

JUDICIAL APPROVAL FOR ADDITIONAL EXPERTS UNDER S. 558.1 OF THE INSURANCE ACT

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In 2020, a number of changes to Alberta's automobile insurance regime, implemented as a result of Bill 411, came into effect. Among these were the enactment of s. 558.1 of the Insurance Act, RSA 2000, c. I-3, which placed restrictions on the number of expert witnesses and expert reports that parties to a motor vehicle accident proceeding are entitled to rely on at trial.

Pursuant to s. 558.1, parties are limited to three experts for injury claims over \$100,000, and to one expert for claims for damages less than \$100,000 (s. 558.1(2)).

Exceptions allow for additional experts to be called if joint experts are used (s. 558.1(3)) or if consent of the opposing party is obtained (s. 558.1(4)).

Failing either of those situations, however, a party may not call additional experts, or file more than one report per expert, unless he/she first obtains permission of the court, which may only be granted on a finding that certain conditions stipulated by the legislation are met.

This article examines case law providing insight into the types of circumstances that may be considered to satisfy the conditions necessary for judicial approval of the use of additional experts or additional expert reports under s. 558.1.



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While Alberta courts have had limited opportunity to address this issue to date, case law from British Columbia and Ontario, where similar provisions are also in force, is instructive.

Alberta – s. 558.1 of the Insurance Act

Section 558.1(5) of Alberta's Insurance Act provides that a court may allow expert evidence of one or more additional experts to be tendered, or allow the party to tender as evidence one or more additional reports from an expert, if the court is satisfied that the conditions in s. 558.1(6) are met. Section 558.1(6) states:

((6) The following are the conditions for the purposes of subsection (5):

(a) the subject matter of the additional evidence to be tendered is not already addressed by expert evidence permitted under subsection (2) or (4);

(b) without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding.

Only one reported case has considered the conditions set out in s. 558.1(6) of Alberta's Insurance Act.

In *Norris v. Vomacka*, 2024 ABKB 312, Mattis J found that the conditions in the requirement in section 558.1(6) were satisfied and the plaintiff was granted permission to file two additional expert reports.

The plaintiff had already obtained expert reports from a physiatrist, an occupational therapist and an economist. He applied to tender two additional expert reports from an ear, nose and throat ("ENT") physician and a neuropsychologist. The physiatrist had recommended obtaining assessments from the ENT physician and neuropsychologist.



It was not a contentious issue that the additional experts addressed ongoing symptoms not addressed by the expert evidence already obtained. The plaintiff argued he would suffer prejudice to his ability to prove his injuries, his functional impairments, the care he required, and the damages he had suffered if leave was not granted.

Mattis J found the plaintiff's choice of which expert reports to obtain was not determinative, given the plaintiff's position that all five reports were necessary and each addressed a "distinct area" relating to his injuries (para 14). He found determining prejudice required looking at the heads of damages claimed in the Statement of Claim and considering the expert evidence necessary to prove those claims. Mattis J found the increased cost and complexity that would result from allowing the additional evidence could be addressed by a potential costs award post-trial, once the benefit of the additional expert reports and resulting additional complexity and cost were known.

In an unreported decision, *Broschinski v. Wiebe*, No 2201-02106 and *Small v. Wiebe*, No 2201-12497, February 10, 2025, the issue of timing for applications under section 588.1 was addressed.

Poelman J, sitting in morning chambers, ruled that the defense application seeking to "enforce section 558.1 of the Insurance Act" and limit plaintiffs to three expert witnesses was premature. While no plaintiff's expert reports had been obtained in the *Broschinski* matter, some reports were available in the parallel *Small* claim. In *Small*, a physiatrist's report and an interim report from an occupational therapist had already been produced. Additionally, a neuropsychology report, though no longer relevant due to the passing of the expert, was still available. Despite these reports being present in the *Small* case, Poelman J maintained that the application was premature, stating in his oral reasons that it would be more appropriate to revisit the issue closer to trial when the content of the expert reports could be fully assessed. The application was dismissed without prejudice to the defendant's ability to reapply at a later stage when a clearer picture of the expert evidence would be available.

British Columbia – s. 12.1 of the Evidence Act

Section 12.1 of the British Columbia Evidence Act, RSBC 1996, c. 124 is substantially similar to s. 558.1 of the Alberta

Insurance Act, including ss. 12.1(5-6), which are identical to ss. 558.1(5-6) regarding the conditions that must be met on an application for leave to tender expert evidence in excess of the statutory limits. Courts in BC have had opportunity to consider the application of these rules on several occasions.

