|  |  |  |
| --- | --- | --- |
|  |  |  |
| Law 435C.001 | Personal Injury Advocacy | 2018 Term 2 |
|  |  |  |
| Professors:  MARC KAZIMIRSKI and SANDRA KOVACS | Tel: (604) 681-9344  Email: mak@kazlaw.ca  Email: [sk@kazlaw.ca](mailto:sk@kazlaw.ca)  Office: 1900-570 Granville Street, Vancouver BC | Mondays 5:00 – 8:00 pm  UBC Faculty of Law  Room 121 |
|  |  |  |

CLASS SCHEDULE

**WEEK 1: JANUARY 8, 2018** - **Introduction to personal injury claims in Canada**

* Introduction to course topics - review grading, assignments and objectives.
* Personal injury as a specialized subsection of Tort Law requiring proof of negligence/liability, causation, and damages.
* The types of personal injury claims: motor vehicle accidents, occupier’s liability, product liability, municipal liability, slip and fall, assault, professional negligence/malpractice, sports injuries, and wrongful death claims.
* Motor vehicle claims in British Columbia – Tort and Part 7 (Rehabilitation) claims.
* The various tort regimes applicable to motor vehicle claims: no-fault insurance (Quebec), optional no-fault (Saskatchewan and Manitoba), thresholds, deductibles and caps applied to tort claims (Ontario, Alberta, and Maritimes), full tort rights (British Columbia) and rehabilitation benefits (all provinces).
* Tort Reform in Canada and Hot Coffee discussion.
* Effective advocacy and bias in a personal injury claim – knowing the facts, the law, and the psychology of persuasion.

**WEEK 2:** **JANUARY 15, 2018 - Negligence and liability**

* Negligence - duty of care, breach of that duty, causation, and damages.
* Burden of proof and standard of proof for establishing negligence.
* Duty of care – foreseeability and the long reach of civil liability.
* Breach of the duty of care – standard of care; statutory duties (using the *Motor Vehicle Act, R.S.B.C. 1996, c. 333* as an example); codes of conduct; and using the common law to interpret these duties.
* Causation in liability - *Clements (Litigation Guardian of) v. Clements 2012 SCC 32.*
* Proving negligence and liability in motor vehicle cases: left turn case, emergency situations, and inevitable accidents.
* Apportionment of fault, contributory negligence, and joint and several liability – application of the *Negligence Act* *R.S.B.C. 1996, c. 333* in *Aberdeen v. Township of Zanatta et al.* 2007 BCSC 993 varied 2008 BCCA 420.
* Secondary liability defences: *volenti non fit injuria* and e*x turpi causa.*
* Vicarious liability (finding the deep pockets): why, how, and when.
* Psychology of persuasion: using the Rules of the Road to prove liability by polarizing the case: *Davies v. Elston*, 2014 BCSC 2435.

**WEEK 3:** **JANUARY 22, 2018** - **Causation**

* Defining causation in the Supreme Court of Canada: *Athey v. Leonati* 1996 3 SCR 458; *Athey*, *Resurfice Corp. v. Hanke* 2007 1 SCR 333 *Resurfice*, and *Clements v. Clements* 2012 SCC 32.
* Two tests for causation: “but for” test and “material contribution test”.
* Complex causation issues: pre-existing injuries or health conditions; multiple tortious and non-tortious events; divisible and indivisible injuries: *James D, “Defending Claims Involving The Issue Of Divisible Versus Indivisible Injuries” Continuing Legal Education Society of British Columbia, Personal Injury Conference 2013.*
* Psychological injuries as a special case: *Mustapha v. Culligan of Canada Ltd*. 2008 SCC 27.
* Psychology of persuasion: proving causation in the complex chronic pain case – *Foster v. Kindlan and Pineau*, 2012 BCSC 681 – case example involving labral hip tear and long-standing per-existing history of low back pain.

