the Verdict

ISSUE 175 / WINTER 2022

TRIAL LAWYERS ASSOCIATION of BC

Supreme Court Justices Clash Over the Constitutionality of the "Ghomeshi Rules"

Evidence to Facts to Truth to Justice

Defamation, Cyber Libel and Social Media

PM 40027828

OUR MISSION: TO SUPPORT AND PROMOTE THE RIGHTS OF INDIVIDUALS IN BRITISH COLUMBIA

UPCOMING PROGRAMS

Mark your calendar with these CLE sessions

Friday 2 December 2022

Effective Presentation of Medical Evidence in Complex Personal Injury Cases

Seminar, 6 CPD Credits

Thursday 8 December 2022

Family Violence 7: Tech-Facilitated Violence

Webinar Series, 2.5 CPD Credits

The Family Violence series continues January through April 2023

Friday 9 December 2022

Addiction 101 - The Need for Sensitive Conversations in Your Practice

Complimentary Members-Only Webinar, 1 CPD Credit

Friday 3 March 2023

Family Law Conference (in-person)

Seminar, 6 CPD Credits

Friday 9 June 2023

Estate Litigation Conference (in-person)

Seminar, 6 CPD Credits

TRIAL LAWYERS ASSOCIATION *of* BC

View all upcoming programs at www.tlabc.org/upcomingprograms

CONTENTS

Articles

Featured

Columns + Miscellaneous

DIGITAL EDITION
tlabc.org

@BCTrialLawyers
@tla_bc
@tlabc

CEO CORNER ▸

BY **SHAWN MITCHELL MPA, C.DIR.**
TLABC CEO
PAC Contributor

Shawn is the CEO of TLABC. He has spent more than 20 years in senior management positions in the nonprofit and private sectors including the Vancouver Botanical Gardens Association, Edelman PR, charityvillage.com, WWF-Canada and the Huntington Society of Canada. A Chartered Director (C.Dir.), he is currently the Vice President and Governance Chair of the Three Links Care Society, and a three-term former director of MEC.

This issue of *the Verdict* has got a lot going for it. First, it is the first full issue put together by our new Publisher and staff colleague, Jenny Uechi, who has replaced Merri Hagan since she returned to her native Australia with her family.

Second, we have some really interesting pieces focused on rights – or more specifically, the implications of what happens when individual rights are encroached upon by government. For more on that, please read Don Renaud's piece first as a primer for the articles focused on this theme.

Third, our columnists have again done a great job of bringing some really relevant issues to these pages, including Jessie Legaree's Legislative Watch; Jonathan Desbarats' column talking about the so-called "Ghomeshi Rules"; and, Rose Keith's column exploring the benefits of mediation in emotionally charged disputes such as estate litigation.

But we would also be remiss if we did not take a moment to once again flag the Attorney General of BC's efforts to modernize the regulatory framework for legal professionals in the province. Finally, in late September the government released its intentions paper, *A Call to Action: Intentions Paper on Legal Professions Regulatory Modernization*.

With the intentions paper in hand, members can finally get a look at the government's thinking and, should they see fit, provide feedback. For a relatively small paper, there's a lot to digest. But some topline ideas include:

- Replace benchers with a smaller board of directors made up of elected directors, directors appointed by other directors, and members of government (which will form a minority).
- Reduce the role of the board to "strategic oversight."
- Prohibit members (now to be called "licensees") from bringing forward resolutions to direct the board, or to vote on the regulator's rules.

- Assign the regulator authority to regulate competence and integrity **but** "include government guidance to the regulator on *how* it should carry out its duties."
- Keep the "practice of law" more or less the same for lawyers, but expand the scope of legal services notaries, paralegals and "other future categories" may provide. Notaries in particular may be expanded "without the need for legislative change" by regulation or rule.

> While TLABC is still digesting the paper and deciding on next steps, members have begun to publicly share their thoughts.

TLABC Governor Joven Narwal, for example, posted his thinking in September on his LinkedIn page. It's worth a read in full; in the interest of brevity, I will summarize his main points.

Joven highlights three primary concerns regarding the government's intentions regarding the proposed governance structure for the new regulator. Specifically:

1. There is no requirement for a clear majority of independent lawyers on the Board. To maintain the independence of the bar, Joven argues there must be at least a two-thirds majority.
2. There is a lack of clarity on scope of practice of non-lawyers and who sets the standard. I'm simplifying Joven's point here, but essentially he is suggesting that to maintain independence of the bar, lawyers should determine what aspects of their role can and should be delegated. A board that is constituted in such a way where lawyers are NOT the majority is in opposition to this (see the first point).
3. Reducing the size of the board could have a prejudicial effect on diversity, equity, inclusion and reconciliation. Here, he points to the paper's observation by Harry Cayton in his 2021 LSBC governance review that the current size of the Bencher table is too large for effective discussion, deliberation or decision-making.

Joven writes, "However, the current Bencher table is the most diverse in the history of the Law Society; its composition is a function in part of geographical diversity arising from the county district boundaries and the number of seats available in each constituency. Reducing the number of elected governors risks undoing this progress and could create new forms of disadvantage."

More to come in the months ahead. Stay tuned.

the Verdict
ISSUE 175
WINTER 2022

ADDRESS CHANGES & UPDATES
tla-info@tlabc.org

LETTERS TO THE EDITOR
editor@tlabc.org

ADVERTISING INQUIRIES
Jenny Uechi
jenny@tlabc.org

PUBLISHER
Jenny Uechi
jenny@tlabc.org

EDITOR EMERITUS
Kenneth A. Price

MANAGING EDITOR
Shawn Mitchell
shawn@tlabc.org

EDITORIAL BOARD
Candace Cho
Jock Craddock
Magal Huberman
Jesse Kendall
Kyla Lee
Nicholas Peterson
Donald J. Renaud
Jennifer Tater
Elsa Wyllie

LAYOUT & DESIGN
April San Juan RGD
Colour Time Printing + Digital Imaging

The purpose of *the Verdict* is to provide information and opinion that is timely, practical, and relevant. The editor welcomes your submissions. Statements and opinions expressed are not necessarily those of TLABC.

Publication of advertising does not imply endorsement.

the Verdict is published quarterly by

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA
380 – 2608 Granville Street, Vancouver BC V6H 3V3 Canada
TELEPHONE 604 682 5343 TOLL FREE 1 888 558 5222
EMAIL tla-info@tlabc.org WEBSITE www.tlabc.org

Estimated Readership: 6000
Registered with the National Library of Canada. ISSN No. 1185-8931
Publications Mail Agreement No. 40027828

Return undeliverable Canadian addresses to:
the Verdict, Circulation Department
380 – 2608 Granville Street
Vancouver BC V6H 3V3
EMAIL verdict@tlabc.org

Cover photo by **Mart Production** on Pexels.

Get Involved!

Are you interested in volunteering on a TLABC committee? Visit tlabc.org/committees to learn more.

Committees include:

- Criminal Defence
- Education Planning
- Family Law
- Membership
- New Lawyers Planning
- Public Affairs (PAC)
- *the Verdict* - Editorial Board

TRIAL LAWYERS ASSOCIATION of BC

PRESIDENT'S MESSAGE ▸

BY **BILL DICK KC**
TLABC President
TLABC Member
Champion of Justice

TLABC COMMITTEE
- Litigation Oversight Committee

Bill Dick KC is a litigation lawyer and a partner at Murphy Battista LLP's Vernon office. Bill has extensive experience representing plaintiffs in serious, complex personal injury claims, including medical malpractice and insurance disputes at trial and on appeal. In addition to his courtroom experience, Bill is an effective advocate for clients involved in mediation and arbitration. He also has expertise in representing clients in complex commercial litigation, construction law disputes, and class action lawsuits.

Death is such an unpleasant topic and even more unpleasant when it involves people you know. It does, however, force you to reflect on your own life, and it gives you the opportunity to reflect on how an individual has touched and impacted your own life.

September 16, 2022 was a particularly hard day. I learned early in the morning the shocking news that TLABC's lead counsel, Ryan Dalziel had passed away in Quebec City, after attending a Supreme Court of Canada hearing. Later that day, I learned of the passing of one of my mentors, Justice John Truscott. I take this opportunity to make a few comments about both.

John Truscott can best be described as an "old school" litigator. He hated mediations, and once he had his mind made up, he was quite immovable. As a junior lawyer, you needed to do your best work or it would be ripped to pieces and you would be called (in my case, justifiably) "an idiot." I learned a lot from him, including the importance of doing excellent work, in a professional and ethical manner. I recall at Partners' meetings, he didn't speak very often, but when he did it was always thoughtful, considerate and effectively persuasive. I learned from him that sometimes when you say less, you say more.

Ryan Dalziel was also an excellent lawyer. In fact, undoubtedly the brightest and most capable lawyer I have encountered. He had the rare combination of brilliance, humor and relatability. I had the privilege of instructing him on TLABC's various legal challenges. He would send me drafts and ask for comments or changes. I don't believe I recommended any changes and the only comments were how good they were. He was simply amazing.

His passing is a huge loss to the legal profession in general and a massive loss to our organization. My heart goes out to his family and friends.

We will move forward with our litigation and life will carry on. We will select new and capable lawyers who will build on the foundation Ryan created. But Ryan will not be "replaced" and *he* will never be forgotten.

BY **DON RENAUD**
TLABC Past President
TLABC Member

TLABC COMMITTEE
- *the Verdict* Editorial Board

Don is a TLABC past president and practiced in the courts of BC for over 35 years. He has a special interest and commitment to the families of children who have suffered brain injury and cerebral palsy due to medical negligence and birth trauma.

Don has spoken nationally on wrongful death law reform, medical negligence and civil jury practice. He belongs to AAJ's Birth Trauma, Medical Malpractice and Professional Negligence groups. He also belongs to OTLA's Medical Negligence subsection.

Evidence to Facts to Truth to Justice

The Verdict looks to interest not only trial lawyers, but also journalists, jurists, social activists, and concerned citizens in our common search for the truth. Access to the truth is essential to a just, properly functioning just society.

Stated in every issue of *the Verdict* is TLABC's mission statement: *"To support and promote the rights of individuals" in British Columbia.* Hopefully, this issue — themed *Evidence, Facts and Truth* — will assist and inspire the reader to reflect on the disappearing rights of individuals, bearing in mind that a right without a remedy is no right at all. It's thought that the truth is the ultimate remedy. However, as frequently cautioned by Gloria Steinem: *The truth will set you free .... But first, it will piss you off.*

Trial lawyers endeavour to put people who have no power on an equal footing with those who hold power. Ours is the Sisyphean challenge of righting wrongs. In our world, rights are tools provided by the law for use in correcting injustice. Not to be dismissed as merely procedural, these rights, hard earned by our predecessors, are essential to our task of right-siding wrongs.

Together with our paralegals and experts, we work to locate and gather the requisite evidence of the cause and extent of wrongs. This evidence is needed to support those findings of fact the court makes reaching verdicts for the individuals we represent. The court's findings of fact are for us where the rubber hits the road — judicial declarations of truth.

Like justice, the truth is an ideal and not always achieved. Trial lawyers know better than anyone that the trial court's verdict is often as close as society can get to the unvarnished truth. In this world, there's nothing quite like a courthouse fight to expose the truth to the public record. As with journalists, we're constantly challenged by powerful institutions, bureaucracies, and governments which are motivated to restrict access to evidence and the courts.

Truth with Consequences

Many of our clients are new to Canada. They're often unaware of the historically class-based social structure from which we are still emerging. They assume a North American standard of justice and watch as our southern neighbor's courts shut down misinformation aimed at overturning election results. They see conspiracy theorists like Alex Jones successfully sued for millions of dollars after spreading lies about the parents of the Sandy Hook shooting victims. They expect us to step up to the plate and put the truth on the public record as did the great Koskoff law firm, not only against Alex Jones but also gun manufacturers for dangerously marketing semi-automatic rifles to civilians.

The great consumer advocate Ralph Nader is responsible for more American public safety legislation than any U.S. president or governor. When he spoke in Vancouver, during the NDP's previous tenure as government (1996-1999), he explained the difference between American and Canadian lawmaking. He explained that in the United States, when government has a good idea, it is difficult to make it law, whereas in Canada the reverse is true. He went on to note that unlike in the U.S., in Canada when government has a bad idea, it has little difficulty making it law.

The independence of courts in Canada is crucial. It seems that only in our trial courts that evidence, facts, and truth really come together.

Defending the Truth

The feature articles in this edition of *the Verdict* focus on the trial lawyer's task of using rights to correct wrongs. They demonstrate that the right to access evidence is as vital as accessing the court itself. We play a vital role in asserting the individual's right to reveal the truth in a public, independent forum.

Greg Phillips' piece uncovers the latest effort by the executive branch to degrade the ability of citizens to access evidence. With perfect clarity in *Privacy Update: Freedom of Information and Protection of Privacy Act*, he demonstrates how non-partisan calls for transparency were ignored by the executive branch in favour of further restricting access rights.

Anthony Leoni's article *Accountability Denied: Health Care Providers and s.51 of the Evidence Act* expertly dissects the longest and most comprehensive section of BC's *Evidence Act*. He exposes this legislatively sanctioned brick wall facing the innocent victim's attempts to uncover evidence of health provider and bureaucratic negligence.

Using experts to uncover, protect and preserve evidence is a practical solution every trial lawyer should consider. Craig A. Good sets out the nuts and bolts of doing so in car crash cases from a forensic engineering perspective is well set out in *Hard Facts – The Importance of Evidence Gathering With a Focus on Vehicle Collisions*.

Defining "truth" becomes the focus in actions regarding reputation. In Alan McConchie's excellent article: *Defamation, Cyber Libel and Social Media*, he shows that principled thinking, foundational to the common law, is able to tackle the wrongs of the information age.

Hopefully this edition will fortify us as we pick up the cudgels — to use in the most civilized way, of course.

BY **GREG PHILLIPS**
TLABC 2nd Vice President
TLABC Member
PAC Contributor (Silver)

TLABC COMMITTEE
- Human Resources Committee
- Government Relations Committee

Greg Phillips was called to the bar in January 2010. Much of Greg's practice is Personal Injury and ICBC injury cases. The remainder of his practice is focused on civil litigation and resolving disputes between individuals or businesses, including employment law. He represents clients at all levels of the court system as well as at the Workers Compensation Appeals Tribunal.

While Greg has recovered fair compensation for his clients at many trials, he is also an excellent negotiator and has managed countless claims through to fair settlement or resolution.

Privacy Update: Freedom of Information and Protection of Privacy Act

There are very few lawyers in British Columbia who do not interact in some way, and to some extent with the *Freedom of Information and Protection of Privacy Act* R.S.B.C. 1996 c. 165 (the "Act").

As the name implies, the Act sets out to accomplish two parallel goals: providing individuals with access to information held by public bodies, and setting out the manner in which those public bodies can collect, use and disclose personal information.

Not just the domain of privacy lawyers and government lawyers, it is an important piece of legislation for anyone who interacts with public bodies – and this is especially so recently, as it has undergone some of its most substantive changes since its introduction.

Amendments and changes are routinely made to the Act. Section 80 of the Act obligates a Special Committee of the Legislative Assembly to perform a comprehensive review of the Act every six years. As the previous review was undertaken in 2015, the Act was due for review in 2021 and a Special Committee was appointed on June 11, 2021 by the Legislative Assembly.

Remarkably, and despite having appointed a Special Committee just four months previous, in October 2021, the government introduced significant amendments to the Act that received Royal Assent on November 25, 2021. The amendments passed by government have been unpopular and it remains to be seen which (if any) of the Special Committee's recommendations will be adopted in future legislative sessions.

The November Amendments

There are a number of key substantive changes to the Act, including amendments which:

- Require public bodies to develop a "privacy management program";
- Create new reporting obligations for public bodies to an affected individual and the Privacy Commissioner;
- Broaden the scope of documents which are exempted from the Act;
- Add new penalties and offences for individuals, service providers and their employees and associates;
- Remove the Office of the Premier as a "public body";
- Repeal the requirement for storage of personal information within Canada; and
- Require an application fee for access to information requests.

Of these, three require some special comment.

With respect to so-called "data residency" requirements, this represents a significant shift in thought from previous iterations of the Act. The Act previously prohibited public bodies from storing personal information outside of Canada, presumably under the presumption that Canadian data storage was more secure or trustworthy than a given data centre outside of the country. In practice, this was a significant barrier to innovation and product delivery, and a public body could have easily found themselves on the wrong side of the Act simply by failing to confirm their emails were being stored within Canada, for example.

Organizations, lawyers or clients who interact with public bodies should be aware that public bodies are now required to conduct a "privacy impact assessment" to determine whether they may export personal information outside of Canada[1], and be alert for breaches of same. Additionally, public bodies may now have looser requirements for the transmission of sensitive data than has been the past norm.

Second, the Act has always contained a long list of types of information that are exempted from disclosure. The recent amendments further expand that list. Of particular note is the exemption of metadata from disclosure. As many modern litigators know, the metadata associated with a digital record is often a treasure trove of information. Metadata can include, for example, the date or specific location a photograph was taken, a record of all edits to a document (including the identity of the editor), or even, in certain cases, identifiable information about the individuals who viewed a certain document.

Most controversial is the addition of a $10 fee for access to information. This represents a significant departure from previous iterations of the legislation. The Information and Privacy Commissioner, Michael McEvoy, took the unusual step of penning a deeply critical open letter to the government, noting that "I am unable to understand how this amendment improves accountability and transparency when it comes to public bodies that operate in a free and democratic society … To add another barrier of access at a time when transparency is critical is deeply troubling."[2]

The fee is not applicable to requests for personal information, only for general information. In practice, however, many public bodies continue to charge fees for access to personal information – especially where the request is made via an authorized representative like a law office.

What's Next?

As noted at the outset, the government enacted these changes at essentially the same time the Special Committee was appointed to review the Act and recommend any changes – a move described by Privacy Commissioner McEvoy as "baffling." Nevertheless, the Special Committee issued its recommendations on June 8, 2022, featuring 34 separate recommendations going to creating a "culture of transparency," narrowing exceptions to the Act, reducing barriers to access to information, increasing individual privacy rights and requiring proactive (rather than reactive) disclosure[3].

The amendments made in November, even given their most generous reading, are almost all geared towards restricting access rights. It is striking, in comparison, that the cross-partisan Special Committee's recommendations are almost all focussed on increasing rights of access – calling the recommendations a "fundamental shift toward a culture of increased transparency." It remains to be seen whether any of the recommendations will be put into action by Legislature, but given what has transpired over the last 10 months, counsel would be wise to consider this version of the Act to be part of the privacy landscape for the foreseeable future.

1 Section 2(1), *Personal Information Disclosure for Storage Outside of Canada Regulation*, B.C. Reg. 294/2021

2 Michael McEvoy, *RE: Bill 22 - Freedom of Information and Protection of Privacy Act amendments, OIPC Public Comments,* https://www.oipc.bc.ca/public-comments/3592

3 Special Committee to Review the Freedom of Information and Protection of Privacy Act, *FIPPA For the Future,* https://www.leg.bc.ca/content/CommitteeDocuments/42nd-parliament/3rd-session/fippa/report/SC-FIPPA-Report_42-3_2022-06-08.pdf

Defamation, Cyber Libel and Social Media

BY **ALAN McCONCHIE**

Alan McConchie is a litigator with a focus on defamation, reputation management and cyber libel. He represents clients at all levels of the court system.

Alan's practice with McConchie Law Corporation includes helping to identify the parties responsible for defamation posted on the internet anonymously; addressing defamation on social media; and addressing defamatory reviews posted to rating sites. He is a Member of the Law Society of British Columbia.

Is the Internet a lawless Wild West where unbridled freedom of expression reigns supreme? It has never been easier to access information or to post reviews, ratings or other allegations to social media and other websites. With the click of the keyboard anyone can now easily cause immediate and profound damage to personal or professional reputations. But that doesn't mean there aren't consequences.

The Supreme Court of Canada has held that the right to free expression does not confer a licence to ruin reputations.[1] Where the defendant is subject to the jurisdiction of a Canadian court, a plaintiff may advance a claim against them in defamation or malicious falsehood. Also, the Ontario Superior Court of Justice recently recognized the tort of internet harassment.[2]

This article will focus on the tort of defamation in the context of the Internet age, social media and digital news sources while also providing a general overview of defamation law in Canada.

What is Defamation?

In Canada, to establish a claim in defamation a plaintiff must establish the following:

1. the statements were published by the defendant;[3]
2. the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
3. the words in fact referred to the plaintiff; and
4. that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

If these elements are established the law presumes that the impugned words are false. The onus then shifts to the defendant to establish a defence to escape liability.[4]

The main reason why a plaintiff commences a defamation claim is to vindicate their reputation and to mitigate future harm. A plaintiff must give serious consideration before deciding to commence a defamation action. Litigation should only be brought as a last resort when there are no other means of achieving these aims. Among other considerations, the plaintiff must weigh the risk of a defamation claim attracting greater publicity to the defamatory allegations. As public documents, the media will be free to report on all court filings including the pleadings.

Defamation Defences

There are a number of defences to a defamation claim. The two defences most likely to apply to online content are the defence of justification (the technical name for the defence of truth) and the defence of fair comment.

Truth is a complete defence to an action for defamation. The defence does not require a defendant to prove the literal truth of every detail of the expression. A defendant need only prove the "substantial truth" of every defamatory meaning (or "sting") conveyed by

the expression. Minor inaccuracies do not defeat the defence of justification. Conversely, if the overall impression of the publication is false, the defence fails – even if some or all of the expression is proven to be true in their literal sense.[5] A defendant cannot succeed under this defence by proving that the allegation has been previously made by someone else; they must provide the truth of the underlying allegation.[6]

The defence of fair comment protects the subjective expression of opinions on a matter of public interest.[7] It does not protect statements of fact.

One of the elements of the defence is that the comment (opinion) must be based on true facts. The facts must be sufficiently indicated in the comment or so notorious that the audience can make up its own mind based on the merits of the comment. The factual foundation is an important objective limit to the fair comment defence.[8] The defence will not succeed if important or material facts that would falsify or alter the complexion of the facts stated in the comment are omitted.[9]

Another element of the defence is the requirement that the impugned expression, though it can include inferences of fact, be recognisable as comment. A comment includes a deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof. Words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used.[10]

The defence does not require a defendant to prove the literal truth of every detail of the expression. A defendant need only prove the "substantial truth" of every defamatory meaning (or "sting") conveyed by the expression.

A successful defamation plaintiff is entitled to an award of general damages, which serves three distinct functions: a) to act as a consolation to the plaintiff for the distress they suffer; b) to repair the harm to their reputation; and c) as vindication of their reputation.[11]

Damages Awards Involving Internet Defamation

In recent years, the damages awarded in Internet defamation verdicts have continued to increase in amount as Canadian court continue to recognize Internet defamation's "tremendous power" to harm to harm reputation. Internet defamation is a particularly egregious form of defamation. It is distinguished from its less pervasive cousins in terms of its potential to damage the reputation of individuals and corporations, as a result of its interactive nature, its potential of being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility.[12]

The B.C. Supreme Court in *Hee Creations Group Ltd. (c.o.b. Amara Wedding) v. Chow*[13] awarded the plaintiff damages totaling $115,000 over a dozen internet social media posts published by the defendants disparaging the plaintiff's wedding services. The posts were made in English and Chinese language blogs, forums and social media sites, including Facebook. The Court found that "[t]he Publications were disseminated over the internet so that they would be read by thousands of people for the purpose of causing as much damage as possible to the reputation and ongoing business of the plaintiff. That goal was successful."[14]

In *Rook v. Halcrow*[15] the plaintiff geological and business consultant commenced an action in B.C. Supreme Court alleging he had been defamed by his ex-girlfriend on numerous websites. The publications at issue were made anonymously or under pseudonyms. The court did not find the defendant's denials of responsibility for the publications credible, relying in part on expert evidence, in finding the defendant liable for the publications. The plaintiff was awarded $175,000 general damages and $25,000 aggravated damages. The plaintiff was also awarded $29,870.00 (USD) special damages as compensation for expenses he incurred engaging the services of reputation consultants who assisted in having the posting removed from the Internet. In its reasons the court stated: "The courts have recognised that the internet can be used as an exceedingly effective tool to harm reputations. This is one such case."[16]

The Saskatchewan Court of Queen's Bench in Houseman v. Harrison[17] awarded the plaintiff dentist a total of $240,000 in damages for defamatory reviews made on www.ratemds.com and in posts to Google reviews. In its discussion on damages, the Court stated: "In my view, particular significance must be given to the mode and extent of publication. The fact that the offending words were posted on the internet, through a specific rating website, is particularly noteworthy. It is a sign of the times that Canadian courts have seen an increasing number of defamation actions pertaining to uncomplimentary and damaging words posted online. This medium is widely accessible and broadens the ability of anyone to publish harmful comments."[18]

In *Port Alberni Shelter Society v. Literacy Alberni Society*[19] the B.C. Supreme Court, assessing damages following a default judgment on liability, awarded the plaintiffs $344,720.75 in damages against the defendant society and its Executive Director for defamatory statements published in emails, on Facebook, a Change.org petition and in YouTube videos. The award included $4,720.75 in special damages for the expense of hiring a public relations firm to mitigate the defamation. The Court stated: "that internet publication is 'instantaneous, seamless, interactive, blunt, borderless and far-reaching' and is therefore relevant to the quantum of dam-

ages because it is more pervasive and effective than other forms of publication."[20]

Recently, on August 24, 2022, the B.C. Supreme Court in *Premier Finance Ltd. v. Ginther*[21] awarded damages aggregating $90,000 to two individual plaintiffs and a corporate plaintiff against a "disgruntled customer" over two online reviews, one on Google and one on Yelp.

Injunctive Relief: Stopping Further Expression and Removing the Expression From the Internet

Where the impugned defamatory content remains online and there is a risk the defendant may make further posts, one remedy a plaintiff may seek at trial is a permanent injunction compelling the defendant to remove the impugned content and prohibiting them from posting any content in the future containing the same or similar allegations. Permanent injunctions have typically been ordered after findings of defamation where either (1) there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that they are liable to the plaintiff for defamation; or (2) there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible. [22]

Looking Forward

The Internet has made it easier for anyone with access to a computer to defame. The significant features of Internet defamation, distinguishing it from other forms, are its ability to instantaneously reach a world-wide audience and its potential to remain accessible online indefinitely.

Defamation verdicts continue to recognize the particular harm caused by Internet defamation. Customers, clients and patients who post defamatory reviews about services and products, whether they be retail, restaurant, professional, medical, or whatever the case may be, should not assume that they are immune to liability.

1 *Grant v. Torstar Corp.,* 2009 SCC 61 per McLachlin C.J. (as she then was) at para. 58.
2 *Caplan v. Atas,* 2021 ONSC 670 at para. 171
3 Defamatory expression on the Internet this is posted anonymously or by someone using a pseudonym will require the plaintiff to take steps to identify the defendant, often by obtaining disclosure of information from the website hosting the impugned content which may assist identify the defendant.
4 *Grant v. Torstar Corp.,* 2009 SCC 61 per McLachlin C.J. at paras. 28 and 29
5 *Cimolai v. Hall* et al., 2005 BCSC 31 per Holmes J. at para. 173, aff'd 2007 BCCA 225
6 This is the "repetition rule": *Grant v. Torstar Corp.*, 2009 SCC 61 per McLachlin C.J. at para. 114.
7 The test for the fair comment defence is as follows: a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts? (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice. *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 per Binnie J. (as he then was) at para. 28.
8 *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 per Binnie J. at paras. 31 and 34.
9 *Creative Salmon Company Ltd. v. Staniford,* 2009 BCCA 61 per Tysoe J.A. at para. 61, lv to app den'd (2009), 285 B.C.A.C. 320 (note) (S.C.C.).
10 *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 per Binnie J. at par. 26
11 *Turco v. Dunlop,* 1998 CanLII 4608 (BC SC) at para. 75.
12 *Crookes v. Newton,* 2011 SCC 47 per Abella J. (as she then was) at paras. 37-38.; *Barrick Gold Corporation v. Lopehandia* (2004), 239 DLR (4th) 577 (ON CA) at para. 34.
13 2018 BCSC 260
14 At para. 104.
15 2019 BCSC 2253
16 Para. 1.
17 2020 SKQB 36
18 At para. 30.
19 2021 BCSC 1754
20 At para. 95.
21 2022 BCSC 1461
22 *Hunter Dickinson Inc. v. Butler,* 2010 BCSC 939, at paras. 75-79.

BY **TONY LEONI**
TLABC Member
Champion of Justice

Tony Leoni is a trial and appellate lawyer and Partner with Rice Harbut Elliott LLP in Vancouver. His practice is entirely devoted to representing Plaintiffs. Tony's practice is focused on class actions relating to product liability, privacy breaches and financial wrongdoing and single event cases relating to medical negligence, occupiers liability and government liability, including Charter damages. Some of Tony's most recent noteworthy cases include the certification of a privacy breach case relating to the CERB against the Government of Canada and a case confirming that Charter damages are available against health care providers. Since 2019 Tony has co-authored the Damages Chapter of the CLE-BC Motor Vehicle Accident Claims Practice Manual. Tony regularly writes and presents on wide-ranging topics in tort law, government liability and class actions.

Accountability Denied: Health Care Providers and s. 51 of the *Evidence Act*

Following *Cambie Surgeries*[1], British Columbians have one and only one in-Province option for required health care: the public system, which is administered by the regional health authorities. Unfortunately, when that system fails patients, which is reportedly not an uncommon occurrence[2], health care providers benefit from a complex and impenetrable wall of statutory privilege that prevents important evidence from being received and considered by the Court.

Section 51 of the *BC Evidence Act,* RSBC 1996 c. 124 (the *"Evidence Act")* is arguably the most concerning provision for victims of negligence by health care providers, as it institutionalizes an uneven playing field between plaintiffs and the health care establishment. It creates a culture of secrecy and an absence of accountability and transparency which is at least notionally contrary to the *Patient Care Quality Review Board Act*, SBC 2008 c. 35 (the "*PCQRBA*"), a more recent enactment that is intended to foster transparency and openness between the healthcare system and the public.

