However, the applicant must still establish that the subsequent examination is necessary, having regard to where there is overlap or an attempt at "bolstering" evidence. The greater the overlap, the greater the obligation to establish justification for the subsequent examination; and
>
> h) Different opinions of experts do not entitle a defendant to an examination under this rule to merely match "expert for expert".
>
> i) Ultimately, every case is to be determined on its own facts.

Master Robertson refused to take judicial notice of the purpose, scope, and expertise of a vocational consultant. Master Robertson dismissed the application because there was no evidence before the court on this application that showed why the vocational assessment was necessary. She contrasted the case

to her previous decision in *Walsh v. Riley*, 2023 BCSC 135, where the court had the benefit of instruction letters; and letters from the experts setting out the scope of their examinations, tests that would be undertaken, and their expertise. This type of evidence is required in every application to establish that the IME is necessary.

b. *Cohen v. Torrenueva*, 2023 BCSC 1386, Master Robertson

The plaintiff suffered soft tissue injuries, injuries to his knee, nervousness and stress, anxiety, headaches, and jaw pain, all of which continued to cause him some disability nine years post-accident. There was evidence that he was taking as many as 15 Percocet pills a day at one point which was reduced to 8 pills per day and that he was self-medicating with as much as four or five alcoholic drinks and marijuana products, from time to time. There was evidence before the court as to whether the plaintiff had an addiction and whether it had an impact on his recovery and prognosis.

The plaintiff was compelled to attend an IME with an addiction specialist as well as to undergo testing of blood, urine, saliva, nail, hair and/or breath as required by the doctor.

c. *Farr v. Barbosa*, 2022 BCSC 972, Master Vos

The defendant applied to compel the plaintiff to attend an IME with an orthopeadic surgeon on a particular day and time. The plaintiff agreed to the examination but advised that she was not available at the suggested date and time as she was scheduled to attend an annual conference that her employer hosts and to assist with the day-to-day coordination of the conference. Plaintiff's counsel had also taken the additional step of contacting the expert's office to confirm that another day was available within the report deadline.

Master Vos found that the defendant's "hard line" position was unreasonable. Although normal apprehension concerning a medical appointment or typical inconvenience is not a justifiable reason to not attend, counsel and parties are expected to act reasonably when arranging events for litigation. The plaintiff had advised and provided detail of her unmovable work commitment well in advance of the scheduled examination date. The plaintiff also indicated she was available to attend on another day and determined that the expert was available on that day.

The defendant's application was dismissed with costs.

d. *Ferguson v. Guthrie*, 2022 BCSC 962, Master Vos

The defendant applied to compel the plaintiff to attend a third IME with a physiatrist in addition to IMEs that had already been agreed to with a psychiatrist and a neurologist. The court re-iterated the purposes of *Rule 7-6* from *Tran v. Abbott*, 2018 BCCA 365:

- to balance the plaintiff's advantage in obtaining expert reports by providing the defendant with access to the plaintiff in order to obtain the expert assistance they require;
- to put the parties on an equal footing with respect to medical evidence; and
- that multiple medical examinations may be appropriate and necessary where a variety of injuries are alleged or the etiology of illness is not straightforward.

Neither party had served or disclosed expert reports so the court considered the alleged injuries as plead in the Notice of Civil Claim. Master Vos emphasised that the defendant need not disclose their expert reports or wait until assessments have already taken place to compel the plaintiff to attend a subsequent or additional examination. The court found that the medical specialties of neurology, psychiatry, and physiatry were quite distinct. There may be some overlap, but that does not disqualify

an examination. Master Vos granted the application noting that the injuries claimed were significant and diverse including physical, psychological, and neurological injuries.

e. *Purganan v. Joliet*, 2023 BCSC 858, Master Harper

The defendant's expert required the plaintiff to complete a number of questionnaires for his assessment, including a back disability questionnaire, a neck disability questionnaire, brief pain inventory, head impact test, and anxiety form. The application was brought with short notice because of the timing of the IME. The defendant had an email from their expert which said:

> As for the other questionnaires about pain and emotional dysregulation, these are not obligatory, but it is highly encouraged that the claimant complete them. Any interference with these would result in a comment in the opinion section of the IME that plaintiff counsel interfered with a medical specialist's full assessment.

Master Harper found that the evidence from the doctor was a sufficient basis to make the order sought, noting that the questionnaires were non-intrusive, there was no evidence from the plaintiff that cognitive issues interfered with their ability to understand the test, and that the doctor had professional responsibilities that alleviate concerns that the test will not be administered fairly.

f. *Zhao v. Yip*, 2023 BCSC 1290, Master Bilawich

The defendant applied to compel the plaintiff to attend a three-day functional capacity evaluation. The defendant had previously arranged, and the plaintiff attended, four prior assessments with a physiatrist, psychiatrist, neurologist, and urologist. The issue was whether the functional capacity evaluation would provide an expertise or analysis that was not encompassed in the prior IMEs.

The defendant produced the expert reports from the physiatry and psychiatry experts. The physiatrist concluded that there was no ongoing physical disability as a result of the accident. The psychiatrist had concluded that there was a depression disorder that was interfering with the plaintiff's function. The court dismissed the application on the grounds that the functional capacity evaluation would not capture the psychological disability and so would not bring a new meaningful component to the case.

XV. INSURANCE ISSUES

a. *Stewart v. Lloyd's Underwriters*, 2022 BCCA 84, per Abrioux J.A. (Fitch and Voith JJ.A. concurring)

The plaintiff brought the action under a policy for travel insurance. The insurer initially denied coverage for the plaintiff's out of province medical bills. However, three weeks before trial, the insurer reversed its decision and began negotiating with the health care providers for settlement of their accounts. The plaintiff proceeded to trial to pursue claims under the policy on the theory that the health care providers may pursue him for the balance owing between the insurer's settlement and the invoiced cost. That claim was dismissed. However, the trial judge awarded punitive damages against the insurer for the manner in which it settled the claims of the health care providers. The trial judge dismissed the plaintiff's claim for legal fees as damages for breach of the duty of good faith.

On appeal, the court held that the trial judge properly dismissed the plaintiff's claim for legal expenses as compensatory damages for the insurer's breach of the duty of good faith. There was no express or

implied term of the insurance policy that such fees would be paid. Compensatory damages for breach of the duty of good faith must be consequential to the breach and legal fees are properly dealt with under the costs regime.

The insurer's cross appeal of the award of punitive damages was allowed. The court first determined that section 150(4) of the *Wills Estates, and Succession Act* does not prevent an estate from recovering a claim for punitive damages. However, the conduct which gave rise to the award was not behaviour directed toward the plaintiff. Rather, the impugned conduct was directed toward the health care providers. Abrioux J.A. ruled that the trial judge erred in law in essentially "piggybacking" this behaviour to that which she found the insurer directed toward the plaintiff, that being an "overwhelmingly inadequate investigation". The trial judge specifically stated that the inadequate investigation was done without malice and did not, on its own, warrant an award of punitive damages. There was therefore no proper basis upon which the award of punitive basis could be made.

b. *Lambright v. Sonnet Insurance Company,* 2022 BCSC 709, Milman J.

The plaintiff was successful in obtaining judgment brought by summary trial for benefits under a fire insurance policy. The outcome of the claim did not depend on findings of credibility and the trial judge found that there was no conflict in the evidence needing to be resolved. The amount in issue did not justify a full trial and further delay was unwarranted, considering that the loss occurred three years earlier.

The trial judge found that while the insurer was within its rights to investigate the claim, it did not do so in a reasonable manner. It continued refuse to pay unless further documentation was produced, documents that were shown not to exist. She was questioned on discovery about unrelated court proceedings which gave rise to suspicion on the part of the insurer about the fire claim. However, no outstanding request from discovery was unanswered. The court held that the insurer could not avoid its obligations by investigating indefinitely. Punitive damages were awarded in the amount of $30,000 for the insurers delay in its investigation and improperly withholding payment on other parts of the claim that were undisputed pending the outcome of that investigation.

XVI. INTEREST

a. *Chang v. GEA Refrigeration Canada Inc.*, 2023 BCCA 22, per Griffin J.A. (Willcock and Skolrood JJ.A. concurring)

On this appeal, the court considered whether payment of a judgment into a trust account to be held pending appeal stopped the running of post-judgment interest under the *Court Order Interest Act.* The terms of the payment into trust were silent about post-judgment interest. A term of the agreement was counsel's undertaking to repay the funds plus pre-judgment interest if the defendant was successful on appeal. This undertaking meant that the funds had to be held in trust. There was no implicit term that post-judgment interest stopped running. On appeal, the court found no error in the judge's conclusion that the payment was not an unconditional one "toward judgment" but a form of security for judgment. Had the defendant wished to take the position that the agreement stopped the running of post-judgment interest, it should have proposed that as an express term.

The court noted that the *Court Order Interest Act* does not state when post-judgment interest stops running. Griffin J.A. held that it stops running when the judgment is paid by the judgment debtor such that the judgment creditor has use of the funds. The undertaking to repay in this case meant that the judgment was not paid for the purposes of the *Act* and, there being no express terms governing payment of post-judgment interest, the interest continued to run until the judgment was paid.

b. *Chavez-Salinas v. Tower*, 2023 BCSC 89, Armstrong J.

The plaintiff's award was increased on appeal at 2022 BCCA 43. The defendant did not pay the judgment pending the appeal and did not apply for a stay of the judgment. The defendant argued that the plaintiff was not entitled to post-judgment interest under the terms of an agreement made between the parties pending the outcome of the appeal. The defendant also argued that no post-judgment interest should be granted to the plaintiff due to her inordinate delay between filing the notice of appeal in December 2017 to the hearing in January 2022.

The court held that the terms exchanged between the parties' counsel were clear and constituted an agreement to suspend the plaintiff's entitlement to post-judgment interest for inordinate delay and that the plaintiff was bound by it, despite the plaintiff's argument that her counsel acted without instructions. Armstrong J. found that the plaintiff engaged in significant delay in prosecuting her appeal, exceeding the prescribed time limits under the rules after many opportunities were given to perfect her appeal within reasonable time limits. He concluded that the defendant and ICBC were released from paying post-judgment interest for a one-year period during which the plaintiff should have been filing her appeal books and factum.

However, the court was not prepared to find that post-judgment interest was not payable to the plaintiff generally outside of the agreement. The defendant did not apply for a stay or under s. 8 of the *Court Order Interest Act* to change the date from which post-judgment interest must be calculated based on the plaintiff's delays. Armstrong J. held that the court should be slow to reduce a plaintiff's entitlement to court order interest and that delay will not deprive a party of interest absence some clear evidence of prejudice.

XVII. JURY

a. *Arctic Pearl Fishing Ltd. v. Intact Insurance Company*, 2022 BCSC 1549, Master Robertson

The plaintiff applied to strike a jury notice pursuant to *Supreme Court Civil Rule 12-6(5)(a)*.

The action involved a claim for damages sustained to one of the plaintiff's commercial fishing vessels, insured by one defendant and underwritten by the other. The vessel's engine suffered damage soon after the plaintiff purchased it. Issues at trial would include whether a warranty in the policy was valid and applicable, whether the warranty was breached, the cause(s) of the engine damage, whether the cause(s) were included in the policy, whether exclusions applied, whether the plaintiff was contributorily negligent, and the extent and quantum of damages.

The plaintiff's application was based on all three subcategories of *Rule 12-6(5)(a)*, namely whether (i) the issues required prolonged examination of documents or accounts of a scientific or local investigation that could be made conveniently with a jury, (ii) the issues were of an intricate or complex character, and (iii) the extra time and cost involved with a jury would be disproportionate to the amount involved.

Ultimately, the master dismissed the application.

The master cited precedents providing some guidance but noted that ultimately each decision rests on its own facts, nature of evidence, and issues in dispute, and that a right to have a jury is a fundamental right not easily displaced.

Regarding *Rule 12-6(5)(a)(i)*, while there was some technicality to the matters in dispute, the master noted there were only two counsel, trial was only set for eight days, each party only had one expert, the areas of law were for the most part not novel, and the defendants had a *prima facie* right to a jury. Furthermore, the experts had done an admirable job in their reports of explaining the cause of the engine damage in relatively plain language.

Regarding *Rule 12-6(5)(a)(ii)*, the master similarly concluded that the issues did not appear to be of such an intricate or complex character that the jury would be unable to make findings in accordance with the instructions and charge given to it, with the assistance of the experts and counsel.

Finally, regarding *Rule 12-6(5)(a)(iii)*, the master noted that the costs that may be added to an eight-day trial due to the involvement of a jury were not out of proportion to an approximately $1 million claim.

The master also dismissed the plaintiff's concern that its primary witness spoke English with a thick accent, and that a jury did not have the same ability as a judge to stop a witness and ask him or her to repeat or clarify statements when necessary.

b. *Valdez v. Neron*, 2022 BCCA 301, per Abrioux J.A. (Hunter and Horsman JJ.A. concurring)

The plaintiff was injured in a motor vehicle accident and after a nine-day jury trial was awarded $19,000 total—$600 for non-pecuniary damages, $900 for special damages, and $17,500 for income loss to trial. The plaintiff appealed and sought a new trial, arguing that the jury's verdict was plainly unreasonable in that it was internally inconsistent and contradictory.

