**Personal Injury Case Chart – Spring 2014**

**Week 2 - Negligence**

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| **Case Name** | **Facts** | **Ruling** | **Key** |
| *Clements v Clements* | Fat motorcycle crash, nail in tire | For D | But for test, failed to show accident wouldn’t have happened despite Ds negligent overloading of the bike. Material Contrib test not applicable. |
| *Ryan v Victoria* | None – DOC use Anns/Kamloops test |  | **SOC = ordinary, reasonable, prudent person in same circs** |
| *Ediger* | Forceps birth, baby deprived of O2 for several minutes before eventual crash c-section - brain damage -causation? | For P | Breach of SOC, should have had backup surgical help with forceps birth |
| *Rowland (US)* | None - judicial exceptions to DOC | Public Policy factors | See pp 6—7 |
| *Hill v Hamilton - Wentworth* | New tort - negligent police investigation? Hill wrongfully convicted d/t dumb police | Yes, but didn’t breach in this case. | Broad/Robust interp of DOC |
| *Stewart v Dueck* | P passed on right of turning truck | For D | SOC not perfection, reasonableness. P was negligent |
| *Aberdeen BCSC* | Biker run through guardrail on road | For P | City and D found J/S liable |
| *Aberdeen BCCA* | Remitted to trial for contrib. neg | Mostly for P | Liability on behalf of D upheld |

**Week 3 – Causation**

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| *Athey v Leonati* | 2 MVAs, hx of back pain, herniated disc while working out | SCC awards full damages | P need not prove sole causal factor, materially contributed beyond de min range creating injury, was reasonably following instructions of dr |
| *Resurfice v Hanke* | P puts water in the gas tank of the zambonee | For D | Only but for applies, no proof of negligence on part of D, only carelessness on part of P |
| *Clements* | Fat motor cycle crash, nail in tire | For D | But for est by inference? D can prove would have happened anyway. MC only used exceptionally |
| *Mustapha* | Flies in the water bottle – nervous shock | For D | Too remote, TEST for psychological damage foreseeability is a person of reasonable fortitude and robustness (diff from thin skull)  Applied in *Millikin* (costs of looking after Ps H)*; Degennero* (chronic pain caused by hospital bed collapse – person of ordinary fortitude who has worse than expected damage from injury); *Smith v Both* (min impact MVA? Still can cause ++ injury); *Midgley* (start up costs of business too remote); *Mezo* (Factual and legal causation must be proven); *Warren v Morgan* (brain lesions, psych injury – list from *Yoshikawa*); *Zawadski* (alcoholism caused by MVA- combined with phys injury, not of unreasonable fortitude, thin skull still applies, had a predisp for alcoholism d/t fam hx) |
| *Foster v Kindlan* | P in 3 MVAs, a workplace incident, then another MVA. Pain from WP was diff from prev complaints | For P | Divisible injuries can be proven through med evidence. Thin skull – take victim as found |
| *Estable v New* | Prior and subsequent injuries, MVA 03 | For P | Divisible injury (apportionment based on part responsible for *Long*) vs indivisible (fully liable for all damage *Bradley*) |
| *Bradley v Groves* | P in 2 MVAs, almost recovered from 1st when 2nd occurred. Indivisible | For P, 1st D ordered to pay 100% - J/S liable | Indivisible injury, apportionment can happen between Ds, but they are J/S liable once indivisibility found as fact |
| *Blackwater* | none | Distinction | Causation of injury and causation of damages – shouldn’t put P in better position than would have been anyway |
| *Scoates* | 4 MVAs, 2 serious, then 2 minor | Minors not resp for loss of income | Can hold that with indivisible injuries, some Ds not liable for some heads of damage |