The relevant parts of s. 51 of the *Evidence Act* are as follows:

> 51 (2) A witness in a legal proceeding, whether a party to it or not,
> a. must not be asked nor be permitted to answer, in the course of the legal proceeding, a question concerning a proceeding before a committee, and
> b. must not be asked to produce nor be permitted to produce, in the course of the legal proceeding, a record that was used in the course of or arose out of the study, investigation, evaluation or program carried on by a committee, if the record
> i. was compiled or made by the witness for the purpose of producing or submitting it to a committee,
> ii. was submitted to or compiled or made for the committee at the direction or request of a committee,
> iii. consists of a transcript of proceedings before a committee, or
> iv. consists of a report or summary, whether interim or final, of the findings of a committee.

A "witness" is defined broadly in s. 51(1) of the *Evidence Act*. It includes anyone who is examined for discovery, cross-examined on an affidavit, or "is called on to answer any question or produce any document, whether under oath or not." A "committee" is also defined in s. 51(1) and is broad. Given the sheer volume of committees, terms of reference, and administrative staff that populate the health authorities, and their control of such matters, the practical conclusion is that everything that is done in the context of an investigation of an error arises out of a committee and is prevented from being received as evidence in Court.

In *Gill v Fraser Health Authority*[3], a three-year old child died in hospital, allegedly due to the medical staff's failure to treat her infectious condition. Part of the allegations involved a lack of proper training and protocols on the part of the health authority. The Defendants brought an application seeking to declare inadmissible a letter that the

health authority sent to the Plaintiffs regarding the matters in issue. The Plaintiffs had the letter in their possession. The *PCQRBA* required that the letter was to be sent by the health authority to the Plaintiffs. At the hearing, the health authority took the position that the letter erroneously included information from an internal quality review process, and thus sought an order prohibiting the plaintiffs from using the letter as evidence or referring to it in the proceedings.

Justice N. Smith held as follows:

> [26] The plaintiffs also submit that the mandatory disclosure provisions in the PCQRBA, the more recently enacted of the two statutes, must be interpreted to qualify the prohibition in s. 51 of the EA. To do otherwise, they say, would defeat the public policy goals of transparency and accountability in the health care system for which the PCQRBA was enacted.
>
> [27] There is clearly tension between the objectives of s. 51 of the EA and those of the PCQRBA. The PCQRBA provides for an inspection and reporting process that is expressly restricted by its reference to s. 51 of the EA. Presumably, not all patient complaints will give rise to an internal review under s. 51; however, if the complaint raises issues of sufficient severity to do so, the PCQRBA investigation and mandatory reporting to the complainant may be limited and incomplete if the restriction relating to s. 51 is given full effect.
>
> [28] The plaintiffs urge the Court to recognize a distinction between matters that were before a committee pursuant to s. 51 of the EA, or that emerged from it, and specific steps taken in response to a complaint under the PCQRBA. They say the latter are subject to mandatory disclosure, even if a committee pursuant to s. 51 of the EA was involved in their formulation.
>
> [29] But even if that is correct, the PCQRBA only addresses the right of a patient or other complainant to receive the information. Whether any information received by a party is admissible in legal proceedings is a different question governed by the applicable rules of evidence. The applicable rules of evidence in this case include the absolute prohibition in s. 51(2) of the EA, which is not altered by anything in the PCQRBA.
>
> Determination
>
> [30] I am satisfied on the evidence that the March 27 letter contains information that "arose out of the study, investigation, evaluation or program carried on by a committee" and that it includes what is in fact "a report or summary" of its findings within the meaning of s. 51(2)(b) of the EA. As frustrating as this result may be for the plaintiffs, I am bound to apply s. 51(2) of the EA and rule that the March 27 letter cannot be put into evidence or referred to in these proceedings.

The result was consistent with previous decisions upholding the unassailable protection of s. 51, including in cases where the plaintiff was intentionally shown documents by a health care provider[4]. This creates a perverse result: a patient can be a recipient of factual evidence of wrongdoing, either by a health care provider acting as "whistleblower" or by the health authority itself, and can then be precluded from using that information to seek redress and accountability in Court.

Furthermore, the absolute prohibition against using outcomes of internal investigations as evidence is contrary to both the letter and the stated purpose of the more recent enactment, the *PCQRBA*. *Hansard* debates of the Legislative Assembly provide important context for understanding the purpose of the *PCQRBA* (then Bill 41).

As explained by (then) Health Minister Abbott, the *PCQRBA* was drafted with the stated goals of improving healthcare transparency and accountability:

> In the Conversation on Health British Columbians told us that they **valued the principles of transparency and accountability in our public health care system. Our government also believes very strongly in those principles,** and we took those principles and enshrined them in the Medicare Protection Act, which is currently before the House.
> [...]
> As I stated at the beginning of my comments, **the public told us in the Conversation on Health that transparency and accountability are two key principles of a world-class health care system. We're putting those principles into action with the *Patient Care Quality Review Board Act*.** British Columbians can expect this process to be up and running by the fall. **This means greater transparency and greater accountability than ever before for patients in our province.**

> What we have seen, and that's why we're supporting this.... **We're hoping to, in fact, encourage the government down a newer path of accountability.** We have seen over the last number of years — sadly, the last seven years — an approach to accountability in our public health care system that I think has been less than desirable. [EMPHASIS ADDED]

Then opposition critic, and current Minister of Health Adrian Dix provided the following further insight on the *PCQRBA*, the goals of which are arguably diametrically opposed to the continued operation of s. 51:

> ... Those health authorities were essentially in court defending their right to not have any public meetings. **No accountability. This goes to the culture, I think, under which Bill 41 can succeed — the culture in which people feel that if they have a legitimate complaint, they can go and make a complaint and not have it held against them in any way by the health care system, that they can, in fact, bring about change by raising complaints and that they're encouraged to bring about complaints.**
>
> ...
>
> **What did Justice Macaulay say?[5] He described the health authority's position as "a cynical favouring of the interests of the bureaucracy over that of the public."** He further stated that it represented — and I know the member for Burnaby-Edmonds is shocked by this — "a stunning disregard of the legislative intent of the *Health Authorities Act*."

This issue of accountability. In all of these ways the government has moved away from accountability and has in fact suggested to members of the public that they don't really have a right to know what's going on in their health care system.

Why is this important? Because for a complaint process to work, the public has to have confidence that complaints will be taken seriously. So we're going to approve the framework of this here, but let it not be said that we don't have concerns.

We have concerns, in fact, that the very fact that the public feels discouraged and denied by their health authorities will lead to fewer complaints, because the public will say: "This process won't go anywhere. Nothing will change. Maybe I'll have a right to appeal and get a different report, but nothing will change."

Remember, the **purpose of the health authority model is to use the accountability that comes with being closer to the people in order to improve the accountability of the**

health care system. The idea wasn't to create six large corporations which would impose their views on the public. **The idea was to use the very accountability that comes with being closer to the community and representing health regions, I would suggest, to make things better. That's the purpose of it.**

This is relevant, of course, to Bill 41. This is extremely relevant to Bill 41, as you know, hon. Speaker, because Bill 41 is about trust. It's about accountability. It's about believing that if you put a system in place, the public will come and participate in that system. They will only participate in that system if we get a change in the way the health authorities do business.

What we need, in addition to patient care quality review boards, is a **change in the culture of accountability in our health authorities and in our health care system.** We have to have a government that believes in public health care. If we have a government that believes in public health care — and unfortunately, we don't have that today — that would be a first step.

[EMPHASIS ADDED]

The *Hansard* debates on the *PCQRBA* highlight the importance the Legislature placed on several values: transparency, accountability, improvements in health authority-client relations, increasing public confidence and a change in the culture of accountability in health authorities. The older s. 51, which provides a shield from accountability, runs counter to these values. Indeed, some authors have recently concluded that one of the most serious negative impacts of s. 51 is the undermining of trust in the healthcare system itself, a concept known as "institutional betrayal."[6] This deterioration of trust in our public bodies further reinforces systemic power imbalances and intergenerational distrust among patients, particularly Indigenous patients.[7]

The legislative debates preceding the enactment of the *PCQRBA* also underscore the importance the legislature put on disclosing to the public the "facts behind what occurred and why" when complaints are made and "in the case where a review has recommended change to improve the health care system for the future, that that information be made available as well."

The defence typically espoused to s. 51, explained by Master MacNaughton (as she then was) in *Parmar* and the Court of Appeal in *Sinclair* is to encourage absolute candour in cooperation in quality reviews thereby ensuring high standards of patient care and professional competency. There was a concern against the possible chilling effect on cooperation of knowing that statements made could be shared outside the hospital.

Contrary to this argument, health care professionals are highly regulated and have a duty to cooperate with investigations into their professional status, as a condition of their continued right to practice. The prohibition in s. 51 not only runs contrary to the spirit of accountability discussed above, it also protects and insulates health authorities and other health professionals from meaningful checks and balances in our civil justice system when an adverse event occurs in our public health facilities, protecting only those responsible for our care when they fail patients and further undermining public confidence in the healthcare system itself.

The prohibition in s. 51 not only runs contrary to the spirit of accountability discussed above, it also protects and insulates health authorities and other health professionals from meaningful checks and balances in our civil justice system when an adverse event occurs in our public health facilities.

It is hoped that as part of the Legislature's enthusiastic support of a "public system only" health care strategy, the Legislature will see it fit to complete the work it commenced with the enactment of the *PCQRBA* and to permit health care committee findings and documents to be used in litigation against negligent healthcare providers once internal reviews are complete. Any potential minor chilling effect of such an amendment is outbalanced by the need for accountability, transparency and trust in our healthcare system, thus promoting the end goal of quality care for patients.

1 *Cambie Surgeries Corporation v British Columbia (Attorney General),* 2020 BCSC 1310, aff'd 2022 BCCA 245

2 A study conducted by the Canadian Medical Association Journal had determined that over 87,000 patients in Canada had suffered from what they call an adverse event in hospitals each year. Additionally, the study had found that as many as 24,000 patients died each year in hospitals because of medical errors. Out of these numbers between the years 2002 and 2006, the CMPA reported that only 5,246 lawsuits were filed against doctors in Canada, or about 1,000 per year. The statistics are alarming, meaning almost 99% of possible medical malpractice victims have not filed a claim. https://wagners.co/are-canadian-medical-malpractice-claims-different-than-in-the-united-states/

3 2022 BCSC 638

4 *Lew (Guardian ad /item) v. Mount St. Joseph Hospital Society,* [1995] B.C.J. No. 2755 (S.C.); *Sinclair v. March,* 2000 BCCA 459 at para. 26; *K.D. v. BC Women's Hospital et al,* 2003 BCSC 2016 at paras. 26-28; *Parmar v. Fraser Health Authority,* 2012 BCSC 1596 at paras. 9-10; *Nagase v. Entwistle,* 2015 BCSC 1654, aff'd 2016 BCCA 257

5 The referenced decision of Justice Macaluay was *Hospital Employees' Union v. Health Authorities (British Columbia),* 2003 BCSC 778, regarding the then practice of health authorities to conduct meetings in private

6 Dr. Robert Robson et al., *Legal Privilege Legislation: Consequences for Patient Safety,* Healthcare Quarterly Vol. 25 No. 1, p. 25

7 *Ibid.*, p. 22

BY **CRAIG A. GOOD**

Dr. Good received a doctorate in Mechanical Engineering specializing in Injury Biomechanics from the University of Calgary in 2007 and holds two seatbelt patents. He provides consulting services in the areas of collision reconstruction, automotive safety systems, and injury biomechanics. Areas of special expertise include evaluation of helmets and trampoline parks, occupant modeling, and product failure analysis of airbags, seatbelts, and child restraints.

Hard Facts: The Importance of Evidence Gathering with a Focus on Vehicle Collisions

When accidents happen, emotions run high and accusations abound. Everyone has an opinion about what happened, and they frequently differ. The facts, and how to interpret them, often are not obvious. An impartial expert can help get to the bottom of the matter. Examples of some typical questions frequently asked are:

- How fast were the vehicles going?
- Who crossed the centreline?
- Who was driving?
- Could the collision have been avoided?
- Were outside factors involved, such as fog, rain, snow, ice, construction, wildlife, etc.?
- Are the injuries consistent with the dynamics and severity of the collision?
- Was the injured occupant wearing their seatbelt?
- How would restraint usage have affected the injury outcome?
- Did a defect or failure contribute to the collision or the injuries?

Identifying the key issues guides the investigation. While there will be some variation to the investigative approach case-by-case, evidence gathering and preservation should always be in the forefront.

Evidence collection may include collision site and vehicle inspections, downloading event data recorders, and gathering component parts for retention. This article provides some key considerations and guidance for gathering the physical evidence, or *hard facts*, by those involved in the earliest part of an investigation.

Site Inspections

Evidence gathering at the accident scene is generally conducted by the attending police officers. The extent to which police document the collision evidence varies greatly for many reasons, assuming they are called to the scene at all. Documentation can range from filling in the police report and possibly snapping a few scene photographs to conducting a complete scene survey and even aerial drone photography. The police file may also include vehicle mechanical inspections, witness statements, and a reconstruction. The file should be requested as soon as possible, before it is closed and purged by the police department.

A site visit by an expert after the scene has been cleared involves photographic documentation, and often measurements are taken of the area. Evidence left at the collision site may include tire marks (skid marks, yaw marks, collision scuff marks), scrapes and gouges in the pavement, furrows in the ditch, and vehicle debris, to name a few. It is best to have the site visited as soon as possible after a crash, before tire marks have worn away or the roadway has been re-paved. The need for an expert to attend the collision site should be assessed on a case-by-case basis. If the police have thoroughly documented the scene, a site inspection may not be necessary. Advice for anyone attending the site before an expert is retained is to get thorough photographic documentation.

Perspective should always be kept in mind when photographing a site. A close-up view of a tire scuff mark on the pavement may not be useful without a perspective photograph to show where it was located on the roadway.

Vehicle Inspections

Whenever possible, all involved vehicles should be inspected in a timely manner, before vehicles are repaired, exposed to the elements for long periods of time, or salvaged and crushed. Too often all that is left to work with are a few poor-quality photographs and perhaps a damage estimate. Evaluating issues such as vehicle speed, collision severity, seatbelt usage and injury causation may not be possible without good damage documentation.

If attending a vehicle before an expert is retained, take good quality, digital photographs following some basic guidelines outlined below that could become crucial pieces of evidence should the vehicle be unavailable for inspection later.

The first step is to get an overall idea of the impact direction and collision severity from the vehicle damage. Start by taking photographs of the entire vehicle, photographing the front, rear, left and right sides, and each corner, whether damaged or not. Also, photograph each wheel. Take close-ups of areas that show damage such as crushed or dented sheet metal, scuffs and scratches, and material transfer from the impacting vehicle. Whenever close-up views are taken, first take a photograph of the overall area to provide perspective for the close-up. Moving to the interior, look for evidence of occupant loading on areas such as the windshield, pillars, steering wheel, instrument panel, dash, and door panels. Photograph the amount of intrusion into the occupant compartment. Examine the seatbelts, photographing evidence of occupant loading on the latch plate, D-ring, and webbing such as shown in the example photographs. Make sure to indicate which photographs belong to which seatbelt. If airbags have deployed, photograph any transfer such as bodily fluids.

Event Data Recorders

Most late model passenger vehicles and many older vehicles are equipped with event data recorders, or EDRs, that capture and store crash data. The data stored varies from model to model but usually includes crash and pre-crash information such as vehicle speed and collision severity. Special equipment is required to access the data. EDR data must be interpreted by a qualified expert and corroborated by a full analysis of the physical evidence whenever possible.

EDR data can be overwritten or corrupted under certain circumstances. Just one example is the case in which a vehicle is involved in a collision with relatively minor vehicle damage and no airbag deployment. The vehicle is repaired and then driven daily. Some years later an investigation into the crash is needed as it relates to claims of long term injury sequelae. The EDR may have recorded important data related to the collision in question that has since been overwritten due to the time elapsed.

Heavy Vehicles

Heavy vehicles also use event data recorders. Unlike passenger vehicles, the equipment used to access heavy vehicle event data recorders (HVEDRs), and the way in which the data is recorded, varies dramatically. Further, the recording systems are much more vulnerable to data loss than are passenger vehicle EDRs. Simply

moving a heavy vehicle to the side of the road after a crash or even cycling the engine could lead to data being overwritten. Extra precaution should be taken to avoid destruction of valuable data when heavy vehicles are involved. Only an expert specifically trained in HVEDRs should access and interpret the data.

Commercial vehicle operators are usually in a hurry to get their vehicle back into service. Factors specific to heavy vehicle collisions and the extra expertise required during inspection are too many to cover in this article. Have an expert qualified in heavy vehicle reconstruction conduct an inspection before the vehicle is put back on the road. If this is not possible, at the very least, photograph the vehicle and arrange to have the electronic modules removed and retained for later download.

Failures and Defects

In the event of a suspected vehicle failure or defect, it is imperative to protect and retain the physical evidence. If an examination of the physical evidence cannot be completed immediately, the vehicle or components should be retained and protected from damage. If a vehicle will be put in storage prior to inspection, the vehicle should be stored indoors or covered by a tarp to prevent the physical evidence from being exposed to the elements.

Vehicle Fires

Vehicles involved in fires are often towed from the scene after the fire is extinguished.

Bystander scene photographs and video of the development and aftermath of the fire can be extremely useful in documenting the progression of the fire and in determining the fire origin. Vehicles should be inspected promptly following a fire or protected from the elements.

Fire-damaged vehicles that are left exposed to the elements will begin to rust, which can obscure burn patterns used in the determination of the fire origin.

Motorcycles, Bicycles and Pedestrians

Motorcycles and other recreational vehicles that are involved in collisions should be treated in the same way as passenger cars, making sure they are preserved, documented and examined in a timely manner. This also applies to bicycles. It is also important to preserve helmets worn by the riders involved in collisions. Helmet inspections can provide valuable insight into rider dynamics and head injury causation. Examination of the injured party's clothing, particularly in pedestrian impacts, may also offer clues about how the collision occurred. Vehicle and scene evidence from pedestrian impacts is often subtle and easily overlooked. Early documentation by an expert is of utmost importance.

Photographs and Video

Cell phones with high-quality cameras have become ubiquitous, and dashcams are becoming more and more common. Do not forget to canvas witnesses for any possible photographs or video of the collision or aftermath. Also look into CCTV footage from area homes and businesses or traffic cameras. This video is usually overwritten, sometimes after a very short time period, so it is important to investigate these sources of evidence promptly.

A robust engineering analysis relies on careful, thorough evidence documentation. Gathering and preservation of physical evidence, the *hard facts*, are key elements in any collision reconstruction, biomechanical analysis, or product failure evaluation and should be conducted with this in mind for every case.

CASE NOTES ▸

BY **EDWARD (ED) P. GOOD**
TLABC Sustaining Member
PAC Contributor

Edward P. Good has been a member of TLABC since 1984, a contributor to *the Verdict* since 1992 and served on the Editorial Board for almost twenty years. Ed practices plaintiff-side personal injury as a sole practitioner, and is sought out for his experience in civil jury trials. Passionate about injury prevention and rehabilitation, Ed has been involved as a volunteer with organizations including Disability Alliance BC (formerly the Coalition of People with Disabilities), the Brain Injury Association, and the Paraplegic Association.

He is proud to have contributed to BC's bicycle helmet laws. In a former life, Ed was a marine biologist, but seasickness drove him to the Bar.

THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

Editorial Note: These case notes are selected from CLEBC's Case Digest Connection and are reprinted with the permission of CLEBC. Case Digest Connection is an online service that alerts you regularly with summaries of new cases from the British Columbia courts. Learn more about this subscription service at https://www.cle.bc.ca/case-digest/ or by calling CLEBC customer service at 604 893 2121.

CONSTITUTIONAL LAW — Principles — Access to justice • April 2019 amendments to the Civil Resolution Tribunal Act giving the Civil Resolution Tribunal jurisdiction over the determination of:(a) entitlement to no-fault accident benefits paid or payable under the Insurance (Vehicle) Act;(b) whether an injury is a "minor injury" under the Insurance (Vehicle) Act; and (c) liability and damages for personal injury of $50,000 or less — Court finding ss. 133(1) (b) and (c) of the Act, relating to liability and damages, to be unconstitutional and of no force or effect, since those provisions prevent access to the courts in a manner inconsistent with Constitution Act, s. 96, thus falling outside provincial jurisdiction under s. 92(14) to administer justice — Appeal court majority allowing appeal, finding the new provisions not giving a provincial tribunal the powers of a s. 96 court. The Civil Resolution Tribunal (CRT) was created by the Civil Resolution Tribunal Act, S.B.C. 2012 (CRTA). Effective April 1, 2019, the province introduced a package of reforms consisting of amendments to the CRTA, the Insurance (Vehicle) Act and the Insurance (Vehicle) Regulation as well as two new regulations: the Accident Claims Regulation and the Minor Injury Regulation. The scheme created by the amendments in part gave the CRT jurisdiction over motor vehicle accident (MVA) claims, effective April 1, 2019. The CRTA amendments gave the CRT jurisdiction over the determination of: (a) entitlement to no-fault accident benefits paid or payable under the Insurance (Vehicle) Act; (b) whether an injury is a "minor injury" under the Insurance (Vehicle) Act; and (c) liability and damages for personal injury of $50,000 or less. The amendments to the Insurance

SEE PAGE 71

MEDICAL MALPRACTICE ▸

BY **BRENDA OSMOND**
TLABC Member

Brenda Osmond is a lawyer at Pacific Medical Law. Brenda obtained her law degree from UBC and was called to the bar in 2010. Her law practice is focused on representing patients who have suffered injury as a result of medical malpractice. Throughout her career Brenda has been a speaker at professional development conferences, a frequent contributor to professional publications and an adjunct professor at the Allard School of Law.

Acute Ischemic Stroke

This is the fourth article in our series aimed at providing a detailed examination of the challenges and pitfalls in different types of medical negligence lawsuits and approaches to overcoming them. Each article will focus on specific injuries and will highlight the obstacles a plaintiff faces in bringing their case to a successful conclusion. By comparing cases involving similar injuries, we hope to illustrate how the plaintiff succeeded, and when they did not, strategies that may have been available to improve their chance of success.

This article will focus on a recent stroke case in which the plaintiff was successful, *Hasan v. Trillium Health Centre Mississauga*, 2022 ONSC 3988 (CanLII) *(Hasan)* to illustrate a number of successful strategies used by plaintiff's counsel, and point out some problems experienced by the defence as they presented their case. With damages agreed on a global basis in advance, the court was left to determine standard of care and causation over the course of this 21-day trial.

Introduction

Delayed diagnosis leading to delayed treatment are often at play in stroke cases, and given that there is a relatively short window for the successful treatment of a stroke, the plaintiff's lawyer must embark on a methodical and thorough work-up and presentation of the case in order to persuade the court that but for the negligence, the diagnosis would have been made in time to administer appropriate therapy and achieve recovery.

In 2011 Syed Hasan was a 40-year-old man with no pre-existing serious health conditions. Early on December 3, 2011, he felt dizzy and nauseous and he began to vomit. He was unsteady on his feet and feared he would fall if he didn't hold on to somebody's hand. He attended Milton District Hospital where he was diagnosed with probable peripheral vertigo and discharged home. Later that day he was still unwell and saw his family doctor who examined him, gave him a referral note and directed him to go to Trillium Health Partners – Mississauga Hospital, the Regional Stroke Centre ("Trillium") with the request to "rule out organic cause (brain lesion or stroke)."

Later that day Mr. Hasan was seen by the defendant Dr. Campbell at Trillium. Dr. Campbell took a history, examined him, and ordered medications and a CT of the head which showed no evidence of intracranial hemorrhage. His diagnosis was "Dizzy — Bell's Palsy – Peripheral Vertigo." Mr. Hasan was sent him home with a prescription for dizziness and instructions to follow-up with his family doctor in 3-4 days and return to the emergency department if he got worse.

Early on December 4, 2011, his condition worsened significantly, and at 3 a.m. he could not get out of bed. He returned to the emergency department at Trillium by ambulance. He was again assessed by Dr. Campbell who ordered another CT scan of the head to rule out a stroke. By noon Mr. Hasan had deteriorated so severely that he had to be intubated and admitted to the intensive care unit. He had suffered a devastating life-altering stroke that left him with severe long-term disabilities.

On December 8, 2011, five days after his initial symptoms, Mr. Hasan underwent an MRI of the brain and a CT angiogram of the head and neck. He was then diagnosed with a brain stem stroke and was placed on an anticoagulation protocol. It was noted that Mr. Hasan had very good collateral circulation around the area of the blood clot, which was what allowed him to survive the serious stroke.

The court found that the defendant breached the standard of care on December 3 and 4 by not taking a complete medical history, not conducting a complete physical examination and by not ordering a CT angiogram to rule out a stroke, among other things. The uncontested evidence was that a CT angiogram would have been the immediate test of choice on December 3-4.

The complex causation arguments are detailed in the judgment, and while there are a number of differences in the theories advanced by both sides, the difference that impacted the question of what treatments were available and how likely were they to be successful, was that of a clot.[1] The plaintiff's theory was that he suffered a dissection in the left vertebral artery that was the source of the formation of a clot that occluded his basilar artery and cut off blood flow to parts of his brain. The defence's experts agreed that there was a dissection in the left vertebral artery, but opined that it was the dissection itself that extended and occluded multiple blood vessels cutting off the blood flow and causing a stepwise progressive stroke. This difference was critical to the causation finding. If a blood clot were involved, there would have been three options available to try to open the blockage created by the blood clot – intravenous administration of the clot-dissolving drug tPA, use of a catheter to pull out the clot, or the injection of a smaller dose of tPA directly into the clot through the tip of a catheter. If the defence's opinion was preferred by the court and no clot was involved, the plaintiff's claim would be dismissed because it would been very difficult to treat the plaintiff and obtain a positive outcome.[2] Ultimately the court found that Mr. Hasan's stroke was caused by a clot, and had he been diagnosed by CT angiogram on December 3 or 4, he would have had appropriate therapy that would have been successful.

Working With Your Experts

The *Hasan* judgement reads as a masterclass in how to work with your experts at several significant steps from initial selection of the expert all the way to preparation for cross-examination.

Qualifications

It goes without saying that careful selection of your experts is the starting point for success. In *Hasan*, in commenting on the complexity of the case, the court noted that nearly all of the experts were teachers, most of whom had received various teaching awards. They were able to explain their opinions and the science in clear and accessible terms that the court found helpful.[3] Despite making that comment, when the defence invited the court to give no weight to the opinion of an expert who had fewer awards, recognitions, research, and publications than the defence's highly accomplished doctors, the court pointed out that "awards and publications do not produce opinions; experience produces opinions."[4]

While it may not always be possible to retain experts with a teaching background, what is clear is that it is necessary to work with your experts to ensure that their opinion can be expressed in clear and understandable terms. In *Hasan* the complicated causation theories on both sides were made even more accessible to the judge through demonstrative aids including medical illustrations and an animation. Although these were not entered into evidence, they were still noted by the judge to be useful in simplifying complex concepts.

As illustrated in the *Hasan* judgement, starting with a blank slate gives the expert the best chance of arriving at an opinion that will be viewed by the court as helpful and unbiased.

Use of Factual Assumptions

In *Hasan*, as in many stroke cases, the evolution of the plaintiff's symptoms over hours or days play a central role in the expert's understanding of the nature of the stroke, the potential treatments available and the likelihood of success of a potential therapy. The facts required to accurately outline the evolution of symptoms may come from a number of sources including the medical records and imaging, but also from collateral sources such as the plaintiff themselves or friends or relatives who were with them when the stroke happened. Because an expert may not have access to all of this critical information through the records alone it may be beneficial to create a set of factual assumptions to assist them in forming their opinion. Because their opinion may rise and fall on that factual foundation, these assumptions must be created meticulously, and it is necessary to consider each fact and ensure that it can be proven at trial. In *Hasan* the court emphasized that "Where an expert mingles admissible and inadmissible evidence, the weight to be attributed to that opinion will be directly related to the amount and quality of admissible evidence on which the expert relies."[5] This was in play in *Hasan* as the court noted that the defence experts did not have a correct understanding of the progression of the plaintiff's symptoms, which undermined their opinions both on the standard of care and on causation.[6]

The Expert's Methodology

In weighing the expert opinions with respect to their review of the CT scans, the court considered the methodology employed by

each expert to arrive at their conclusions.

Two of the plaintiff's experts approached their review of the imaging "blindly" meaning they did not have preconceived theories about what might have occurred. Although the court wasn't certain if the third plaintiff's expert followed that same approach, the judge was impressed with that expert's description of his process — he asked himself questions as he reviewed the imaging and matched up the imaging with the trajectory of the plaintiff's symptoms.[7]

In contrast, one of the defence experts, the neurologist Dr. Silver, developed a theory about what might have happened based on particular features on imaging of December 8, then set about to prove his theory. As a result, he overlooked two other critical features on the imaging. The approach taken by the defence's neuroradiologist, Dr. Krings, was also highlighted. Dr. Silver spoke with Dr. Krings and provided him with his theory of the case. The court did not suggest deliberate collusion, but was alive to the possibility of an unconscious or confirmation bias.[8]

The different methodology used by the experts for each side left the judge with greater confidence in the reliability of the plaintiff's experts' opinion. How you approach a potential expert at the beginning of your discussions with them has the potential to colour their approach to the case. As illustrated in the *Hasan* judgement, starting with a blank slate gives the expert the best chance of arriving at an opinion that will be viewed by the court as helpful and unbiased.

Cross-Examination

Each of the experts in this case gave their evidence over three or four days and no doubt the cross-examination was grueling. The court contrasted the approaches taken by the causation experts for both sides.

The experts for the plaintiff gave their evidence in an objective, forthright and comprehensive manner. They made concessions in cross-examination where it was warranted.[9] They provided explanations that were thorough, comprehensive and made common sense.[10] The court appreciated the evidence given by the plaintiff's standard of care expert, but noted that his finding that the defendant breached the standard of care was based principally on admissions made during the cross-examination of the defence expert, as well as some of the defendant's own testimony.

