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| Law 435C.001 | Personal Injury Advocacy | 2021 Term 2 |
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**WEEK 10: EVIDENCE AT TRIAL**

* 1. **Teaching Objectives**
* To explore the various kinds of evidence, the procedure for admitting or leading evidence, and how to challenge your opponent’s evidence through cross-examination and otherwise.
  1. **Readings**
  + Sample cross-examinations (attached to email)
    - *Uy v.* *Dhillon,* 2019 BCSC 1136: Cross of defendant driver Dhillon
    - *Anderson v. Molon,* 2020 BCSC 1247*:* Cross ofArchbishop Emeritus Exner
  + *Samuel v. Chrysler,* [2007 BCCA 431](https://www.canlii.org/en/bc/bcca/doc/2007/2007bcca431/2007bcca431.pdf)(admissibility of clinical records binders)
  + *Crawford v. Nazif,* [2019 BCSC 2337](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc2337/2019bcsc2337.pdf)(admissibility of scene evidence, para. 44-62)
  1. **Overview**
* The onus is on the plaintiff to prove his or her case.
* On some issues, the defence will have the onus of proof, usually for certain defences (such as contributory negligence, mitigation).

**There are four possible SOURCES of proof:**

1. Witnesses (both lay and expert)
   * Your witnesses - Direct examination and re-examination
   * Opposing party’s witnesses – Cross Examination
   * Discovery read-ins or impeachments
2. Exhibits
   * real objects such as clothing, helmet
   * audio visual evidence such as photographs, video, audio
   * written documents and records such as contracts, letters, reports, tax returns, clinical records, invoices
3. Judicial notice

* The Court can take judicial notice of certain facts that are widely accepted or can be easily determined and verified by a reliable source and do not necessitate proof.

1. Admissions
   * The parties may agree that certain facts are agreed and present these admissions to the Court, in which case evidence need not be called to prove these facts.
   * Notices to Admit in advance of trial
   * Pleadings
   1. **Witnesses**

* A witness must be listed in a witness list or leave is required
  + *T.S. v. Gough*: ICBC failed to comply with TMC Order or Rule 12-5(28)
* Witnesses, what they have to say, and how they say it are critical to the outcome of any trial. A case is only as good as its facts, and the facts are usually solicited from the witnesses.
* Scheduling of witnesses
  + Logical sequencing: telling the story is important.
  + Logistics: witness availability can be a challenge.
  + The court has been critical of plaintiff’s counsel who do not call the plaintiff as the first witness. For example, see *Gustafson v. Davis,* 2012 BCSC 1576, at paras. 114:

*[112] Ms. Bartholomew, Ms. Hunter, Mr. Sivertson, Mr. Gustafson, a teaching colleague, and Ms. Gustafson’s family practitioner, Dr. Verbonac, were called before Ms. Gustafson went into the witness box. Much of their evidence was hearsay and consisted of subjective complaints and accounts by Ms. Gustafson to them. As the court mentioned several times to counsel for Ms. Gustafson, it would have been helpful to hear her first, before the substance of her evidence was given second hand by other witnesses while she listened to it and to the issues that arose during cross-examination.*

*[113] Aside from their recounting of things Ms. Gustafson had told them, these witnesses also had their own observations to make. While their observations of Ms. Gustafson are not hearsay, that evidence was given without the benefit of Ms. Gustafson’s presentation and her first hand testimony, and was difficult to put into a meaningful context, not having heard her testify.*

[114]  Counsel has the responsibility to present his case as he sees fit and the court understands if obstacles are created by scheduling difficulties for expert and out of town witnesses, or other unavailability. However, from the point of view of a trier of fact, it is not only frustrating and even confusing to listen to evidence without a context, it can have an impact on the value of all of the evidence.

[115]  The practice of calling the plaintiff first is longstanding and is a common theme in advocacy texts for reasons that resonate with, and are often written by, trial judges. I refer, for example, to § 25.8 of Fraser, Horn & Griffin, The Conduct of Civil Litigation in British Columbia, 2nd ed. (Markham, Ont: Lexis Nexis Canada Inc., 2007):  
Unsurprisingly, if a plaintiff is called as the first witness for his case, he tends to have more credibility than if he is called as the last witness, because of his opportunity, in the latter situation, to tailor his evidence to the evidence of the witnesses who have gone before him.  
and to s. 8.20 of the British Columbia Civil Trial Handbook, 2nd ed. (Vancouver: The Continuing Legal Education Society ofBritish Columbia, 2005):

In many cases the plaintiff will be called first, such as in a non-catastrophic injury case or a family case. One reason for this choice is that the decision­maker usually wants to see the plaintiff to get a sense of the case, and may pay less attention to other witnesses if impatiently awaiting the plaintiff.

and to Donald S. Ferguson, ed., Ontario Courtroom Procedure (Markham, Ont.: Lexis Nexis Canada Inc., 2007) at p. 815:

It is common for counsel to call their party as their first witness to avoid any submission that the party may have tailored his or her testimony to that of other witnesses.

