

## Liability

Negligence = failure to act as a reasonable person would be expected to act in similar circumstances.

**Ryan v Victoria:** N = objectively unreasonable risk of harm

### ONUS for ALL ELEMENTS:

- P proves all elements EXCEPT D proves contributory N and remoteness (if needed); mitigations

### DUTY OF CARE

DOC = legal obligation imposed on indiv. requiring adherence to standard of reasonable care while performing act

**Ryan v Victoria:** TWO STEP ANNS/KAMLOOPS TEST → (1) relationship of proximity such that it was RF that a careless act could result in injury to P (2) factors which should limit/ eliminate duty (ex. policy – safe injection site); limited only in the sense that duty arises in some situations and not others; but if DOC exists, it exists fully. NOTE: DOC NOT concerned with statute.

**Rowland v Christian:** US case: only justified if these PP factors → (a) foreseeability of harm (b) magnitude of harm (c) social value of activity (d) usefulness of D's conduct (e) costs/ burden associated w/ alternative conduct

### UNCERTAINTIES:

**Hill v Hamilton-Wentworth Regional Police:** tort of N police investigation?

How far does the DOC extend into future? Ex. engineer of collapsing bridge

### BREACH OF SOC

#### PROVING BREACH

- Statutory obligations/ CL
- Industry practices & regulatory standards – only prima facie SOC. BUT adherence might not be sufficient for D – heavy burden on P to show nonetheless N.
- Professional codes of conduct
- D's own policies/ procedures/ protocols

#### Statutory duties: MVA

s 144(1) → careless driving prohibited

s 162(1) → following too closely

**Stewart v Duek:** SOC = statute + reasonableness of parties' actions

(ex. bee in the car). **FACTORS COURT CONSIDERS IN DETERMINING WHETHER D MET SOC** → (a) motorists have overarching CL duty to exercise reasonable & due care (b) duty to keep proper look out & take precautions in response to apparent hazards (c) if could avoid collision and fails to take steps, N (d) entitled to assume other users of road will obey law

## CAUSATION

Causation = law requires a causal link between act/ omission & harm suffered

**Clements v Clements:** Motorcycle accident; driver didn't inspect; 100lbs overweight; tired; wet weather; nail punctured tire. **D's N was necessary to bring about injury.** Where "but-for" is established by inference only, D can bring evidence that injury would have resulted without N – ie. injury inevitable **MATERIAL CONTRIBUTION TEST ONLY** **WHEN** → D is N & impossible to prove using "but for" CUZ multiple tortfeasors – in which 1+ did cause injury (ie. P not injured but for D's, globally) but P can't show which one

**GOAL OF TORT LAW** → fairness; deterrence; corrective justice

**Athey v Leonati:** P predisposition back problem; 2 MVA; at gym, disk herniation (doc recommended gym). **To show causation**, sufficient that D materially contributed (beyond de minimus range) to creation of injury. Causation is common sense – need not be proved to scientific standard – and can be inferred

**Resurface Corp v Hanke:** P placed water hose into gas tank on ice resurfacing machine; burns; tanks not easily distinguishable. P argued it was a foreseeable consequence of the deficient design. Court confirms test is "but for" – compensation only where **substantia connection** between injury and D's conduct. Material contribution ONLY in special circumstances. P must show breach of duty that exposes P to unreasonable risk of injury.

**Ediger v Johnston:** P, infant, suffered brain damage from forceps and late C-section. Court found breach of SOC cuz doctor should have had measures in place to do immediate C-section upon using forceps – in not doing so, **created risk**.

### ISSUES WITH PROVING CAUSATION

#### 1. PRE-EXISTING INJURIES

- Need to show the tortious event caused a material change in the pre-existing injury

#### 2. MULTIPLE TORTIOUS EVENTS

- ARGUE: 2<sup>nd</sup> caused minor/ temporary aggravation of injury OR injury made P more susceptible to consequences of 2<sup>nd</sup>
- if indivisible, the J&S

#### 3. INDIVISIBLE INJURIES

- If injuries can't be separated, apply but-for in respect of D's act – if caused, then D fully liable (**Estable v New**)
- J&S liability for damages. See Scoates for exception.

#### 4. DIVISIBLE INJURIES

- = capable of being separated out
- apply **Long v Thiessen** for damages – divide injuries into causes or points in time, and assess damages twice – once on day before 2<sup>nd</sup> tort & once at trial.
- Each D responsible for share. P can only collect from each their share.

**Athey v Leonati:** multiple causes of back injury. Court affirmed that so long as D caused/ contributed to injury, fully liable.