In commenting on the causation defence experts, the court noted that they did not mention a key feature on the imaging, the dissection in the left vertebral artery at the C5/C6 level (described by a plaintiff's expert as the "smoking gun") in their initial opinions, which raised doubt over the reliability of their opinions on causation.[11] One defence expert readily admitted that he had overlooked the dissection at the C5/C6 level[12] and when questioned further he was dismissive of the importance of it. One defence expert agreed that it would have been best if he had reported on that irregularity, but the court found that concession to be compromised by a sarcastic follow up comment.[13]

Preparing one's experts for cross-examination is a critical step in the preparation for trial, including what questions to expect and when and how to make concessions if appropriate. Although the demeanour of an expert in the witness box is not a factor to be considered when a court weighs conflicting expert evidence,[14] a reluctance to make concessions when warranted, and a retreat to sarcasm or dismissing the importance of key evidence has the potential to colour the courts' weighing of that evidence.

Medical Literature: Bolster Expert Opinion

Medical literature often plays an important role in medical negligence cases and can be persuasive for both the standard of care and causation analysis.

If there are relevant recognized practice guidelines published by professional organizations, in peer-reviewed journals, or in text-

books, these can be useful to bolster the standard of care case. In *Hasan*, the plaintiff's standard of care expert, Dr. Brankston, gave evidence on the appropriate approach to evaluating a patient with vertigo and other cranial nerve abnormalities. The court noted that the approach he described lined up with the guidance provided in a particular textbook.[15] It was especially helpful that the textbook was one accepted by the defendant and other expert physicians as an authoritative text and reference guide.

This alignment of the plaintiff's expert's opinion with the guidance provided by this accepted textbook not only gave added weight to the opinion, but also undermined the defence's urging that the expert's opinion should be rejected on the basis that he was not impartial, that he was biased and that his opinion was arrived at through the benefit of hindsight.[16]

Medical Literature – Distinguish Your Client

It was nearly 30 years ago that the phrase "time is brain" was coined to recognize the importance of early treatment to improve the chance of recovery from stroke. In those early days of ischemic stroke therapy using tPA to dissolve the clot, the time window for the successful treatment was considered to be three hours from the onset of symptoms. Over the years that window has been extended up to four-and-a-half hours. More recently, head imaging has been used to identify certain patterns of ischemia that are associated with a greater chance of neurological improvement even if reperfusion occurs more than 12 hours after the onset of symptoms. In addition, the literature has shown that optimal collateral circulation can positively affect outcomes, and that the location of the clot may also be relevant to the chance of successful recovery.[17] This information highlights the importance of ensuring that your experts consider the unique characteristics of your client and are prepared to distinguish them from the participants in studies that report aggregated data.

Mr. Hasan had very good collateral circulation, as mentioned earlier. Unfortunately for another plaintiff, Ms. Neelands, she did not. Although her case bears similarity to that of Mr. Hasan — minor symptoms culminating in a significant stroke — Ms. Neelands' lack of good collateral circulation contributed to the finding that earlier treatment would not have been of benefit to her.

In Neelands, the plaintiff was a 54-year-old woman who experienced symptoms of arm numbness a day and a half before her speech became garbled, and she fell onto the floor. She was taken to hospital by ambulance where a CT scan showed a right middle cerebral artery stroke. She was not treated with tPA. The expert for the defence noted that stroke specialists were moving away from the "time-based window for thrombolysis" to a "tissue-based window" using multimodal CT or MR imaging to guide decision making. In his view the plaintiff did not suffer the occlusion of the right middle cerebral artery until the time at which she fell to the floor and by the time the CT scan was done 1.5 hours later she had developed irreversible brain damage. Although that seems like a very short time to develop irreversible brain damage, he noted that the plaintiff did not have good collateral circulation which explained why her irreversible brain damage occurred so quickly. He opined that thrombolysis in that situation would have had a high risk of hemorrhage, and would not have been warranted.

In *Hasan*, the court was presented with medical literature to support the plaintiff's expert neurologists' opinion that Mr. Hasan had several unique characteristics that supported the theory that he would have had a successful outcome if treated late on December 3 or early in the morning of December 4. The studies relied on by the defence experts reviewed the likelihood of success of recanalization therapies but did not relate that data to Mr. Hasan's specific clinical presentation.[18] When a defence expert was confronted on cross-examination with the specific condition of the plaintiff on presentation to the hospital on December 3, he conceded that 73.8% of patients with the plaintiff's condition would have a good outcome following recanalization therapy.

The use of the medical literature in *Hasan* underscores the importance of understanding how study data and results are presented, and how your client's characteristics align with those studies. Data that is presented in terms of overall efficacy in a large cohort of study participants may not be reflective of your client. Working with your experts to ensure you understand the implications of the literature and how it relates to your client's situation can help you identify strategies to capitalize on, or minimize the impact of,

those characteristics.

Conclusion

Certainly not all stroke cases can be won by the plaintiff, even with the most astute plaintiff's counsel and the best team of expert opinions. But *Hasan* provides an example of a case where plaintiff's counsel was able to present a complex case with the help of well-reasoned expert opinions and demonstrative aids. Through meticulous attention to every detail, they were able to unravel the defence opinions on cross-examination and arrive at a winning judgment.

1 Hasan v. Trillium Health Centre Mississauga, 2022 ONSC 3988 (CanLII) at para 155, 156, 188, 191.
2 Hasan v. Trillium Health Centre Mississauga, supra at para 259.
3 Hasan v. Trillium Health Centre Mississauga, supra at para 153.
4 Hasan v. Trillium Health Centre Mississauga, supra at para 219.
5 Hasan v. Trillium Health Centre Mississauga, supra at para 73, "see Marchand, at paras. 60-61."
6 Hasan v. Trillium Health Centre Mississauga, supra at para 115, 252.
7 Hasan v. Trillium Health Centre Mississauga, supra at para 222.
8 Hasan v. Trillium Health Centre Mississauga, supra at para 224.
9 Hasan v. Trillium Health Centre Mississauga, supra at para 213.
10 Hasan v. Trillium Health Centre Mississauga, supra at para 227.
11 Hasan v. Trillium Health Centre Mississauga, supra at para 225.
12 Hasan v. Trillium Health Centre Mississauga, supra at para 229.
13 Hasan v. Trillium Health Centre Mississauga, supra at para 240.
14 Hasan v. Trillium Health Centre Mississauga, supra, see paras 70, 71 for a description of the factors to be considered.
15 In this case, Rosen's Emergency Medicine, (7th edition).
16 Hasan v. Trillium Health Centre Mississauga, supra at para 110, 112, 114.
17 Journal of Stroke and Cerebrovascular Diseases, Vol. 27, No. 8 (August), 2018; pp 2214-2227.
18 Hasan v. Trillium Health Centre Mississauga, supra at para 297.

Effective Presentation of Medical Evidence in Complex Personal Injury Cases

Virtual Medical Legal Conference

Friday 2 December 2022

Learn from esteemed speakers and panels as they present on the effective presentation of medical evidence in complex personal injury cases, including Ed Lazarus who will share "How to Effectively Present Your Client's Case to a Jury"

TRIAL LAWYERS ASSOCIATION *of* BC

www.tlabc.org/MedicalLegal2022

PAC 2022

The Public Affairs Committee

CHAMPIONS OF JUSTICE

Firms

Collette Parsons Corrin LLP
Guy Collette, Daniel Corrin, Richard Parsons

Collins Peterson Injury Lawyers
Simon Collins, Nick Peterson

Doak Shirreff
J Ab Estephan, Lee Turner

Integra
Erica Enstrom

Johnston Franklin Bishop
Marsha Bishop, Trina Brubaker, Stuart Cappus, Simon Irving, Greg Phillips, Heather White

KazLaw Injury Lawyers
Marc Kazimirski

Maryn & Associates

McComb Witten Marcoux
Siavash Khazamipour, Robert Marcoux, Garry McComb, Meghan Neathway, Brittany Therrien, Jeffrey Witten

Murphy Battista
Giuseppe Battista KC, William Dick KC, Kevin Gourlay, Irina Kordic, Joseph Murphy KC, Alexander Sayn-Wittgenstein, Scott Stanley

Mussio Goodman
Eric Goodman, Wesley Mussio, Thomas O'Mahoney, Karol Suprynowicz

RDM Lawyers
Shelly Avram, Jessie Legaree, Douglas Lester KC, Kathleen Jenkins, Karen McNeilly, Spencer Thomson

Rice Harbut Elliott LLP
Michael Elliott, Jonathan Harbut, Anthony Leoni, John Rice KC

Slater Vecchio LLP
James Buckley, Sam Jaworski, Nicole Kelly, Aimee King, Todd Lucyk, James Richards, Michael Slater KC, Saro Turner, Anthony Vecchio KC

Stephens & Holman
Thomas Braidwood, William Bucci, Simon Holman, Mark Kozlowski, Alexander McQuarrie, Karen Munro, Paul Nigol, Larry Trach, Brendan Veale

Warnett Hallen LLP
Manjot Hallen, Paul Warnett

Watson Goepel LLP
Janet De Vita, Anastase Maragos

Individuals

Todd Cherniak
Kevin Gourlay
Thomas P Harding
Christopher Dyson

AS AT 17 OCT 2022

PAC 2022

The Public Affairs Committee

DIAMOND Individuals

Leonard Cohen
Bonnie Lepin
Michelle Ma
William G Slater

PLATINUM Individuals

Andrew Brine
Chris Carta
J.F. Raymond Chouinard
Raj Dewar
Meena Dhillon
Robert C Doell
David H Doig
Tyrone Duerr
Bryan Fitzpatrick
Edward Good
Douglas Chiu
Oana Grant
David Grunder
Paul Hergott
Simon Irving
Gary R Jackson
Farouk Jiwa
Dylan Kozlick
Wm Rory Lambert
Conrad Margolis
Veronica Medved
Shawn Mitchell
Paul L Mitchell KC
Edward L Montague
Karen Munro
Ronald D. Nairne
Etienne Orr-Ewing
Arthur Vertlieb KC
James Vilvang KC
Zack Vilvang
Mark Virgin
Gordon Zenk

GOLD Individuals

Michael Holroyd
Kyla Lee
Georgialee Lang
David N Osborne
Hovan Patey
Daniel S Shier
Krista Simon
Rob Wickson

SILVER Firms

Fulton & Company LLP
Lyle Backman KC
Frank Scordo

Vocational Consulting Group
Derek Nordin

SILVER Individuals

Roy Antunes
Susan P Apperley
Daryl Brown
Mary AM Brunton
Tara Chandler
Candace Cho
Robert C Claus KC
Lawrence W. Coulter
Jock Craddock
Stewart Daroux
Jon M Duncan
Max Durando
Megan Ejack
Kevin A Filkow
Stephen E. Gibson
Keri Grenier
Jim Hanson
Timothy Huntsman
Deb Jamison
Sam Jaworski
Larry Kancs
Andrew Kemp
Jesse Kendall
Jasmine Kooner
Naz Kohan
Jeffrey Logan
AW McGarvey
Richard McMullan
John L Mickelson
Sahaub Missaghi
Scott Morishita
Matthew Nathanson
J.A. Pankiw-Petty
Greg Phillips
Dana Quantz
Elisabeth Sadowski
Kelley Stewart
Jennifer Tater
Howard Teasley
Peter J Thornton
Trevor Todd
Adam Ueland
Kevin Westell
Daniel Winks
Joseph Zak

BRONZE Firms

Bronson Jones
Campbell Redmond
Dohm Jaffer & Jeraj
Drysdale Bacon McStravick LLP
Hammerco Lawyers
Jon M. Duncan Law Corp.
McNeney McNeney Spieker
Sugden McFee & Roos
GhostPractice

BRONZE Individuals

Stuart Cappus
June Gambrel
Merri Hagan
Ashley Harrison
Nathaniel Hartney
Tyler Jones
Alexia Majidi
Heather McMahon
Janelle O'Connor
Karen St. Aubin
Simon Tucker
Stephen W Turner
Seth Wheeldon

AS AT 17 OCT 2022

TLABC PUBLIC AFFAIRS COMMITTEE

Support the rights of your fellow British Columbians!

Wondering What Comes Next?
Contribute to TLABC's Court-Based Advocacy Work

Make your financial contribution to support TLABC advocacy work today!

Name _____

Firm _____

City / Province _____

Phone _____

Email _____

❑ **Personal Contribution**

❑ **Firm Contribution**
Please list which members of your firm should also be recognized in printed material:

_____

_____

❑ I wish that my contribution remain **anonymous**

Total Amount Enclosed $ _____

❑ Cheque ❑ is enclosed ❑ will follow by mail

❑ Charge to: ❑ VISA ❑ MasterCard ❑ AMEX

Name on Card _____

Card Number _____ Exp _____

Signature _____

MAKE CHEQUES PAYABLE TO TLABC PAC FUND

Mail to: Trial Lawyers Association of BC
380 - 2608 Granville Street
Vancouver BC V6H 3V3

For more information, please call TLABC:
604 682 5343 · tla-info@tlabc.org

FAMILY LAW ▸

BY **JULIE BROWN**
TLABC Member

Julie has practiced family law since being called to the Bar in 2013. She represents clients on a range of issues, including child custody, division of property and debt, child support and spousal support. She has experience at all stages of the litigation process and has appeared before all levels of court in British Columbia. Additionally, she represents clients at mediations, negotiates settlements and drafts agreements.

Julie graduated from the University of British Columbia in 2012 with a Juris Doctor.

Balancing the Best Interests of the Child and Privacy Concerns in Document Disclosure

In a family law dispute, document disclosure is an important part of gathering evidence. The same test for document disclosure is applicable in both civil and family law matters. Supreme Court Family Rule 9-1(1) sets out disclosure requirements:

1. Unless all parties consent or the court otherwise orders, each party to a family law case must:

    a. prepare a list of documents in Form F20 that lists
        i. all documents that are or have been in the party's possession or control and that could, if available, *be used by any party at trial to prove or disprove a material fact*, and
        ii. all other documents to which the party intends to refer at trial

[EMPHASIS ADDED]

The *Family Law Act* also emphasizes the disclosure obligations of parties in family law disputes. Section 5 provides that:

1. A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.
2. A person must not use information obtained under this section except as necessary to resolve a family law dispute.

When the best interest of the child is at issue in a family law dispute, the scope of evidence is widened as the court must take into account a broad range of considerations, including the needs, means, condition and other circumstances unique to the child before the court.[1] Both the *Family Law Act and the Divorce Act* (Canada) provide specific factors that the court must consider in its analysis of the best interests of the child. These factors may also inform disclosure requirements.

For example, section 37 of the *Family Law Act* requires the court to consider the ability of each person who is a guardian to exercise his or her responsibilities.

Although the scope of disclosure in a family law dispute is broad, it is subject to limits. Proportionality is built into the Supreme Court Family Rules (SCFR) and the Provincial Court Family Rules. For example, SCFR 1-3 provides that the conduct of the family law case should take into account the impact that it may have on a child and be proportionate to the interests of any child affected.

This article will look at two common disclosure requests: financial disclosure and disclosure of medical records.

Financial Disclosure

Child support is considered the right of the child, which also invokes a consideration of the best interests of the child when determining what disclosure is required. Additionally, the SCFR and the *Federal Child Support Guidelines* list specific categories of documents that must be disclosed. SCFR 5-1 sets out the required financial disclosure

when there are claims for property division, child support and spousal support. There are specific documents that must be provided including personal tax returns, pay statements, corporate financial statements and other specific income information documents. While these are documents that normally contain private and confidential information, the disclosure requirements under the *Federal Child Support Guidelines* and the SCFR recognize that they are also necessary to be able determine income and make appropriate support orders.

A party may have a concern that private and confidential information will fall into the wrong hands. There are certain restrictions on the use of these documents. There is a general implied undertaking that applies to all documents produced in the litigation. This undertaking is that documents produced are not to be used by the other party except for the purposes of this litigation unless and until the scope of the undertaking is varied by court order or statutory override, or if a situation of immediate and serious danger emerges. The implied undertaking continues after settlement or the conclusion of litigation.

Additionally, for financial records disclosed under SCFR 5-1, Rule 5-1(29) expressly provides that any person who has access to documents obtained under this rule must keep the documents and any information contained in them in confidence and must not disclose the documents or information to anyone other than a) for the purposes of a valuation of an asset, b) for a determination of the disclosing the party's income, or c) in the course of permitting the documents to be introduced into evidence during the family law case. Rule 5-1 (30) also authorizes the court to seal documents and any transcript of the cross examination on the document if the court considers the public disclosure of any information would be a hardship on the person in respect of whom the information is filed.

There are also limits on who can search a family law file. Unlike in civil matters, in which the court file is generally searchable by any person, only the following people can search a family court file in the Supreme Court: [2]

a. A lawyer, whether or not a lawyer of a party;
b. A party;
c. A person authorized in writing by a party;
d. A person authorized in writing by a party's lawyer.

These restrictions demonstrate the balance between appropriate and mandatory disclosure requirements and protecting a party's privacy. The importance of proper and complete financial disclosure is also underscored by the numerous options for fines and other relief when parties do not provide the necessary disclosure.

Disclosure of Medical Records

In a family law dispute, there may be records that contain private and confidential information that if disclosed may harm a party or a child. This is an important consideration for disclosure of information from medical records and counselling records. In applications for the disclosure of such records from third parties, the court must balance the best interests of the child and the privacy concerns of the party who is the subject of the records.

Many parties in a family law dispute seek counselling for themselves and/or for the children.

Mental health and treatment are important and the courts regularly encourage counselling to help the family involved in the breakdown of the relationship and family unit.

It is important that a party or a child's ability to seek counselling is not put at risk.

Although in the context of a criminal matter, the BC Court of Appeal case of *R v. O'Connor* 1994 CanLII 8746 provides a basis for limiting the production of medical and counselling records. These policy considerations were cited by the BCCA (at para 3) from the dissenting opinion in *R. v. Osolin*, [1993] 4 S.C.R. 595.]:

1. If people are aware that medical records can be obtained, they may be reluctant to seek needed and valuable treatment if there is any prospect that they may be required to testify at trial;
2. Routine disclosure of medical records and unrestricted cross-examination upon disclosure threatened to function unfairly against anyone who has undergone mental or psychiatric therapy as compared to other members of the public. Such person would be subject to invasion of their privacy not suffered by other witnesses who are required to testify.
3. Medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards to reliability. A witness's concerns expressed in the course of therapy after the fact even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history thoughts, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.

In *B.R. v. S.F.*, 2020 BCPC 212, Judge Brecknell considered the law on the factors that a court may consider in dealing with private, personal information held by third parties and how that may be impacted by the best interests analysis.

A parent may object to disclosure of medical records, in particular counselling records, on the basis that the information is confidential and privileged. The test for privilege is set out in the four-part Wigmore test which consists of the following (at paragraph 29):

1. The communication must originate in a confidence that will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
3. The relationship must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the action.

It is clear that medical records, including counselling records would be privileged information at the outset.

Judge Brecknell provided an extensive summary of the numerous other factors to be considered by the court including the following:

a. the Court must exercise care to ensure the protection of the privacy interests of a party to whom the records pertain (see *Hyvarinen v. Burdett*, 2012 BCSC 1034);
b. privacy interests may be supplanted in favour of the best interests of the child and the interests of justice (see *R.C.T v. MTT*, [1997] BCJ No. 1239 and., *K.A.P v. K.A.M.P.*, 2012 BCSC 811.)
c. an applicant for disclosure must demonstrate a clear connection to the issues before the Court beyond a mere possibility;
d. evidence in support of a disclosure application must be detailed and persuasive and not either sparse in nature or contradictory (see *L.C.T v.. R.K.*, 2013 BCSC 1437., *Kalsi v. Kalsi*, 2009 BCSC 513);
e. disclosure of documents must relate to the issues set out in the pleadings. Disclosure will only be ordered, and maybe circumscribed, if they are relevant, not a fishing expedition and not sought for an improper purpose (see *B.F v. J.A.L.F*, 2019 BCPC 240.,T.E.K. v. B.V.S. [1994] BCJ No. 439 *Gorse v. Straker,* 2010 BCSC 119);
f. a previous history of treatments or hospitalizations for symptoms or illnesses similar to recent treatments or hospitalizations may make the records more relevant to the issues before the Court;

g. disclosure of documents may be limited or refused if the requesting party has previously disclosed confidential, private or embarrassing information about the other party in the past;
h. where disclosure may seriously damage an ongoing counselling or therapeutic relationship with the record holders it may be denied (see *B.F.*);
i. disclosure may be topic or time limited (see *H.V.G., K.A.P., B.F.*);
j. the records to be produced may be expansive and include those "relative to any assessment, treatment or counselling contained in clinical record, interview notes, testing results, medical consultation reports and assessment materials" (see *K.A.P.*); **or**
k. the records should be limited in scope to those dealing with diagnosis, prognosis and treatment compliance (see *H.V.G., B.F.*);
l. a disclosure order, if granted, may be wide ranging or limited by *Jones* or *Halliday* orders (see *C.E.L. v. D.C.A*, 2016 BCPC 147*, Callan v. Cook*, 2013 BCSC 142);
m. if a *Halliday* order is made and counsel fulfils their obligations to the Court there is no prejudice to the opposing party's discovery rights. They may apply to the Court to make a determination if they feel that relevant information has not been disclosed (*Gorse*);
n. disclosure of relevant documents is extremely important in order to enable a party to prepare for the for the litigation and to assist the Court in discerning the truth and rendering a just decision (*A.M.*).

If a parent has received counselling, or has medical issues, some portion of those records may be relevant. The best interests of the child analysis casts a wide net of relevancy and the information in counselling records could provide evidence to the court regarding the parent's ability to meet the child's needs and other important factors in the best interests analysis. If a parent has a medical issue that may impact their ability to parent, then disclosure of relevant records may be necessary.

However, there must be recognition of the parent's right to privacy and to receive counselling, and to privacy regarding medical conditions. A parent receiving counselling and treatment promotes the best interests of the child. A parent who is concerned that the information may be disclosed to a former spouse in an adversarial court process may avoid counselling or be careful in what they discuss with the counsellor, which negates the purpose of counselling and renders it ineffective.

In balancing the privacy interests of the parent and the best interests of the children, the court may consider restricting production of counselling records. In *H.V.G. v. L.E.T*, 2017 BCSC 791, the court limited production of a father's psychiatric records to the psychiatrist's conclusions, treatment recommendations, and whether the recommendations were complied with.[3] Such limitations may strike the balance between providing relevant information that will be helpful to the court's analysis of the best interests of the child and protecting a party's privacy in receiving counselling and treatment.

Summary

When the court is tasked with determining the best interests of the child, disclosure of certain evidence that may otherwise be considered private and privileged may be necessary, and a party's privacy rights will be impacted.

The court must strike a balance between having the necessary evidence before it to make decisions and protecting the privacy of a party.

With respect to financial disclosure, there are mandatory documents that must be provided by a party when support is at issue. However, there is recognition that disclosure of confidential information may cause hardship to a party. It would not be in a child's best interests if the payor parent is negatively impacted in their earning capacity.

With respect to medical records, in particular counselling records, it is usually in the best interests for a parent to receive treatment. It is also necessary for the court to be able to determine that the parent has received appropriate treatment and is capable of parenting the child. At times the privacy interests and best interests of the children may be competing. However, these interests may also overlap. It is in the best interests of a child that a parent receive counselling/treatment and it is contrary to the best interests of the child to use potentially prejudicial evidence with questionable probative value. The court must find a balance when ordering disclosure that will not compromise the parent's ability to get treatment and also provide it with the evidence it needs to make determinations in the best interests of the child. Ultimately the best interests of the child will be the prevailing consideration.

1 Barendregt v. Grebliunas, 2022 SCCC 222 at Para 66
2 SCFR 22-8(1)
3 At Paragraph 48

WILLS & ESTATES ▸

BY **TREVOR TODD**
TLABC Past President
TLABC Sustaining Member
PAC Contributor

Trevor Todd is one of the province's most esteemed estate litigation lawyers. He has spent more than 40 years helping the disinherited contest wills and transfers – and win. From his Kerrisdale office, which looks more like an eclectic art gallery than a lawyer's office, Trevor empowers claimants and restores dignity to families across BC. Although his work is renowned, Trevor is not a suit n' tie stuffy lawyer type. He is, in fact, the very opposite. He is an outspoken advocate for the disinherited. He is a world traveller (131 countries and counting) who is approachable, creative, and a fan of pushing buttons, finding needles in haystacks, and doling out advice for free. He is a mentor to young entrepreneurs and an art buff who supports starving artists the world over. He has an eye for talent and a heart for giving back. Trevor is deeply committed to his clients and his craft. He is a Past President of TLABC, a regular contributor to legal publications and a sought-after public speaker.

Safety Deposit Boxes in Estates

While a review of the law relating to safety deposit boxes ("SDB") shows that about 90% of the case law relates to the police search warrants or spouses alleging hidden assets, two important issues relating to estate litigation occasionally arise:

1. The issue of who is legally entitled to the contents of a joint safety deposit box — the surviving joint owner, or the estate of the deceased; and

2. Does delivery of the safety deposit box key to a person in contemplation of death by the donor (*donatio mortis causa*) sufficiently legally transfer the contents of the SDB to the donee.

Joint Safety Deposit Boxes

I was recently an executor and while listing the contents of the safety deposit box, and I was told by the banker that since it was a jointly owned box, the contents could only be distributed to both the executor and the joint survivor in the presence of each other.

I tried to explain to the banker that this was not my understanding of the law.

The court in *Clarke v. Hambly*, 2002 BCSC 1074 considered the issue of whether money deposited in joint accounts by a father in favour of himself and his daughter was an absolute gift to the daughter, or held under a resulting trust for the benefit of the father's estate.

The court in *Clarke v. Hambly* concluded that the jointly held assets in the contents of the safety deposit box vested in the estate as a resulting trust.

The case summarized the principles of law as follows:

a. The general rule with regard to joint bank accounts is that on the death of one customer, the survivor is not entitled, as against the estate of the deceased customer, to hold the funds as her own property, if the funds were provided entirely by the deceased customer, unless there is a presumption of gift or an intention, on the part of the deceased customer, that the survivor shall have the right to retain the funds as her own: *Re Fenton Estate* (1977), 26 N.S.R. (2d) 662 at 673.
b. The question, in the absence of fraud or undue influence, is the intention of the donor creating the joint account. The "ordinary rule" is that where the funds are provided entirely by the deceased the funds revert to the donor upon a resulting trust: *Edwards v. Bradley*, [1957] S.C.R. 599.
c. The "ordinary rule" may be modified when the transfer involves a parent and child, in which case the presumption of advancement may arise: *Shephard v. Cartwright,* [1955] A.C. 431 at 445.
d. The presumption of advancement may be rebutted, but should not give way to slight circumstances: *Shephard v. Cartwright.*
e. Because advancement is a question of intention, facts antecedent or contemporaneous with the transaction may be put in evidence to rebut the presumption or to support it: W.J. Mowbray, B.A., *Lewin on Trusts*, 16th ed.

(London: Sweet & Maxwell, 1964) at 135.

f. The subsequent acts and declarations of the parties cannot be used to support their positions but may be used against them: *Shephard v. Cartwright*.

The leading case in British Columbia is *Mawdsley v. Meshen*, 2010 BCSC 1099 where the court found that the defendant failed to rebut the presumption of a resulting trust on the balance of probabilities relative to the contents of the SDB and held they belonged to the estate.

Mawdsley followed the leading authority on presumptions relating to jointly held assets in *Pecore v. Pecore*, 2007 SCC 17.

Generally speaking, where an individual gratuitously transfers assets into joint names with another or into another's name alone, it is presumed that the recipient, who has given no value for the asset, holds the property in trust for the transferor. In such a scenario, the property is said to result or go back to the transferor, hence the term resulting trust.

The presumption of resulting trust finds its roots in the principle that equity assumes that parties make bargains rather than gifts.

Thus, if all of the contents of a safety deposit box were deposited by one of the joint owners, a presumption of resulting trust will arise that is rebuttable by sufficient evidence of an intention to gift, based on the balance of probabilities.

It is probably safe to say that many people are using a safety deposit box to hold valuables for fear of home robberies or break-ins.

Delivery of the SDB Key in Contemplation of Death

Case authorities relating to delivery of the SDB key in contemplation of death, involves the law of *donatio mortis causa* which requires three elements:

1. The gift must have been made in contemplation, though not necessarily an expectation of death;
2. there must have been delivery to the donee of the subject matter of the gift;
3. the gift must be made under such circumstances, and show that the gift is to revert to the donor in case he should recover.

Donatio mortis causa may be defined as a gift made by a person in his or her lifetime with the intention that it should take effect only on his or her death. The gift is therefore conditional upon death, but once the condition is satisfied, it takes effect retrospectively from the date the gift was made.

Brown v. Rotenburg (1946), O.R. 363 (ONT C.A.) held that delivery of a key for an SDB constituted a valid and effectual gift in contemplation of the contents of the safety deposit box.

The donor had parted with the only means that he possessed of getting at the contents, and thus control over the contents; therefore, the donee was in a position to demand that the donor's personal representative complete the title by furnishing whatever authority was necessary to take possession of the contents of the box.

In *Bayoff Estate* (2000) 3 WWR 455 the deceased gave the donee the key to a safety deposit box, and told her everything in it was hers. He, however, failed to sign the necessary bank papers to permit the donee to access the box.

This imperfect *inter vivos* gift was perfected when the donee became the deceased executrix and she was able to take delivery of the contents of the box.

The leading case in British Columbia is *Costiniuk v. Official Administrator of British Columbia*, 2002 BCCA 125.

In *Costiniuk,* the deceased had no family, but had a close relationship with the plaintiff, and had given her a key to her home many years before so she could check on her.

The deceased also gave the keys to her safety deposit boxes one month before her death, and during her final illness told the plaintiff from her hospital bed side that she wanted her to have everything. The deceased died before she could execute a will that named the plaintiff her sole beneficiary.

