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| Law 435C.001 | Personal Injury Advocacy | 2021 Term 2 |
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**WEEK SIX: The Defence of Personal Injury Claims**

1. **TEACHING OBJECTIVES & OVERVIEW**

The goal of this week’s class is to cover personal injury law from the perspective of the defence, including consideration of the relationship as between defence counsel, the insured defendant, and the insurer (the “Tripartite Relationship”), and the full and partial defences that may be advanced.

Readings:

* *Lukasiewicz et al.,* “A Lawyer’s Duty to Opposing Counsel,” The Advocates’ Society, available [online here](https://www.advocates.ca/Upload/Files/PDF/Advocacy/InstituteforCivilityandProfessionalism/Duty_to_Opposing_Counsel.pdf).
Law Society of BC, *Practice Resources*, Joint Retainer Letter, [available online](https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ltr-joint-retainer.pdf).
* [*Holt v. Rother*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=50893), 2013 BCSC 1065
* Surveillance:
* *Williams v. Sekhon,* [2019 BCSC 1511](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1511/2019bcsc1511.html), at paras. 183-223
* Marchitelli, Rosa, [“Injured woman secretly videotaped by insurer, then wrongly accused of fraud,”](https://www.cbc.ca/news/canada/toronto/insurance-surveillance-injured-1.5899254) CBC News, 8/FEB/2021
* The battle between commercial and public safety interests, see: [Kovacs, S.L., “Liability waivers becoming a foe, not friend to the public interest,” The Lawyers Daily, August 29, 2017](https://docs.wixstatic.com/ugd/682071_3510c909d57b43ffaa7b50ce40adafb2.pdf).
* *Jamieson v. Whistler Mountain Resort Limited Partnership,* [2017 BCSC 1001](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc1001/2017bcsc1001.pdf)
* *Dhaliwal v. City of Richmond,* [A1600870 (Re), 2017 CanLII 53435 (BC WCAT)](https://www.canlii.org/en/bc/bcwcat/doc/2017/2017canlii53435/2017canlii53435.pdf)
* *Uy v. Dhillon,* [2019 BCSC 1136](https://www.bccourts.ca/jdb-txt/sc/19/11/2019BCSC1136.htm)
* *Forghani-Esfahani v Lester,* [2019 BCSC 332](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc332/2019bcsc332.pdf)
1. **CIVILITY AND COURTESY**

Law Society of BC, *Code of Professional Conduct*, Chapter 7:

7.2-1 A **lawyer** must be courteous and civil and act in good faith with all persons with whom the **lawyer** has dealings in the course of his or her practice.

1. **THE TRIPARTITE RELATIONSHIP**
* When retained and instructed as defence counsel by an insurer, e.g. ICBC, you have two clients: the insurer and the insured. This is so even if you are in-house counsel at ICBC. It is essentially a joint retainer, but only one of your clients is paying the bill.
* LSBC Rule 3.4-1: A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted by this Code.
	+ Commentary [1]: As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.
	+ Commentary [2]: A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.
* What governs the relationship between your two clients? *The insurance policy*.
* What is a policy of insurance at its core? *A contract between two parties*.
* Would you ever normally act for both parties to a contract? *Of course not*.
* The purpose of an insurance policy is to indemnify the insured for any judgment exposure associated with a covered risk. For example, under a motor vehicle liability policy, the insurer is promising to indemnify the insured for the judgment(s) the insured is obligated to pay to third parties because of his or her negligence.
* Every liability policy includes a “duty to defend” clause, this is a useful clause because (a) it gives the insured access to legal counsel that he or she might not otherwise be able to afford, and (b) it permits the insurer to instruct defence counsel in order to minimize the indemnity exposure.
* It is widely accepted (including by the Law Society) that defence counsel appointed under an insurance policy is under a joint retainer and owes a duty of loyalty to both the insurer and the insured.
* Examples of possible conflicts that can arise in the tripartite relationship:
	+ On appointment, the insurer asks you to help them write a reservation of rights letter to the insured (indicating a defence will be provided but that indemnity coverage may later be contentious depending on the outcome of the claim), on their letterhead, and then continue on with the defence. Is this appropriate? *No, although in practice it is done frequently. To do this puts DC in a direct conflict of interest before he or she even picks up the file to defend the insured’s interests in the litigation. You wouldn’t prepare a ROR letter mid-litigation, therefore you shouldn’t agree to write one before you file the responsive pleading either.*
	+ The policy limits are not enough to cover the anticipated claim(s) against the insured. Do you give advice to either the insurer or the insured about how the insufficient limits affect their respective interests? *No: you identify the policy limits exposure in writing, to each, and you recommend each of your clients seek independent limits counsel.*
	+ In the course of preparing your defendant insured driver for an examination for discovery, she confesses to you that she was intoxicated at the time of the motor vehicle accident.
		- Can / should you share that information with the liability insurer? *No. You must withdraw without sharing that information with either the insurer or the insured, and advise each to seek independent legal advice. New defence counsel will be appointed.*
		- How does the outcome change if your insured confesses she was intoxicated during the discovery? *If the information was not revealed to you under the cloak of solicitor-client privilege, you are free to report the fact to the insurer, but you must refrain from commenting upon whether the insured has breached her contract with her insurer.*
	+ In the course of defending, you realize the claim may exceed primary limits but there is additional umbrella or excess coverage available. What do you do? *You inform both the insurer and the insured in writing of the possibility that the primary layer may be exceeded and that they may wish to put the excess insurer on notice.* *The excess insurer may also then become your client.*
1. **FULL DEFENCES**
2. **No Negligence / Defence of Explanation**
* Negligence cannot be inferred where the defence leads in evidence alternative explanations of how the accident may have occurred without negligence on the defendant’s part: [*Fontaine v. Loewen Estate (Official Administrator)*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=1370), [1998] 1 S.C.R. 424; [*Nason v. Nunes*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=14462), 2008 BCCA 203; [*Michel (Litigation Guardian of) v. John Doe*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=15356), 2009 BCCA 225, leave to appeal refused [2009] S.C.C.A. No. 324 (QL); [*Singleton v. Morris*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=17953), 2010 BCCA 48.
* The plaintiff carries the burden of proof: [*Waters v. Mariash*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=24095), 2012 BCSC 927.
* Examples of situations where no negligence may arise:
	+ Mechanical failure, such as unforeseen brake failures: see [*Chow-Hidasi v. Hidasi*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=20620), 2011 BCSC 583, affirmed 2013 BCCA 73, [*Little v. Einarsen*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=53371), 2015 BCSC 2127, [*Delgiglio v. British Columbia (Public Safety and Solicitor General)*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=24000), 2012 BCSC 480;
	+ Unexpected ice: [*Johns v. Friesen*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=20661), 2011 BCSC 1694 and [*Collins v. Rees*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=23994), 2012 BCSC 1460;
	+ Wildlife / animals or other unexpected obstructions on the road: [*Racy v. Leask*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=20693), 2011 BCSC 846 (moose on road), *Waters v. Mariash* (tree falling on roadway), but see [*Ziemer v. Wheeler*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=51724), 2014 BCSC 2049 where the driver was not negligent for hitting a moose, but was negligent for failing to warn other drivers of the carcass on the road) and [*Knight (Litigation guardian of) v. Knight*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=53362), 2014 BCSC 1478 (where the court refers to ICBC’s *Learn to Drive Smart* Manual as being relevant to the standard of care that applies to animals on the road).
	+ In single-vehicle emergency cases, the proper test is whether the driver or cyclist responded reasonably in an emergency situation, sometimes referred to as the defence of “agony of the moment” (see [*Mayne v. Mayne*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=50310), 2013 BCSC 391 and [*Graham v. Carson*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=53346), 2015 BCCA 310). If there is no emergency, the agony of the moment defence doesn’t apply ([*Ackley v. Audette*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=53311), 2015 BCSC 1272 at paras. 134 and 135).
* *For discussion: What are some examples of reasonable steps a defendant, with warning of winter road conditions, can take to avoid an accident?*
1. **Inevitable Accident**
* The defence of inevitable accident involves circumstances beyond the defendant’s control, “the effect of which could not have been avoided by the greatest care and skill”: see [*Rintoul v. X-Ray & Radium Industries Ltd.*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=23137), [1956] S.C.R. 674 at 678).
* A defendant who advances the defence of inevitable accident carries the burden of proving that he or she used reasonable care, which differs from explaining how the accident might have occurred without his or her negligence: [*Hearn v. Rowland*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=1484) (1988), 33 B.C.L.R. (2d) 67 (C.A.).
* The difference between the defence of inevitable accident and the defence of explanation has been described as follows: see [*Holt v. Rother*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=50893), 2013 BCSC 1065 at para. 13:

In *Perry v. Banno*, Brenner J. (as he then was) distinguished between the defence of explanation and that of inevitable accident: the former rests on circumstances external to the driver, such as the presence of black ice on the road; the latter arises from circumstances “wholly within the defendant himself”. The onus of proof necessary to avoid liability differs depending on which defence is at issue. In the case of the defence of explanation, the defendant must only establish how the accident may reasonably have happened without negligence on his or her part. If that is done, then the plaintiff will not succeed because he or she will not have discharged the burden of proving negligence. On the other hand, if the defence is inevitable accident, the burden is greater. Such a defence is only made out upon proof on a balance of probabilities that the driving was not the product of conscious acts on the part of the defendant.

* A common example where the defence of inevitable accident is applied is where the driver has had an unanticipated loss of consciousness due to medical reasons: see [*Johnson v. Carter*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=12774), 2007 BCSC 622; *Holt v. Rother*; [*H. (S.) v. M. (A.)*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=53349), 2015 BCSC 2400.
* A defendant advancing the defence of inevitable accident must establish that the situation was not reasonably foreseeable and that he or she could not have avoided the accident by the exercise of reasonable care once the situation unfolded.
* For example, in an accident that occurred because the defendant lost consciousness at the wheel, the court considered whether the defendant had any preliminary symptoms or warning of the illness: [*Slattery v. Haley*](http://pm.cle.bc.ca/clebc-pm-web/manual/42751/reference/casePopup.do?id=2106), [1923] 3 D.L.R. 156 (Ont. C.A.).

**(c) Waiver**

A plaintiff can waive his or her right to sue a defendant for damages for injuries, e.g. by signing a liability waiver form. A signed waiver is a contract between the plaintiff and the defendant.

* The battle between commercial and public safety interests, see: [Kovacs, S.L., “Liability waivers becoming a foe, not friend to the public interest,” The Lawyers Daily, August 29, 2017](https://docs.wixstatic.com/ugd/682071_3510c909d57b43ffaa7b50ce40adafb2.pdf).
* A recent decision: *Jamieson v. Whistler Mountain Resort Limited Partnership,* 2017 BCSC 1001.
	+ Blake Jamieson was rendered a quadriplegic following a mountain biking crash in Whistler Bike Park. He sued Whistler, but the judge dismissed his action finding that Whistler’s release operated as a binding contract where Jamieson had waived his right to sue for injury.
	+ The release in question was four pages and printed on standard 8 ½ x 11 paper. In a box outlined in red and highlighted in yellow, the following text was set out:

**TO WAIVE ANY AND ALL CLAIMS I have or may in the future have against the RELEASEES AND TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death, that I may suffer or that my next of kin may suffer, as a result of my participation in Mountain Biking,**

* + There were also signs in the Park stating that “**WHISTLER MOUNTAIN’S LIABILITY FOR ANY INJURY OR LOSS IS EXCLUDED BY THE TERMS AND CONDITIONS ON YOUR TICKET OR BIKE PARK PASS RELEASE OF LIABILITY**.”
	+ Mr. Jamieson attempted to avoid the waiver by arguing that he did not understand that a spinal cord injury was a possible consequence of mountain biking, but there was evidence of his familiarity with Whistler Mountain and the bike park, and the injuries that could happen, because of his previous experience as a volunteer patroller. He had used precautionary spinal procedures in evacuating other riders. Thus, the precedential value of this case could be limited by its facts. Much depends on the recreational facility’s waiver wording, and collateral efforts (i.e. signage, process) to ensure the patron understands the rights he is waiving.
* There is protection for for-profit operators even where the operator’s negligence is the sole cause of injury, see: *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.
	+ Ms. Loychuk and Ms. Westgeest signed releases before participating in a zip trek tour on Cougar Mountain, north of Whistler. They collided while traveling on the same zip line, because a guide sent Westgeest down the zipline while Loychuk was still suspended mid-line. Both suffered injuries, through no fault of their own.
	+ Cougar Mountain admitted their employees were negligent but argued that the waiver signed by both plaintiffs excluded any liability, even where the sole cause of the accident was their own negligence. The court found that the exclusion clause was not unconscionable and applied. A person can decline to sign the release if he or she does not wish to participate in the recreational activity. The agreements were signed “knowingly and voluntarily” and the activity was one that was inherently risky.
	+ A court has residual power to decline the enforcement of an exclusion clause where to give effect to the clause would endanger the public by providing a substandard product or service, or where the party was acting recklessly.
* Ordinary versus inherently risky activities – *Chamberlin v. Canadian Physiotherapy Association*, 2015 BCSC 1260:
	+ In this case, the plaintiff was injured while participating in a continuing education course for physiotherapists organized by the defendant. The defendant argued the plaintiff waived her claim to any damages because she signed a waiver of release and that she willingly assumed the risks participating in the course.
	+ The court rejected the defence of waiver. The court found that the nature of the activity, notwithstanding a waiver, did not mean all risks were wholly accepted by the participants including the plaintiff (para. 79). The court noted at para. 88:

[88] Notwithstanding what Ms. Lee and Mr. Cope had to say about their identical understandings of the Waiver and its legal implications, I am of the opinion that a reasonable participant at the Course would not have understood or expected that he or she was agreeing to such onerous legal risks, particularly given the general language of the Waiver and its lack of specificity with respect to negligence. Ms. Chamberlin contends that she understood the Waiver to be similar to waivers used in her practice, which she says “prevent any lawsuits for soreness or minor pain after treatment.” The circumstances of this case are not analogous to recreational sporting activities like skiing, racing, white water rafting, zip-lining, or scuba diving, where, given the inherent risks and social expectations surrounding the allocation of risk, a willing participant in such activities reasonably expects that he or she assumes all risks of injury.

**(d) Worker-Worker**

If a person’s injuries arise out of and in the course of his or her employment, and another worker or employer is allegedly responsible for those injuries, the claim for damages for injuries falls within the scope of Part 1, section 10 of the *Workers Compensation Act* thereby precluding any ICBC claim.

* The Workers’ Compensation Appeal Tribunal has jurisdiction to determine this question of fact.
* The WCAT considers nine factors in assessing whether a particular injury arises out of and in the course of employment:
1. On Employer’s Premises

(2)   For Employer’s Benefit

(3)   Instructions From the Employer

(4)   Equipment Supplied by the Employer

(5)   Receipt of Payment or Other Consideration from the Employer

(6) During a Time Period for which the Worker was Being Paid or Receiving Other Consideration

(7) Activity of the Employer, a Fellow Employee, or the Worker

(8) Part of Job

(9)   Supervision

Assigned reading: *Dhaliwal v. City of Richmond, (A1600870 (Re), 2017 CanLII 53435 (BC WCAT))*:

* In this case, the plaintiff and defendant were employed by the City of Richmond. The plaintiff was involved in a carpooling program and was injured in a car accident while commuting home after work.
* The WCAT determined that the plaintiff was a worker at the time of the accident but that the plaintiff’s injuries did not arise out of and in the course of employment. The tribunal considered the evidence mixed with regard to the nine factors considered. The tribunal’s decision turned on the key fact that the employees bore a significant percentage of the carpool expenses (deducted from their paycheques) such that the carpool could not be considered as provided by the employer (para. 128).

**(d) Limitation Period**

Under the *Limitation Act*, S.B.C. 2012, c. 13, s. 6(2) a person has two years from the date the cause of action arose to file action.

