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| Law 435C.001 | Personal Injury Advocacy | 2022 Term 2 |
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| Professors:MARC KAZIMIRSKI and SANDRA KOVACS | Tel: (604) 681-9344Email: mak@kazlaw.ca Office: 1900-570 Granville Street, Vancouver BC  | Mondays 5:00 – 8:00 pmUBC Allard HallFaculty of LawRoom 121 |
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**WEEK 1: Introduction to personal injury claims in Canada
(Via Zoom until January 24, 2022)**

**Meeting ID: 896 2353 7971**

**Passcode: 062876**

**Join Zoom Meeting:** [**https://us02web.zoom.us/j/89623537971?pwd=S0w2K3hCTjFUa01hbWpVakc3a1V1QT09**](https://us02web.zoom.us/j/89623537971?pwd=S0w2K3hCTjFUa01hbWpVakc3a1V1QT09)

**Introduction to the class**

* Welcome
* Our backgrounds
* Your backgrounds
* Interactive
	+ We will call upon everyone to participate in class.
	+ We want to make it a practical class that gives you something more than a surface understanding of personal injury law. In order for all of us to meet that goal, it is important that you all participate.
	+ We base 25% of your mark on participation.
* Overview of course materials, readings, and grading.
* Readings & class notes – all found on the KazLaw website under “UBC Law”, not all updated yet.
* The focus of this course is to demonstrate how to successfully advocate for an injured plaintiff. The skills you learn in the course are, however, broadly applicable to any case where you are advocating for your client.
* PI has become increasing prevalent for anyone who has a litigation practice.
* Traditionally, PI was practiced primarily at small firms that either specialized in personal injury or had this as a component of their general practice. More recently, there is a trend where bigger firms have also developed practices.
* The statistics for personal injury in Canada are daunting: most individuals will suffer a significant personal injury during their lifetime, injury/trauma is the leading cause of death for children and young adults, and injury is the dominant cause of disability for Canadians.
* The statistics for personal injury litigation in the British Columbia Supreme Court are equally significant: personal injury claims accounts for nearly 25% of all civil pleadings filed and 20% of all trials.
* Given these statistics you can appreciate that PI litigation is essential for anyone considering a litigation practice.

**Course format**

* The course is broken into two distinct sections and taught with specific case examples:
	+ The first five weeks are the fundamentals of tort law – case law, statutes, legal issues and heads of damage.
	+ The following five weeks are focused on trial advocacy and procedure specific to personal injury.
	+ We refer to many real cases that we or our colleagues have handled to try to ensure our lesson plans are as practical as possible.
	+ We will have guest lecturers to provide other perspectives, including from the defence.
* By the end of the course we expect you will understand:
* The relevant statutes and key judicial decisions governing personal injury claims in Canada with a particular emphasis on British Columbia.
* The structure of a personal injury claim including the various heads of damage, the anatomy of a personal injury claim, and defences to a personal injury claim.
* The advocacy skills required to advance a personal injury claim.
* There is no text for this course and the majority of the readings are case law and select excerpts from various texts and articles posted on the KazLaw website.
* We recommend the following as supplemental reading if you intend to practice personal injury:
* *British Columbia Civil Trial Handbook,* 3rd ed. Continuing Legal Education Society of BC, 2010.
* *David Ball on Damages.* 3rd ed. National Institute for Trial Advocacy, 2011.
* Rick Friedman, *Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability.* 2nd ed. Trial Guides, 2010.

**Course Evaluation**

* The course evaluation is based on the following criteria:
* Final Exam (75%)
* Class Participation (25%): Students attend and participate in class discussions and are required to provide weekly feedback/reflections on each lecture.

**Contact Details**

You can reach us by email or phone and all of the course information is on the website.

* Email: mak@kazlaw.ca and sk@kazlaw.ca (make sure to include “UBC” in the subject line)
* Phone: (604) 681-9344 at the office; (604) 657-3128 (Marc’s cell); (778) 991-3335 (Sandy’s cell)
* Website: <http://www.kazlaw.ca/index.php/ubc> or click on “UBC Law” on [www.kazlaw.ca](http://www.kazlaw.ca). Included on the website is the following information:
	+ Course Materials: course description, schedule, etc.
	+ Lecture Notes: Our lecture notes for class will be updated and posted week-to-week.
	+ Assignment: detailed information on the written assignment.
	+ Resources: Relevant websites, papers, etc.

**Teaching Objectives for Week 1:**

* Putting personal injury in context: PI is prevalent for lawyers working in Canada because most people will suffer a significant personal injury causing disability during their lifetime and 25% of all civil claims are personal injury matters.
* Bias in personal injury claims: we have to acknowledge this bias when advocating in PI claims and the goal of this course is to develop strategies to mitigate against this bias.
* Types of personal injury claims: motor vehicle accidents, occupier’s liability, assaults (including sexual assaults), sporting injuries, professional negligence, municipal and government liability, etc.
* *Hot Coffee* discussion
* Types of motor vehicle insurance regimes in Canada: no-fault, optional no-fault, and full tort rights.
* Tort Reform in British Columbia
1. **Defining Personal Injury**

**1.1 Personal Injury is a subsection of tort law**

* This course is titled “personal injury” – a subsection of tort law.
* The three elements of a tort:
* negligence / fault,
* causation,
* damages (compensable harm).

