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Case Law and Legislation Update

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Case Law and Legislation Update

I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference held in June 2006. Some case summaries have been published in the Insurance Corporation of British Columbia's quarterly publication, *The Defence*.

The full text of most of these cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Causation

A. Resurfice Corp. v. Hanke, 2007 SCC 7

Chief Justice McLachlan took the opportunity in this case to clarify the proper test for causation in cases of negligence:

- The basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute [i.e., the *Negligence Act*].
- The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at 327, *per* Sopinka J.
- In special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test.

- The material contribution test involves two requirements:

    (a) It must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge.

    (b) It must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach.

B. Hutchings v. Dow, 2007 BCCA 148, per Prowse JA (Low and Kirkpatrick JJA, concurring)

The plaintiff suffered significant injuries in a motor vehicle accident and was injured two years later in an assault when he was struck over the head with a bottle. The trial judge found that the plaintiff continued to suffer from cognitive difficulties and a chronic low back problem which were solely the result of the accident. He also found that the plaintiff suffered from serious and ongoing depression which was a result of both the accident and the assault.

The most critical finding of the trial judge was that the depression suffered by the plaintiff was an indivisible injury which was contributed to in a material way by both the accident and the assault. Although he applied the *Negligence Act* to apportion causation between the accident (60%) and the assault (40%), he concluded that the tortfeasors in the accident and the assault were jointly and severally liable for the entirety of the damages flowing from that injury. In doing so, he relied on the Supreme Court of Canada decision of *EDG v. Hammmer*, [2003] 2 S.C.R. 459.

On appeal, the defendants argued that the trial judge had erred because he failed to use the "but for" test for causation as articulated by the Supreme Court of Canada in *Resurfice, supra.* The Court of Appeal rejected this argument, finding that although the trial judge had not framed his reasons in "but for" language, he had in fact applied the "but for" test in concluding that the depression was an indivisible injury caused by both the accident and the assault. "But for" the accident, the depression would not have occurred and "but for" the assault, the depression would not have occurred.

The Court of Appeal also held that the trial judge had not erred in relying upon the *Hammer* decision in his application of the *Negligence Act* to conclude that the accident and assault tortfeasors were jointly and severally liable for the depression. He had made findings of fact that supported the conclusion that the accident and assault tortfeasors were several concurrent tortfeasors whose acts combined to create the same injury, and therefore were jointly and severally liable.

C. Ashcroft v. Dhaliwal, 2007 BCSC 533, Shaw J.

The plaintiff was injured in two motor vehicle accidents one year apart. At the time of the second accident, the plaintiff had not recovered from the effects of the first. She settled her action arising from the second accident for an undisclosed amount.

The issue before Shaw J. was whether the defendant in the first accident was responsible for all of the plaintiff's injuries, included those received in the second accident, based on the approach taken in *Athey v. Leonati*, [1996] 3 S.C.R. 458 or whether the assessment of damages should be confined to the first accident only, based on the *Long v. Thiessen* (1968), 65 W.W.R. 577 approach to the assessment of damages where there are multiple causes.

He concluded that *Athey* should prevail, based on the following findings of fact:

(a) At the time of the second accident, the plaintiff had not yet recovered from the injuries she suffered in the first accident.

(b) The first accident injuries made her vulnerable to any further accident exacerbating her condition.

(c) The injuries she received in the second accident were within the scope of her vulnerability.

He concluded, as did the trial judge in *Hutchings*, *supra*, that the injuries suffered by the plaintiff in the two accidents were indivisible. And, in light of *Resurfice*, he also concluded that both the "but for" and the "material contribution" tests for causation established a causal connection between the tortious conduct of the defendant in the first accident and all injuries suffered by the plaintiff in both accidents.

He, therefore, assessed damages globally, but held that in order to prevent double recovery, the amount recovered by the plaintiff as a result of the settlement of the second action would be deducted from the award.

In the event he was wrong and it was subsequently decided on appeal that *Long v. Thiessen* prevailed, Shaw J. apportioned damages between the two accidents at 70% for the first accident and 30% for the second accident.

D. White v. Stonestreet, 2006 BCSC 801, Ehrcke J.

In this case, the opinion of the defence expert, Dr. Thompson, prevailed over those of three of the plaintiff's experts to preclude the plaintiff from proving that the accident caused his pre-existing asymptomatic spondylolysis and spondylolisthesis to become symptomatic.

The plaintiff, a fit 30 year-old at the time of the accident, did not complain immediately of back pain. He lost no time from work. His clinical records showed a steady improvement in his back symptoms for the year and a half after the accident. He returned to his fit lifestyle, which included jogging, and did not complain of a worsening of his symptoms until his son was born and he noted that carrying and bathing the child caused back pain. It was only then that his pre-existing condition (which is a developmental condition) was diagnosed.

At para. [74] of his reasons, Ehrcke J. commented that the logic applied by the plaintiff's experts to show causation was "*post hoc ergo propter hoc*": after this therefore because of this. Their opinion that the motor vehicle accident caused the aggravation of his pre-existing condition was based on nothing more than a temporal connection with no consideration of the plaintiff's symptoms and activities after the accident. Dr. Thompson, on the other hand, closely scrutinized the plaintiff's complaints after the accident and the progress of his symptoms to conclude that the accident caused nothing more than soft tissue injury to his back.

Dr. Thompson's opinion was that the aggravation of his condition was more likely caused by the repetitive stresses placed on his back by his jogging and child-care activities. His symptoms until that time were consistent with soft tissue injures that eventually resolved. The motor vehicle accident may have been one minor factor in contributing to his degenerating condition. Ehrcke J. accepted Dr. Thompson's opinion over those of the plaintiff's experts and concluded that the accident caused the plaintiff to suffer soft tissue injuries to his neck and back which were largely resolved within six months and completely resolved within a year and a half.

The plaintiff awarded $35,000 in non-pecuniary damages and nothing for future loss of earning capacity.

III. Costs

A. Kalesnikoff v. ICBC, 2006 BCSC 1068, McEwan J.

Following the discontinuance of the Part 7 action against it, the defendant applied for an order for special costs against the plaintiff based on his conduct throughout the proceeding.

The plaintiff's claim against ICBC arose out of two motor vehicle accidents. His statement of claim included, in addition to a declaration of entitlement to accident benefits, twenty-six allegations of the defendant's breaches of its duty of good faith and claims for aggravated and punitive damages.

ICBC paid the plaintiff temporary total disability benefits for two years after the accident, at which time it determined that the plaintiff was capable of working.

Having reviewed the material filed before him, McEwan J. summarized the plaintiff's conduct during the litigation as follows:

- he breached a Master's order requiring an Affidavit of documents relating to the plaintiff's earnings and work history by providing a non-responsive affidavit;
- he repeatedly failed to produce documents to which the defendant was entitled;
- he failed to make efforts to obtain documents it was in his power to produce;
- he was untruthful in relation to material facts: at discovery he denied that he was working while receiving disability benefits from ICBC; documents subsequently obtained showed that he had worked during the period of his alleged disability.

McEwan J. was satisfied that the plaintiff's conduct in pursuing a bad faith claim against ICBC, in light of his own deception, was reprehensible such that special costs were in order. He concludes:

> [39] The whole case is a comprehensive matrix of reprehensible conduct, starting with the aspersions cast upon the representatives of the defendant, who, it turns out, were only doing their jobs. The plaintiff was obstructive and uncooperative for the very good reason that he had things to hide, and was perpetrating a fraud. The audacity of his claims for punitive damages, is, in the circumstances truly remarkable.

