IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Manson v. Mitchell,* 2025 BCSC 1588

Date: 20250818
Docket: S219805
Registry: Vancouver

Between:

Ian Craig Manson

Plaintiff

And

Jeffrey Adam Mitchell, Revelstoke Alpine School Inc. and Association of Canadian Mountain Guides

Defendants

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:	T.D. Goepel R. Powell
Counsel for the Defendants:	R.B. Kennedy, K.C. A. Render
Place and Date of Hearing:	Vancouver, B.C. May 20, 2025
Place and Date of Judgment:	Vancouver, B.C. August 18, 2025

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I. Introduction

[1] This is an application by the plaintiff seeking leave to amend the notice of civil claim. The defendants oppose the application arguing the proposed amendments substantially change the complexion of the case, including by adding new causes of action after the expiry of a limitation period. They claim they would be prejudiced by these substantial changes shortly before trial. They also argue some of the proposed changes are improper pleadings that cannot be allowed to stand.

[2] The action arises out of a mountaineering incident that occurred on July 15, 2021 on Mount Rogers in Glacier National Park, B.C. The plaintiff, Ian Manson, was on a professionally-guided rock climbing adventure led by the defendant, Jeffery Mitchell. Mr. Manson hired Mr. Mitchell to guide the trip. He did so either directly or through Mr. Mitchell's employer, the defendant Revelstoke Alpine School Inc., which Mr. Mitchell owns.

[3] Mr. Manson alleges the incident occurred when Mr. Mitchell was on a ledge belaying Mr. Manson who was about 10 metres below him on a ledge. Belaying is essentially securing the safety rope that is attached to another climber down the

mountain face. It is alleged that while Mr. Manson was on the belay, Mr. Mitchell used his foot to test the stability of a rock on the ledge where he was standing above Mr. Manson and dislodged the rock causing it to fall and graze Mr. Manson who was standing on the ledge below. This caused Mr. Manson to fall some seven metres down the mountain face.

[4] As Mr. Manson fell, his safety rope tightened and pulled Mr. Mitchell from his belay stance and he too fell some distance down the face of the mountain. Both men suffered injuries and had to be airlifted off the mountain.

[5] In the original notice of civil claim ("NOCC"), Mr. Manson claims that Mr. Mitchell was negligent in testing the stability of the rock and in how he had set up the belay. He claims to have suffered serious physical and psychological harms as a result his fall and the overall incident. He also sues in breach of contract.

[6] Mr. Manson also makes claims against the defendant, Association of Canadian Mountain Guides ("ACMG"). The NOCC alleges ACMG is a "self-governing regulatory body that provides, *inter alia*, accreditation for mountain guides". It alleges that Mr. Mitchell was a professional mountain guide "formally certified as such by the ACMG". It alleges that ACMG held itself out as ensuring that guides meet certain professional standards and issued public statements regarding the expertise of its members, including Mr. Mitchell. It alleges that ACMG breached a duty of care to Mr. Manson by failing to properly train and continually educate its members, including Mr. Mitchell, and for certifying Mr. Mitchell as a guide knowing he had not been properly trained in belaying.

[7] The amendments Mr. Manson now wishes to make provide more details and particulars of the existing claims against all three defendants. He also seeks to make claims in negligent misrepresentation against each of the three defendants and claim aggravated and punitive damages. An amendment to the NOCC was first proposed in July 2024 but the current proposed Amended Notice of Civil Claim ("ANOCC") was proposed in January 2025, approximately nine months before the scheduled trial date in October 2025.

II. Legal Principles

[8] Rule 6-1(1) allows a party to amend pleadings after a notice of trial is filed, either with consent or leave of the court. A decision to grant leave is discretionary

but, with all acts of discretion, it must be exercised judicially and in accordance guidelines established in the authorities.

[9] The rationale for allowing amendments is to enable the real issues to be determined. Amendments are to be allowed unless prejudice can be demonstrated by the opposing party, the amendment would be useless, or if the amendment otherwise fails to meet the requirements of a proper pleading: *Langret Investments S.A. v. McDonnell*, 1996 CanLII 1433, 21 B.C.L.R. (3d) 145 (C.A.) at para. 34; *Morriss v. British Columbia,* 2010 BCCA 95 at para. 17. The onus to show prejudice is on the party resisting the amendment, although prejudice will be presumed when the amendment seeks to introduce a new cause of action after the expiry of a limitation period: *British Columbia (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372 at para. 41; *Letvad v. Fenwick*, 2000 BCCA 630 at para. 30.

[10] A proposed amendment may be disallowed where it fails to disclose a cause of action or it is plain and obvious that the claim has no prospect of success. This is measured on the same standard as an application to strike an existing pleading: *McMillan v. McMillan*, 2014 BCSC 546 at para. 13.

III. Analysis

A. The Proposed Amendments Generally

[11] The plaintiff suggests the amendments fall into four categories:

a) minor grammatical changes or clarifications;

b) particulars to already pleaded causes of action;

c) additional events that occurred after the incident that the plaintiff alleges support a claim for aggravated damages; and

d) new claims for aggravated and punitive damages.

[12] Although the defendants oppose all the amendments in their Application Response, they were more selective in their oral submissions. Principally, they oppose amendments which they say introduce new causes of action in negligent misrepresentation and breach of a duty to warn. They argue these amendments

should not be allowed because the limitation period for them has passed. They also argue that aspects of the negligent misrepresentation claims are improperly pled and should be disallowed for that reason. Finally, they argue that the claims for aggravated and punitive damages are without foundation and should be disallowed.

[13] I agree with the plaintiff that many of the proposed amendments as they relate to the negligence and breach of contract are either clarifications of the existing claims or particularizations of already-pled facts and claims. For example, I find the amendments to paras. 2 through 13 are clarifications or particularizations of claim or material facts already alleged in the NOCC. I would allow those amendments.