In ***Le (Litigation guardian of) v. British Columbia (Attorney General)***, 2023 BCCA 200, the British Columbia Court of Appeal acknowledged the reality that in personal injury claims, the statutory limit will often need to be exceeded as "[s]everal medical experts may be required to address a plaintiff's injuries and explain their prognosis for recovery". Different heads of damages may require more than one expert, such as loss of income earning capacity, which often requires the evidence of two experts (a functional capacity assessment and an economist's report) in addition to evidence from medical experts to establish the plaintiff's injuries.



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(Multiple experts may be required to defend against a defendant's argument that an aspect of the plaintiff's claim has not been supported by the medical evidence or request for an adverse inference because the plaintiff did not call a certain expert to give evidence.

In *Vespaziani v. Lau*, 2021 BCSC 1224, one of the first cases to consider s. 12.1 of the Evidence Act, the defendants applied to prohibit the plaintiff, who had served on them 10 expert reports, from tendering more than three reports at trial. The plaintiff distinguished between her "first-tier" reports, which addressed her injuries, and second and third-tier reports, which described how her injuries affected her physical and mental wellbeing, her employment opportunities, and her cost of future care and loss of future income claims. She submitted the reports were in keeping with the "basic anatomy of a personal injury case", which is:

[28] to first prove the injuries suffered by the plaintiff, then prove the impact of those injuries on the plaintiff in terms of care needs and ability to work, and finally prove the cost or financial losses associated with those impacts.

The court determined that both conditions in s. 12.1(6) of the Act (s. 558.1(6) in the Alberta legislation) must be met and should be considered separately when determining whether leave to tender additional expert evidence should be granted. It further determined that a case does not need to be of an "extraordinary or unusual nature" (para 29) or "unique or particularly complex" (para 32) in order for leave to be granted. It warned against relying too heavily on cases decided under the Canada Evidence Act, which does not contain the specific conditions found in s. 12.1(6) of the British Columbia Evidence Act. It further pointed out that allowing a plaintiff to tender additional reports did not restrict a trial judge from considering the admissibility or weight of the reports.

Turning to the case at bar, the court found the first condition in s. 12.1(6), which sought to avoid duplication or "piling on" of experts, was met as, although there was some overlap, the specific subject matter of each report was not addressed by the other reports. With respect to the second condition, the court found that limiting the plaintiff to three reports would prejudice her ability to prove the essential

elements of her claim and that such prejudice would be disproportionate to the benefit of not increasing the complexity and cost of the proceeding.

The court questioned whether there would even be a benefit in terms of complexity in not allowing the report. The quantum of damages claimed, characterized as significant, was a consideration in determining proportionality, even recognizing the amount awarded at trial might be lower than claimed. A further proportionality consideration was the time expected to be taken at trial by the additional reports, which was submitted to be "relatively short" (para 52).

The court concluded the prejudice to the plaintiff was disproportionate to the potential savings in trial time. It pointed out that admitting the reports might actually decrease complexity and trial time since having to prove the matters covered in the reports – such as the quantification of the cost of future care or future earnings – through other means, might be more difficult, assuming it was even possible:

[54] The notion of saving a day and a half or perhaps a little more of trial and the concomitant preparation time by not tendering these expert reports could very well be illusory. Without these reports, the plaintiff is put in the position of trying to prove as many of the matters covered in the reports as possible through lay witnesses or documentary evidence. Assuming that this could even be done, it could very well add to the length or complexity of the trial and preparation time. Proving facts such as a quantification of cost of future care or loss of future earnings without the benefit of an economist to provide the necessary calculations and analysis would significantly add to the complexity by leaving it to the parties and the court to attempt these calculations on their own. [emphasis added].

Finally, the court addressed the admissibility of multiple reports from the same expert. It found the conditions in s. 12.1(6) applied. It noted that updated reports from a single expert were often appropriate, were not duplicative, and were more properly considered as a single report that spoke to different periods of time, which did not constitute piling on.

Requiring the expert to consolidate their report would be a “triumph of form over substance” and could add to the cost of the litigation by increasing the expert’s fees. The defendant’s application was dismissed and the plaintiff was granted leave to tender all of her reports.

Since **Vespaziani**, a small body of British Columbia has emerged regarding leave to tender additional expert evidence that has followed the principles enunciated in **Vespaziani** and demonstrates that in considering the two conditions for granting leave, the specifics of the plaintiff’s injuries and damages claimed as well as the substance of the reports are considered on a case-by-case basis.

