the Verdict

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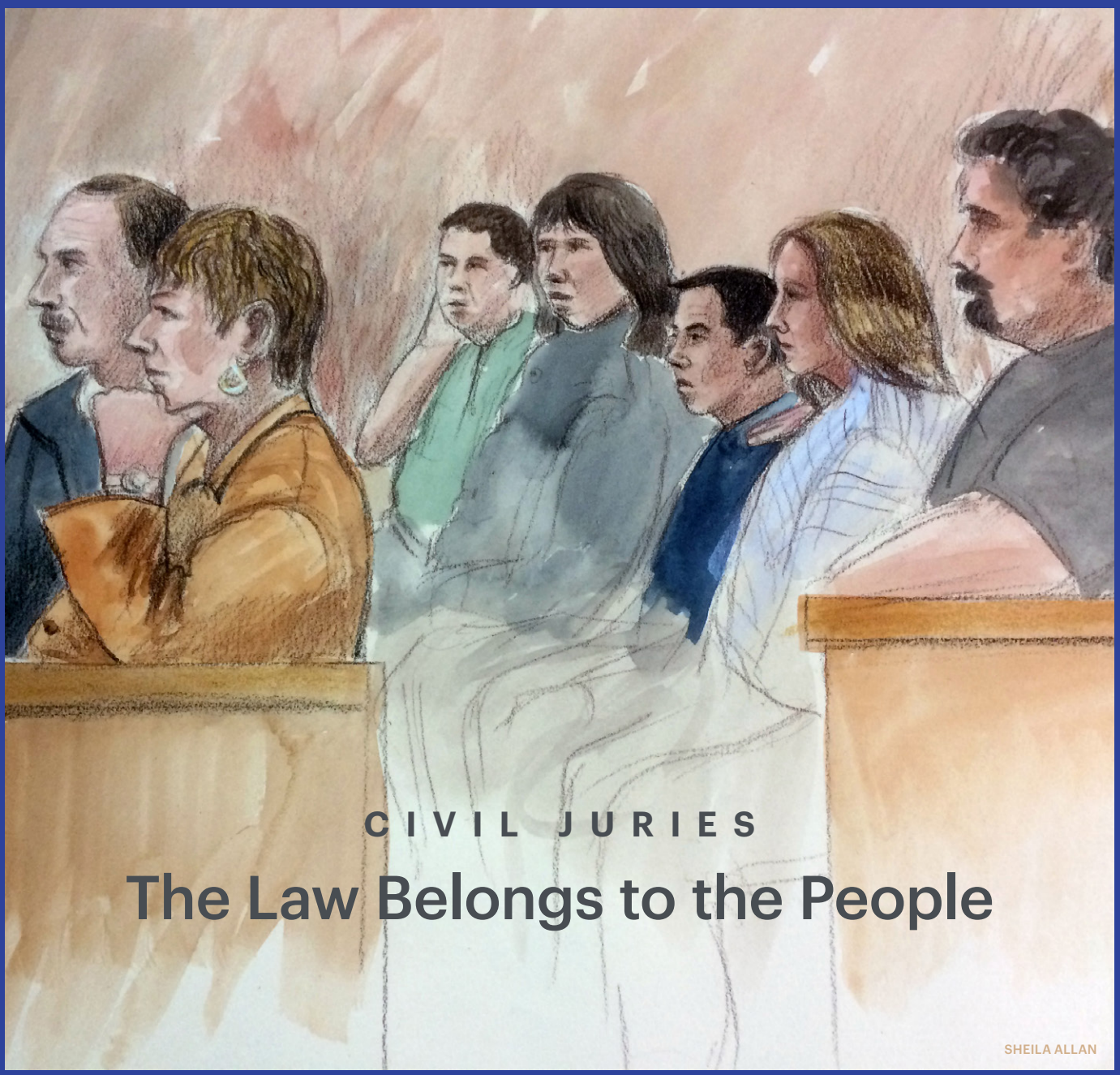