[14] The more substantive amendments begin at para. 14 of the proposed amended notice of civil claim ("ANOCC"), although there are many clarifications and particularizations sprinkled throughout the ANOCC at and after para. 14. I do not propose to comment on every one of these amendments but instead will focus on the broader categories of amendments that were expressly opposed by the defendants in oral argument. Those categories are: the negligence claims; the negligent misrepresentation claims; the new claims for aggravated and punitive damages; and the "additional events". For any proposed amendment that I do not specifically address in these reasons, I have concluded that it is either a clarification or particularization of an already-pleaded fact or claim, and does not give rise to any prejudice such that the amendment should be allowed.

B. The Negligence Claims

1. Negligence against Mr. Mitchell

[15] Paragraph 13 of the original NOCC pleads facts that are said to support a duty of care on Mr. Mitchell's part and para. 14 sets out how it is alleged Mr. Mitchell breached that duty. The ANOCC proposes several amendments to para. 14, most of which I find are clarifications or particularization of previously pleaded facts. There are several new subparagraphs that relate to Mr. Mitchell's training and his alleged failure to act in accordance with that training (paras. 14(c), (j), (k), and (l)). I view these as particularizations of the existing allegation in para. 13(b) of the NOCC that Mr. Mitchell failed "to have appropriate knowledge or skill as a mountain guide". They also tie in with existing allegations in the NOCC that ACMG

failed to properly train Mr. Mitchell and certified him knowing that he was improperly trained. To the extent these subparagraphs are new, I find they are sufficiently linked to existing factual allegations in the NOCC and no prejudice to the defendants arises from them. I would allow those amendments.

[16] Paragraphs 14(m) through (o) essentially allege that Mr. Mitchell breached the duty of care by failing to warn Mr. Manson of the additional risk of undertaking the adventure with a guide that was inadequately trained and supervised. The defendants argue this is a new cause of action founded an a discrete “duty to warn”. They rely on *Lewis v. McGahan Medical Corporation*, 1995 CanLII 633, 37 C.P.C. (3d) 22 (B.C.S.C.) which described a duty to warn as being separate from a more conventional duty of care in negligence.

[17] In *Lewis*, the plaintiff sued the designer and manufacturer of breast implants alleging they were negligently designed, manufactured, and distributed. She also sued the doctor who inserted the implants alleging he failed to “advise, warn or caution” her about their risks, but she had not specifically claimed that against the designer and manufacturer. She sought to do so through a proposed amendment and argued it was just a particularization of the existing negligence claim and not a new cause of action. Master Joyce disagreed. He found there can be different types of negligence claims against a single defendant with “more than one type of duty, each with its own standard of care.” He said it may be that a single set of facts could prove more than one duty and more than one breach but in the case before him, the statement of claim did not plead facts to prove a breach of a duty to warn even if a duty of care was pled. Thus, he concluded that the duty to warn was a new cause of action against the designer and manufacturer that was sought to be added after the limitation period. He allowed the amendment but preserved that defendant’s ability to raise a limitations defence at trial.

[18] In this case, the alleged failure to warn is not that Mr. Mitchell failed to warn Mr. Manson about the dangers of rock climbing generally but rather that he failed to warn him of a very specific danger of being led by an inadequately trained and supervised guide. This claim is rooted in the existing allegation in the NOCC that Mr. Mitchell failed to have appropriate training, knowledge or skill as a mountain guide. Essentially, the proposed amendment suggests that Mr. Mitchell had a duty to disclose that alleged fact to Mr. Manson but failed to do so.

[19] To the extent this is a new cause of action, no new facts are alleged in support of it. The original NOCC alleges that Mr. Mitchell was inadequately trained and did not have the appropriate knowledge or skill to serve as a mountain guide on this adventure. All the potentially new claim does is to assert that Mr. Mitchell had a duty to tell Mr. Manson he had not been properly trained or supervised in mountain guiding techniques and thus there were greater risks in undertaking the adventure with him as a guide. Whether there is any merit in that claim is a matter for trial but I see no prejudice in allowing the amendment at this stage.

[20] In para. 14(q) of the ANOCC, it is alleged that Mr. Mitchell failed to warn Mr. Manson before he tested the stability of the rock, causing it to dislodge and fall. I find this is not a new cause of action grounded in a distinct duty to warn. Rather, it is a particularization of the negligent conduct alleged in respect of Mr. Mitchell's testing the stability of the rock. A duty to warn suggests that the defendant had a duty to warn the plaintiff of some potential danger before the plaintiff ventured on a particular course of action. Here, however, the allegation is that Mr. Mitchell ought to have given Mr. Manson a heads up that he (Mr. Mitchell) was about to engage in conduct that might put Mr. Manson at risk. It was not a warning about anything Mr. Manson was about to do or not do. I do not view that as a stand-alone claim about a duty to warn but rather a particularization of negligent conduct alleged in the original NOCC as it relate to testing of the rock. I would allow that amendment.

[21] Paragraph 14(r) of the ANOCC is also a particularization of the alleged negligence regarding testing of the rock stability and does not give rise to anything new or prejudicial. I would allow that amendment.

[22] There is one new point in para. 14(i) of the ANOCC which is "the failure [of] Mitchell to select a safe route for himself and the plaintiff to climb". In my view, this introduces a new cause of action in that it alleges a breach that was not made in the NOCC. The breaches in the NOCC relate to Mr. Mitchell's testing of the rock, the adequacy of the belay he established, and his undertaking of the guiding adventure without proper training or qualifications. The new allegation that he should have selected a safe route up the mountain is quite different to the existing allegations. It implies there are other, safer routes that could have been taken. It adds a new dimension to the case about what route options were available to be taken and why this route, as opposed to some other route, was selected.

[23] In my view, that is a substantial change to the claim and it is prejudicial to the defendants if it were made at this late stage. Assessing whether the overall route was suitable or if there were safer routes that ought to have been chosen would likely require an expert to survey the area and opine on the route itself (rather than just the site where the incident occurred) and what other routes up the mountain might have been safer. I would not grant leave to make this amendment at this late stage. I got the impression from counsel that this amendment is not especially important to the plaintiff's theory of the case in any event.