In **Raniga v. Kang**, 2021 BCSC 2340, the plaintiff applied for leave to tender the reports of an occupational therapist and her general practitioner. She had also served reports of a neurologist, a psychologist, and a sports medicine doctor. The defendants had consented to allowing the plaintiff to tender an economist’s report. The court examined the reports and found the recommendations addressed by the sports medicine doctor were distinct from the

recommendations of the occupational therapist, despite some overlap.

With respect to prejudice and proportionality, the court found the nature of the plaintiff’s injuries was an appropriate consideration and the corresponding need to have multiple expert reports to speak to complex or multiple injuries. The plaintiff should not be put to a form of “Sophie’s Choice” between reports that a plaintiff with more simple injuries would not face (para 26).

The report of the occupational therapist was allowed. However, the family doctor’s report, which was largely a factual recitation with a summary opinion addressed by other reports, was duplicative and not permitted to be tendered. With respect to prejudice in relation to the family doctor’s report, the court pointed out the family doctor could be called as a lay witness to give his factual evidence.

In **Ghane v. Bhullar**, 2022 BCSC 929, the plaintiff applied to remove his proceeding from the fast track, or alternatively for leave to tender a second expert opinion. The plaintiff had served a report of his family physician and sought to tender the report of a neurosurgeon.



The court refused to remove the proceeding from the fast track but allowed the plaintiff's alternative relief. The court found that while there was some overlap in the reports, the neurosurgeon's report focused primarily on treatment options and his expertise was distinct from that of the family doctor. The plaintiff's ability to prove his claim related to his back injuries would be prejudiced by refusing leave to tender the report. The family doctor's recommendation that the plaintiff consult a neurosurgeon was a sufficient reason for why the second report was needed.

In ***Cooper v. Clements***, 2022 BCSC 1775, the plaintiff, who was in three separate accidents, served 34 expert reports by 13 different experts. The trial judge held a voir dire to determine the admissibility of 26 reports the plaintiff sought to admit into evidence, the defendants arguing their admission offended the limitations in s. 12.1 of the *Evidence Act*.

The court found that, given the nature of the case, the number of reports sought to be introduced was excessive. However, updated reports by some experts were appropriate and necessary.

The reports of certain experts were disallowed on the basis they were duplicative of admissible reports. The plaintiff was free to call those experts as fact witnesses or to obtain their evidence through notices to admit or agreed statements of fact. Limiting the plaintiff to seven damage experts would not result in prejudice to the plaintiff and would avoid the undeniable increased cost of admitting the volume of expert reports sought by the plaintiff. The court then proceeded to examine the reports of each expert individually and determined whether their reports were admissible based on the s. 12.1(6) criteria and the common law principles of admissibility set out in Mohan.

Cooper demonstrates the ability of the trial judge to properly determine the admissibility of expert reports at the time of trial, when the parties are in a position to present their best and most updated information.

In ***Aulakh v. Singh***, 2023 BCSC 863, the plaintiff submitted her core reports were two psychiatry reports and a functional capacity evaluation. She sought admission of two economist reports, one that provided future care multipliers and calculations and one that provided loss of future

earning capacity multipliers and calculations. The defendant argued that once the plaintiff had declared what reports she intended to admit into evidence at trial, the defendant, not the plaintiff, was entitled to determine which reports were subject to the exercise of judicial discretion pursuant to s. 12.1(6) to determine admissibility.

The court rejected the defendant's interpretation of s. 12.1 as contrary to *Raniga v. Kang*. Further, it held a plaintiff has the fundamental right to determine what expert evidence to submit as part of their case and clear language would be necessary to infringe that right. Finally, it was the plaintiff who was required to apply for leave to admit additional reports. The plaintiff was entitled to determine which of her reports were core reports and which were additional for s. 12.1 purposes.

In *Pawluk v. Hanson*, 2023 BCSC 2328, a few days prior to trial, the plaintiff applied for leave to tender additional expert evidence. The plaintiff had been seriously injured in the subject accident and sought significant damages including past and future loss of earning capacity in excess of \$1 million. He sought to rely on 12 reports from 11 experts.

The court agreed with the finding in *Aulakh* that a plaintiff may select three core experts and determine which expert evidence is subject to leave of the court. It acknowledged the challenge to defendants if there is uncertainty about which additional expert evidence will be admitted. While a defendant could attempt to bring an application to enforce the limits in s. 12.1, as was done in *Vespaziani*, the court acknowledged such an application could be met with the argument that the application should be heard by the trial judge. The court concluded it is preferable, if not necessary, to delay a s. 12.1(5) application until the commencement of trial, or until a trial judge has been assigned, so that the trial judge can make the determination at the same time they rule on other aspects of admissibility of the evidence in question. The court pointed out that it may not be possible to make a determination on the additional expert evidence, and whether it is duplicative of the core expert evidence, until it is known with certainty what that core evidence will actually be. Similarly, it may not be possible to assess prejudice without knowing with certainty what the core evidence is.