In a personal injury claim you need someone (the defendant) to have committed a negligent act that caused a compensable injury.

* Does a person have a compensable claim if any one of these elements are missing – ***no!***
	1. **Defining “Personal Injury”**
* The term “personal injury” is tossed around without any thought given to what it means. What do we mean when we use the term “personal injury”:
* “Personal” references the fact that the harm, or the injury, is something that happens to the person, as opposed to property, reputation, etc…
* “Injury” - Physical, emotional or psychological injury inflicted to a person.
* Do we have any further criteria for personal injury – for example:
* does it have to be objectively verifiable,
* does it have to be caused by a specific incident or can it be caused by a series of incidents occurring over a period of time,
* does it include aggravations of a pre-existing injury or does it have to be a new injury, or
* does it include emotional or psychological injuries?

**1.3 Types of Personal Injury Claims:**

* Is there any limit to the different types of personal injury claims?

Motor Vehicle Accidents (MVAs):

* The most common of personal injury claims are MVAs. This includes any and all types of MVAs such as multi vehicle accidents, single vehicle accidents, pedestrian accidents, cycling accidents, etc.
* These claims are governed by statute, the *(Insurance (Vehicle) Act* and associated *Regulations* in BC), and the common law.

Occupier’s Liability:

* Like MVAs, occupier’s liability in BC is also governed by statute (the *Occupier’s Liability Act*), and the common law.
* Occupier’s liability includes:
	+ slips and falls on premises,
	+ social or commercial host liability,
	+ injuries resulting from improper safety, maintenance or design considerations such as deck collapse at a house or injuries in pools.
* Most provinces have occupiers’ liability legislation (exception is New Brunswick which relies upon common law and Quebec has a civil code).

Product Liability:

* There is a never-ending list of product liability cases. These include, for example, the Toyota class action related to the sudden acceleration problem, the Suzuki Tracker vehicle rollover caused by negligent design, and medical product failures such as the Zimmer hip, failed medications such as Vioxx (which may cause heart disease), broken bike frames such as the Cannondale Gemini, etc…

Assault and battery:

* Assault and/or battery are claims arising from harmful/offensive non-consensual contact. This includes historical sexual abuse, fights in bars, intentional motor vehicle accidents, failing to disclose sexually transmitted diseases, etc…
* Civil liability vs. criminal negligence – different burdens of proof

Professional Negligence/Malpractice:

* A common personal injury claim arises out of professional negligence – this includes medical malpractice, dental malpractice, physiotherapy malpractice, chiropractic malpractice, improper psychological counseling, etc.
* The test is whether the professional owed a duty of care to the injured party, whether he or she breached the requisite whether standard of care, and that breach is what caused the injury and resulting damages.

Sports Injuries:

* Some sports related injuries are compensable. The primary issue is one of consent, and the courts have consistently ruled that there is a voluntary assumption of risk in sporting activities. However, at a certain point the defendant’s conduct goes beyond the normal expectations of the participants and the resulting injury is compensable. For example, hockey with fights or hits from behind into the boards, improper tackles in soccer, rugby injuries in the scrum causing paralysis, etc..
* The most famous case of a sports injury that is connected to Vancouver is the [Steve Moore and Todd Bertuzzi](https://www.cbc.ca/sports/hockey/nhl/steve-moore-confirms-settlement-in-bertuzzi-case-1.2756008) incident that took place in 2004. In the course of a game between the Vancouver Canucks and the Colorado Avalanche, Todd Bertuzzi jumped on Moore from behind, driving him into the ice before two more players jumped onto him. Moore suffered three broken vertebrae and a concussion as a result of the incident, and never returned to professional hockey.
* Another interesting illustration of this is the Myles Garrett and Mason Rudolph incident that took place in 2019. This took place during a NFL football game between the Pittsburgh Steelers and the Cleveland Browns.
	+ The principle of consent, if the contact was incidental and part of the game, and whether or not Garrett’s conduct would meet the threshold for criminal assault charges is explained in [this article published in Forbes.](https://www.forbes.com/sites/ericmacramalla/2019/11/15/quick-legal-look-myles-garrett-swinging-a-helmet-at-mason-rudolph-is-criminal-assault/?sh=7255f27936f1)
	+ [This article from the LA Times](https://www.latimes.com/sports/story/2019-11-15/myles-garrett-suspended-nfl-legal-assault-mason-rudolph) examines other notorious sports related assaults over the years.

Municipal Liability:

* Failing to salt or clear the road or sidewalk in hazardous conditions, failing to prevent rock fall near highways, failing to put up guardrails to protect motorists when driving near a cliff, recreational facilities including pools, Walkerton contamination of water supply causing deaths of seven people and numerous injuries, etc...
* These claims are governed by the *Local Government Act* and the common law.