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MEDICAL MALPRACTICE ▸

Complexities of the Medical Malpractice Jury Trial

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Supreme Court Justice Claire L'Heureux-Dube called the jury "the conscience of the community,"[1] and wrote that it can "act as the final bulwark against oppressive laws or their enforcement."[2] Jury trials have long been considered a fundamental right within the Canadian court system. As with any right, there are restrictions placed upon it. For example, a trial *must* be heard by a judge without a jury if the case relates to the custody of an infant or the administration of a deceased person's estate. In the context of medical malpractice there are restrictions on the use of jury trials both procedurally (whether the court will allow or refuse a jury trial) and practically (whether either party will find a jury trial effective in resolving the case). The purpose of this article is to look at some of the complexities of the medical malpractice jury trial.

Jury Trial Availability in British Columbia

By default, civil actions in the Supreme Court are tried without a jury unless a party files and serves a jury notice[3]. These jury notices can be challenged by the opposing party for the reasons stated in Rule 12-6(5):

i. the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
ii. the issues are of an intricate or complex character, or
iii. the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action.[4]

At first glance, it may appear that this rule would apply broadly to medical malpractice cases, which almost inevitably involve a multitude of experts, complex medical issues and examination of voluminous medical records. However, the analysis is not always quite as straightforward. The determination of whether to strike a jury notice for complexity or prolonged examination of documents/accounts or scientific investigation is a two-step process:[5]

a. will the issue require prolonged examination of document or account or scientific investigation; and, if so
b. can the issue be conveniently decided by a jury?

First, the judge must make a determination as to whether one of these issues is at play. If so, the judge is then required to exercise the discretionary jurisdiction contemplated by the subrule. This distinction is important. Convenience is a separate question from the factual determination as to whether there are complexities at play; the fact that a jury trial is not the most convenient mode of trial does not displace the plaintiff's right to a trial by jury.[6]

If the finding is either that the issues require prolonged examination of documents or accounts, or that the issues require a scientific or local investigation, then the discretion must be exercised in relation to the question of whether the examination or investigation can be made conveniently with a jury.[7] Convenience does not refer to physical or personal convenience but rather to the proper conduct of the trial; the jury must be able to understand the issues, the evidence, the submissions and the judge's charge.[8] In exercising this discretion, there are a multitude of factors the court should consider, including (but not limited to):

a. the expected length of the trial;
b. the number of experts to be called;
c. the volume of expert evidence;
d. the nature and character of expert evidence;
e. the extent to which experts disagree;
f. how the trier of fact will resolve the disagreements between or among experts, including whether there will be resort to scientific literature;
g. the extent to which the trier of fact will have to understand unfamiliar medical terminology;
h. the number of issues the trier of fact will have to resolve;
i. the character of the issues; and
j. the complexities that might arise from interaction between or among issues.[9]

Under the current Rules, medical malpractice will never be cut off from jury trials simply because of the cause of action; something more is required. Some medical malpractice cases are heard by juries. Others are deemed too complex to be conveniently tried before a jury and proceed before a judge alone. There is no bright line separating these cases. The unique features of each case will determine how the court exercises its discretion; there is no checklist or a scientific process.[10]

Convenience is a separate question from the factual determination as to whether there are complexities at play; the fact that a jury trial is not the most convenient mode of trial does not displace the plaintiff's right to a trial by jury.[6]

In *Lord Estate v. Royal Columbian Hospital*,[11] a medical malpractice case focused on the need for safety procedures and supervision following medication changes as well as the proper treatment and drug regimen prescribed. The trial judge found that the case could not be conveniently tried by a jury. The court noted that the mere fact that medical records (both doctors' records and hospital charts) would be entered into evidence did not mean the issues required a prolonged examination of documents. The jury notice was struck, however, on the basis that seven defendants underwent a total of 20 days of discovery (one doctor was asked over 2500 questions), the trial was anticipated to last 5-6 weeks on liability alone and the jury could not be expected to remember and properly deal with the extent of the evidence.