**Week 4 – Non Pecuniary Damages**

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| *Andrews* | 21 yo rendered quadriplegic | Cap necessary to prevent social burden of huge claims, give consistency to awards | Restitution is impossible for non-pecs, serves function of making up for what has been lost in the only way possible |
| *Thornton* | 18 yo quadreplegic – full time care needed |  | **Trilogy – ceiling of $100,000** (adjusted to account for inflation *Lindal*) |
| *Teno* | 4 yo girl with severe brain damage |  | Non-pecs set up a fund P can draw from, not compensate losses, but **provide substitute for lost amenities** |
| *Stapley* | Hit from behind in tractor, thoracic outlet syndrome (rib resection) | BCCA reduces non-pec award from 275 to 175 (**dissent from Finch J – no grounds to change decision**) | Factors to consider: age of P, nature of injury, severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital, social relps, impairment of physical and mental abilities, loss of lifestyle, Ps stoicism – shouldn’t penalize. |
| *Etson v Loblaw* | No evidence that P would not have enjoyed active and independent lifestyle for years. | Higher award for elderly losses | **Injury to the elderly can be more profound than to the young** *Pingitore* |
| *Fata* |  |  | Retirement years special, small loss of function more harmful |
| *Olesik* | P 88 yo | Non-pec award reduced to 50% | **Other line of cases says that elderly should get lower award d/t fewer years left** |
| *Hagreen* | Was an accomplished wheelchair bball player, central to his life | Awarded 110,000 | Reasonable prospect of a diminution of his enjoyment in life |
| *Agar* | P had CF, functioned extremely well, MVA left him with chronic pain, unable to do job, exercises that kept him healthy | Awarded 175 based on life expectancy of 3 more years | Emotional Injury to an already disabled person is nigh incomprehensible (*Bracey; Heska; McAllister*) – to rob a disabled person of what little they have is a monstrous injury |
| *S.Y. v F.G.C.* | Terrible ongoing sexual abuse by stepfather, jury awarded huge non-pec award | BCCA reduced to 250,000 | No cap on sexual assault cases, BUT still need to be reasonable and consistent with other awards |
| *Whiten* | Insurance company claimed arson, refused to pay claim for house fire. All evidence was to the contrary | 1 mill award was excessive, ONCA reduced to 100,000 | For an award of punitive damages to be made, **two requirements** must be met: first, the defendant must have committed an independent or separate actionable wrong causing damage to the plaintiff; and second, the defendant's conduct must be sufficiently harsh, vindictive, reprehensible and malicious that it offends the court's sense of decency |
| *Rizzolo* | Mrs Brett turned left and caused an MVA with Mr. Rs motorcycle, caused injury to lower leg – stoic, chronic pain affecting all aspects of life | 125,000 award for non-pecs | Facts!!! Judge outlines factors relied on in giving closer to the higher end of range – point is, tell the story well and convince the judge of the impact.  \*Witness account found unreliable because it contradicted everyone else. |
| *Milina v Bartsch* | 18 yo, acrobatic ski jump, quadriplegic | Court gave cap | Must consider individ situation of P, extent $ can bring solace, limits from the Trilogy |
| *Galbraith* | 78 yo, low impact MVA, seat belt didn’t lock d/t slow speed | 12,000 awarded for non-pecs | Competing factors of age vs impact on remaining years must be weighed in determining an award |
| *Morrow* | Chronic pain from negligent surgery ended promising hockey career at 19 – led to deficiencies in all aspects of life | 200,000 + 35,000 punitive (cap was 330,000) | All factors considered, deserved a large award (Q of whether general and aggravated damages combined could surpass cap not answered) |

**Week 5 – Pecuniary Damages**

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| *Steward v Berezan* | D ran a red light, injured P. P near end of career, unable to work d/t injuries. D argues pec awards excessive | Cancelled award for future earning capacity | No evidence that he would return to a job that his injuries would prevent him from doing. He was a realtor would had previously worked as a carpenter. |
| *Perren v Lalari* | Future earning loss |  | Confirms that *Athey* applies – real and substantial risk of loss, not mere speculation. Loss of **CAPACITY**, not loss of earnings. **2 approaches to quantifying loss**: earnings approach (when loss easily measurable ex: 10 more years of work at x wage) or capital asset approach (loss not easily measurable ex: youth is injured, uncertain career path *Miller v Lawlor*) |
| *Milina v Bartsch* | Principles for assessing Future cost of care |  | 1. Put in position would have been in, insofar as can be done with $ 2. Losses that can’t be righted by money awarded on a functional basis to provide substitute pleasures. 3. Provide adequate future care – Std is what is reasonably necessary on the med evidence to promote phys and mental health (Note: NOT medically necessary, BUT medically justifiable) |
| *Krangle* | Child born with Downs, parents sue dr for cost of care – failed to tell about genetic testing | SCC restores TJ of costs of care up to age of maj | Only allowed to realize costs that could reasonably be expected to be incurred. TJ found that adult costs would likely be covered by social welfare group, and awarded 5% contingency in case not. |
| *Spehar* | TBI – 16 yo girl ++ sig impairment | Upper levels of awards | Consider pos and neg contingencies |
| *Agar* | CF in MVA |  | Principle of full compensation in pecs d/t arbitrary cap nonpecs |
| *Rowe* | Past income loss |  | Past income loss – loss of the value of the work that would have been performed. Std of proof for actual lost events is BOP, theoretical lost income (promotions etc) = real and substantial possibility that it would have occurred. |
| *Rosevold* | none |  | Projections based on past earnings are but one factor |
| *Rozendall* | Real and substantial possibility that LPN work would be limited, tasks more difficult than classmates | Future loss of one years wage as LPN 50,000 | The essential task is to compare the likely future working life of the P with the likely future given the accident |
| *Loverock* | P returned to work, but not able to work OT, and limited potential to stay in that position longterm | 100,000 award | Real and substantial possibility of future earnings loss – not an exact science to determine |
| *Kwei* | Perm head injury, was unemployed | Award based on | Capital asset approach (he had some low-paying jobs before) |
| *Pallos* | Perm disability, making ++$ than before the accident |  | Still can be a finding of loss of capacity, even if earnings have increased subsequent to the accident |
| *Fox v Danis* | Sig impairment, returned to work, would have risen in the ranks at the bank | Awarded 750,000 based on earnings approach | Uses *Rosevold* approach of looking at what earnings would have been vs what they likely will be + contingencies |