Government Liability:

* Residential school claims, Hep-C class action in which the government failed to screen blood donations and infected thousands of Canadians with contaminated blood, etc.
* These claims are governed by the *Crown Proceeding Act* and the common law. In *Canadian Tort Law* (5th Edition), Justice Allen Linden summarized the *Just* decision and government liability by saying:

*"The government must be entitled to govern free from tortious liability. It cannot be a tort for government to govern. However, when a government is supplying services, that is, doing things for its people other than governing, it should be subject to ordinary negligence principles."*

Distinguishing Personal Injury from Wrongful Death Claims:

* Wrongful death claims are the subject of much debate in BC because the compensable damages are severely restricted.
* These claims are governed by the *Family Compensation Act* and the common law. The *FCA* takes into account ONLY the direct financial losses resulting from death, however, it fails to acknowledge non-pecuniary damages for pain and suffering. Therefore, if your child dies, you likely have no claim for anything other than funeral expenses, unless you can establish an economic loss.
* The following categories of losses are paid under the FCA:
* Compensation for lost *family* *income* which would have been earned in the future by the deceased from which the dependent would have benefitted;
* Compensation for the value of lost *household services* which would have been performed in the future by the deceased; and
* For surviving children, some compensation is made for the “loss of parental guidance” which would have been provided by the deceased in the future.
	+ The campaign for change is being spearheaded by In Their Name, a non-profit campaign of the BC Wrongful Death Law Reform Society that is comprised of 100% volunteer staff. Its members have each experienced a wrongful death in the family and are selflessly dedicated to legislative reform for families in the future. Their website can be found [here.](https://intheirname.ca/about/)
* This article by Sandy Kovacs comments on how the current state of BC’s FCA leaves families without adequate compensation:
	+ The Lawyers’ Daily, August 28, 2017 - [*A matter of life and death: Urgent call for a new wrongful death statute in BC*](https://docs.wixstatic.com/ugd/682071_8134f6e58bdc4ccfbd972118000fcce1.pdf)
* Note that BC is different from many other provinces and territories that allow damages for grief and loss of companionship.
	1. In Alberta, section 8 of the *Fatal Accidents Act* allows certain close family members of a deceased killed by a wrongdoer the right to claim compensation from that wrongdoer for the grief and loss of companionship suffered by the family. In Alberta, once a claim is made and the liability of the wrongdoer established, the amount of compensation is automatic ($82,000 for a spouse, $82,000 to parents, and $49,000 for each child of the deceased) and there is no requirement for the family members to prove their grief. The family members entitled to make a claim are the spouse, parents and children of the deceased. This compensation is often referred to as bereavement damages.
	2. The Yukon government recently amended its legislation in 2014, including a claim for bereavement damages of $75,000 for a surviving spouse, $45,000 to a child, and $74,000 to parents (or $37,500 to one parent).

There is a movement in BC to amend the *Family Compensation Act* to allow for bereavement damages, but this has yet to be achieved. Why?

* 1. **Tort Reform**

**Is there a bias against personal injury claimants and counsel?**

* How do you think the public regards lawyers generally? Are we hated? The usual jargon: lawyers defend criminals and get them off on technicalities, they charge lots of money, they advance fraudulent or frivolous claims….
* How do you think the public regards personal injury lawyers – even worse? Ambulance chasers, preying on innocent victims, charging exorbitant fees for frivolous claims….
* Why do you think lawyers, and particularly personal injury lawyers, have this negative reputation?
* Does this pre-existing bias impede an injured plaintiff’s access to justice?
* Example 1 - Do you think the ICBC adjuster handling a MVA claim simply accepts the claim for chronic pain or is he or she skeptical from the start?

Example 2 - How about the judge deciding the case where the unemployed plaintiff has been involved in four accidents – do you think he or she looks at this as a cash grab or a legitimate claim? When considering this issue reflect on the comments of McEachern C.J.S.C. (as he then was) in *Butler v. Blaylock* (7 October 1980), Vancouver B781505 (B.C.S.C.) and consider if the Court is articulating a new standard of proof in these cases:

*I am not stating any new principle when I say that the Court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.*

*An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence ‑‑ which could be just his own evidence if the surrounding circumstances are consistent ‑‑ that his complaints of pain are true reflections of a continuing injury.*

* Or how about jury trials (if trials by jury return in a post-COVID world). Do you think we, as plaintiff personal injury lawyers, can ignore the fact we are loathed, and that the eight jurors are skeptical and distrust our intentions? Can the jury pool be influenced by subtle advertisements suggesting that plaintiffs are fraudulent? See:

	+ <https://www.youtube.com/watch?v=YWS1VXjP6JA>
	+ and [ICBC’s anti-fraud advertising: purely educational or jury interference?,](https://docs.wixstatic.com/ugd/682071_a7f8208b36544a4b82e9f295c21a824f.pdf) The Lawyers’ Daily, May 25, 2017
* The majority of this course is devoted to answering one question: how do we effectively advocate for an injured individual when the overwhelming pre-existing prejudice and belief is that these are fraudulent or exaggerated claims? Our task is to give you strategies and techniques to ensure that truth and justice prevails.
* Let’s define “tort reform”: refers to proposed changes/reform of civil justice systems that would reduce tort litigation or damages. This includes procedural limits on the ability to file claims and capping the awards of damages.
* What is the rationale/justification in favour of tort reform?
	+ The primary criticism of the tort system focuses on an economic analysis and asserts that the costs of litigation and compensation payouts raise the cost of insurance (and products generally). Because most tort claims will be paid from the pockets of insurance, and because the public generally pays into insurance schemes of all kinds, tort reform proponents assert that reducing tort litigation and payouts will benefit everyone who pays for insurance.
	+ Frivolous lawsuits clog up our courts and drive up the cost of doing business for industry.
	+ The tort system is an expensive and inefficient way to compensate those injured.
* What is the rationale/justification against Tort Reform?
	+ "...tort law serves two legitimate purposes. First, the law serves to compensate victims for their losses. Second, the threat of liability serves to deter future accidents."
	+ Limitations on damages and other restrictions on plaintiff's traditional rights will reduce corporate accountability. Because corporations typically engage in a cost-benefit analysis before considering whether to stop a wrongful action (such as polluting or not enacting proper measures for safety), corporations will decide that the cost of changing a wrongful practice would be greater than the cost of continuing it, unless there is the chance that the cost of continuing will be made greater by a successful lawsuit.
	+ There is no objective or reliable evidence supporting a crisis in our justice system that requires tort reform.
	+ There are no savings associated with tort reform.
* Examples of tort reform in Canada: the cap on pain and suffering from the 1978 Trilogy, statutory caps/deductions/thresholds on soft tissue injuries, costs, limitation of actions against government and municipalities, limitation against juries in claims against government, and – most important today – British Columbia’s new “Enhanced Care” No-Fault System for motor vehicle collisions, effective May 1, 2021.

***How many of you have heard of the McDonald’s Hot Coffee case from the U.S.?***

What do you know about the case?

* Was this the first claim against McDonalds for a hot coffee burn injury?
* How old was the plaintiff?
* Was the plaintiff seriously injured?
* Did the plaintiff cause her own injury – meaning did she spill the coffee into her lap?
* Was this a frivolous or fraudulent claim?
* How much money did the plaintiff receive?
* How many of you think the plaintiff was paid too much money?

We are going to watch the first 40 minutes of a documentary called Hot Coffee – make some notes and we are going to discuss this at the end of the class.

[**https://www.youtube.com/watch?v=KmEYWCg0J7Q**](https://www.youtube.com/watch?v=KmEYWCg0J7Q)

**Class discussion regarding “Hot Coffee”**

* Do you think the jury award was reasonable in the circumstances of that case?
	+ Remember that Liebeck initially asked McDonalds to pay only her medical bills and they refused. The jury ultimately awarded Liebeck $160,000 in compensatory damages (for medical bills and the like) and $2.7 million as punitive damages against McDonald's. This amount was reduced to reflect Ms. Liebeck’s contributory negligence.
* Reflect on the jurors’ task:
	+ The job of a juror is one of the hardest and most solemn jobs a citizen ever may have in a democracy. Each day, all over the country, the jury's deliberative work is the embodiment of one of the few inherent powers of the governed over the governing.
	+ Alexis de Tocqueville wrote hundreds of years ago in glowing terms about the jury. He saw in it both a form of grassroots democracy—individual citizens rendering judgments that became part of the body of the law—and a civic virtue—individual citizens playing a direct role in their own governance and learning from it.
* Was there a tipping point or piece of evidence that was particularly compelling?
	+ the temperature of the coffee was absurdly high,
	+ least 700 other McDonald's customers had been injured by hot coffee,
	+ the photographs of the burns were shocking to see,
	+ the company showed no signs of reducing the temperature in its coffee makers,
	+ the punitive damage amount equaled only two days’ worth of McDonald's coffee sales.
* Why do you think we showed you this movie – why is it relevant or important?
* Why do you think Ms. Liebeck’s case has been so widely misrepresented in the media?
* What do we mean by tort reform?
* What is the impetus or motivation for tort reform – what is the basis for the allegation that tort systems are unfair, costly and inefficient?
* Tort reform in Canada – caps on pain and suffering from the trilogy, caps on minor and/or soft tissue injuries, limitations or waivers of liability that are interpreted strictly, move towards reform of joint and several liability (in BC we sever liability if the plaintiff is contributory negligent but this does not happen in other jurisdictions), no damages for wrongful death – and B.C.’s new “Enhanced Care” No Fault program for motor vehicle collision injuries.
* Who benefits from tort reform? Insurance companies and, arguably, the premium-paying public.
* Does eliminating liability reduce personal responsibility and safety innovations?
* Do you think that fraudulent or frivolous claims are widespread in Canada?
* What safeguards are put in place in Canada, compared to other countries such as the United States, to prevent frivolous lawsuits?
* Further discussion and perhaps the subject of your first weekly reflection – look up the issue of fraudulent claims, the incidence of fraudulent claims, etc.