The trial judge held, and the Court of Appeal upheld, that the plaintiff was entitled to the contents of the safety deposit boxes as a result of *donatio mortis causa* because there had been delivery of the keys by the deceased to the donee in contemplation of death.

Conclusion

It is probably safe to say that many people are using a safety deposit box to hold valuables for fear of home robberies or break-ins. This stored wealth is often considerable.

The executor has authority under S. 183 WESA to open the SDB and in the presence of a person in control of the premises list an inventory of the box and then take the original will with him or her.

If the contests of the box are valuable, they then must be listed as assets of the estate, and remain such subject to a successful challenge of a joint owner of the box, or someone with a key asserting ownership by reason of *donatio mortis causa*.

MEDIATION MOMENT ▸

BY **ROSE KEITH KC**
TLABC Past President
TLABC Member

TLABC COMMITTEE
- Women Lawyers Retreat Planning Committee

Rose Keith KC is Associate Counsel at Harper Grey. She graduated from the University of Saskatchewan Law School in 1992 and was called to the Bar of the Province of British Columbia in 1993. Ms. Keith's practice has focused on personal injury and employment law. She is a roster member of Mediate BC with extensive experience as both counsel and mediator in conducting and participating in mediations. She serves on TLABC's Women Lawyers Retreat Planning Committee and is an active member of the BC Branch of the Canadian Bar Association.

Mediation and Estate Litigation

> Peace cannot be kept by force;
> it can only be achieved by understanding.
>
> ALBERT EINSTEIN

Mediation is an important tool in dispute resolution. Not only does it increase the opportunity to resolve a case without proceeding to a judgment following a trial, but it also presents the opportunity for increased understanding of the positions, motives and interests of parties involved in a dispute. In matters that involve an ongoing relationship between the parties, for example — private family affairs or grief over the death of a loved one — the wish to preserve these relationships may heighten their motivation to mediate a dispute. Due to the nature of estate litigation and the relationships that exist after the litigation is over, this is a type of matter that is particularly well suited to mediation. This edition of Mediation Moment will focus on the unique nature of estate litigation that makes it particularly compelling to mediate, the benefits of mediating an estate file and practical tips for ensuring the successful mediation of an estate file.

Estate litigation is an area involving some of the most emotionally charged disputes. Estate disputes can be painful and exhausting, both emotionally and financially. Estate litigation arises from various types of scenarios, such as conflicts over the distribution of the testator's assets, concerns that an executor has acted inappropriately, concerns about regarding inter vivos transfers or whether the creation of joint accounts were intended to be gifts, and disputes regarding the validity of a will. The parties to the dispute are grieving the loss of a loved one while also dealing with additional feelings associated with the source of the dispute about estate litigation.

The parties may be dealing with longstanding hurt feelings and resentments, difficult relationships, feelings of inequality, inadequacy, competition and long held family resentments. All of these emotions can lead to a lack of objectivity in decision-making.

Like no other area of litigation, the real "cause" of the dispute may never be clear and may be wholly unrelated to what is plead in court filings. Furthermore, the person who is at the centre of the dispute is not available for consultation or to testify in court. All of these factors combine to make mediation an important tool for estate litigators.

The decision to pursue mediation in estate matters offers the opportunity to preserve the finite resources of the estate and provides the opportunity to rebuild or preserve relationships, particularly when the mediation occurs early in the process. Mediation

allows the parties the space to share emotions, which opens the door to the repair of fractured relationships, understanding and a path for the parties to move forward. Mediation provides the parties with a mechanism to deal with power imbalances. Wills variation actions, in particular, are focused on fairness which makes them ideal for mediation. Mediation also provides the parties with privacy in what is a very personal dispute.

Important benefits of mediation in estates matters include the following:

1. **Cost savings** – estate litigation, like any litigation, can be incredibly expensive. The difference in estate litigation is that those costs are paid from the assets of the estate or by the parties personally. When the costs are paid from the assets of an estate, the parties themselves will be directly affected as they are typically beneficiaries whose interests are being depleted by the costs of the litigation.

2. **Flexibility** – mediation allows the parties to assert control over the resolution process and the outcome. The mediator, the parties, and their counsel can be creative in ways that are unavailable to the court. In estate litigation, it is not uncommon for a party's non-legal interests (for example, in relation to assets or transfers that are tied to deep-rooted memories and emotions) to not fully align with legal positions or legal analysis. Creativity allows the parties, their counsel and the mediator to guide the mediation towards an outcome that aligns with the parties' respective interests. Although the same can be said about other types of disputes, this is particularly true in estate litigation matters.

3. **Time savings and continuity** – estate litigation can prolong the grieving that occurs after a death and compromise family members' ability to move on with their lives. Mediation can assist family members to resolve disputes and begin the process of healing.

4. **Privacy** – estate litigation can involve public disclosure of personal or financial information that parties would normally want to keep private. Discussions at mediation are confidential.

5. **Repair of family relationships** – mediation allows families to work together to craft an acceptable outcome, to have space to express emotions, and to preserve and even repair relationships.

The biggest difference between mediating an estates matter and the mediation of other civil litigation cases, is the level of emotionality that the clients will be bringing to the table. This high level of emotionality requires increased preparation and care prior to the mediation. Clients should be prepared to be respectful of the process; they should be encouraged to leave their anger out of the room and be open to hearing what other parties have to say.

Ensuring that parties use neutral language rather than blaming language throughout the mediation will be important. It is vitally important that the mediator explains to clients that mediation is a process and that expectations are managed. During the mediation, make space to express hurt feelings, but in a way that opens the door to reconciliation rather than further entrenching the parties.

Because of the high level of emotion that pervades estate litigation, it is often best not to put an arbitrary end time to the mediation, but rather allow sufficient time for the process to play out. As counsel, anticipate and respect that the process will not just be about the law and about the risks of an adverse finding at trial, but rather may be more about the family dynamics that existed long before the litigation began. The emotion that pervades estate disputes must be kept in mind in preparing for the mediation and in preparing clients for the mediation. Returning to Albert Einstein's quote, understand that peace cannot be forced, but peace, and a resolution to the legal issue, can be achieved through understanding.

PARALEGAL PERSPECTIVE ▸

by **MICHÈLE ROSS**
TLABC Member

Michèle Ross is a designated paralegal at Virgin Hickman. She is the past President of the BC Paralegal Association and sits on the British Columbia Supreme Court Civil and Family Rules Committee. She was a member of the Law Society's Licensed Paralegal Task force in 2019 and 2020. On March 14, 2022, Michèle was appointed by the Provincial Government as a bencher for the Law Society of BC. She is a member of the Law Society's Discipline Committee, the Innovation Sandbox Advisory Group, and the Trust Review Task Force.

Innovation Sandbox Update

Two years ago, the Law Society of BC launched an online application process for the Innovation Sandbox, "a 'safe space' for those not currently authorized to provide legal services, and for existing firms to test out ideas in a controlled environment that are likely to benefit the public."[1]

Several paralegals were amongst those approved for this pilot project. As an update to my column from *the Verdict*'s Spring 2021 issue summarizing the development of the Innovation Sandbox, I took the opportunity to connect with participants to see where they are now and how they've proceeded since receiving approval.

The Innovation Sandbox is not restricted in terms of who may apply. It is open to individuals, businesses, organizations, or anyone who has an idea that they believe will assist the public with accessing legal assistance. There are various types of applications that have been approved — online platforms, human resource consulting, paralegals in BC offering a variety of services and even paralegals from outside of BC. Here's what some of the participants said about their experience with the Innovation Sandbox.

Tracy Laninga

Tracy is a litigation paralegal at Fasken in Vancouver. She specializes in product liability and insurance matters. She submitted an application as an individual to the Law Society's Innovation Sandbox in April 2021 seeking to provide limited legal services and coaching services to lay litigants in simple small claims disputes, desk order divorces (restricted to uncontested divorces with no other issues), simple landlord/tenant disputes under the *Residential Tenancy Act*, Insurance Corporation of British Columbia disputes under the jurisdiction of the Civil Resolution Tribunal, assisting clients with access to specific government programs, assisting clients with applying for legal aid and drafting annual corporate maintenance documents for start-up companies and grant applications. The Law Society issued a 'no action' letter to Tracy dated July 31, 2021,[2] which means that as long as she works within prescribed boundaries, the Law Society will not take action against her for services she provides.

Prior to becoming a paralegal, Tracy worked in Costa Rica and Australia, before returning to Vancouver to take on various roles in the family business within the craft beer industry. Given Tracy's business experience and background, her vision was to provide her approved services through a corporate entity, and she formulated her business plan. Tracy reserved her business name, West Coast Legal Coaching Inc. through the corporate registry, and her name was approved in March 2022. She proceeded to incorporate in May 2022. Tracy's next step in her journey was to apply for and receive a business license from the City of Vancouver. She is now engaged in the process of developing a website to offer fully remote legal services. A hurdle that Tracy encountered along the way was obtaining insurance and her experience has been that underwriters simply do not understand what the Innovation Sandbox is all about. However, Tracy has not let that discourage her and points out that there are always hiccups when starting a new business. She continues to work on the insurance piece and is awaiting approval for coverage for West Coast Legal Coaching Inc.

Tracy believes she can provide assistance and help bridge the gap for people who are not able to access traditional legal services. She plans to use social media, word of mouth, contacts she has made over the years and networking within the profession to promote her services. I am looking forward to continuing to watch Tracy's journey and launch of services through West Coast Legal Coaching Inc.

Nya Guy

Nya is a corporate paralegal. He saw the needs of British Columbians requiring legal services for corporate matters, and even more so during the pandemic. Nya submitted an application to the Sandbox as an individual in April 2021 to provide corporate legal services including but not limited to annual report filing, name registration, name change, change of directors/officers and incorporation, extra-provincial registration, continuation and dissolution and legal process outsourcing to law firms and corporations. Nya received his 'no action' letter dated October 26, 2021.[3]

Nya knew right away that if he was going to provide the services outlined in his proposal, he wanted to devote his full time and energy to his business model. In April 2021 he incorporated PaaS - Paralegal as a Service Inc., which provides remote corporate paralegal services on a subscription basis. In December 2021, Nya left his job at a law firm to focus on developing and growing PaaS - Paralegal as a Service Inc. Nya saw 2022 as being a significant year as he ventured towards having his website developed, building the foundation of his business as well as setting up software and strategic plans, and obtaining errors and omissions insurance. Nya obtained his first client in May 2022 and his business has been growing progressively since that time. By August 2022, Nya saw tremendous growth and currently receives new clients and projects daily. His clients come to him mainly through marketing efforts through his website[4], as well as through various marketing and networking events he attends. He has also aligned himself with various accounting firms. While Nya was approved to provide outsourcing work to law firms, his focus has been on providing his approved corporate legal services directly to the public.

Most of Nya's work is virtual. However, he meets with clients in-person when required. He has developed a sample minute book as an effective tool to show clients what needs to be done and what a minute book looks like. His business model includes a virtual minute book which is created through an app, so that clients can easily access their own documents by username and password.

Nya's experience is that clients are very happy with his services which they find affordable. Coming from a strong customer service background, Nya's focus is to provide value and affordable services to those who could otherwise not afford legal assistance. Nya does not provide legal advice to clients, and should his clients require legal advice, Nya has lawyer contacts to whom he refers his clients.

In recognition of his founding of PaaS - Paralegal as a Service Inc., Nya received a Business Excellence Award on September 17, 2022, from the Black Business Association of BC for the most innovative business.

Courtney Burnett

Courtney is a designated paralegal at Samfiru Tumarkin LLP. She practices in the area of employment law and disability insurance law. Courtney's approach to the Sandbox was to apply alongside her firm to provide services to the public. Courtney does not desire to work outside of Samfiru Tumarkin LLP where she has been for five years. Applying to the Sandbox while in the employment of her firm was a perfect opportunity for Courtney to offer clients access to legal services at a lower hourly rate while working independently at her firm.

Applying to the Sandbox while in the employment of her firm was a perfect opportunity for Courtney to offer clients access to legal services at a lower hourly rate while working independently at her firm.

Courtney originally submitted an online application on March 15, 2021 to provide employment law services through Samfiru Tumarkin LLP without direct supervision. Courtney received approval of her application in July 2021. She submitted a second application on October 22, 2021 to include disability insurance law services. Her second application was similar to her first in that the services she proposed will be offered through her firm without direct supervision. Courtney's second application was approved on March 24, 2022, which resulted in both Courtney and Samfiru Tumarkin LLP receiving a 'no action' letter.[5]

Since July of 2021, Courtney has been able to develop her own practice within her firm where she provides her approved Innovation Sandbox services to clients while working independently. She conducts consultations with clients, negotiates settlements of her files, prepares demand letters, and drafts pleadings.

Since receiving her no action letter, Courtney has also been able to assist clients with court and tribunal appearances. She has attended a settlement conference in Provincial Court, Human Rights Tribunal mediations, as well as a pre-trial conference and a Small Claims application. She has also prepared for and conducted a hearing alongside a lawyer at her firm for an appeal of Canada Pension Plan disability benefits before the Social Security Tribunal. Her calendar currently sees approximately three Provincial Court

settlement conferences per month. She has her first Provincial Court trial in November 2022.

Courtney's experiences dealing with opposing counsel on her Innovation Sandbox files has been positive. Lawyers have been respectful to Courtney in her handling of her files or appearing at courts or tribunals and in their communications with her.

The benefit of Courtney's model is that her firm directs clients to her, and from her experience, there is no shortage of work in the areas of employment law and disability insurance law. Prior to receiving approval in the Sandbox, Courtney saw many files where it simply did not make sense for a party to retain a lawyer at a lawyer's hourly rate to handle their matter. With Courtney's Sandbox approval, her firm has been able to pass that work to Courtney, and clients retain her and have their matters handled at an hourly rate lower than that of a lawyer. Because Courtney provides her services within her employment at her firm, she also has the advantage of easily accessing a lawyer should circumstances warrant it or for troubleshooting or strategizing. As Courtney puts it, her firm "has her back."

Because insurance for paralegals did not exist in British Columbia up until the existence of the Innovation Sandbox, Courtney did experience some challenges in obtaining insurance. However, her firm helped her to reach out to insurance providers and Courtney was successful in securing errors and omissions insurance for paralegals. In addition to operating her caseload through the Innovation Sandbox which consists of approximately 60 – 70 files at any given time, Courtney also continues to work as a designated paralegal to Lia Moody at Samfiru Tumarkin LLP.

Mayette Ostonal

Mayette is a senior litigation paralegal with a range of experience including personal injury law and strata law. She is also a certified legal coach. Mayette is currently at Clark Wilson LLP and while she does not wish to leave her day job, she wanted to be able to offer some services to the public independent of her employment, on her own time. Mayette applied to the Innovation Sandbox in January 2021.

The focus of Mayette's application was to provide legal coaching services. She received her 'no action' letter dated May 26, 2021 wherein she was approved to provide legal coaching in civil litigation procedure, with a focus on the Civil Resolution Tribunal and personal injury litigation, including (a) helping clients understand the process and what is required of them at each step, (b) providing clients with information on how to find rules and other relevant legislation, proper forms to use, serving parties and deadlines, (c) assisting with determining evidence required and (d) coaching clients when they prepare their pleadings and other court documents. She is also approved to provide general information and coaching on Small Claims matters and Supreme Court matters

process which both engaged and facilitated Revenue Canada's investigation". One basis on which to distinguish *Viccars* is that the applicants sought remedies relating to the use the CRA could make of the evidence it had collected, which a judge would be able to address in any subsequent trial, whereas here Mr. Smith seeks remedies against the Commission. In somewhat different circumstances, in *B. (A.) v. British Columbia (Securities Commission)*, 2004 BCCA 249, the appellant commenced an ia, injunctive relief to stay investigative proceedings by the commission from allege t privilege.

The Commission had obtained a sea ice premises the appellant shared with solicitors. Gerow J. had declined to grant the 7: "The plaintiff seeks an interlocutory injunction pending a determ tion of priv more appropriate to deal with the issue of whether a stay should anted w e known a can be considered."

Hall J.A. held it would be it would icant to see remedy from the Commission rather than to bring the a was whether a action seeking an interlocutory injunction was premat milarities betwe injunctions and stays of proceedings, it may be that least an applicat to a court for a stay, would be premature. I observe a Smith is not seeking re medies relating to what use may be made of p le proceeding ag st him be stayed.

There is unlikely to umstances of whet ther s. 7 applies to the extent there was in th um. In British Colu First *(Securities Commission) v. Branch*, [1 urt held at para 8: "The liberty interest is engaged at the ngaged, the inve ial compulsion. becomes whether or not dance with the nd principles of fundamental justice." I was not se because he was outside of Brit of evidence by

However, he served with a subpoena immediately prior to giving evidence when h arrived at the Commission's office Mr. Smith will argue that he was effectively *compelled because* of the grave consequences for to appear before the Commission when summoned. Such an argum succeeded in *Williams v. The C* for a stay of proceedings of a trial ased on the tockbr Nova Scotia Securities Commission ("NSC") with he RCMP. The abo nvestigator of the NSC investigator, but he testified he had at ended because he knew his aed to appear before the Securities Act, R.S.N.S. 1989, c. 418, and i his counsel had advised him be forced under the purposes of the securities investigation. Nunn J. fo nd s. 7 applied and s said was only for the purposes of the NSC investigator did tell Mr. that whether violation. However, in *Williams*, the securities investigation only only be used for the purposes of the

The Court reached v. British Columbia *(Securities Commi* At issue in *Moore* was a refusal by t enter a stay of

and to assist clients with refocusing their claims (although Mayette does not provide legal advice to clients on what their legal issues are).

Mayette created a website through Google webspace to offer her services as Modus Legal Coaching. Her services are provided virtually, and her model is to charge her clients on an hourly basis.

The Law Society does not require approved applicants to carry professional liability insurance. Because Mayette does not provide legal advice, she did not obtain insurance and her clients are informed of this in writing as required by the Law Society.

Andrea Abbinante

Andrea is a senior litigation paralegal with 30 years of experience in litigation. She is also a certified legal coach. Andrea has been at the firm of Virgin Hickman for over 12 years and is a designated paralegal to Mark V.C. Virgin in his civil litigation practice. Through the Innovation Sandbox, Andrea saw an opportunity to provide the public with assistance in personal injury matters in situations where injured parties cannot afford a lawyer, particularly given the cap on damages which can apply to motor vehicle accidents occurring between April 1, 2019 and onward, and the introduction of no-fault insurance which came into effect on May 1, 2021.

Andrea submitted her application alongside Virgin Hickman on November 25, 2021. Both Andrea and Virgin Hickman received a 'no action' letter dated February 8, 2022. Andrea is approved to offer services in civil litigation matters, focusing primarily on the area of personal injury without direct supervision including, (a) representing personal injury clients in their claims for ICBC Enhanced Care Accident Benefits for motor vehicle accidents occurring post-May 1, 2021 including all communications and negotiations with ICBC and representation at the Civil Resolution Tribunal; (b) representing personal injury clients in their claim for accident benefits and damages with ICBC for motor vehicle accidents occurring between April 1, 2019 and May 1, 2021 where the cap on damages applies (including representation at the Civil Resolution Tribunal), and (c) representing personal injury clients in their claims for accident benefits and damages with ICBC and other insurance companies (including drafting court documents and legal correspondence, negotiating on behalf of clients, conducting legal research and attending tribunal and court hearings) and (d) providing legal coaching services to personal injury and general civil litigation clients.

Andrea's experience and acceptance to the Sandbox has afforded her the ability to help injured parties who otherwise could not afford a lawyer. Whether it is a client who has experienced a slip and fall on municipal property, or a motor vehicle accident victim facing an unfair denial or cessation of benefits by ICBC. Andrea can support and guide individuals through the process, as well to act as their representative with the insurance companies. To illustrate this from a client's perspective, recently one of Andrea's clients expressed how affected she was to be advised that the firm wanted to provide her with "economical" options for legal services; something she did not think existed in the legal industry. She signed on as Andrea's first Sandbox client without hesitation.

Andrea's services through the Sandbox are included on the firm's website, along with other affordable solution options which include the designated paralegal initiative, unbundled legal services, and legal coaching services.

Conclusion

The Innovation Sandbox has now been in place for two years. It continues to be an opportunity for paralegals (and others) to propose models to the Law Society of BC to deliver legal services in areas of unmet legal need. The paralegals outlined above all believe in providing access to justice to British Columbians. By applying to the Sandbox and being approved, they are playing a role in providing options for the public. Whether it be independent from a law firm or alongside a law firm, are you a paralegal who has an idea for a model of legal services in areas that are currently being unmet but unsure how to get started? I hope that the stories of Tracy, Nya, Courtney, Mayette and Andrea can provide inspiration and the motivation to move forward. I look forward to continuing to watch their journeys and to see more paralegals being innovators and pursuing approval in the Innovation Sandbox as time progresses.

The views expressed here are those of the writer and should not be inferred as those of the Law Society of BC.

1 https://www.lawsociety.bc.ca/our-initiatives/innovation-sandbox/
2 https://www.lawsociety.bc.ca/website/media/Shared/docs/sandbox/Laninga-Tracy-2021-07.pdf
3 https://www.lawsociety.bc.ca/Website/media/Shared/docs/sandbox/Guy-Nya-2021-10.pdf
4 https://www.paasinc.com
5 https://www.lawsociety.bc.ca/Website/media/Shared/docs/sandbox/Burnett_SamfiruTumarkin-2022-05.pdf

CRIMINAL LAW ▸

BY **JONATHAN DESBARATS**
TLABC Member

TLABC COMMITTEE
- Criminal Defence Committee

Jonathan Desbarats works primarily in criminal defence and has acted in a number of high profile, large and complex criminal prosecutions. He has also represented clients in regulatory matters, and in civil forfeiture cases at all levels of court in British Columbia and in various provinces across the country, in both English and French. Prior to being called to the bar he worked as a journalist and documentary filmmaker. He is a member of the Board of the Association of Legal Aid Lawyers (ALL).

Supreme Court Justices Clash Over the Constitutionality of the "Ghomeshi Rules"

In June the Supreme Court of Canada released its long-awaited decision in the companion cases *R. v. J.J.* and *A.S. v. Her Majesty the Queen and Shane Reddick,* with the majority upholding the constitutionality of sections 278.92-278.94 of the *Criminal Code*.

The decision, which at 263 pages is a veritable tome, exposes some deep divisions within the Court, particularly on the issue of trial fairness and the proper framework to analyze constitutional challenges where both ss. 7 and 11 are engaged.

The new rules were enacted as part of Bill C-51 in 2018. They have been referred to colloquially as the "Ghomeshi Rules," a reference to the sex assault trial and controversial acquittal of former CBC radio host Jian Ghomeshi which preceded them. In the trial, Ghomeshi's defence counsel on several occasions confronted the complainants in cross-examination with their own text communications to impeach their credibility. The new rules are intended to act as a screening mechanism for judges to determine when private records should be admissible, with the goal of protecting the privacy and dignity of complainants.

The *J.J.* and *Reddick* appeals followed interlocutory rulings by the trial judges in each case on a challenge to the constitutionality of ss. 278.92-278.94. Broadly speaking, both accused challenged the regime on the basis that it violates *Charter* rights enshrined in ss. 11(c) and (d), and s. 7, such as the right to silence, the privilege against self-incrimination, and the right to a fair trial. Several aspects of the legislation came under fire.

First, under s. 278.93(2), an accused bringing an application for private records must set out "detailed particulars of the evidence that the accused seeks to adduce and that relevance of that evidence to an issue at trial." This effectively imposes a requirement that the defence disclosure their trial strategy and elements of their anticipated defence well in advance of trial, raising concerns regarding the right to silence, and the right against self-incrimination.

Furthermore, because complainants have participatory rights under the regime, they are entitled to see the application materials, creating a risk that complainants will prepare tailor-made responses to flaws in their evidence in advance of trial, distorting the fact-finding process and consequently violating the right to make full answer and defence, and the right to a fair trial.

In *J.J.,* the trial judge ruled that part of the regime was unconstitutional, while the judge in *Reddick* struck it down in its entirety. The Crown in *J.J.* appealed, and *J.J.* cross-appealed. Both were granted leave. In *Reddick,* the court took the unusual step of granting leave, and standing, to the complainant.

When is a Record a Record?

The Supreme Court justices weighed in to clarify confusing elements of the legislation, most importantly the proper statutory interpretation of a "record" and what it means to "adduce" a record.

Section 278.1 defines a "record" as "any form of record for which there is a reasonable expectation of privacy." The section lists particular records falling under that definition including for example medical records, psychiatric records, or therapeutic records. However the list is not exhaustive, which, as the court acknowledged, has led confusion and uncertainty. What about records which contain personal information, but not so personal as to attract the degree of privacy as the enumerated records? Or records which are inherently private, such as electronic communications? How does the analysis square with established s. 8 jurisprudence relating for instance to a reasonable expectation of privacy in text communications between an accused and complainant?

The majority concluded that only records containing "highly personal information" which would rise above mere "discomfort and embarrassment" and impact a complainant's dignity should qualify as records for the purposes of the screening process. To assess whether a record rises to this level, the court must look to the specific content of the information. Is it mundane? Or does it "strike at the subject's more intimate self?"

These nebulous concepts are difficult to define. After all, complainants are not uniform in their sensibilities. What to one person may seem merely mundane might strike at another's dignity.

Brown J. in dissent took dead aim at this problem, noting that the legislation does not clarify whether certain records, critical to an accused's defence, might fall under the screening regime and be subject to advance disclosure or exclusion, such as messages from a complainant to an accused disclosing a different version of events or expressing a lack of memory; angry messages during a breakdown of their relationship referring back to the sexual assault; and sexualized or flirtatious text conversations before or after the alleged sexual assault.

Côté J. took a slightly different approach, arguing for a narrower interpretation of "record" which would not capture communications between the complainant and the accused except where there was a legitimate expectation of confidentiality. In her view, a person does not have a reasonable expectation of privacy in communications vis-à-vis the recipient. Moreover, as she put it, the majority view creates the "absurd" consequence of having a distinction between information exchanged orally and through electronic means. In the former instance, an accused would be free to cross-examine a complainant about their conversation without advance notice; in the latter case where the conversation occurs via text, the screening regime would apply.

Majority's Ruling Based on "Judicial Ad Hoc-ery": Brown, J.

While the dissent and majority traded jibes as well over the property interpretation of "record", the case exposed a more fundamental division in the court relating to the concept of trial fairness, and the correct analytical framework for constitutional challenges involving both s. 7 and other *Charter* rights such as ss. 11(c) and (d). Rowe, J. led the charge on this front, claiming that the Crown

and other parties were inviting the court to do an end run around s. 1 by attenuating the right to a fair trial under s. 11 of the *Charter* by reference to a balancing of various "principles of fundamental justice" within s. 7, including the interests of the complainant, and society more broadly.

Brown J. colourfully referred to this line of reasoning as the "product of 40 years of accumulated judicial *ad hoc*-ery"—prompting the majority to accuse the dissenting judges of disregarding the principle of *stare decisis* and "sweeping aside decades of this Court's binding jurisprudence."

In the end, the decision is notable for just how far apart the majority and dissent appear to land on the ultimate question, with Brown and Côté JJ agreeing that the legislation did not even *come close* to passing constitutional muster, and Brown J. repeatedly asserting that the legislation raises "the near certain prospect of innocent persons being convicted."

Timing, and Privacy Assessment, Offer Avenues for the Defence

In its assessment of what constitutes a "record," the majority clearly left considerable room for interpretation and argument on the "content and context" analysis. This is where the primary battleground will likely remain, and judges will be left with the unenviable task of parsing through the content of records to determine that point at which the information becomes so personal as to threaten the dignity of a complainant.

The timing of applications also leaves some room for tactical manoeuvring by the defence. The majority indicates that pre-trial applications should be the norm, but stopped short of prohibiting mid-trial applications, leaving that decision up to the discretion of trial judges. The court also explicitly references the cross-examination of complainants regarding their review of application materials.

Given what is at stake for defendants in sex assault trials, it is inevitable that defence counsel will push the bounds of this legislation in other ways, now that the final word is in from the Supreme Court.

CLASS ACTION ▸

BY **ADEN KLEIN**
TLABC Member

Aden Klein is a class action lawyer in the Vancouver office of Klein Lawyers LLP. Aden acts for plaintiffs in a variety of class actions, including cases involving anti-competitive behavior, privacy breaches, government negligence and defective medical products. Aden has a Bachelor of Commerce with Honors from the University of British Columbia and Juris Doctor from the University of Toronto.

What Makes a Successful Consumer Class Action Settlement?

A Review of The Federal Trade Commission's Report on Consumer Class Action Settlements

What makes a successful consumer class action settlement? That is, what are the characteristics of these settlements which encourage class members to participate and submit claims?

The U.S. Federal Trade Commission ("FTC") sought to answer these questions in their 2019 report entitled "Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns."[1] The report compares 149 consumer class action settlements, analyzing characteristics of the settlements, including notice and compensation, and how these characteristics affect participation in the settlement. It provides insight into crafting settlements which successfully engage class members in consumer class actions.

What is a Consumer Class Action?

Consumer class actions are cases wherein the class is composed of consumers who purchased, used, and/or own a product.

There have been a variety of different consumer class action ranging from contaminated food products (*Fakri and Aylon v. Alfafa's Canada Inc.*, on behalf of customers who were infected or exposed to Hepatitis A after eating Capers food products), and defective household goods (such as *Bickert v. Whirlpool Corporation et al.* regarding dangerous Whirlpool dishwashers), to privacy breaches (such as *Chartrand v. Google LLC*, regarding Google receiving location tracking data from users of Android devices).