[116]   If persuasion is the objective, and if it rests largely on the credibility of the plaintiff, counsel might give consideration to the practical and sensible course suggested by experience and this common sense advice.

How a witness testifies:

* Logistics – takes the stand when called, sworn or affirm, then sits down in witness box.
* Examination in chief or direct examination begins.
* Cross-examination follows.
* Re-examination if necessary.
* Affidavit of evidence in chief: Rule 12-5(59)

How do witnesses fit into the theme of the case?

* Tell the story.
* Elements of the claim that need to be proven.
* Collateral witnesses are especially important if the plaintiff has a limited capacity to tell their story.
* You do not need to call all “witnesses” that you interview. Be strategic. Avoid redundancy.
* The limits of lay evidence – a review of the law of evidence including the prohibition against hearsay, oath helping, and no opinion evidence unless properly qualified as an expert (of which notice must be given).
* The limits of expert evidence – must provide written opinion in advance (84 days if it is a primary report, 42 days if responding) and, in direct, testimony is limited to *an explanation of the technical terms in their report*.

What are the elements of the case that you have to prove?

* Liability
* Causation
* Injury
* Damages

Who are the witnesses you may want to call in order to prove those elements?

* Liability
  + Plaintiff
  + Eye witnesses
  + Police officer or emergency attendants.
  + Engineer or technical scientific expert.
* Injury
  + Plaintiff
  + Medical experts
  + Treatment providers (physio, OT, massage therapist, kinesiologist)
* Damages
  + Plaintiff
  + Collateral witnesses (family members, friends, co-workers, colleagues)

Adverse Witnesses

* The Rules allow a party to call a witness who is “adverse” in interest.
* Plaintiff would rarely call a defendant as an adverse witness. You only do this where you are worried that the defendant will not call that witness and you need evidence from that witness to prove part of your case.
* Questioning of an adverse witness is akin to cross-examination.

***Direct Examinations***

Direct Examination (Examination in Chief): a party presents their evidence through direct examination of their witnesses.

* Important not to underestimate the impact of direct examination.
* The evidence comes from the witnesses because you are not allowed to “lead” evidence on important aspects of evidence.
* Can lead on non-controversial evidence.
* Must ask open ended questions and the witnesses presents their evidence.
* Counsel facilitates the conversation between the witness and the trier of fact.
* Keep it simple.

Preparing the witness.

* Preparation is essential.
* Preparation means identifying the issues of the case for the witness, helping them understand how their evidence fits into the case, and explaining why they are being called to testify. It also requires reviewing their evidence with them both for direct and cross-examination purposes.
* Review documents that you will introduce through them or that may be put to them.
* Take them to a Court room so they can see where they sit, where counsel stand, where the jury sits, where the judge sits. They can watch a trial to see how it works.
* Must identify for them where they are vulnerable.
* Takes hours of time.

Example:

* What kind of questions will you ask the plaintiff?
* What kind of questions will you ask the plaintiff’s employer?
* What kinds of questions will you ask the plaintiff’s family members or friends?

Organizing the Direct Examination

* Introduce the witness to the trier of fact.
  + Establish context – their background insofar as it relates to the case (ex, family member, friend, co-worker, doctor); how do they know the plaintiff.
* Set the scene
  + Accident
  + Slip & fall
  + Medical negligence
* Damages evidence
  + - The plaintiff before and after
    - Injury
      * Diagnosis
      * Treatment
      * Prognosis
    - Impact on all aspects of life
      * Home
      * Recreational, social, etc
      * Work
      * Interpersonal
      * Emotional
* Have a goal then sequence your questions to achieve that goal.
* Lay the foundation for the evidence you are eliciting.
* Be logical.
* Options:
  + Chronological.
  + Dramatic impact.
* Start broad then narrow in.
* Do not lead on important evidence!
* If your witness forgets certain facts, you can exhaust their memory and lead a bit.
* Ex.:
  + What time did the accident happen?
  + Was it in the afternoon?
  + I suggest it was 1:00 pm., does that accord with your recollection.
* Have documents organized.
* In some cases, documents have to be proven through a witness.
* Inoculate the weaknesses? Judgment call.
  + Ex. hurtful info in document – not sure if def will pick it up
  + Ex. surveillance
* LISTEN TO THE WITNESS
  + If their answer is unclear or confusing, ask them to clarify or explain.
  + They might answer > 1 question at once so don’t ask the other question.
  + Unexpected answer. Might have opportunity to speak to witness to clarify

***Cross-Examination***

Cross-Examination: seeking admissions or denials that assist your case.