B. Forsyth v. Pender Harbour Golf Club Society, 2006 BCSC 1108, Allan J.

Although the defendant was successful at trial in this occupier's liability case, Allan J. exercised her discretion under Rule 57(9) and refused to award costs because of the defendant's failure to produce in a timely manner relevant documents in its possession. Despite several requests from the plaintiff, the defendant produced the documents only three days prior to the start of trial.

Allan J. stressed the necessity for timely and thorough production of relevant documents to allow the parties to assess the risks of proceeding to trial.

C. Coronado v. Farkas et al., 2006 BCSC 881, Lander J.

The plaintiff delivered an offer to settle and subsequently recovered a more favourable judgment after a two-day Rule 66 trial.

Lander J., however, refused to give effect to the Rule 37 offer because of the failure of the plaintiff to produce relevant documents. He awarded lump sum costs in accordance with Rule 66(29)(b).

IV. Damages for Non-Pecuniary Loss

A. Lee v. Dawson, 2006 BCCA 159

On October 19, 2006, the Supreme Court of Canada denied leave to appeal *Lee v. Dawson* which challenged its 1978 imposition of a "cap" on non-pecuniary damages for personal injuries.

The Court of Appeal in *Lee* had commented on the need to review the "rough upper limit" imposed by the 1978 trilogy:

> [90] I agree with the plaintiff and the intervenor that the time may have come for the rationalization or conceptual underpinning for having a rough upper limit on non-pecuniary damages to be re-examined. However, I am not persuaded that it is open to this Court to proceed on the footing that the trilogy establishing the rough upper limit is not binding on us. Some of the submissions made by the appellant and the intervenor advocating a reconsideration of the rough upper limit seem to me to be compelling but, in the end, this Court cannot overturn the trilogy.

B. Stapley v. Hejslet, 2006 BCCA 34

The Supreme Court of Canada denied leave to appeal this decision in which Chief Justice Finch, in his minority judgment, expressed his views on the chilling effect the rough upper limit has had on judge-made awards in non-catastrophic cases and the impropriety of using such awards to test the reasonableness of jury awards that, unfettered by the rough upper limit, reflect current community values.

V. Damages for Income Loss

A. Steward v. Berezan, 2007 BCCA 150, per Donald JA (Newbury and Chiasson, JJA concurring)

The Court of Appeal clarified the approach used by Southin JA in *Palmer v. Goodall* [1] and its application by trial judges when assessing whether a plaintiff has suffered diminished earning capacity. The trial judge found that the plaintiff's injuries would not affect his ability to earn income as a realtor in future. The medical evidence suggested that his residual disability would interfere with strenuous physical work. She concluded that he suffered a loss of capital asset because other occupations, presumably requiring strenuous physical work, were now closed to him. She referred to the wording in *Palmer* and awarded $50,0000, concluding that "[i]t is impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life."

Donald JA held that the trial judge used the wrong test. The language she used to justify the award—"it is impossible to say ..."—had been used in *Palmer* in the context of appellate review. At trial, the plaintiff bears the onus to prove a substantial possibility of a future event leading to an income loss and the court must then award compensation on an estimation of the chance that the event will occur. In this case, there was no evidence that the plaintiff would have resorted to other occupations that would be affected by his injuries in the event he stopped working as a realtor. Donald JA concluded:

> There being no other realistic alternative occupation that would be impaired by the plaintiff's accident injuries, the claim for future loss must fail.

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1 (1991), 53 B.C.L.R. (2d) 44 (C.A.).

B. Sinnott v. Boggs, 2007 BCCA 267, per Mackenzie JA (Finch CJBC and Low JA, concurring)

The defendant appealed the trial judge's award of $30,000 for loss of future earning capacity. The plaintiff was 16 years old and still in high school at the time of the accident. The trial judge found that the plaintiff would continue to suffer limitations as a result of her injuries and she would likely have some difficulty with more strenuous and physically demanding work, particularly if it involved lifting and carrying.

He concluded that she met the test in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) in that her limitations rendered "her less marketable and less valuable to herself as a person capable of earning income in a competitive labour market. While pain and suffering is not to be confused with loss of capacity, when the painful symptoms are likely to continue in such a way that they affect one's ability to work at a competitive pace in a variety of jobs, the capital asset of one's employability is affected."

The defendant appealed, arguing that the fact that the plaintiff was precluded from particular types of work that she realistically would have undertaken was an essential foundation for an award for loss of earning capacity and in the present case, there was no finding or evidence that the plaintiff would ever have engaged in physically demanding work requiring lifting and carrying. Appeal counsel cited *Steward v. Berezan*, *supra* and other cases in support of their argument.

The Court dismissed the appeal. The case cited by the appellant all involved middle-aged plaintiffs established in careers whose continuing limitation or symptoms did not affect their ability to earn income in their chosen occupations. The plaintiff was young and without a settled line of work. The judge's finding that she faced limitations on her ability to work competitively in jobs that were previously open to her was an adequate foundation to support the award.

C. Dionne v. Romanick, 2007 BCSC 436, Gray J.

An interesting issue in this personal injury case was whether sick leave benefits received by the plaintiff were deductible from her award for past lost earnings.

Gray J. summarized the general principles and opposing policy reasons behind the treatment of such work-related benefits, starting with the Supreme Court of Canada decision in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 in which the policy against double recovery took precedence in the absence of evidence that the plaintiff had paid for the benefits. In *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, the Supreme Court of Canada articulated the "insurance exception" to the rule against double recovery. Benefits paid for, either directly by the plaintiff or indirectly through contracts of employment, are not deductible from damages for lost earnings. The effect of Cunningham, according to Donald J.A. in *Kask v. Tam* (1996), 72 B.C.A.C. 133, is that the insurance exception has swallowed the rule against double recovery. However, although rare, there will be exceptions to the exception.

In this case, the plaintiff received $39,700 in sick leave benefits as salary continuation. Gray J. concluded they were deductible for the following reasons:

> [124] The evidence did not establish that Ms. Dionne contributed directly or indirectly to the sick leave benefits, unless one assumes that wages will necessarily be less if the employer provides a benefit. The cases suggest that is not a permitted assumption. Ms. Dionne was only entitled to use banked sick leave if she were sick, and she was not entitled to cash out any unused banked time on retirement.
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> [125] In this case, the accident caused Ms. Dionne to lose her banked sick leave, which was of no financial consequence to her. The sick leave benefits functioned as a way for Ms. Dionne's employer to limit employee sick time. The benefits fall within what remains of the general rule that wage benefits must be deducted from a plaintiff's lost earnings award. Ms. Dionne is not entitled to compensation for lost earnings in the period December 1, 1999 to September 21, 2000, because she did not suffer a loss in that period.

VI. Aggravated and Punitive Damages

A. Fidler v. Sun Life Assurance Company of Canada, 2006 SCC 30

The plaintiff had disability insurance with the defendant insurer. She qualified for benefits in 1991. In 1997, the defendant insurer terminated her benefits after it obtained surveillance video that apparently showed her engaged in activities of which she claimed to be incapable. The defendant maintained the denial until the eve of trial at which time it reinstated benefits retroactively. Despite the reinstatement, the plaintiff went to trial seeking aggravated and punitive damages.