The cause of action arises on the date of discovery. *When is a claim discovered?*

* A claim is discovered when a reasonable person in the plaintiff’s position would have become aware that:
	+ (1) they have suffered injuries;
	+ (2) their injuries were caused by the defendant(s); and
	+ (3) suing the defendant(s) for damages would have a reasonable prospect of success.
* In *N.T. v. British Columbia,* 2017 BCSC 1742, the plaintiff sued two doctors claiming they were negligent in diagnosing and treating him which led him being certified as an involuntary patient. He was certified as an involuntary patient in 2000 and by 2002, he wrote letters to the doctors to have them reconsider their diagnosis and treatment. His involuntary status was last renewed in 2012. He eventually obtained second medical opinions and was discharged from involuntary patient status in 2015. He filed his claim against the doctors in 2016. The trial judge affirmed the limitations defence:

48 The first matter to be determined is the date on which the plaintiff's cause of action first arose in respect of each the defendants. It is now trite law that this will be the date that the allegedly negligent conduct occurred.

Postponing the limitation period

* Sections 6(3) to 6(6) of the *Act* provide for the postponement of the running of the limitation period in certain circumstances.
* Change in appreciation of injuries does not postpone limitation period – see *Bell v. Wigmore,* 2017 BCCA 82 where a plaintiff suffered an injury to his eardrum but later realized after the limitation period that his injury was likely to be permanent. The trial judge and Court of Appeal affirmed the limitation defence:

[23] The mere fact that injuries prove to be more severe than initially believed will not serve to postpone the running of the limitation period: Peixeiro v. Haberman, [1997] 3 S.C.R. 549; Craig v. Insurance Corporation of British Columbia, 2005 BCCA 275. On the other hand, where it can be shown that the injuries were not, initially, sufficiently serious that a reasonable person would seek advice concerning a lawsuit, the running of the limitation period may be postponed to a time when the seriousness of the injuries became evident.

**3 REDUCING THE EXPOSURE (PARTIAL DEFENCES)**

**(a) Credibility**

\*In some circumstances, attacking a plaintiff’s credibility can be a complete defence, but in most cases it is a means of reducing the exposure.

Assigned reading: *A Tangled Web – Credibility in Personal Injury Cases:* Alison L. Murray QC

* The plaintiff’s credibility must be assessed based on objective probabilities – *Sharma v MacDonald*, 2017 BCSC 2121 at para. 210 citing *Faryna v. Chorny* [1952] 2 D.L.R. 345:

An assessment of the plaintiff's credibility is critical: The test must reasonably subject his story to an examination of its consistency with the probabilities which surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

* *Kingston v. Warden,* 2017 BCSC 794 at para 117 citing Madam Justice Dhillon in *Bradshaw v. Stenner*, 2010 BCSC 1398:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560(S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Farnya v. Chorny, [1952] 2 D.L.R. 354(B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

* + Duncan J. in *Kingston supra* at para 118 further noted Madam Justice Dhillon’s comment in *Bradshaw* that the inability to produce relevant documents to support a claim is a relevant factor that negatively affects credibility.

* *Schellak v. Barr,* 2003 BCCA 5, paras. 19-20; aff’d *Schellak v. Barr*, [2003] S.C.C.A. No. 91:

19 There is room at the appellate level to interfere with a trial judge's finding as to credibility. However, to do so there must be a compelling reason arising out of the trial judge's analysis.

20 In the case at bar the trial judge tested Ms. Schellak's testimony from several different angles. I am satisfied, to paraphrase Mr. Justice O'Halloran in Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.), that the trial judge's finding of credibility was based not on one element only to the exclusion of others, but was based on all the elements by which it can be tested in the particular case.

* A plaintiff is still credible even when they are not – *Koltai v. Wang*, 2017 BCCA 152 at para. 86 distinguishing *Mariano v. Campbell,* 2010 BCCA 410:

86 Applying the R.E.M. approach to the task of this Court on appeal (which my colleague outlines at para. 43 of these reasons and which I have also alluded to above), in my view, the above reasons, while succinct in the context of a 315-paragraph judgment, adequately disclose how the trial judge resolved contradictory evidence (in particular, para. 238) and demonstrate that he was keenly aware of the importance of credibility and the impact of Mr. Koltai's self-reporting on the reliability of the medical evidence (this is apparent from paras. 239 and 247). In the words of Justice Groberman in Mariano at para. 51, there was a body of evidence on which the trial judge could rely to believe at least portions of Mr. Koltai's evidence. His reasons clearly demonstrate his appreciation of the contradictory evidence and disclose how he came to the conclusions that he did.

* Deference is afforded to a trial judge’s assessments of plaintiff’s credibility – *Ibister v. Delong,* 2017 BCCA 340 at para. 38 citing *R. v. Gagnon*, 2006 SCC 17 at para. 20:

38 Assessing credibility is not a science. A trial judge has an "overwhelming advantage" in making such assessments, which are entitled to deference absent a showing of palpable and overriding error: Housen v. Nikolaisen, 2002 SCC 33 at para. 24, [2002] 2 S.C.R. 235; R. v. Gagnon, 2006 SCC 17 at para. 20, [2006] 1 S.C.R. 621. It is not for this Court to reweigh the factors that were open to a judge to consider in making a credibility assessment.

* *Sharma v. MacDonald,* 2017 BCSC 2121 a para. 210 citing *Edmondson v. Payer*, 2011 BCSC 118

The doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room Edmondson v. Payer, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114

* Reliability vs. Credibility: *Julian v. Joyce,* 2016 BCSC 1417:

36 It is not submitted by the defendants that the evidence of Mr. Julian is not credible; they say that his evidence is not reliable. I agree.

37 Mr. Julian testified in an engaging manner. He appeared to be earnestly attempting to solve the puzzle of what occurred in the accident. His positive demeanour did not vary from direct to cross-examination. However, Mr. Julian's evidence is fraught with inconsistencies in relevant areas. It is also contradicted by the photographic evidence.

* *Koltai v. Wang*, [2015] B.C.J. No. 1656:

219 I have grave reservations about the plaintiff's reliability and credibility in his presentation to the Court. As I have outlined above, the defence made significant challenges to his credibility which I agree compromised his credibility.

* Cross examination of plaintiffs – courts are more favourable toward plaintiffs who are consistent in their evidence andwho appear reasonable – *Ross v Dupuis*, 2017 BCSC 2159:

[117] As is the case in most personal injury actions, the most important witness is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff’s evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.

[118] A plaintiff who accurately describes her symptoms and circumstances before and after the collision without minimizing or embellishing them can reasonably anticipate that the court will find his or her evidence to have been credible and reliable.

[120] Overall, I found that the plaintiff to be a genuine and honest witness who testified in a sincere, forthright, and credible manner. Her credibility was enhanced by her willingness to agree, without hesitation, with questions put to her on cross-examination when appropriate even when her answers went against her interest, for example, her pre-existing pain symptoms and her candid acceptance of statements attributed to her in the various clinical records of physicians who were not called to testify on the basis that “if it’s recorded there I probably said those things”.

* Subjective reports of pain and medical opinion – while a plaintiff’s credibility can reduce the weight of a medical opinion, the opposite is true as well. Lack of reliable medical opinion can help buttress a plaintiff’s credibility – *Davidge v. Fairholm,* 2014 BCSC 1948:

127 Dr. Sovio's off-hand opinion in relation to causation was not well explained. From the context of his evidence, it appeared to be based on his view that the patient had new onset of low back pain that was not there before, seven months after the accident (i.e. it was new when first noted in Dr. Rebeyka's April 9, 2010 clinical record). This was despite the plaintiff telling Dr. Sovio that he had low back pain almost immediately after the accident. In other words, Dr. Sovio chose to not believe the plaintiff because Dr. Sovio did not see low back pain documented in the clinical records until later.

132 Dr. Sovio performs many assessments for the Workers' Compensation Board, and he made it clear in his evidence that he thinks many workers injured at work simply would prefer not to return to work even though they do not have a good reason for not returning. He offered this as his explanation for discounting the opinion of the plaintiff's general physician. Unfortunately I felt that Dr. Sovio was unduly cynical and had a bias in this regard and so viewed the plaintiff's own reports of back pain as not worthy of any weight, which is not an objective approach.