The court allowed the appeal. There was considerable evidence on the record for the jury to make adverse credibility findings. Still, the non-pecuniary award of $600 was effectively a *de minimus* award of nil, while the non-pecuniary awards appeared to be predicated on the jury's view that the plaintiff was disabled from working for 2.5 months after the accident. These could not be reconciled, which made the non-pecuniary award so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

The court concluded that it could substitute its own damages assessment rather than order a new trial. Reviewing the authorities, the court observed that there was some authority for the proposition that the appropriate remedy should be a new trial when credibility is in issue. However, in these cases it was difficult to identify a clear reasoning process, as some did not follow this rule. The court ultimately concluded that if the record provides an adequate basis for substituting an award, then, in cases where credibility is a significant issue at trial, appellate courts must be particularly careful in the conclusions drawn from the quantum of damages award, or the disparity between them.

Here, the court concluded that the record was sufficient to assess non-pecuniary damages. The jury's pecuniary awards were indicative of its finding that the plaintiff was disabled for approximately 2.5 months after the accident. There was evidence on the record on which they could have reached this conclusion. As such, the court was not left to guess what the jury found with respect to the severity and effect of the injuries, and the non-pecuniary award was antithetical to its pecuniary award. It would also be in the interests of justice to avoid the time and expense of a new trial. Given the plaintiff's age, the pain and suffering resulting from 2.5 months of soft tissue injuries, and the plaintiff's unreliable self-reporting, the court assessed his non-pecuniary damages at $35,000.

XVIII. LIMITATIONS

a. *Aubichon v. Grafton*, 2022 BCCA 77, per Voith J.A. (Frankel and DeWitt-Van Oosten JJ.A. concurring)

The appellant appealed a chambers judge's dismissal of his application to strike the respondent's claim for being statute-barred under the *Limitation Act*, S.B.C. 2012, c. 13.

The respondent was suing the appellant police officer for assault stemming from his arrest on February 18, 2016. The respondent did not commence his action until July 23, 2020, more than four years later. The respondent's position was that he was not aware that a civil action was "appropriate" under s. 8(d) of the *Limitation Act* until criminal charges were laid against the appellant, which occurred in July 2020. The appellant's position was that the respondent's claim should be summarily dismissed because there is no subjective element to s. 8(d).

The court dismissed the appeal. The *Supreme Court Civil Rules* that the appellant was relying on to dismiss the claim meant that the claim would only be dismissed if it was "plain and obvious" that it would fail (*Rule 9-5(1)(a)*) or that it was "beyond a doubt" that the action would not succeed (*Rule 9-6*). The court has repeatedly cautioned against deciding whether a limitations defence is available on applications to strike. Furthermore, the court is cautious when dealing with applications to strike that involve a question of statutory interpretation.

While there were authorities from other provinces that a claimant's subjective knowledge does not postpone a limitation period, s. 8(d) is a relatively recent provision that has not been extensively considered, and the narrow issue raised by the respondent had never been addressed by a British Columbia court. Such an interpretation would not be a straightforward exercise. As such, it was open to the chambers judge to take a restrained approach and decline to engage in such an exercise on an application to strike.

XIX. MEDIATIONS

a. *King v. Aviva Insurance Company of Canada*, 2022 BCSC 973, Skolrood J.

The plaintiff applied for an order that a dispute resolution process ("DRP") commenced under s. 12 of the *Insurance Act*, R.S.B.C. 2012, c. 1 be terminated and that the matters in dispute in that process be determined via the court proceeding.

The plaintiff owned a strata unit that suffered water damage. The unit as well as the complex were insured by the defendant insurers. During the adjustment process, a disagreement arose between the plaintiff and the insurers regarding the value of the damage and the nature and extent of repairs required. As a result, the plaintiff invoked s. 12 of the *Insurance Act*, which creates a statutory DRP for disagreements as to the value of an insured property or the repairs needed. Nine months later, without a resolution, the plaintiff advised that she no longer wished to participate in the DRP and that all issues should be dealt with in the court proceeding. The defendants opposed her position.

The judge denied the plaintiff's application and held that the DRP should continue. The case was distinguishable from the plaintiff's authorities because in those cases there were factual and legal issues that went beyond the jurisdiction of the DRP's umpire, whereas in this case the matters in issue (being

the value of the damage and the repairs required) fell squarely within the umpire's ambit. Furthermore, the DRP is a mandatory process that was initially triggered by the plaintiff. The DRP had also advanced to the stage where all that was left to be done was for the plaintiff to make her submissions to the umpire and for the umpire to render a decision. Finally, by permitting the DRP to continue, the plaintiff was not foreclosed from bringing this matter before the court and resolving others that she raised, such as her allegation that the insurers breached their duty of good faith.

XX. NEGLIGENCE

a. *Brown v. Ponton*, 2022 BCSC 2248, Stephens J.

The plaintiff brought a claim for personal injury arising out of an act of "vehicular aggression".

At some point prior to the facts that gave rise to the claim, the parties met in a parking lot and exchanged heated and aggressive words. The plaintiff found his tires slashed and assumed it was done by the defendant. Weeks later, the plaintiff saw the defendant's van and followed it until it stopped on the side of the road in an out-of-the-way area. The plaintiff then got out of his vehicle and walked towards the van at which point the defendant accelerated his van towards the plaintiff. The plaintiff was able to get out of the way and got back into his car. The defendant then drove into the side of the plaintiff's car with great force, reversed and then struck the car again and again until it was on the verge of going into the ditch on the side of the road.

The court did not find that the plaintiff was contributory negligent for the "vehicular aggression" since it was entirely unpredictable. The court indicated that, had the plaintiff been injured when the defendant drove towards him, there would likely have been some contributory negligence as the plaintiff did not need to get out of his vehicle and approach someone with whom he had previously had an aggressive interaction.

The court refused to consider the plaintiff's claim for aggravated damages as there was nothing in the pleadings that put the defendant on notice that the damages would be sought, and nothing pleaded that supported a finding of aggravated damages.

b. *Canada (Attorney General) v. Frazier*, 2022 BCCA 379, per MacKenzie and Horsman, JJ.A. (Fitch J.A. concurring)

On appeal from the dismissal of Canada's application to strike, the court of appeal struck the plaintiff's claim against Canada in negligence on the basis that there was no *prima facie* duty of care that existed between the plaintiff and Canada under the *Explosives Act* and that the plaintiff had not plead sufficient material facts to establish a relationship of proximity. The underlying action was for personal injuries that were sustained in an explosion at a business.

The duty of care analysis focused on whether there was sufficient proximity between the parties. The court of appeal first considered if the *Explosives Act* gave rise to a private law duty of care. The *Act* sought to protect the public generally and not a specific class of individuals which weighs against a private law duty of care. The court of appeal held that the trial judge erred in finding that the absence of conflicting duties created proximity. The court further held that the Minister responsible for the *Act* was tasked with reducing public risk in the sale, storage, and use of explosives in a wide variety of settings. The *Act* is not intended to prevent such activity but to regulate it. Further, the Minister's administrative duties to the regulated parties created a conflict with a duty to the public generally.

The court then considered whether a novel duty of care existed if the Minister knew or ought to have known that contraventions of the *Act* by the owner of the premises created hazardous conditions, and,

nevertheless, approved the licence. The court of appeal held that the facts, as pleaded, were nothing more than a bare allegation and did not comply with *Rule 3-1(2)(a)* of the *Supreme Court Civil Rules*. Not pleading the material facts prevented the court from engaging in a meaningful proximity analysis. The court re-affirmed that expecting material facts to emerge from pre-trial discovery processes is not a proper basis to resist an application to strike.

c. *Dutton v. Schwab*, 2023 BCCA 161, Voith J.A. (Fenlon and Newbury JJ.A. concurring)

The plaintiff appealed the trial judge's dismissal of her claim. The claim was dismissed on the grounds that the plaintiff had failed to meet her burden of proving who the driver was at the time of a motor vehicle accident. The parties agreed that the driver of the vehicle was liable for the accident, which was a head-on collision with a tractor-trailer. Both parties had been drinking. The plaintiff could not recall the accident but ended up in the rear seat without a seatbelt on. The defendant was in the passenger seat. At the end of the plaintiff's case, the defendant elected not to call any evidence and argued that the plaintiff had failed to meet the burden of proving who was driving at the time of the accident.

On appeal, the appellate argued that the judge misapplied the burden of proof and should have concluded who was more likely to have been driving at the time of the accident. The court of appeal dismissed the appeal on the grounds that the plaintiff has the ultimate burden of proof. The appellate's argument would result in the burden of proof being "at large" between the parties, which is not correct. If a judge is not able to reach a conclusion on a balance of probabilities on the evidence before them, then the plaintiff has failed to meet their burden and the action must fail.

d. *Garside v. Dougan*, 2022 BCSC 799, Marzari J.

The plaintiff brought a claim in scienter and negligence against the defendant whose dog bit her hand when she tried to separate their two dogs.

The plaintiff argued that, to make out a case in *scienter*, it was sufficient that the dog was known to cause harm to animals and the prior harm did not need to be directed at a human. The dog in issue was known to go after birds and other dogs but had not previously injured or attempted to attack a human. The court disagreed. After an extensive review of prior case law, the court held that the previous harm had to be directed at humans. Harm towards other animals was not sufficient to make out a claim in scienter.

The court found that negligence does not have the same requirement as *scienter* to have a propensity to cause harm to humans; however, the defendant had met the standard of care in the circumstances by taking various precautions to keep the dogs separated.

e. *Heck v. Strathcona Park Lodge Ltd.*, 2022 BCSC 912, Stephens J.

This was an application for leave to file third party proceedings against the plaintiff's parents and a psychologist who assessed the plaintiff and was an expert witness for the plaintiff. The plaintiff was injured during a hiking excursion and the injuries included psychological injury. The third party claim alleged that, if the plaintiff has developed a somatization injury, it was caused or contributed to by the negligence of the parents and treating psychologist. Ultimately, the court allowed the third party claims to proceed subject to a determination of the merits of the limitation defence. The court found that,

while the claim against the treating psychologist and parents may be novel, it was not clear that it was bound to fail.

f. *Helgason v. Rondeau*, 2023 BCCA 339, per Fenlon J.A. (Newbury and Voith, JJ.A. concurring)

This was an appeal of a finding that the defendant, Pederson, was not negligent and provided the court of appeal with an opportunity to address the "agony of the moment" principles.

Pederson had passed the plaintiff on the right shoulder of the roadway while the plaintiff was stopped intending to turn left. The plaintiff was rear-ended by the defendant, Rondeau, who admitted liability and the plaintiff's vehicle was then pushed to the right where she struck Pederson's vehicle.

Pederson testified that he had to move on to the shoulder to go around the plaintiff because he had applied his brakes and the anti-lock brake system was activated. He realized he had no traction and that he had to make a decision quickly. He thought if he braked there was a good chance he would be able to stop without hitting the plaintiff's vehicle; however if he was unable to stop, the impact would be catastrophic. Accordingly, he made the decision in the moment to try to go around the plaintiff.

Liability was reapportioned 60% to Rondeau and 40% to Pederson.

The court of appeal determined that the trial judge's analysis of the standard of care failed to consider Pederson's obligations rising from ss. 144, 158 and 162 of the *Motor Vehicle Act* to come to a stop. Further, the trial judge aired in finding that Peterson did not breach the standard of care because it was necessitated by "exigent circumstances". The "agony of the moment" principle applies only where the situation is caused by the fault of another and only when a driver is faced with an emergency which is unanticipated.

The trial judge also erred in finding that although the plaintiff sustained injuries from colliding Pederson's vehicle that causation in fact and in law were not established. Factual causation is made out if the plaintiff's injuries would not have occurred "but for" the defendants negligence. The "but for" test applies to the case of multiple actors creating a loss, even where the actions of the tortfeasors are temporally distinct or of a different nature from the other. It is sufficient that Pederson's breach of the standard of care contributed to the plaintiff's injuries, as factual causation does not require the defendant to be the sole cause of the harm. Lastly, the judge erred in determining legal causation by requiring that the precise mechanism by which the injury occurred be reasonably foreseeable rather than the actual injuries.

g. *Jackson v. Lindsay*, 2022 BCSC 793, Verhoeven J.

This case involved an assessment of damages after the plaintiff obtained default judgment against the defendant for the defendant's failure to make discovery of documents and comply with court orders. The plaintiff was injured while riding a dirt bike on an unpaved road in rural property in Mara, B.C. owned by the defendant when he struck a metal chain that had been strung across the road. The plaintiff's injuries were significant. He had to be airlifted out and spent several months in the hospital.

h. *Karbalaeiali v. Insurance Corporation of British Columbia*, 2022 BCCA 223, per Willcock J.A. (Harris and Fenlon JJ.A. concurring)

The plaintiff brought a claim against ICBC and the Minister responsible for ICBC following a settlement of two motor vehicle accidents for difficulties he had with ICBC staff and "fake medical authorisations"

which had errors with respect to his birthday and the date range of the records. The court of appeal dismissed the appeal and the plaintiff's claims were struck as disclosing no cause of action.

i. *Langston-Bergman v. Orchard*, 2022 BCSC 762, Slade J.