The trial judge[2] awarded the plaintiff $20,000 in aggravated damages on the basis that the breach of contract by the defendant had caused her significant mental distress. He found, however, that the defendant's denial was based on a mistaken but genuine belief that the plaintiff did not qualify for benefits and therefore its conduct did not amount to a breach of the duty of good faith. The Court of Appeal[3] upheld the award of aggravated damages but overturned the dismissal of the bad faith claim and awarded $100,000 in punitive damages. The defendant appealed both the aggravated and punitive damage awards to the Supreme Court of Canada.

The Supreme Court upheld the award of $20,000 in aggravated damages but overturned the Court of Appeal's award of punitive damages. Its analysis of the issues is as follows:

1. Aggravated Damages

The Supreme Court said that awards for aggravated damages in Canada have traditionally encompassed two entirely separate concepts:

- Damages for conduct that goes beyond a mere breach of contract—fraud or defamation, for example—in which case the additional wrong can be said to aggravate the damages that are caused by the breach of contract and an additional award under a separate head of damages is appropriate. These damages, the court says, are "true" aggravated damages.
- Damages for mental distress caused directly by a breach of contract where there is no separate actionable wrong may be awarded in cases where an aspect of the contract included protection from mental distress. The principles for this sort of award are set out in the English case, *Hadley v. Baxendale*.[4] The Supreme Court confirmed that this type of award is not really an award of aggravated damages and the cases that have used that term have caused confusion. The Supreme Court viewed this type of award as simply one aspect of an award of damages for breach of contract.

The Court went on to say that in order to prove a claim for the second type of damages the plaintiff must prove two things: (1) that "an object of [the] disability contract was to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made" (para. 56); and (2) that "the mental distress ... at issue was of a degree sufficient to warrant compensation" (para. 59).

In this case, the Court found that the disability insurance provided by the defendant was a contract in which the parties would reasonably contemplate that the plaintiff was buying peace of mind to protect her from stress in situations in which she might otherwise lose her stream of income, and that the plaintiff had proved that she had suffered to a sufficient degree to be deserving of compensation.

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2 2002 BCSC 1336, Ralph J.

3 2004 BCCA 273, per Finch, CJBC (Prowse JA concurring and Ryan JA dissenting in part).

4 (1854), 9 Ex. 341, 156 E.R. 145.

2. Punitive Damages

The Court strongly reinforced the fundamental principles set out in *Whiten v. Pilot Insurance Co.*[5] and particularly the notion that punitive damages should be awarded only in exceptional cases. The Court stated at para. 62:

> By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency—the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency ... The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, 'punitive damages straddle the frontier between civil law (compensation) and criminal (punishment).' Criminal law and quasi-criminal regulatory schemes are recognised as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

The Court also confirmed that something more than a mere denial of a claim has to be proved in order to establish a finding of bad faith (para. 63):

> ... The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith ... [T]he legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* [citation omitted]:
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> The duty of good faith also requires an insurer to deal with its insured's claim fairly ... [A]n insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement ...

The Court went on to say (para. 71):

> ... [a]n insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined to be legitimate ...

On the facts of this case, the Supreme Court of Canada found that Sun Life's conduct was "extremely troubling" and "inappropriate" but did not go far enough to amount to bad faith.

B. McIntyre v. Grigg, 2006 CanLII 37326 (Ont. C.A.)

The Ontario Court of Appeal overturned a jury award of aggravated damages and reduced an award for punitive damages in a case that involved a pedestrian who was struck and seriously injured by a vehicle operated by an impaired driver. The jury awarded the plaintiff, in addition to non-pecuniary damages of $250,000, aggravated damages of $100,000 and punitive damages of $100,000.

Aggravated damages, according to the Court, "are awarded ... when the reprehensible or outrageous nature of the defendant's conduct causes a loss of dignity, humiliation, additional psychological injury, or harm to the plaintiff's feelings" (para. 50). The Court agreed with the appellant that that there was insufficient evidence to establish that the plaintiff's psychological harm was increased because the defendant was impaired at the time of the accident.

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5 [2002] 1 S.C.R. 595, 2002 SCC 18.

Moreover, this case confronts the issue not considered by the BC Court of Appeal in *Bob v. Bellerose*[6] which is whether aggravated damages, when added to an award for non-pecuniary damages, can exceed the upper limit for personal injury set by the trilogy.

The Ontario Court of Appeal held that aggravated damages are part of the general non-pecuniary award and subject to the upper limit. In this case, the award for non-pecuniary damages of $250,000 was generous and should not be increased even if there was an evidentiary basis for awarding aggravated damages.

Given the absence of Canadian authorities, the Court (Blair J.A. dissenting) gave careful consideration to the propriety of awarding punitive damages in the context of a motor vehicle action where the negligent conduct involved alcohol impairment. The Supreme Court of Canada in *Whiten v. Pilot Insurance Co*,[7] established the general principles of punitive damages. Such damages are awarded to meet the objectives of punishment, deterrence and denunciation of the defendant's conduct in exceptional cases.

The Court was satisfied that the jury's award of punitive damages met all three objectives. Drinking and driving is a "social evil" requiring general deterrence. The defendant's misconduct in operating a vehicle after consuming a significant amount of alcohol was reprehensible and recklessly disregarded the plaintiff's rights. Given the defendant's $500 fine after a guilty plea to a reduced charge of careless driving, punitive damages would not amount to double punishment.

However, the quantum awarded by the jury was not proportionate to the circumstances of the case given that it was an isolated event, there was no specific relationship between driver and injured person resulting in an abuse of power over a vulnerable person, and the harm was not directed specifically at the plaintiff. The award was reduced to $20,000.

VII. Implied Undertaking of Confidentiality

A. Doucette (litigation guardian of) v. Wee Watch Day Care Systems Inc., 2006 BCCA 262

The Court of Appeal determined the scope of the implied undertaking of confidentiality that attaches to evidence produced in the civil discovery process.

After a thorough review of the law in BC, Ontario and England, Kirkpatrick JA concluded at para. 56:

> ... I conclude that the implied undertaking of confidentiality rule is as stated in [*Hunt v. T & N plc*, (1995), 4 B.C.L.R. (3d) 110 (C.A.).]: a party obtaining production of documents or transcriptions of oral examination of discovery is under a general obligation, in most cases, to keep such document confidential. A party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of the court. However, the obligation of confidentiality does not extend to *bona fide* disclosure of criminal conduct. On the other hand, non-*bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt.

Kirkpatrick JA further held that the rule of civil procedure embodied in the implied undertaking of confidentiality cannot be elevated to a principle of fundamental justice and is limited to the pre-trial process. The confidentiality of the discovery process evaporates once the evidence is tendered in court.

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6 2003 BCCA 371.

7 [2002], 1 S.C.R. 595.

B. Litton v. Braithwaite et al., 2006 BCSC 1481, Halfyard J.

In this case, Halfyard J. commented on Madam Justice Kirkpatrick's comment in *Doucette*, *supra*, that the implied undertaking of confidentiality evaporates once the evidence is tendered in court. It had been argued by the defendant who opposed the plaintiff's application for an order permitting her to use information obtained in her divorce action in a subsequent action that the comment was obiter dicta.