**Low Velocity Collisions**

* Absence of damage or minimal damage sustained in accident is not determinative of whether an injury was sustained. However, a court will take into account negative contingencies which weigh against a plaintiff’s credibility (*Gignac v. Rozylo,* 2012 BCCA 351 rev’g (in part) *Gignac v. Rozylo,* 2010 BCSC 595)
* The ‘LVI’ defence has been firmly rejected by the BCSC on several occasions: see, for example, *Duda v. Sekhon,* 2015 BCSC 2393 at para. 62:

[62]        Counsel for the defendants spent considerable time and effort making the submission that the two accidents did not cause significant motor vehicle damage. However, it has been clearly established in Canadian law that minimal motor vehicle damage is not “the yardstick by which to measure the extent of the injuries suffered by the plaintiff”. Mr. Justice Macaulay stated in *Lubick v. Mei and another*, [2008 BCSC 555](https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc555/2008bcsc555.html) at para. [5](https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc555/2008bcsc555.html#par5):

The Courts have long debunked as myth the suggestion that low impact can be directly correlated with lack of compensable injury. In *Gordon v. Palmer*, [1993 CanLII 1318 (BC SC)](https://www.canlii.org/en/bc/bcsc/doc/1993/1993canlii1318/1993canlii1318.html), [1993] B.C.J. No. 474 (S.C.), Thackray J., as he then was, made the following comments that are still apposite today:

I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.

He goes on to point out that the presence and extent of injuries are determined on the evidence, not with “extraneous philosophies that some would impose on the judicial process”. In particular, he noted that there was no evidence to substantiate the defence theory in the case before him. Similarly, there is no evidence to substantiate the defence contention that Lubick could not have sustained any injury here because the vehicle impact was slight.

**Experts for Hire**

* Experts for hire & records-only reviews – *Ross v Dupuis*, 2017 BCSC 2159:

[84] I am concerned by what appears to be a growing trend among some medical practitioners to view medical-legal reports as a profit-motivated business to be run as efficiently as possible. I find it difficult to accept that any medical specialist, regardless of experience and expertise, is able to accurately opine on the cause of a patient’s injury by simply reviewing the clinical records prepared by others and conducting a 15-minute physical examination in respect of an injury sustained over four years after a motor vehicle crash. My concern is heightened in this case by the fact that the primary interview of the patient was conducted by someone other than the expert. This form of assumption-based, mass-produced, “cookie cutter” opinion evidence is generally unconvincing and unhelpful to the court.

**Surveillance**

* Video surveillance is often not persuasive unless it shows activities contrary to what the plaintiff asserts – *Koltai v. Wang*, [2015] B.C.J. No. 1656:

220 I am unable to conclude that the plaintiff's description of his limitations in movement and his capacity to lift and carry objects is entirely reliable. I have reached this conclusion because there are inherent improbabilities in his testimony concerning his limitations. The differences in his physical performance observed on the video surveillance and compared to his physical presentation at trial and when he was attending the Orion Health Clinic erode my confidence in his reliability. I accept that the video surveillance was carried out over short periods of time and there is a paucity of evidence concerning his physical state before or after those incidents. However, these inconsistencies coupled with the other flaws in his testimony lead me to conclude that the truth of the story of a witness is not in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" at those times and places referred to.

* For discussion: Marchitelli, Rosa, [“Injured woman secretly videotaped by insurer, then wrongly accused of fraud,”](https://www.cbc.ca/news/canada/toronto/insurance-surveillance-injured-1.5899254) CBC News, 8/FEB/2021
* Mr. Justice Voith in *Williams v. Sekhon,* [2019 BCSC 1511](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc1511/2019bcsc1511.html), at paras. 183-223:

[183]     The Plaintiff seeks an award of special costs of the proceeding against the Defendant on the basis that the investigators working for the Defendant's insurer "grossly exceeded" the legitimate interests of an insured defendant to conduct an investigation into the validity of a personal injury claim and the consequential harm the investigation caused Mr. Williams by increasing "his depression and anxiety and his attendant feelings of embarrassment, shame, and low self-worth".

[184]     This issue was raised at the outset of the trial.  The Defendant thereafter, based on discussions between counsel and with the Court, made further disclosure of various records.  That disclosure, in the main, pertained to the extent, frequency, and nature of the investigation that was undertaken in relation to Mr. Williams and his claim while concurrently protecting various forms of privilege.

[185]     The Defendant called several witnesses, who were representatives of the various investigation firms that were retained by the Insurance Corporation, who were then cross-examined.

[186]     The documentary and *viva voce* evidence that relates to this issue is extremely detailed.  It reflects, with precision, exactly what work, over what time, was done by which individuals, who were employed by each of the four investigation firms that were retained by the Insurance Corporation, from 2015 to 2019, to look into Mr. Williams and the claim he advanced.  Seventeen different investigators from these four firms were used.  The documentation from two of these firms, in the form of records and reports, yielded nearly 200 pages.  The written submissions of counsel for the Plaintiff described more than a dozen discrete concerns with what they said occurred.  Each party in their respective submissions used unnecessary hyperbole to advance its position.

[187]     On account of the conclusions I have arrived at, I do not consider it necessary to address the issues that have been raised in such a detailed manner.  Because the issue of what constitutes a proper or, alternatively, an unreasonable and intrusive level of investigation appears to be one of first instance and because this does raise an important issue, I have endeavoured to address the matter as one of principle.  I have done so in order to provide the Insurance Corporation and other litigants with some guidance.

[188]     It is relevant that the Insurance Corporation has formal "Performance Standards for Private Investigators".  Those written standards include, *inter alia*, the following instructions:

a.            Pg. 4: ICBC requires that the degree of investigation undertaken on a claim file be proportionate to the complexity and risk associated with the claim. PIs must use discretion and common sense regarding the amount of information gathered in preparation of all reports.

b.            Pg. 5: 2. Reports must not contain the PI's opinion or unsubstantiated and gratuitous comments.

c.            Pg. 5: If asked for identification, the PI must provide his/her name and state that he/she is an owner, partner or employee (whichever is the case) of a provincially licenced private investigation firm that has been retained by ICBC. Identify the PI firm, but do not claim to be or give the impression of being an employee of ICBC.

d.            Pg. 6: PIs conducting investigations on behalf of ICBC must do so in a manner that will not alarm claimants or anyone else, nor give anyone reasonable cause for apprehension for public safety and security. All investigations must be carried out in the least obtrusive way possible while complying with the following requirements: (a) Do not:

•         enter on the private property of the person being investigated, except where the property is used by that person/for commercial purposes, and the investigation relates to that commercial purpose;

•         use a pretext or misrepresentation to gain access to any premises.

e.            Pg. 6: At all times, PIs must make all reasonable efforts to protect the privacy of individuals who are not under surveillance.

[189]     The fact that the Insurance Corporation has "Performance Standards" for its investigators is appropriate.  It recognizes that an investigation into the activities of a plaintiff, if not undertaken properly, has the potential to be intrusive, upsetting, and intimidating.

[190]     This reality gives rise to a necessary balancing of interests.  The Plaintiff accepts, and I do not question, the right of the Insurance Corporation to investigate those activities of a plaintiff that are relevant to the claim being advanced.  In most actions, a plaintiff has the advantage of being able to call friends and family to support the claim being made.  The evidence of these witnesses is often important because it adds content and texture to the plaintiff's claim.  It provides the Court with an insight into the life of the particular plaintiff before and after his or her accident.  It generally corroborates the evidence of the plaintiff.

[191]     The Insurance Corporation is, in a sense, at a disadvantage.  Absent independent medical examinations and absent its own investigations, it has limited means available to it to test a plaintiff's claim and evidence or the evidence of other witnesses.  It must necessarily ascertain whether there is other evidence or other witnesses whose evidence is relevant to that plaintiff's case.

[192]     On the other hand, counsel for the Defendant accepts, and I have no doubt, that there are limits with respect to (i) the object or purpose of an investigation, (ii) the degree of investigation that is appropriate, and (iii) the manner in which that investigation is conducted.