Courts have commented that consumer class actions can be lawyer-initiated, though that isn't a bad thing:[2]

lawyer-initiated proceedings are not just inevitable, given the costs involved, but can also represent a social good in the consumer class action setting. As Perrell J. wrote in one Ontario case, "the entrepreneurial nature of a class proceeding can be a good thing because it may be the vehicle for access to justice, judicial economy, and behaviour modification, which are all the driving policy goals of the Class Proceedings Act, 1992." [33] Scholars have observed that, within the proper limits of ethical rules that bind all lawyers, courts should recognize that lawyer-initiated consumer class actions can be helpful to meet the access to justice policy goals of the modern law of civil procedure. [34]

However, when cases are initiated by lawyers, it is important that those lawyers ensure consumers have access to justice. One way to measure this is by reviewing whether consumer class members participate in the action and whether they are compensated.

The FTC Report

Criteria

The FTC reviewed 149 consumer class action settlements ranging a variety of consumer industries including product malfunction, telephone-related violations, price inflation/

anti-competitive conduct, overdraft policies, consumer privacy, mortgage-related products, debt collection, misrepresentation, improper payment (charged or credited) and other miscellaneous consumer cases.[3]

The cases had to meet four criteria – the cases all involved consumer issues, provided sufficient data for the analysis, provided data on the number of notice recipients eligible to file a claim, and did not clearly represent settlements where a small minority of notice recipients met the claim eligibility criteria.[4]

The cases were divided into four categories: "cases requiring all notice recipients to file a claim to receive compensation (claims made), cases requiring none of the class members to file a claim to receive compensation (direct payment), cases requiring some of the recipients to file a claim and providing other recipients with direct payment (hybrid with subclasses), and cases providing recipients with the option to file a claim to receive more favorable compensation (hybrid with option)."[5]

The four categories were further divided into: "those with standard documentation requirements (standard claims made) and those with varying documentation requirements (nonstandard claims made)."[6] Seventy per cent of the cases were standard claims made settlements.[7]

To determine the 'success' of the settlement, the report (1) examined outcomes including the claims, objection, and exclusion rates, all as a percentage of the total notice recipients; (2) examined the claims approval and denial rates as a percentage of the number of claims filed; and, (3) calculated the check cashing rate as a percentage of checks mailed to class members.

Summary of Results

The FTC provided a summary of the results:[8]

First, the overall claims rate of the cases in the sample was less than 10% and varied depending on whether class members received notice by packets, postcards, or email. Second, we did not find different claims rates when publication notices were used as a supplement to direct notices. Third, we did not find that changes in median compensation were related to claims rates, but the study did show that check cashing rates were higher as median compensation increased. Finally, in a supplementary examination of qualitative notice and claim form characteristics, we found that the claims rate was higher in cases where the notices used visually prominent, "plain English" language to describe payment availability. However, we did not find other notice and claim form characteristics, such as form length and documentation requirements, to be related to the claims rate in our sample.

It was clear that consumer class actions typically have low participation. Across the 149 cases, the median claims rate[9] was 9% and the weighted mean (i.e., cases weighted by the number of notice recipients) was 4%. The range was between at least 34% of recipients filing a claim (the 10th percentile) and at most 2% of recipients filing a claim (the 90th percentile).[10]

While participation rates were low, claim approval rates were high. Approximately 86% of claims submitted were approved and the median approval rate was 93%.[11]

Practically no consumers objected to or sought to be excluded from the settlements:

> Objection and exclusion rates were miniscule; only 0.01% of notice recipients excluded themselves from the settlement and 0.0003% objected to the proposed settlement.[12]

Characteristics of the Settlements

Compensation

The median compensation was $69 or more. There was not a statistically significant relationship between median compensation and claims rates – "the claims rate for the less-than-$10 category [was] only 1 percentage point lower than the more-than-$200 category."[13]

The FTC offered its comments on this surprising finding:

> The lack of a strong relationship between redress level and claims filing is surprising because it suggests that higher redress amounts may not be more motivating to consumers. However, many consumers may not read the notice carefully, or at all. Also, ... about a third of the notices do not provide any compensation estimate. Thus, many consumers may not file simply because they are not aware of the redress amounts.[14]

Notice

Notice and the use of claim form language were significant factors relating to claims rate. Notice has a range of characteristics.

There is direct notice and publication notice.

Direct notice often occurs when there is contact information for class members. When there is not, or the information is absent, there is typically publication notice.

The use of publication in notice did not have a signification relationship with the claims rate.[15]

There are a different methods of direct notice:[16]

> The specific method of direct notice (e.g., email, postcard, or notice packets) usually depends on one or more of the following factors: the available consumer contact information, the cost of sending notice to the class, and the defendant company's past interactions with class members (e.g., many defendant companies may use email to reach their

> customers who purchase online because of its low cost and greater accuracy).
> ...
> There are marked differences in the claims rates across notice methods. Claims rates for notice campaigns using notice packets were the highest, with a median claims rate of 16% and a weighted mean of 10%. Notice campaigns that use postcards had lower rates, with a median and weighted mean of about 6% to 7%. Finally, email notice campaigns had the lowest mean and median claims rates of 2% and 3%, respectively.

More important than the type of notice was the use of multiple notices: "cases that send multiple communications to class members have average and median claims rates that are more than twice as high as cases that attempt to reach class members just once."[17]

The FTC also found there is a significant relationship between the use of visually prominent, plain English language describing payment availability.[18] In this regard, the FTC undertook a qualitative analysis reviewing characteristics including:[19]

- the amount of legal information contained at the top of the notice, whether the notice included a table of options (which typically lists the claims filing deadline, along with other options such as excluding oneself, doing nothing, or attending a hearing);
- whether the notice used visually prominent, explicit language to describe the consequences of doing nothing; whether the notice used visually prominent, explicit language to describe the necessity of filing a claim;
- whether the notice contained a statement explaining the relevance of the notice to the recipient; and
- whether the notice used visually prominent, plain English language to describe the amount and availability of payment

Notices with plain English included words such as "money, payment, refund, cash, reimbursement" or an amount accompanied by the "$" symbol.[20]

There was not a statistically significant relationship between other notice and claim form characteristics, such as form length and documentation requirements.[21] Nevertheless, noticeable, easy-to-find claims forms yielded higher claims rates.[22] For example, postcards which had a detachable claim form on it yielded claims rates twice as high as those which did not.[23]

Study Limitations

The FTC is careful to highlight that their study has a variety of limitations.[24] Most notably, the study examines *correlation* between characteristics of settlements and consumer participation. However, this does not mean that such characteristics necessarily *cause* consumer participation; the characteristics do not "definitively show that one particular practice performs better than others." For example:[25]

> [The FTC] observed higher claims rates for cases that utilize notice packets compared to those that use email. However, we cannot conclude from the analysis that the use of those notice packets caused the higher claims rate because the higher claims rate may simply reflect the fact that notice packet campaigns, for example, involve companies with more detailed customer records or closer relationships with their customers.
>
> Class actions are also complex, so it is hard to compare one settlement against another. For example, there are a variety of intangible settlement characteristics such as severity of injury, defendant company reputation, and availability of consumer contact information. These characteristics are difficult to account for in an empirical study.

Conclusion

Class actions are intricate and difficult to understand. It is clear from the FTC study that helping consumers understand a class action settlement is correlated to participation rates. Providing clear information in plain language can help consumers understand if the settlement applies to them, how to file a claim, and the compensation they can expect to receive. It is also important to provide multiple notices so that the message is reached by more people.

Claims forms should be noticeable and easy-to-find. They should also be easy to fill out.

Class counsel must be cognizant of creating simple and easy-to-understand settlements and notice information. This is more important than the amount of compensation each class

member can receive. Recognizing that many people do not understand class action settlements, and helping them to understand, can go a long way towards increasing participation rates in settlements which typically have low participation.

1 https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf
2 Sibiga c. Fido Solutions inc., 2016 QCCA 1299, para 102 (citing Fantl v. Transamerica, 2008 Ont No 1536, para. [49] (SCJ), Jasminka Kalajdzic, "Self-Interest, Public Interest and the Interest of the Absent Client: Legal Ethics and Class Actions" (2011) 49 Osgoode Hall L.J. 1, and Frank Iacobucci, "What is Access to Justice in the Context of Class Actions" (2011) 53 Sup. Ct L. Rev. (2d) 17)
3 FTC Report, pages 10, 18.
4 FTC Report, page 17
5 FTC Report, page 13
6 FTC Report, page 13
7 FTC Report, page 17
8 FTC Report, pages 1-2
9 Claims Rate is the number of people who submitted claims divided by the number of people who received direct notice of the settlement.
10 FTC Report, pages 11, 22
11 FTC Report, pages 11, 22
12 FTC Report, pages 11, 22
13 FTC Report, pages 11, 22
14 FTC Report, page 32
15 FTC Report, page 11
16 FTC Report, pages 23, 25
17 FTC Report, pages 26, 27
18 FTC Report, page 12
19 FTC Report, page 33
20 FTC Report, pages 35, 42
21 FTC Report, page 12
22 FTC Report, page 27
23 FTC Report, page 28
24 FTC Report, pages 3, 16
25 FTC Report, pages 3, 16

EMPLOYMENT UPDATE ▸

BY **ROSE KEITH KC**
TLABC Past President
TLABC Member

TLABC COMMITTEE
- Women Lawyers Retreat Planning Committee

Rose Keith KC is Associate Counsel at Harper Grey. She graduated from the University of Saskatchewan Law School in 1992 and was called to the Bar of the Province of British Columbia in 1993. Ms. Keith's practice has focused on personal injury and employment law. She is a roster member of Mediate BC with extensive experience as both counsel and mediator in conducting and participating in mediations. She serves on TLABC's Women Lawyers Retreat Planning Committee and is an active member of the BC Branch of the Canadian Bar Association.

Workplace Investigations: How Are They Done?

Workplace bullying and harassment are frequent occurrences and the impact on workers and the workplace is significant. Bullying and harassment can affect both the psychological and physical wellbeing of workers. Occupational Health and Safety legislation imposes duties on employers, employees and supervisors to take steps to prevent and minimize workplace bullying and harassment.

Occupational Health and Safety Requirements

The obligation to prevent bullying and harassment arises from occupational health and safety legislation. Every employer in British Columbia, regardless of the size of the workplace, has a duty to ensure the health and safety of its workers. That duty includes the requirement to take all reasonable steps to prevent or otherwise minimize workplace bullying and harassment and eliminate or otherwise minimize workplace violence. Beginning in November 2013, every business in British Columbia was subject to the occupational health and safety obligations of the Workers Compensation Act (the Act) to prevent and address workplace bullying and harassment. Based on the Act, all employers, regardless of size, are required to take reasonable steps to address the hazard of workplace bullying and harassment. All employers regardless of size must have a policy statement indicating that workplace bullying and harassment is not acceptable and must have procedures in place to enable workers to report incidents of bullying and harassment as well as the process for employers to follow to address complaints. All workers must be informed of the policy and trained on how to recognize and respond to incidents of workplace bullying and harassment.

The Occupational Health and Safety policies provide the legal framework that identifies the reasonable steps that all workplaces are expected to take to meet their legal duties. The phrase "bullying and harassment" is defined by WorkSafe BC as:

a. any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but
b. excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.

What is Bullying and Harassment?

Some examples of bullying and harassment include verbal aggression or insults, calling someone derogatory names, harmful hazing or initiation practices, vandalizing personal belongings and spreading malicious rumours. Other more subtle behaviours such as targeted social isolation can also be considered bullying and harassment if they are intimidating or humiliating. A person does not have to intend for their behaviour to be intimidating or humiliating for the behaviour to constitute bullying and harassment.

Reasonable management actions such as providing instructions or feedback, or performance management, are not bullying and harassment, however management ac-

tions must be undertaken in such a way that objectively it does not humiliate or intimidate. Disagreements and personality clashes between co-workers also does not constitute bullying and harassment unless the negative workplace encounters rise to the point that they create a hostile work environment.

What Does This Require of Employers?

Occupational Health and Safety policy D3-115-2 sets out the steps that WorkSafeBC considers reasonable for employers to take to comply with their obligations to prevent and address workplace bullying and harassment. Those steps include the following:

1. Develop a policy statement on bullying and harassment — all BC employers are required to develop a written policy statement that declares that workplace bullying and harassment is not acceptable and will not be tolerated. Employers are also required to ensure that all workers are made aware of the policy statement.

2. Take steps to minimize bullying and harassment — employers are required to take steps to prevent or minimize workplace bullying and harassment which means that if they are aware of circumstances that present a risk of workplace bullying and harassment they must put in place preventative measures.

3. Develop and implement procedures for workers to report incidents or complaints — this includes how the worker can report workplace bullying and harassment, when it is to be reported and to whom the complaint should be reported. The procedures should clearly state the process for reporting the complaint and must have reporting procedures for circumstances where the employer or supervisor is the alleged bully.

4. Develop and implement procedures for dealing with incidents or complaints — the employer must develop a procedure that states how they will deal with incidents and complaints. The established procedure must ensure a reasonable response, and be aimed at both fully addressing the incident and preventing or minimizing the risk that it will recur. The procedure specifically must address:

    a. how and when investigations will be conducted;
    b. what will be included in the investigation;
    c. the roles and responsibilities of all involved in the investigation including employers, supervisors, workers, the investigator and witnesses;
    d. follow up to the investigation including a description of corrective measures to be taken and the time frame for taking them;
    e. record keeping requirements for the investigation.

5. Inform workers of the policy statement and steps taken to prevent bullying and harassment — this can be accomplished during the onboarding of new employees and through posting of the policies and procedures in high traffic areas at the employer's worksite.

6. Train supervisors and workers on the bullying and harassment policy. Training must include the following:

    a. how to recognize bullying and harassment
    b. how workers who experience or witness bullying and harassment should respond
    c. procedures for reporting and how the employer will deal with the incidents

7. Do not engage in bullying and harassment of other workers.

8. Apply and comply with the policies and procedures on bullying and harassment.

9. Conduct an annual review of the bullying and harassment policy, steps to prevent or minimize workplace bullying and harassment, reporting procedures and procedures for dealing with incidents.

A worker who experiences negative employment consequences, such as dismissal or demotion, as a result of reporting workplace bullying and harassment may file a discriminatory action complaint with WorkSafeBC.

Investigations

Employers are not required to engage a third party to investigate complaints of bullying and harassment, but they are required to ensure that their investigation into any complaint is reasonable and undertaken in good faith.

The investigation must be fair, impartial and focused on finding facts.

As a general rule, if the facts are easily ascertained, independent witnesses are available, the matter is uncomplicated and there are no additional complex underlying issues or problems an employer may consider undertaking its own investigation.

When the allegations are more serious or complicated, a third-party investigator should be retained. Examples of circumstances where a third-party investigator should be considered include where there are allegations of physical assault or sexual

harassment, where the allegations indicate a potential systemic issue in the workplace, or when the allegations concern a member of the management team.

The advantages of retaining a third-party investigator include the following:

1. Significant costs can result if an internal investigation is done improperly.[1]
2. External investigators are proficient in process. When the external investigator is a lawyer, they are also trained to apply standards of proof and to assess credibility and internal consistency;
3. External investigators are neutral, unbiased and uninterested in the outcome of the investigation. Internal investigations are always subject to the biases of the workplace, the experience of the investigator of the workplace and the interest in the outcome of the investigation;
4. External investigators, in particular lawyers hired as investigators, are knowledgeable about the issues at play in litigation that may potentially follow the investigation;
5. Employees tend to be more comfortable and more forthcoming with an external investigator rather than someone that they work with;
6. Hiring an external investigator emphasizes for employees as well as those judging the actions taken in response to a complaint, of how seriously the employer has dealt with the complaint;
7. Hiring a lawyer as an external investigator can shield the investigation report from disclosure because of solicitor client privilege.

Summary

There is a heavy onus on British Columbia employers to provide a workplace free of bullying and harassment and to respond to reports of bullying and harassment in a thorough and serious manner. While many workplace investigations can be conducted internally, investigations regarding allegations of bullying and harassment require a different approach. Not only will the investigation be scrutinized by WorkSafe BC, but in addition, significant potential liability can also result from bullying and harassment in the workplace. A professionally done, thorough investigation can serve as a defense against claims for punitive and aggravated damages, can identify where systemic problems exist and can provide the opportunity for the employer to learn vital information to prevent and minimize bullying and harassment in the future.

1 *Boucher v. Walmart Canada Corp.* 2014 ONCA 419

TECHNOLOGY ▸

BY **MARK VIRGIN**
TLABC Associate Member

Mark Virgin is an experienced litigator whose practice focuses on civil, commercial and administrative law. He assists clients with a broad range of matters, including family law disputes, insurance disputes, personal injury claims, product liability suits, and professional negligence actions. Mark has presented before professional bodies such as the Canadian Defence Lawyers, the CLEBC, and the Pacific Legal Technology Conference for TLABC. He has published articles on a variety of topics and has been recognized by the CBA for his years of ongoing community service.

Bad Online Reviews: A Lawyer's Recourse

The internet has presented lawyers with wide reaching and innovative ways to market their practices. It also affords a wide reaching and innovative platform for persons to air grievances about lawyer's services — whether or not those grievances are justified.

Responding to unjustified negative reviews can be a frustrating proposition for any business.

Reviewers often have a shield of anonymity, making direct responses time-consuming.

Such reviews are hosted on sites operated by corporations whose internal directives govern responses to requests to remove postings.

One leading way in which lawyers have sought to counter unjust online reviews is through defamation action.

Court action offers a potential solution, but that is inevitably time consuming. Past decisions have also proved quite unsatisfactory from the owner's perspective. Litigants have been frustrated by defences offered to corporations under foreign statutes, and/or have been hindered in efforts to prove more than nominal damages.

In this article, we will canvass recent BC decisions in which lawyers have sought relief for defamatory statements made in online reviews. In particular, we will highlight the mixed success plaintiffs have had to date and note certain of the issues which have defeated past defamation actions.

Hopefully, after reading this article, lawyers will be better able to evaluate their options should they find themselves in similar circumstances to those facing the plaintiffs herein.

Defamation

To establish a claim for defamation, the plaintiff must show the statements at issue were defamatory, in that they would lower a reasonable person's opinion of the Plaintiff. The Plaintiff must further show the defamatory statements referred to them and that the Defendant directed the statement to at least one other person.

Damages need not be proved. Though defences, including the truth of the statements, are available, the onus shifts to the Defendant to establish those. An injunction is an available remedy to prevent continuation of the defamation, in circumstances where a monetary judgement may not dissuade the defendant. On its face, the law of defamation is a strong response to negative reviews. A defamation action against a former client was successfully brought by the plaintiff firm in *Slater Vecchio LLP v. Arvanitis*, 2019 BCSC 2369. The trial reasons note the Plaintiff posted to the

firm's website Google reviews of the firm and other entities and personal social media of its lawyers and their families. She further had actively reached out to former clients of the firm to discuss her views of them.

The defamation action followed an unsuccessful claim by the defendant against the firm. Accordingly, *res judicata* applied to a number of issues raised by the defendant in response.

The trial court also agreed with the reasons of Madam Justice Duncan who had granted the Plaintiffs a temporary injunction and who found the defamatory statements likely to cause damage as follows:

> *...the publications at issue "amount to accusations of criminality and unethical behaviour by a law firm," and she held that "[t]hose types of comments are, in my view, manifestly defamatory; that is, defamatory on their face" (para. 24). She also held that the defamatory statements appeared "likely to cause irreparable harm to the plaintiff's reputation by dissuading potential clients, as one example."*

On summary judgement, the court agreed and found, on the "voluminous" evidence before it, that the defendant had defamed the law firm.

While the firm did not seek damages, they obtained an injunction not only prohibiting the defendant from continuing to make defamatory statements, but to also cease discussing her opinion of the firm with its former clients.

The defendant's actions in *Slater Vecchio* were egregious. The court further noted the firm's restraint in choosing to ignore the defendant's statements, until the point where she started contacting former clients.

Availability of Damages

Less successful were the Plaintiffs in *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961 (CanLII), which concerned a negative Google Plus review left by a former client. The Plaintiffs commenced an action and received no response pleadings and then secured a default judgement for the court to subsequently assess.

On that assessment, the court considered the impugned statement and reasoned as follows:

> [13] The cases above make clear that the alleged defamatory statement must be considered objectively from the standpoint of a reasonably thoughtful, well-informed person. The whole of the entry must be looked at including how it was written.
>
> [14] Applying that test to the post in question I note the following:
>
> 1. *The review is clearly written by a disgruntled client;*
> 2. *It was posted in the heat of the moment; and*
> 3. *It is written in poor English, and contains spelling mistakes and poor punctuation.*

It is not clear from the reasons the basis by which the court determined points 1 and 2 were correct, nor how the same might be apparent to a reader of the review.

The court found that, if the review was defamatory at all, it fell at the low end of defamation. The court awarded $1 in damages, while emphasizing its view that the Plaintiffs should not have brought the action.

In support of that damage award, the court further found that the Plaintiffs' affidavit evidence asserted an apparent decline in business without particulars. The court also noted from images of the negative review that there were thirty-two other reviews given and that the firm maintained an average rating of 3.6/5.

In making its damage award, the court commented on the weight which lawyers ought to assign such reviews, as follows:

> *[34] In this time when virtually everyone has instantaneous access to the internet, many use the internet to express their feelings without pause or reflection. Business people with Google Plus profiles or the like invite comments from customers. Surely no one can expect to receive all favourable reports. When choosing a lawyer or other professional or service provider, prospective customers reading such reviews would be naive to think that anyone or any business would receive all positive reports. As the adage goes, you can't please everyone all the time.*

The commentary above was relied on shortly thereafter in *Busch v. Yelp Inc.*, 2019 BCSC 1746.

The Plaintiff was a lawyer and operator of a law practice. He created a business account with online review service Yelp. He discovered a user-posted review on April 22, 2017 which he felt was defamatory. He contacted Yelp and made efforts to have the review taken down, to no avail.

On April 18, 2019, the Plaintiff commenced an action against Yelp, its Canadian subsidiary, and the Jane Doe who posted the offending review (whom the Plaintiff inferred was a former client). He claimed for defamation, among other bases. Yelp responded by pleading the forum selection clause of its Terms of Service. Yelp then applied for summary disposition.

At the outset of his reasons, Mr. Justice Ross cautioned that

"*these reasons constitute an application of law to a very specific set of facts. It is not my intention that this decision be of general application.*" That said, the reasons address several points which lawyers should keep in mind.

First, the provisions of the Terms of Service were valid, including the one requiring all disputes to be heard in California was valid. The Plaintiff had argued that the non-negotiable terms of service constituted a "grey area," between a commercial transaction and a consumer transaction. Such argument attempted to shift the analysis towards the realm of consumer protection law. The court rejected this argument, holding there was no authority for the existence of such "grey area." The Plaintiff created the account for the commercial purpose of advertising his business. As a lawyer, the Plaintiff was aware that agreeing to the Terms of Service could impact his right to sue at the time he created the account.

Second, choice of California Law in the Terms of Service was not unconscionable. The Plaintiff had argued the clause was unconscionable as he had not received the opportunity to negotiate it when claiming the Yelp Account for his business. The court rejected this argument on similar grounds as his invalidity argument.

Third, the application of California law significantly undermined the Plaintiff's prospect of success at trial. Based on expert evidence as to the effect of California Law, the court found that the *Communications Decency Act* immunized Yelp against any damage award resulting from statements made by its users. Further, Yelp would be entitled to payment of its legal costs.

Based on expert evidence as to the effect of California Law, the court found that the *Communications Decency Act* immunized Yelp against any damage award resulting from statements made by its users.

While it was unlikely the person who posted the review had similar statutory protection, the court drew upon the reasons in *Acumen* to find that the Plaintiff may receive only nominal damages. The net effect of the application of California law and the *Acumen* decision, therefore, was that the Plaintiff would receive a nominal award against the Jane Doe defendant and would be required to pay Yelp's legal costs.

The court accordingly ordered the matter stayed, holding that doing so was essentially for the Plaintiff's own benefit, as follows:

[35] So, in the particular and peculiar factual matrix of this case, I have a significant concern that the plaintiff may proceed through trial and obtain nominal damages. Further, Yelp may be able to avail itself of the immunity provided by California law to internet providers and web sites. Hence, the primary consideration that I am taking into account in the second part of the Pompey test is protecting the plaintiff from the prospect of a nominal damage award for him and a large award of costs against him.

Key to the judgement in *Busch* is, of course, the Plaintiff's prior agreement to Yelp's Terms of Service when he created his account. For comparison, the BC Court of Appeal in *Giustra v. Twitter, Inc.*, 2021 BCCA 466 recently confirmed that a BC man could proceed with his action against Twitter in BC where the company did not raise such contractual defence.

For business owners concerned about obtaining more than nominal damages in connection with negative online reviews, a recent decision of the BC Supreme Court suggests that A*cumen* may not be settled law.

In *Smiley Kids Dental v. Huang,* 2022 BCSC 1568, the dentist Plaintiff commenced an action over a negative Google review left by the defendant.

Counsel for the Defendant brought an action to strike the pleadings, relying significantly on *Acumen*. The Defendant's counsel asserted that the court must evaluate the statement within the context of internet reviews. Invariably, business must expect to receive some negative reviews. Further, the posting was short, vague, subjective, and did not connote an ongoing problem. The Defendant's counsel referred the court as well to the passage from *Acumen* quoted above.

The court denied the Defendant's application to strike the pleadings.

In denying the application, the court resiled from the position in *Acumen* that a single negative online review could have only a nominal impact. Rather, in ruling the matter should proceed, the court held as follows:

[25] In my view, a reasonable, right-thinking person would not view the posting as silly, vague, vacuous, or just part of the uncouthness and boorishness frequently seen on the Internet.

[26] The posting refers specifically to Dr. Chin. The author of the posting also refers to "horrible customer service" and "treated our child with 0 care." In my view, a reasonable, right-thinking person who had a young child and who was looking for a pediatric dentist for his or her child may view the posting negatively in deciding whether or not to select the plaintiffs for his or her child's dental care.

[27] The collective wisdom of a jury is particularly well-suited to make the determination as to whether the posting is defamatory.

As the *Smiley Kids Dental* decision was announced September 7, 2022, we are still sometime away from learning – if we will learn at all – whether the impugned statement was in fact defamatory, and if so, what damages it may garner.

Availability of Injunction

As an alternative, seeking an order that parties be enjoined from posting defamatory content addresses the continuing harm of un-

fair reviews, without risking the same approbation that has accompanied claims for damages.

As shown in *Slater Vecchio*, courts are willing to grant injunctions in defamation actions against former clients. A further benefit of an injunction is that it is obtainable as interlocutory relief. However, in a defamation action, the threshold for obtaining an interlocutory injunction is more stringent than in other tort actions.

In *Niemela v. Malamas*, 2015 BCSC 1024 the plaintiff lawyer sought an interlocutory injunction against Google requiring it to block 146 web URLs containing defamatory statements against him from its websites worldwide. The plaintiff also sought removal of the automatically generated "text snippets," which Google displays alongside the URLs to preview the linked page's contents. Notably, Google had already voluntarily removed most the results from its Canadian ".ca" site.

The court denied the plaintiff's injunction. Its reasons highlighted that, in a defamation action, an injunction is only available in the *"clearest of cases" where the words complained of are "manifestly defamatory"* [at para 20]. The plaintiff also failed to establish that he would suffer irreparable harm if the court did not grant the injunction. He also failed to show the balance of convenience favoured the injunction.

The court then granted Google's application for summary judgement dismissing the action, finding that Google was not a publisher of the defamatory statements in the circumstances. Specifically, the court found that the URLs and text snippets Google displays are generated by its algorithm. It was unfeasible for Google to vet the trillions of webpages which its algorithms could link to. In that context, it could not be said Google was authorizing the appearance of defamatory statements on its website in any meaningful way.

Under the traditional approach to defamation, a lack of awareness of the defamatory statements would not have prevented Google from being a publisher. However, relying on the Supreme Court of Canada's decision in *Crookes v. Newton*, 2011 SCC 47 and the BC Supreme Court's decision in *Weaver v. Corcoran*, 2015 BCSC 165, the court found the passive instrument test was applicable.

Under the passive instrument test, an entity operating a service such as Google would not be a publisher so long as it had not taken deliberate action in causing the defamer to post statements on its page, and so long as it was not aware of the statement's contents. Upon becoming aware, such entity must then take immediate action to remove the statements or it would cease to be a passive instrument. As Google had voluntarily taken down URLs at the plaintiff's request, it continued to be a passive instrument.

Conclusion

There are several take aways from a review of recent cases of professionals dealing with negative reviews. Certain entities are willing to remove reviews at the request of the reviewee – though efforts to legislatively enshrined "free speech" in the US may be eroding such willingness. Even if the entity does not voluntarily remove the results, providing prior notice opens another avenue to argue the entity is complicit in defamation. However, one should be careful not to agree to be bound by the company's terms of service in the course of seeking a voluntary removal.

Lawyers should also moderate their expectations as to the cost versus benefit of a defamation action. Outside of rare circumstances where evidence supports a clear loss of business, the damage awards in a defamation action based on online reviews is unlikely to compensate lawyers for the time spent on the action.

An injunction is an alternate remedy available to lawyer's seeking removal of defamatory content. In most circumstances simply having defamatory statements removed by way of injunction will address a sizable portion of the harm caused by defamatory statements. Considering a sampling of recently published decisions, a plaintiff seems more likely to receive a sympathetic decision when seeking an injunction alone rather than damages.

However, when considering whether to proceed against an entity such as a search engine, lawyers should keep in mind the trend over recent decisions to finding that such services are not publishers but are passive instruments. A plaintiff may overcome such determination by either establishing the entity prompted defamatory statements through deliberate action or that the entity became aware of the statements and did not immediately remove them. However, the onus is on the Plaintiff to establish that those circumstances are applicable.

LEGISLATIVE WATCH ▸

BY **JESSIE LEGAREE**
TLABC Board of Governors
TLABC Member

TLABC COMMITTEE
- New Lawyers Committee

Jessie graduated in 2015 from University of Toronto then promptly returned home to the Fraser Valley. She articled at RDM Lawyers LLP where she remains, focusing on employment and estate litigation and managing a department that tackles most things 'civil'.

Prior to being sucked into the legal vortex, Jessie was immersed in politics. Now she's a volunteer who faithfully picks up a lawn sign yet has no lawn.