In contrast, the medical malpractice case *Renaerts (Guardian ad litem of) v. Korn*,[12] which dealt with the post-delivery care of a premature infant following an incomplete abortion, was permitted to be heard before a jury. The court concluded that, while liability was in issue, the case could be determined primarily on the basis of a series of findings of fact. The damages case involved a mass of detailed evidence including actuarial, medical, rehabilitation and other reports addressing the plaintiff's future needs and the cost of future care together with supporting medical, school and other records. This did not preclude a jury trial as there was general agreement that the plaintiff suffered from severe disabilities and the primary issues were the degree of care required and its duration. The court held that the jury was capable of following the evidence appropriately, retaining it and deliberating effectively at the end of the trial.

In *Howe* v. *Hwang*,[13] the plaintiff alleged that her physician performed the wrong surgical procedure to treat her diverticulitis and performed the procedure incorrectly leaving her with lifelong impairments. The court found that the jury would be asked to engage in a prolonged examination of documents, the resolution of the issues would require a scientific or local investigation and the issues were of an intricate and complex nature. As discussed above, however, this was only the first step in the analysis and triggered the exercise of discretion to resolve the issue. The court considered the length of the trial (10-11 days), the number of experts (5), the length of the expert reports (32 pages total) and the nature and character of the expert evidence. The jury would be called upon to deal with technically demanding scientific medical issues and unfamiliar terminology, as well as the conflicting evidence of experts, but this was within the range of functions credited to the jury system in British Columbia. The terminology was not so mysterious or opaque that the jury would be unable to come to a conclusion on the technical issues or be properly instructed.

The Impact of the COVID-19 Pandemic on Jury Trials in British Columbia

As of March 19, 2020, Chief Justice Hinkson suspended regular operations of the Supreme Court of British Columbia at all of its locations to protect the health and safety of court users and to help contain the spread of the virus.[14] Part of this suspension involved cancelling jury selections and jury trials until October 7, 2022.[15] In

addition to the obvious impact on the availability of jury trials between March 2020 and October 2022, this suspension may have lasting effects on the availability and practice of jury trials in British Columbia. During the suspension period, the entire premise of jury trials is under reconsideration. The Ministry of the Attorney General is now reviewing the possibility of permanent reforms.[16] Options for the outcome of this review include the possibility of permanently abolishing jury trials for civil litigation in BC.[17] The other possibilities are retaining jury trials with or without reforms or restricting the availability of jury trials only to particular causes of action.[18]

The relative complexity of medical malpractice trials make them particularly vulnerable to a determination that jury trials should be abolished. Whether the availability of jury trials should be a fundamental right for plaintiffs and whether it provides a benefit to the parties is open for debate.

The Practical Difficulties Associated with Running a Medical Malpractice Jury Trial

There are a couple of practical considerations for counsel to consider before deciding whether to serve a jury notice in a medical malpractice case. The first overlaps with the determination of whether the jury notice will be struck. Medical malpractice claims often involve extensive medical records, numerous expert reports (on both liability and damages issues), and complex medical issues that must be resolved to prove a breach of the standard of care and the causal link between that breach and the injuries suffered. With these features at play, one of the more difficult aspects of proving one's case can be ensuring that the trier of fact understands the intricacies of the evidence and the issues before the court. The lawyers involved have had years to assemble the information and many hours to go over the expert evidence in order to better understand the medical issues. To have all of that evidence distilled into coherent and convincing reports that can be absorbed and analyzed within a matter of weeks is a significant burden. With experienced judges who are skilled at dealing with complex material in a fast paced but comprehensive manner, the burden can be managed. Trying to explain the evidence of the solidity of your case to a jury; a collection of strangers from all walks of life with a wide range of experience with the medical system, can be more difficult.