After reviewing the opinions in each report, the court granted leave to admit all of them on the basis they were not duplicative of each other and the prejudice to the plaintiff outweighed the increased complexity of admitting them. Although the defendants argued they would be prejudiced if all of the reports were admitted, the court noted that prejudice to parties other than the party seeking leave was not expressly mentioned as factor to be considered in the balancing exercise in s. 12.1(6)(b).

Sehgal v. Lissimore, 2023 BCSC 1506 is a cautionary tale regarding the evidence expected in an application for leave to tender additional expert evidence. The plaintiff wished to tender the evidence of a physiatrist and a functional capacity evaluator, in addition to the opinion of an orthopaedic surgeon obtained jointly with the defence. However, the plaintiff did not identify the issues or questions sought to be answered by the additional experts, who the experts were and their qualifications, or why the surgeon could not address the issues. The court was unwilling to assume the surgeon could not opine on the issues and dismissed the plaintiff's application.

Ontario – s. 12 of the Evidence Act

In **Ontario**, the limit on expert evidence is found in s. 12 of the Evidence Act, RSO 1990, c. E.23, which provides that no more than three expert witnesses may be called by a party without leave. Unlike the Alberta and British Columbia provisions, there are no legislative conditions that must be met for leave to be granted. The case law in Ontario has developed a list of factors to consider on an application for leave to call more than three expert witnesses which includes:

[17] any objection by the opposite party; (b) the number of expert subjects in issue; (c) the number of experts each party proposes to call on each issue; (d) the number of experts customarily called in similar cases; (e) whether leave would disadvantage the opposing party; (f) the necessity of calling more than three experts; (g) any duplication of the opinions; and (h) whether the time and costs are disproportionate **Majerczyk v. Manalo**, 2023 ONSC 3064, [2023] O.J. No. 2263; **Desmond v. Hanna**, 2023 ONSC 4097 at para 10, [2023] O.J. No. 3045).

These factors largely reflect the statutory conditions that must be met in Alberta and British Columbia. There is also a recognition that in personal injury cases, especially where chronic pain is in issue, it is common practice to have more than one expert speak to issues of causation (**Majerczyk**, para 20). Leave is “routinely given” to both sides in complex injury cases and is normally left for a trial judge to decide based on the evidence at that time (**MacGivvon v. Warren-Phenix**, 2021 ONSC 6899 at para 33). However, the Ontario courts have cautioned against allowing the use of experts to “run amok”, which increases litigation costs and makes litigation inaccessible (**Desmond**, para 16).

The Ontario courts have also distinguished between litigation experts (retained for litigation purposes), and participant or non-party experts (experts who have formed an opinion for non-litigation purposes), concluding that s. 12 of the Ontario Evidence Act only applies to litigation experts (**Higashi v. Chiarot**, 2021 ONSC 2399 at paras 5).

Section 12 was meant to curb the increasing costs

of litigation by restricting the number of “hired gun” experts (**Higashi**, para 42). As in every jurisdiction, the bottom line is to prevent duplicative evidence that unnecessarily drives up the cost and time of proceedings (**Higashi**, para 47).

In **Majerczyk**, the defendant was granted leave to lead evidence of two additional experts, since although the reports were “strikingly similar”, the underpinning of the reports was “strikingly different” and did not result in undue duplication (para 22-23).

In **Desmond**, the court struck a balance by granting the plaintiff leave to call one expert from a group of three to speak to the plaintiff’s chronic pain, given their opinions were “wholly duplicative” and any differences in their specialities did not warrant a separate opinion from each (para 25). The plaintiff was also granted leave to call either a psychiatrist or a psychologist given their investigations, diagnoses and opinions were virtually the same (para 32).

Conclusion

While courts have acknowledged the legislative concerns for avoiding duplication in expert evidence and curbing rising litigation costs that inform s. 558.1 and comparable provisions, the cases also suggest courts remain highly aware of the potential prejudice that can result to litigants from an overly strict application of the legislative restrictions. Taken together, the above cases provide a number of helpful insights into how the conditions under s. 558.1(6) of Alberta's Insurance Act might be met, and confirm that a case does not need to be extraordinary or unusual for leave to be granted.

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