Jessie also serves on the TLABC New Lawyers Committee and hopes to provide a helpful resource on legislative and related developments for busy trial lawyers.

At the time of writing, the BC Legislative Assembly has not returned from summer break. Below I have featured a recent report by a special committee, a recent practice direction regarding the sealed bid process for foreclosures and, finally, my rant on the Note to the Profession regarding in-person court appearances.

Report to Government: FIPPA for the Future

A Special Committee to Review the *Freedom of Information and Protection of Privacy Act* (FIPPA) submitted its report to the BC government in June 2022. FIPPA came into force in 1993 and applies to over 2,900 public organizations in BC. Statutory reviews are required to take place at least once every six years, with the most recent review taking place from 2015-2016.

In light of the 2016 recommendations, several amendments were made to FIPPA in November 2021 including:

- Requiring public bodies to have a privacy management program
- Mandatory privacy-breach reporting
- Increasing penalties for offences and adding new offences for evading FOI
- Adding Indigenous cultural protections

The 2021-2022 Special Committee was tasked with reviewing FIPPA keeping in mind the recent changes. The 2022 report includes 34 recommendations to support a "culture of transparency." Some of the more significant recommendations include:

- Introduce into the Act a duty to document to ensure all public bodies create and manage detailed records of decisions and actions
- Amend definition of "public body" to ensure that any board, committee, commissioner, panel, agency or corporation created or owned by a public body is subject to the Act, regardless of whether it is listed in Schedule 2
- Reduce the scope of the exceptions in s. 12 "cabinet and local public body confidences exception" to clarify that background materials must be released by public bodies
- Reduce the scope of s. 13(1) "policy advice or recommendations exception" to clarify that the discretionary exception for "advice" or "recommendations" by or for a public body or a minister does not extend to facts upon which they are based or investigative background materials
- Clarify there is no exception to disclosure for settlement privilege
- Reduce the scope of the s. 14 "legal advice exception" to clarify that the exception applies only to legal advice provided in confidence and not any time a lawyer is involved in providing policy or program advice
- Allocate resources to modernize the freedom of information system with a focus on timeliness
- Amend the Act to establish that an applicant who makes a formal access request

has the right to anonymity
- Enact new comprehensive health information privacy legislation
- Amend s. 75(3) of the Act to make it clear that applications by an individual or a party requesting records on their behalf are exempt from fees and, in the interim, issue an interpretation bulletin that clarifies that legal representatives are able to collect personal info on behalf of their clients

These are recommendations only and, in some cases, substantially similar ones were also made in 2016 or at even earlier reviews. It's unlikely any changes will be introduced by the BC government in the near future and we will provide an update if and when that happens.

Supreme Court Practice Direction – 62: Sealed Bid Process for Foreclosures and Other Matters Involving Sales of Land

On August 12, 2022, the Supreme Court set out a process for submitting sealed bids to the Court for foreclosure and other matters involving the sale of land. This Practice Direction revokes prior COVID directions. Of key importance, within a "reasonable period of time" after filing an application for the approval of a sale, the seller's counsel is required to forward a copy of a link to the Practice Direction or the text of the Practice Direction to the listing agent for distribution to any interested buyer(s) or their agent(s).

A process is then set for interested persons to make competing bids to the seller's counsel by 4 p.m. two business days before the hearing date ("Bid Date"). The original offeror is then provided until 10 p.m. on the day after the Bid Date to provide a revised bid. After receipt of any bids received and after the Bid Date, the seller's counsel must review and forced any bids electronically to the applicable Registry and to CC foreclosurebids@bccourts.ca. The Court retains full discretion to consider bids outside of this process and parties may still apply to court for approval of a sales process other than the set out "Bid Process."

Attached to the Practice Direction is a sample transmission letter and acknowledgement of receipt. If your practice includes foreclosures and sales of land, it is important to review this Practice Direction in detail.

Supreme Court COVID-19 Notice No. 50: Manner of Attendance for Civil and Family Proceedings

On June 22, 2022, the BC Supreme Court announced "the Court is preparing to return to Pre-COVID-19 practices for regular chambers." In one fell swoop, the Court reversed the strides we had taken over the past two years to take advantage of 21st century technology. Effective August 15, 2022, we have returned to the archaic pre-COVID era of default physical appearances in court to speak to all matters aside from Trial Management Conferences.

That I would never again need to leave home two hours early to get to chambers to speak to an uncontested matter for five minutes was one of the few things that kept me sane during the dark days of discovery screen sharing. At least something good would come of it all, I thought.

It is an object of both the Supreme Court Civil and Family Rules "to secure the just, speedy and inexpensive determination of every proceeding on its merits." With teleconferencing and videoconferencing, counsel no longer need to find or spend half a day or an entire day travelling to and attending court, substantially reducing legal fees. It also means clients are not as restricted to selecting counsel within a particular geographic region, an issue that disproportionately effects rural regions where there may be a shortage of lawyers and travel times are also increased.

There is no doubt attending chambers in-person is superior for complex matters and those requiring substantial materials. And clearly there are issues we need to address, like obtaining signed orders in a timely way and any other problems that have been identified by the Court. The savings and accessibility for the public, however, should outweigh the convenience of tradition and compel a hybrid model. COVID-19 expanded our toolbox and, for most workplaces and service providers, created a new sense of flexibility. We need to use our new tools to continue working on our system for the just, speedy and inexpensive determination of every proceeding on its merits.

Concluding Remarks

The interpretation and commentary on this government report and court publications are mine, and you should review any new legislation or notices that may impact your clients carefully.

If you have concerns about upcoming legislative or legislative-esque matters, please contact one of the members of the TLABC Executive who will be pleased to discuss matters with you. If you want to discuss the politics behind it, I am all ears.

WELCOME NEW MEMBERS

A warm welcome to the following new and returning TLABC Members:

Na Young Bae, New Westminster
Robert Bellows, Vancouver
Hannah Breckenridge, Vancouver
Gabriella Bright, Nanaimo
Angela Cao, Vancouver
David Clarkson, Victoria
Katherine Daniels, Vancouver
Emily Delaney, Surrey
Sheetal Dhull, Langley
Jessica Dorfmann, Vancouver
David Ferguson, Vancouver
Sara Finnegan, Vancouver
Zuleika Gedeon, Squamish
Simran Gill, Abbotsford
Allen Goldin, Vancouver
Shanna Gu, Vancouver
Daniel Hryhorchuk, Kamloops
Rea Kalsi, Vancouver
Manmeet Khaira, Abbotsford
Maryam Khalid, Vancouver
Alexander Lee, Vancouver
Chantelle Lefebvre, Lloydminster
Seamus Lim-Heley, Vancouver
Dawn MacGregor, Vancouver
Shahin Mahmoodi, Vancouver
Hailey Massingham, Nanaimo
Renee Neitsch, Kelowna
Jennifer Nguyen, Vancouver
Gabriella Pasolli, Vancouver
Carly Peddle, Vancouver
Brie Reilly, Whistler
Puneet Riar, Vancouver
Miles Schaffrick, Vancouver
Megan Sidhu, Langley
Felicia Slogoski, North Vancouver
Lily Suh, Surrey
David Taylor, Vancouver
Julia Turner, Kamloops
Paul Van Benthem, Vancouver
Lee Vandergust, Vancouver
Brenden Walker, Vancouver
Nathan Wells, Vancouver

* ALL MEMBERSHIP INFORMATION AS AT 3 OCTOBER 2022

THANK YOU FROM TLABC

Our sincere appreciation and thanks to the following TLABC Members:

HONOURARY MEMBERS

Linda Atkinson
Adrian Chaster
Romano Giusti KC
Gary V. Lauk KC
John Noel Laxton KC
Ronald F. MacIsaac
Robert W. Mackay
Donald W. Maskall
Richard L. Middleton
Thomas J. Murray
Darrell W. Roberts KC
Terrence L. Robertson KC
Arthur Vertlieb KC

BENEFACTOR MEMBERS

Shelly Avram
Giuseppe Battista KC
Christopher Dyson
John Green
Thomas Harding
Azool Jaffer-Jeraj
John Kennedy
David Allan Klein
Andreas Kuntze
Douglas Lester KC
Jeffrey Logan
Conrad Margolis
Paul McMurray
Joseph Murphy KC
Kerri Priddle
Joseph Prodor
Michael Slater KC
David Sliman
Jennifer Tater
Jeffrey Thomas
Peter Unruh
Anthony Vecchio KC
James Vilvang KC
Barbara Webster-Evans
Michael Yawney KC
Patrick Yearwood

SUSTAINING MEMBERS

Renee Aldana
Marsha Bishop
Daryl Brown
James Buckley
Dick Byl
Robert Cameron
Devon Carbol
Morgyn Chandler
Richard Chang
Douglas Chiu
Matthew Cleary
Daniel Corrin
L.A. (Lee) Cowley
Rajwant Dewar
Ian Donaldson KC
Diane Drummond
Jon Duncan
Glenn Einfeld
Megan Ellis KC
Kevin Filkow
Stephen Frame
Robert Gibbens KC
Edward Patrick Good
David Grunder
Brent Hambrook
John Hemmerling
Michael Hoogbruin
Agnes Huang
Vahan Ishkanian
Gary Jackson
Joseph Jacoe
Jaimie Kidston
Krishan Klear
Irina Kordic
William Rory Lambert
Georgialee Lang
William (Bill) MacLeod
Duncan Magnus
Barri Marlatt
Marlisa Martin
Daniel McDonagh
Robin McFee KC
A. W. McGarvey
Dale McGregor
Richard McMullan
Joseph McStravick
Edward Montague
J. Craig Moulton
Ronald Nairne
Dan Parlow
A.C. Richard Parsons
Bableen Rana
James Richards
John Richter
Krista Simon
Christopher Smith
Michael Steven
Khushpal Taunk
Jeremy Thom
Garry Thomas
E. Anthony Thomas
R. Trevor Todd
Perminder Tung
Meghan Wallace
Morris Warren
Jeffrey Witten

PAST PRESIDENTS

2021 - Kevin Gourlay
2020 - John Rice KC
2019 - Ronald Nairne
2018 - Sonny Parhar
2017 - Keri Grenier
2016 - Aseem Dosanjh
2015 - Krista Simon
2014 - A.C. Richard Parsons
2013 - Hon. Dennis Hori
2012 - Marc Kazimirski
2011 - Azool Jaffer-Jeraj
2009-10 - Robert Holmes KC
2008 - Stephen Frame
2007 - Rose Keith KC
2006 - Hon. Gary Weatherill
2005 - Jeffrey Witten
2004 - Rick Gambrel
2003-04 - David Osborne
2002-03 - Hon. Maris McMillan
2001-02 - Donald Renaud
2000-01 - Anthony Vecchio KC
1999-2000 - Noreen Collins
1998-99 - David Klein
1997-98 - Edward Montague
1996-97 - James Murphy
1994-96 - Hon. Nathan Smith
1993-94 - James Vilvang KC
1992-93 - Joseph Murphy KC
1991-92 - Robert Deering
1990-91 - Adrian Chaster
1988-90 - David Stuart
1987-88 - Kenneth Price
1986-87 - R. Trevor Todd
1984-86 - Humphrey Waldock
1983-84 - Ian Sisett
1981-83 - Arthur Vertlieb KC
1980-81 - Bob Mackay

Add your name to this list!

Contact TLABC Director of Membership & Education Karen St.Aubin for details.

T: 604.696.6523 E: karen@tlabc.org

* ALL MEMBERSHIP INFORMATION AS AT 3 OCTOBER 2022

ADVERTORIAL ▸

Wait… Don't Settle! Five Tips to Ensure a Successful Claims Administration Process for Class Actions

Canadian courts have described access to justice as one of the three goals of class proceedings. An experienced claims administrator can help counsel realize this important objective throughout the settlement process by helping with everything from drafting and advising on notice and how best to reach class members, to designing and implementing an efficient and accessible claims process that avoids complexities for class members. Below are five tips counsel should consider when working toward resolution of a class action.

Tip 1: Consult Experts BEFORE Settlement

All too often, thought is not given to the settlement administration when the settlement is being finalized. By engaging a claims administrator early in the process, the parties can help ensure a comprehensive notice plan and compensation protocol is presented to the court. The claims administrator can help draft the notice to ensure it is clear and comprehensible and provide critical insight into the proposed notice plan to ensure that it is appropriately targeted to class members.

Similarly, claims administrators have the expertise needed to help counsel design a customized claims process that will meet the specific needs of the class, which considers the anticipated timelines and evidentiary requirements appropriate for the claimant demographic and the types of claims that the settlement compensates.

Tip 2: Consult with the Administrator on Restorative Processes

In some cases, the class action being settled involves traumatic, emotional, or personal harm. In such circumstances, a carefully drafted settlement agreement and compensation plan should create a process that enhances access to justice for vulnerable persons by encouraging them to safely come forward. In building a claims process that includes a restorative aspect, counsel should consult with an experienced claims administrator to develop and implement a process that minimizes intrusiveness and harm related to claims for compensatory relief, while simultaneously supporting the long-term objectives of the settlement to prevent future harm.

A claims administrator can work with counsel to develop solutions for claimants who may find the claims process difficult, emotional, or painful. They may, for example, offer broad options such as extended deadlines, secondary support resources, filing assistance, and other accommodations as may be appropriate.

Consideration should also be given to the resources required of the claims administrator to meet the anticipated needs of the class. Contact Centre agents and other members of the administration team should be knowledgeable and experienced in communicating with claimants so that they are able to identify claimants or claim situations that require compassionate or specialized handling appropriately matched to the issues raised by the action.

Tip 3: Understand Noticing Options

An effective notice plan should aim to reach as many class members as possible and be available in both English and French. Class member demographics such as vulnerability, age, education, and gender are examples of case specific factors that should be considered for notice to be effective. Regardless of the demographics, notice should be short, easy to understand, and direct class members to additional information such as a website where they can download forms and/or learn more about the action and the settlement. Bilingual support from the claims administrator should be available to class members making inquiries.

Depending on the circumstances, notice may be direct (i.e. ground mail or email) or indirect (i.e. publication). In contrast to direct notice by email, direct notice by mail remains the most effective form of Notice. National Change of Address or "NCOA" searches can provide updated addresses for known class members. Print and postage costs, however, can vary depending on the type and volume of the mailing and are important to consider early in the process.

Published notice by paid media is common where class members are largely unknown or as a supplement to direct notice. Traditional print publications can be costly and don't necessarily reach as many class members as digital options. Digital notice options include online news sources, social media, or website banner ads These are especially effective in a younger class member demographic. Digital Notice can be targeted and scaled to ensure class member reach is as broad as possible and can be considerably more cost effective than traditional print options.

Tip 4: Understand Your Data

The age and condition of class member data available to the parties for the purposes of facilitating a settlement can be a significant cost and timeline driver. Normalizing and loading data can be one of the most time consuming and expensive aspects of a settlement administration. Settlements involving governments, for example, have specific data security considerations and requirements. You should ensure that your claims administrator has a track record of supporting compliance audits and includes screening of personnel and physical security of data and who has access to it.

Data security and protection is critical for class action settlement administrations in Canada where use and disclosure of personal information and other forms of data is protected by law. Participation in a class action settlement means that personal and sensitive information will inevitably be sent to the claims administrator and must be accessed and stored in a secured and encrypted fashion as part of the administration process. Robust database and server security measures are therefore critical.

Tip 5: Get the Right Scope of Services

Class member demographics are an important determinator of the technology required to support the claims process. Younger class members or those with high levels of computer literacy will often require technological claim options with little or no need to interact with the claims administrator. By contrast, vulnerable or elderly class members, or those less comfortable with technology may prefer paper claim forms or speaking to a live agent for information, guidance, and assistance in filing their claim.

Similarly, distribution of settlement funds should be efficient and cost-effective, and appropriate for the class demographic. Payment by paper cheque is best where compensation amounts are high. On the other hand, cheque re-issue frequency can be costly with print and postage prices and are often an unexpected cost driver. Electronic distribution options such as direct deposit or email transfer work well where compensation amounts are low and with a demographic that is comfortable with electronic money transfer.

Conclusion

An experienced claims administrator can help counsel achieve settlement objectives by advising on the notice, notice plan and compensation protocol. While a carefully considered, thoughtfully drafted settlement agreement is critical, involving a claims administrator early in the process can help counsel avoid common pitfalls, and appropriately manage class member expectations, timelines, and costs.

Epiq Canada has decades of experience administering some of the largest and most complex claim administration mandates in Canadian history. Our vast experience enables us to ensure a seamless, on-time and on-budget administration for all types of settlement services large or small. For more information, please contact Elizabeth (Lisa) deBoer, Vice President, Canada Class Action Solutions at Elizabeth.deBoer@epiqglobal.ca or Dawn McPherson, Director Business Development at Dawn.McPherson@epiqglobal.com.

Dawn McPherson is a director of Class Action and Mass Tort solutions at Epiq. She draws upon over two decades of experience as both a UK solicitor and US attorney to provide consultative advice on all aspects of the settlement process from notice plan implementation through claims processing and disbursements.

Elizabeth deBoer (or "Lisa" for short) is Epiq Canada's VP, Canada Class Action Solutions. Before joining Epiq, Lisa practiced as class action lawyer with a primary focus on pharmaceutical, medical device and consumer protection class actions.

FROM PAGE 24

(Vehicle) Act included a new cap on the amount of non-pecuniary damages that could be awarded in claims based on minor injuries. Contemporaneously with the suite of amendments coming into force, the plaintiff Trial Lawyers Association of British Columbia filed its notice of civil claim challenging the constitutional validity of the amendments. The plaintiffs argued the legislative scheme offended s. 96 of the Constitution Act, 1867 for two reasons. First, they said that s. 133 of the CRTA vested a judicial function in the CRT which was historically within the exclusive jurisdiction of the superior courts. They said that because the members of the CRT were appointed by the provincial cabinet and not by the Governor General, the CRT represented an unconstitutional encroachment upon the constitutional function of the federally-appointed judiciary, in effect creating a s. 96 court within the provincial executive. Second, they said that s. 16.1 of the CRTA, with its companion provisions, denied certain claimants access to the court for the adjudication of their claims, diverting them instead to the CRT and presenting challenges to the exercise of what they asserted to be their right to be heard by a s. 96 judge. The plaintiffs also claimed the amendments to the Insurance (Vehicle) Act, and regulations promulgated thereunder, violated s. 15 of the Charter. The plaintiffs applied to have only the s. 96 challenge determined by way of summary trial or summary judgment. They asked for an order declaring that ss. 16.1 and 133 of the CRTA, and the Accident Claims Regulation associated therewith, were unconstitutional and of no force or effect. The judge declared ss. 133(1)(b) and (c) (determination of whether an injury is a minor injury and determination of liability and damages) unconstitutional and of no force or effect. He also declared that s. 16.1(requiring the Supreme Court to dismiss or stay certain proceedings) unconstitutional insofar as it applies to accident claims, with the exception of the determination of accident benefits under s. 133(1)(a). He declined to grant any independent order with respect to the Accident Claims Regulation (of which s. 7 sets the tribunal limit amount to $50,000). The defendant Attorney General of British Columbia and some motor vehicle claim defendants appealed. Held, appeal allowed. Per Bauman C.J.B.C. (Butler J.A. concurring): The purpose of s. 96 is to give effect to a compromise reached at confederation. Provinces have exclusive jurisdiction over the "administration of justice in the province": Constitution Act, 1867, s. 92(14). But subtracted from that power is the power to make judicial appointments to superior courts. The federal power over superior court appointments furthers the twin principles of national unity and the rule of law. For superior courts to fulfil the objectives of maintaining national unity and preserving the rule of law, legislatures must not be permitted to create parallel courts with provincially appointed judges or to otherwise interfere with the exercise of the superior courts' core jurisdiction. The Supreme Court of Canada has developed two tests intended to police this line. One test is focused on whether the jurisdiction that has been granted to a potential "shadow" or "mirror" court was dominated by the superior courts at confederation. The second is a test focused on protecting the "core jurisdiction" of the superior courts, ensuring that "superior courts are not impaired in such a way that they are unable to play their role under s. 96. The burden throughout is on the plaintiff impugning the grant of jurisdiction. If the plaintiff fails to demonstrate that the jurisdiction was dominated by superior courts at confederation, or that the jurisdiction is exercised in the context of a judicial function, or that the jurisdiction is not subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal, the challenge will fail. Here, the summary trial judge characterized the grant of jurisdiction under the new legislative scheme as one encompassing "personal injury claims in tort." Next, he applied the test in Reference re Residential Tenancies Act, 1979, [1981]1 S.C.R. 714 at 728, 123 D.L.R. (3d) 554 and found that the jurisdiction so characterized was exclusively exercised by the superior courts in three of the four confederating provinces at the relevant time, namely, Nova Scotia, New Brunswick and Lower Canada. Advancing to step two of the test, the judge concluded that the grant of jurisdiction was indeed exercised in the judicial capacity and that at step three of the test, the jurisdiction was not subsidiary or ancillary to an administrative function nor necessarily incidental to the achievement of a broader policy goal of the legislature. Having arrived at those conclusions, the judge did not need to consider the "core jurisdiction" test. The judge erred in finding exclusivity (or dominance) in superior courts over the granted jurisdiction at or around the date of confederation in respect to at least New Brunswick and he erred in his analysis at step three of the Residential Tenancies test in any event. That the matter was heard primarily below on the basis of R. 9-6(5), together with the fact that the judge did not have the benefit of the "core jurisdiction" test as refined in Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27 -called for a de novo analysis of the constitutionality of the impugned grant of jurisdiction. In characterizing the jurisdiction being exercised the judge was correct not to accept it as "novel" and not exercised by courts generally in and about 1867. The judge was also correct with respect to the historical situation in Upper Canada and Nova Scotia in 1867. Where the judge erred was with respect to New Brunswick. One had to conclude that during the essential time period around the date of confederation there was concurrency in the exercise of the impugned jurisdiction in the superior and inferior courts of New Brunswick. In Upper Canada, inferior courts exercised concurrent jurisdiction over personal injury claims. With a finding of concurrency in Upper Canada, that led at least to a 2-2 "tie." As the plaintiffs did not lead evidence of the situation in the United Kingdom in 1867 to "break the tie" they had not met the burden and the grant of jurisdiction survived an application of the Residential Tenancies test. Accordingly, there was no need review the judge's decision in concluding that there was exclusivity in Lower Canada notwithstanding the historical debate in that regard. That left the core jurisdiction test. A review and weighing of the non-exhaustive list of factors relevant in the test led to the conclusion that the core jurisdiction of the Supreme Court of British Columbia remained in

place even in the face of the new scheme. Its "essence" as a superior court of general jurisdiction remained. Per Bennett J.A. (dissenting): The transfer of a significant part of the personal injury cases arising from automobile accidents—recalling that 80% of cases settle for an amount within the tribunal's jurisdiction—to the CRT must be seen as a serious transfer of the jurisdiction of the superior court. It deprives the court of a large number of opportunities to ascertain what amounts to negligence, resulting in liability, in a time when the law isin a period of change. While some cases may well result in "minor" personal injury, they still give rise to complicated and novel legal questions. The impugned sections infringed s. 96 when all factors were weighed and considered together. The CRT had been established as a parallel court assigned to deal with personal injury from motor vehicle claims. As a result, the unity and uniformity of the Canadian judicial system was undermined, and the core jurisdiction of the superior court had been impermissibly infringed. Trial Lawyers Assoc. of British Columbia v. British Columbia (Attorney General) (https://www.bccourts.ca/jdb-txt/ca/22/01/2022BCCA0163.htm) S.C., Bauman C.J.B.C., Bennett & Butler JJ.A., 2022 BCCA 163, Vancouver CA47320; CA47332, May 12, 2022 , 77pp., [CLE No. 77225] • Appeal from judgment of Hinkson C.J.B.C., 2021 BCSC 348, [2021] C.D.C. 73906 (CLE) • Principal case authorities: Reference re Amendments to the Residential Tenancies Act (N.S.), [1996] 1 S.C.R. 186 — considered. Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27 — applied. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 — considered. Residential Tenancies Act, 1979, Re, [1981] 1 S.C.R. 714 — applied. Sobeys Stores Ltd. v. Yeomans, [1989] 1 S.C.R. 238— considered. Tomko v. Labour Relations Board (N.S.), [1977] 1 S.C.R. 112 — considered.

CONTRACTS — Breach • LIMITATION OFACTIONS — PRACTICE — Evidence — Hearsay — Statements of deceased — In 2006, plaintiffs orally agreeing to advance funds to R and M for the purchase of a new mobile home — R dying in 2014 and M in 2019 — Court finding there was a valid loan agreement binding on M's estate, repayable on M's death and plaintiffs' claim was not statute-barred — Court allowing witnesses' testimony concerning conversations in which R and M acknowledged their indebtedness, finding such evidence to be necessary and substantively reliable. The plaintiffs and R and M, a married couple with limited financial means, were close friends. In 2006, aware that R and M were facing eviction from their mobile park and that their trailer ["the old home"]could not be relocated, the plaintiffs loaned R and M the funds(approximately $115,000) to purchase a trailer in another park ["new home"]. The understanding was that repayment would be made from the sale proceeds of the old home. The parties' agreement was never reduced to writing. The old home did not sell until 2009 and for an amount ($34,000) much less than the parties had anticipated. The proceeds were paid to the plaintiffs. The plaintiffs then offered to have the balance of the loan repaid from the sale proceeds of the new home whenever the last of R and M died or the new home was sold; the parties' agreement in this regard was again not reduced to writing. R died in 2014. M died in 2019 after executing a simple, "do-it-yourself" will that named her children as beneficiaries and did not reference any particular debt. M's daughter, the executrix of M's will, later sold the new home and paid the proceeds into M's estate for distribution to the beneficiaries. The plaintiffs sued M's estate for repayment of the loan balance, approximately $85,000. The executrix denied the existence of any contract; in the alternative, she claimed the funds were advanced as a gift or under a demand loan. The defendants also objected to the admission of evidence of the plaintiffs' witnesses concerning what R and M had told them about the plaintiffs' loan. Held, judgment for plaintiffs. The hearsay evidence was admissible as being both necessary and substantively reliable. The witnesses, long-time close friends of R and M, testified to many spontaneous and similar conversations they had over the years in which R and M acknowledged their debt to the plaintiffs. The witnesses had no motive to favour one side or the other and no financial or other interest in the outcome of the litigation. There was also evidence corroborating the witnesses' testimony, in particular a bank draft showing the plaintiffs paid $105,821to a law firm, in trust, the amount and timing of which coincided with R and M's purchase of the new home. Based on the testimony of the plaintiffs, the factual matrix, including the documentary evidence and the evidence of partial performance (payment to plaintiffs of sale proceed of the old home), the court found there was an oral loan agreement between the plaintiff and R and M on the terms alleged. There was no evidence whatsoever the funds were intended as a gift. The plaintiffs' claim was also not statute-barred; the loan was a contingent loan payable on the occurrence of M's death in 2019 or the sale of the new home, which occurred after that, and the plaintiffs' claim was filed within the limitation period. Piga v. Uffelman (https://www.bccourts.ca/jdb-txt/sc/22/09/2022BCSC0983.htm) S.C., Donegan J., 2022 BCSC 983, Victoria S202392, June 10, 2022 , 41pp., [CLE No. 77452] • A.D.G. MacIsaac and A. Gibson, for plaintiffs; B. Soloway, for defendant. Principal case authorities: Berthin v. Berthin, [2016] C.D.C. 61127 (CLE), 2016 BCCA 104 — considered. Bradshaw v. Stenner, 2010 BCSC 1398, [2010] C.D.C. 46396 (CLE) af 'd 2012 BCCA 296, [2012] C.D.C. 50781 (CLE) — considered. Erickson v. Sibble, [2013] C.D.C. 51905 (CLE), 2012 BCSC 1880 — considered. Kong v. Saunders, 2014 BCCA 508, [2015] C.D.C. 57638 (CLE) — considered. R. v. Khelawon, [2006] 2 S.C.R. 787; 2006 SCC 57 — considered. Shaw Production Way HoldingsInc. v. Sunvault Energy, Inc., [2018] C.D.C. 67087 (CLE), 2018 BCSC 926 — considered.

COSTS — Assessment • Disbursements — Expert's fees — Trial judge awarding claimant husband costs after 8-day trial of parties' family law proceeding — On costs assessment, registrar finding the litigation was complex, involving family assets of about $5 million — Respondent disputing, inter alia, a disbursement for $27,015 for the services of D., an actuary — Evidence not justifying the amount claimed, including the fact that D. performed some work which could have been done by counsel — Registrar concluding "on a rough and ready basis" that it was appropriate to

allow $10,000 of the $27,015 claimed. Higgs v. Lear (https://www.bccourts.ca/jdb-txt/sc/22/09/2022BCSC0997.htm) S.C., Master Scarth (Sitting as Registrar), 2022 BCSC 997, Duncan E16957, June 14, 2022 , 10pp., [CLE No. 77470] • See also 2020 BCSC 194, [2020] C.D.C. 71428 (CLE) • R.B. McDaniel and J.A. Drozdiak, for claimant husband; W. Murphy-Dyson, for respondent. Principal case authorities: Fairchild v. British Columbia (Vancouver Coastal Health Authority), [2012] C.D.C. 51063 (CLE), 2012 BCSC 1207 — applied. Forsythe v. Strader (1987), 17 B.C.L.R. (2d) 124 — considered. Morrissette v. Smith, [1990] B.C.J. No. 193 (S.C.) — considered. Ward v. Pasternak, [2015] C.D.C. 59260 (CLE), 2015 BCSC 1190 — considered. Wheeldon v. McGee, 2010 BCSC 491, [2010] C.D.C. 45173 (CLE) — applied.