If counsel overcomes these obstacles, there is the additional complication that jury verdicts are not set in stone. Unlike a judge alone trial, juries may fail to reach a verdict. If a verdict is found, that verdict can be rejected by the trial judge in certain circumstances. Rule 12-6(7) dictates that "[i]f, after any redirection the court considers appropriate, a jury answers some but not all of the questions directed to it, or if the answers are conflicting, so that judgment cannot be pronounced on the findings, the action must be retried." *Cheung (Litigation guardian of) v Samra*,[19] provides a compelling example of the potential concerns with jury verdicts. In *Cheung*, the plaintiff was a child with profound disabilities as a result of hypoxic ischemic encephalopathy (brain damage resulting from oxygen deprivation). She had been diagnosed with hypotonic cerebral palsy and required assistance with almost all her activities of daily living. She alleged that these disabilities were the result of the negligence of the obstetrician who followed her mother during her pregnancy and the doctor on call at the hospital the day that she was delivered. Carol Cheung, the plaintiff's mother, saw the defendant, Dr. Samra, on March 17, 2006. At that time, he noted that the plaintiff, Rhonda, was in breech position and consequently scheduled a caesarean section for April 25. At a subsequent appointment on March 30, Dr. Samra diagnosed intrauterine growth restriction; Rhonda was not growing as expected for a fetus of her gestational age. There are known risks associated with intrauterine growth restriction. He arranged for further monitoring but did not change the date of the scheduled caesarean section. On April 21, Carol Cheung attended hospital for a non-stress test (NST) to assess Rhonda's health by way of assessment of the fetal heart rate. The nurse performing the test had concerns but Dr. Ma, the other defendant, assessed the fetal heart rate tracing and determined that it was reassuring. She discharged Ms. Cheung. The following morning Ms. Cheung reattended the hospital with some bleeding. Another NST was performed and this time Dr. Ma felt that the fetal heart rate was abnormal. Rhonda was delivered by urgent caesarean section on April 22, 2006. She was born flat (meaning her heart rate, breathing, colour and tone were all inadequate) and she required extensive resuscitation. It was alleged that Dr. Samra should have arranged for an earlier caesarean section and that Dr. Ma should have delivered Rhonda when Ms. Cheung first attended hospital on April 21; it was further alleged that their failure to do so caused Rhonda's brain injury and cerebral palsy. The jury found that both doctors were negligent and that their negligence caused Rhonda's injuries. Defence counsel asked the court to reject the jury's verdict.

The causation issue was the primary point of contention in relation to the jury's findings. The argument was twofold. First, defence counsel submitted that the plaintiff had offered no evidence on which the jury could find causation because the plaintiff had failed to lead evidence on what would have happened had Rhonda been delivered prior to April 22. In addition, defence counsel submitted that the jury's answers were not responsive to the questions on causation and could not support a basis for judgment.

As to the first point, defence counsel argued that it was incumbent on the plaintiff to call evidence to establish on a balance of probabilities that if Rhonda had been delivered earlier, it was more likely than not that she would not have brain damage, but that the plaintiff failed to do so. Plaintiff's counsel argued, with the support of expert testimony, that the brain injury occurred in the 30 minutes or so prior to birth and was linked to the fact Rhonda was intrauterine growth restricted (IUGR). Thus, it was open to the jury to find that Rhonda should have been delivered earlier and if she had been, that she would not have suffered brain damage. The theory was that Rhonda was IUGR which carried risks; such risks materialized because the pregnancy continued and the risks increased.

The defence theory acknowledged the IUGR issue, but asserted that apart from a difficult delivery, Rhonda was born without compromise and any problems she currently has are unrelated to the events around the time of her birth. Her test results following birth were not what you would expect from an individual who suffered a hypoxic-ischemic brain injury at the time of birth. The defence theory was that she suffered an injury in the months after her birth, possibly as a result of a genetic disorder. The trial judge agreed that the plaintiff's expert evidence was "less than ideal", "lacked cohesiveness and specificity" and much of it "consisted of bald assertions…broad brush statements lacking in specificity." The court held that to reject the jury verdict on this point required that there be *no* evidence upon which the jury could have reached its conclusion, a very low threshold. As the plaintiff's experts had testified that if Rhonda had been delivered 30 minutes earlier she would have avoided her brain injury, there was an evidentiary foundation on which the jury could have found causation. The judge held that it was not appropriate to weigh the evidence or its reliability on this particular challenge to the jury verdict.

