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| **Law 435C.001** | **Personal Injury Advocacy** | **2021 Term 2** |
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| Professors:  MARC KAZIMIRSKI and SANDRA KOVACS | Tel: (604) 681-9344  Email: mak@kazlaw.ca  Email: [sk@kazlaw.ca](mailto:sk@kazlaw.ca)  1900-570 Granville St., Vancouver BC | Mondays 5:00 – 8:00 pm  UBC Faculty of Law  Online via Zoom |
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**CLASS SCHEDULE**

**WEEK 1: JANUARY 11, 2021** - **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 for now (British Columbia) and rehabilitation benefits (all provinces).
* ICBC’s new “no fault” regime.
* 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 18, 2021 - Negligence and liability**

* The elements of proving liability in negligence:
  + Duty of care (***Rankin (Rankin’s Garage) v. J.J.,*** [**2018 SCC 19**](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17085/index.do)**)**;
  + Breach of that duty;
  + Causation; and
  + Damages.
* Burden of proof
* Standard of proof
* Proving liability in motor vehicle collision cases:
  + Left turn collisions: **Reading Assignment: *Chima v. Hans et al,* Oral Reasons, Bernard J., Vancouver Registry, 20171114 (PDF posted)**
  + Rear-end collision / agony of the collision: ***Uy v. Dhillon,*** [**2019 BCSC 1136**](https://www.bccourts.ca/jdb-txt/sc/19/11/2019BCSC1136.htm)
  + Apportionment of fault, contributory negligence, joint and several liability: ***Aberdeen v. Zanatta et al.,* 2007 BCSC 993, varied** [**2008 BCCA 420**](https://www.kazlaw.ca/wp-content/uploads/2019/10/cd08b4_a6471f1eda2c4084800d3c7106fb64e2.pdf) **.**
* Brief discussion of secondary liability defences: *volenti non fit injuria, ex turpi causa* (to be covered in more detail in week 6)
* Vicarious liability: why, how, and when: ***Bowe v. Bowe,*** [**2019 BCSC 1454**](https://www.bccourts.ca/jdb-txt/sc/19/14/2019BCSC1454.htm)
* Psychology of persuasion: using the “Rules of the Road” to prove liability by polarizing the case.
  + ***Davies v. Elston*,** [**2014 BCSC 2435**](https://www.bccourts.ca/jdb-txt/SC/14/24/2014BCSC2435.htm) **.**

**WEEK 3:** **JANUARY 25, 2021** - **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:** **February 1, 2021** - **Non-pecuniary damages**

* Compensation for a plaintiff in a personal injury claim must fall under “heads of damage”:
  1. Non-Pecuniary Damages (i.e. “pain and suffering”)
  2. Past Income Loss (i.e. income lost up to the date of trial/settlement)
  3. Loss of Earning Capacity (i.e. income that will be lost after the trial/settlement)
  4. Special Damages (out of pocket expenses for treatments, medications, etc.)
  5. Cost of Future Care (i.e. cost of treatments after trial/settlement)
  6. “In Trust” Claim (the cost of services provided by loved ones)
* Today we will look at the theoretical justification for non-pecuniary damages and the valuation of these damages in various case examples, as well as non-compensatory damages, such as punitive damages and aggravated damages.
* 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, *Galbraith v. Marin et al*, 2004 BCSC 671, and *Fata v. Heinonen,* 2010 BCSC 385, at para. 88):
  + Athletes (*Morrow v. Outerbridge*, 2009 BCSC 433;*Hagreen v. Su,* 2009 BCSC 1455);
  + Previously disabled plaintiffs (*Agar v. Morgan*, 2005 BCCA 579); and
* “Rough upper limit” or “cap” for 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) (collectively, “the Trilogy”).
  + **See also *Uy v. Dhillon,*** [***2020 BCSC 1302***](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.pdf)
* Sexual abuse (*S.Y. v. F.G.C.* [1997] 1 WWR 229 BCCA); *Water v. Bains,* 2008 BCSC 823; ***Anderson v. Molon,*** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.pdf)
* Aggravated and punitive damages - *Whiten v. Pilot Insurance Company*, 2002 SCC 18; *Macleod v. Marshall et al*., 2019 ONCA 842; *Howell v. Machi,* 2017 BCSC 1806; ***Anderson v. Molon,*** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.pdf)
* The “Minor Injury Cap” – a limit on non-pecuniary damages for specific injuries arising from motor vehicle accidents: <https://www.icbc.com/claims/injury/Pages/Minor-injuries.aspx>