**Week 6 – Defences**

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| *Foster v Kindlan* | 4 MVAs + workplace incident, evidence of enjoying motorcycle trips, long list of alleged inconsistencies | Found credible | Protracted period of time, unclear records made by other people, issues admitted/justified (ex the motorcycle trips) – not lack of credibility. |
| *Sevinski v Vance* | P not found credible in chronic pain case | Awarded some damages but not to extent argued by P | Inherent frailty to a subjective pain case, BUT the evidence of the P or witnesses can be sufficient to convince the court |
| *Janiak v Ippolito* | P refusal to undergo recommended surgery 70% success rate – 100% recovery. Failure to mitigate? | TJ found he shouldn’t be entitled to claim damages when he unreasonably refused tx. CA agreed, changed award somewhat. SCC agreed with CA. | Trier of fact must decide whether refusal is unreasonable: take into consideration the degree of risk from the surgery, the gravity of the consequences of refusing it, and the potential benefits to be derived from it.  P Must have **CAPACITY** to agree or refuse (thin skull again).  Principle of no compensation if fails to mitigate.  Psych infirmity (thin skull) – preexisting, can be considered in reasonableness assessment. If subsequent, **CAN’T**. |
| *Maslen* | Somatoform pain disorder (chronic pain), starting from minor accident, soft tissue injury – had won lottery and given away. 51 yo woman, seamstress | CA upheld TJ that accident caused her pain. Dismissed appeal and cross appeal – was ok for TJ to decide that she would be reasonably likely to recover rather than being an invalid for life as she claimed | Must be evidence of a convincing nature (in subjective pain cases) to overcome the improb that pain will continue, in the absence of obj sx, for longer than the normal recovery period.  **P must prove for causation**:  (a) that his/her psychological problems have their cause in the defendant's unlawful act, rather than in any desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation; and (b) that he/she cannot be expected to overcome those problems by use of his or her own inherent resources. |
| *Rozendaal* | Soft tissue injuries from 2 MVAs, H was driver, D. | P didn’t fail to mitigate | Law doesn’t req perfection in pursuit of rehab. Life circs taken into acct |

**Week 7 – Pre Trial Strategy and Procedures**

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| *Colbeck v Kaila* | Lawyers acting like jerks re: scheduling exams for discovery | Costs ordered against the P | Must be civil. Unfortunate string of conduct, should be give and take between counsel and rigid positions are not always helpful. |