Halfyard J. states:

> [34] In my opinion, the statement of the Court of Appeal at paragraph 80 of *Doucette (litigation guardian of) v. Wee Watch Day Care Systems Inc.* has changed the law as held by Williams C.J.S.C. in *Discovery Enterprises Inc. v. Ebco Industries Ltd.* While a decision on this point may not have been essential to the decision of the issue on appeal, in my view it is a firm statement of the court which should be followed by trial judges. If I am right, then it follows that the implied undertaking of confidentiality does not apply to the documents that were introduced in evidence at the trial of the divorce action. Accordingly, the plaintiff may use any of those documents in her action against Mr. Braithwaite, subject of course to relevance and admissibility.

C. Sovani v. Gray et al.; Jampolsky v. Shattler et al., 2007 BCSC 403, Edwards J.

The issue in these parallel motions was whether disclosure to non-parties to litigation, without the plaintiffs' consent, of information obtained during the discovery process by defendants' counsel for the purpose of obtaining further discovery information from these non-parties, constitutes a breach of the implied undertaking of confidentiality.

In both cases, defence counsel, in support of impending Rule 26(11) applications, had provided to the non-parties from whom documents were sought, notices of motion and affidavits which either summarized or exhibited information obtained by the defendants through the discovery process. The plaintiff brought applications for orders that the defendants, the defence counsel, the adjusters in each case and ICBC's CEO be found in contempt of court and fined and or jailed for breach of the implied undertaking of confidentiality.

In support of their applications, the plaintiffs referred to ICBC's Litigation Management Strategy manual which recommends to defence counsel guidelines designed to protect plaintiffs' privacy in similar situations. These recommendations were made in response to concerns voiced by the Information and Privacy Commissioner about the privacy rights of parties involved in litigation.

Edwards J. concluded that the implied undertaking of confidentiality does not apply to limit the use which may be made of information disclosed through discovery in the litigation in which that information is obtained. The effect of the plaintiffs' submission was to invite the court to expand the scope of the implied undertaking to comprehend the policy as stated in the Litigation Management Strategy manual. The implied undertaking of confidentiality applies to all litigants, not just ICBC and its insureds. The policy adopted by a public body should not determine or inform the common law as developed by the courts in respect of the scope of the implied undertaking. Edwards J. comments that the law delineating the scope of the implied undertaking of confidentiality draws a "bright line":

> [50] That bright line tends to expedite litigation, which is the goal of all recent reforms of civil litigation procedure in various jurisdictions. An obscure line would tend to promote procedural controversy, which is antithetical to that goal. The current bright line sacrifices litigants' privacy for more procedural certainty. Its ultimate goal is to achieve a just result in the litigation.

VIII. Insurance Issues

A. ICBC v. Eurosport Auto Co. Ltd., 2007 BCCA 279, per Prowse JA (Mackenzie and Saunders JJA, concurring)

ICBC brought a civil action against the defendants, an autobody repair shop and its principals, for damages, including punitive damages, for fraud and conspiracy to defraud. The trial judge awarded ICBC compensatory damages and investigative costs and a total of $115,000 in punitive damages against three of the defendants. In supplementary reasons, the trial judge awarded special costs to ICBC and double special costs from the date it delivered a "Calderbank offer." See Costs for further information on the Court's disposition of this issue.

The corporate defendant and one of its principals had previously been convicted under s. 42.1 of the *Insurance (Motor Vehicle) Act* and fined $60,000 each.

On appeal, the defendants argued, *inter alia*, that the judge erred in "failing to find that ICBC's pursuit of the civil action was for the predominant purpose of exacting more punishment from the appellants in the form of punitive damages and that it constituted an abuse of process."

Prowse JA dismissed this ground of appeal. Although punitive damages were a significant aspect of its claim, ICBC also sought to recover compensatory and investigative damages. It was entitled to protect itself and the public against systemic small-scale frauds committed by the appellants and others with whom it did business. It was not required to elect one of two remedies—quasi-criminal prosecution or civil action—but was expressly permitted under s. 42.1 of the Act to pursue both. The fines imposed in the quasi-criminal proceeding were payable to the Crown and did not preclude ICBC, as a victim of fraud, to seek punitive and compensatory damages in a civil action.

The Court of Appeal allowed the defendants' appeal with respect to the punitive damages award. The award, when taken in context with the other "punishments" meted out to the defendants (substantial fines, special costs and loss of business and reputation), did not meet the rational purpose test set out in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595. The additional punishment imposed upon the defendants by the award of punitive damages was not rationally connected to the goals of denunciation, deterrence and retribution which such an award is designed to serve.

IX. Juries

A. Ramcharitar v. Gill, 2007 BCSC 561, Macaulay J.

The jury found that the defendant had been negligent but that the negligent conduct had not caused or contributed to the plaintiff's damages and awarded no damages. The plaintiff applied, pursuant to the inherent jurisdiction of the court and Rule 41(2), for orders to set aside the jury's verdict and for a new trial or, alternatively, for a substituted verdict by the trial judge.

The ability of a trial judge to set aside a jury's verdict is limited to the following four circumstances[8]:

(a) Where there is no evidence to support the finding of the jury;

(b) Where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment;

(c) Where the jury answers some but not all of the questions directed to it; or

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8 *Leblanc v. Penticton (City)* (1981), 28 B.C.L.R. 179 (C.A.), recently confirmed in *Johnson v. Laing*, 2004 BCCA 364.

(d) Where the answers are conflicting, so that the judgment cannot be pronounced on the findings.

The plaintiff argued that the jury's verdict should be set aside because (1) the jury's answers were conflicting and (2) there was no evidence to support the jury's finding with regard to causation. Macaulay J. disagreed.

The jury had been charged to answer three questions:

1. Was the defendant's conduct negligent?
2. If yes, did the negligence of the defendant cause or contribute to the plaintiff's damages?
3. At what amount do you assess the damages sustained by the plaintiff in the following categories ...

The jury answered yes to question number one but no to question number two. The plaintiff argued that these answers were inconsistent because having found negligence on the part of the defendant implied that damages, as an element of negligence, should automatically follow. Macaulay J. concluded that the plaintiff's argument conflated negligence as it relates to conduct and negligence as a cause of action. The jury was charged on the basis of the former. The references to negligent conduct and negligence in the charge related to one discrete element of the cause of action, that is, conduct that breaches a duty of care.

As well, it was open to the jury to accept all, none or part of the evidence put forward on behalf of the plaintiff. Its answer to the third question meant that the jury rejected the plaintiff's case in its entirety and a trial judge may not reject such a finding.

B. Larlee v. Manufactures Life Insurance Company Co., 2006 BCSC 1497, Master Taylor

The defendant disability insurer sought to strike a jury notice in a claim for punitive damages and in which there was no issue as to entitlement to disability benefits. The defendant argued that the principal question in issue was whether its conduct was justified under two insurance policies and therefore required the construction of a written contract. The application was dismissed. The issue of whether the defendant had acted in bad faith in terminating benefits was a fact-based decision and did not require construction or interpretation of an enactment nor were the issues too intricate or complex for a jury.

C. Deelman v. Maritime Life Insurance Company (24 October 2006), Vancouver Registry No. S014074, Master Tokarek

Master Tokarek refused an application brought by the defendant to strike a jury notice on the grounds that the matter involved the interpretation of an insurance contract. He granted bifurcation of the plaintiff's allegations for bad faith from the issue of the plaintiff's entitlement to disability benefits. However, he then exercised his discretion under Rule 30 and, having bifurcated the claims, he ordered the both trials proceed before a Judge alone because of the credibility issues being raised.