* Effective cross-examination can have a profound impact on the evidence a witness gave in chief and their credibility.
* Very critical aspect.
* Prepare, prepare, prepare!
* Questions should lead to the answer (yes or no).
  + “What time did you arrive?” versus “You arrived at 1:00 p.m., correct”?

Do you have to cross-examine every witness?

* No. Resist the urge to cross-examine just because.
* Identify the topics or areas that you want to cross-examine the witness on.
* Consider whether the evidence will help your case or injure the other party’s case.
* When do you NOT cross-examine? If the witness’ evidence in direct does not harm your case.
* If there is no evidence that you can get from this witness that will assist your case.

Organization of the Cross-Examination

* Goal – maintain control of the witnesses’ evidence.
* Every question must have a purpose. Every question must contribute to building your client’s case or undermining the opposing case.
* Short – get in, get out. There are exceptions.
* Common error – re-iterating the witnesses’ examination in chief. Don’t do this.
* Consider what strategy you need to use?
  + Attract bees with honey
  + Intimidate into submissiveness
* Sequence your questions to lay the proper foundation to get you to your end goal.
* Be logical. For each question, consider the potential range of answers and where you go from there depending on the answer. Like a decision tree.
* If the person you are cross-examining is a party, use the discovery transcript to help you prepare your cross. If you are asking a question that was covered in discovery, make sure you know that transcript so you can impeach them if they change their evidence.
* If you have a witness statement for that witness, you can use it to guide your cross-examination. If changes evidence, you can use that statement to impeach their credibility.
* Can also use discovery transcripts to elicit helpful evidence.
* Consider what documents you want to put to that witness and organize them within the context of your cross-examination goals.
* Suppress the urge to ask that last question – it can get you into trouble.
* Do not ask a question that you do not know the answer to unless the answer does not hurt your case either way.
* *Browne v Dunn* = if you intend to argue a theory or make an allegation, you must put that theory or allegation to the witness to permit them to rebut it otherwise you cannot make the argument.
  + Ex. If the defence is arguing that there are other explanations for why the plaintiff is injured or why they cannot work, they must put those explanations to the plaintiff on cross otherwise they cannot make those arguments in closing.
  + Ex.
    - Not the accident that caused the injury but rather a slip and fall at work (Foster).
    - Did not stop working because of physical restrictions or limitations caused by injury but rather due to interpersonal difficulties at work.
* Make sure you are accurately reciting evidence if you are putting it to a witness. Do not misstate their evidence from direct or other evidence (ex. Statements made to doctors etc).

***Scope of Cross-Examination***

* In *Mazur v. Lucas,* 2014 BCCA 19, the BC Court of Appeal confirmed that potential bias is a legitimate subject of questioning in cross (para. 25):

[25]        I agree with the respondents that the questions put to Ms. Morrison on cross-examination appropriately probed any potential bias arising out of her dual role as a witness from the law firm employing Ms. Mazur and as a management employee of the law firm representing Ms. Mazur. The cross-examination of a witness with respect to potential bias is a legitimate subject of questioning.

Sometimes cross-examination is all you have

* See *McLaren v. Rice,* 2009 BCSC 1457

*[22]         The plaintiff sustained a closed head injury and fractured skull and has no memory of the accident.*

*[23]         The physical evidence at the scene of the accident as described by Cst. Dyson discloses no braking marks on the roadway or any gouges on the roadway in the northerly direction of traffic or in the southbound lanes before the ditch.*

*[24]         There are significant inconsistencies and contradictions between the evidence given by [the defendant] Jacob Rice at trial and prior unsworn statements given by him and prior evidence given under oath. It is, of course, the evidence given at trial that I must assess, and those prior inconsistent statements go to the credibility of Mr. Jacob Rice. I find that Jacob Rice is an unreliable witness and that the inconsistencies and contradictions diminish such weight as his evidence might have had. I find that the events immediately preceding the accident are not clear in Jacob Rice’s mind because he was either asleep or inattentive as the truck proceeded across the oncoming lanes of traffic. There were no brake marks or any indication that evasive action was taken until the truck “hit the ditch”. I find that what Jacob Rice told ICBC in his statement taken on March 8, 2005, is likely what happened:*