**Bradley v Groves:** injury resulting from two separate car accidents.

Affirmed that J&S liability attaches to indivisible injuries – even if from separate incidents. P collected from insurer of 1<sup>st</sup> accident for full

**Scoates v Dermott:** multiple car accidents; 3<sup>rd</sup> only temporarily increased pain/ suffering but didn't contribute to loss of income **indivisible injuries from different accidents may be divisible for the purpose of specific heads of damage** (ex. loss of income) – cuz D not held liable for losses they played no part in.

**Forster v Kindlan:** addressing pre-existing injuries → recovered from 1<sup>st</sup>? 1<sup>st</sup> make P more susceptible (thin skulls)?;

### MUSTAPHA: CAUSATION OF PURE PSYCHOLOGICAL HARM

With regard to RF, the Q is what a person of ordinary fortitude would suffer; will not impose liability for the exceptionally frail indiv – cuz tort imposes liability for harm done w. reasonable foresight (fairness; socially useful). Once established that RF mental injury, D takes P as he is.

### MORE ON CAUSATION AND FORESEEABILITY OF DAMAGES

**Miliken v Rowe:** P wanted damages for injury cuz she could no longer care for her husband which might be needed at a later date. These costs are not RF. **RF does not mean merely possible; RF determined at time of tort**

**Degennaro v Oakville Tragalgary:** chronic pain is RF as falling within range of consequences flowing from an injury. If more serious than expected – still RF.

**Midgely v Nguyen:** expenses for **compromised business loan/ rent** as a result of injury **too remote**.

**Mezo v Malcolm:** Prior back issues/ shorter leg do not discount reduced energy/ mood change/ sleep issues arising from injury.

**Zawadzki v Calimoso:** pure psychological harm is distinguished from psychological ailments coinciding injury. **alcoholism resulting from injury; can fall within thin skull principle.**

**Smith v Leach Brain:** lip burn triggered cancer. Q is whether the D could RF the type of injury which he suffered; **D liable for full extent – even if more serious due to pre-existing condition – as long as initial injury were a kind that is RF.**

**Saadati v Moorhead:** mental injury must be proved by medical diagnosis.

**Blackwater v Plint:** sexual abuse in schools; tragic home life; both leadings to injury. Rules of causation find D fully liable if but for D, no injury. **Rules of damages consider what original position of P would've been – D need not put P in a better position than original AND shouldn't compensate for damages P would've suffered anyways**

### WORKER'S COMPENSATION

**BC (WCAT) v Fraser Health Authority:** 3/7 employees diagnosed w. breast cancer – wanted WCAT – due to occupational disease.

**Inconclusive expert evidence on exact cause** Presence or absence of expert opinion not determinative – up to trier to determine whether an inference can be made for causation. Here, the cluster ratio was

sufficient to infer causation. NOTE: the standard is lower than BOP for WCAT

## APPORTIONING LIABILITY

### CONTRIBUTORY N

Where P fails to take steps for own safety & P's N contributes to loss – P's claim may be reduced/ eliminated

**Nance v BC Electric Railway:** sharing of responsibility for damage where injury results from own fault + fault of another.

**Bow Valley Jusky (Bermuda) v Saint John Shipbuilding:** D only need prove that P didn't take reasonable care of self + contributed to his own injury

NOTE: historically, a complete defence – statute replaced this.

### Negligence Act:

s 1(1) → if 2+ at fault, liability to make good the damage/ loss is in proportion to degree of fault

s 1(2) → if can't apportion fault, liability apportioned equally

s 1(3) → not liable if haven't contributed

s 2(c) → P entitled to recover from D the % of damage/ loss that corresponds to degree of fault of D (this is read with s 1)

s 3 → liability for costs same as proportion

s 4(1) → if 2+, court must determine degree of fault

s 4(2) → if 2+, (a) jointly & severally liable to P (b) between them, in absence of contract, liable to contribute to an indemnify each other

\*\* if P CN, severs liability and can't collect from one D

### JOINT AND SEVERAL LIABILITY

Where there are *joint torts* OR *independent torts* THAT combine to cause a single indivisible injury

**WHY** → (a) efficient & promotes access to justice (b) D in best position to apportion damages amongst selves (c) once liability established, D free to litigate amongst selves (d) shouldn't be responsibility of the harmed to seek out full compensation if one can't pay BUT then sometimes leads to one who is only minorly at fault bearing unfair burden of damages

MY THOUGHTS - either D or P will be at a loss. J&S puts D at the loss. Since P is innocent, and J&S severed if not, P should obtain this benefit.. This final part reinforces rationale of principle.

## Aberdeen v Township of Langley

FACTS – biker; truck crosses yellow line; city left gap between metal & cement barrier. P argues truck only minor departure from SOC; city extreme departure.

LAW – **key inquiry = moral blameworthiness (relative degree by which each party departed from SOC expected in circumstances – informed by: nature of departure; its magnitude; gravity of risk created)**

## Damages

Overriding goals: **athey v Leonati:** restore the P to position he would have enjoyed but for N.