X. Liability

A. Yeung (Guardian ad litem of) v. Au, 2006 BCCA 217

A five-member panel of the Court of Appeal overruled its earlier decision in *Schoenbach v. Truong* (1996), 19 B.C.L.R. (3d) 313, and ruled that a lease agreement containing an option to purchase clause is not a contract of conditional sale so as to exempt leasing companies from vicarious liability under s. 86(3) of the *Motor Vehicle Act*.

Section 86(3) provides that where a vehicle has been sold and is in the possession of the purchaser under a contract of conditional sale, the purchaser is deemed to be the owner of the vehicle, but the seller is not deemed to be an owner. The phrase "contract of conditional sale" is not defined anywhere in the Act.

Until it was repealed in 1990, the *Sale of Goods on Condition Act* governed conditional sales in BC and defined the term "conditional sale" to include a lease containing an option to purchase. This definition did not survive the Act's repeal nor its replacement by the *Personal Property Security Act*. Nevertheless, in 1996 the Court of Appeal in *Schoenbach* interpreted s. 86(3) broadly to extend to a lease with an option to purchase.

In *Yeung*, Newbury JA, on behalf of the panel, concluded that the legislative intent for the exception created in s. 86(3) was to exempt people who had "sold" a motor vehicle and who had therefore parted not only with possession and control, but effectively with title or ownership of the vehicle. The exemption was not intended to extend to a lessor who had granted an option that might never be exercised and who might therefore remain the "owner" long after the term of the lease has expired.

The Supreme Court of Canada granted leave to appeal this decision with a tentative hearing date of October 16, 2007.

Note: see comments regarding Bill 35, *Miscellaneous Statutes Amendment Act (No. 2), 2007* outlined below.

B. Smith v. Tucker, 2007 BCSC 489, Russell J.

These Reasons are useful for their summary of the history and development of the law relating to rescuers.

The plaintiff, who injured his back while assisting the defendant in pushing her incapacitated vehicle off the roadway, was unable to convince the court that he fell within the category of a "rescuer" to whom the defendant owed a duty of care.

Russell J. held that the defendant was negligent in permitting her vehicle to run out of fuel and stall while traveling in traffic.

The issue was whether the stalled truck posed a sufficient risk of danger to enable the plaintiff to invoke the rescuer doctrine, or whether he must be taken to have freely chosen to assist the plaintiff and, therefore, to have consciously assumed any risks inherent in his course of action. Russell J. concluded that the circumstances lacked the necessary element of imminent peril. The defendant's truck had stopped moving; there was no collision between any vehicles; no one suffered an injury as a result of the truck stalling and, regardless of where the truck had come to rest, other motorists had not attempted to pass her vehicle. The plaintiff was not trapped in her vehicle, nor was she rendered helpless by the vehicle. The effective cause of the plaintiff's injuries was his decision, freely made, to push the truck.

XI. Offers to Settle

A. Seatle et al. v. Purvis et al., 2006 BCSC 724, Garson J.

This medical malpractice case supports the position that a Rule 37A offer is valid when a party offers to waive costs in exchange for a dismissal of the action against it.

The facts in this case are somewhat unusual. The plaintiff commenced a medical malpractice suit against two sets of defendants. At one stage of the litigation, the plaintiff agreed to a dismissal of the action without costs against one set of defendants (the "hospital defendants"). However, the other set of defendants (the "defendant doctors") refused to consent to the dismissal and opposed all subsequent attempts by the hospital defendants to extricate themselves from the action. The hospital defendants delivered a Rule 37A offer to settle to the plaintiff and the defendant doctors, offering to waive their costs in exchange for a dismissal of the action against them. Although the plaintiff was prepared to accept the offer, he was unable to do so because the defendant doctors refused to accept it.

The plaintiff's action was dismissed after trial. Garson J. agreed with the hospital defendants that it would be unfair to saddle the plaintiff with the costs of the hospital defendants' attendance throughout a lengthy trial when it was unreasonable for the defendant doctors to insist on keeping them in the proceedings. She awarded costs at Scale 4 to the hospital defendants against the defendant doctors up to the date of the delivery of the offer, and double costs thereafter.

Leave to appeal the ruling was dismissed by the Court of Appeal[9] on July 17, 2006.

B. P.G. Restaurant Ltd. dba Mama Panda Restaurant v. Northern Interior Regional Health Board et al., 2006 BCSC 1680, Goepel J.

The defendants delivered separate Rule 37A offers to settle for the sum of $50,000, together with 25% of the plaintiff's assessable costs and disbursements at Scale 3. The plaintiff's action was subsequently dismissed. The defendants applied for an order awarding them double costs from the date of delivery of their offers.

Goepel J. held that the Rule 37A offers were of no force or effect:

> [22] Rule 37A was introduced following the Court of Appeal decision in *Brown v. Lowe* (2002), 97 B.C.L.R. (3d) 246 (C.A.) in which the majority held that Rule 37 constituted a complete code governing offers to settle and that Calderbank letters should no longer be recognized. Rule 37A supplements Rule 37 and provides a remedy in those situations in which Rule 37 does not apply. Rule 37A does not, however, provide an alternative means of settlement which can be used instead of Rule 37. If an offer to settle can be made under Rule 37, it cannot be said that Rule 37 does not apply: *Cao (Guardian ad litem of) v. Schroeder* 2005, 42 B.C.L.R. (4th) 222 (C.A.). In this case the defendants could have made an offer under Rule 37. They chose not to. The offer made under Rule 37A is of no force or effect.

While there are cases in which similar Rule 37A offers were held to be valid,[10] most pre-date the Court of Appeal decision in *Cao*. In *Seatle v. Purvis*,[11] a 2006 decision, a Rule 37A offer purporting to waive costs in exchange for a dismissal of the action was given effect by Garson J. without questioning its

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9 2006 BCCA 342, Huddart JA (In Chambers).

10 *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2002 BCSC 396; *McGurk v. Primus Auto Financial Services Inc.*, 2003 SCBC 1864; *Norman v. McMillan et al. and Norman*, 2004 BCSC 384; *Seiler v. Mutual Insurance Company et al.*, 2003 BCSC 1536.

11 2006 BCSC 724.

validity. If Goepel J.'s rationale in *P.G.Restaurant* prevails, it will become increasingly difficult to ascertain, in the post-*Cao* world, what gaps in Rule 37 Rule 37A was intended to address.

C. Kurylo v. Rai, 2006 BCCA 176, Southin JA (Levine and Smith JJA, concurring)

The Court of Appeal overruled the decision in *Clark v Sidhu*[12] in which Johnston J. held that a defendant seeking double costs under Rule 37(24) following a dismissal of the plaintiff's claim must show that the offer to settle was reasonable in the circumstances of the case in which it was made. He concluded that an offer to settle in the amount of $1.00 was not reasonable.

Southin JA, writing for the panel, states:

> [7] In my opinion, with great respect, the judgment in *Clark v. Sidhu* is wrong and must be overruled. There is an underlying reason. When a defendant assess his position in litigation of any kind he may consider that the plaintiff has no case and if the case goes to trial, will fail. But the defendant may also be willing to make some minor offer which would carry with it the costs in the hope that the action will go away and that he will not, therefore, incur large legal bills to establish his legal position that the plaintiff has no case.

She further stated that the reasonableness of an offer when it is a monetary one is not a matter for judicial consideration.