[24] It follows from that I would also not grant leave to amend para. 14(d) to include "route-finding" but the other amendments to that subparagraph are acceptable particularizations of an existing claim.

2. Negligence against ACMG

[25] The basic allegation against ACMG in the original NOCC is that it failed to properly train Mr. Mitchell, that it purported to certify him knowing that he was not properly trained, and that his skills did not meet ACMG's standards for a certified mountain guide. Paragraph 16 of the NOCC alleges facts that purport to underlie a duty of care on ACMG's part and para. 17 alleged breaches of that duty.

[26] Paragraph 16(b) of the NOCC alleges that ACMG held itself out as ensuring that the mountain guides it certifies meet certain standards of professional conduct. Paragraph 16(e) alleges that ACMG made "public statements" as to the expertise of its members, including Mr. Mitchell. The proposed amendment found in para. 26(f) of the ANOCC alleges that these public statements were issued with the intention of attracting and inviting persons to hire ACMG-accredited guides. I view that as a clarification of the existing claim regarding ACMG's alleged public statements and I find no prejudice in this addition. Nor do I see prejudice in para. 26(g) of the ANOCC which is a new paragraph that alleges it was foreseeable that Mr. Manson would rely on Mr. Mitchell's ACMG certification in his decision to retain him as a guide or in para. 26(g) which alleges it was foreseeable that Mr. Manson might suffer injury as a result of ACMG's alleged negligence in training and certifying Mr. Mitchell. I would allow these amendments.

[27] I find the amendments in paras. 27(a) through (g) are largely clarifications and particularization of existing allegations and are not prejudicial to the

defendants. However, for the reasons I expressed earlier about the proposed new "route-finding" claim, I exclude from this the allegation in para. 27(d) that ACMG failed to teach its members how to properly "route-find". I would not allow this amendment but the rest para. 27(d) is acceptable particularization of an existing claim.

[28] Paragraphs 27 (h) through (l) are new but I find they are particularizations of the existing claim that ACMG failed to properly train and oversee Mr. Mitchell. Paragraphs 27(m) through (o) allege a failure to warn the public, including Mr. Mitchell, about additional risks of engaging a guide who is not adequately trained or supervised. These allegations mirror those in para. 14(m) through (o) of the ANOCC which I discussed earlier and, for the reasons given there, I would allow these amendments.

[29] Paragraph 27(p) alleges that ACMG failed to comply with its own policies regarding "professional practice, continuing professional development, advertising guidelines, conduct review procedures and/or code of conduct." This pleading is somewhat vague in that the ANOCC does not identify specific policies of the ACMG that the plaintiff alleges ACMG failed to comply with. However, the original NOCC alleged at para. 16(d) that ACMG "has issued policies and manuals which set out the actions that its members, including Mitchell, must take in relation to mountain guiding activities". Thus, the existence of these policies is nothing new and, if the specific identification of them was an issue, I presume ACMG would have asked for particulars by now. I would therefore allow this amendment.

3. Negligence against Revelstoke Alpine School

[30] Paragraphs 38-41 of the ANOCC allege negligence against Revelstoke Alpine School. The allegations of negligence against Mr. Mitchell and the school were combined in the NOCC and thus identical. The ANOCC proposes to separate these claims and make them specific to each of these two defendants. The amendments also shift the focus of the alleged negligence against Revelstoke Alpine School from being co-extensive with Mr. Mitchell's negligence to an alleged failure on the part of the school to ensure Mr. Mitchell, as its employee, was properly trained and qualified to lead the adventure. To the extent there is anything new in these paragraphs, they are co-extensive with what I have already addressed in respect of paras. 13 and 14 of the ANOCC and, with the exception of

"route-finding" in para. 39(d), the defendants have not shown any prejudice from these amendments. I would allow these amendments with the exception of the reference to "route-finding" in para. 39(d).

C. The Negligent Misrepresentation Claims

[31] The proposed ANOCC contains three discrete sections alleging negligent misrepresentation against each of the three defendants. The defendants argue these are new causes of action that Mr. Manson seeks to introduce past the expiry of the limitation period. They also argue the claims are not properly pled in that several of the alleged misrepresentation are not of past or existing facts. They also argue the claims are not particularized as required by the *Supreme Court Civil Rules.* Mr. Manson argues the negligent misrepresentation claims are not new and their core elements can be found in the original NOCC.

1. Is Negligent Misrepresentation a New Cause of Action?

[32] I accept that some aspects of the original NOCC might hint at a negligent misrepresentation claim but it was not expressly pled and did not form part of the original NOCC.

[33] It is plain on the face of the original NOCC that the plaintiff's claims were founded in breach of contract and negligence. The legal basis section asserts claims in breach of contract and negligence. It is silent on negligent misrepresentation. Although there are brief mentions (three by my count) of the defendants making certain representations, essential elements of the cause of action for negligent misrepresentation are not found in the NOCC.

[34] The test for negligent misrepresentation is set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 11. It identifies five general requirements for the cause of action:

a) there must be a duty of care based on a "special relationship" between the representor and the representee;

b) the representation in question must be untrue, inaccurate, or misleading;

c) the representor must have acted negligently in making said misrepresentation;

d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[35] The negligence claim against Mr. Mitchell and Revelstoke Alpine School in the original NOCC set out the "facts underlying [the] duty of care" at para. 12 which include two facts that amount to representations:

> (a) Mitchell held himself out as being capable of providing professionally guided mountaineering adventures, including mountaineering and rock climbing;
>
> (b) Mitchell held himself out as being certified by the ACMG

[36] These alleged representations are said in the NOCC to support a duty of care in negligence. It was not alleged in the NOCC that they were made in breach of a duty of care. As counsel for the defendants correctly state, "these allegations were not alleged to be actionable in and of themselves. Rather, they were expressly pled as facts supporting the existence of duty of care" in negligence.