[193]     The object of an investigation should be limited to ascertaining whether the plaintiff's claim is forthright and reasonable.  Its purpose must be fact-finding in nature.  Its purpose cannot be to intimidate or embarrass a plaintiff.

[194]     These purposes, in turn, then define the scope of what investigation is appropriate.  The investigation should be proportionate to the magnitude and nature of the claim being advanced.  In this case, the claim advanced by Mr. Williams, for more than $2 million, was sizable.  Such a claim justifies a greater level of investigation.  His claim asserted that his work, his recreational and his social activities were all affected by the Accident.  These claims justified some investigation into each of these areas of Mr. Williams' life.

[195]     And yet, as the Insurance Corporation's "Performance Standards" recognize, "discretion and common sense" must be used "regarding the amount of information gathered".  When a claim for loss of earning capacity is advanced, it will normally be appropriate to speak to a plaintiff's employer or former employers and to a few past or present co-workers.  That level of inquiry should be sufficient to test and understand the plaintiff's claim.  If those enquiries support some reason for concern, it may be appropriate to go further.  If they do not, it will not, absent something unusual, normally be appropriate to speak to an employer repeatedly or to speak to an unreasonable number of a plaintiff's co-workers.  Excessive investigation will inevitably get back to a plaintiff and will be, at a minimum, embarrassing.  If it continues, it becomes intimidating.  It also has the prospect of casting a plaintiff in a poor light with others, as someone who is not honest or who is malingering.  Similar considerations pertain with respect to investigations or interviews with a plaintiff's friends, acquaintances or teammates.

[196]     The Insurance Corporation, or its investigators, can carry out three different kinds of investigation.  In some cases, such as this case, they will do all three.

[197]      The first form of investigation is described as an "Open Source Investigation".  The object of this investigation is to search public Internet and social media sites to learn more about a plaintiff's activities and to determine a plaintiff's level of function. Such sites are open to the public and there is nothing unlawful about searching them.  An open source investigation does not, or should not, breach any social media privacy settings.  Thus, the only information accessible to investigators is the information that is available to any member of the public.  All information is either posted by a plaintiff or by others with full knowledge that that information, including pictures, will be available to the public at large to view if they so desire.  I do not consider that reference by an investigator, retained by the Insurance Corporation, to such sites is improper.  This would include references to a social media site maintained by a plaintiff, or their immediate family, or their friends.  All such information is public and has the legitimate prospect of providing information about a plaintiff's activities and level of functionality.

[198]     In circumstances such as in the present case, where Mr. Williams has argued that the Accident curtailed his athletic activities and social interactions, social media sites had the legitimate prospect of providing the Insurance Corporation with relevant and useful information.  Indeed, counsel for the Defendant used information, for example, that was obtained from a search of the Facebook page of Spagnuolo and Company, to cross-examine Mr. Spagnuolo.

[199]     In this case, the investigators retained by the Insurance Corporation also looked, for example, to information in the Land Title Office.  Mr. Williams, for a time, stayed at his parents' home.  The investigators sought to ascertain who owned that home.  Again such information is public and I do not consider that activity was undertaken improperly.  To the extent investigators made similar inquiries about the ownership of Ms. Mitchell's condominium I again do not consider that unreasonable or improper.

[200]     I also understand that the Insurance Corporation has the resources and ability to ascertain who owns a vehicle.  To the extent those resources are used in a limited and fact-specific way, I do not consider this to be inappropriate.

[201]     The second form of investigation is the actual surveillance of a plaintiff.  The object of surveillance, necessarily undertaken surreptitiously, is to ascertain whether a plaintiff's actual or observed level of function and activity aligns with what that plaintiff asserts he or she is capable of doing.  There is nothing wrong, in concept, with such surveillance activity and it is a tool that is routinely relied on by the Insurance Corporation.

[202]     To the extent, however, that investigators become aware that their presence is known to a plaintiff, such surveillance is obviously ineffective.  If such surveillance persists, its purpose necessarily changes and it is difficult to see how ongoing surveillance could be justified.  In such circumstances the object of ongoing surveillance would be, at least in part, to communicate to a plaintiff that he or she is being watched or followed.

[203]     In this case, two separate firms, J.P. Moore Investigations Ltd. ("Moore") and Paladin Securities ("Paladin"), conducted surveillance of Mr. Williams.  The Moore work was done between late 2016 and April 18, 2017.  Three investigators were involved.  The time spent attempting to obtain video footage was some 24 hours.  The actual video footage obtained, once edited to remove scenes that did not show the Plaintiff, was less than an hour.  Mr. Moore described the steps taken to avoid alerting Mr. Williams to their presence and he testified that he believed the Plaintiff was unaware of the surveillance being undertaken.

[204]     The surveillance conducted by Paladin took place between July 4, 2018 and March 24, 2019.  Not including travel time and reporting time, which Mr. Williams could not have known about, Paladin attempted to obtain video surveillance on 25 days for a total of slightly more than 83 hours.  From this effort, Paladin was able to obtain approximately 42 minutes of unedited video footage, which was turned into approximately 31 minutes of footage that was edited to remove scenes where Mr. Williams was not present.

[205]     Both the Moore and the Paladin video footage was used at trial.

[206]     The witness put forth by Paladin testified that it was not Paladin's intent to harass Mr. Williams, his friends or his family.  That witness further testified that if Paladin suspected the Plaintiff knew he was under surveillance it would have aborted its activities.  I accept that evidence.

[207]     Mr. Williams testified that he was aware investigators were present at the arena where he and his teammates played hockey, that he found this upsetting and that he communicated this and other sources of concern to his counsel.  His counsel, in turn, sent an email to counsel for the Defendant on March 27, 2019 expressing concern over such surveillance and other matters I will turn to.  It is undisputed that after this email was delivered the surveillance of Mr. Williams ended.

[208]     The last form of investigation used is through witness interviews.  It is the form of investigation that is, in some senses, most fraught with risk.  This is so in various respects.  There is a very real prospect a plaintiff will learn that friends and colleagues are being contacted about them.  Furthermore, such interviews can affect a third-party's perception of a plaintiff.  A plaintiff's awareness that he or she is being investigated, particularly where that plaintiff is emotionally fragile or anxious or depressed, can be particularly distressing.

[209]     This does not mean that such interviews are inappropriate.  It simply means that judgment and discretion must be exercised when undertaking the process.

[210]     In this case various investigators from Paladin, Crawford Adjusters and Mercury Adjusters either sought to speak to or did speak to numerous witnesses.  Mr. Spagnuolo was contacted in the fall of 2016 and again in May 2019.  Mr. Ford was contacted in May 2019.  Mr. Sadler, the Plaintiff's employer at Lender Connect, who did not give evidence at trial, was contacted in the fall of 2016.  Mr. Tulk and Mr. Gomes, who were the Plaintiff's roommates at different times, were called by investigators though Mr. Gomes, who did not give evidence at trial, was not contacted successfully.  Most of these witnesses, I understand, indicated that they did not wish to speak to the investigator who contacted them.  There is no evidence that any of them were harassed in any way.

[211]     Two investigators with Paladin also sought to contact, or did contact, approximately 20 individuals who were on Mr. Williams' hockey team.  Those efforts took place between October 3, 2018 and November 1, 2018.  Generally speaking, if the investigator left a message and their call was not returned they would try again.  If an individual indicated that they were not able to speak at that time, the investigator would again try to contact them at a later time.  If an individual indicated he did not wish to speak to the investigator, that individual would not be called again.

[212]     The individual who did most of these interviews, Mr. Smith, testified that almost none of the people who were contacted were prepared to speak to an investigator.  Mr. Smith said that if he had been able to get information from two or three such individuals, and if that information was generally consistent, he would not have persisted further or contacted anyone else.