**Week 8 – Legal and Ethical Obligations**

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| *Grewal v. Brar* |  |  | Expert must provide an unbiased opinion and consider material facts which are put to him or her. |
| *Barnes v. Richardson* |  |  | Not to act as an advocate for one side. |
| *R. v. Marquard* |  |  | A judge and jury must assess credibility of a witness, not rely on an expert’s opinion of credibility. |
| *Giang v Clayton* |  | Expert report inadmissible – ventured into realm of advocacy | Credibility is the proper function of a jury |
| *Kuhne v Kuhne* |  |  | Comments from a dr as to the P’s credibility are inadmissible opinion evidence. Don’t req expert evidence to prove. |
| *Lee v Swan* | Care-giver is expert witness |  | Weight of expert evidence affected if self-interest |
| *Chaicig v Chiacig* | Dr F receiving ++ referral work from ICBC for many yrs | Opinion tainted | Monies received in payment for prep of reports, ongoing relp with D work. Affects weight to be given.  Argumentative and condescending demeanor also decreases weight given. |
| *Shearsmith* |  |  | Ill-prepared for court, expert inferred to be an ICBC hack. |
| *Keefer Laundry* |  |  | Allowed to advocate for **OPINION**, should be confidence that expert would have rendered the same opinion whether hired by the P or the D. Can’t argue the legal case. |
| *Fabretti* |  | Report not admitted | Doesn’t qualify as an expert – no particular expertise in the subject matter |
| *Sammartino* | Sammy – brain injured child, over time question of functioning to assess damages – 14 years go by. Parents served with 3rd party notice (as co-Ds for alleged neglect) on 1st day of trial. | Special costs ordered to Sammy’s parents | Dr Klonoff not basing opinions on real info – not prepared  Reprehensible conduct reqs punishment. Service of notice of negligence with no evidence to support was such conduct. |

**Week 9 – Opening and Closing Statements**

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| *Knauf v Chao* | Comments of the P during opening were irrelevant, designed to evoke emotion, hostility. D didn’t ask for mistrial at the time. | No new trial, non-pec award reduced from 135-100,000 | Deference owed to jury awards, D should have brought up mistrial at the trial – shouldn’t have an opportunity to cast P in a less favourable light.  New trial shouldn’t be ordered unless the interests of justice plainly require it *Arland v Taylor* |
| *Brophy v Hutchinson* |  | Opening address, coloured the entire proceeding going forward. New trial ordered. | **Opening**s: goal = assist jury to understand what witnesses will say, present overview so they get the whole picture. No personal opinions, no facts that need proof that won’t be provided by the witnesses, nothing irrelevant, prej, hostile, or geared towards an emotional response. No rhetoric, sarcasm, or derision. |
| *Moskaleva v Laurie BCCA 2009* | Russian expert was cross examined on his past, even though his qualification wasn’t disputed by counsel.  Appellent also argued that the opening stmt was inappr and prej. | Wasn’t a case of throwing out random abusive accusations, wasn’t unsubstantiated, was about the quality and standard of his training, which experts are subject to being cross examined on.  No mistrial sought at the time, can’t go back latr and say unfair.  Both grounds dismissed. | Court confirmed that so long as there is **a legitimate foundation for the question and it is relevant to the issues** in the proceeding then the question is permissible in cross examination. |
| *Moore v Kyba* | P wanted to start his opening with a PPT | Not allowed, not given to the D or the court during TMC, given the Friday before trial started. | PPT presentation may be used for an opening but needs to be brought up in TMC with enough time to address issues with form and content |
| *Cahoon v Brideaux* |  |  | Mistrials are common in PI, but in modern times, jurors should be given more credit re: understanding their duty, not being hoodwinked by counsel.  Closings are argument, counsel should marshal the evidence in a favourable light |
| *Giang v Clayton* |  | Appeal based on Ps closing not allowed. D didn’t ask for mistrial at the time, wasn’t without fault throughout the trial | Award varied as being excessive but no new trial. |
| *De Araujo v Read* | Appeal by ICBC because comments from P put D and experts “on trial” were inflammatory and prej | New trial ordered | D did ask for mistrial at the time. Comments were wrong in nearly every way described in *Brophy* TJ didn’t do his job to remedy |
| *Walker v John Doe* |  | Mistrial granted | Closing was unfairly prej – misrepresented issues and legal principles |
| *Aberdeen* | Bike accident/guard rail. P applies to strike jury 26 days into trial (because of multiple Ds, Langley (City)’s opening was on day 24). It ended up sounding more like a closing, assessing all the evidence presented by the other Ds. | Jury struck (reluctantly) under *Rule 41-7*. | Allowing the trial to continue with the jury would be too prej against the P and the other Ds. Not reasonable to ask the jury to ignore, had sat on the “closing” for 2 days. Ps right to put its case first to the trier of fact is significant.  P shouldn’t be expected to interrupt the opening to object – is considered very egregious. |

**Week 11 – Part 7 Benefits**

No cases.