### NON-PECUNIARY

#### "Pain and Suffering"

**Andrews v Grand & Toys Alta:** \$ to make up 4 what has been lost

**Teno v Arnold:** to provide a substitute for that which is lost

**Milina v Bartsch:** provide substitute pleasures to make life more bearable. Court MUST consider extent to which \$ can provide solace for this specific indiv.

**Stapley v Hejset: FACTORS THAT INFLUENCE AWARD** → (a) age of P (b) nature of injury (c) severity/ duration of pain (d) disability resulting (e) emotional/ psychological suffering (f) loss/ impairment of life **AS WELL AS** → (g) impairment of social relationships (h) physical/ mental impairment (i) loss of lifestyle (j) P's stoicism (not penalizing P)

### ELDERLY

**A. INCREASED** – Golden Years Principle

**Pingitore:** older age already limited in pleasure/ activities. Injury has more profound consequences – takes what little is left

**Etsonv Loblaw Companies:** if no evidence that older person wouldn't have continued to enjoy active/ independent lifestyle but for the injury – more profound than if younger

**Fata v Heinonen:** realizing own morality and should be able to enjoy retirement. If always previously active, loss is > for older.

**B. REDUCED-** Injuries will have shorter duration

**Olesik v Mackin:** court reduced non pecs by 50% due to necessary limited duration (P = 88yrs) P would suffer from injuries.

**Munro v Faircrest:** suffer loss of amenities over a shorter duration. Reduced non pec for loss of use of wrist/ ankle by \$15000 - age of 68

**Dahl v Gelderman:** again, found 50% reduction in non-pecs for 70yr  
**Knudson et al v Tyckyj:** took age of 98yr old in awarding. Noted that both parties failed to address how much would be given to younger person for same injury

**C. BALANCED**

**Galbraith v Marin et al:** injury may be more serious because of **limited time to enjoy life**. Noted that Olesik focuses on **life expectancy** BUT this should be balanced

*MY OPINION – increased – although younger will live longer, they will have more time to adapt. Further, pain and suffering will likely be greatest post accident, and then, hopefully trickle down. An older person might not have time for the trickle down, but instead their last few years are spent in turmoil and. A reduction of 50% is inappropriate. CONTRAST with pre-disabled below*

### ATHLETES

Where P's injuries impact ability to pursue athletic endeavors. Directly impacting enjoyment of life.

**\*Morrow v Outerbridge: FACTORS:** humiliation; embarrassment; loss of social circle; angry; frustrated; family conflict; chronic pain; depression – ie. loss his sense of self.

**Hagreen v Su:** court took into account the level of passion for sports in coming to total – as well as centrality to life AND aspirations to achieving high level of success in sports.

### PRE-DISABLED/ INJURED P

**Bracy (Committee of) v Jahnke:** pre-existing brain injury. MVA causes fracture/ torn ligaments in leg. Robbed what little P had left – noting that mental anguish usually higher.

**McAllister v Sotelo:** pre-existing multiple sclerosis affecting 1 leg. Accident caused injury to other leg & further compounded symptoms from multiple sclerosis. The injuries from accident more significant because of prior disability.

**Heska v Little:** pre-existing condition that COULD potentially be debilitating – but stable before accident (able to function/ work/ sports). After accident, health deteriorated. FACTORS CONSIDERED: current activity levels; social ability; ability to sit still/ comfortably  
**Agar v Morgan:** non-pec despite significant possibility that P's pre-existing condition would have deteriorated regardless. CUZ he faced deterioration earlier – lost 3 years of stability which was a precious commodity given pre-existing condition and likelihood of deterioration from it. **NOTED:** caselaw indicates at 105 000 to 150 000 in non-pecs where D robs/ reduced what little P has left.

### SEXUAL ABUSE

**SY v FGC:** confirmed that sexual has no cap on non-pec but court nonetheless decreased jury award by 100 000\$ for non-pecs. RATIONALE: current range of sexual abuse = \$100-175 000. Wanted to maintain consistency – noting studies don't know the extent of consequences yet. **NOTED:** difficulty of giving solace/ satisfaction to P; likelihood of psychological impact for years;

### CAP ON NON-PECUNIARY

"trilogy" of cases in 1978 led to cap  
**Hill v Church of Scientology:** confirmed cap and noted **POLICY REASONS:** previously, damages awarded varied tremendously AND given the # of car accidents, non-pecs considered almost daily. Size and disparity of assessments was affecting insurance rates (and cost of operating MV).