COSTS — Outcome of litigation • After 3-day voir dire in personal injury action, court ruling inadmissible expert evidence tendered by plaintiff as unnecessary — Court rejecting plaintiff's submission for costs on Scale C for that voir dire, the plaintiff's insistence on proceeding with a voir dire respecting evidence that was not necessary being the type of conduct that should be recognized in an adverse costs award — Plaintiff awarded costs of the trial on Scale B, except for the 3-day voir dire — Defendants entitled to their costs and disbursements of the voir dire on Scale B. Bolduc v. Stratton (https://www.bccourts.ca/jdb-txt/sc/22/13/2022BCSC1319.htm) S.C., Iyer J., 2022 BCSC 1319, Vancouver M195574, August 4, 2022 , 3pp., [CLE No. 77825] • T. Dennis, for plaintiff; D.E. Burns and J. Mansfield, for defendants. Case authorities: British Columbia v. Worthington (Canada) Inc. (1988), 29 B.C.L.R. (2d) 145 (C.A.) — considered. Danicek v. Li, [2011] C.D.C. 47745 (CLE), 2011 BCSC 444 — applied.

COSTS — Outcome of litigation • Nature of litigation • Offer to settle — Plaintiff psychiatrist, while working at the Inpatient Psychiatry Unit of the Penticton Regional Hospital, suffering a serious and disabling assault at the hands of a patient he was assessing in an interview room — Court dismissing his action after 36- day trial, finding no negligence — Although the defendant was the successful party, plaintiff seeking apportionment of costs because there were issues advanced by the defendant where it was unsuccessful, or where time was spent proving a matter the plaintiff said should have been conceded — For its part, defendant seeking costs at Scale C, saying the matter was of more than ordinary difficulty, and the trial was lengthy — Defendant also seeking double costs based on a formal offer to settle for $625,000 plus costs and disbursements — Trial judge finding that the trial was not unnecessarily lengthened as a result of anything the defendant did or refused to do and that, although the trial was lengthy, the issues were not particularly complex — As for the offer to settle, judge taking into account, inter alia, the amount of the offer was a small fraction of the plaintiff's claim for damages, and indeed was a relatively small fraction of the defendant's position on quantum — Although the plaintiff did not succeed, his decision to proceed to trial instead of accepting the offer was not unreasonable — Defendant entitled to costs at Scale B throughout. Sheoran v. (British Columbia) Interior Health (https://www.bccourts.ca/jdbtxt/sc/22/08/2022BCSC0877.htm) S.C., Wilson J., 2022 BCSC 877, Kelowna S112454, May 26, 2022 , 10pp., [CLE No. 77345] • See also 2022 BCSC 335, [2022] C.D.C. 76760 (CLE) • W. Dick, Q.C. and J. Stanley, for plaintiff; L. Zivot and S. Gersbach, for defendant. Principal case authorities: Cottrill v. Utopia Day Spas and Salons Ltd., [2019] C.D.C. 68687 (CLE), 2019 BCCA 26 — applied. Gill v. Canada (Minister of Transport), [2014] C.D.C. 57466 (CLE), 2014 BCSC 2235 — applied. Khan v. School District No. 39, 2021 BCSC 2611, [2022] C.D.C. 76688 (CLE) — considered. Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc., [2019] C.D.C. 68702 (CLE), 2019 BCSC 83 — applied. Mort v. Saanich School District No. 63, [2001] Civ. L.D. 590; [2001] C.D.C. 22167 (CLE) (B.C.S.C.); 2001 BCSC 1473 — applied.

EMPLOYMENT — Wrongful dismissal — Damages — Mitigation • Notice period — Plaintiff, 61, terminated from her middle-management position after 35 years' employment with defendant airline — Given her age, length of service and management status, court finding appropriate notice period to be 24 months, less 2 months' notice received and 3 months for failure to mitigate, finding it unreasonable for plaintiff not to consider comparable positions with other airline, which were available — Court applying contingency discount of 15% from date hearing to end of the notice period to allow for possibility plaintiff might secure employment in that time

— Plaintiff awarded special damages of $1,764 for cost incurred for career counselling — Damages totalling $170,393. The plaintiff, age 61, was employed by the defendant airline for almost 35 years, rising through the ranks to manager of the defendant's Vancouver Global Centre. She was the most senior person in her department, with budgeting and hiring/firing responsibilities for 71 employees. Due to the effect of the COVID-19 pandemic, in 2020 and 2021the defendant introduced three "special leave schemes" ["SLS"] under which employees took reduced salaries. In October 2020, the defendant advised the plaintiff that it was closing the Vancouver centre and that her employment would be terminated effective December 2020. In the interim, the plaintiff handled the transfer of the Vancouver operations to defendant's office in Manila, training the Manila staff, terminating the 71 employees she supervised, and closing the Vancouver officer. The plaintiff declined the severance package offered, which included the refund her 2020 SLS contributions, of $10,692, and outplacement assistance. She advised the defendant that she wanted to take advantage of the outplacement assistance offer in the second quarter of 2021, but no further steps were taken by either party for her to do so. The plaintiff received $31,613 comprising the basic three-month severance required by the Canada Labour Code [CLC payment]. The plaintiff was devastated by the loss of her position, and did nothing to search for new employment before February 2021. She then created a résumé and began searching online job sites. In April through June 2021 she attended eight sessions with a leadership-coaching consultant. In June 2021, she began to actively apply for jobs outside the airline industry but without success. There was evidence of several job postings for positions comparable to the plaintiff's former position, including with Air Canada and WestJet. As of the date of summary trial in May 2022 the plaintiff remained unemployed. The issues were: (i) entitlement to unpaid wages prior to the termination of employment in respect of the SLS; (ii) mitigation; (iii) the application of a contingency discount to reflect the likelihood that the plaintiff would obtain employment before the expiry of the notice period; (iv) the notice period; (v)special damages for the cost of outplacement assistance services. Held, judgment for plaintiff for $170,393. The plaintiff was not entitled to the $10,692 for unpaid wages prior to her termination because that amount represented the reductions to the plaintiff's salary made by agreement. The plaintiff accepted the reduction in exchange for her continued employment which was potentially in jeopardy because of the pandemic, with no expectation that the reduction would be reimbursed to her. The offer in the severance package to refund all SLS contributions was not a contractual obligation, as the offer was not accepted. Allowing a reasonable period of time to process the shock of the termination, the plaintiff failed to take reasonable steps to mitigate her loss. From February to June 2021 her attempts to find new employment could best be described as passive. There were several job postings for positions comparable to the plaintiff's position with the defendant, of which she was unaware, but it was incumbent on her to explore available positions in the very industry in which she had spent her entire working career. A three month reduction in the notice period was warranted because the plaintiff could have found alternative had she taken reasonable steps commencing in February 2021to do so. In addition, a contingency discount of 15 percent on the damages award from the date of hearing to the end of the notice period was warranted to allow for the possibility the plaintiff may secure employment in that time. With respect to the notice period, the plaintiff held a middle-management position with the defendant. She was a first line manager with 71 employees reporting to her, responsible for various supervisors, trainers, and administrators. Given her age, length of service, and management status, this was an appropriate case for the upper limit of 24 months' notice. After deducting the two months' notice she received and three months for her failure to mitigate, she was entitled to damages based on 19 months' notice, less the CLC payment she received, plus ten percent in lieu of the pension contribution she otherwise would have received. She was also entitled to special damages of $1,764 for the cost of career counselling. Okano v. Cathay Pacific Airways Limited (https://www.bccourts.ca/jdbtxt/sc/22/08/2022BCSC0881.htm) S.C., G.C. Weatherill J., 2022 BCSC 881, Vancouver S213760, May 26, 2022 , 14pp., [CLE No. 77346] • G.C. Allison, for plaintiff; S. Mitchell, for defendant. Principal case authorities: Ansari v. British Columbia Hydro and Power Authority (1986), 2 B.C.L.R. (2d) 33 (S.C.) — considered. Smith v. Aker Kvaerner Canada Inc., [2005] C.D.C. 31416 (CLE); 2005 BCSC 117 — considered. Waterman v. IBM Canada

Ltd., [2010] C.D.C. 45035 (CLE), 2010 BCSC 376 — considered.

LAW PROFESSION — Discipline • Law Society hearing panel finding appellant lawyer guilty of misconduct based on his statements in an address to a jury that resulted in a mistrial, and his subsequent statements to a journalist — In allowing appeal, court finding panel erred in its approach in:(i) not considering full context of appellant's in-court statements and whether they were made in good faith and with a reasonable basis, and (ii) failing to consider Charter values of freedom of expression in considering statements to the journalist. A hearing panel of the respondent Law Society [LSBC] made a finding of professional misconduct against the appellant lawyer based on his closing argument to a jury in a personal injury action that resulted in a mistrial, and based on his subsequent communications with a journalist. In the action, the defendant ICBC had vigorously cross-examined the plaintiff and his witness, repeatedly suggesting that they were lying about there having been an accident. Both sides called expert engineering evidence. The trial judge granted ICBC's application for a mistrial on the basis that the appellant's closing submissions improperly prejudiced the jury by: describing defence counsel as making "ugly insinuations", and disparaging defence counsel; attacking the defence expert engineer, T, alleging he had misrepresented or falsified evidence; mischaracterizing the issues before the jury; misstating the applicable legal principles and the defence position; and making appeals to emotion. The expert T made a complaint about the appellant to the LSBC. The mistrial ruling came to the attention of a journalist, who spoke to the appellant and subsequently wrote an article published in the Vancouver Sun newspaper. T commenced a defamation action against the appellant and the Sun, and the appellant delivered a signed apology to T, which was published in the Sun. He settled T's defamation action for $100,000, of which he paid $60,000 personally. The trial judge ordered the appellant to pay increased costs in the personal injury action, pursuant to SCCR 14-1(33) considering that the appellant's conduct was "willful and obdurate", "reprehensible" and "deserving of rebuke and sanction". In 2018 the LSBC issued a citation against the appellant alleging that his improper submissions to the jury, and improper comments to the journalist about T and the judiciary constituted professional misconduct or conduct unbecoming a lawyer pursuant to s. 38(4) of the Legal Profession Act [LPA]. In regard to the in-court statements, the hearing panel concluded that the attacks on T were egregious, and that the appellant's belligerent behaviour and unwarranted personal attack undermined the objects of the trial process. In regard to the out-of-court statements, the panel found that the statements fell below standards of conduct because the appellant "continued the unnecessary demeaning" of T and improperly criticized the judicial system by a "patently untrue characterization of the law" and the trial judge's findings. The panel found the appellant's conduct was a marked departure from the conduct expected of lawyers, and that he committed professional misconduct. The appellant appealed pursuant to s. 48 of the LPA. He argued that the panel erred in failing to: (i) apply the Groia approach for determining professional misconduct with respect to his in-court statements; and (ii) apply the test for professional misconduct with respect to out-of-court statements made by lawyers consistent with Doré, and consider how his statements engaged the Charter value of freedom of expression. Held, findings set aside; matter remitted for rehearing. There is an important contextual difference between in-court and out-of-court statements. The in-court statements were in furtherance of the appellant's professional duty to resolutely advance his client's case. The out-of-court statements to the journalist engaged values of freedom of expression that may serve an important public interest. With respect to the in-court statements, though the LSBC panel cited Groia, it did not follow the approach in Groia: it did not consider whether the appellant made the statements in good faith and whether he had a reasonable basis for them and could have misapprehended the law. It also did not consider the surrounding context of his closing submissions, including his duty as a resolute advocate in the context of the stakes in the case, and instead relied primarily on the trial judge's findings made in the context of a mistrial ruling and costs award, treating them as determinative of the question of whether the appellant's statements to the jury were made in good faith and on a reasonable basis without considering the context relevant to professional misconduct. Further, the trial judge's conclusions in the costs ruling regarding the appellant's beliefs as to the appropriateness of his conduct were in part based on his prior conduct in a different trial. The judge's comments were also somewhat ambiguous in the context of a professional misconduct hearing in that he found that the jury submissions could not be simply the product of zealous advocacy or mistake but noted that the appellant repeatedly took the position that his jury submissions were appropriate and had an obdurate belief that they were appropriate and permissible. The panel also did not consider the context that the application of the general legal principles regarding jury addresses is often not a bright line, and that it is a matter of professional judgment to determine what is a forceful statement of a client's position in an appropriate attempt to persuade the jury, and what crosses the line and amounts to making irrelevant appeals designed to provoke prejudice against the opponent. Though the use of mockery and sarcasm will often be poor advocacy, humour and sarcasm have been used by great trial lawyers to illustrate the weakness of a witness's evidence or the outrageousness of a position. The LSBC panel erred in its approach in failing to consider whether the appellant made his closing address in good faith, and whether he had a reasonable basis for his statements and believed them to be within the legal boundaries of a proper closing address. Groia endorses the approach of considering all the circumstances when a lawyer is alleged to have made improper statements in court, including the dynamics, complexity and particular burdens and stakes of the trial, which the panel failed to do. The context here was that the appellant's client's alleged injuries were serious and the outcome was very significant to him; that defence counsel had repeatedly accused the client and his witness of lying about the

accident; and that T's evidence was tendered to support the defence theory that they were lying. The decision on how hard or far to push a point as an advocate is an exercise of judgment. The appellant did not directly accuse the defence lawyers of misconduct, and there was a reasonable basis for him to say that the defence was accusing his client of trying to get money by lying. Everything turned on this in the case because if the jury members thought there was something to these accusations, his client would lose. The appellant was required to be resolute in his advocacy. Lawyers must be independent, resolute advocates for their clients without fear of reprisal. The LSBC panel erred in failing to consider this context. Further, in relying almost exclusively on the trial judge's findings in the mistrial and costs rulings, the panel failed to consider that the trial judge's decisions were based on different factors than those relevant to a finding of professional misconduct. While the reaction of the judge to the in-court statements of a lawyer is relevant evidence when considering whether those statements amount to professional misconduct, it should not be treated as determinative. Behaviour that a presiding judge deems inappropriate may not rise to the level of professional misconduct. With respect to the out-of-court statements made to the journalist, the panel misunderstood the meaning of the statements and, contrary to the approach in Doré, did not consider the Charter values associated with freedom of expression. A careful reading of those statements showed that the appellant did not suggest that T was laughable or unprofessional, but bragged that he had made the jury laugh in his questions or submissions in respect of T, and that he raised questions about the jury system and wondered whether such a system was unduly paternalistic and deserved further research. Further, the panel wrongly attributed the appellant's comments about judges as criticisms of the trial judge, when they were in fact comments critical of the general legal principles that apply to declarations of mistrials. The panel erred in its approach by failing to consider the Charter values of expression that were at play in the appellant's statements to the journalist. Law Society of British Columbia v. Harding (https://www.bccourts.ca/jdbtxt/ca/22/02/2022BCCA0229.htm) C.A., Frankel, Willcock & Griffin JJ.A., 2022 BCCA 229, Vancouver CA47359, June 30, 2022 , 39pp., [CLE No. 77552] • Trial costs ruling at: Walker v. Doe, 2014 BCSC 294, [2014] C.D.C. 55240 (CLE) • Gerald A. Cuttler QC and O.R. Pulleyblank, for appellant; J. Kenneth McEwan, Q.C., and E. Kirkpatrick, for respondent Law Society. Principal case authorities: Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 — applied. Doré v. Barreau du Québec, 2012 SCC 12 — applied. Groia v. Law Society of Upper Canada, 2018 SCC 27 — applied. Hamman v. Insurance Corp. of British Columbia, [2020] C.D.C. 72223 (CLE), 2020 BCCA 170 — considered. Histed v. Law Society of Manitoba, 2021 MBCA 70 — considered.

MEDICAL MALPRACTICE — Proceedings generally — Evidence • PRACTICE — Evidence — Admissibility — In medical malpractice action against defendant hospital and others, plaintiffs alleging their infant daughter died in hospital due to a failure to properly diagnose and treat an infection — Before the plaintiffs commenced action, defendant Fraser Health Authority (FHA) sending them a letter erroneously including information from an internal quality review process — Court finding that document protected from disclosure under Evidence Act, s. 51, and inadmissible in the proceedings. Gill v. Fraser Health Authority (https://www.bccourts.ca/jdb-txt/sc/22/06/2022BCSC0638.htm) S.C., N. Smith J., 2022 BCSC 638, Vancouver M184452, April 26, 2022 , 12pp., [CLE No. 77116] • A. Leoni, J.R. Kendall and J. Vanstone, for plaintiffs; J.A. Bank and R. Lai, Articled Student, for defendant; D.C. Froese, for defendant. Principal case authorities: Cole v. St. Paul's Hospital (21 August 1998), Vancouver Registry No. C963888 (B.C.S.C.) — considered. Dawson v. Vancouver Coastal Health Authority, 2021 BCSC 2060, [2021] C.D.C. 75820 (CLE) — distinguished. Lew (Guardian ad litem of) v. Mount St. Joseph Hospital Society, [1995] 46 C.P.C. (3d) 168 (B.C.S.C.), 1995 CanLii1291 — considered. Sinclair v. March, 2000 BCCA 459; [2000] Civ. L.D. 418; [2000] P.Inj. L.D. 138; [2000] C.D.C. 19295 (CLE) — applied.

MOTOR VEHICLE INSURANCE — No fault benefits — Deductibility • QUANTUM ASSESSMENT — Management fees — Court awarding plaintiff injured bus passenger damages, including $180,000 for non-pecuniary damages, $570,000 for future loss of earning capacity, $40,000 for loss of housekeeping capacity, and $144,115 for future care — On defendants' application, court allowing, in part, deductions claimed pursuant to the Insurance (Vehicle) Act, s. 83 and Pt. 7 of the regulation, including an agreed $77,662 from future care costs plus plus $4,000 awarded for Botox — Court also allowing deduction of the loss of housekeeping capacity award in full — Further, court allowing deduction from the award for loss of future earning capacity the present value of committed payments to the plaintiff to age 65, but reducing the claimed deduction of $208,032 by 25% to $156,024 to allow for contingencies — Finally, court dismissing plaintiff's claim for a management fee. Blackburn v. Lattimore (https://www.bccourts.ca/jdb-txt/sc/22/07/2022BCSC0719cor1.htm) S.C., Wilkinson J., 2022 BCSC 719, Vancouver M181389, May 4, 2022 , 15pp., [CLE No. 77184] • See also 2021 BCSC 1417, [2021] C.D.C. 75104 (CLE) • T. Schapiro, for plaintiff; M. Suderman, for defendants. Principal case authorities: Jurczak v. Mauro, [2013] C.D.C. 53774 (CLE), 2013 BCSC 1370 — applied. Pearson v. Savage, [2020] C.D.C. 72002 (CLE), 2020 BCCA 133 — applied. Tench v. Bugnum, 2021 BCSC 501, [2021] C.D.C. 74087 (CLE) — applied. Expert: R. Carson, economist — considered.

MOTOR VEHICLE INSURANCE — No fault benefits — Deductibility • Court awarding personal injury plaintiff damages of $563,210 including future care costs of $54,813 — ICBC providing written undertaking to pay for most items and applying under Insurance (Vehicle) Act, s. 83, for order that $46,239 be deducted from the award as an amount available to plaintiff under Insurance (Vehicle) Regulation, Part 7 — Court finding the defendant had established that that the contested benefits were rehabilitative would be paid

by ICBC — Court allowing the deduction as claimed. Smith v. Law (https://www.bccourts.ca/jdb-txt/sc/20/08/2022BCSC0840.htm) S.C., Lyster J., 2022 BCSC 840, Vancouver 162415, May 18, 2022 , 11pp., [CLE No. 77294] • See also 2021 BCSC 1789, [2021] C.D.C. 75485 (CLE) • W.E. Derber, for plaintiff; M.D. Beharry, for defendant. Principal case authorities: Aarts-Chinyanta v. Harmony Premium Motors Ltd., [2020] C.D.C. 72290 (CLE), 2020 BCSC 953 — applied. Del Bianco v. Yang, [2021] C.D.C. 75329 (CLE), 2021 BCCA 315 — considered. Pang v. Burns, 2021 BCSC 2430, [2022] C.D.C. 76222 (CLE) — applied. Safdari v. Buckland, [2020] C.D.C. 73354 (CLE), 2020 BCSC 2019 — applied. Skinner v. Dhillon, 2021 BCSC 1992, [2021] C.D.C. 75733 (CLE) — applied.

MOTOR VEHICLE INSURANCE — No fault benefits — Deductibility • PRACTICE — Orders — Drawing and settling — Personal injury damages award including $104,400 for costs of future care — Court allowing defendants' application for deduction, pursuant to Insurance (Vehicle) Act, s. 83, and Insurance (Vehicle) Regulation, Part 7, for certain benefits in the amount of $26,050 — Court directing that ICBC's "irrevocable, unequivocal and unconditional" commitment to pay those benefits be recited in the formal order — On application to settle the order, ICBC taking position that such a recital should not be contained in the order — Court finding the practice of directing that such commitments be referenced in the formal order is consistent with established practice in comparable areas (i.e., interlocutory injunctions) and not contrary to authority. Holman v. Leung (https://www.bccourts.ca/jdb-txt/sc/22/10/2022BCSC1047.htm) S.C., Veenstra J., 2022 BCSC 1047, Victoria M182559, June 22, 2022 , 10pp., [CLE No. 77517] • Supplementary to 2021 BCSC 2328, [2021] C.D.C. 74822 (CLE) • S. Missaghi, for plaintiff; R.W. Parsons, for defendants. Principal case authorities: Halvorson v. British Columbia (Medical Services Commission), [2010] C.D.C. 45521 (CLE), 2010 BCCA 267 — considered. Law v. Cheng, [2016] C.D.C. 61196 (CLE), 2016 BCCA 120 — considered. Kim v. Sodhi, [2021] C.D.C. 73356 (CLE), 2020 BCSC 2023 — applied. Kongrecki v. Rafael (1993), 81 B.C.L.R. (2d) 378 (C.A.) — applied. Purewal v. Uriarte, [2021] C.D.C. 75661 (CLE), 2021 BCSC 1935 — considered. Rainbow Country Estates Ltd. v. Resort Municipality of Whistler, [1994] B.C.W.L.D. 1488, 1994 CanLII 1996 — applied. Rix v. Koch, [2021] C.D.C. 75215 (CLE), 2021 BCSC 1526 — considered. T-W Insurance BrokersInc. v. Manitoba Public Insurance Corp. (1997), 115 Man. R. (2d) 305 (C.A.) — applied.

OCCUPIERS' LIABILITY — Commercial premises — Restaurants • Plaintiff suffering serious ankle injury when he slipped, allegedly on water, while exiting a restaurant — Plaintiff suing for damages in excess of $10 million — Action dismissed — Plaintiff failing to establish prima facie case of negligence and defendants therefore not required to establish they had a reasonable system of cleaning and inspection in place at the time. In 2011the plaintiff, a successful insurance sales executive, slipped and fell as he was leaving a restaurant, suffering a serious ankle fracture. He alleged the wood floor inside the restaurant and tiled floor in the external alcove were wet, which caused the fall. He sued the restaurant operator and its landlord under the Occupiers Liability Act ["OLA"], claiming damages in excess of $10 million, the bulk of which was for alleged lost commissions and bonuses. It was conceded at trial that operator and the landlord were "occupiers" for purposes of the OLA. Held, action dismissed. Once a plaintiff in an OLA action establishes a prima facie case of negligence, the occupier may rebut the presumption with evidence that at the time of the accident, it had a reasonable system of cleaning and inspection in place. Here, the plaintiff failed to establish a prima facie case. His testimony, which often appeared scripted and strategic, was lacking in credibility and unreliable in several respects. His claim of his restricted ability to return to work full time for over a decade was undermined by videotape evidence taken in 2012 and other photographic evidence showing otherwise. There was no direct evidence from the plaintiff or any other corroborating witness that his fall was caused by water on the floor. The plaintiff, who had the burden of proof, had the option of calling restaurant employees regarding the condition of the floor but chose not to. Also, unlike in the majority of slip and fall cases where expert evidence is central in guiding the court's determination of the threshold issue - whether a condition or hazard existed which caused the slip - the plaintiff adduced no such evidence. The many fact witnesses who testified with respect to the plaintiff's alleged business losses were

either: (1) employees who reported to the plaintiff and economically dependent upon him; or (2) senior executives who benefited from the plaintiff's continued success. His damage claim was supported by little or no corroborative documentary evidence such as sales contracts or an expert business valuation independent of data the plaintiff provided. There was also a plausible alternative cause of the fall. Given the lack of evidence, the plaintiff's allegation he slipped on water was little more than mere speculation and insufficient to discharge the burden of proof under the OLA. As the plaintiff failed to establish a prima facie case of negligence, there was no onus on the defendants to establish they had a reasonable and regular practice of cleaning and drying the restaurant's entrance. Gujral v. Meat and Bread Sandwich Company Ltd. (https://www.bccourts.ca/jdbtxt/sc/22/09/2022BCSC0917.htm) S.C., Taylor J., 2022 BCSC 917, New Westminster S155417, June 2, 2022 , 43pp., [CLE No. 77383] • A.E. Maragos and R.R. Lee, for plaintiff; M. Carnello, for defendant; S.T. Frost and J. Lauwers, for defendant. Principal case authorities: Bradshaw v. Stenner, 2010 BCSC 1398, [2010] C.D.C. 46396 (CLE) af 'd 2012 BCCA 296, [2012] C.D.C. 50781 (CLE) — considered. Druet v. Sandman Hotels, Inns & Suites Ltd., [2011] C.D.C. 47399 (CLE), 2011 BCSC 232 — considered. Fulber v. Browns Social House Ltd., [2013] C.D.C. 54138 (CLE), 2013 BCSC 1760 — considered. Mason v. Reid, 1999 CanLII 5438 (BCSC) — applied. Nerland v. Toronto-Dominion Bank, 2016 BCSC 45, [2016] C.D.C. 60702 (CLE) — considered. Van Slee v. Canada Safeway Ltd., [2008] C.D.C. 39596 (CLE), 2008 BCSC 107 — considered. Welder v. Lee, 2019 BCSC 1328, [2019] C.D.C. 70161 (CLE) — considered.

PRACTICE — Pleadings — Amendment • TORTS — Spoliation — Master declining plaintiff's application to plead independent tort of spoliation, though permitting amendments that raised spoliation as an evidentiary issue — Plaintiff's appeal dismissed — There is no action for punitive damages for spoliation as an independent tort in BC. The plaintiff sued the defendant for damages, alleging that she was injured in a slip and fall at the defendant's store. There was CCTV footage of the incident, but the plaintiff said that the defendant had deliberately destroyed other probative video evidence. The plaintiff sought leave pursuant to SCCR 6-1(1)(b)(i) to amend her notice of civil claim [NOCC] to include: the facts of the alleged spoliation; allegations that the defendant implemented policies intended to limit its liability to customers injured at its stores; and that the defendant destroyed CCTV evidence. She sought to claim aggravated and punitive damages, and special costs. The defendant applied to strike the plaintiff's reply. The master declined to allow the amendments that raised spoliation as an independent cause of action not directly related to the alleged destruction of the video, but allowed amendments that put spoliation as an evidentiary issue. The master struck the reply because it was obsolete given the amendments she allowed to the NOCC. She granted the plaintiff leave to file a new reply after the defendant had filed an amended response to civil claim. The plaintiff appealed the order refusing her leave to amend to plead spoliation as a cause of action. Held, appeal dismissed. The question before the master was whether the amendments pled spoliation as a cause of action, a question of law which was vital to the final determination. This appeal was a rehearing on the record, and with respect to any question of law, the standard of review was correctness. Generally, amendments to a plaintiff's pleading ought to be allowed unless the amendments fail to disclose a reasonable cause of action or they would cause actual prejudice to the defendant's ability to defend the action. The law in BC is that there is no action for punitive damages for spoliation as an independent tort. It should always be the case that spoliation is alleged along with another cause of action because that isthe nature of the allegation: that evidence relevant to that other cause of action was destroyed. Here, the plaintiff's proposed amendments alleged that it was the destruction and defendant's policy itself which was actionable, and the authorities prohibited such a claim. Panchal v. Wal-Mart Canada Corp. (https://www.bccourts.ca/jdbtxt/sc/22/10/2022BCSC1040.htm) S.C., Norell J., 2022 BCSC 1040, Vancouver S197047, June 6, 2022 , 24pp., [CLE No. 77668] • Appeal from Master Harper, 2022 BCSC 71, [2022] C.D.C. 76438 (CLE) • N. Muirhead and J. Gray A/S, for appellant plaintiff; E. Harris, for respondent defendant. Principal case authorities: 0856464 B.C. Ltd. v. TimberWest Forest Corp., [2012] C.D.C. 50291 (CLE), 2012 BCSC 597 — applied. Abermin Corp. v. Granges Exploration

Ltd. (1990), 45 B.C.L.R. (2d) 188 (S.C.) — applied. British Columbia (Director of Civil Forfeiture) v. Violette, 2015 BCSC 1372, [2015] C.D.C. 59466 (CLE) — considered. Endean v. Canadian Red Cross Society, [1998] Civ. L.D. 256; [1998] C.D.C. 12234 (CLE) (B.C.C.A.) — applied. Holland (Guardian ad litem of) v. Marshall, [2008] C.D.C. 41517 (CLE), 2008 BCCA 468— considered. McDougall v. Black & Decker Canada Inc., 2008 ABCA 353 — considered. Sangha v. Reliance Investment Group Ltd., 2010 BCCA 340, [2010] C.D.C. 45870 (CLE) — considered. Spasic Estate v. Imperial Tobacco Ltd., 2000 CanLII 17170 (ON CA) — considered.