See also: there is an excellent article in *The* *Economist*, “Closing the Lottery”: <https://www.economist.com/united-states/2011/12/10/closing-the-lottery>

* 1. **Tort Regimes Applicable to Motor Vehicle Claims in canada**
* There are four types of tort regimes applicable to motor vehicle accidents in Canada: full tort rights, no fault insurance, optional no-fault Insurance, and insurance that has thresholds (caps or deductions) on damages.
* In several provinces, motor vehicle insurance is purchased through private insurance companies, including in the Yukon and Alberta.
	+ In BC, Manitoba, SK, the government provides basic mandatory public insurance. Premium payments are collected by the provincial governments.
	+ In Quebec, the government covers personal injury, while private insurers cover vehicle damage.
1. No-Fault Insurance:
* Means you get compensation from your own insurance company rather than having to deal with the other motorist’s insurer.
* British Columbia, Manitoba and Québec: These provinces operates in a “pure” no-fault environment, meaning that all injured claimants (regardless of liability) are entitled to statutory wage loss and rehabilitation benefits provided by the government-run insurer. The injured claimant cannot sue for damages beyond these statutory benefits.
1. Optional No-Fault:
* Saskatchewan: An individual has the option of paying less for the Personal Injury Protect Plan (PIPP) no-fault insurance that provides statutory benefits, or paying more for the tort option that allows the injured individual to sue for non-pecuniary damages (subject to a $5,000 deductible) and pecuniary damages.
1. Thresholds, Deductibles and Caps Applied to Tort Claims:
* Ontario: The individual can sue for non-pecuniary and pecuniary damages subject to a threshold and deductible of $15,000 or $30,000 depending on the injury. The threshold distinguishes injuries causing a “permanent serious impairment of an important physical, mental or psychological function” from lesser injuries. If the injuries meet the threshold there is no deduction or cap on the claim. If the injuries do not meet the threshold then the injured individual receives accident benefits and may sue for further damages subject to a $30,000 deductible.
* Alberta:
	+ Minimum insurance for third party is $200,000; caps on no-fault benefits for medical payments ($50,000), funeral expenses ($5,000) and disability ($400/week for 104 weeks).
	+ The individual can sue for non-pecuniary and pecuniary damages, however, there is a limit/cap of $4,777 cap for minor injuries pursuant to the *Minor Injury Regulation* (MIR). A “Minor Injury” is defined as a sprain, a strain, or a Whiplash Associated Disorder (‘WAD”) injury caused by an accident that does not result in a serious impairment. Damages for such injuries are limited to the legislative amount, plus an allowance for inflation. The adjusted cap amount for general damages is $4,777; however, it should be noted that other heads of damages (lost wages, out of pocket expenses, etc.) are not affected by the MIR. The issue that arises is establishing criteria for what should be considered a “serious impairment” for the purposes of the MIR.
	+ Note that the MIR was challenged in *Morrow v. Zhang*. The constitutional challenge was initially successful before Associate Chief Justice Wittmann (now Chief Justice Wittmann) at the Alberta Court of Queen’s Bench. Justice Wittmann found that the MIR violated an injured plaintiff’s right to equality under Section 15 of the Charter on the basis that the distinction between victims who sustained soft tissue injuries and those who sustained other injuries was discriminatory and that such a limit reinforced the stereotype that individuals so afflicted are malingers. The Crown appealed on the grounds that Justice Wittman failed to consider the MIR in relation to the rest of the legislative scheme when conducting his Constitutional analysis. The MIR and related legislation were introduced in 2004 as a control mechanism for rising insurance premiums. Justice Rowbotham fo ra unanimous Court of Appeal held that the cap on non-pecuniary damages was a justifiable concession and the regime would ensure immediate access to care without any interference from an insurer. Both Justice Wittmann and the Court of Appeal dismissed various arguments that the MIR violated the Plaintiffs’ “life, liberty and security of person” rights under Section 7 of the Charter. The Supreme Court of Canada denied leave to appeal in December 2009.
* The Maritimes: the individual can sue for non-pecuniary and pecuniary, however, there is a limit/cap of $8,200 in Nova Scotia, $7,500 for non-pecuniary damages in New Brunswick and $2,500 in Newfoundland and Labrador where the injuries are “minor” and/or “non-permanent injuries”. Note that the move to caps was precipitated by an “insurance crisis” in which the private insurers stated they could no longer afford to insure drivers in the Maritimes. This crisis has been challenged and there is a move in Nova Scotia to revisit the cap on minor soft tissue injuries.
	1. **TORT REFORM IN BRITISH COLUMBIA**

**Recently expired: Tort Rights in BC**

* Until May 1, 2021, accident victims in BC had full tort rights and were entitled to two types of compensation in a motor vehicle accident:
* No Fault Accident Benefits: Everyone in BC who was injured in an MVA was already entitled to no-fault “accident benefits”. Even if an individual was at fault for the accident, ICBC would pay these benefits, so long as the individual met the conditions of the insurance. These benefits were previously governed by Part 7 of the *Insurance (Vehicle) Act,* and were colloquially known as “Part 7s”.
	+ Generally, these benefits include temporary total disability (TTD) wage indemnity benefits (i.e., disability benefits for lost income to a maximum of $740 per week (up from $300 / week), as well as medical and rehabilitation benefits. Part 7 benefits are capped at $300,000 for medical payments, recently raised from $150,000, for collisions occurring on or after April 1, 2019.
* Damages:  Under the old system before May 1, 2021, everyone in BC injured in a MVA caused by another person’s negligence had a “tort” claim and was entitled to “damages” for pain and suffering, lost past and future wages, future care, out-of-pocket expenses and other losses. These tort damages were indemnified by the defendant’s insurance policy issued by ICBC. These damages awards were aimed to put an injured person in the same position they would have been in had the accident not occurred (as far as money can do this).
* Until recently, BC was the only remaining jurisdiction in Canada that had full tort rights in motor vehicle claims.