D. Anderson v. Routbard, 2007 BCCA 193, per Prowse JA (Lowry and Thackray, JJA concurring)

The BC Court of Appeal confirmed that the standard wording used in ICBC Rule 37 offers to settle is clear and unambiguous. The wording in issue on appeal was the standard wording recommended by ICBC for use in all defence Rule 37 offers to settle:

> The sum of FIVE THOUSAND FIVE HUNDRED DOLLARS ($5,500), after taking into account Part 7 benefits paid or payable pursuant to Section 25 of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 and any advances paid to date;

The defendant delivered the offer approximately 18 months prior to trial. Madam Justice Humphries dismissed the action, but refused to award double costs of the action to the defendant because she concluded that the offer was uncertain in that it purported to settle the plaintiff's tort and Part 7 actions and "held back" amounts that were payable.

Madam Justice Prowse (Thackray and Lowry, JJA concurring) states at para. [21]:

> I am sympathetic to the plaintiff's submission that only a person with a working knowledge of s. 25 of the Act would understand that the defendant was offering to settle for $5,500, no more and no less. Once it is understood by reference to s. 25, however, that benefits can only be 'taken into account' by deducting them from the tort claim, I agree with the defendant that the offer to settle is clear and unambiguous. I also agree that the plaintiff cannot utilize his ignorance of s. 25 or its application as a basis for arguing that the offer is unclear, at least in the circumstances, as here, where s. 25 is referred to in the offer itself.

The BCCA also clarified the law regarding the relationship between Rule 66 and Rule 37, an issue which has resulted in conflicting decisions in the courts below. It ruled that the court retains a discretion in Rule 66 actions to give effect to a Rule 37 offer or not.

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12 2005 BCSC 914, Johnston J.

Madam Justice Prowse states at para. [46]:

> ... Rule 37 is not given elite status as a special circumstance and, in some cases, it may be only one of many special circumstances which the court may consider in determining whether the fixed costs under subrule (29) should apply. If it is the only special circumstance, however, it is reasonable to expect that the court's discretion would generally be exercised to award double costs, as was the case in [*Duong v. Howarth*, 2005 BCSC 128].

The Court went on to approve the method used by Macaulay J. in *Duong* to assess the costs in Rule 66 cases where the offer to settle has been given effect. Macaulay J. used the approach that the $3,600 and $4,800 fixed costs provisions for one and two day trials, respectively, mean that the cost of each day of trial would be $1,200, with the balance, or $2,400, going to all pre-trial activities. The trial portion is then doubled.

However, the Court of Appeal modified that approach given that the offer to settle in *Anderson* was made 18 months prior to trial shortly after pleadings had been closed. Prowse JA assessed costs at double the entire amount ($4,800 x 2 = 9,600) less a 10% deduction for the period of time prior to the delivery of the offer, resulting in an award of costs of $8,640.

E. Yazdi et al. v. ICBC, 2006 BCSC 1595, Cole J.

F. Gale v. Knapp, 2006 BCSC 1225, Bennett J.

These two decisions, which preceded the Court of Appeal decision in *Anderson v. Routbard*, provide examples of the factors considered by the Courts when determining whether to give effect to a Rule 37 offer in a Rule 66 action and therefore remain relevant in the post-*Anderson* world.

In *Yazdi*, the defendants delivered, seven days prior to trial, an offer to settle in the amount of $1.00 in a Rule 66 action in which the plaintiffs sued ICBC to recover the cost of their stolen vehicle under their comprehensive coverage. The plaintiff's action was subsequently dismissed after a three-day trial. At issue before Cole J. was the effect of the Rule 37 offer on the defendant's costs.

Cole J. followed *Lee v. McGuire*[13] to conclude that the Court retains discretion under Rule 66(29) to consider the effect of a Rule 37 offer on the assessment of costs. He considered the following factors before giving effect to the offer to settle:

- The offer was made seven days before trial.
- The offer was $1.00 more than the judgment.
- The trial was somewhat complicated and took three days.
- The plaintiffs' misrepresentation as to the principal operator of the vehicle was tantamount to fraud.

In assessing the amount of costs, he followed the approach in *Linekar v. Andreiko (No. 2)*[14] and awarded the defendant costs to the date of the offer and double costs thereafter, subject to a maximum. In this case, because the trial lasted three days, the judge found that the ordinary lump sum costs were $6.000 ($4,800 plus $1,200 for the extra day of trial); therefore, the maximum of double the lump sum was $12,000.

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13 2005 BCSC 428.

14 2004 BCSC 1244.

In *Gale*, Bennett J. gave effect to an offer to settle delivered by the plaintiff which was exceeded by the amount he recovered in damages after a two-day Rule 66 trial. She considered the following factors:

- The offer was made two weeks before trial.
- The judgment exceeded the offer by $9,000 and therefore the offer had been reasonable (*Lee v. McGuire*[15]).

Bennett J. preferred the approach used in *Duong v. Howard*[16] which assessed costs, where the trial lasted two days, in the bulk amount of $7,200.

G. Icecorp International v. Nicolaus et al., 2007 BCCA 97, per Levine JA (Newbury and Saunders, JJA concurring)

The Court of Appeal overruled *Reischer v. ICBC*[17] and upheld the interpretation given to subrule 37(37)(b) by the chambers judge below.[18] The plaintiff accepted an offer to settle in the amount of $100 in a breach of contract action in which the damages sought by the plaintiff were alleged to be in the range of $375,000. Pitfield J. concluded that the magnitude of the claim made it inappropriate to have brought the action in Provincial Court and awarded the plaintiff its costs of the action.

Subsequent to the chambers judge's decision in *Icecorp*, Macaulay J. in *Reischer* interpreted subrule 37(37)(b) differently. He concluded that subrule 37(37)(b) had been added to the rule on July 1, 2003 in order not to penalize plaintiffs who were precluded from bringing an action in Provincial Court because it lacks jurisdiction: for example, actions for libel, slander and malicious prosecution. His interpretation gave certainty to the subrule in that the court would have no discretion to make anything other than an order for disbursements only when an offer to settle in an amount within the Provincial Court monetary jurisdiction is accepted.

In *Icecorp*, Levine JA concluded that Macaulay J.'s interpretation was in error:

> [26] I can find no justification in the words, the context, or the scheme of Rule 37 to ascribe a narrow, jurisdictional meaning to the word 'appropriately' in Rule 37(37)(b), that would effectively exclude an examination of the amount of the claim. Had the Legislature intended that a narrow jurisdictional test be applied in interpreting paragraph (b), it could have clearly provided for that. Deleting the word 'appropriately' would arguably have that effect.

The Court of Appeal held that Rule 37(37)(b) requires an assessment of the amount of the claim or, as was the case in *Kuehne v. Probstl*,[19] an examination of the tactical advantages of starting an action in Supreme Court, in order to determine whether the action could appropriately have been brought in the Provincial Court.

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15 *Supra.*

16 [2005] B.C.J. 207.

17 2006 BCSC 198, Macaulay J.

18 2006 BCSC 25, Pitfield J. Rule 37(37) states:

> Despite subrule (22), the plaintiff is not entitled to costs other than disbursements if
> (a) an offer is accepted for a sum within the jurisdiction of the Provincial Court under the Small Claims Act, and
> (b) the proceeding in which the offer was made could appropriately have been brought in the Provincial Court.

19 2004 BCSC 865, Master Groves.

The Court also commented that under Rule 57(10) the plaintiff has a higher onus to justify bringing the action in Supreme Court where damages within the Provincial Court jurisdiction are awarded after trial.

It appears, therefore, that the delivery or acceptance of any Rule 37 offer within the Provincial Court jurisdiction will necessarily be fraught with uncertainty until the issue of costs is resolved, either by agreement or, more likely, by order.