The plaintiff was injured at a rock concert of the band, Boogie Monster, comprised of a guitarist and a drummer. The concert was played from the dance floor in close proximity to the attendees. At the end of his set, the guitarist lit his guitar on fire. The flammable liquid was in a water bottle next to the guitarist and he somehow stepped on it, propelling flaming liquid at the plaintiff causing burns. There was no question that the guitarist was negligent. The primary issue was whether the operator of the venue or the drummer were also negligent.

The court found that the venue operator owed a duty of care to the plaintiff as an attendee of the concert both under the *Occupiers Liability Act* and the common law. The operator had been made aware of the guitarist's intention to perform the stunt, denied permission, and suggested he do it outside after the concert. No further steps were taken to prevent the stunt from taking place, notably, there was no security for the event and no attempt to oversee the guitarist's action especially towards the end of the show. In addition, water buckets that had been set up to put out the fire remained in place.

The drummer, by contrast, bore no liability to the plaintiff. He was aware of the guitarist's intention, was aware that the operator had denied permission, and had reasonable grounds to believe that the guitarist would obey based on a previous experience.

The court did not apportion liability between the defendants.

j. *Lavery v. Community Living British Columbia*, 2022 BCSC 739, Punnett J.

This was an application to strike certain claims brought by the plaintiffs, the estate of a person with developmental disabilities who died in care, and her mother. The plaintiffs sued the care facility as well as Community Living British Columbia ("CLBC"), a statutory body responsible for the care of adult patients with developmental disabilities. CLBC was successful in striking the mother's claims on the basis that there was insufficient proximity between CLBC and the mother to establish a *prima facie* duty of care. The court found that the *Community Living Authority Act*, S.B.C. 2004, c. 60, did not give rise to a private law duty, in part, because such a duty to the patient's parents may be in conflict with its duty to the patient.

The mother also argued that the claim gave rise to a novel duty of care that related to funding decisions. The court held that policy decisions are generally protected from liability and only operational decisions may give rise to a claim, which were not pleaded in this case. Thus, the claims against CLBC that were brought by both plaintiffs were struck.

The mother also brought a claim for intentional infliction of nervous shock based on a prolonged period where her daughter's needs were not being met and that this caused her metal suffering. The court held that a claim for infliction of mental suffering must be sudden, and unexpected; thus, the mother's claim was bound to fail and was struck.

The only remaining claim was brought under the *Family Compensation Act*.

k. *Leach v. Insurance Corporation of British Columbia*, 2022 BCSC 557, Hinkson C.J.S.C.

The plaintiff was injured in a motor vehicle accident on Highway 101 between Earls Cove ferry terminal and Sechelt ferry terminal. It was raining and the roads were wet. The plaintiff was negotiating a tight curve in the highway with a suggested speed sign of 30km/hr when she crossed over the solid painted lane divider into oncoming traffic and was struck by a pickup truck. The plaintiff believed that she lost traction on the highway, not due to rain, but due to a slippery substance on the highway, likely spilled fuel from an unidentified vehicle.

The court found that there was insufficient evidence that the substance on the highway was fuel, and, even if it were fuel, the court could not infer negligence on the presence of fuel alone as there are several explanations for how the substance got there without negligence. The court further found that had the plaintiff been travelling at a safe speed, she would not have lost control of her vehicle and dismissed her claim.

l. *Liu v. Keurdian*, 2022 BCSC 1334, E. McDonald J.

Liability for a rear-end collision was found 100% against the plaintiff who was the front driver. The plaintiff insisted that he came to a reasonable stop at a crosswalk for a pedestrian crossing. The evidence of the defendant and an independent witness, which the court accepted, was that the plaintiff was in the curb lane but changed quickly into the centre lane before stopping when he saw the pedestrian in the crosswalk. The court found that the plaintiff had changed lanes a second or two before stopping, and the plaintiff's sudden lane change and stop prevented the defendant driver from having sufficient time to react.

m. *Makara v. Peter*, 2023 BCSC 1478, Gibb-Carsley J.

A defendant was found not negligent for striking a significantly impaired plaintiff pedestrian who was walking in the same direction as traffic, wearing dark clothes on a dark and rainy night and just left of the "fog line".

There was nothing about the area that would have alerted the defendant to the potential of a pedestrian on the road although the defendant was aware that pedestrians sometimes used that roadway. The defendant was driving 10 kilometres below the posted speed limit. He chose to use his low beams based on his previous experience driving in heavy rain. When the defendant saw the plaintiff he swerved but was unable to avoid striking him.

The court found the plaintiff had placed himself in an extremely dangerous situation. The court accepted engineering evidence that the use of high beams would not have provided any greater visibility of the plaintiff allowing the defendant to avoid the impact. There was no evidence that the defendant was not exercising due care or keeping a proper lookout.

n. *Moskowitz v. Detox*, 2022 ONSC 4063, Brown J.

The plaintiff brought an action in negligence against a fitness club and fitness instructor for injuries sustained by the plaintiff during a class. The action against the club was dismissed prior to the trial and the trial proceeded solely on the question of liability. The plaintiff alleged that the instructor was negligent in using an air-filled ball for the "slam ball exercise", in which a ball is lifted above the head and slammed to the ground and then caught, and for failing to provide any, or sufficient, instruction.

After hearing testimony from the parties as well as two other participants in the class and two standard of care experts, the court found that the fitness instructor met the applicable standard of care and the plaintiff was the author of her own misfortune.

o. *Orr v. Graemond Holdings Ltd.*, 2022 BCCA 156, per Willcock J.A. (Harris and DeWitt-Van Oosten, JJ.A. concurring)

This case involved a cyclist who was cycling on the sidewalk, against traffic when he was struck by a vehicle coming from a driveway onto the road. The trial judge found the driver 100% at fault for, having seen the cyclist, proceeding into the roadway and misjudging whether it was safe to enter the intersection. The trial judge concluded that the cyclist was not negligent because he believed that the driver saw him, and the driver did in fact see him.

On appeal, the court overturned the trial judge's decision finding that neither the driver nor the cyclist had the right of way since both were in contravention of the *Motor Vehicle Act*: the cyclist, for riding on the sidewalk; and the driver, for entering into the sidewalk portion before stopping completely.

The court held that the trial judge erred in law by not considering the same factor that grounded the driver's negligence with respect to the cyclist: namely, whether the cyclist was negligent in misjudging whether it is safe to enter an intersection when one does not have the right of way.

The court of appeal substituted its own apportionment of 25% against the cyclist and 75% against the driver.

p. *Raber v. Romero*, 2022 BCSC 748, Hughes J.

This was a liability-only trial for an accident between a motorcycle and a motor vehicle. Damages had been agreed by the parties. The plaintiff was riding his motorcycle in a group and attempted to pass the defendant on the right on the shoulder of the highway immediately after two highway lanes had merged into one.

Three other motorcycles in the group had passed the defendant's vehicle first. The defendant maintained his speed and course and saw the plaintiff in his mirrors attempting to pass. The plaintiff was an inexperienced motorcyclist and had his licence for less than a year. The plaintiff was seriously injured in the accident and had no memory of it. Two of the motorcyclists from his group said that they saw the defendant swerve into the plaintiff. The court rejected their evidence and preferred the evidence of the defendant and the defendant's passenger who said there was no contact between the motorcycle and his vehicle until after the plaintiff had lost control and been ejected from the motorcycle, at which time the motorcycle came back across the lanes of traffic and went underneath the trailer he was towing.

The court found that both parties were negligent, and that the plaintiff's conduct was far more blameworthy than the defendant's, whose only possible response was to slow down and move to the left-most portion of the lane. 15% liability was apportioned to the defendant and 85% against the plaintiff.

q. *Revelstoke (City) v. Gelowitz*, 2023 BCCA 139, per Fisher J.A. (Fenlon and Fitch JJ.A. concurring)

This was an appeal from the trial judgment that found the City owed the plaintiff a duty of care and failed to meet the standard by failing to warn of known hazards. The plaintiff was seriously injured when he made a shallow dive into Williamson Lake and struck an obstacle in the water. The City of Revelstoke owned an adjacent park and the lake. The land from which the plaintiff's dove was not owned by Revelstoke. The City was apportioned 35% of the liability and the plaintiff was 65% contributory negligent.

On appeal, the court held that it was incorrect for the trial judge to find that the duty of care was established in previous case law, which all related to owners and occupiers of the waterfront property in issue, whereas, in this case, Revelstoke was not the owner. The court of appeal upheld the novel duty of care found by the trial judge by applying the two-stage *Anns/Cooper* framework. There was sufficient proximity primarily because the City knew that park users often would swim or paddle across the lake and jump from the side of the lake that it did not own, knew of the risks of diving into the lake, and had placed "no diving" signs on the park foreshore, dock, and floating raft. It was also found that the floating raft, which was in the middle of the lake, facilitated access to the unowned shore.

r. *Rutt v. Meade*, 2022 NSSC 100, Gatchalian J.

The court dismissed an application to strike a third party notice against the plaintiff's soccer coach who was alleged to have pressured or allowed the plaintiff to play soccer three weeks after a motor vehicle accident in which the plaintiff sustained a concussion. The defendant alleged that the soccer coach's actions aggravated the plaintiff's concussion and caused her current and ongoing post-concussion symptoms.

The court reviewed the law regarding concurrent and joint tortfeasors including the interplay of legislation and the common law. The court held that where the damage caused is truly indivisible such that it is impossible to separate the damage caused by one tortious act with that caused by another, then liability will be joint and several and the third party claim will succeed.

The court upheld the third party notice and left it to the trial judge to make the final determination of whether the damage caused by the two tortious acts was indivisible.

s. *Saloojee v. Gibsons (Town)*, 2023 BCSC 249, Adair J.

The 17-year-old plaintiff, along with four older boys, were in a forested area of White Tower Park in Gibsons, pushing on a dead tree when a part of the tree broke off, hit the plaintiff, and severed his spine rendering him a tetraplegic. The plaintiff was ultimately unsuccessful in proving negligence against the Town of Gibsons, who owns and maintains White Tower Park.

The plaintiff argued that Gibsons was negligent for failing to post sufficient warning signs or restrict access to the forested part of the park that was not regularly maintained. Gibsons had a policy that differentiated between low to high risk areas and had a policy for hazard tree identification in high risk areas, those areas with established trails or facilities provided to the visiting public. These portions of the park had warning signs and were regularly maintained and cleared of dead trees or other obvious hazards. The portion of the park where the incident occurred was a forested area without any walking paths. It was not often frequented by visitors to the park.

In addition to finding that Gibsons' hazard tree policy was reasonable, the court found that the boys went to this portion of the park in order to engage in activities they did not want observed by others and that warning signs or attempts to restrict access would not have been effective.

t. *Sidhu v. Hiebert*, 2022 BCSC 1024, per Forth J.

The plaintiff was nine years old in the rear seat of a vehicle driven by his mother that was hit by a drunk driver. The plaintiff was catastrophically injured and rendered a quadriplegic.

There were several defendants to the action included the plaintiff's mother, the drunk driver, social host of the drunk driver, and the vehicle manufacturer, Nissan. There were also allegations of contributory negligence against the plaintiff who had, with his mother's permission, removed the chest strap portion of his seatbelt. There was no question that the improper use of the seatbelt caused or contributed to the severity of the plaintiff's injuries.

The court found that the plaintiff's mother was negligent in allowing her son to remove his seatbelt strap.

The claim against the social host was dismissed. The court found that gathering was family-oriented and a raucous party. In addition, the social host had made efforts to stop the driver from driving away from the party.

ICBC, as a third party for the breached drunk driver, attempted to rely on admissions it made in a reply to a notice to admit sent by the plaintiff, regarding liability of Nissan. Nissan was released from the action following a BC Ferries agreement and did not participate in the trial. The court held that a notice to admit is only binding on the party making the admissions. The court, nonetheless, allowed the defendants to rely on its admissions as they would have been severely prejudiced as the plaintiff only made his position known mid-trial.

Negligence was alleged against Nissan for the design of the seatbelt. There were alternatives available for children aged 6 to 16 – the, so-called "Forgotten Children" – who had grown out of booster seats but were not fully grown. Nissan had an adjustable upper anchorage ("AUA") installed in its vehicles but not "comfort guides", which were also available. The court did not find sufficient evidence that comfort guides were safer or more comfortable than an AUA. The court also found that Nissan had provided sufficient instructions on the use of the AUA and sufficient warnings in the manual.

The court found that the plaintiff was not contributorily negligent for moving his seatbelt to the wrong shoulder. Given his age and permission from his mother, it was a momentary error of judgment, but not sufficient to make out negligence.

The court apportioned 90% of the fault to the drunk driver and 10% to the plaintiff's mother.

u. *Stevens v. Sleeman*, 2023 BCSC 719, per Francis J.

There was a fatal motor vehicle accident at an intersection controlled by traffic lights, which had gone out earlier the same day. A left turning vehicle was struck by an oncoming, straight-through vehicle that did not obey the four-way stop procedure. They were not aware the lights were out until it was too late to stop. Negligence on the part of the two drivers was admitted but they contended that the RCMP dispatchers and the road maintenance contractor were also negligent in failing to respond appropriately to the light outage.

Prior to the accident, two calls had been made to RCMP dispatch advising that the lights were out. The second caller said vehicles were not following the four-way stop procedure, “tons” of vehicles were “racing” through the intersection, and an accident would occur. The dispatchers who responded to the calls did not follow the procedures of advising the responsible RCMP officers who could have assisted with traffic control at the intersection.