*It was a pull to the left and then, I just hit the ditch and as we hit the ditch, I tried pulling it to the right and it lost control and, and spinning and from there, it just lost control.*

*(Emphasis Added)*

Examples of cross-examinations:

* The defendant driver Daljit Singh Dhillon, *Uy v. Dhillon,* 2019 BCSC 1136
* Archbishop Emeritus Exner in *Anderson v. Molon*

***Re-examination***

Re-examination = a witness can be re-examined by the counsel who called him or her but the scope of re-examination is limited to points that arose during cross-examination.

* Purpose – to refute or explain evidence brought out on cross.
* Very limited scope to prevent splitting of case by the plaintiff
* Often do not have time to consult with the witness and have to make a snap decision. Can ask the Court for leave to consult but won’t necessarily be given.
* Keep a list of areas you might want to re-examine on then assess how important they are to your case.
* If not important and not confident as to what witness will say, leave it alone.
* Should be approached with caution: do not re-examine your witness if you do not have to.
* Dangerous if you don’t know what they will say.
* Sopinka et al., *The Law of Evidence in Canada*: “The purpose of re-examination is to enable the witness to explain and clarify relevant testimony which may have been weakened or obscured in cross-examination.”

***Objections at trial***

* The most obvious purpose of objection is the exclusion of improper evidence. Another reason is to prevent an improper manner of questioning.
* Some of the grounds for objecting during direct or cross are:

1) relevance  
2) no foundation  
3) hearsay  
4) leading questions  
5) opinions and conclusions  
6) repetitive (asked and answered)  
7) assuming facts not in evidence  
8) misstating evidence/misquoting witnesses  
9) speculative  
10) argumentative  
11) improper impeachment or attack on character.

* Making proper and timely objections is challenging
* Objections must be timely and have a legal basis.
* An effective objection or the failure to make an appropriate and timely objection can change the course or even the outcome of a trial (or an appeal)
* Stand up, make your objection *to the judge*, and state your basis for it.

***Credibility of witnesses at trial***

* ***See 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), [1919 CanLII 11 (SCC)](https://www.canlii.org/en/ca/scc/doc/1919/1919canlii11/1919canlii11.html), 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.); *Faryna v. Chorny*, [1951 CanLII 252 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1951/1951canlii252/1951canlii252.html), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997 CanLII 324 (SCC)](https://www.canlii.org/en/ca/scc/doc/1997/1997canlii324/1997canlii324.html), [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 (*Farnya* at para. [356](https://www.canlii.org/en/bc/bcca/doc/1951/1951canlii252/1951canlii252.html#par356)).

[187]     It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a ‘stand alone’ basis, followed by an analysis of whether the witness’ story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the “preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions” (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), [1993 CanLII 7140 (AB QB)](https://www.canlii.org/en/ab/abqb/doc/1993/1993canlii7140/1993canlii7140.html), 12 Alta. L.R. (3d) 298 at para. [13](https://www.canlii.org/en/ab/abqb/doc/1993/1993canlii7140/1993canlii7140.html#par13) (Alta. Q.B.)). I have found this approach useful.

***Other evidence that can be introduced at trial:***

* Read-ins from discovery transcripts
  + If the defendant makes admissions at examination for discovery, the plaintiff can “read in” these admissions during the trial proper, and they will form part of the evidentiary record. But be careful not to read-in evidence that is unhelpful to your case! See *Duncan v. Mazurek,* 2010 BCCA 344, at para. 30:

[30] The defendant, relying on Chetwynd-Palmer v. Spinnakers, [1993] B.C.J. No. 95 (S.C.) and Tsatsos v. Johnson (1970), 74 W.W.R. 315, says that by reading in that discovery the plaintiff adopted and approbated his evidence, and the trial judge is not entitled to reject it and choose a different version more favourable to the plaintiff. I am not convinced those cases go that far. While the plaintiff may be at some risk in reading in such evidence as part of her case, where there is contradictory evidence it is my view that the trial judge must retain discretion to weigh it all in reaching his findings.

* Defendants cannot ‘read in’ the plaintiff’s discovery evidence: instead, they can only impeach the witness with the discovery evidence.
  1. **Exhibits**

**Real evidence**

* Real evidence can include clothing, a helmet, etc. Anything tangible.