[37] The allegations of breach of a duty of care were set out in para. 13 of the NOCC and did not refer to any representations. While paras. 13(b) and (c) clearly allege that Mr. Mitchell breached a duty by undertaking the guiding contract with inadequate knowledge, skill, and training as a mountain guide, they do not allege as a breach that Mr. Mitchell made an untrue, inaccurate, or misleading statement to Mr. Manson about those matters. It would have been necessary to allege that as a breach to plead negligent misrepresentation. Thus, I find that negligent misrepresentation was not pled against Mr. Mitchell or Revelstoke Alpine School in the NOCC.

[38] The negligence claim against ACMG in the NOCC starts at para. 15 with the facts supporting the claim set out at para. 16, including the following references to representations:

> (b) the ACMG held itself out as ensuring that mountain guides certified by them meet standards of professional conduct;
>
> …
>
> (e) the ACMG issues public statements of the professional expertise of its members, including Mitchell.

[39] Again, these are alleged facts that are said to support a duty of care and not stated to be breaches of a duty. The alleged breaches are set out in para. 17 and, with only one exception, relate to how ACMG trained and certified its members, including Mr. Mitchell specifically. They say noting about a misrepresentation.

[40] The exception is an allegation in para. 16(g) of the NOCC that ACMG issued public statements about the professional expertise of its members without ensuring its members met those standards. However, there is no pleading in the NOCC that Mr. Mitchell relied on these public statements which is essential to a negligent misrepresentation claim.

[41] Thus, the full extent of any allegations of negligent misrepresentation in the original NOCC amounts to two statements of Mr. Mitchell holding himself out to have certain qualifications and a certification, and ACMG making public statements about its members' professional expertise. While facts that relate to the negligent misrepresentation claims now proposed were pleaded, I am satisfied that negligent misrepresentation was not pleaded as a cause of action in the original NOCC. It therefore falls to me to decide whether the amendment should be allowed having regard to any prejudice to the defendants and other factors that are to be considered when a plaintiff seeks to amend a claim to add a new cause of action after the expiry of a limitation period.

2. Are the Amendments Prejudicial to the Defendants?

[42] The claims in negligent misrepresentation were first proposed in a draft amended notice of civil claim delivered on July 22, 2024. However, that proposed amendment only alleged negligent misrepresentation against ACMG and not against the other two defendants. Further, even as of July 22, 2024, the proposed amendment was delivered more than year past the two-year limitation period. An application seeking leave to make that amendment was filed in September 2024 and set for November but then adjourned. In December 2024, Mr. Manson retained his present counsel and in January 2025 new counsel proposed the present ANOCC which seeks to claim negligent misrepresentation against all three defendants.

[43] There is a presumption of prejudice that arises when a new cause of action is raised after a limitation period, but the degree of prejudice remains relevant: *Letvad,* paras. 29-30. Other relevant factors are the extent and explanation for the delay in advancing the claim and the extent of the connection, if any, between the existing claims and the proposed new cause of action: *Letvad*, para. 29

[44] The negligent misrepresentation claims against Mr. Mitchell and Revelstoke Alpine School are founded largely on facts that were pled in the original NOCC:

a) The facts alleged in paras. 13 and 16 of the NOCC are relied on in paras. 18 and 30 of the ANOCC as founding the special relationship necessary for a duty of care. Paragraphs 13 and 16 are largely unchanged in the ANOCC save for some minor additions and clarifications that are neither new nor prejudicial to the defendants.

b) Paragraph 19 of the ANOCC sets out Mr. Mitchell's alleged representations which contain several new subparagraphs, but these largely amount to a particularization of the two representations originally pled in para. 13 of NOCC, namely that Mr. Mitchell was capable of providing professionally guided mountaineering adventures and he was certified by the ACMG. As the proposed para. 19 amounts to particularization of existing factual allegations, I find the defendants are not prejudiced by the addition of these facts.

c) Paragraph 31 of the ANOCC sets out representations ACMG is alleged to have made on its website with respect to the level of training and competency of its members and the professional standards they adhere to. These allegations have some grounding in the original NOCC where, at para. 16(e), it was alleged that ACMG "issues public statements of the professional expertise of its members, including Mitchell" and at para. 17(g) where it was alleged that ACMG breached a duty of care by "publicly issuing statements of the professional expertise of its members without ensuring its members meet these professional standards."

[45] There is no question the proposed ANOCC contains more detail about the nature and content of the alleged representations and introduces negligent misrepresentation as a new cause of action, but the factual basis for the claim is

found in the original NOCC, albeit in a more general form. This dampens any prejudice arising from the new cause of action at this stage. The public statements said to form the basis for the negligent misrepresentation have been part of the claim from the outset, although now with more particularization.

[46] The defendants submit that ACMG is prejudiced by the new claim because the alleged misrepresentations attributed to it are said to have been made on its website and it does not maintain an archive of its website. Thus, it says, it cannot verify what content was posted when Mr. Manson claims to have read and relied on the website. However, it will be for Mr. Manson to prove what content he read and when he read it. He has produced screen captures of the pages he claims to have obtained from a publicly accessible website that allows one to download archived websites. He has deposed that this archived content includes printouts of the pages from the ACMG website that were publicly accessible at the times he clams to have viewed them. He also provides (in an affidavit though not in the ANOCC) dates on which he says he accessed the website. I am not persuaded ACMG is prejudiced when Mr. Manson has provided what he says are the specific webpages he claims to have read and relied upon.

[47] ACMG also asserts prejudice because its website is managed through a contractor and ACMG cannot determine "*who* viewed their website". However, there is no evidence that ACMG or its contractor could at any time (before or after the expiry of the limitation period) determine who had viewed the website. To my knowledge, analytics data can provide some information such as the number of visitors to a webpage, dates and times that it was viewed, and the general location of those who viewed a site. However, to drill down to a level where one can identify specific persons who have viewed a website – a significant invasion of personal privacy – one would need I.P addresses and, absent consent of the user, a search warrant: *R. v. Bykovets*, 2024 SCC 6. The defendants have not persuaded me that they could, under any circumstances, determine "who viewed their website" and thus I find no prejudice arising from this point.