A driver for the road maintenance contractor went through the intersection twice prior to the accident. The driver saw the lights were out and that vehicles were obeying the four-way stop procedure. Instead of immediately calling in the outage or directing traffic, he returned to the yard and started unloading his vehicle. He was planning to call in the outage, but the accident occurred before he did. In finding fault against the road maintenance contractor, the court held that it was contractually bound to its obligations. The fact that the driver was unable to safely direct traffic on his own was a failing of the company that did not relieve it from its obligations. The court found that the safety risk to the public was sufficient to necessitate some action on its part.

The court apportioned fault 40% against the RCMP dispatchers; 25% against Emil Anderson; 25% against the straight-through driver, and 10% against the left-turning driver.

v. *Tam v. Allard*, 2023 BCCA 178, per Fenlon J.A. (DeWitt-Van Oosten and Horsman JJ.A. concurring)

At trial, the defendant successfully argued inevitable accident based on a catastrophic brake failure that resulted in a rear-end collision. The appellate argued that without expert evidence of the mechanism of failure, the judge was wrong to conclude that there was a mechanical failure and that it could not have been prevented through reasonable care of the vehicle.

The trial judge concluded that there was a catastrophic failure of both brake lines caused by corrosion and that the lines were in a difficult to access location so the corrosion would not have been discoverable with reasonable diligence.

The court of appeal upheld the trial judge’s decision. The cause of the mechanical failure was a finding of fact that the judge was able to conclude based on the available evidence. Expert evidence was not required to prove the exact mechanism of the failure. The court noted that, in some cases, expert evidence may be required, but in this case there was sufficient evidence to support the trial judge’s findings.

A. Medical Negligence

a. *Focken v. Fraser Health Authority*, 2022 BCSC 2124, Basran J.

A deceased man’s widow sued the defendants for medical negligence.

The deceased began vomiting blood at home and went to the hospital. There, doctors examined him and determined he needed a procedure, but that it could wait until the next morning. Overnight, the deceased suffered another significant bleed while still at the hospital, leading to brain damage and, ultimately, death.

The trial judge had to determine whether (a) the deceased continued to actively bleed from the time he arrived at the hospital to his eventual catastrophic bleed, and (b) the decision to perform the corrective procedure the next morning as opposed to immediately breached the standard of care.

The trial judge determined that the deceased was not continuously bleeding. The three doctors and three nurses who cared for the deceased did not observe any continuous bleeding. While the

deceased's widow and daughter testified that they observed him bleeding, the judge rejected their evidence as unreliable.

With respect to the standard of care, the trial judge determined that the physicians did not commit any breach. The doctors exercised reasonable clinical judgment. The deceased was stable when the doctors determined he did not need the procedure immediately. The treating physician reviewed all relevant information and consulted with others. The complication rate for the corrective procedure was higher when performed after-hours as opposed to in the morning. The defendant's expert opined that they met the requisite standard of care. The plaintiff's expert was of limited use because his report relied on incorrect and incomplete information about the deceased's condition.

b. *Hicks v. Belknap*, 2022 BCCA 292, per Grauer J.A. (DeWitt-Van Oosten and Marchand JJ.A. concurring)

Leona Belknap ("Belknap") sued Dr. Tracy Hicks ("Dr. Hicks") for professional negligence following hip surgery. Belknap alleged it was negligent for Dr. Hicks to have performed the operation he did, that he failed to obtain Belknap's informed consent, and that he was negligent in his post-operative care. The trial judge dismissed the first two claims but found in Belknap's favour with respect to her allegation of post-operative care. Dr. Hicks appealed that finding. Belknap, too, appealed the trial judge's conclusions that she had failed to prove Dr. Hicks' negligent post-operative care had caused or worsened her hip problems beyond November 2016 (the date she underwent a subsequent total hip replacement), and as a result dismissed her claim for costs of future care and aggravated damages.

Dr. Hicks' appeal rested on his submission that the trial judge made a palpable and overriding error in his interpretation of one of the two expert witnesses, Dr. Masri. After Belknap's surgery, she continued to experience pain, and the crux of this allegation turned on a finding of whether Dr. Hicks' "wait-and-see" approach was reasonable or if an earlier, more active intervention was required. The trial judge cited Dr. Masri's evidence as supporting the contention that Dr. Hicks should have intervened sooner, whereas Dr. Hicks' position was that Dr. Masri's evidence supported his course of action.

The court dismissed Dr. Hicks' appeal. Within the full context of Dr. Masri's evidence, there was support for the trial judge's conclusion that it suggested Dr. Hicks should have acted with more urgency in treating Belknap's post-operative pain. As a matter of fundamental principle, a trial judge is entitled to accept all, none, or only part of an expert's opinion. It is not for the court of appeal to reweigh that evidence absent palpable and overriding error. Having reviewed the evidence of both experts, the court was satisfied that no palpable error had been demonstrated. There was evidence capable of supporting the judge's conclusion.

Regarding Belknap's appeal on causation, after her corrective hip replacement surgery she continued to have back pain and a shortened right leg. The issue was whether the delay in pursuing a full hip replacement caused or exacerbated those problems. Belknap alleged that the trial judge erred in law by failing to appreciate that she only had to prove that Dr. Hicks' negligent delay was just one contributing cause, not the most probable of several contributing causes. The court of appeal dismissed this ground. The trial judge did not find that Dr. Hicks' negligence was one of several causal factors. Rather, he found that the evidence did not establish a causal link on a balance of probabilities.

Regarding Belknap's appeal on aggravated damages on the basis that the trial judge misapprehended the test for aggravated damages, the court of appeal dismissed this ground of appeal. Belknap's

submission was based on a misreading of the judge's decision. The trial judge set out the correct test. The trial judge's finding that Dr. Hicks' conduct did not rise to the level of aggravated damages was entitled to deference, and Belknap did not demonstrate any palpable and overriding error in the judge's finding.

B. Seatbelts

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

The action followed a tour bus crash with 55 passengers. The driver and company operating the bus admitted liability, and the trial concerned the liability of the bus manufacturer, the tour operator, another bus company who sub-contracted the bus charter, and the tour guide. The bus did not have seatbelts, the reasonableness of which was a major issue at trial.

Prévost manufactured the bus. The plaintiffs alleged that Prévost breached the standard of care by not installing seatbelts. The assessment of the issue was based on the state of affairs at the time the bus was manufactured, not the date of the accident. The trial judge concluded that Prévost was not negligent. It acted reasonably in its design and manufacture of the bus without seatbelts. It followed industry and regulatory standards at the time. The plaintiffs failed to show that those standards were negligent or unreasonable or that another industry standard existed in North America. Nor was Prévost negligent in not retrofitting the bus with seatbelts.

The plaintiffs also sued Prévost for using tempered instead of laminate glass for the windows. The trial judge dismissed this claim. The industry standard was to use tempered glass. The experts explained why it was the preferable choice. Nor would using laminate glass have prevented some of the plaintiffs from being ejected from the bus.

The defendants CanAm and Universal were sued for negligent contracting. CanAm contracted with Universal for the provision of a bus and driver, and Universal sub-contracted with Western for the bus and driver as they did not have one available. The trial judge concluded that these defendants were not negligent in engaging a bus operator that did not employ seatbelts because of the conclusions the judge had already reached with respect to Prévost. The trial judge also concluded that there was no negligence in failing to investigate Western's training and safety planning. Universal was entitled to rely on Western's licensing and regulatory compliance in contracting with them. Furthermore, there was no evidence that the accident was caused by driver fatigue, which was what the arguments of liability for CanAm and Universal hinged on.

Regarding the plaintiffs' allegations of duty to warn, the claim failed because they did not prove causation. The lack of seatbelts was not a hidden defect. The plaintiffs would have noticed it upon getting on the bus, and they continued with the tour anyways. Furthermore, the judge concluded that the plaintiffs would have continued with the tour even if they had received a warning.

XXI. OCCUPIERS LIABILITY

a. *Gujral v. Meat and Bread Sandwich Company Ltd.,* 2022 BCSC 917, Taylor J.

The plaintiff brought an action under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 ("OLA") against the defendants. The plaintiff slipped and fell as he was leaving a restaurant suffering a serious ankle fracture. The plaintiff sought damages in excess of $10 million and the trial occupied 22 days. The plaintiff alleged he slipped on water but failed to lead any direct evidence to support his conjecture. The plaintiff did not enter any expert evidence nor call witnesses to corroborate his account of how the fall

occurred. There was also a reasonable alternate explanation for how the fall occurred and the plaintiff was found to be lacking in credibility.

After a thorough review of the relevant case law, Justice Taylor dismissed the plaintiff's claim for not meeting the requisite burden of proof to establish that his fall was caused by a risk or hazard at the defendants' restaurant or that any such risk or hazard was unreasonable in the circumstances.

b. *Pavlovic v. Just George Cleaning and Maintenance Inc.,* 2023 BCCA 219, per Grauer J.A. (Fenlon and Griffin JJ.A concurring)

The appellant was injured when she slipped on a city sidewalk adjacent to a property owned by a strata corporation. The respondent provided snow removal to discharge the strata's obligation under a city bylaw to remove snow and ice from city sidewalks adjacent to private property by 10am everyday. The trial judge had dismissed the appellant's claim on the basis that the respondent did not owe a duty of care.

The court of appeal upheld the trial decision. The court's previous decision of *Der v.* Zhao 2021 BCCA 82 was determinative on the question of proximity. The sidewalk was owned and controlled by the city, the appellant was a passerby and not invited to the property, and the respondent was only contracted to remove snow and ice in the morning to meet the by-law requirements, not throughout the day. No duty of care existed in the circumstances.

c. *Voje v. Teck Developments Ltd.,* 2022 BCSC 503, MacNaughton J.

The plaintiff tripped at a loading bay behind a pet food store on a curb edge. At trial, the issues included whether the defendants were "occupiers" of the fall area pursuant to the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 ("OLA") and whether the plaintiff established that the fall area was unreasonably hazardous.

The court found that both defendants, the property owner and the commercial tenant, owed a duty to the plaintiff in common law. Nonetheless, the court held the area in question was not unreasonably hazardous.

In reaching her decision that the area was not unreasonably hazardous, Justice MacNaughton considered multiple factors, including that the area was in good repair without debris; the area complied with applicable by-laws and safety codes; there was a visible difference in texture and colour at the curb edge; and the loading bay was used regularly without prior complaints or incidents. Further, the plaintiff had prior experience as a delivery driver and was familiar with loading bays. He also had a toe injury on his left foot. At the time of the fall, the plaintiff was looking straight ahead rather than at the ground and he should have been more cautious about where he was walking. Justice MacNaughton concluded the cause of the accident was the plaintiff's own lack of reasonable care for his safety and his action was dismissed.

XXII. OFFERS TO SETTLE

a. *Cook v. Kang*, 2022 BCSC 1255, Riley J.

The defendants applied for costs to account for a formal offer made prior to trial. The trial judge noted, however, that the offer was a small fraction of the amount claimed and did not represent a true

compromise by the defendant. In addition, the offer was for $99,999 plus past and future Part 7 benefits. The court assumed that the value of the Part 7 benefits was the amount determined by the court for future care following trial, resulting in a total overall value of the settlement offer at $211,793.96. The defendant argued that the offer was presented in such a fashion to avoid double recovery. However, the trial judge found that an offer on these terms carries a certain degree of uncertainty as future benefits would not be known. In addition, the Justice Riley found that because he declined to deduct future Part 7 benefits, the plaintiff's eligibility for such benefits may be further challenged by ICBC and subject to additional IMEs. A costs consequence would negatively impact his resources to fund future care if necessary.

The defendant also argued that a cost consequence should flow because the plaintiff acted unreasonably or recklessly in grossly overstating the value of his case, failing to make a counter-offer, and failing to engage in settlement negotiations. The defendant submitted that the plaintiff acted unreasonably in the course of litigation. The trial judge held that failing to engage in settlement negotiations was not a factor weighing against the plaintiff on costs and to the extent that a party's conduct warrants a costs award, it should be dealt with under *Rule 14-1(14)* for an improper act or omission. The plaintiff did not unreasonably pursue his claims for other heads of damage and he was awarded his costs for the three successful actions.

b. *Dhillon v. Labelle*, 2023 BCSC 32, Verhoeven J.

After a 14-day trial, a jury awarded the plaintiff $5,100 for non-pecuniary damages and $2,415.02 for special damages. The defendant sought costs on account of four formal offers, all of which substantially exceeded the award at trial. The trial judge held that the plaintiff did not unreasonably refuse the first two offers as she had not received any of her expert reports that she ultimately relied upon at trial and the defendant had not served any expert reports. The lack of expert medical and other expert evidence made it difficult and practically impossible for her to evaluate her claims. The third and forth offers were made shortly before trial. At that time, the plaintiff had a reasonable basis for believing that a jury would accept her injury claims as arising from the accident. Her expert evidence included a diagnosis of a permanent partial disability.

Verhoeven J. repeated the caution that jury awards are notoriously difficult to predict, particularly non-pecuniary damage awards because they are given no guidance in respect of them. While the defence argued that the plaintiff should have known that surveillance video would be devastating to her case, the trial judge found that the footage was unimpressive and that the plaintiff would have no reason to think that it would be devastating to her claims.