H. Kerpan v. ICBC et al., 2007 BCSC 203, Shaw J.

A jury awarded damages to the plaintiff with respect to her s. 24 action against ICBC and dismissed two other actions. The defendant had delivered a Rule 37A offer in the amount of $200,000 "old money" inclusive of costs and disbursements, which exceeded the damages awarded by the jury. The offer purported to settle all three actions before the jury and a fourth claim not before the jury.

Defence counsel argued that because ICBC's maximum liability under section 24 was $200,000, inclusive of costs and disbursements, it could not make an offer under Rule 37, which must be exclusive of costs and disbursements.

Shaw J. held that the defendant should have made an estimate of the plaintiff's costs and disbursements and then made a Rule 37 offer for the balance. Because Rule 37 was available, Rule 37A was not, and the Rule 37A offer was therefore invalid.

Furthermore, the offer purported to settle four claims against defendants who were severally, not jointly, liable. Therefore, on the authority of *Cao v. Natt*,[20] the Rule 37A offer was invalid.

Alternatively, the defendant argued that the Court should consider the offer as a factor in the exercise of its discretion under Rule 57(9) and give it effect as a *Calderbank* offer. Shaw J. concluded, following the Court of Appeal decisions in *Brown v. Lowe*[21] and *Chaub v. Campbell*,[22] that Rules 37 and 37A together form a complete code to the exclusion of any other mechanism, such as the *Calderbank* offer, that could trigger costs consequences.

I. ICBC v. Eurosport Auto Co. Ltd., 2007 BCSC 279, per Prowse J. (Mackenzie and Saunders JJA, concurring)

The Court of Appeal confirmed that it is not open to the court to award double special costs under either Rule 37 or 37A. Nor is there a residual discretion outside of Rules 37 and 37A which would permit the court to award double special costs. Rule 37(1) was amended in 1999 to include the following definition of double costs:

> "double costs" mean double the fees allowed under Rule 57(2) and includes the disbursements allowed under Rule 57(4);

Rule 57(2) specifically refers to the assessment of costs under Appendix B.

Under Rule 37A, the court may award costs to the offering party in an amount not greater than the costs that would have been awarded to the offering party if the offer had been made under Rule 37.

With respect to the issue of residual discretion to award double special costs, Prowse JA concluded that "[Rule 37 and Rule 37A] together cover the field when it comes to the court's power to award double

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20 (2005), 42 B.C.L.R. (4th) 222 (C.A.).

21 (2002), 97 B.C.L.R. (3d) 246 (C.A.).

22 2004 BCCA 85 (leave to appeal).

costs" [para. 44], based on the combined effect of the Court of Appeal decisions in *Brown v. Lowe*, 2002 BCCA 7, *Cridge v. de Vooght* (2005), 37 B.C.L.R. (4th) 62 and *Anderson v. Routbard*, 2007 BCCA 193.

XII. Practice

A. Makara v. Weihmann, 2005 BCSC 1757, Barrow J.

During the course of a jury trial, plaintiff's counsel objected to the admissibility of photographs depicting damage to the vehicles involved in the collision. The plaintiff alleged he suffered a fracture to the T1 vertebrae. Although liability for the accident was admitted, causation and the extent of the plaintiff's injury were in issue. The plaintiff argued that the photographs were inadmissible on the basis that they were highly prejudicial to his claim and had no probative value given that liability was not in issue, resting his argument in large part on Thackray J's comments in *Gordon v. Palmer*[23] with respect to the relationship between the extent of vehicle damage and injury.

Barrow J. ruled that the photographs were admissible. The amount of vehicle damage and the nature of the collision is a relevant consideration in resolving the issues of causation and extent of injury. Any potential for prejudice arising from the jury viewing the photographs was offset by three factors:

- it was open to the plaintiff or any party to call evidence to address the issue of what, if any, relationship existed between the damage to the vehicles and the injuries complained of;
- juries are quite capable of making appropriate use of evidence;
- if necessary, the jury could be specifically instructed with respect to any inferences that may be taken from the photographs.

B. Cam v. Hood et al., 2006 BCSC 842, Brooke J.

Plaintiff's counsel objected to the admission of surveillance videotapes during the course of a jury trial on the bases that their prejudicial value outweighed their probative value and that they had been obtained surreptitiously in circumstances that were tantamount to an "unbridled invasion of privacy."

The videotapes depicted five hours during which the plaintiff played volleyball.

Brooke held that, in civil proceedings, the test for admissibility is whether the proffered evidence is relevant and probative of a fact in issue. He states at para. 5: "Where a videotape is proffered and is shown to be accurate in its depiction, and it fairly represents what is depicted, then so long as it is relevant and probative of the fact in issue, it is admissible."

He also concluded that there had been no invasion of privacy. The investigators conducting the surveillance operated on or from public property and in accordance with standards designed to safeguard privacy. They were registered and supervised under relevant provincial legislation.

C. Naidu v. Mann et al., 2007 BCSC 272, Russell J.

Madam Justice Russell's ruling in this case provides a helpful summary of the law on the admissibility of expert rebuttal evidence.

The plaintiff sought to adduce, very close to the end of trial, the expert report of a vascular surgeon intended to meet the evidence of the defendants' expert who commented on surveillance video-

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23 [1993] B.C.J. No. 474 (S.C.).

recordings served by the defendants seven days prior to trial. The defendants argued that the report was inadmissible as rebuttal evidence.

Referring to *Sterritt v. McLeod*,[24] Russell J. stated that there are two types of rebuttal evidence:

(a) Evidence going to an issue the burden of proof of which lies upon the defendant. The plaintiff has no obligation to adduce any evidence on the issue until after the defendant's case at which time the plaintiff has the right to respond. If the plaintiff addresses the issue in his own case, he will not be permitted to 'split his case' by addressing it again after the defendant's case.

(b) Evidence responsive to some point made in the oral evidence of the witnesses called by the defendant. Such evidence is strictly limited to true response evidence and cannot be fresh opinion evidence masquerading as answer to the other side's expert evidence.

(c) Russell J. concluded that the disputed report more closely corresponded to the second type of rebuttal evidence. The issue was whether such evidence tendered late in the process and without notice could be construed as 'true response evidence.' Furthermore, expert evidence, whether rebuttal or not, must still meet the tests for admissibility:

- It must be of assistance to the court in deciding a question requiring long study or experience.
- The expert must remain within his or her area of expertise.
- The expert must not be permitted to displace the role of the trier of fact.
- The expert should express his or her opinion in an objective and impartial manner, and must not present argument in the guise of expert evidence.

The plaintiff's expert had not had the opportunity to view the video-recordings prior to giving his opinion. Furthermore, the plaintiff had already tendered a rebuttal report from another vascular surgeon that responded to the defendant's expert report. In ruling that the disputed report was inadmissible in its entirety, Russell J. concluded that it was argumentative in the extreme, repeated the opinions in his earlier report, drew conclusions with respect to the surveillance video-recordings without having seen them, usurped her role as trier of fact and included "fresh opinion evidence" which did not meet the test for rebuttal evidence.

The late service of the report was not a factor considered by Russell J. The appropriate remedies available to a party who sees the need to respond to surveillance evidence served shortly before trial is to seek an adjournment of the trial or to address such evidence in closing argument based on the opinions expressed in admissible export reports.