[213]     The difficulty, however, is that Mr. Smith contacted 17 individuals within the space of a few days.  He did not wait for people to get back to him before he continued with his work.  I appreciate that to some degree what Mr. Smith did was efficient.  At the same time, his shotgun approach was the very approach or behaviour that can cause the sort of upset and difficulty that I have described.  It was inevitable that with such behaviour Mr. Williams and his teammates would discuss what was happening, as they did, and that such discussions would be upsetting for Mr. Williams.  It was not consistent with the direction in the "Performance Standards" that investigations are to be carried out in the "least obtrusive way possible".

[214]     There is further evidence that another investigator with Paladin tried to contact one of Mr. Williams' teammates by attending at his home.  That teammate was not at home at the time and the investigator spoke to his son.  Mr. Smith explained that it is often more effective to attend at an individual's home than to try to speak to them over the phone.  That may be but such behaviour is necessarily more intrusive and more invasive.  Even if done politely it has the air of being more aggressive.  Arriving unannounced on the doorstep of a friend or teammate of a plaintiff is, again, likely to get back to that plaintiff and to be, at a minimum, embarrassing.

[215]     There is also evidence that one of Mr. Williams' teammates, Mr. Clarkson, who gave evidence at trial, received an email from his workplace indicating that someone from "BC Hydro" had called him and asked him to return the call.  That individual was identified in the email as "Mr. Smith" and he had left his phone number.  When Mr. Clarkson returned the call, Mr. Smith identified himself as someone working on behalf of ICBC.  At that point Mr. Clarkson told Mr. Smith that he did not wish to discuss the Plaintiff's claim.  Mr. Smith, in his evidence, denied seeking to contact Mr. Clarkson or any witness through false pretenses.  I am satisfied that both witnesses were truthful.  There is a real prospect that there was some miscommunication between Mr. Smith and the individual who subsequently sent an email to Mr. Clarkson.

[216]     To the extent, however, that an investigator misrepresents their status or identity, in order to speak to a potential witness, that would clearly be wrong.  It would also be inconsistent with the Insurance Corporation's "Performance Standards".

[217]     There was also an indication, in a file that was produced, that an individual within the Insurance Corporation had instructed Paladin's investigators to conduct interviews of the persons who had been present at one or more weddings that Mr. Williams had attended.  There is no evidence this was done.  Nevertheless, it will be apparent that such a sweeping instruction, particularly if conducted as broadly and bluntly as the attempted interviews with Mr. Williams' teammates, would, absent something unusual, be excessive and inappropriate.

## i.         The Relevant Legal Framework and Conclusions

[218]     The test for when special costs should be awarded was described by Mr. Justice Lambert, for a unanimous Court, in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), [1994 CanLII 2570 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1994/1994canlii2570/1994canlii2570.html), 9 B.C.L.R. (3d) 242 (C.A.) at para. [17](https://www.canlii.org/en/bc/bcca/doc/1994/1994canlii2570/1994canlii2570.html#par17):

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, [1993 CanLII 34 (SCC)](https://www.canlii.org/en/ca/scc/doc/1993/1993canlii34/1993canlii34.html), 84 B.C.L.R. (2d) 1, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, 74 B.C.L.R. (2d) 311, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung*, 77 B.C.L.R. (2d) 314, in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

See also *Smithies Holdings Inc. v. RCV Holdings Ltd.*, [2017 BCCA 177](https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca177/2017bcca177.html) at paras. [56–58](https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca177/2017bcca177.html#par56).

[219]     Special costs will be awarded in circumstances where conduct, within the litigation itself, warrants sanction and the court's rebuke: *Smithies* at paras. 128 and 131–133.  In concept, the conduct of investigators who are retained by the Insurance Corporation, to investigate a plaintiff's claim, and who act in a manner that warrants the court's rebuke, is subject to an award of special costs.

[220]     I do not, however, consider that such a cost award would be appropriate in the circumstances of this case.  There are various aspects of the work that was undertaken by the investigators who were assigned to the Plaintiff's case that were entirely appropriate.

[221]     There are other aspects of that work that are more troublesome.  I have said that it would be better if, in circumstances where a broad range of individuals may have some information, to contact those individuals incrementally and to see if that limited endeavour will be sufficient.  This may be less efficient than contacting everyone at the same time but I consider that such restraint is appropriate.  To be specific, I do not consider that it would be appropriate to reach out to all of a plaintiff's teammates, or co-workers, or the guests at a wedding simultaneously in order to ascertain if one or two of them may have information and are willing to speak to an ongoing investigation.

[222]     I also consider that, in normal circumstances, arriving unannounced at the home of a third party, to attempt to obtain information, is to be discouraged.  That practice is, as I have said, inherently invasive.  In addition, there is the real prospect that the person who will open the door to speak to the investigator will be some other family member.  This necessarily, and without purpose, further widens the scope of the people who become aware that the claim of a plaintiff is being investigated.  None of this serves any useful purpose.

[223]     That said, I am satisfied that none of the investigation that was undertaken on behalf of the Defendant was undertaken with the object of causing the Plaintiff any upset or distress.  To the extent it had that effect, that consequence was inadvertent.  It was not conduct that warrants a punitive sanction.  Furthermore, there has been, until now, no formal or explicit direction from this Court that has addressed the issues raised by the Plaintiff.  Aspects of those issues are matters of judgment and discretion.  An award of special costs is an exceptional remedy: *Gibson v. F.K. Developments*,[2018 BCSC 437](https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc437/2018bcsc437.html) at para. [15](https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc437/2018bcsc437.html#par15) and *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, [2013 BCSC 1352](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1352/2013bcsc1352.html) at para. [73](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1352/2013bcsc1352.html#par73).  The circumstances that I have described, for the various reasons I have expressed, including the lack of guidance to date, do not justify the special cost award the Plaintiff seeks.

* Social media – In *Tambosso v. Holmes,* 2015 BCSC 359, the court rejected the extent of the plaintiff’s claim of injury, relying heavily on the plaintiff’s own Facebook posts:

[170] Throughout her evidence, the plaintiff testified that as a result of the PTSD and stress suffered as a result of the aftermath of the 2008 accident, her life completely changed from that of a vibrant, outgoing, industrious, ambitious, physically active, progressive and healthy young woman to that of a housebound, depressed, lethargic, forgetful, unmotivated woman who is unable to concentrate, cannot work, has friends only on the internet and whose “life sucks”.

[171] One hundred and ninety-four pages of Facebook entries from her Facebook page posted between May 7, 2007and July, 2011 were entered in evidence following an order for production by Master Tokarek in August 2011. There are extensive status updates, photographs, and other posts to the plaintiff’s Facebook page that at face value appear to directly contradict her evidence regarding her alleged injuries, and her state of mind following the 2008 accident in particular.

[172] It was submitted in argument that persons posting the events of their life on social media tend to post positive events and activities to portray themselves as “social” and avoid posting negative thoughts, events and news. There is no opinion evidence to support this submission, but I nonetheless approach the Facebook evidence with caution. However, even given potential frailties with this evidence I find there are numerous examples that buttress my findings on the plaintiff’s credibility.

[173] Examples of postings of the plaintiff on Facebook which conflict with the evidence of the plaintiff are many; I highlight some examples which are included in the Facebook pages found at Ex. 1, Tab 1:

... Facebook postings indicated that the plaintiff quickly returned to join her friends in social events following the 2008 accident. On July 29, 2008 and August 6, 2008, mere weeks after the 2008 accident, Ms. Tambosso was tagged in photo albums entitled “Kerri’s Stagette” and “Kerri’s Stag Part 2” that depict her drinking with friends and river tubing near Penticton. Similarly, numerous posts from October 2008 indicate the plaintiff eagerly anticipated and attended a Halloween party, including her RSVP message to the event page which stated “Yeah Party! You guys have the best parties. I’ll be there . . . with bells on! xoxoxo Sarah”,

**(b) Failure to mitigate**

A defendant can argue that the plaintiff failed to mitigate his or her damages thereby justifying a reduction in the damages award, e.g. for failing to return to work earlier than possible, failing to seek treatments, failing to follow medical advice.

The burden of proof is on the defendant to establish a failure to mitigate. The defendant must prove that the plaintiff could have avoided all or a portion of his/her loss.