The court concluded that the offer was at the low end of a possible outcome and that the plaintiff should have given it serious consideration. The plaintiff took an aggressive position at trial on all heads of damage, making large claims with a precarious foundation. Credibility was in issue. In light of the fact that it was the defendant's jury notice, and the defendant also took an aggressive position at trial, the defendant was not awarded costs. The plaintiff was awarded costs up to the seven day point following service of the last formal offer and nothing thereafter.

c. *Fryer v. Village of Nakusp,* 2023 BCSC 478, Morellato J.

The plaintiff suffered serious injuries in a pedestrian- motor vehicle accident and was awarded significant damages. The plaintiff applied for double costs. Morellato J. held that a key factor in this case was the proposition that the double costs rule should only be a penalty for unreasonable litigation and not simply a penalty for an inaccurate prediction or assessment of the outcome. In this case, the plaintiff's first formal offer had expired six months before trial and there was some ambiguity as to

whether it was open for acceptance at any time after that. The plaintiff's second formal offer was made on the eve of trial with about half a business day to consider it. The issues in the case were challenging with a difficult factual matrix that did not suggest a clear outcome prior to trial. The court concluded that it did not provide a reasonable opportunity to consider the offer or obtain the necessary instruction.

d. *Funk v. McLurg,* 2023 BCSC 656, Hinkson C.J.S.C.

The plaintiff made a series of formal offers, including one made during a hiatus in the trial in an amount higher than the last offer made pre-trial. The defendant also made a number of offers. Hinkson C.J.S.C. noted that while there may, and often can be reasons why multiple offers can and should be made, parties who engage in the creation of a moving target for their opponents must accept that such offers may affect their entitlement to costs. The serial offers in this case suggested that neither party was able to accurately assess the value of the plaintiff' claim. To penalize the defendant when the plaintiff altered her offer to settle to a far higher figure during the trial would improperly ignore the requirements that the offer was one that ought reasonably to have been accepted. The pre-trial offer in an amount lower than the judgment was made three days before trial and not open for acceptance after the trial began. The plaintiff was denied double costs in the circumstances.

e. *Gatti v. Savin*, 2022 BCSC 1306, Hardwick J.

The plaintiff applied for double costs on account of a formal offer made prior to trial in an amount less than the judgement but only open for acceptance for two days immediately before trial. Hardwick J. refused to consider the plaintiff's mediation brief attached to an affidavit on the basis that it was made without prejudice and covered by settlement privilege. The plaintiff's offer was made when all parties were aware of the evidence to be tendered at trial. The timeline for acceptance was tight but not unreasonable given that the defendant was aware of the evidence. The defendant did not file submissions on costs so did not bring any factor to the attention of the court to demonstrate that the refusal of the offer was not unreasonable or to demonstrate that any other factors were at play that would make an award of double costs unjust.

f. *Gray v. Lanz*, 2023 BCSC 331, Gomery J.

The defendant challenged the plaintiff's application for double courts, in part, on the basis that it was not served on the defendant in accordance with *Rules 4-2(2).* It was emailed directly to counsel rather than the email address for service stated on the amended response to civil claim. After citing authorities requiring strict compliance of service requirements, Gomery J. held that email service is ineffective if the email is sent to an email address that is not the email address for service. The offer did not qualify as a formal offer. In the event that he was wrong in this conclusion, he further held that the offer was not one that the defendant should reasonably to have accepted because it was effective when the parties were not ready for trial and it was not ripe for consideration.

g. *Halvorson v. West*, 2022 BCSC 457, Blok J.

In considering the factors in *Rule 9-1(6)* in determining a plaintiff's entitlement to double costs, Blok J. questioned the utility of the factor of the relative financial circumstances of the parties in personal injury cases where defendants are insured as there will be a vast disparity in financial circumstances in

almost every case. The issue is one of whether the insurer used their financial strength in an untoward manner.

The plaintiff argued that the defendants' strategy of advancing a case largely on cross-examination only was a risky strategy that left them vulnerable to a substantial award against them if the strategy fell short. The court declined to consider this "high risk" approach as an additional factor in favour of double costs. In the result, the plaintiff was awarded double costs on the basis that her offer was made when the defendants had full information to assess the strength of the plaintiff's claim and plenty of time to perform that assessment. The variables in play were not so extreme that a reasonably reliable assessment could not be made.

h. *Henry v. Fontaine*, 2023 BCSC 558, G.C. Weatherill J.

The plaintiff applied for double costs based on a formal offer made five days before trial. The offer was open until 12:00 Pacific Standard time on the Friday before the trial was set to commence. Weatherill J. noted that the time did not exist as it was Pacific Daylight Saving Time at that point but no consequence flowed from that error. A significant factor in this case was that the loss of earning capacity was the largest component of the claim and the plaintiff's case suffered from many evidentiary difficulties on that issue. The plaintiff's evidence was vague and the evidence proffered on his behalf was speculative, amounting to bald assertions and uncorroborated generalities. Weatherill J. found that, given the paucity of objective evidence as to the work the plaintiff missed, it was not unreasonable for the defendant to reject the offer and test the issue at trial.

i. *Leach v. Insurance Corporation of British Columbia*, 2022 BCSC 2243, Hinkson C.J.S.C.

The plaintiff's claim against ICBC as nominal defendant for a hit and run accident was dismissed on the basis that she failed to establish negligence on the part of the unidentified driver. However, damages were assessed at $895,436.45. ICBC made a formal offer of $10,000 plus disbursements and sought double costs for the plaintiff's refusal to accept it once the expert engineering evidence was in hand. The court characterized the offer as a nuisance one, given with no rationale. In the result, the court found that it was not unreasonable for the plaintiff to have rejected the offer. She was seriously injured in the accident, she obtained lay and expert evidence that supported her theory of negligence, and the liability issue was not one of doubtful merit. On the issue of relative financial circumstances, the trial judge noted that the plaintiff was not working and had no real savings. There was a clear financial advantage to ICBC over the plaintiff which was mitigated to some extent by an insurance policy of $100,000 taken out by the plaintiff to provide her with financial protection for costs and disbursements. Notwithstanding this insurance, the trial judge found that this factor favoured her in denying the defendant double costs. The defendant was awarded costs, but not double costs.

j. *McMahon v. Sovdat*, 2023 BCSC 919, Marzari J.

The defendant sought costs following a jury verdict awarding the plaintiff an amount 18% less than the defendant's formal offer. The plaintiff sought damages for chronic pain, injuries requiring multiple surgeries and new and aggravated serious psychological injuries. The trial judge noted that the defendant's offer was a reasonable possible outcome and represented a compromise of the defendant's position. The court commented that it "appreciates it when serious offers are made that reflect a compromise of the defendant's position." The trial judge also found that the differential between the jury award and the offer was sufficient to merit a consideration of cost consequences to the plaintiff. However, she found that this factor was offset by the unpredictability of jury awards in general and the

unpredictably low non-pecuniary award in particular in this case. The jury awarded $50,000 non-pecuniary damages and the trial judge held that this was not a case where the plaintiff ought reasonably to have anticipated the extent to which her evidence would be rejected. In awarding the plaintiff costs of the entire action, the trial judge held that since the defendant opted for the jury and ultimately benefited from the lack of guidance that juries receive with respect to non-pecuniary damages, it was unnecessary to provide a further consequence to the plaintiff for not having accepted the offer.

k. *Sheoran v. (British Columbia) Interior Health*, 2022 BCSC 877, Wilson J.

The plaintiff, a psychiatrist at the Penticton Regional Hospital, brought an action against the Interior Health Authority for an assault by an involuntary patient in the psychiatric unit. The action was dismissed and the defendant sought double costs.

The defendant's offer was made shortly before trial in an amount that was a small fraction of even the defendant's position on quantum at trial. It was not unreasonable for the plaintiff to have rejected the offer. There was no improper conduct by the defendant in mischaracterizing evidence or withholding key documents as suggested by the plaintiff. However, double costs were not awarded as the trial judge found that it was not unreasonable for the plaintiff to have proceeded to trial where it was not plain and obvious that the liability issue would fail and the amount of the offer was low.

Also of interest is the plaintiff's position that despite the dismissal, he ought to be awarded costs of a specific issue, being the assessment of damages, on which issue he was successful. The court rejected this argument, finding that there is no authority for this position and that assessment of damages is common even where a matter is dismissed on a liability issue.

XXIII. PART 7 ISSUES INCLUDING DEDUCTIONS UNDER S. 83 OF THE *INSURANCE (VEHICLE) ACT*

a. *Amer v. Geoghegan*, 2023 BCSC 125, Warren J.

Following trial awarding damages, the defendant sought deductions under s. 83 of the *Insurance (Vehicle) Act* for benefits to which the plaintiff "would have been entitled" but for the fact that he let his insurance policy lapse. Under s. 96(b) of the *Regulation*, ICBC is not liable to pay Part 7 benefits if the injured is the occupant of a vehicle that could be, but was not, licensed unless the occupant had reasonable ground to believe that the vehicle was licensed. Pursuant to ss. 83(4) and (5) of the *Act*, benefits "to which the person...is or would have been entitled" must be taken into account.

Warren J. accepted that the plaintiff did not intentionally allow his insurance to lapse and that he did not learn of that fact until after the accident. She also accepted that he did not intentionally allow his vehicle to be driven while not insured and that his failure to renew the policy was inadvertent. However, the evidence failed to establish that he had reasonable grounds to believe that his vehicle was insured. His experience of living the US where another insurer provided a grace period for renewal was not a reasonable basis for thinking that ICBC would do the same. Accordingly, ICBC's liability to provide Part 7 benefit was excluded by s. 96(b) of the *Regulation.*

On the issue of whether benefits were to be deducted under s. 83, Warren J. held that they should not on the basis that the plaintiff was never entitled to them. The case was distinguishable from those cases where a plaintiff lost entitlement or where benefits were forfeited. The loss occurred at a time when he

had no eligibility for Part 7 benefits. In this case where the failure to renew was inadvertent, a further deduction of benefits which will not be paid under Part 7 was punitive.

b. *Blackburn v. Lattimore,* 2022 BCSC 719, Wilkinson J.

The defendants sought to deduct over $400,000 from the trial award related to cost of future care, future loss of earning capacity, and loss of housekeeping capacity.

The plaintiff objected to deductions for the homemaking benefits under Part 7, submitting that it was not comparable to the housekeeping capacity award. Justice Wilkinson reviewed the relevant portions of the *Insurance Vehicle Regulation* and determined it appropriate to deduct the full amount of homemaking benefits available.

The plaintiff also objected to deductions for the total disability benefit from the future loss of earnings capacity award as she was not found to be totally disabled at trial. Justice Wilkinson acknowledged she found at trial that there was a "possibility" the plaintiff would return to work. In the result, Wilkinson J. did not deduct the amount of disability benefit entirely, but rather reduced it by "a reasonable contingency of 25%".

c. *Gill v. ICBC,* 2022 BCCRT 1338, A. Ritchie, Vice Chair

The applicant requested a decision about their entitlement to medical benefits. The applicant had received some treatment funding but sought an additional $434 in reimbursement. The applicant did not provide any evidence or submissions in support of their claim beyond the initial Dispute Notice. Section 88.01 of the *Insurance (Vehicle) Regulation* requires an insured to submit receipts for expenses within 60 days of incurring them, or ICBC is not required to compensate the insured for the expense. The applicant had failed to provide any medical report or evidence that they required further treatments and there were no receipts in evidence. The applicant has the responsibility of proving their claim for entitlement to Part 7 benefits and they failed to do so.

d. *Holman v. Leung,* 2022 BCSC 1047, Veenstra J.

This hearing was to settle the wording of an order following a judgment for applicable s. 83 deductions. In the reasons for judgment regarding s. 83 deductions (indexed at 2021 BCSC 2328) the court directed that ICBC's 'irrevocable, unequivocal and unconditional' commitment to pay these benefits be recited in the formal order. At the hearing, the defendants effectively requested Justice Veenstra to reconsider this direction on the basis that the inclusion of such a provision is contrary to established practice and binding Court of Appeal authority. Veenstra J. thoroughly reviewed the applicable case law and concluded that his direction was consistent with established practice in comparable areas (i.e. interlocutory injunctions). Justice Veenstra did not accept the plaintiff's proposed wording for the order and instead provided an example of the appropriate wording to use.

e. *McMahon v. Sovdat,* 2023 BCSC 919, Marzari J.

The defendant sought a deduction of Part 7 benefits of approximately $65,000 from a jury's award for future cost of care. The plaintiff disputed any deduction on the basis that the future care award was not broken down by type of care and the jury was specifically instructed that they did not have to be unanimous on their breakdown for this head of damages, only the total award.

Justice Mazari agreed the nature of the jury award presented challenges to an assessment of deductions, but that she was still required to estimate the amounts from the evidence at trial, submissions of counsel to the jury and agreements by counsel. The strongest basis for consideration is

the parties' own submissions and concessions as to what the plaintiff was entitled to, with any ambiguity resolved in favour of the plaintiff. In the result, the plaintiff's award for future costs of care was reduced by $50,000.

f. *Oloumi v. ICBC,* 2022 BCCRT 1342, E. Regehr, Tribunal Member

The applicant claimed compensation for delay in receiving accident benefits. The applicant's position was that (1) ICBC should have proactively helped him make a claim for benefits sooner and (2) after he made a claim, ICBC should have provided housekeeping and counselling benefits faster.