[48] The defendants further claim it will be difficult to determine if any alleged representations on ACMG's website were true at the time they were made because of fading memories. Again, this is unpersuasive. The defendants have identified no witnesses who might or might have testified about matters concerning the website content. Nor have they identified anything on the webpages produced

by Mr. Manson that might have been questioned if a now-unavailable witness had been able to testify or how fading memories might impact on verifying or contextualizing the content. In short, the prejudice the defendants assert is speculative.

[49] I acknowledge that prejudice arising from fading memories is to be presumed when a new cause of action is brought after the expiry of a limitation period, but the *degree* of prejudice remains a relevant consideration: *Letvad* para. 29. The defendants have not persuaded me that the presumed prejudiced has any real impact on their ability to respond to the new cause of action.

[50] I therefore find that while the negligent misrepresentation claims are new causes of action not found in the original NOCC, they are sufficiently grounded in facts that were alleged in the NOCC such that any prejudice from introducing these claims after the limitation period does not impair the defendants' ability to respond. Subject to considering whether the negligent misrepresentation claims have been properly pled, which I will turn to in a moment, I would not refuse the proposed amendments on grounds of prejudice to the defendants.

3. Other Factors

[51] Other considerations in deciding whether to grant leave to introduce a new cause of action after the expiry of a limitation period include the extent of the delay, the reason and explanation for the delay, and the extent to which the new cause of action is connected with existing claims: *Letvad,* para. 29-30.

[52] I have largely dealt with the last consideration and I find the negligent misrepresentation claims are closely connected with the existing negligence claims.

[53] There is little in the plaintiff's submission that explains why the negligent misrepresentation claims have only been advanced in July 2024 (against ACMG) and January 2025 (against Mr. Mitchell and Revelstoke Alpine School). However, it appears that it largely relates to the change in plaintiff's counsel in December 2024. Although previous counsel had proposed an amendment as early as July 2024 to claim negligent misrepresentation against ACMG, it was only after new counsel was retained that the plaintiff sought to further expand the claim to the other two defendants.

[54] It is understandable that new counsel would come to the file with fresh ideas about the theory of the case. Here it appears that new counsel thought it wise to better particularize some aspects of the existing claim and envisioned a broader claim in negligent misrepresentation than did previous counsel. That provides some explanation for the delay.

[55] Mr. Manson also points out that there was a summary trial dealing with an issue of a waiver of liability and an appeal of that summary trial judgment. That proceeding, including the appeal, had the prospect of ending the case altogether and it is suggested that there was no utility in seeking to amend the NOCC until those proceedings concluded in April 2024

[56] In light of my conclusions on prejudice and the close connection between the negligent misrepresentation claims and the existing claims in the original NOCC, I find these points adequately explain the delay in seeking the amendments.

4. Is the Negligent Misrepresentation Properly Pled?

[57] The defendants argue there are three fundamental defects in how the negligent misrepresentation claims have been pled. First, they argue the ANOCC fails to plead facts which, if proven, would prove a special relationship between Mr. Manson and ACMG. Second, they say the alleged misrepresentations are not statements of past or existing fact but rather are statements of opinion or future events. Third, they argue the claims of negligent misrepresentation are not adequately particularized. Fourth, they argue it is not open to Mr. Manson to plead unspecified representations that counsel will advise of prior to trial.

(a) Special Relationship

[58] The defendants argue the pleaded facts do not allege any direct dealings between Mr. Manson and ACMG or that ACMG even knew of Mr. Manson. They argue this is essential for the special relationship necessary to a negligent misrepresentation claim. They argue Mr. Mitchell's claim that he read and relied upon representations made on ACMG's website is insufficient to establish a special relationship because the website, "deals only with the guides" and any undertaking made on ACMG's website was directed to the guides, not to the general public.

[59] I find the submission about the website unpersuasive. If a statement on website is restricted to a limited class of persons, then only those persons should have access to the site. If the website is made public, then it is to be expected that members of the public will view it and potentially rely on the statements.

[60] Further, based on the webpages that Mr. Manson has provided, it appears that ACMG's website was very much directed at the public. There is a page that explains the benefits of hiring a certified professional guide that is clearly directed to persons considering a guided mountain trip. There is also a page that explains how to find a certified guide using the website and how to be sure that a guide is certified by ACMG. Clearly, all of this content is directed to the public. I am not persuaded at this preliminary stage that the website contains no representations or undertakings to the public.

[61] There remains a question of whether a representation made by ACMG to the general public on its website is sufficient to establish a special relationship, or even a proximate relationship, between ACMG and Mr. Mitchell: *Schilling v. Certified General Accountants Assn. of British Columbia*, 1996 CanLII 621, 20 B.C.L.R. (3d) 144 at para. 45 (C.A.). The submissions on that point were not comprehensive, apart from the argument I just discussed about the audience for the website. I have not been persuaded that it is plain and obvious a special relationship cannot arise on these pleaded facts so I conclude the matter should be decided at trial.

(b) Statements of Past or Existing Fact

[62] Next the defendants argue the alleged misrepresentations are not of past or existing facts but rather are opinions or promises of future events. They also argue one alleged representation simply makes no sense.

[63] An actional misrepresentation must pertain to a matter of past or existing fact or circumstance. A promise that something will be done in the future cannot be properly construed as a past or existing fact: *PD Management Ltd. v. Chemposite Inc.,* 2006 BCCA 489 at paras. 12-14. Likewise, an opinion is not a statement of fact.

[64] The defendants argue that following representations alleged in para. 19 of the ANOCC to have been made by Mr. Mitchell are matters of opinion and not fact:

> (b) through his email signature reading "ACMG Mountain Guide" in emails with the plaintiff between June 16, 2021 and July 3, 2021, representing that Mitchell was a certified ACMG Mountain Guide and met the standards of knowledge and practice of an ACMG Mountain Guide;
>
> (c) through his communications with the plaintiff between June 6, 2021 and July 15, 2021, representing that Mitchell was capable of providing professionally guided mountaineering adventures in a safe and competent manner;
>
> …
>
> (d) making the representations in (a) to (c) while omitting that Mitchell did not meet ACMG standards for certification, lacked proper instruction, training, supervision, examination and / or did not comply with the ACMG professional practice requirements and / or CPD requirements.