**The first step toward tort reform: the Minor Injury Cap**

* On April 1, 2019, caps were introduced for “minor injuries”.
* From ICBC’s website: <https://www.icbc.com/claims/injury/Pages/Minor-injuries.aspx>

What is a minor injury? BC's minor injury definition includes:

* *sprains*
* *strains*
* *general aches and pains*
* *cuts*
* *bruises*
* *road rash*
* *persistent pain*
* *minor whiplash*
* *temporomandibular joint disorder or TMJ (pain in your jaw joint and in the jaw muscles)*
* *mild concussions*
* *short-term mental health conditions.*

*A medical professional – not ICBC – will diagnose your injury, and this diagnosis will determine whether it is minor or not.*

Minor injury and your compensation:

*The determination of an injury as minor only affects your compensation for pain and suffering. This is just one part of your claim and is separate from your medical treatments and benefits to help you recover.*

***As of April 1, 2019, a limit of $5,500 will apply to pain and suffering payouts for minor injuries.***

*Your injury may have been determined to be minor after the crash, but if the injury turns out to impact your life for more than 12 months - for example, you're still not able to go to work or school, have to modify your work hours or duties, or you're unable to care for yourself - it will no longer be considered minor and will not be subject to the payment limit.*

*In the case of concussions or mental health conditions, the limit on pain and suffering will not apply if there is significant impairment beyond 16 weeks.*

What if you dispute a determination that your injury is “minor”?

* From April 1, 2019 and onward, the [Civil Resolution Tribunal](https://civilresolutionbc.ca/) (CRT) is available to address certain disputes between customers and ICBC, including minor injury determination disputes.
* The CRT is independent of ICBC and can solve some disputes “without involving legal representation” [emphasis added].
* On April 1, 2019, the TLABC commenced legal proceedings that challenge the constitutional validity of the ICBC-NDP scheme to cap damages and force most matters to the CRT. Initially, the TLABC was the only named party. It was always intended that individual plaintiffs would be added later to eliminate any standing concerns and to provide an individualized factual context for the challenge.
* Arguments were heard in August 2020 and in March of 2021, Chief Justice Hinkson ruled that the CRT’s adjudication of minor injuries was an **unconstitutional infringement of s.96 of the *Constitution Act, 1867****,* in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* [2021 BCSC 348](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc348/2021bcsc348.html?autocompleteStr=2021%20BCSC%20348&autocompletePos=1).
* Following this decision, BC Attorney General David Eby announced that the BC Government was applying for a partial stay of the declaration granted by the BC Supreme Court. [A copy of the statement may be found here.](https://news.gov.bc.ca/releases/2021AG0042-000632)
* The BC Government’s application for a partial stay was granted in chambers by Mr. Justice Frankel on April 8, 2021. [The Order](https://news.gov.bc.ca/files/8.4.2021_EnteredOrder.pdf), allows for claims which began between April 1, 2019 and April 30, 2021 to operate under the auspices of the CRT until the appeal has been adjudicated upon. Further details of how the Order affects claimants from this time period can be found [here.](https://news.gov.bc.ca/releases/2021AG0048-000726)

# **More tort reform: Three-Expert Limit**

Round One: Rule 11-8 amendment

* Enacted February 11, 2019 in the *Supreme Court Civil Rules* , Reg. 68/2009
* The rule limited the number of expert witnesses permitted to bring evidence, in relation to damages, to three for each party, and limits the number of reports to one per expert.
* Sub-rules provide exceptions for additional experts by consent, in response to a report served on them by an opposing party, a joint expert ordered by the court or, for an expert appointed by the court.

*Crowder v British Columbia (Attorney General),* [2019 BCSC 1824](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1824/2019bcsc1824.html?autocompleteStr=2019%20BCSC%201824&autocompletePos=1)

* Suffered extensive injuries in an MVA, filed a notice of trial to commence Sept. 14, 2020.
* His ability to tender expert opinion evidence at trial was captured by the impugned rule.
* His counsel argued the Rule made it impossible for Mr. Crowder to discharge his burden of proof on the nature, duration and extent of his injuries, and his long-term prognosis, including long-term function and the lifetime care he will need.

Issues

* Were Rule 11-8 Orders authorized by the Act?
* Did Rule 11-8 contravene s. 96 of the *Constitution Act, 1867* by inhibiting the power of the Supreme Court of BC to control its own process?