The tribunal found the applicant's first allegation relates to ICBC's obligation under s.129 of the *Insurance (Vehicle) Act* to "assist an individual with making a claim for benefits" and is not a claim about ICBC's determination of entitlement to benefits. Therefore, it falls outside CRT's accident claims jurisdiction.

The tribunal agreed with ICBC that the second allegation about delay is essentially a bad faith claim. Mr. Regehr commented that there might be circumstances in which the CRT could award damages against ICBC for breaching its obligation to provide accident benefits but the amount sought for damages ($100,000) brought the matter outside the CRT's monetary limit of $5,000.

g. *Park v. Shepheard,* 2022 BCSC 2270, Branch J.

The defendant appealed a decision from Master Schwartz settling the trial order. The defendant asserted the Master erred in entering the order before the s. 83 deductions had been determined, as the deductions should be reflected in the same order as the outcome of the trial. The plaintiff took the position that there should be two separate orders, one for the trial and a subsequent one for addressing s.83 deductions.

Justice Branch referred to the comments of Justice Southin in *Reilly v. Lynn*, 2003 BCCA 49 and *Verlann v. Von Deichmann* 2006 BCCA 389 and held that a single order is more appropriate. Justice Branch addressed two practical concerns by noting that (1) if the conduct of any appeal will be unduly delayed by the need to determine the s. 83 deduction, the court properly retains a discretion to enter an initial order that reflects the trial outcome, which order should then expressly acknowledge any pending s.83 determination; and (2) trial judges should consider establishing a fixed timeline for the presentation of the defendant's s. 83 arguments in judgements.

h. *Singh v. ICBC,* 2022 BCCRT 934, A. Ritchie, Vice Chair

This dispute concerned entitlement to income replacement benefits. The applicant sought payment of benefits based on projected earnings, but the tribunal disagreed. The *Insurance (Vehicle) Act* requires ICBC to calculate and determine income replacement benefit in accordance with the regulations. In the applicable regulations there is no provision for the applicant to have his benefit calculated based on future expected income in the circumstances. The applicant's claim was dismissed.

i. *Smith v. Law,* 2022 BCSC 840, Lyster J.

The defendants sought to deduct approximately $46,000 for Part 7 benefits from the cost of future care award. The plaintiff opposed the application on the basis that there was uncertainty about her

entitlement to the benefits and that certain discretionary items were not likely to promote rehabilitation.

Causation was a significant issue at trial, but Justice Lyster found the affidavit submitted from ICBC was sufficient to establish that ICBC accepted the court's findings on causation and removed any uncertainty regarding entitlement to benefits.

With respect to the plaintiff's position that certain discretionary items are not likely to promote rehabilitation, Lyster J. referenced *Skinner v. Dhillon* 2021 BCSC 1992 and was similarly persuaded that the expenses "are 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". The full amount sought was deducted.

j. *Van't Haaf v. ICBC,* 2022 BCCRT 535, K. Gardner, Tribunal Member

The issue in dispute was whether COVID-19 exceptions could apply to allow the applicant to bring his claim against ICBC despite having filed it outside the applicable 2-year limitation period. The Ministerial Orders under the *Emergency Program Act* suspended the mandatory limitation periods for court actions; however, for tribunals, such as the CRT, the order was permissive, stating the tribunal *may* waive, extend, or suspend a mandatory time period.

The tribunal generally requires evidence that the COVID-19 pandemic itself contributed to an applicant filing their dispute after the applicable limitation period before waiving or extending the mandatory limitation period. In this case, the applicant did not explain the delay and admitted to filing another dispute with the CRT related to the same matters at issue here within the applicable time period. The applicant's claim was dismissed.

k. *Watson v. Fatin,* 2023 BCCA 82, Saunders J.A. (Fitch and Marchand JJ.A concurring)

The defendants appealed the deductions made for Part 7 benefits from the cost of future care award. The trial judge had reduced the amount of the deductions by 20%, stating that it represented a contingency reduction. The court of appeal held that the contingency reduction was fatally speculative, as there was no evidence of a risk that the plaintiff would not receive the benefits to which she was entitled. For a discount to be applied there must be some connection to the evidence plausibly supporting the view that there is a realistic risk that the insured will not be fully compensated for future care.

XXIV. PRACTICE

a. *Brind-Boronkay v. Amann*, 2023 BCSC 1220, Master Nielsen

The defendant applied for an adjournment of a trial set for July 2024, pending a determination by the CRT as to whether or not the plaintiff's injury met the definition of "minor injury". The plaintiff conceded that the action was required to be stayed but opposed the adjournment on the basis that an adjournment could result in a further two-year delay.

Master Nielsen dismissed the application on the basis that it was likely the CRT would have a decision within approximately eight months, leaving seven months to prepare for trial. Accordingly it was premature to make a ruling regarding whether the parties could be adequately prepared for the scheduled trial date.

b. *Cheng v. Chan*, 2023 BCCA 118, per Griffin J.A. (Willcock and DeWitt-Van Oosten JJ. A. concurring)

The plaintiff appealed terms of an order made at a TMC adjourning the trial preventing the plaintiff from resetting the trial until the court was satisfied that sufficient documentation had been produced demonstrating the source of certain bank deposits. The source of the bank documents was a central issue in the litigation. The appellant argued that the order could have only been made after a proper application with supporting affidavits pursuant to *Rule 12-2(11*) and that the judge had erred in making the order on his own motion.

The court noted that considerable deference is given to a discretionary order, particularly where the order is made in a TMC. However, the appeal was allowed because the additional terms of the order were made on the judge's own motion, without notice of application or affidavit evidence. The facts were in dispute regarding the ability to produce the documents and the matter could not be determined without affidavit evidence. Therefore, it was outside the scope of the judge's discretion pursuant to *Rule 12-2(11)*. Further, the order raised problematic questions regarding the meaning and enforceability of the term requiring a party to prove a fact in issue to the satisfaction of the court before a trial date could be set.

c. *Cox v. Swartz Estate*, 2022 BCSC 1494, per Armstrong J.

This was a claim by a plaintiff who was a passenger in a vehicle involved in a single vehicle accident in which the driver was killed. The plaintiff failed to call any evidence at trial concerning the liability issue or the owner's role (who was a passenger in the vehicle at the time of the accident). After the close of both parties' cases, plaintiff's counsel applied to reopen his case to call viva voce evidence from the owner.

Plaintiff's counsel had made a serious error in assuming that liability had been admitted, particularly after indicating in their opening that evidence would be called on the issue of liability. Plaintiff's counsel was intending to simply cross examine the owner or the defence toxicologist rather than calling them as part of the plaintiff's claim case. The court found that plaintiff's counsel had not strategically elected to abandon the chance to call evidence on liability as that created a gaping hole in his case. His error occurred as a result of a misapprehension about an agreement on liability. The court found that the proposed evidence did not involve revisiting any evidence that had been presented and that permitting the plaintiff to reopen the case was not prejudicial. The issue was whether a miscarriage of justice would probably occur if the plaintiff did not succeed on the application. The application failed. The proposed evidence would not establish any negligence on the part of the driver as the owner could not say how the accident happened and her memory of the driver's exclamation immediately before the accident suggested other plausible inferences for the cause of the accident.

d. *Creamore v. Parilla,* 2022 BCSC 2402, Warren, J.

During a trial management conference, as a result of concerns about the trial estimate, the parties agreed to pare down their witness lists. An order was made that each party provide the other with a list of witnesses to be called and will-say statements for each of the non-party lay witnesses two weeks before the commencement of trial. The parties were also ordered to exchange draft trial schedules by certain dates.

The plaintiff complied with the TMC orders. The defence did not provide either their final witness list, will-say statements or the draft trial schedule. Four days before trial, the defence provided an "updated list of non-party lay witnesses that they may wish to call at trial and each witness' respective will-say statements". The list was not pared down but instead included the 16 lay witnesses previously identified as well as further potential witnesses generically described. The will-say statements were not specific and amounted to list of topics that applied to all of the witnesses. Plaintiff's counsel responded with their objection to the defence calling any of the witnesses.

Plaintiff's counsel raised the issues regarding the defence witnesses on the first day of trial. Defence counsel was ordered to provide a trial schedule that identified their actual witnesses by 10:00 the next morning. The next day, a list was provided identifying two witnesses. Plaintiff's counsel asked for proper will-say statements for the two witnesses. Will-say statements were not provided and instead phone numbers for five witnesses were provided, without any explanation. The five witnesses were identified by the defence in their original witness list.

The court found that the defence had not offered any reasonable explanation for failing to comply with the original TMC order. Further, defence counsel was not able to say what the witnesses' specific evidence would be. The court found that the plaintiff would be prejudiced if the defence was permitted to call three of the witnesses. Plaintiff's counsel had not had the opportunity to interview them and then secure evidence that might neutralize any damaging evidence they might give. It was not reasonable to expect counsel to conduct a proper investigation in the middle of a trial by proposing that they interview the witnesses at that point. Further, this was not a situation where the potential prejudice to the plaintiff could be easily remedied by permitting her to reopen her case. If the witnesses had damaging evidence, she would likely have to call other witnesses, which would require preparation and potentially lead to further request for documents from ICBC and ultimately an adjournment of the trial. The plaintiff's objection to the three witnesses was sustained.

Creamore was referenced in *685946 B.C. Ltd v. Nijjar*, 2023 BCSC 1037. In *Creamore*, the defendant, at times self-represented, failed to comply with CPC and TMC orders to provide witness lists and proper will-say statements. He was allowed to call three of his proposed 22 witnesses pursuant to an order made during the course of trial that included he provide fulsome will-say statements for the three witnesses and permitting the plaintiff to reopen its case to reply to this evidence, if necessary.

e. *Dhingra v. Hayer*, 2022 BCSC 2042, Master Nielsen

The plaintiff sought an order pursuant to *Rule 7-5* to compel the two adult children of the defendant to attend a pretrial examination as witnesses to the subject car accident. The two witnesses failed to respond to efforts by the plaintiff's investigator to interview them. After they were served with the application, counsel for the defendant contacted counsel for the plaintiff regarding the application. Counsel for the defendant then provided copies of signed and dated witness statements obtained by an investigator retained by the defence. The statements from the two witnesses were virtually identical.

The court found that the two witnesses had not been responsive to the plaintiff's investigator and the plaintiff had not had any opportunity to ask them questions. Since the defendant was the mother of the two witnesses, the court accepted that it was logical that she had discussed the circumstances of the accident with them. The court noted the unusual circumstance being that there was no arm's length relationship between the witnesses and the defendant and so the provision of the written statements was not considered a response in writing. The order sought was made.

f. *Dhingra v. Kang*, 2023 BCSC 708, Ahmad, J.

The description in a witness list to "Allied Insurance Services Employer" does not comply with the requirement to identify a witness. In this case, the defendant was granted leave to call a witness not properly disclosed but the evidence was limited two specific issues and the defendant was required to provide a will-say statement.

g. *Drennan v. Smith*, 2022 BCCA 86, per DeWitt-Van Oosten, J.A. (Goepel and Dickson, JJ.A. concurring)

This was an appeal from an order dismissing an action in trespass and unjust enrichment for the want of prosecution. The appeal was allowed, and the decision is of interest because of the following comments by the court about delay in civil proceedings:

> [60] However, in my view, the judge's concern about the time it was taking for this action to reach a trial was not unwarranted. The case involves relatively simple claims. Almost five years had passed between the filing of the NOCC and the hearing of the application for dismissal. The anticipated trial dates were another 18 months away. In submissions before this Court, it was suggested that a delay of five years is not unusual in civil actions; it is not uncommon for parties to move at the pace seen here; and that to dismiss an action for want of prosecution after only five years would be extraordinary.
>
> [61] If that is an accurate depiction of civil litigation practice in British Columbia, it may be time to revisit the legal test for dismissal. In particular, this Court may wish to reconsider the requirement for a likelihood of serious prejudice. The object of the *Supreme Court Civil Rules* is "to secure the just, speedy and inexpensive determination of every proceeding on its merits" (R. 1-3). Consistent with that object, reformulating the test for dismissal may incentivize parties to conduct themselves with increased dispatch in advancing and defending their claims. We cannot do that here. We were not asked to reconsider the legal standard and doing so would require a five-member division.
>
> [62] In *R. v. Jordan*, 2016 SCC 27, a majority of the Supreme Court ruled that the absence of prejudice can no longer be used to justify delay in criminal proceedings. The majority emphasized that "[t]imely justice is one of the hallmarks of a free and democratic society" (at para. 1). Extended court delays "undermine public confidence in the [justice] system" (at para. 26), and Canadians "rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner" (at para. 27). While those comments were made in the criminal law context, where timely justice takes on "special significance" (at para. 1), some of the underlying policy concerns, contextually informed, also resonate in the civil law realm. See, for example, the discussion in *The Workers Compensation Board v. Ali*, 2020 MBCA 122 at paras. 84–87.
>
> [63] This is a matter for another day, but, in my view, the case before us provides a good example of why it may be worthy of consideration.

h. *Hu v. Lee*, 2023 BCSC 794, Forth, J.