The court went on, however, to consider the next challenge: that the jury's answers were not responsive to the questions on causation and therefore could not found a basis for judgment. The questions to the jury were as follows (an identical set of questions for each defendant except with the names changed):

1(a) Have the appellants satisfied you on a balance of probabilities that there was a breach of the standard of care on the part of Dr. Samra/Ma?

1(b) If yes, please state the particulars of the negligence and provide clear and specific answers.

2(a) If your answer to question 1(a) is yes, have the appellants satisfied you on a balance of probabilities that, but for the breach of the standard of care, Rhonda would not have sustained brain damage?

2(b) If your answer to question 2(a) is yes, how did Dr. Samra/Dr. Ma's breach of the standard of care cause Rhonda's brain damage? Please provide clear and specific answers.

The trial judge explained to the jury that a finding that a standard of care was breached does not automatically result in liability; a causal link between the breach and the harm is required. She instructed the jury that the plaintiff must prove on a balance of probabilities that, but for the breach, the injury would not have occurred, i.e. that if they concluded that Dr. Samra or Dr. Ma should have delivered Rhonda earlier than April 22, 2006, they would still have to be satisfied that the failure to do so was a necessary cause of Rhonda's brain damage. She specifically instructed the jury that they must set out how or why the doctor's breach of the standard of care caused Rhonda's injuries. In finding both a breach of the standard of care and a causal link, the jury provided the following answers:

i. In relation to Dr. Samra:
Dr. Samra's failure to move the C-Section to April 18, 2006 put Rhonda at higher risk which more likely than not caused Rhonda's brain damage.

ii. In relation to Dr. Ma:
Dr. Ma's failure to deliver Rhonda on April 21, 2006 due to her being IUGR, her medical history and NST results more than likely caused her brain damage.

The trial judge found that these answers demonstrated that the jury ignored the charge on causation and failed to explain *how* the negligence caused the plaintiff's brain injury. The law is clear that putting a person at risk of a bad outcome is not sufficient to establish causation; nor is increasing a risk of a poor outcome without specifying how that manifested itself; causation must be proven on a balance of probabilities through expert evidence. By failing to identify a specific link between the negligence, the risk and the injury, the jury failed to provide an answer that could found the basis of a judgment. The trial judge held that:

> 78 The jury's answer to question 2B demonstrates their reasoning was flawed; they concluded that being at "higher risk" caused brain damage, which is clearly erroneous. Even on a generous reading, this answer fails to set out the causal link between the breach (the failure to move up the delivery date) and the outcome (the brain damage). It fails to explain how, which is the essence of causation.
>
> 79 The jury's answer to the question on the particulars of causation for Dr. Ma was similarly flawed. It mirrors the answer to the question on particulars of the breach of the standard of care... Simply being an IUGR baby cannot be causative of brain damage; and neither can a baby's medical history nor the NST results. The answers fail to identify the mechanism of injury or to put it differently, to say how the actions of Dr. Samra and Dr. Ma in failing to deliver the baby earlier resulted in Rhonda suffering brain damage at the time of her birth.
>
> 80 The answers of the jury on causation do not explain the causal link between the negligence and the brain damage; they make no reference to the vast amount of expert evidence on such matters as the normal imaging following Rhonda›s birth, the normal cord gases at birth, the state of the placenta or the onset and effect of the seizures that commenced in July 2006. Furthermore, the evidence of the Plaintiffs› experts was that the brain damage occurred in the 30 minutes prior to birth. Thus, the jury›s answer on causation, that the baby should have been delivered on either April 18 or April 21, 2006, fails to explain how the breaches of the standard of care they identified resulted in or caused Rhonda›s brain damage.