**SY v FGC. EXCEPTION TO CAP = SEXUAL ABUSE. WHY** → policy reasons not present: no impact on public purse; no social burden. Disproportionate awards can be mitigated thru appeals. Accident/ malpractice VS intentional criminal behavior. Still, here the award was reduced to 250 000 – much below the cap AND this was thought of as one of the worst cases. Might act as an upper limit to future cases.

## AGGRAVATED DAMAGES

Harm done by wrongful act aggravated by manner in which act was done.

- Must be evidence of aggravation (**Fidler**)
- **Typical range = 10 000 – 100 000**

**SY v FGC: Sexual abuse case. FACTORS HERE:** position of trust; made childhood a nightmare; not remorseful; but angered for being exposed; continued abuse until girl left; didn't admit liability; threatened P – this all increasing psychological trauma to P. **GENERAL FACTORS TO CONSIDER** → relationship between P & D; # of assaults; age when assaults occurred; frequency/ duration; degree of violence/ coercion; nature of abuse; physical pain & mental suffering. **HELD PART OF NON-PECS**

**Morrow v Outerbridge:** The N conduct was not removing anchors from P's shoulder knowing they could damage. **Agg comes from:** didn't warn P of the potential effects or signs to look out for that indicate problem with anchors; rejected concerns expressed by P which clearly warranted investigation; ie. directed P not to get 2<sup>nd</sup> opinion. **The result of this high-handed and arrogant behavior was not removing anchors and . More pain/ suffering.**

**PART OF NON-PECS?** → some cases have made aggravated damages separate from non-pec) while in other cases, it is included (: Included in cap). HERE, it was included in non-pec.

**AGGRAVATED vs PUNITIVE** → **AGG** when D's conduct aggravates injury – highhanded, malicious, or oppressive. Measured by P's suffering and designed to compensate P. Sometimes this overlaps with punitive, but still separate. **PUN** punishes and deters others from acting in similar way. Measured by degree of moral culpability – not intended to compensate P. Likely an element of willfulness or recklessness. Harsh, vindictive, reprehensible conduct. In addition to P already being fully compensated through other heads of damages.

### MORE ON DIFFERENCES:

- AGG requires proof of injury
- PUN requires separate actionable wrong (duty of good faith)
- No cap on PUN.

## PUNITIVE DAMAGES

**Hill v Church of Scientology:** awarded when D's misconduct is so malicious, oppressive, and highhanded that it offends court's sense of decency. **Purpose is to punish** (not compensate). Meant as a deterrent. **ONLY** awarded when compensation is insufficient to achieve goal of punishment/ deterrence. **TWO REQUIREMENTS** → (1) D committed separate/ independent actionable wrong causing damage to P (2) conduct must be sufficiently harsh, vindictive, reprehensible, and malicious.

\*exception to principle that civil damages seek to compensate P

**Whiten v Pilot: ESSENTIAL POINTS** → (a) exception, not rule (b) only if highhanded, malicious, arbitrary, highly reprehensible misconduct that is marked departure from ordinary standard of behavior (c) amount proportionate to harm caused, degree of misconduct, vulnerability of

P, advantage/ profit gained by D, and all other penalties D received (d) only where conduct is otherwise unpunished OR penalties insufficient for retribution, deterrence, and denunciation (e) purpose is not compensation BUT retribution, deterrence, condemnation/ denunciation (f) only where compensatory damages insufficient to accomplish these purposes (g) kept as windfall to P (h) moderate usually sufficient

## PECUNIARY

= economic loss; full compensation.

**Andrews v Grand & Toy alta:** full compensation = paramount concern  
**Kemp and Kemp:** as close as possible to same position but for wrong; a response, in part to cap on non-pecs.

**Agar v Morgan:** confirmed that full compensation is in response to arbitrary cap on non-pecs

## PAST INCOME LOSS

*Claim for loss of earning capacity resulting from effects of injuries.*

Proved on BOP

**DATE OF VALUATION** = btwn past income loss & future wage loss

Ex: loss of overtime; time off work; job switch & earning less; loss of opportunity (promotion; hiring); loss of business if own compan

**Rowe v Rowe:** for loss of value of work P would have performed, but was unable due to injury

**Piper v Hassan: ELEMENTS:** (a) loss of past earning capacity (b) what P would have, not could have, earned (c) must deduct income tax – s 98 Insurance Vehicle Act – P can recover past net income (d) burden = BOP (e) assessment involves hypothetical events – these need not be proven on BOP – taken into consideration so long as real & substantial possibility and not mere speculation

### TWO IMPORTANT POINTS:

- (1) **STANDARD OF PROOF:**
  - a) **Past actual events** = BOP ex. P missed 1-month work
  - b) **Past hypothetical events** = real & substantial possibility ex. promotable; due for promotion; injury prevented it. Once threshold met, court looks at likelihood of occurring (%) AND multiplies this by the loss.
- (2) **DAMAGES ONLY FOR NET INCOME LOSS total loss income over years, taxed as if this total was total income from 1 year.**