This case contains a helpful summary of the case law applicable to a recusal application at paragraphs 11-18.

i. *Law Society of British Columbia v. Harding*, 2022 BCCA 229, per Griffin J.A. (Frankel and Willcock JJ. A. concurring)

This case is of interest because it was the appeal of a finding of professional misconduct of a lawyer arising out of statements he made in court in his closing submissions to a jury that resulted in a mistrial and subsequent statements made to a journalist. The appeal was allowed, and the matter was remitted back for a rehearing on the basis that the Law Society had failed to consider the full context of the appellant's in court statements and whether they were made in good faith and with a reasonable basis. The Law Society had also erred in its approach to the appellant's statements to the press and it failed to consider *Charter* values of freedom of expression.

j. *MacKinnon v. Swanson*, 2022 BCSC 1821, Kent J.

At paragraph 75 of this case, Justice Kent was critical of the defence's boilerplate pleading of failure to mitigate noting that a pleading must include the particulars of the allegations of the plaintiff's failure to mitigate.

k. *Olsen v. Orca Sand & Gravel Ltd.,* 2022 BCSC 1959, Master Krentz

This was an application by the defendants to change the venue of the trial from Chilliwack to Campbell River. The judgment has a helpful summary of the relevant law and factors to be considered.

Master Krentz determined that the significant factors for consideration on this application were:

> 1. The change of the venue would result in a delay of the trial because counsel for the plaintiff was not available for the alternative dates in Campbell River and may not be available until November 2023. Whereas both counsel were available for the current Chilliwack trial date.
>
> 2. Although it would be more convenient for the witnesses to travel to Campbell River, that convenience was outweighed by the additional costs to have counsel to travel to Campbell River.
>
> 3. It is expensive and time consuming for counsel to travel to Campbell River, whether by plane or car.

The application was dismissed. The plaintiff has the right to control the place of trial and the defendants failed to discharge their burden of proving that serious prejudice would arise if the venue were not changed.

l. *Pannu v. Sandhu*, 2022 BCSC 1585, Master Bilawich

The defendant, Grewal, sought to withdraw admissions made in responses to civil claims filed by ICBC defence counsel in three separate actions arising out of a motor vehicle accident involving a vehicle allegedly owned by Grewal and driven by Sandhu. The responses included admissions by both defendants that Grewal was the owner or co-owner of the vehicle. Grewal says the admission was made in error and without his knowledge and instruction.

Grewal, a Washington resident, was the initial owner of the vehicle. It was his evidence that he gifted the vehicle to Sandhu more than three years prior to the accident. Grewal also alleged that he requested his insurer to remove Sandu and the vehicle from his coverage.

It was in the interest of justice that the admission be withdrawn. It was made as a result of oversight before Grewal was aware that there was an action commenced against him. The withdrawal of the admission would not unduly prejudice the plaintiffs as any memory issues would likely affect the owner, who had the onus of proof. Although the delay in the application had not been fully explained by defence counsel, the delay was countered by the plaintiffs' delay in failing to set the matter for trial or discovery. A triable issue was established, and it was in the interest of justice that the issue be determined on the merits.

The case also contains a discussion of the cases relating to the vicarious liability of an owner of a motor vehicle pursuant to s. 86(1) of the *Motor Vehicle Act* (which refers to "owner" not "registered owner").

m. *Serginson v. Cook*, 2022 BCSC 1125, Jenkins J.

The plaintiff settled her claim arising from two motor vehicle accidents. She sought an order that her lawyers be permitted to release the settlement funds held in their trust account, by agreement, pending a resolution of claims being advanced by the plaintiffs' two children, who were also injured in the second accident. The value of the two children's outstanding claims was unknown. It was a term of the settlement agreement that if there was insufficient insurance coverage relating to the second accident, the plaintiff would reallocate any portion of her settlement from the second accident that may be necessary to satisfy her children's claims.

The defendant in the second motor vehicle accident and ICBC opposed any payment out of the settlement funds until the children's claims were resolved. The court, exercising its *parens patriae jurisdiction*, allowed an advance of the funds upon the provision of adequate security as the fairest resolution.

n. *Tol v. Whitney*, 2023 BCSC 9, Master Bouck

This was an application by the defendant for an adjournment of a trial and to have the action tried at the same time as an action relating to a subsequent motor vehicle accident. Plaintiff's counsel unilaterally set the trial date after being advised by defence counsel that she was not available for the proposed date. Plaintiff's counsel unilaterally set the date because defence counsel did not provide corroboration for her unavailability. Thereafter, defence counsel sought cooperation from plaintiff's counsel to set a CPC to address the trial date. Plaintiff's counsel then offered to reschedule the trial for June 2023 on the condition that the defendant pay cost thrown away for the filing of the notice of trial. Defence counsel was not available for the proposed June 2023 trial date. A CPC proceeded but the issue of the trial date was not resolved, and the issue proceeded to an application.

Master Bouck was critical of the applicant's evidence because it consisted of correspondence and documents exhibited to a legal assistant's affidavit. Although this type of evidence is frowned upon by the court, Master Bouck found the evidence was not "fatally flawed" such that a proper application could not be had. Master Bouck was also critical of the content of the correspondence sent by plaintiff's counsel and to his assertion that defence counsel had "lied to the court".

Starting at paragraph 21, Master Bouck provides a helpful summary of the legal framework to be applied on an adjournment application. The application was granted because: there was no evidence that the applicant had misused the court process or delayed the proceeding; the adjournment was necessary so that the defendant's chosen counsel could represent them at trial; the application had been made in a timely manner; plaintiff's council was aware of the applicant's position even before the notice of trial was filed; and, the defence would be prejudiced by the loss of her chosen counsel.

Although the usual order for this type of application would be costs in the cause, Master Bouck ordered that the defendant be entitled to costs of the application in any event of the cause due to plaintiff counsel's lack of civility with respect to the setting of trial dates.

XXV. RELEASES

A. BC Ferries Issues

a. *Ridley Terminals Inc. v. Sandvik Canada Inc.*, 2023 BCSC 420, Master Robertson

This application engaged the court's consideration of the effect of a *BC Ferries* settlement on the right of a party to seek apportionment of liability by way of third party proceedings against a settling co-defendant when no claims of contribution or indemnity are being sought. The action arose out of the design and construction of stackers and reclaimers used to stack and store bulk containers for marine transport.

Two defendants in the action applied for leave to file third party notices against another defendant, Ausenco. Prior to the applications, the plaintiff settled with Ausenco, filed a discontinuance in respect of Ausenco, and amended its notice of civil claim to insert a BC Ferries Clause which confirmed that the plaintiff waived its right to recover any portion of its loss that may be attributable to Ausenco.

Ausenco opposed the application on the basis that it was no longer a necessary party to the proceeding, given the plaintiff's wavier of right to recover any portion of its loss attributable to it. There was no longer a claim to be made by the defendants for contribution and indemnity; the third party claim would be for declaratory relief of apportionment of liability only. Ausenco argued that the court could still apportion liability against it and compel its involvement as a non-party to the extent it is necessary for document production or witness evidence.

Master Robertson agreed that to apportion liability, it was not necessary that Ausenco be a party. The issue distilled down to whether there was prejudice or merely inconvenience to Ausenco being a third party and whether there would be a greater injustice by not having them added for that purpose. In this case, of the defendant applicants had a contractual relationship with Ausenco such that it would have first hand knowledge as to the involvement of Ausenco in the project sufficient to enable them to make the necessary inquiries and have full benefit of the *Rules* in respect of non party disclosure. Master Roberston held that the applicants failed to establish that there would be greater injustice and inconvenience to them if Ausenco was not added as a third party and the applications were dismissed.

b. *Sidhu v. Hiebert*, 2023 BCSC 436, Forth J.

In this motor vehicle action, Nissan was sued for its role in the design, manufacture, distribution, and sale of the Nissan vehicle in which the plaintiff was a passenger. Prior to trial, Nissan entered into a BC Ferries settlement agreement with the plaintiff. Forth J. had granted a sealing order on the amount of the settlement paid by Nissan, holding that there is an overriding interest in the financial privacy of the

settlement that is not overcome by the right of public access to this information. This was particularly so since she ultimately found that Nissan was not at fault.

Following trial and an award of significant damages, the non settling defendants applied for an order for the unredacted settlement agreement, disclosing the amount of the settlement.

The plaintiff was rendered a ventilator-dependent quadriplegic as a result of the accident and received government support for independent living and outreach programs. The deductibility of these amounts and ongoing entitlements were deferred until after the quantum judgment was rendered and outstanding at the time of this application. Forth J. held that there was no longer any compelling policy reason to maintain privilege over the settlement amount and ordered production in an unredacted form.

In addition, Forth J. ordered production of documents evidencing when and how the settlement monies were paid as such documents were relevant to the ongoing issues concerning deductibility and entitlement to government supports. On this issue, the trial judge rejected the plaintiff's contention that to make such an order contravenes the principle that the plaintiff has "property of their award".

XXVI. SOCIAL HOSTS

a. *McCormick v. Plambeck*, 2022 BCCA 219, per Fenlon J.A. (Bennett and Grauer JJ.A. concurring)

The appellant was injured in a motor vehicle accident after leaving a party at the home of the respondents. The appellant appealed the trial judge's finding that the respondents did not owe him a duty of care.

The appellant, then aged 17, attended a party at the respondents' house, who conducted some supervision of but did not provide liquor to the attendees. When the appellant and his friend left the party, they took an unlocked car on the side of the road that had its keys in it for a joy ride. The appellant was the passenger when the car left the road and crashed. The trial judge concluded that the respondents did not owe a duty of care to the appellant, as the appellant did not establish a *prime facie* duty of care under the first part of the *Anns/Cooper* test: whether the injury was reasonably foreseeable. The judge wrote that it was not foreseeable that the appellant would suffer personal injury or that they would steal a car and drive it unsafely.

The appellant argued that the trial judge erred because he considered it necessary for the precise sequence of events leading to the appellant's injuries to be foreseeable. The appellant's position was that the way the personal injury occurs does not matter and need not be foreseeable, as long as the class of harm is foreseeable.

The court of appeal dismissed the appeal. While the precise mechanism of injury need not be foreseeable, the general mechanism must be. Reviewing the jurisprudence, the court of appeal found that foreseeability is not tied to the precise sequence of events or extent of injury, but rather to a general mechanism of injury. The question was whether the respondents ought reasonably to have foreseen that the appellant would suffer injury from riding in a car being operated dangerously. The trial judge concluded that it was not foreseeable that the appellant could sustain such an injury, and the court of appeal saw no error in that conclusion. Furthermore, the trial judge did not give weight to irrelevant considerations in his foreseeability analysis.

XXVII. UNINSURED / UNIDENTIFIED VEHICLES

a. *Clark v. Insurance Corporation of British Columbia,* 2022 BCSC 451, Gaul J.

The plaintiff was injured in an accident when his vehicle left the road and went into a ditch. He alleged that the accident was caused by the actions of a second unidentified vehicle and sought judgment from Insurance Corporation of British Columbia ("ICBC") as a nominal defendant. ICBC sought a dismissal of the claim due to the plaintiff failing to make reasonable efforts to identify the driver or owner of the unknown vehicle as is required by s. 24(5) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 . ICBC disputed the claim on additional grounds, including disputing the existence of the second vehicle altogether, but Justice Gaul found it only necessary to address the question of whether the plaintiff complied with requirements of s. 24(5).

The plaintiff took three steps to ascertain the vehicle, namely: (1) he called the RCMP detachment, but received no response and did not follow up; (2) he published an advertisement, but could not say when it was published or for how long; and (3) he placed a hand-written note on a telephone pole and had only an incomplete photograph of it to enter at trial.

Justice Gaul held that there was a considerable amount more the plaintiff could have and should have done to reasonably identify the second vehicle. The plaintiff should have made a greater effort to follow up with the police and obtain contact information to a likely witness to the accident; he should have tried to contact residents in a house near the accident scene to determine if they had any information; the plaintiff waited too long to post his advertisement and should have published it more than once; and he should have posted a notice on a community bulletin board and checked to ensure it stayed up rather than posting a handwritten note to a telephone pole. Furthermore, the plaintiff had inconsistent times of the accident and inconsistent descriptors of the unknown vehicle in his advertisement and notice which unnecessarily limited the scope of his search. The few and unsustained steps the plaintiff took did not satisfy the reasonableness threshold required by s. 24(5). The plaintiff's action was dismissed.

b. *Hoflin v. Doe,* 2022 BCSC 1473, Coval J.

The Insurance Corporation of British Columbia ("ICBC") brought a summary trial application seeking to dismiss the plaintiff's claim under the unidentified driver provisions in the *Insurance Vehicle Act*, R.S.B.C. 1996, c. 231 for her failure to comply with the requirements in s. 24(2) by failing to provide written notice within six months and s. 24(5) by failing to make an effort to identify the driver's identity or license plate at the scene despite the opportunity to do so.

The plaintiff was injured in an unusual manner. She was working in a lumber yard and counting the items in the back of customer's van when the customer slammed the rear hatch on her head. She was knocked to the ground and briefly unconscious. After taking a moment to recover, she completed the transaction and the customer drove away without her recording any information about the vehicle or the driver.

The plaintiff made some effort to identify the customer by trying to locate a copy of the receipt issued to the customer, but one could not be found. She investigated the security camera footage, but the cameras were not operational. She took these steps because of her potential claim against the customer. At the time, she was unaware of a possible claim against the van owner or ICBC.