Decision

* Hinkson, CJ found the effect of the Rule was to change the substantive law of evidence and therefore, Rule 8-11 Orders and the Rule itself **were not authorized by the *Act***.
* Found that the **Rule unconstitutional** as it eliminated the Supreme Court’s inherent discretion to control its own processes, in relation to expert witnesses.

Remedy

* Declared Rule 11-8 and corresponding Orders contrary to s.96 of the *Constitution Act, 1867* and thus unconstitutional and of no force or effect.
* Sub-rules 11-8(3), (4), (5), (10) and (11) were set aside.

Consequences

* BC Government chose not to appeal the decision, but proceeded by essentially legislating Rule 11-8 as an amendment to the *Evidence Act*, effective August 10, 2020.
* Although Hinkson, CJ found Rule 11-8 unconstitutional, this was in the context of the *Supreme Court Civil Rules,* BC Reg 168/2009,and we will likely have to wait for the anticipated challenge to the amended *Evidence Act* to address the amendments constitutionality.

Round Two: *Evidence Act* Changes

* S.12.1 of the *Evidence Act* stipulates that each party in a fast-track litigation proceeding will be limited to one expert and one expert report. In all other actions, concerned parties will be limited to three experts and three expert reports. The courts will be able to exercise discretion to allow additional reports .

* Under s.12.1(4) of the *Evidence Act* parties can agree to use more experts without filing a court application if they proceed by consent.

# **Even more tort reform: The 6% Disbursement Rule**

* As of February 12, 2021, s.5(1) of the [Disbursements and Expert Evidence Regulation](https://www.bclaws.gov.bc.ca/civix/document/id/crbc/crbc/210_2020) has set a limit of 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered.
* The Attorney General’s press release can be viewed [here](https://news.gov.bc.ca/releases/2021AG0018-000266):

Evidence Act regulations have been made that will reduce the cost and complexity of lawsuits under the current auto insurance system.

The regulations place a limit on the amount recoverable from an unsuccessful party for disbursements related to motor vehicle personal injury litigation in Supreme Court, at 6% of the overall judgment or settlement. Disbursements include all expenses incurred for the purpose of a lawsuit, such as courier fees, process servers and photocopying. But the limit will not apply to disbursements for fees payable to the Crown, such as filing fees, court fees and jury fees.

* Does this new legislation interfere with the plaintiff’s ability to meet the burden of proof? Does it restrict access to justice by way of trial?

# **“ENHANCED CARE” AND No Fault**

**General Overview**

* The No Fault regime is marketed as the “Enhanced Care” coverage system, and it came into effect on May 1, 2021 (<https://enhancedcare.icbc.com/savings-and-refunds>) (1). Its supposed goal is to save drivers’ money on their insurance and to provide enhanced medical care and wage loss benefits without litigation (1).
* It is alleged that No Fault will save more than $1.5 billion in the first year, which the BC Government has promised will be passed onto ICBC customers (1). The prediction is that each driver can save about 20 per cent on their car insurance, an average of $400 per person (1).
	+ In their [March 2021 Financial Summary](https://s3.amazonaws.com/tld-documents.llnassets.com/0029000/29896/statement-of-operations-q4-2020-21.pdf), ICBC posted a net income of $1.527 billion. ICBC has turned their $0.5 billion deficit into a $1.9 means that they erased the deficit that no-fault was intended to address before the no-fault system was ever fully implemented.
* British Columbians will be eligible for medical care and rehabilitation benefits up to a maximum of $300,000, as opposed to the maximum of $7.5 million proposed in the intentions paper released in February 2020 ([BC Gov News - Enhanced Care confirms improved crash benefits](https://news.gov.bc.ca/releases/2021PSSG0021-000400) (2)). This eligibility does not depend on a person’s degree of fault or their role in a motor vehicle accident (pedestrian, driver, etc.) (2).
* Within this coverage limit, there will be sub-limits for different categories of benefits. Income replacement will be capped at 90% of net income based on a maximum gross annual income of up to $100,000 (additional coverage can be purchased to a maximum of $200,000 for wage replacement) (2), and up to a lump sum payment of $265,000 if a person is catastrophically injured in a crash (2).
* For commentary on the state of no fault ICBC insurance and its effect on injured parties, the Lawyer’s Daily article “*B.C.’s new automobile insurance model puts crash victims at a disadvantage, lawyers say*” from September 21, 2021 [can be found here.](https://www.thelawyersdaily.ca/insurance/articles/29896/b-c-s-new-automobile-insurance-model-puts-crash-victims-at-a-disadvantage-lawyers-say)