## FUTURE LOSS OF INCOME EARNING CAPACITY

**Burden of proof = simple probability** → real and substantial risk of pecuniary loss (< BOP)

**Athey v Leonati:** hypothetical events given weight according to likelihood – same as past income loss.

**Perren v Larari: SUMMARY OF RULES** → (1) P must prove real and substantial possibility of a future event leading to income loss (2) future and hypothetical taken into account so long as **substantial possibility and not mere speculation** (3) may be able to prove substantial possibility of future income loss despite returning to work (4) inability to perform occupation that is not a realistic alternative is

not proof of future loss (5) **compensation not for loss of earnings BUT for loss of earning capacity** (6) after burden discharged, must quantify the loss (7) **two methods for valuing:** (a) earnings approach (b) capital asset approach (8) earning approach **more useful when** loss is easily measurable (9) capital asset approach **more useful when** loss is not easily measurable (more common)

**PROVING** → (1) substantial possibility that lost capacity will result in pecuniary loss (2) prove quantification by one of the two approaches below. (3) is the award fair and reasonable to both parties.

### FACTORS RELEVANT FOR SHOWING LOSS OF EARNING CAPACITY

- (1) historical earnings (2) comparative earnings from co-workers in similar positions (3) workplace opportunities for promotion (4) opportunity for change of vocation or advancement

VALUING FUTURE LOSS OF INCOME:

**A) CAPITAL ASSET APPROACH** (more common)

- Is P rendered less capable overall from earning income from all types of employment
  - P is less marketable/ attractive to potential employers
  - P has lost ability to take advantage of job opportunities which might otherwise have been open but for injury
  - P is less valuable to self as person capable of earning income
- Rosvold v Dunlop:** past earnings may be a useful factor but only 1 WOULD APPLY IN THESE CIRCUMSTANCES:

**Miller v Lawlor:** young person whose career path is uncertain & impact of injuries hard to measure. **Estimated 3 years – 210 000**

**Rozendall v Landingin:** P with chronic pain that impacts ability to do physical work. LPN, likely still pursue RPN due to grades; family . **Estimated loss to be 1 year as LPN – 50 000**

**Williams v Loverock:** P returns to work but will struggle with overtime & other aspects of employment. **Suffering no current \$ loss except for missed overtime BUT future at job not guaranteed and he is lucky to be employed there given his condition. Awarded 100 000**

**Kwei v Boisclair:** P not employed before (or minimal earning) & not employed after. **Based pecuniary on earn capacity approach**

**Pallos v ICBC:** earning capacity still found to be reduced **despite P earning more after injury** than before CUZ he would only be able to do lighter work in the future

### B) EARNINGS APPROACH

- When earning capacity is quantified in a measurable way
- Fox v Danis:** P didn't miss any work, but suffered significant disability/ impairment from injuries. Useful tool is to **compare likely future income if accident hadn't occurred with likely future income of P now that it has occurred.** Court also considers contingencies in assessing loss: boss might offer higher paying part-time work given his high regard for P; unemployment; premature death. **Assessed at 750 000 (had high potential)**

## SPECIAL DAMAGES

### **P's out of pocket expenses related to injuries**

- Treatment; Medications; home attendant; gym; dentist; home/ work modifications; vocational counselling; retraining; rehabilitation programs; in trust claim for family members working as unpaid care-providers

**TEST** → whether expenses are reasonably related to P's injuries

### **DEFENCE WILL ARGUE:**

- Expense was unreasonable; cost too high; treatment too long; treatment provided no benefit
- Expense was unrelated to P's injuries (P would have incurred expense anyways)
- Expense not medically justified (usually when no medical recommendation given for it)

## FUTURE COST OF CARE

Expenses related to injury P will have to pay in the future (same list as special)

**Milina v Bartsch: PRINCIPLES OF DAMAGES** → (a) restore injured person to position he would have been in – rationale for loss of earning capacity, future care, special (b) for losses not made good by money, damages to provide substitute pleasure for those lost – rationale for non-pecs (c) adequate future care – based on what is reasonably necessary on the medical evidence to promote mental/ physical health of P **ASSESING FUTURE CARE** → (1) must be medically justified (2) must be reasonable (3) to preserve P's mental/ physical health

**Aberdeen:** medically justified doesn't mean medically necessary.

Sometimes hard to draw the line between happiness (non peccs) and health – this for the judge to decide.

See online article\*\*\*

## **NO FAULT BENEFITS**

Under part 7 of the Regulations to the Insurance Act – Anyone injured through use or operation of MV + insured.