**WEEK 4:** **JANUARY 29, 2018** - **Non-pecuniary damages**

* Catastrophic injuries and the Supreme Court of Canada Trilogy (*Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229; Thornton v. School District No. 57 (Prince George), [1978] 2 S.C.R. 267; Teno v Arnold, [1978] 2 S.C.R. 287*) - establishing the “rough upper limit” for non-pecuniary damages.
* Pain, suffering, loss of enjoyment of life and loss of amenities – quantifying the unquantifiable - *Stapley v. Hejslet*, 2006 BCCA 34.
* Special cases - elderly individuals (*Etson v. Loblaw Companies Limited*, 2010 BCSC 1865 and *Galbraith v. Marin et al*, 2004 BCSC 671); athletes (*Morrow v. Outerbridge*, 2009 BCSC 433 and *Hagreen v. Su*, 2009 BCSC 1455); previously disabled plaintiffs(*Agar v. Morgan,* 2005 BCCA 579); and sexual abuse (*S.Y. v. F.G.C*. [1997] 1 WWR 229 BCCA).
* Aggravated and punitive damages - *Whiten v. Pilot Insurance Company*, 2002 SCC 18.
* Psychology of persuasion: proving non-pecuniary damages – *Rizzolo v. Brett*, 2009 BCSC 732 affirmed on appeal 2010 BCCA 398 – case example involving tibial fracture and chronic pain.

**WEEK 5: FEBRUARY 5, 2018** - **Pecuniary damages**

* *Restitutio in integrum* – a principled approach to full compensation from the Supreme Court of Canada Trilogy.
* Past wage loss and future loss of earnings capacity – *Athey* applied by the British Columbia Court of Appeal in *Steward v. Berezan, 2007 BCCA 150* and *Perren v. Lalari, 2010 BCCA 140*.
* Special damages and future cost of care – medical justification for future cost of care needs: *Slater M, “Future Cost of Care in Canada – Justice Requires Something Better” Verdict 2010*; *Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff’d (1987), 49 B.C.L.R. (2d) 99 (C.A.); Krangle (Guardian ad litem of) v. Brisco, [2002] 1 S.C.R. 205*.
* Complex cases – predicting future wage loss for infants or other cases where no earnings pattern established (*Fabretti v. Gill*, 2014 BCSC 899); future wage loss where the plaintiff is still able to work and has not incurred any losses to date ; and cost of care that is exorbitantly expensive (*Spehar and Aberdeen)*.
* Psychology of persuasion: proving pecuniary damages – *Fabretti v. Gill*, 2014 BCSC 899 – case example involving 12 year old boy injured in a motor vehicle accident and suffering chronic pain and addiction.

**FAMILY DAY – FEBRUARY 12 and SPRING BREAK**

**WEEK 6: FEBRUARY 19, 2018** *-* **The defence of personal injury claims**

* Surveillance, social media, and investigation of plaintiffs – Big Brother is watching!
* Credibility – *Foster v. Kindlan and Pineau*, 2012 BCSC 681 and *Sevinski v. Vance*, 2011 BCSC 892.
* Failure to mitigate - *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 (C.A.); *Janiak v. Ippolito,* [1985] 1 S.C.R. 146*; Rozendall v. Landingin*, 2013 BCSC 24.
* Defence of personal injury claims – a defence lawyer’s perspective: *Murray A, “Insurance Defence: Practical Considerations and Preparation for Change”.*
* Psychology of persuasion: polarizing the case to rebut the defence attack on credibility - *Foster v. Kindlan and Pineau*, 2012 BCSC 681
* Waivers: *Loychuk v. Cougar Mountain Adventures Ltd*. 2011 BCSC 193, affirmed 2012 BCCA 122, leave to appeal to refused [2012] S.C.C.A. No. 225
* Section 10 *Workers’ Compensation Act* Defence - *Dhaliwal v. City of Richmond* (WCAT) / *(A1600870 (Re), 2017 CanLII 53435 (BC WCAT))*
* Limitation Periods - *Bell v. Wigmore,* 2017 BCCA 82
* Inevitable Accidents - *Tran v. Edbrooke,* 2013 BCSC 1802