On this basis, the jury's verdict was rejected and a new trial ordered. The decision was appealed and upheld. In reviewing the trial judge's decision, the court considered the purpose of judicial reasons:

"Judicial reasons are sufficient if they satisfy their identified purposes, which are:

i. To justify and explain the result and satisfy the public that justice has been done;
ii. To explain to the losing party why he or she lost;
iii. To provide for an informed consideration of any grounds of appeal; and,
iv. To permit effective appellate review."

The court held that jurors need not justify their results nor explain to the losing party why he or she lost but certainly their reasons must support the integrity of their verdicts. The answers to the questions are supposed to demonstrate that the jury understood and addressed the key issues. The court outlined that jurors' reasons will be insufficient if they:

a. Are not responsive to the question(s) asked;
b. Manifest confusion, disagreement or ambiguity or demonstrate that the jury did not understand and properly apply the instructions given to them; or
c. Indicate that the jury missed an essential issue.

In this case it was held that the judge correctly determined that the answers were essentially non-responsive to the causation question and, to the extent the responses were specific indicated a misunderstanding of the correlation between risk and "but for" causation. The answers then raised concern about the jurors' understanding of the legal issues and judge's instructions. As the jury seemed to confuse the issues of standard of care and causation, the jury verdict was appropriately rejected.

Conclusion

Jury trials have a long history in both civil and criminal litigation. For some, they represent a core right and, as noted by the Ontario Superior Court of Justice Divisional Court, "[t]hey are an integral part of how we, as Canadians, govern ourselves in a free and democratic society." In medical malpractice cases, the value and complexity of electing a jury trial over a trial before a judge alone must be carefully considered before serving a jury notice. Assuming jury trials resume after October 2022 (an open question), whether a jury notice will be struck is the first hurdle. If it can be surmounted, counsel should consider their ability to teach untrained laypeople enough of the medical issues to feel comfortable that they can prove their case.

Finally, the lawyers will need to consider the risk of a jury verdict being rejected and the additional time and money that would be expended in pursuing a new trial. All in all, jury trials in medical malpractice are a viable option in the right case but will rarely, if ever, be a slam dunk option and should be carefully analyzed to ensure they are in fact in the client's best interests.

1 *R. v. Sherratt*, 1991 CanLII 86 (SCC), [1991] 1 SCR 509, at para <https://canlii.ca/t/1fslt>
2 *Ibid*.
3 *Supreme Court Civil Rules*, BC Reg. 168/2009, at 12-6(1).
4 *Supreme Court Civil Rules*, BC Reg. 168/2009, at 12-6(5).
5 *Forstved v Kokabi*, 2018 BCSC 1878
6 *Mewhort v Frimer* (1980), 19CPC 59 at para 61 and 63.
7 *Rados v Pannu*, 2015 BCCA 459 at para 7.
8 *Mewhort, supra* at para 61 and 63.
9 *Rados, supra* at para 12.
10 *Cliff v Dahl*, 2012 BCSC 276 at paras 32, 40 and 44.
11 [*Lord Estate v. Royal Columbian Hospital,* [1982] BCJ No. 456
12 [*Renaerts (Guardian ad litem of) v. Korn,* [1998] BCJ No. 999
13 *Howe* v. *Hwang,* [2018] BCJ No. 88
14 https://www.bccourts.ca/supreme_court/documents/COVID19_Notice_No.41_Amendments_to_the_Supreme Court_Civil_Rules_Temporary_Suspension_of_Civil_Jury_Trials.pdf
15 *Ibid*.
16 https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/current-reviews/civil-jury-trials
17 *Ibid*.
18 *Ibid*.
19 *Cheung (Litigation guardian of) v Samra*, 2018 ONSC 3480 and *Cheung (Litigation guardian of) v Samra*, [2020] O.J. No. 3716