[65] The defendants argue that it is a matter of opinion as to whether Mr. Mitchell met the requirements for ACMG certification. There may well be some room for opinion in that respect, depending on how objective the ACMG standards for certification are. However, it is not plain and obvious that the standard cannot be objectively determined or that Mr. Mitchell's qualifications cannot be objectively measured against that standard. It seems to me that these will be matters of evidence. I am not persuaded it is plain and obvious that these allegations are not of factual representations. I would allow these amendments.

[66] The defendants argue that the following misrepresentations alleged against ACMG in para. 31 of the ANOCC are matters of opinion:

> (b) the ACMG's primary focus is ensuring that its members are the best trained and most professional guides and instructors anywhere:
>
> (c) the ACMG protects the public and the public interest.
>
> (e) ACMG guides and instructors are experienced and knowledgeable about mountain terrain and conditions.
>
> (i) that Mr. Mitchell … lacked proper instruction, training, and supervision…

[67] I agree that the first statement is a matter of opinion and too general a statement to constitute a representation of fact. There is no objective standard by which to assess whether a guide is the "best trained" or "most professional" of any. I would not allow the amendment to para. 31(b).

[68] I find the statement in para. 31(c) that ACMG protects the public and the public interest is also so broad that it cannot be a statement of a past or existing fact. There is no pleaded statement of what constitutes the public interest for the purpose of this alleged misrepresentation. The term is so broad it is impossible to know what would be required of ACMG to protect “the public and the public interest.” Even if that standard is ascertainable, the statement is in the nature of a promise that ACMG will do something in the future to ensure that the public interest is protected and not a representation of an existing fact. I would not allow this amendment.

[69] The statement is para. 31(e) certainly has the ring of opinion but it is sufficiently factual that I would not exclude it at this stage.

[70] Paragraph 31(i) also as the ring of an opinion insofar as assessing what is “proper” training. However, reading the paragraph in its entirety, I find the allegation is essentially that ACMG held Mr. Mitchell out as having received an amount of instruction, training, and supervision to make him qualified to guide a mountain-climbing trip. I understand the allegation to be that Mr. Mitchell did not receive instruction or training that was sufficient to meet ACMG’s own standards for certification. While there is undoubtedly some subjectivity in that standard, I would not exclude the amendment at this stage.

[71] The defendants argue that the following misrepresentations alleged against Revelstoke Alpine School in para. 43 of the ANOCC are matters of opinion:

> (a) advertising that Mitchell was a competent mountain guide capable of providing professionally guided mountaineering adventures to clients;
>
> (b) advertising that Mitchell was a certified ACMG guide and using the ACMG Mountain Guide insignia in association with Mitchell's name;
>
> (c) making the representations in (a) and (b) while omitting the pertinent information that Mitchell did not meet ACMG standards for certification, lacked proper instruction, training, supervision, examination and / or did not comply with professional practice requirements and / or CPD requirements;

[72] I agree that paragraph (a) is a matter of opinion. It does not refer to any objective standard by which Mr. Mitchell’s competency can be measured. It is a matter of opinion rather than fact that Mr. Mitchell was a “competent guide” who was “capable of providing professionally guided mountaineering adventures to

clients. Paragraph (b) is a factual representation, namely that Mr. Mitchell was a certified guide. Paragraph (c) appears to be sufficiently factual to the extent it can be shown that, objectively, Mr. Mitchell did not meet ACMG standards. Thus, I would not allow the amendment proposed in para. 43(a) but would allow 43(b) and (c).

[73] The defendants argue the following alleged representations in para. 31 of the ANOCC are promises of future events and not statements of existing fact:

> (d) ACMG guides hold their client's safety paramount in all situations;
>
> …
>
> (f) ACMG guides will ensure that their clients are aware of all possible risks inherent to a trip prior to departure;
>
> …
>
> (h) clients may rely on information on the ACMG website to ensure that individual members and businesses have the right certification and permits.

[74] I agree the statements in paras. (d) and (f) are promises of something to be done in the future, namely that ACMG guides will hold their clients' safety paramount and will ensure they are aware of all possible risks. I would not allow these amendments.

[75] I find the alleged representation in para. 31(h) is factual in that it represents that the ACMG website is a reliable source to ensure that a guide is properly certified. I would allow that amendment.

[76] Finally, the defendants argue the following alleged representation in para. 31 is circular and makes no sense:

> (g) the ACMG's training curriculums and assessment criteria adhere to the high standards established by the ACMG

[77] I agree this is not a meaningful representation. Essentially, the alleged statement is that ACMG has training curriculums and assessment criteria that meet a high standard set by the ACMG itself. There is no alleged representation as to what that standard entails other than the very general and subjective assertion that it is a "high" standard. I would not allow this amendment.

(c) Particulars of Misrepresentation

[78] Next the defendants say Mr. Mitchell has failed to provide required particulars of the alleged misrepresentations. Rule 3-7(18) states that if a party relies on misrepresentation, "full particulars, with dates and items if applicable, must be stated in the pleading." The defendants argue Mr. Mitchell has failed to disclose "any dates or specific representation allegedly made by the Association, including who made them and when they were relied on."

[79] That submission is only partially correct. As against Mr. Mitchell, the ANOCC paras. 19(a) to (c) contain dates and other particulars about the alleged misrepresentations. As against ACMG, it is alleged that all the representations were made on its website. I find that is sufficient to allege who it is that made the representations as it would be unreasonable for Mr. Manson to have to specify who, on behalf of ACMG, posted that content on the website. With regard to dates and specifics of these statements, I agree the proposed pleading lacks those necessary particulars. However, they are set out in Mr. Manson's 8th affidavit dated March 21, 2025 where he attaches what he says are archived webpages from ACMG's website and, at para. 23, sets out dates on which he claims to have viewed the website. As a condition of granting leave to amend the Notice of Civil Claim, I would order that Mr. Manson include those particulars in the ANOCC.