### **WHO CAN CLAIM** → the “insured”

- Owner of vehicle in insurance
- Member of owner's household
- driver of vehicle licensed on BC
- Passenger of vehicle not licensed in BC but driven by someone with valid BC license
- Cyclist/ pedestrian who **collides** with vehicle registered in BC (even if not driven by owner)
- BC resident who is entitled to bring claim under s 20 (uninsured motorist provisions) or s 24 (hit and run)
- Personal representative of deceased insurer
- Resident of BC who hold valid BC license.

## TYPES OF BENEFITS

### **a) medical expenses**

- what is reasonable & necessary
- b) rehabilitation expenses s 88**
- items likely to promote rehabilitation
- (1) mandatory – reasonable expenses only
  - o chiro; dental; medical; ambulance; prosthetic
- (2) permissive -
  - o ex. care attendant; home alteration; wheelchairs
  - o these are discretionary

### **c) wages; Total disability Benefits (TTD's) s 80**

- if accident prevented a person from working within 20 days
- must be totally disabled – cant perform duties
- must have been employed for at least 26/ 52 weeks
- if 65+ when injured, only paid for 104 days
- 75% of average weekly earning in 52 weeks before accident; max 300\$/ week; max 104 weeks
- ICBC will deduct CPP/ EI from total
- MUST wait 7 days – be disabled for 7+ to claim (s 85)

### **d) homemaker disability benefits s 84**

- for homemaker whose injuries prevent regularly performing most of home tasks
- hire someone, other than family (unless doesn't live)
- max 145\$/ week

### **e) dental, hospital, ambulance, nursing**

\*\*ICBC requires injured to rely on other coverage before accessing part 7 (ex. private health plan s 88) ex. WCB s 82

### **MAX OF 150 000\$**

**s 96** → none if:

- tries to commit suicide
- car being used for prohibited trade/ transport
- accident resulted from sickness/ disease

## MAKING A CLAIM

- Limitation period = 2 years – of accident
- Commenced by Notice of Civil Claim
- Requires medical evidence to support paying for expenses
- Must give notice of claim within 30 days of accident & fill out proof of claim (CL22)
- ICBC must pay within 30 days (for weekly benefit) OR 60 days (for other expenses) on receipt of CL22
- Any benefits from tort damages will deduct amount given under part 7

## **Pre-Trial Strategy and Procedure**

### **3 STEP PROCESS:**

#### **1. INFORMATION GATHERING**

- Incident
  - o Liability
  - o Relevant parties
  - o Evidence: witness, photo/ video; police

- o Distractions; weather; speed; prior state of vehicle
- Pre-existing health conditions
- Plaintiff's injuries
  - o Progression of injuries
  - o And impact on their life: show state before & after accident (work; education; well-being; hobbies; lifestyle; health)
- Intervening acts
  - o MVA; assault; slip & fall
- Expenses
  - o Past and future
- Anticipated defenses; contributory N; WCB (no ICBC); mitigation
- 2. TRIAL STRATEGY**
- Experts
  - o Doctors; engineers; economists; aptitude; vocational
- How injury impacts client
- Timeline
  - o Often takes 3 years
  - o What of old clients, drug addicted, without work
- Mode of trial
  - o Judge or jury
- Credibility/ likability of client → **THEN IMPLEMENT**

## **CASE MANAGEMENT**

### **CASE PLANING CONFERENCE – RULE 5**

Order that can be made:

Orders that cant be made: anything final

### **INTERLOCUTORY APPLICATION – RULE 8**

Applications that require affidavit material or that affect 3<sup>rd</sup> parties are brought thru Notice of Application and are argued in Cambers

### **COMMON APPLICATIONS BROUGHT BY P:**

- Adding parties to an action
- Default judgment
- Production of documents (if D fails to list)
- Production of privileged documents (statements taken by insurer after accident; adjustors notes/ files)
- Production of documents from third parties

### **COMMON APPLICATIONS BROUGHT BY D**

- Production of documents (in P's or 3<sup>rd</sup> parties' possession)
- Compelling P to attend independent medical examination (IME)
- Compelling P to attend further examination for discovery
- Dismissal of claim for want of prosecution

### **TRIAL MANAGEMENT CONFERENCE – RULE 12-2**

- Trial brief: with witness names/ addresses
- Court can make orders to ensure parties are prepared for trial and that it will proceed in orderly fashion

## DISCOVERY

### DOCUMENT DISCOVERY

#### RULE 7-1

- (1)(a) → all documents that are/ have been in party's possession/ control AND that could, if available, be used by any party to prove/ disprove material fact
- (3) → must include any insurance policy under which an insurer might be liable to satisfy judgment or indemnify
- (11) → onus on party seeking production to give written demand identifying additional documents/ class of documents AND reason why they should be disclosed
- Party may refuse until service of notice of application to compel production. Court will balance right to obtain w. cost/ burden of producing

#### PRODUCED BY P:

- Clinical records (waives privilege when making PI claim)
- Medical records (unless subject to claim of privilege)
- Income/ Employment → Income tax; EI; Self employment records; School record
- Special damages receipts
- Extended health care/ disability insurance
- Diary/ journal

#### PRODUCED BY D:

- If MVA
  - o Vehicle damage records/ photos
  - o ICBC claim documents
  - o Part 7 documents
- Slip & fall
  - o Maintenance; construction; prior incident – records
- Municipal/ gov't defendant
  - o Minutes of meeting
  - o Inspection notes
  - o Policies regarding systems of inspection, etc...