The plaintiff argued that she did not learn of her potential claim against ICBC until a year after the accident from a casual conversation with an acquaintance who happened to be a lawyer. At trial, the plaintiff sought to extend the s. 24(2) deadline due to "the discoverability rule" as applied in *Mudrie v.*

Grove, 2010 BCSC 1113. Justice Coval distinguished the case at bar, as the plaintiff had all material facts underlying her s.24 cause of action within days of the accident, contrary to the plaintiff in *Mudrie.* What the subject plaintiff lacked was the legal knowledge that she had a potential claim under s.24. Justice Coval held that the discoverability rule did not apply in the circumstances, where it was reasonably possible for the plaintiff to bring her claim, and she was aware of all the material facts that would constitute it, but just lacked the legal knowledge that the claim existed. Justice Coval held that the plaintiff's claim against ICBC was barred by s. 24(2) for failure to give written notice within six months.

Justice Coval still considered ICBC's alternative argument under s. 24(5) and found the plaintiff did not act unreasonably by failing to obtain the requisite information before the customer drove away given her evidence of being shaken, confused, and not thinking straight. ICBC's application to dismiss the plaintiff's claim under s.24(5) was dismissed.

XXVIII. VICARIOUS LIABILITY

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

The appellant, Boltz, appealed the trial judge's finding that he was vicariously liable for injuries to his stepson—the respondent Tyson—in a motor vehicle accident.

Tyson was 15 years old when he and his cousin, Dale, took Boltz's vehicle without his knowledge or consent. Tyson and Dale went for a joyride when, with Dale at the wheel and Tyson as passenger, the vehicle crashed and caused Tyson life-altering injuries.

As part of his action, Tyson advanced a claim in vicarious liability against Boltz pursuant to s. 86(1)(a) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. Section 86(1)(a) holds that in an action to recover damages arising out of the use or operation of a motor vehicle, a person driving or operating the motor vehicle who is: (a) living with, and as a member of the family of, the owner, or (b) acquired possession of the motor vehicle with the consent, express or implied, of the owner, is deemed to be the agent or servant of the vehicle's owner, employed as such, and driving or operating the motor vehicle in the course of his or her employment with that owner.

The trial judge held Boltz vicariously liable. He reasoned that the legislature does not speak in vain and that the word "operating" must mean something different from "driving". His conclusion was that a person is "operating" a vehicle for the purposes of s. 86(1) if that person has the care, custody, or control of the vehicle. Thus, even though Dale was driving, Tyson had the care, custody, or control of the vehicle and was operating it within the meaning of s. 86(1). Since Tyson lived with Boltz as a member of his family, the requirements of s. 86(1)(a) were met.

The court of appeal allowed Boltz's appeal. To be operating a vehicle within s. 86(1) a person must generally have physical control over the vehicle. Since Tyson was merely a passenger, he was not operating it. This conclusion was consistent with the way in which s. 86(1) had been interpreted in the past. Furthermore, the trial judge's statutory interpretation exercise was flawed. The court of appeal's approach did not violate the rule of statutory interpretation that the legislature is presumed, by using the phrase "driving or operating", to have intended the words to have different meanings. Both words refer to someone who has physical control over a vehicle, but "operate" has a broader meaning.

The court of appeal also rejected an alternative theory of secondary agency advanced by Tyson, which engaged s. 86(1)(a) and (b) simultaneously, as the language in the statute could not support this interpretation, the argument failed on policy grounds, and there was no case authority supporting such an interpretation.

b. *Mansour v. Rampersad*, 2022 ABCA 173, per the Court (Slatter, Veldhuis, and Schutz JJ.A.)

The issue on appeal was whether the appellant was driving the respondent's car without her consent at the time of a motor vehicle accident.

The appellant, Rampersad, originally borrowed the car of the respondent, Pinksen, with her express consent and was to return the car later that same day. Rampersad failed to return the car as agreed.- Pinksen reported it stolen two days later. A police officer subsequently contacted Rampersad and, with Pinksen's agreement, told Rampersad he had until 5 a.m. the next morning to return it. Rampersad did not return it by that time, and Pinksen again reported it stolen. After the deadline, Rampersad was in a collision with the respondent, Mansour.

The chambers judge concluded that consent had been withdrawn after the 5 a.m. deadline. The court of appeal disagreed and overturned that finding. According to Alberta law, there is no such thing as conditional consent. Rampersad had the consent to possess the vehicle until 5 a.m., but violation of the condition by keeping it beyond that did not have the effect of negating Pinksen's vicarious liability.

XXIX. WORKERS' COMPENSATION

a. *Hartley v. SNC-Lavalin,* 2022 BCSC 2106, Loo J.

The defendants sought a dismissal of the plaintiff's claim pursuant to *Rule 9-6* and *9-5* and in the alternative, a stay of proceedings pending determinations by the *Worker's Compensation Appeal Tribunal* ("WCAT"). The plaintiff was at all material times employed by the defendant company and a member of the BC General Employees' Union which was party to a collective agreement. The underlying action concerned a claim for damages for alleged personal injuries arising from alleged sexual misconduct by an employee of the defendant company.

The defendants argued that the collective agreement precluded the plaintiff from bringing civil proceedings. Justice Loo noted there are limited circumstances where a court may exercise its residual discretion to assume jurisdiction and that remained a possibility here. Thus, he could not conclude that the claim had no reasonable prospect of success or no genuine issue for trial.

The defendants also sought a dismissal on the basis that WCAT had sole jurisdiction to decide the claim. The defendants had already submitted an application to WCAT to determine whether the alleged conduct constituted a workplace incident. WCAT's determination was still pending at the time of the application hearing. Justice Loo declined to answer the question for WCAT and thereby dismissed the defendants' application for a dismissal of the plaintiff's claim. Justice Loo held the appropriate course of action was a stay of proceedings pending WCAT's determination.

XXX. LEGISLATION

a. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2022 BCCA 163, per Bauman C.J.B.C. (Butler J.A. concurring, Bennett J.A. dissenting)

The court of appeal ruled on the constitutional validity of British Columbia's scheme to create a statutory category of injuries called "minor injuries" and to give the Civil Resolution Tribunal ("CRT") jurisdiction over the issues of liability and damages for said claims.

The scheme caps the amount recoverable by a claimant for non-pecuniary damages from "minor injuries" incurred in a car accident. It gives the CRT exclusive jurisdiction over whether an injury is a "minor injury" and specialized expertise over liability and damages for said injuries. It requires the supreme court to dismiss proceedings with respect to determination of whether an injury is a minor injury. Where a party alleges that the damages will exceed the statutory limit of $50,000, the supreme court must stay the proceedings until the CRT determines whether the presumption has been rebutted, unless it would not be in the interests of fairness and justice to do so.

The Trial Lawyers Association of British Columbia argued that the scheme was unconstitutional by virtue of infringing on superior courts' authority contrary to s. 96 of the *Constitution Act, 1867*. The judge in a summary hearing agreed, determining that the impugned provisions were, for the most part, of no force and effect. The Attorney General of British Columbia appealed.

A majority of the court of appeal allowed the appeal.

One of the applicable tests came from the Supreme Court of Canada's judgment in *Reference re Residential Tenancies Act, 1979*:

1. Does the transferred jurisdiction conform to a jurisdiction that was dominated by superior, district, or county courts at the time of Confederation?
2. If so, was the jurisdiction in question exercised in the context of a judicial function?
3. If the first two questions are answered in the affirmative, is the jurisdiction either subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal of the legislature?

In respect of the first part, the jurisdiction at issue could be characterized as "personal injury claims in tort" or "personal injury claims, including related property damage claims, in tort", though for the majority's analysis it did not make a difference. Their analysis of the historical record led them to conclude that, at the time of Confederation, at least two of the provinces had shared jurisdiction over these claims between inferior and superior courts. For that reason, the plaintiffs could not succeed under this test.

Under the core jurisdiction test outlined in the Supreme Court of Canada's *Reference re Code of Civil Procedure*, which was not available to the judge below at the time of his judgment, the scheme also survived the challenge. Analyzing the six non-exhaustive factors outlined by the Supreme Court of Canada—the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the monetary limits to which it is subject, whether there are mechanisms for appealing decisions rendered

in the exercise of the jurisdiction, the impact on the caseload of the superior court of general jurisdiction, and whether there is an important societal objective—the majority found that the Supreme Court's jurisdiction remained in place. It's "essence" as a superior court of general jurisdiction remained.

In a dissenting judgment, Bennett J.A. dismissed the appeal. The impugned sections of the scheme infringed s. 96 when all of the factors were weighed. She found that the CRT was established as a parallel court, which undermined the unity and uniformity of the Canadian judicial system and infringed the Supreme Court's core jurisdiction.

b. *Court of Appeal Act* and *Rules*

Significant changes were made to the *Court of Appeal Act* and *Rules* effective July 18, 2022. The Court of Appeal website provides a detailed annotated Table of Concordance to assist with the transition, along with forms, completion instructions and templates. The large scope of the changes is beyond the mandate of this paper and participants are encourage to visit the website at bccourts.ca.

c. Court of Appeal Directives

- **Appearing Before the Court (14 March 2023)** – outlines the practice of introducing and addressing the court, gowning requirements, and conduct in the courtroom.
- **Case Compilation & Presentation Software (18 July 2022)** – parties interested in using case compilation and presentation software should submit a proposal to the Registrar who will authorize and provide directions on it use.
- **Chambers Applications (18 July 2022) –** overview of the practice of setting an application. Request too Appear Remotely must be made with the party's application materials on the timelines in the *Rules.*
- **Citation of Authorities (18 July 2022) –** includes general and specific citation practices along with style practices.
- **Costs (18 July 2022) –** explains the practice and parties' responsibilities with respect to costs.
- **Court Sittings in Kamloops and Kelowna (18 July 2022)** – appeals originality from Kamloops, Kelowna, Vernon, Penticton, and Salmon Arm will be heard at either Kamloops or Kelowna, unless the Registrar directs the appeal to be heard in Vancouver.
- **Declaration of Invalidity in Court Orders (18 July 2022)** – addresses the requirement to include a term dealing with a declaration of invalidity or setting aside a declaration of invalidity.
- **Judicial Settlement Conferences (18 July 2022) –** outlines procedure for applying for and proceedings at a settlement conference.
- **Publication Bans and Sealing Orders (18 July 2022) –** outlines issues and practice pertaining to publication bans and sealing orders.
- **Remote Appearances (18 July 2022) –** process for applying to appear remotely, procedure, rules and decorum.
- **Style of Proceedings (12 September 2022) –** direction to immediately substitute "Rex" or "His Majesty the King" in place of "Regina" or "Her Majesty the Queen". Outlines the new format that the appellant will appear first and respondents second.

- **Supplementary Arguments (18 July 2022)** - after an appeal has been argued and judgment is reserved, the Court will not receive any further unsolicited material without the consent of all counsel. If there is no consent, the requesting party must make an application.
- **Registrar's Filing Directive (21 November 2022)** - addresses options for filing documents, how to e-file, e-filed documents that must be filed in paper, other documents that must be filed in paper, and guidelines for materials at the hearing, processing times, requirements for signatures and authenticity, and the requirement to seek directions from the Registrar for large appeals (more than 4,000 pages of material).

d. Policy of the Provincial Court of British Columbia on Access to Court Records

Policy ACC-2 (May 15, 2023):
https://www.provincialcourt.bc.ca/downloads/public%20and%20media%20access%20policies/ACC-2%20-%20Access%20to%20Court%20Records.pdf

This policy specifies who has access to which types of court records.

e. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Effective September 1, 2023

1. **"Business Day" Definition Added**

   The following definition is added to Rule 1-1 (1): "business day" means a day on which the court registries are open for business.

2. **Email Address for Service**

   Rule 4-1 is amended to require an email address for service, if available.

3. **New Forms for Case Planning Conferences**

   Form 19.1 is to be used when applying to shorten the notice period and Form 20.1 is to be used when seeking to attend remotely.

4. **Filing Application Record**

   Rule 8-1 is amended to prohibit filing application records with the court earlier than the business day that is three full business days prior to the hearing date.

5. **New Trial Brief Rules**

   Rule 12-1.1 includes:

   a) The plaintiff must file a trial brief at least 56 days before trial and other parties must file a trial brief 49 days before trial;

   b) Trial briefs must now be in Form 41;

   c) The plaintiff may file an amended trial brief at least 42 days before trial;

d) If a party has failed to comply with trial brief deadlines, the judge or master at the trial management conference may orders costs against that party; and

e) If a party later learns their witness list in a trial brief is incorrect or incomplete, they must promptly filed an amended list.

6. Trial Management Conference

Rule 12-2 (1) no longer requires a trial management conference for every trial. A trial management conference must take place if:

a) required by order of the court, or

b) unless the court otherwise orders,

   i. more than 15 days have been reserved for the trial,

   ii. any party of record is not represented by a lawyer, or may not be represented by a lawyer at the trial,

   iii. the trial is to be heard by the court with a jury, or

   iv. a party of record requests a trial management conference by filing a requisition not less than 42 days before the scheduled trial date.

7. Form of Order

An order made at a trial management conference must be in Form 47.1

8. Filing Petition Record

Rule 16-1 is amended to prohibit filing application records with the court earlier than the business day that is three business days prior to the hearing date.