**WEEK 7: February 26, 2018 – Pre-trial strategy and procedures**

* Developing themes for the plaintiff’s case: Ball, David. *David Ball on Damages*. 3rd ed. National Institute for Trial Advocacy, 2011 – select chapters.
* Interviewing the plaintiff and investigating the claim.
* Discovery of documents and gathering the evidence required to prove your claim: Harris, Lyle G, *Discovery Practice in British Columbia*, 2nd ed. Continuing Legal Education Society of BC, 2009; *Biehl v. Strang* 2010 BCSC 1391.
* Examination for discovery: Harris, Lyle G, *Discovery Practice in British Columbia*, 2nd ed. Continuing Legal Education Society of BC, 2009; *Colbeck v. Kaila et al*. 2007 BCSC 689.
* Pre-trial case management: applications, case planning and trial management. *British Columbia Civil Trial Handbook*, 3rd ed. Continuing Legal Education Society of BC, 2010 – select chapters.

**WEEK 8: March 5, 2018 - Experts**

* The scope of expert evidence – excerpts from *Expert Evidence in British Columbia Proceedings, 3rd ed. Continuing Legal Education Society of BC, 2011.*
* Strategic use of experts – which experts and why?
* Rule 11 of the Civil Rules of Court – case planning and applications for experts; timing of expert reports; disclosure obligations; notice of objections; expert evidence at trial.
* Admissibility of expert reports - *Kazimirski M, The legal and ethical obligations of experts, TLABC December 2010 Conference on Chronic Pain.*
* Cross examination of experts: attacking qualifications, bias, factual assumptions, and the expert’s theory/opinion - *Fabretti v. Singh* excerpt from trial and miscellaneous case examples.

**WEEK 9: March 12, 2018 – Opening and Closing Statements**

* Different strategies and limitations for opening and closing statements in Judge versus Jury trials.
* Boundaries of openings - telling the plaintiff’s story and anticipating the defendant’s theory of the case: *Knauf v. Chao,* 2009 BCCA 605*; Brophy v. Hutchinson* [2003] B.C.J. No. 47 (C.A.); *Moskaleva v. Laurie*, 2009 BCCA 260. Use of demonstrative evidence - *Moore v. Kyba*, 2011 BCSC.
* Boundaries of closing statements - *Cahoon v. Brideaux*, 2010 BCCA 228; *Giang v. Clayton* [2005] B.C.J. No. 163 (C.A.); *de Araujo v. Read* [2004] B.C.J. No. 963 (C.A.); *Walker v. John Doe and ICBC,* 2012Vancouver Registry, Docket MO85239.
* Keys to effective delivery: natural speaking, charisma, and the use of 3s.
* Psychology of persuasion (how far is too far in an opening statement) - *Aberdeen v. Langley (Township),* 2006 BCSC 2062 - case example involving inflammatory opening statement.

**WEEK 10: March 19, 2018 – Evidence at Trial**

* The different types of evidence in a civil trial: oral evidence (testimony), admissions, read-ins, documents, photographs and videos, objects, etc… excerpts from *Introducing Evidence at Trial, 2rd ed. Continuing Legal Education Society of BC, 2012.*
* Basic concepts on the law of evidence – excerpts from *Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 4th ed, LexisNexis Butterworths Canada.*
* Direct examination of a witness – the difference between lay witnesses and experts; how are questions asked (opened ended questions versus leading questions), hearsay evidence and exceptions, and avoiding adverse inferences.
* Cross examination of witnesses – pick your battles and know the answer before you ask the question!
* Redirect of a witness – limits, landmines, and loopholes.
* Introducing documents (business records, clinical records, tax returns), photographs and videos at trial.
* Psychology of persuasion: simpler is better when deciding what evidence to adduce at trial.

**WEEK 11: March 26, 2018 – Post Trial/Settlement Procedures**

* Costs, offers to settle, and taxations.
* Public Guardian and Trustee review of infant settlements.
* Appeals of judge versus jury trial judgments.
* The difficult client and getting off the record.

**WEEK 12: April 2, 2018 – Review of Course Materials and Exam Prep**