**What Is the Real Cost and What Does All of This Mean?**

Broadly

* Effective May 1, 2021, ICBC pays compensation directly to injured persons regardless of who is at fault in a collision.
* This is a major shift in BC as, effectively, a plaintiff’s right to sue in Tort law is done away with. **The option to engage immediately in a lawsuit to recover damages is no longer available**. **Essentially, an individual’s choice and access to the court system to ensure they receive fair compensation is abolished.**
* Section115 of the *Insurance (Vehicle) Act* now states:
	+ *Despite any other law or enactment but subject to this Part,*
		- *(a) a person has right of action and may not commence or maintain proceedings respecting bodily injury caused by a vehicle arising out of an accident, and*
		- *(b) no action or proceeding may be commenced or maintained respecting bodily injury caused by a vehicle arising out of an accident.*
* Section 116 (2) of the *Insurance (Vehicle) Act* lists the narrow exceptions to s.115 where litigation is still possible. These exceptions include:
	+ - *(a) a vehicle manufacturer, respecting its business activities and role as a manufacturer;*
		- *(b) a person who is in the business of selling vehicles, respecting the person's business activities and role as a seller;*
		- *(c) a maker or supplier of vehicle parts, respecting its business activities and role as a maker or supplier;*
		- *(d) a garage service operator, respecting its business activities and role as a garage service operator;*
		- *(e) a licensee within the meaning of the Liquor Control and Licensing Act whose licence authorizes a patron to consume liquor in the service area under the licence, respecting the licensee's role as a licensee in the sale or service of liquor to a patron;*
		- *(f) a person whose use or operation of a vehicle*
	+ *(i) caused bodily injury, and*
	+ *(ii) results in the person's conviction of a prescribed Criminal Code offence;*
		- *(g) a person in a prescribed class of persons.*

Disputes with ICBC under No Fault

* [On July 12, 2021](https://news.gov.bc.ca/releases/2021PSSG0067-001349) the BC Government appointed Michael Skinner, former lawyer and adjudicator, as ICBC’s new fairness officer. The BC Government states that this office will be tasked with “ensuring [ICBC’s] policies, practices and actions are fair and transparent, while further strengthening public trust in ICBC as an organization dedicated to providing affordable auto insurance and caring for people who are injured in a crash”.
* According to the fairness officer’s [website](https://www.icbcfairnessofficer.com/#about-the-fairness-officer-accordion), the fairness officer will be tasked with:
	+ *Helping claimants understand and resolve their issue with ICBC;*
	+ *Make recommendations to ICBC to resolve the claimants complaint;*
	+ *Recommend mediation or arbitration, if necessary;*
	+ *Dismiss the complaint if no unfairness is found; and*
	+ *Make recommendation to address systemic problems with the fairness of ICBC processes.*
* Notably, the fairness officer’s [website](https://www.icbcfairnessofficer.com/#about-the-fairness-officer-accordion) states that the fairness officer will not review disputes about the amount of a final payment, the entitlement of benefits, or the assessment of responsibility for a crash.
* Annual fairness reports will be released annually, with the first report due for publication in Summer 2022.

ICBC Duties

* S.120 of the *Insurance (Vehicle) Act,* as amended by Bill 11,now mandates ICBC to assist each claimant with making a claim, and to ensure that each claimant receives the benefits to which they are entitled.
* Basically, tasks and responsibilities formerly carried out by plaintiff’s counsel will now be delegated to ICBC. The insurance provider will be responsible for helping injured parties access compensation in motor vehicle accidents.
* Can ICBC meet its mandated duty to provide all the benefits due to a claimant, without the risk of bias?
* There seems to be an obvious conflict of interest where one organization is supposed to fully compensate injured parties but also has the responsibility of managing costs.
* Another issue here is that a lack of individualized compensation is likely to result from this system. Not all pain is the same for every injured party (back pain, etc.), and the same injuries can present to different degrees in different parties, and be causative of different losses. The No Fault system will inevitably require standardizing the amount being given to all persons suffering from a specific injury.

**Alternatives**

* Instead of doing away with tort law, would increasing insurance market competition drive prices down and give benefits to consumers?

**FOR Discussion:**

* What is the rationale/justification for no-fault insurance?
* What is the rationale/justification for full tort rights in British Columbia?

**Readings for next week (Week 2):**

1. ***Rankin (Rankin’s Garage) v. J.J.,*** [**2018 SCC 19**](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17085/index.do)
2. ***Alragheb v. Francis*,** [**2021 BCCA 457**](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca457/2021bcca457.html?autocompleteStr=2021%20BCCA%20457&autocompletePos=1)
3. ***Aberdeen v. Township of Langley et al.,*** [**2007 BCSC 993**](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc993/2007bcsc993.html?resultIndex=1)**, rev’d** [**2008 BCCA 420**](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca420/2008bcca420.html?resultIndex=1)
4. ***Dewar v.******Finnigan,*** [**2020 BCSC 1721**](https://www.bccourts.ca/jdb-txt/sc/20/17/2020BCSC1721.htm)
5. ***Uy v. Dhillon****,* [**2019 BCSC 1136**](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1136/2019bcsc1136.html?autocompleteStr=2019%20BCSC%201136&autocompletePos=1)**, aff’d** [**2020 BCCA 163**](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.html?autocompleteStr=uy%20v%20&autocompletePos=4)
6. ***Anderson v. Molon*,** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?resultIndex=1)
7. ***Nelson (City) v. Marchi*,** [**2021 SCC 41**](https://www.canlii.org/en/ca/scc/doc/2021/2021scc41/2021scc41.html?autocompleteStr=2021%20SCC%2041&autocompletePos=1)