(d) Further Representations to be Identified

[80] Next the defendants take issue with the plaintiff purporting to reserve the opportunity to rely on "such further and other representations as counsel may advise prior to trial". I agree this is an improper pleading and I would not allow the amendments to this effect.

[81] As Justice Griffin stated in *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 2324 at para. 25:

> Either the plaintiffs know of the misrepresentation and can provide it, or they do not, in which case they cannot reserve the ability to raise another misrepresentation at the last minute at trial simply by use of the qualifying word "including".

[82] I would add to this that it defies logic and common sense for a plaintiff to claim to have relied on representations that they cannot presently identify. The crux of a negligent misrepresentation claim is that the defendant said or did

something that caused the plaintiff to follow a particular course of action to their detriment. It is fundamentally illogical for a plaintiff to say: “I will advise you what representation led me to take this action once I discover what that representation was.”

[83] Thus, I would not allow the amendments to paras. 19(e), 31(j), and 43(d).

D. Aggravated and Punitive Damages Claim

[84] Mr. Manson seeks to amend the NOCC to make a claim for aggravated and punitive damages. The defendants argue the ANOCC pleads no facts that could amount to the kind of “reprehensible or outrageous” conduct required for a potential award of aggravated damages or the “high-handed, malicious, arbitrary or highly reprehensible misconduct” required for punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 94 and 116. They also argue it is unclear from the ANOCC exactly what conduct is alleged to support the claim for aggravated and punitive damages.

[85] Mr. Manson argues it is not plain and obvious that a claim for aggravated and punitive damages will fail. He claims the defendants made representations that Mr. Mitchell was trained as a mountain guide to a high standard such that a member of the public considering hiring him could rely on that training to believe they were in good hands. He asserts that Mr. Mitchell and ACMG operate with a motive to profit and argues the allegations as framed in the ANOCC could lead to a finding that the defendants exposed Mr. Manson to a safety risk in the name of profiting from the guiding contract.

[86] I tend to agree with the defendants that the profit motive is something of a red herring. Any negligence action arising out of a commercial or consumer relationship will be laced with a profit motive. There is no allegation that appropriate safety measures were compromised to avoid cost. For example, it is not alleged that climbing equipment was defective and had not been replaced to avoid an expense that would cut into profits. Thus, I do not see the profit motive as it is described in the ANOCC to be an especially compelling ground for punitive damages.

[87] Nevertheless, I cannot say it is plain and obvious that the punitive damages claim will fail. While the claim for punitive damages would seem to be quite a

stretch if it is founded on the basic negligence claim relating to Mr. Mitchell's testing of the rock stability, I cannot say it is bound to fail as it relates to the negligent misrepresentation claim, but obviously I express no view on that other than to say it is not plain and obvious that it is bound to fail.

[88] That said, I agree with the defendants that the plaintiff should specifically plead which misconduct he claims is high-handed, malicious, arbitrary or highly reprehensible such that an award of punitive damages is justified. As stated in *Whitten* at paras. 90 and 94, pleadings of punitive damages should be specific and "rigorous". To be clear, this is not an invitation to introduce more factual allegations in an amended notice of civil claim. Rather, it is a direction that the plaintiff must specify the conduct already stated in the proposed ANOCC that is said to support a claim for punitive damages. With that qualification, I would allow the amendment to plead punitive damages.

[89] With respect to aggravated damages, these appear to be founded on a proposed amendment to plead events that took place after the alleged tortious conduct. I turn to that next.

E. The Additional Events

[90] The proposed ANOCC contains a new section in which it is alleged that Mr. Mitchell's psychological injuries were exasperated by conduct of the defendants after the incident on the mountain. I gather the specific reference to exasperating psychological injuries is to ground a claim for aggravated damages which may be awarded where the defendant's reprehensible or outrageous conduct caused additional psychological harm to the plaintiff: *Whiten*, para. 116; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 73.

[91] The misconduct alleged in the proposed ANOCC generally amounts to Mr. Mitchell failing or refusing to take responsibility for the incident and failing to disclose an incident report in which Mr. Mitchell is alleged to have admitted wrongdoing in causing the accident. The proposed new paragraph reads in full:

> 54. The plaintiff's psychological injuries as described in paragraph 53(d) above were exacerbated after the Incident by the conduct of the defendants Mitchell and the ACMG described as follows:
>
> (a) Mitchell's failure or refusal to take responsibility for causing the Incident;

(b) Mitchell's dismissal of the plaintiff's account of the Incident;

(c) the ACMG's failure or refusal, prior to this litigation and after promising the plaintiff transparency to provide to the plaintiff an Incident Review and Learning System Report completed by Mitchell wherein Mitchell admits to wrongdoing in causing the Incident by failing to position the plaintiff in a safe location on an anchor and failing to comply with industry practice and what he had been taught ("Mitchell's IRLS Report")

(d) the ACMG's failure or refusal to disclose Mitchell's IRLS Report to the ACMG conduct review committee for their consideration in relation to the plaintiff's conduct review complaint against Mitchell;

(e) the ACMG's failure or refusal, in reliance upon Mitchell's IRLS Report, to independently trigger a conduct review complaint arising from Mitchell's breach of the ACMG Code of Conduct, including but not limited to the duty on Mitchell to hold paramount the safety of his client by managing foreseeable risks:

(f) the ACMG's failure or refusal, as a self-governing regulatory body responsible for protecting the public interest and holding its guides accountable, to otherwise be transparent and/ or hold Mitchell to account following receipt of Mitchell's IRLS Report; and

(g) such further and other conduct of Mitchell and the ACMG, the particulars of which will be provided prior to trial.