PERSONAL INJURY QUANTUM — Neck • Brain • Loss of future earnings — Plaintiff, 26 at trial in 2022, injured in motor vehicle accidents in 2018, 2019 and 2020, suffering mild traumatic brain injury, injury to cervical spine, myofascial pain, and thoracic outlet syndrome [TOS] — Symptoms ongoing but doctors opining there was room for improvement though not full recovery — Court accepting that plaintiff had a realistic chance of being accepted into medical school, both before and after the accident though a reduced chance due to her injuries — Taking that reduced chance into account as well 50% chance she would need to work less than full-time, court awarding $524,698 for loss of future earning capacity — Non-pecuniary damages assessed at $120,000, and costs of future care at $137,400, with special damages and past wage loss agreed — Court ruling inadmissible expert evidence interpreting a single photon emission captured tomography [SPECT] scan of plaintiff's brain since it was unnecessary. The plaintiff, age 26 at trial in 2022, was injured in motor vehicle accidents in 2018, 2019 and 2020. There was consensus among her treating physicians and the medical experts that she sustained a mild traumatic brain injury [mTBI] with ongoing post-concussion symptoms; injury to her cervical spine; myofascial pain; and thoracic outlet syndrome [TOS]. She had mild cognitive challenges, and sleep and mood issues. All the doctors agreed that she had not reached her maximum recovery and recommended additional treatments. The plaintiff's dream had been to become a doctor. She earned a B Sc degree in 2019. In August 2020 she started UBC's nursing program, and was provided with accommodations for exams and her practicums. She did very well in the nursing program. She continued physiotherapy, massage, and active rehabilitation. Her doctors agreed she would be able to complete her nursing program and to work as a nurse with accommodations. At trial, the defendants objected to the admissibility of two reports of a neurologist, Dr. Mehdiratta, to the extent that they referred to or relied on the report of C, a specialist in nuclear medicine, interpreting a single photon emission captured tomography [SPECT]scan of the plaintiff's brain. They also objected to the whole of C's report. On the assessment of damages, the main issues were the awards for non-pecuniary damages, for future costs of care claimed at $392,193, and for future loss of income earning capacity claimed at $2,675,082. Special damages of $12,000 and past wage loss of $6,695 were agreed. Held, judgment for plaintiff for $800,793. On the evidentiary issue, the plaintiff failed to establish that the SPECT scan evidence was necessary, given that she had already been diagnosed with an mTBI and post-concussion symptoms by two doctors after the second accident before Dr. Mehdiratta ordered the SPECT scan. Dr. Mehdiratta and C agreed that a SPECT scan is not a "stand-alone" diagnostic tool. There was also no evidence that anyone examining or treating the plaintiff considered the SPECT findings in determining her treatment or prognosis. Admitting the SPECT evidence in these circumstances would trigger the concerns expressed in the jurisprudence about excessive deference to experts and add expense and time to trials. Those portions of Dr. Mehdiratta's report objected to by the defendants and the entirety of C's report would be excluded. Further, Dr. Mehdiratta's admissible evidence should be given little weight because, contrary to the Rules, his report did not include a copy of his instruction letter. It also erroneously stated that the plaintiff had previously had a CT scan of her head to query a possible brain bleed. Further, he was evasive and argumentative in cross examination, at times sounding more like an advocate for SPECT than an unbiased expert. His opinions or recommendations would not be relied on unless supported by other doctors. With respect to non-pecuniary damages, the plaintiff was relatively young. Her injuries, which had both physical and psychological aspects, had affected every aspect of her life, from her future ambitions, her current work and studies, to her social, personal and intimate life for five years. However, the medical consensus was that her symptoms could continue to improve, particularly if she continued treatments and tried others that were recommended for her. The award would be $120,000. A separate award for loss of housekeeping capacity was not warranted. For future care costs, the award would be $137,400 to cover: medications; psychological counselling; physiotherapy; massage therapy; and equipment such as heating pads. As for loss of future earning capacity, the plaintiff intended to go to medical school and still did. Her marks and extracurricular activities put her well within the range for acceptance, though she had not yet written the MCAT, and it is very difficult to get into medical school. The accidents left the plaintiff with ongoing injuries, and there was no evidence that she would make a full recovery, only that her symptoms might improve with time and treatment. There was a real and substantial possibility that the plaintiff's reduced capacity would cause pecuniary loss, from work both as a nurse and as a doctor. She demonstrated a real and substantial probability that she would have successfully pursued a career as a doctor by writing the MCAT and applying for entry to a Canadian medical school multiple times. In the interim, she would have worked as a registered nurse. The ongoing impacts of her accident-related injuries reduced the likelihood that she would enter and complete medical school, and also adversely affected her income-earning capacity as a doctor or nurse. In the without-accident scenario, there was a 75 percent likelihood that the plaintiff would have been accepted to medical school within her first three years of being able to apply, and would have successfully completed it within the allotted time. There was thus a 25 percent likelihood she would have worked a registered nurse. As

she would not have applied for medical school until she completed her nursing degree, the earliest she could have graduated as a doctor was 2026. The value of the plaintiff's without-accident future income capacity asset was $2,372,734. In regard to the with accident scenario, the plaintiff's ongoing symptoms somewhat reduced the likelihood she would gain admission to medical school in that they made studying for the MCAT harder. She would find completing medical school more challenging, but the requirement for accommodation of disabilities and her success in her nursing program demonstrated that she was capable of the kind of effort required to finish medical school. Post-accident the plaintiff had a 65 percent chance of becoming a doctor and a 35 percent chance of working as a nurse. The present value of her with-accident future income capacity total to age 70 was $2,310,045. An additional factor was that, as a result of the accidents, the plaintiff would find it more difficult to work full-time, regardless of her profession. There was a 50 percent chance she would be able to continue to work full-time and a 50 percent chance her injuries would necessitate a reduction to 0.6 FTE, which meant that the present value of her with-accident earnings was $1,848,036. The difference between the without and with-accident scenarios was $524,698, which was her loss of future earning capacity. Bolduc v. Stratton (https://www.bccourts.ca/jdb-txt/sc/22/11/2022BCSC1168.htm) S.C., Iyer J., 2022 BCSC 1168, Vancouver M195574, M204255, M211905, July 11, 2022 , 23pp., [CLE No. 77665] • T. Dennis, for plaintiff; D.E. Burns and J. Mansfield, for defendants. Principal case authorities: Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.) — applied. R. v. Abbey, 2017 ONCA 640 — applied. R. v. Mohan, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402 — applied. Rab v. Prescott, [2021] C.D.C. 75563 (CLE), 2021 BCCA 345 — applied. Sen-Laurenz v. Napoli, [2020] C.D.C. 70207 (CLE), 2019 BCSC 1379 — distinguished. Stapley v. Hejslet, [2006] Civ. L.D. 109; [2006] P. Inj. L.D. 28; [2006] C.D.C. 34091 (CLE); 2006 BCCA 34 — applied. White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23 — applied. Expert evidence: Dr. Cheung, neurologist — considered. Ms. Clark, economist — considered. Dr. Daniel DeForge, physiatrist — considered. Dr. Holtz, physiatrist — considered. Dr. Mehdiratta, neurologist — rejected. Dr. Palak, physiatrist — considered.

PERSONAL INJURY QUANTUM — Loss of future earnings • Appeals — Court of Appeal allowing appeal from awards of $255,000 for loss of future earning capacity, $60,000 for loss of housekeeping capacity, and $17,199 for cost of future care, finding trial judge erred in quantification of the awards — However, evidence establishing some entitlement to these awards — Applying correct analysis to the assessment to the evidence available, court substituting award of $75,000 for loss of future earning capacity — Evidence supporting awards of $4,108 for 1 year of physiotherapy, and $15,000 for 2 years' loss of housekeeping capacity. In June 2017 the plaintiff sustained soft tissue injuries to her neck, right shoulder, lower back, and right buttock. There was a good prognosis she would experience greater than 80 percent improvement of her neck and shoulder symptoms with rehabilitation though the prognosis for complete recovery was poor. She did not incur any past wage loss due to the accident. The trial judge awarded, inter alia, $225,000 for loss of future earning capacity based on a capital asset approach, $60,000 for loss of housekeeping capacity, and $17,199 for costs of future care. The defendant appealed those awards. Held, appeal allowed; awards of $75,000, $4,108, and $15,000 substituted. There was a relative paucity of evidence bearing on the plaintiff's future employment prospects and plans. In addition, the accident had not caused her any past wage loss given that, post-accident, she had been able to take on all the hours her part-time position offered. With respect to the assessment of future loss of earning capacity, the trial judge did not undertake the requisite steps or make the findings of fact necessary to quantify an award, leaving the appeal court to speculate on the basis for it. The assessment of loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. Though not a mathematical exercise, economic and statistical evidence provide useful tools to assist in determining what isfair and reasonable. The assessment of damages for the loss of future earning capacity involves a tripartite test: (i) whether the evidence discloses a potential future event that could lead to a loss of capacity; (ii) whether, on the evidence, there is a real and substantial possibility that the future event will cause a pecuniary loss; and if so (iii) assessment of the value of that possible future loss, including the relative likelihood of the possibility occurring. The trial judge here did not engage in any analysis of whether there was a real and substantial possibility that the plaintiff's injuries would cause a loss of future earning capacity in relation to her plans and intentions, and did not adequately demonstrate how these injuries would restrict her future earning capacity. He did not compare the probabilities affecting her future earning capacity absent the accident to her future earning capacity given the accident. Moreover, it was impossible to discern the basis of his assessment of damages at $255,000. However, rather than remitting the issue, this was a case where it was possible, and preferable, for the appeal court to assess the evidence and determine the award. The evidence established a potential future event that could lead to a loss of capacity, and there was a real and substantial possibility that the future event would cause a pecuniary loss to the plaintiff. She had an injury that would continue to limit her ability to work which gave rise to a real and substantial possibility that her hours of work could be restricted in her current or similar lines of work, or that other lines of work could be more difficult than would otherwise be the case. With respect to the value of that possible future loss, there was little probative evidence of her earning capacity with or without the accident. There was evidence that she was unlikely to be able to work at more than 80 percent of full time hours in her current job, and that anchored her claim, at least to a modest degree. The evidence that the plaintiff had some intention or plan to work full time was sufficient to ground some award for loss of future earning capacity. $10,000 a year was a reasonable maximum measure of lost residual capacity. Howev-

er, given the significant uncertainty about the plaintiff's plans and future recovery, that maximum annual loss would be reduced by half, and reduced by an additional 20 percent to reflect negative conventional contingencies. An award of $75,000 was fair and reasonable. There was no evidence to support the cost of future care award of $17,199 based on three years of physiotherapy. Given the medical evidence that recommended physiotherapy for one year, the award would be $4,108. The award of $60,000 for past and future loss of housekeeping capacity was not justified on the evidence. While the trial judge canvassed the correct legal principles and appropriately granted a pecuniary award, he did not ground the quantum in the evidence. An award of $15,000 would be substituted, for two years' housekeeping costs. Ploskon-Ciesla v. Brophy (https://www.bccourts.ca/jdb-txt/ca/22/02/2022BCCA0217.htm) C.A., Harris, Stromberg-Stein & Voith JJ.A., 2022 BCCA 217, Vancouver CA47195, June 17, 2022 , 22pp., [CLE No. 77486] • Appeal from Ball J., 2020 BCSC 1873, [2021] C.D.C. 73208 (CLE) • M.H. Wright and J.E. Fergusson, for appellant defendant; T. Dennis and J. Fearon, for respondent plaintiff. Principal case authorities: Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.) — applied. Dunbar v. Mendez, [2016] C.D.C. 61654 (CLE), 2016 BCCA 211 — considered. Pololos v. Cinnamon-Lopez, [2016] C.D.C. 60758 (CLE), 2016 BCSC 81 — considered. Rab v. Prescott, [2021] C.D.C. 75563 (CLE), 2021 BCCA 345 — applied. Reilly v. Lynn, [2003] C.D.C. 25680 (CLE), 2003 BCCA 49 — applied. Rosvold v. Dunlop, [2001] Civ. L.D. 24; [2001] P. Inj. L.D. 9; [2001] C.D.C. 20132 (CLE) (B.C.C.A.); 2001 BCCA 1 — considered.

PRACTICE — Discovery — Independent medical examinations • Defendant in personal injury action requesting that plaintiff attend for an IME — Plaintiff advising that due to an important and unmovable work commitment from which her employer would not excuse her, she could not attend on the specified date — Defendant seeking order requiring plaintiff to attend — Application dismissed — Plaintiff having advised defence counsel of her unavailability 2½ months prior to the deadline for service of expert reports, indicated that she was available most of the days in that period and determined that medical examiner was available on several those dates — Defendant's insistence that plaintiff attend IME on the proposed date, regardless of the consequences to her employment, being unreasonable. Farr v. Barbosa (https://www.bccourts.ca/jdb-txt/sc/22/09/2022BCSC0972.htm) S.C., Master Vos(In Chambers), 2022 BCSC 972, Vancouver M1812619, April 26, 2022 (oral), 6pp., [CLE No. 77438] • A.E. Maragos, for plaintiff; R.O. McQuarrie, for defendant.

PRACTICE — Examination for discovery — Further examination •In personal injury action arising out of a guided rock climbing accident, defendants applying for a further examination of the plaintiff, saying their discovery of him on 2 days did not provide the full 7 hours of discovery time to which they were entitled — Court finding the 7-hour discovery period set out in R. 7-2(2) 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 — Court also finding that a deduction from the 7 hours allotted for discovery should be made for lunch and other breaks and a deduction should be made for any technical issues interfering with the examination — Here, as well, court finding some of plaintiff's conduct during discovery, such as writing down questions before answering them, slowed progress — Court finding that breaks consumed 1.5 hours, technical delays accounted for .5 hours and the plaintiff's conduct caused delay of 1 hour, entitling defendants to a further 3 hours of discovery. Manson v. Mitchell (https://www.bccourts.ca/jdb-txt/sc/22/06/2022BCSC0617.htm) S.C., Mayer J., 2022 BCSC 617, Vancouver S219805, March 28, 2022 (oral), 11pp., [CLE No. 77064] • J.G.M. Foster, for plaintiff; M. Gianacopoulos, for defendants. Principal case authorities: J. & P. Leveque Bros. v. Ontario, 2010 ONSC 231 — applied. More Marine Ltd. v. Shearwater Marine Ltd., 2011 BCSC 166, [2011] C.D.C. 47291 (CLE) — applied.

PRACTICE — Settlement of action — Terms •Infants — Plaintiff settling personal injury action arising from accident in which her 2 children were also injured — After settlement, $1,406,941 of defendant's insurance coverage remaining — Settlement agreement requiring plaintiff's lawyers to hold settlement funds in trust until children's claims were resolved, and for plaintiff to re-allocate portion of her settlement which might be necessary to satisfy their claims — Court granting plaintiff's application for order releasing portion of settlement funds to her on her providing adequate security. The plaintiff was injured in two motor vehicle accidents, in 2015 and 2016. Her two children were also injured in the second accident in which the plaintiff' scar was rear-ended by the defendant DI. After delivery of notices to proceed pursuant to s. 20 of the Limitation Act with respect to the children's claims, their father commenced an action on their behalf in April 2021. The plaintiff's claims were settled in October 2021, for $137,362 in regard to the first accident and $571,479 in regard to the second. After taking into account the settlement, $1,406,941 of coverage remained under DI's third-party liability insurance policy with ICBC. The settlement agreement required the plaintiff's lawyers to hold the settlement funds in trust until the plaintiff obtained approval of the court, and that if the children's claims for damages exceeded the remaining insurance coverage under DI's policy, the plaintiff would re-allocate any portion of her settlement from the second accident that may be necessary to satisfy their claims. The plaintiff applied for an order that she and her counsel be permitted to release all settlement funds held in trust to her. ICBC opposed payment out until the children's claims were resolved or litigated, or proposed that $100,000 be released on the posting of security. Held, order accordingly. Considering all factors, ICBC's proposal that there be an advance of the settlement funds upon the plaintiff's providing adequate security would be fair to the children, the plaintiff, and ICBC. The security could be in the form of a second mortgage of the family property for the principal amount of the advance, interest-free and payable on settlement or payment of all claims in

favour of the children. Serginson v. Cook (https://www.bccourts.ca/jdb-txt/sc/22/11/2022BCSC1125.htm) S.C., Jenkins J. (In Chambers), 2022 BCSC 1125, New Westminster M191593, July 5, 2022 , 10pp., [CLE No. 77597] • S. Brooks, for applicant plaintiff; M. Wright, for defendant. Principal case authorities: Bizovie v. Cornish, [2004] C.D.C. 29427 (CLE), 2004 BCSC 553 — considered. Gill v. West, [2011] C.D.C. 49003 (CLE), 2011 BCSC 1423 — considered. Insurance Corp. of British Columbia v. Hamo, [2009] C.D.C. 41729 (CLE), 2008 BCSC 1700 — considered.

WILLS & ESTATES — Intestate succession — Common law spouses • On appeal from order that deceased died intestate and without a spouse, Court of Appeal finding trial judge erred by adopting a checklist approach, rather than contextual and holistic approach, to determining whether deceased and appellant were in a marriage-like relationship, including by unduly focusing on their lack of conjugal relations and deceased's close relationship with an ex-husband — Considering all the evidence (including that appellant lived with deceased, shared her bed, attended to her medical needs, advised her on her finances, shared meals and celebrations with her, ran errands for her, and spent substantial portions of his day with her), the only conclusion was that they lived in a marriage-like relationship and that appellant was a spouse according to WESA definition. When BL died in December 2016 the appellant SC was living with BL in her home, which was her significant asset valued at $1.6 million to $2 million and encumbered by two mortgages with a total indebtedness of $1 million. The history was that BL and the respondent KL had divorced in 1980s. BL and SC met in 1989. SC claimed that they lived together in a marriage-like relationship for three years beginning in the spring of 1990, and that in around 1998 BL moved into his apartment again a marriage-like relationship. In August 2001, BL signed a testamentary document which named KL as her primary beneficiary. KL moved in with BL and SC in 2002, and the three lived together until 2006. In 2005, BL created a new testamentary document which revoked previous such documents, appointed SC as executor, and named both SC and KL as significant beneficiaries. In April 2006, BL revoked the 2005 document, witnessed by KL. Also in April 2006 BL was injured in a serious motor vehicle collision. While she was hospitalized SC asked her not to move back in with him and KL. In May 2006 BL created another testamentary document which appointed her brother as the executor and divided the remainder between KL and SC. BL and KL then lived together in a hotel in the Downtown Eastside for 13 months after which BL moved into back into her house after her tenant left. SC moved into the house in 2013. He initially maintained his own quarters on the lower floor before moving upstairs and sharing BL's bed and bedroom. On occasion KL would stay overnight in BL's bed while SC would leave and stay elsewhere. In August 2017 SC obtained a grant of administration based on his position that BL died intestate and his status as a spouse. In September 2017, after a master found that the 2001 document was a valid will, KL received a grant of probate. The trial judge concluded that BL died intestate, that SC was not in a marriage-like relationship with her after 2006, and that BL's mother was her sole beneficiary. KL died shortly after the trial. SC appealed. He argued that the trial judge: (i) erred in failing to give effect to a case management order that the issue of the validity of the testamentary documents be heard before the marriage-like relationship issue; (ii) misapprehended the evidence, and drew incorrect inferences with respect to SC's credibility; and (iii) erred when he concluded that there was no marriage-like relationship. Held, appeal allowed. The trial judge erred in concluding that BL and SC were not in a marriage-like relationship when she died; the evidence supported the conclusion they were and that SC was entitled to inherit her estate pursuant to s. 20 of the Wills, Estates and Succession Act [WESA]. The trial judge did not err in determining both the issues: of whether BL left a valid will and whether SC was her spouse. Given that there was two adjournments mid-trial, of four weeks and three weeks, SC had sufficient time to gather documents and witnesses, and was not prejudiced by the process. The fresh evidence SC sought to adduce did not pass the due diligence or relevance tests: all the evidence tendered could have been gathered during the intervals between hearing dates. The trial judge erred in his approach to the determination of whether there was a marriage-like relationship. The old precise definitions of marriage-like relationships are no longer valid in our changing world. Such relationships are no longer defined by financial dependence, sexual relationships, or the mingling of property and finances. The "checklist" approach is incorrect. In regard to the period after 2013 when SC moved back in with BL, the judge's reasons for rejecting the evidence tendered in support of the relationship provided little analysis of the evidence, and the reasons consisted primarily of conclusory statements. Whether people are in a marriage-like relationship is a question of mixed fact and law, subject to deference absent a palpable and overriding error. While the judge was aware that the analysis of this issue requires a contextual and holistic approach, he failed to apply such an approach. He did not meaningfully engage with the factors he enumerated, let alone recognize that they were not a checklist and not appropriate in light of the diversity that exists among relationships. He failed to consider the evidence of two witnesses who had first-hand knowledge of the relationship between BL and SC, rejecting it out of hand without analysis. He committed palpable and overriding error when he failed to consider what their relationship was in the relevant period under s. 2(3) of WESA, the two years prior to BL's death. He placed undue emphasis on the fact that they did not share "conjugal relations", meaning sexual relations, after BL left in 2006. He turned it into a competition between SC and KL who shared her bed more, who attended to her medical needs more, and who gave her advice on her financial affairs more. But, the uncontested evidence was that SC did live with BL, shared her bed, attended to her medical needs, advised her on her finances, shared meals and celebrations with her, ran errands for her, and spent substantial portions of his day with her: all circumstances that led friends who observed them to conclude that they were in a marriage-like relationship. When the evidence as a whole was con-

sidered on a contextual approach, and taking into account the trial judge's lack of confidence in SC's evidence, the only conclusion possible was that they were living in a marriage-like relationship commencing shortly after SC moved into BL's property in 2013. Therefore, SC was a spouse according to the definition in WESA, and inherited her estate. Coad v. Lariviere (https://www.bccourts.ca/jdb-txt/ca/22/02/2022BCCA0222.htm) C.A., Saunders, Bennett & Griffin JJ.A., 2022 BCCA 222, Vancouver CA46477, CA46478, CA46479, June 24, 2022 , 41pp., [CLE No. 77524] • Appeal from Walker J., 2019 BCSC 1691, [2019] C.D.C. 70521 (CLE), indexed as Lariviere v. Coad • Appellant in person; D.A. Hunter and C.D. Rodocker, for respondent KP. Principal case authorities: Austin v. Goerz, [2008] C.D.C. 39206 (CLE), 2007 BCCA 586 — applied. Barendregt v. Grebliunas, 2022 SCC 22 — applied. Benhaim v. St-Germain, 2016 SCC 48— applied. Jones v. Davidson, [2022] C.D..C 76494 (CLE), 2022 BCCA 31 — applied. Weber v. Leclerc, [2016] C.D.C. 60336 (CLE), 2015 BCCA 492 — considered.

WILLS & ESTATES — Intestate succession — Common law spouses • Plaintiff, resident of China, bearing GY's child prior to his immigration to Canada in 2007 and continuing to spend time with GY on his return visits to China — Plaintiff and GY never marrying — GY dying intestate in 2015, leaving multi-million dollar estate and 4 children he fathered with 4 other women, none of whom he had married — GY's relationship with 4 mothers being concurrent with relationship with plaintiff — Court dismissing plaintiff's application for declaration that she was GY's "spouse" for purposes of Wills, Estate and Succession Act — Plaintiff's appeal dismissed — Judge's reasons not demonstrating any material error, serious misapprehension of the evidence, or an error of law — Judge erring in interpreting s. 2(1)(b) of WESA as requiring that the 2 years of a marriage like relationship immediately precede the intestate's death — However, error having no bearing on outcome given judge's finding of fact that GY and the plaintiff had never lived in a marriage-like relationship or, if they did, GY terminated the relationship at least by 2014, when GY cancelled the plaintiff's first visit to Canada, after which he never made any more trips to China — Supreme Court of Canada dismissing application for leave to appeal with costs. Mother 1 v. Solus Trust Company Limited (https://scc-csc.lexum.com/scc-csc/scc-l-csca/en/item/19463/index.do) S.C.C., Wagner C.J. & Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer & Jamal JJ., 40054, August 4, 2022 , 1pp., [CLE No. 77946] • On appeal from 2021 BCCA 461, [2022] C.D.C. 76178 (CLE).

TLABC MEMBERSHIP PERKS ▸

TLABC has secured the below programs for the benefit of members. Check out the Membership Benefits page on the TLABC website or contact the individual providers for more information.

SAVINGS FOR MEMBERS
on various
national brands

Register now at
perkopolis.com

Use TLABC & your member ID number when prompted for a member ID code.

perkopolis

TLABC Extended Benefits Plan

Did you know TLABC offers all current members the chance to join its comprehensive health and dental plan? The plan offers exceptional life insurance, long-term disability and critical illness coverage that is impossible to match when shopping around the competitors.

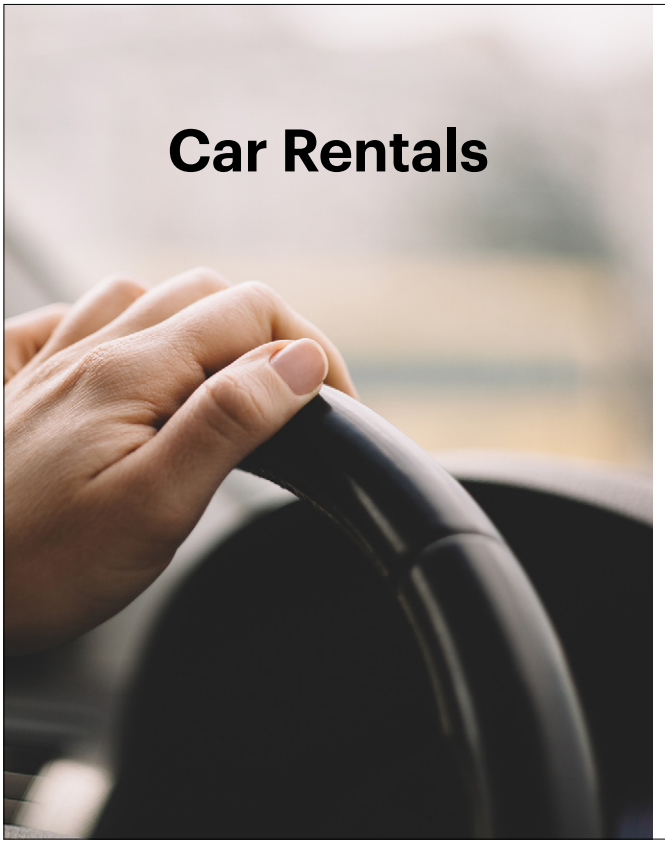
TLABC members have the option of either a comprehensive benefits package or a basic benefits package:

Comprehensive Plan	**Basic Plan**
Basic Dental — 100% covered	Basic Dental — 80% covered
Major Dental — 50% covered	Extended Health — 80% covered
Extended Health — 100% covered	

Both the Comprehensive and Basic packages include the same Group Life Insurance, Critical Illness and Long-Term Disability Coverage.

SPECTRUM
CONTINUITY PLANNING

Alan Leader
P: 604 681 6363
E: alan@spectrumcontinuity.com



Hertz®

Rental Car Preferred Rates for TLABC Members

TLABC members can save **up to 30% off** the base rate* with Hertz. From value savings options like a compact car to a roomy full-size or luxury model, Hertz makes renting a vehicle easy and affordable.

* The CDP savings applies to Base Rental Rate only. Taxes, tax reimbursement, fees, surcharges and optional service charges, such as refueling, are not included. Discounts vary by rental date, location and vehicle type. Discounts in local currency upon redemption. Advance reservation is required. Age, driver, credit and qualifying rate restrictions for the renting location apply. Blackout periods may apply.

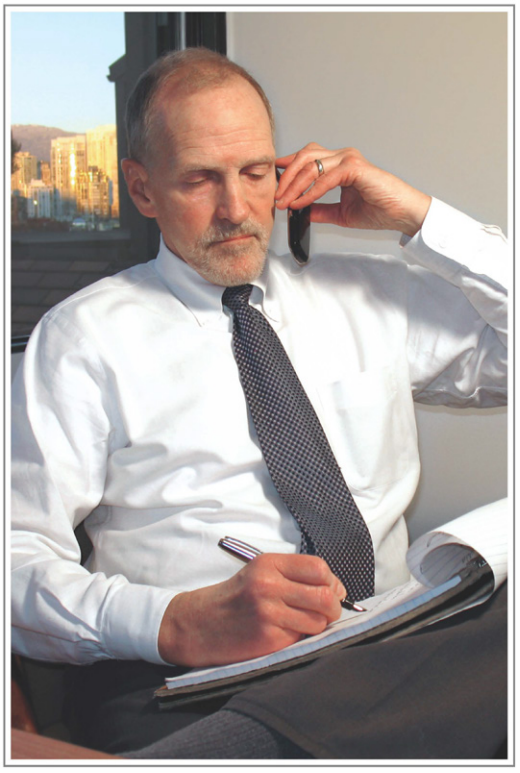
INDEX OF ADVERTISERS ▸

These advertisers make it possible for TLABC to distribute *the Verdict* to members without additional cost.
They will appreciate your consideration of their products and services. Please mention that you've seen their ad in *the Verdict*.

H Teasley, MA(Econ), CPA
Applied & labour economics • Litigation & personal-tax accounting

Expert witness — quantum & value

Personal injury, wrongful death, & related losses



I apply accounting and economic expertise, using tax, payroll, business, medical, and other records (employed or self-employed) and StatsCan and other statistics, to estimate personal-injury and wrongful-death losses. Simple multiplier or earnings-by-occupation reports. One-page summary introducing assumed facts yielding aftertax past earnings loss, future earning-and domestic-capacity losses, present value of future care outlays, and related grossup allowances. Support and service losses in wrongful death.

I have regularly given expert, opinion evidence on such matters in the Supreme Court of British Columbia since 1989. I first gave expert evidence on economic losses (in the Superior Court of the State of Washington) in 1972 and first appeared in the Tax Court of Canada in 2005. I have worked professionally for 39 years as an economic and financial analyst and for nine years as a full-time university teacher (three years teaching accounting at Simon Fraser, six years teaching economics at Western Washington).

Howard Teasley
BSc MA(Econ) CMA(US) CPA CGA

Thanks for the first quarter century

In citing reasons for judgment in Dueck v Mikoula, *the Honourable Mr Justice H L Skipp wrote:"It is my opinion that the plaintiff should be profoundly grateful to Mr Teasley, as he was the only organized, credible witness to testify. In short, in my humble opinion, the plaintiff owes whatever success he enjoyed to Mr Teasley."*

A registered professional accounting practice
N° 12 - 1201 Lamey's Mill Rd, Vancouver, BC V6H 3S8 ***« Note new address »***
(1) 604.341.0819 Fax 604.731.7682 • howard@teasley.ca • www.teasley.ca