**Audio-visual evidence**

* Notice of Demonstrative Evidence – 7 days before trial
* Scene photographs and video – *Uy v. Dhillon,* 2019 BCSC 1136 (liability)
* Audio – 911 Audio, *Crawford v. Nazif,* [2019 BCSC 2337](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc2337/2019bcsc2337.pdf)(admissibility of scene evidence, para. 44-62)
* Video – E.g. day in the life: *Xu v. Balaski,* 2020 BCSC 940

**Documentary Evidence**

* Common books of documents and document agreements
  + Sample Document Agreement and Index attached from *T.S. v. Gough*
* Business Records exception to hearsay rule
  + Section 42 of the *Evidence Act,* RSBC 1996, c. 124:

**Admissibility of business records**

**42**   (1) In this section:

**"business"** includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

**"document"** includes any device by means of which information is recorded or stored;

**"statement"** includes any representation of fact, whether made in words or otherwise.

(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

(a) the document was made or kept in the usual and ordinary course of business, and

(b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

(3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.

(4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.

(5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

* Do not put in documents ‘en masse’ in one big binder

***Samuel v. Chrysler,*** [**2007 BCCA 431**](https://www.canlii.org/en/bc/bcca/doc/2007/2007bcca431/2007bcca431.pdf)

* + *“*The practice of tendering copious volumes of clinical records is one that is to be discouraged.”

[39] The preferable approach is obvious. Clinical records should not be admitted into evidence, by consent or otherwise, unless counsel identify the specific purpose for particular portions of the records. Furthermore, it would be preferable to introduce discrete portions of the records when they become relevant so that their admissibility can be ruled on at that time, when the jury will better appreciate the purpose of those portions in the context of the case and will have the assistance of a contemporaneous limiting instruction. In no event should a "book" of documents simply be handed up to the court and admitted as a whole.

See also *Han v. Park,* 2015 BCCA 324

*Teunissen v. Hulstra,* 2017 BCSC 2365

* + Defendant’s counsel sought to enter into evidence a binder of the plaintiff’s Facebook postings for a 1.5 year period, totaling 258 pages.

[18] This comment is particularly apt in this case. It is simply not apparent how ever single Facebook entry over the course of four years is relevant in this matter. Indeed, to accede to this argument could result in lengthy, unmanageable trials, which the rules of evidence are in place to constrain.

[19] I conclude, therefore, that the proper approach is for the defendant to seek the entry of the pertinent post or picture after properly identifying it, establishing its relevance, and questioning the author on that matter. At that point, the parties can agree or the court will determine whether it should be properly marked as an evidentiary exhibit in this matter.

[20] Accordingly, I decline to admit the plaintiff's public Facebook binder of postings for the last four years, in combination with the Tri-City postings, as an evidentiary exhibit in this matter. The Facebook binder can continue to be used and referred to as Exhibit A for identification. Particular postings or pictures, which are relevant, may be made an exhibit in the appropriate manner and time.

* Err on the side of caution: do your homework in advance, amend your list of documents as soon as you are aware of a new relevant document, and disclose the document before trial: ***Walker v. Doe,*** [**2012 BCSC 1091**](http://www.courts.gov.bc.ca/jdb-txt/SC/12/10/2012BCSC1091.htm)
  + - * During cross-examination of ICBC’s engineering expert, plaintiff’s counsel was about to make reference to two documents that originated in ICBC manuals re: safe handling of motorcycles and proper means of inspecting / fastening tires on vehicles. In a previous case, the expert considered the contents of these manuals to be authoritative.
      * ICBC’s counsel objected.
      * Plaintiff’s counsel said he was unaware of the existence of these documents until the weekend before. Defendant’s counsel did not list the documents either because they were unaware of the existence of these documents.
      * Defendants objected to plaintiff’s reference to these documents because they were not listed.
      * There are 4 factors applicable to the exercise of discretion to admit previously undisclosed evidence (at paras. 13-17):
        + Whether the defendant would suffer prejudice if the use of the documents is permitted.
        + Whether there is a reasonable explanation for the failure to disclose the document in question.
        + Whether excluding the document would prevent the determination of the relevant issue on its merits. (Are the documents probative?)
        + Whether, in the circumstances of the case, the ends of justice require that the use of the document be permitted.
      * Plaintiff’s counsel was permitted to put the documents to the expert.
  1. **Judicial Notice**
* In *Tsawwassen Indian Band v. Delta (Corp.),* [1997] 95 BCAC 241 (CA), the British Columbia Court of Appeal addressed the availability of judicial notice, at paras. 98-99 (recently cited with approval in *Elite Mortgage Corp. v. Derewenko,* 2019 BCCA 125, at para. 24): “Courts may properly accept the truth of a fact or state of affairs without proof where the matter is of such common knowledge in the community that it cannot reasonably be disputed.” (at para. 98).
  1. **Admissions**
* Parties can and do routinely enter into an Agreed Statement of Facts.
  + See attached example *Agreed Statement of Facts* from T.S. v. Gough (liability trial)
* Parties can, in advance of litigation, serve the opposing party with a Notice to Admit under Rule 7-7(4). If not responded to within 14 days, the statements of fact and the authenticity of any documents itemized and attached is *deemed to be admitted.* A party can deny the truth of a fact, but they cannot do so unreasonably without cost consequences. See: *Ceperkovic v. MacDonald,* 2016 BCSC 939, at paras. 38 and 43:

In summary, the failure to admit the truth of a fact may be unreasonable within the meaning of Rule 7-7(4) if:

(a)      the truth of the fact is subsequently proved;

(b)      the fact was relevant to a material issue in the case;

(c)      the fact was not subject to privilege;

(d)      the notice to admit was not otherwise improper;

(e)      the notice to admit was reasonably capable of evaluation within the time required for response; and

(f)       the refusing party had no reasonable grounds for believing that it would prevail on the matter.

…

[43]         While the cost consequences of an unreasonable failure to admit are usually confined to the costs of proving the truth of facts or the authenticity of documents, the power conferred by Rule 7-7(4) to penalize a party by awarding additional costs or depriving a party of costs “as the court considers appropriate” suggests that in an appropriate case the court could go further. At the least, it is not outside of contemplation that if the entire trial could have been avoided had reasonable admissions been made (for example, if the originating party could have applied for judgment on admissions under Rule 7-7(6)), the party who unreasonably failed to admit the facts could be penalized by an award of additional costs for all steps taken following delivery of the notice to admit.

* **Withdrawing an admission**:
* Rule 7‑7(5)
* see *Nagra v. Cruz,* [2016 BCSC 2469](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc2469/2016bcsc2469.pdf) (Master Harper):

[4] The application is brought pursuant to Rule 7-7(5) of the *Supreme Court Civil Rules*: a party is not entitled to withdraw an admission made in a pleading except by consent or with leave of the court.

[5] The legal test to be applied where leave is sought to withdraw an admission is whether there is a triable issue which should be determined on the merits and not disposed of by an admission of fact. The parties agree that consent is a triable issue, but the analysis does not end there. The overriding factor is whether the interests of justice justify the withdrawal of the admission. The discretion to grant leave to withdraw an admission is broad and unfettered, subject to the discretion being exercised judicially. To that end, the court is required to balance the prejudice that would flow from either refusing or granting leave to withdraw the admission. The exercise of discretion on such an application is highly fact-specific.

[6] The factors that should be considered by the court in determining what result is in the interests of justice are:

a) whether the admission was made inadvertently, hastily or without knowledge of the facts;

b) whether the fact admitted was or was not within the knowledge of the party making the admission;

c) where the admission is one of fact, whether it is or may be untrue;

d) whether and to what extent the withdrawal of the admission would prejudice a party; and

e) whether there has been delay in the application to withdraw the admission and any reason offered for such delay.

…

[32] The possibility of Liwag or Cruz suing ICBC or defence counsel who filed the response to civil claim is not a satisfactory approach. The interests of justice are not served by failing to rectify a mistake. The proceeding should be determined on its merits: Rule 1-3(1) of the *Supreme Court Civil Rules*. It would be unfair to hold Liwag personally responsible for a mistake made by ICBC and/or defence counsel.

Affirmed by Abrioux, J (as he then was) in [2017 BCSC 347](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc347/2017bcsc347.pdf):

[69] In my view, the Master was not clearly wrong in concluding that a balancing of potential prejudices favoured Liwag. There is clearly a triable issue pertaining to Liwag’s alleged consent and if the admission is not withdrawn, then he is conclusively vicariously liable for Cruz’s admitted negligence and may well face personal exposure for an amount well in excess of his $1 million third party policy limits.

[70] Any potential prejudice to the plaintiff can likely be remedied by the costs order which was made.

[71] The overriding factor is whether, taking the interests of justice into account, there is a triable issue which should be determined on the merits, and not disposed of by an admission of fact.