[92] The defendants argue para. 54 is not a proper pleading. They point out there is no legal duty to "take responsibility for causing the incident" and no actionable wrong in not providing the incident report to Mr. Manson. There are no material facts in this paragraph that give rise to any tortious conduct or an independent cause of action that might support a claim for aggravated or punitive damages. To the extent that Mr. Manson's injuries were exacerbated by this conduct, the defendants argue it is evidence that does not belong in a pleading.

[93] I largely agree with these submissions. None of the defendants were under a legal obligation to admit liability and they are entitled to require a plaintiff to prove its case (at the risk of costs consequences): *McCabe v. Roman Catholic Episcopal Corporation,* 2019 ONCA 213 at paras 72-73. Nor has Mr. Manson established any legal duty on the part of Mr. Mitchell or ACMG to disclose the incident report outside the context of the litigation. Obviously, once the litigation was commenced, the defendants had a duty to produce the report under Rule 7-1 of the *Supreme Court Civil Rules* (subject to a privilege claim, although I am not aware of a basis on which privilege could be claimed). However, I am not aware of any legal obligation to do so otherwise, and no such duty is pleaded.

[94] It also strains logic, common sense, and credibility to suggest that Mr. Manson's psychological injuries would have been exacerbated by Mr. Mitchell and ACMG not providing the incident report earlier. How could Mr. Manson have been psychologically harmed by non-disclosure of a report he did not know existed until after it was produced in the litigation? I find that this and the other facts alleged in para. 54 are incapable of supporting a claim to aggravated damages. If the evidence at trial suggests a credible basis on which post-accident conduct of the defendants aggravated Mr. Manson's injuries, he may then renew his request to amend his pleading to conform with that evidence, subject of course to the discretion of the trial judge who would rule on such an application. For the moment, though, I find it is plain and obvious that the facts as stated in para. 54 are incapable of supporting that claim.

[95] Mr. Manson argues that the allegations in this paragraph are also potentially relevant to a claim for punitive damages, although that is not made clear on the proposed amendment. Relying on *Robataille v. Vancouver Hockey Club Limited*, 1981 CanLII 532, 30 B.C.L.R. 286 (C.A.) and *Howell v. Machi*, 2017 BCSC 1806, he argues that conduct of a defendant after the commission of tortious conduct may be relevant to an assessment of damages.

[96] In *Robataille,* the plaintiff, a professional hockey player, sustained a permanently disabling injury during a game. In the weeks before, he had complained to the club's coaching and medical staff that he was suffering from an injury that should receive medical attention but they were dismissive of his complaints and continued to put him in the line up. The trial judge found the club was negligent in playing him and also awarded aggravated damages, including for conduct in the days after the game during which senior club officials and medical staff displayed "reckless disregard" for the plaintiff's medical condition and pursued a "wrongheaded course oblivious to the obvious fact that, if their 'treatment' was wrong, the results could mean disaster for [the plaintiff's] health". He found "the dictates of common decency as well as commonsense" were ignored.

[97] On appeal, it was argued that the after-the-fact conduct was irrelevant to the assessment of damages but the Court of Appeal disagreed. It held at para. 71 that the circumstances which accompany or are associated with tortious conduct can "give character" to the tortious conduct and form part of the circumstances "attending" the tortious conduct. It held that it is open to a court to consider all

those circumstances in assessing damages and not just conduct that is “limited to the time that the tort is committed.”

[98] In *Howell*, Justice MacNaughton awarded punitive damages against a defendant in a motor vehicle accident case because he drove away from the scene of the accident after striking the plaintiff who was a pedestrian crossing the street. His leaving the scene of the accident “did not amount to further negligence on his part” but MacNaughton J., as she then was, found this after-the-fact conduct was relevant to the punitive damages claim.

[99] In my view, there is no prospect that Mr. Mitchell’s “failure or refusal to take responsibility for causing the accident” or his “dismissal of the plaintiff’s account” could amount to the kind of conduct that would attract a punitive damages award: *Whitten,* para. 94. I would not allow the amendments in paras. 54(a) and (b) in support of a punitive damages claim because they establish no basis for an award of damages of any kind. It is perhaps conceivable that paras. 54(c) through (f) might inform a claim for punitive damages as conduct that might “give character” to any tortious conduct. It is conceivable that a court might find this alleged conduct to be deserving of rebuke if Mr. Manson were able to prove that a lack of transparency in a conduct review process puts the broader public at danger. Again I make no finding of that but I simply observe that I cannot say at this stage that it is plain and obvious that this alleged conduct could not result in a punitive damages award.

[100] For these reasons, I would allow the proposed amendments in para. 54 (c) through (f) as they relate only to a potential punitive damages claim but I find it is plain and obvious that could not support an aggravated damages claim. That means the introductory portion of para. 54 needs to be revised to reflect that the alleged facts that follow are in support of a punitive damages claim rather than an exacerbation of the plaintiff’s psychological injuries. I would not allow the amendments in paras. 54(a) and (b). Further, for given earlier about yet-to-be-identified representations, I would not allow the amendment in para. 54(g).

IV. Adjournment

[101] The defendants argue that if leave to amend the NOCC is granted, I should order an adjournment of the trial to give the defendants the opportunity to prepare

for a trial based on the amended claim. I decline to do so. Most of the amendments I have allowed are clarifications or particularization of already-pled facts or claims. The new causes of action in negligent misrepresentation do not introduce new material facts. I have not found any prejudice in the amendments that would justify an adjournment of the trial and the defendants have not explained with any specificity what additional steps they must take to prepare for trial if the amendments were granted. It is not sufficient to simply assert that further discovery or expert evidence is needed without specifying what further inquiries are necessary. I therefore decline to impose an adjournment as a condition of the amendments.

V. Conclusion

[102] For these reasons, I would grant leave to make most but not all of the proposed amendments to the Notice of Civil Claim. The permitted and disallowed amendments are set out in these reasons. Some of them are conditional on the plaintiff providing particulars in or revisions to the draft ANOCC. I would give the plaintiff 14 days from the date of this judgment to serve and file an ANOCC that complies with these reasons. Costs of this application will be in the cause.

"Kirchner J."