### PRIVILEGED DOCUMENTS

Ex. solicitor/ client; doctor/ patient

#### LITIGATION PRIVILEGE:

**Two-part test:** (1) was litigation in reasonable prospect at the time the document was produced? (2) if so, what was the dominant purpose for its production?

- If documented in anticipation of litigation, privilege.

#### 4-PART WIGMORE TEST:

- (1) Did the writings originate in confidence & on understanding that they wouldn't be disclosed?
- (2) Was the activity of secret keeping key to healing?
- (3) Did the writing contribute to healing :. Important to record?
- (4) Is injury to healing > benefit gained by disclosure?

### ORAL EXAMINATIONS

#### RULE 7-2

- (1) → each party of record to action must (a) make self available OR (b) if 5-10 applies, make them available – for examination for discovery by parties of record to action who are adverse in interest.
- (2) → must not exceed 7 hours OR greater period than consented UNLESS court orders otherwise

#### PURPOSE:

- Obtain facts AND understand their position w. respect to issues
- Get admissions; lock in their evidence (so they can't change it at trial)
- To assess opposing party's ability as witness/ credibility

#### SCOPE OF QUESTIONS

- Examinee MUST answer any Q which they have knowledge
- Test of relevance is whether the answer to a Q MAY be relevant to issue in the action

#### DISCOVERY OF D:

- Usually on issues of liability
- To determine whether D has disclosed relevant documents (ask what inquiries/ investigations were made)

**DISCOVERY OF P:** P goes first - P discovering D first (usually only if liability in issue)

- Scope of issues here more broad: liability + damages
- Will have done surveillance before

## Credibility

*Likely done as a defence*

**Milburn:** when one deceives, it is difficult to disentangle the truth from falsehood – despite this statement, judges don't follow this

**Faryna v Chorny:** CAN'T be gauged solely by demeanor. **LOOK FOR CONFIRMING EVIDENCE** or **OPPORTUNITY FOR THIS KNOWLEDGE:** is it possible for this witness to know this

**Bradshaw v Stenner: METHOD:** is the testimony believable on stand along basis → is it consistent with other evidence → is it reasonable in the circumstances

**Volzhenin:** credibility is **globally assessed** – one wrong doesn't make P not credible

**Foster v Kindlan:** inconsistency between past documents (medical records) recorded by someone else AND the witnesses testimony should be taken lightly.

**Sevinki v Vance:** FACTORS: poor historian; lied; inappropriately blame injuries on accident. HOW WE KNOW: injuries developed well after accident; injuries didn't appear to get better

#### GOOD:

- Honest, candid, straight-forward, disciplined

#### BAD:

- Defensive, argumentative, evasive, poor historian, dishonest

#### Judge v Jury

- Jury more easily persuaded by surveillance of P walking around like he is fine WHERE a judge would consider that P was good only on this day
- Jury more persuaded by a likable witness

#### HOW TO ATTACK CREDIBILITY:

- Cross examine to reveal inconsistencies (documents)
- Collateral witnesses (who can say stuff about P/D)
  - o If you're P – far removed from P – to uphold credibility
  - o If you're D – those close to P
- Surveillance
- Tax returns
- EI fraud
- Social media

#### RELIABILITY vs CREDIBILITY

- Can be credible but not reliable
- Can't be reliable if credible
- **Reliable:**
  - o Ability to observe, interpret, and recall events
  - o Stress, fatigue, fear
  - o Outside influence (media coverage)

### MITIGATION – after P proves causation, D can argue

*P is required to mitigate and reduce losses in a reasonable manner.*

Example → follow a treatment plan

#### TEST: (Sevinski v Vance)

- (1) P sought medical advice (part of her job)
- (2) Treatment was recommended
- (3) Unreasonable refusal to follow treatment
- (4) Treatment would have made a difference (expert)

Can reduce the amount of non-pecuniary damages (here, 25%)

**Rozendall v Landingin: FAILURE TO FOLLOW WILL NOT ALWAYS BE UNREASONABLE:** too expensive? Not helping when tried it out; trying alternative kinds. **NEED** sincere effort by P

**Janiak v Ippolito:** If a P refuses a course of treatment that has a high success rate and low risk rate, **pain and suffering might not be granted (wasn't here with a 70% success rate)** and **future wage loss will be reduced** – but take into account the likelihood of not succeeding. **THIS IS ONLY SO IF:** the person is capable of making a reasonable decision – if not, thin skull and lack of mitigation not as highly considered.