**WEEK 5: FEBRUARY 8, 2021** - **Pecuniary damages**

* Overview of pecuniary damages:
  + Wage loss (past and prospective); and
  + Expenses (past and prospective).
* *Restitutio in integrum* – a principled approach to full compensation, from the SCC Triology.
* Past wage loss and future lost earning capacity – *Athey* applied by the BCCA in *Steward v. Berezan*, 2007 BCCA 150 and *Perren v. Lalari*, 2010 BCCA 140.
* Case studies:
  + *MacLeod v. Marshall,* Court File No. CV-13-481825 (Jury Award), aff’d [2019 ONCA 842](https://www.canlii.org/en/on/onca/doc/2019/2019onca842/2019onca842.html?autocompleteStr=2019%20ONCA%20842&autocompletePos=1) (leave to appeal to SCC denied)
  + *Lampkin v. Walls,* [2016 BCSC 1003](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1003/2016bcsc1003.html?autocompleteStr=lampkin&autocompletePos=1#SCJTITLEBookMark457);
  + *Pololos v Cinnamon-Lopez,* [2016 BCSC 81](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc81/2016bcsc81.html?autocompleteStr=2016%20BCSC%2081&autocompletePos=1)
* Lost Homemaking Capacity: *Kim v. Lin,* [2016 BCSC 2405](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc2405/2016bcsc2405.html); aff’d [2018 BCCA 77](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html?autocompleteStr=kim%20v.%20lin'&autocompletePos=1)
* Special damages and cost of future care – medical justification for future cost of care needs
  + [Slater M, “Future Cost of Care in Canada – Justice Requires Something Better” Verdict 2010;](https://lawsdocbox.com/Legal_Issues/113459629-Articles-the-verdict.html)
  + *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.y);
  + [*Torchia v. Siegrist,* 2015 BCSC 57](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc57/2015bcsc57.html?autocompleteStr=2015%20BCSC%2057&autocompletePos=1#_Toc409009370)
* Total Lifestyle Approach: ***Uy v. Dhillon,*** [***2020 BCSC 1302***](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.pdf)

**FEBRUARY 15, 2021: FAMILY DAY / READING WEEK**

**WEEK 6: FEBRUARY 22, 2021** *-* **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
* Contributory negligence: ***Uy v. Dhillon,*** [***2020 BCSC 1302***](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.pdf)

**WEEK 7: March 1, 2021 – 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.
* Client management
* The difficult client and getting off the record.

**WEEK 8: March 8, 2021 - 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.*
* See also: *Uy v. Dhillon,* [2019 BCSC 2435](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc2435/2019bcsc2435.html?resultIndex=3); and *Crawford v. Nazif,* [2019 BCSC 2336](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc2336/2019bcsc2336.pdf)
* 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 15, 2021 – 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 22, 2021 – 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.*
  + See *Crawford v. Nazif,* [2019 BCSC 2337](https://d.docs.live.net/21e06839071c083d/Desktop/13.05.docx)
* 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 29, 2021**

**Post Trial/Settlement Procedures**

* Post-judgment interest, tax gross-up, management fee
* Costs, offers to settle, and taxations.
* Public Guardian and Trustee review of infant settlements.
* Appeals of judge versus jury trial judgments.

**Part 7 Benefits, Subrogated First Party Insurers**

* <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/447_83_07>
* Elimination of subrogation rights under the new section 83?
* Section 83 deductions, see: *Del Bianco v. Yang,* [*2020 BCSC 410*](https://www.kazlaw.ca/wp-content/uploads/2020/03/Del-Bianco-v.-Yang-2020-BCSC-410.pdf)*; Silverston v. Griffin,* [*2020 BCSC 0528*](https://www.bccourts.ca/jdb-txt/sc/20/05/2020BCSC0528.htm)

**April 5, 2021 – EASTER MONDAY**

**April 12, 2021 – Optional class: Review of Course Materials and Exam Prep**

**FINAL EXAM: THURSDAY, APRIL 22, 2021 at 8:50 AM**

[**https://allard.ubc.ca/sites/default/files/2020-11/Exam\_Schedule\_Spring\_2021.pdf**](https://allard.ubc.ca/sites/default/files/2020-11/Exam_Schedule_Spring_2021.pdf)