Where the plaintiff has not pursued a course of medical treatment recommended by doctors, the defendant must prove:

1. That the plaintiff acted unreasonably in eschewing the recommended treatment, and
2. The extent, if any, to which the plaintiff’s damages would have been reduced had the plaintiff acted reasonably. (*Chiu v Chiu,* 2012 BCCA 618, citing *Janiak v Ippolito,* [1985] 1 SCR 146.)

Medical evidence is required to establish a failure to mitigate:

* In *Morgan v. Galbraith*, 2013 BCCA 305, the plaintiff was injured in a motor vehicle accident. At the time of the accident, the plaintiff was employed as a senior account manager at the Royal Bank of Canada (RBC). He was also a highly regarded lacrosse player and he continued playing (successfully) after the accident. However, he eventually quit his job at RBC due to his pain. At trial, the trial judge deducted the plaintiff’s non-pecuniary damages by 30% for failure to mitigate. The trial judge observed that after the accident, the plaintiff could not play lacrosse without pain-relief injections and as such, continuing to play lacrosse was not conducive to recovery (para. 41).
* On appeal by the defendant, the plaintiff cross-appealed the trial judge’s deduction of his non-pecuniary damages for failure to mitigate. On appeal, Madam Justice Garson writing for the Court, held:

[80] Although the judge did not explicitly find the extent to which lacrosse aggravated Mr. Morgan’s long term condition, in my view the judge’s findings support his conclusion that 30% was a reasonable reduction for Mr. Morgan’s continued pursuit of lacrosse in the face of both expert and his family’s advice that he should not play. It is also consistent with his similar reduction of the award for future loss of earning capacity, which is also a prospective award.

In *Forghani-Esfahani v Lester,* 2019 BCSC 332, the defendants argued that the plaintiff had failed to mitigate her losses and sought a deduction of 30-40% for all heads of damage.

* At paragraph 69, the Court set out:

[69] I conclude that in order to meet the second part of the *Chiu* test for failure to mitigate (the extent, if any, to which the plaintiff’s damages would have been reduced had he acted reasonably) the defendants must, first, establish a real and substantial possibility that any part of the losses could have been avoided. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.

* In finding that the defendants had not established a failure to mitigate, Mr. Justice Verhoven noted at para 72 that there was no medical opinion in evidence stating that any treatment the plaintiff decline to undergo would have had a real and substantial likelihood of improving the plaintiff’s condition, or the extent of the potential for improvement.

[73] The most straightforward method of establishing the point would be through a medical legal opinion. Dr. Craig was not asked to provide such an opinion and did not do so.

[74] The mere fact that various recommendations have been made and not always completely followed is not sufficient.

[75] In cross-examination Dr. Waseem stated that physiotherapy and massage therapy could have improved her function, but was unable to say to what extent. In my view this evidence does not go far enough. It only establishes that recommended therapies could have helped. Standing alone this is fairly obvious, as otherwise they would not have been recommended in the first place. Dr. Waseem’s main diagnosis is of CRPS. On his opinion, this condition is the predominant cause of the plaintiff’s problems. He declined to agree that more use of pain relief medications or recommended therapies would have or might have avoided the development of CRPS by the plaintiff.

[…]

[77] Again, it is not enough to show that the plaintiff failed to undergo some treatment or other. The defendants must establish failure to mitigate in relation to a specific loss or losses the plaintiff claims. In this case, it is the plaintiff’s hand condition that is by far the most relevant. The major losses the plaintiff complains of flow from her hand condition. As noted by Dr. Popovic:

Dr. Forghani-Esfahani readily admits that although annoying, her neck and shoulder complaints are not causing her any disability from a work perspective. However, she does state that her persistent right handed clumsiness and weakness are quite disabling at work (dentistry) and in leisure (gardening).

[78] The evidence does not support findings that there was a real and substantial possibility that a treatment the plaintiff unreasonably refused to undertake would have avoided this injury, or would have improved the condition to some degree, so as to be relevant to the damages claimed. More broadly the evidence does not establish that any part of the plaintiff’s injuries would have been improved had she undergone recommended treatment she unreasonably refused.

The implication of rational vs. impaired decision-making post-accident:

* In *Mullens v. Toor,* 2016 BCSC 1645, the plaintiff suffered physical and psychological injuries following a motor vehicle accident. The court found that the plaintiff’s decision not to follow medical advice in obtaining treatment constituted a failure to mitigate her damages. In particular, the court noted that the plaintiff’s failure to mitigate was a rational decision, not one influenced by the effects of the accident:

[123] A question is whether the plaintiff’s refusal to attempt to return to work and her reluctance to accept and failure to obtain full psychiatric treatment is rooted in her accident injuries, such that a deduction for failure to mitigate would not be appropriate. However there is no basis for such a finding in the medical or other evidence. The plaintiff is highly educated and intelligent. There is some evidence that she has experienced some cognitive difficulties but these are not severe. She displayed considerable intelligence in giving her evidence, especially in describing her previous work. I do not accept that the plaintiff was impaired in her rational decision-making capacity in relation to her career and her treatment.

**(c) Contributory Negligence**

* *Negligence Act,* R.S.B.C., c. 333, s. 4: a court may determine the degree of fault for damage or loss as between multiple persons, including the plaintiff.
* Even though a plaintiff may have suffered damage or loss attributable to another’s negligence, the plaintiff’s claim to damages may be reduced or eliminated if the plaintiff has failed to take reasonable care for his or her own safety, and his or her own negligence has contributed to that loss. In other words, where the plaintiff’s own negligence contributes to his or her injury, his or her right to fully recover is for that loss may be correspondingly affected.
* In *Nance v BC Electric Railway Co*., [1951] AC 601, at page 612, Justice Simon described contributory negligence as: "*... a sharing of responsibility for damage where a person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons...."*
* The definition of contributory negligence was re-stated by the Supreme Court of Canada in *Bow Valley Jusky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210 where the Court stated, “ *…when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiffs claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full*.”
* Examples of contributory negligence include a plaintiff injured in a motor vehicle accident caused by another but not wearing a seat belt at the time of collision, jay-walking across a road without looking for traffic, or the fact that a plaintiff, at the time the damages occurred, was under the influence of alcohol.
* Historically, contributory negligence was a complete defence to a plaintiff’s claim. Once the defendant was able to establish that the plaintiff contributed to his or her own loss, the plaintiff would be denied any means of recovery. That traditional contributory negligence bar has been replaced by provincial legislation which apportions liability between negligent defendants and contributorily negligent plaintiffs. While the provincial statutes have many similarities, some differ significantly as to whether defendants will be jointly and severally liable, as opposed to severally liable, where a plaintiff is contributorily negligent.
* In B.C. the *Negligence Act* governs the apportionment of liability between negligent parties. Sections 1, 2(c), and 4 of the British Columbia Negligence Act read as follows:

*1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.*

*(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.*

*(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.*

*2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:…*

*(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;*

*4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.*

*(2) Except as provided in section 5 if 2 or more persons are found at fault (a) they are jointly and severally liable to the person suffering the damage or loss, and (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.*

* The effect of these sections was explained by the British Columbia Court of Appeal in *Leischner et al v. West Kootenay Power and Light Company, et al*. (1986), 70 B.C.L.R. 145, as follows: “Sections 1 and 4 apply to different situations; s. 4 applies to cases where two or more persons cause damage to the plaintiff; s. 1 applies where the plaintiff himself is one of the persons found to have caused his damage or loss; s. 2(c) provides that in a s. 1 case the plaintiff shall recover from a defendant only the proportion of the loss that corresponds to that defendant's fault… then by ss.1 and 2(c) he obtains several judgments against the defendants liable for his loss. “
* Where the plaintiff’s own negligence contributes to their injury, their right to full recovery may be proportionately affected. For example, if the plaintiff is found to be 20% contributorily negligent then he/she would only be paid 80% of the value of their claim.
* Thus, a defendant with deep pockets will be incentivized to prove contributory negligence where there is a co-defendant who is judgment-proof, in order to sever joint and several liability, such that the exposed defendant will only be responsible for paying an award reflective of his apportionment of fault.
* The defendant has the onus of proving contributory negligence and must show: (1) there has been some breach by the plaintiff (and error or omission); and (2) that this breach caused or contributed to the plaintiff’s loss. For example, a plaintiff could be negligent for riding a bicycle without a helmet but there would be no deduction for contributory negligence if they suffered an injury
* Contributory negligence is a partial defence (as opposed to “voluntary assumption of risk” or “criminal act” which are complete defences). Proving contributory negligence against a plaintiff is much like establishing negligence against a defendant.
* In *Suran v. Auckland,* 2017 BCSC 472, two vehicles were street racing and a passenger in one of the vehicles died. The passenger’s family sued both motorists. The court found both motorists liable but also found that the plaintiff passenger was 25% contributorily negligent for his failure to exit the situation despite being aware of the dangers:

[172] The essential question to consider on whether contributory negligence has been established is whether the plaintiff took reasonable care for his safety. A case such as this, as set out in Lumanlan v. Sadler, 2008 BCSC 1554 at para. 15:

[15] The essential consideration on the issue of contributory negligence is whether the plaintiff took reasonable care for her safety by agreeing to become a passenger in a car driven by a person she knew to be intoxicated. There are many cases that stand for the proposition that contributory negligence is established when a person becomes the willing passenger of a drunk driver, and the proportions of fault vary with the circumstances. See: Earnshaw v. Despins (1990), 45 B.C.L.R. (2d) 380 (C.A.); Nielson v. Brunet Estate (Public Trustee of) (1994), 95 B.C.L.R. (2d) 303, 48 B.C.A.C. 316; Shaw v. Storey (1991), 53 B.C.L.R. (2d) 257 (C.A.); Mushta v. Best, [1998] B.C.J. No. 1346 (S.C.); Neufeld v. Foster, [1999] B.C.J. No. 764 (S.C.).

[177] The evidence, including the toxicology reports of Ms. Kirkwood and Ms. Jakus, both expert toxicologists, establishes both Mr. Auluck and Mr. Suran were intoxicated on the night in question. As noted earlier, Ms. Kirkwood testified her tests of Mr. Auluck’s blood led her to conclude he had a blood alcohol level of 278, the equivalent of 20.5 oz. of hard liquor or 20.5 glasses of beer. He also had some marihuana in his system. The report of Ms. Jakus indicated Mr. Suran had a blood alcohol level of two times the legal limit, leading to a state of moderate to severe intoxication. While Mr. Marwaha’s evidence was generally unreliable, he was consistent in his description of the erratic driving behaviour of Mr. Auluck and the consumption of drugs and alcohol that evening by Mr. Auluck and Mr. Suran. He was also consistent that Mr. Suran was concerned about Mr. Auluck’s dangerous driving and Mr. Suran urged him to slow down.

[178] While Ms. Suran says there is no evidence as to whether Mr. Suran had the opportunity to exit the vehicle, I conclude a number of opportunities arose over the course of the evening, including the stops described by Mr. Marwaha -- at the gas station, the Central City Pub, Mr. Moustarzak’s residence, and Mr. Marwaha’s residence.

* Marzari, J. engaged in an analysis of the defence of contributory negligence in *Uy v. Dhillon,* [2019 BCSC 1136](https://www.bccourts.ca/jdb-txt/sc/19/11/2019BCSC1136.htm), at paras. 178-187:

*[**178]     As I discussed above, there is a presumption or onus in rear‑end collisions that the following driver is at fault for failing to keep a safe distance for the conditions. In the ordinary case these are conditions that involve one vehicle following another and failing to stop in time when the lead car stops unexpectedly.*

*[**179]     This is not that typical case. Both vehicles were moving at speed, and I have found that the accident was caused by Mr. Dhillon moving into Mr. Uy's lane of travel suddenly and unexpectedly, rather than unexpectedly stopping in front of him. Mr. Uy was anticipating passing Mr. Dhillon to his left in the moments prior to the collision, and there is no reasonable basis to suggest that he should have been keeping a safe distance from the rear of Mr. Dhillon's trailer while he was in a different path of travel.*

*[**180]     Given these circumstances, I find that the defendants are not able to rely on the presumption of liability in rear‑end collisions, or putting it another way I find that the presumption in those cases has been rebutted on the proven facts.*

*[**181]     The defendants have led no other evidence of inattentiveness or carelessness on Mr. Uy's part. Rather they say I should find that Mr. Uy's speed of 70 to 80 kilometres an hour is objectively unreasonable in these circumstances and that had he been driving more slowly, he could have avoided the collision.*

*[**182]     It is not enough for a defendant to point at the plaintiff and allege wrongdoing. It is critical that the defendant also prove that a plaintiff's failure to take reasonable care contributed to the injuries suffered: See Wormald v. Chiarot,*[*2016 BCCA 415 (CanLII)*](https://www.canlii.org/en/bc/bcca/doc/2016/2016bcca415/2016bcca415.html)*, at paragraphs*[*14 to 15*](https://www.canlii.org/en/bc/bcca/doc/2016/2016bcca415/2016bcca415.html#par14)*, which read as follows:*

*[14]  The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained:  Enviro West Inc. v. Copper Mountain Mining Corporation,*[*2012 BCCA 23 (CanLII)*](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca23/2012bcca23.html)*at para.*[*37*](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca23/2012bcca23.html#par37)*.*

*[15] To satisfy the requirement of a causal connection between the plaintiff’s breach of the standard of care and the loss sustained, the defendant must establish more than that but for her negligence, the damage would have been avoided. The plaintiff’s conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself:  Bevilacqua v. Altenkirk,*[*2004 BCSC 945 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc945/2004bcsc945.html)*at paras.*[*39–43*](https://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc945/2004bcsc945.html#par39)*(per Groberman J., as he then was). In other words, the plaintiff’s carelessness must relate to the risk that made the actual harm which occurred foreseeable:  Cempel v. Harrison Hot Springs Hotel Ltd. (1997),*[*1997 CanLII 2374 (BC CA)*](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2374/1997canlii2374.html)*, 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (C.A.) at para.*[*13*](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2374/1997canlii2374.html#par13)*.*

*[**183]     The defendants rely upon Mawani v. Pitcairn,*[*2012 BCSC 1288 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1288/2012bcsc1288.html)*, to support their argument for contributory negligence on grounds that Mr. Uy was going too fast for the conditions. However, I note in that case evidence was led about causation in the form of perception response time to support the finding (at para. 72).*

*[**184]     In this case I have no such evidence. While I do accept that I do not need evidence on standard of care to determine what the appropriate standard is, I cannot find on the evidence before me that Mr. Uy's speed of 70 to 80 kilometres was careless or negligent. Mr. Jackson said that he considered 80 kilometres an hour to be an appropriate speed for the conditions for a passenger vehicle equipped with snow tires, and Mr. Uy's vehicle was so equipped. I do not agree with the defendants that while that speed may have been appropriate for Mr. Jackson, who knew this portion of the highway intimately, it was negligent in Mr. Uy's case.*

*[**185]     Nor do I have any evidentiary foundation upon which to find that Mr. Uy would have avoided the accident at any speed lower than the one he was driving at short of not exceeding the speed of Mr. Dhillon's tractor‑trailer. The evidence before me, however, does establish that tractor‑trailer combinations are required to go significantly slower than passenger vehicles down the steep grade involved here and that indeed Mr. Dhillon fully expected to be passed by such vehicles.*

*[**186]     I conclude that there was nothing that Mr. Uy could have reasonably done to avoid the collision. He was driving well below the speed limit. His Honda had snow tires and his headlights were activated. There is no evidence to suggest that Mr. Uy's Honda had any mechanical problems that could have contributed to the collision. There is no reliable evidence to suggest that Mr. Uy was distracted.*

*[**187]     I find the defendants have not established that Mr. Uy was contributorily negligent or that he contributed to Ms. De Leon's injuries.*

*FOR DISCUSSION: What other facts might support a finding of a passenger plaintiff’s contributory negligence in the context of a motor vehicle accident?*

**NEXT CLASS: WEEK 7: March 1, 2021 – Pre-trial strategy and procedures**