## Experts

### GOOD:

- Assist trier
- Unbiased and independent
- States the facts/ assumptions they rely on to give advice
- Indicate when insuff. Info is present
- States qualifications and credentials

### BAD:

- Selective: cherry picks records
- Comments on credibility
- Interest in outcome of litigation
- Demenour
- Goes outside scope of expertise

### WHY ARE THEY CALLED?

- Liability
- Causation
- Damages

### TEST: WILL EXPERT EVIDENCE BE ADMISSIBLE? (Mohan)

1. Relevance
2. Necessary
3. Absence of exclusionary rule
4. Properly qualified expert

\*novel science gets extra scrutiny for reliability and necessity

- Peer reviewed and published?
- Potential rate of error OR standards in the science
- Whether the theory/ technique is generally accepted.

### RULE 11-2 – DUTIES:

- (1) → duty to assist trier of fact AND not be an advocate for party  
(2) → in report, MUST certify: aware of (1) duty; made report to conform with duty; will give testimony in conformity of duty if called.

### RULE 11-6 – EXPERT REPORTS

(2) → MUST SET OUT:

- a) name/ address/ area of expertise
- b) qualifications/ employment/ education in expertise
- c) any instructions provided to him
- d) nature of opinion and to which issue it related
- e) his opinion on these
- f) reasons for opinion, including: factual assumptions; research conducted to get opinion; list of any documents relied on

### RULE 11-7 – EXPERT EVIDENCE AT TRIAL

(1) → not given at trial UNLESS: prepared in report under 11 and given any required supplementary reports.

(3) → party may request to cross examine an expert who made a report and thus, call the expert to trial

### QUALIFYING THE EXPERT AT TRIAL

- CV will be attached to report. Get him to go over his: education, training, years of experience, awards... etc
- Then, ask the court to qualify
- Can ask leading questions during this part

**\*\*direct limited to explanation of technical terms in report**

### ATTACKING EXPERT

- Exceeds qualifications
- Advocating – argumentative/ defensive
- Attack assumptions: *didn't see P doing X; of after 1 visit.*
- Show bias!

## Opening and Closing Statements

### OPENING

- Juries wont make a decision here BUT they will form a belief about what the case is about.
- Overview of evidence you're going to lead.
- DON'T:
  - o give personal opinion
  - o discuss evidence you wont lead
  - o speak of irrelevant facts
  - o make prejudicial remarks; sarcasm; argument
  - o discuss law
- DO:
  - o Discuss liability and D's conduct
  - o Say rules of road
  - o Speak of the damages
  - o Describe case using hamrs/ losses
  - o Ie. give a roadmap

### Jury v Judge:

- Tell the jury their task; the rules
- Simple words – *crash not collision*

**Knauf:** mistakes in opening will not lead to mistrial if no objection was made at the time UNLESS substantial wrong or miscarriage of justice.

**Walker:** if lawyer's actions caused a mistrial, lawyer may have to pay costs or indemnify the client of certain costs RULE 14-1

### CLOSING:

- Argument allowed and expected.
- State position as forcefully as evidence permits.
- DON'T:
  - o Misrepresent the issues
  - o Don't accuse anyone (expert) of dishonesty unless this was done in cross
  - o Attack opposing council

## Evidence

1. Oral Evidence (witness)
2. Document Evidence (witness or by agreement)
  - o Usually have to be included in list if want to use in trial
  - o TEST TO ADMIT NOT PREVIOUSLY DISCLOSED: would D suffer prejudice; reasonable explanation for failure to disclose; does excluding the evidence prevent determination of issues; does justice require that they be used?
3. Read-ins from discovery transcripts
4. Admissions
5. Demonstrative evidence (photos)
6. Judicial Notice

### TYPES OF WITNESSES:

- Liability witnesses (observers)
- doc for causation
- Emergency witnesses (police; ambulance; fire)
- Collateral witnesses (friends/ family)
- Work witnesses (confirm employment)
- The plaintiff, himself.

**LIMITS:** no hearsay; no oath helping; no experts unless qualified

### ALL EVIDENCE DISCLOSED before trial

## Direct and Cross Examination

### DIRECT

- Open ended Q's only (except for expert)
- Tell a story

### CROSS EXAMINATION:

- Can ask open ended or yes/ no Q's
- YOU'LL WANT TO: keep control; don't ask unless you know the answer; one fact per question

### REPLY:

- Only can address new issues that arose during cross