XIII. Privilege

A. Blank v. Canada (Minister of Justice), 2006 SCC 39

The Supreme Court of Canada addressed, for the first time on this appeal, the difference between "two related but conceptually distinct exemptions from compelled disclosure: the *solicitor-client privilege* and the *litigation privilege*" (per Fish J. at para. 1, emphasis in original).

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24 (2000), 74 B.C.L.R. (3d) 371, 2000 BCCA 318, per Southin JA.

While the Court was focused specifically on litigation privilege and its application in the narrow context of the *Access to Information Act*, R.S.C. 1985, c. A-1, it felt compelled to explore the broader implications of privilege on the conduct of legal proceedings generally. The following principles emerge:

- Solicitor-client privilege (also known as legal advice privilege) has over the years evolved from a rule of evidence to a rule of substantive law. It enjoys near-absolute protection, including permanency.
- Litigation privilege is not directed at, still less, restricted to communications between solicitor and client. It contemplates as well communications between a solicitor and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship.
- Litigation privilege arises and operates even in the absence of a solicitor-client relationship and it applies indiscriminately to all litigants, whether or not they are represented by counsel.
- Litigation privilege, unlike solicitor-client privilege, ends once the litigation has ended.
- Litigation privilege may continue, however, where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source") as well as proceedings that raise issues common to the initial action and that share its essential purpose.
- A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice to extend litigation privilege once the original litigation has ended.
- Litigation privilege does not protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct.
- The dominant purpose test remains the most appropriate test for supporting the creation of litigation privilege. Although providing narrower protection than would a substantial purpose test, it is more compatible with the contemporary trend favouring increased disclosure.
- Whether litigation privilege attaches to documents gathered or copied—but not *created*—has been the subject of conflicting appellate opinion in BC (*Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129) and in Ontario (*General Accident Assurance Co. v. Chruz* (1999), 45 O.R. (3d) 321). However, this issue should be left to be resolved in a case where it is explicitly raised and fully argued.

B. Heatherington v. Loo et al., 2007 BCSC 129, Master Caldwell

The plaintiff sought production of documents listed in Part III of the defendant's list of documents, which included the adjuster's claim file materials: internal notes, witness statements and communications with an independent adjuster. These documents were listed as follows:

> Adjuster's file materials including internal notes, memorandum instructions, reports and statements marked:
>
> P1 initialled by Counsel for the defendants;
>
> P2 initialled by Counsel for the defendants;
>
> P3 initialled by Counsel for the defendants; etc.

Defence counsel relied on the decision in *Leung v. Hanna* (November 9, 1999) 35 CPC (4th) 263 to support his position that the documents in question need not be described with any more particularity so as not to reveal the privileged nature of the documents. Master Caldwell distinguished *Leung* on the basis that it dealt with documents protected by solicitor-client privilege while the documents in issue were protected by litigation privilege. He states:

> While information such as the date and author's identity may well be protected from disclosure under a claim of solicitor-client privilege, such protection is not necessarily afforded claims of privilege based upon the dominant purpose test. The latter protection is less absolute, more fact driven and subject to challenge. In the recent case of *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39, Fish J. said at ¶ 60:
>
> > the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

Master Caldwell was satisfied that litigation was in reasonable prospect from shortly after the date of the accident, based on the plaintiff's conduct. He held, however, that the fact that the plaintiff immediately retained counsel was not enough to infer that litigation was a reasonable prospect. He stated that the plaintiff was entitled to retain counsel and "in fact settlement is often assisted and promoted by the involvement of counsel."

While the adjuster's affidavit asserted that the documents were created for the purposes of litigation and liability investigation, it did not state which of the two was the dominant purpose. The failure to do so was fatal to the claim of litigation privilege. All documents created prior to the start of the litigation were ordered to be produced.

XIV. Production of Documents

A. Ireland v. Low, 2006 BCSC 393, Joyce J.

The defendants applied for an order that the plaintiff deliver his computer to their expert in order to retrieve both existing and deleted data pertaining to the plaintiff's home-based business. The defendants submitted that such documents were relevant under the *Peruvian Guano* test in that they may tend to show business activity that was relevant to the plaintiff's claim for loss of earning capacity and may also reveal his capacity to work on a computer.

Joyce J. concluded that while such documents may fall within the broad scope of relevance under the *Peruvian Guano* test, their probative value was far outweighed by the competing considerations of privacy and cost. He refused to exercise his discretion to grant the order. He ordered instead that the plaintiff deliver an affidavit verifying his list of documents and expressly stating that he had reviewed the recycle bin on his computer and all e-mail folders and that all relevant documents had been listed in Part 1 or part 3 as may be applicable. He was not required to view deleted documents that would be accessible only with the assistance of a computer expert.

B. Desgagne v. Yuen et al., 2006 BCSC 955, Myers J.

The plaintiff alleged she suffered brain injury, chronic pain and fibromyalgia, overwhelming fatigue and soft tissue injuries. At the time of the defendants' application, the plaintiff had not worked for four years as a systems analyst and claimed that she was no longer capable of working in that capacity. The defendant sought production of the plaintiff's hard drive in order to retrieve documents falling within three categories:

- actual and deleted documents contained on the hard drive;
- metadata;
- history of web sites visited by the plaintiff.

These documents and data were relevant, according to the defendants, because e-mails written by the plaintiff to friends may tend to contain admissions against interest; the metadata would enable the defendants to assess the plaintiff's computer functionality; and the history of web sites visited by the plaintiff may tend to indicate whether the plaintiff had learned diagnostic criteria from web sites pertaining to post-traumatic brain injury and psychological trauma.

Myers J. refused to grant the defendants' application in its entirety. With respect to the first category of documents, in the absence of any evidence that the plaintiff had made admissions against interest, a request to view the plaintiff's hard drive to retrieve electronic documents was akin to a request to search through the plaintiff's filing cabinet in the hope of finding documents that may contain admissions against interest, and was therefore clearly not allowed. There was no evidence that the plaintiff had deleted documents for an improper purpose, and the existence of deleted files containing admissions against interest was speculative.

With respect to the metadata, while Myers J. conceded that metadata fell within the definition of document contained in Rule 1(8), he failed to see how information retrieved by an expert as to the usage and time spent by the plaintiff on her computer would assist in an assessment of her cognitive functioning or ability to work. There was no evidence from any of the plaintiff's or defendants' medical experts that metadata would assist in that regard. Even if he could conclude that the metadata had marginal probative value, he agreed with *Park* and *Ireland*, *supra*, that the defendants' interest of attaining full disclosure was outweighed by the plaintiff's privacy and confidentiality interests.

Myers J. declined to order data relating to the plaintiff's web browsing history on the same bases: the lack of relevance and the intrusive nature of such disclosure.

C. Astels v. The Canada Life Assurance Company et al., 2006 BCSC 941, Arnold-Bailey J.

The plaintiff brought action against the defendant disability insurers seeking a declaration that she was totally disabled within the meaning of her policy, and claiming damages for breach of contract, mental distress and bad faith in addition to punitive, exemplary and aggravated damages.

She applied for an order for production of a wide range of documents relating generally to the business practices, policies and procedures of the defendants and their employees, personnel files of employees who had dealt with the plaintiff's claim and extensive financial information about the present and past dealings of the two corporate defendants, including their history of mergers, claims reserves and profitability. She also sought an order to allow access by a historian retained by her to corporate archival material not otherwise available to the public.

The plaintiff's rationale for requesting such information was that it was relevant to the issues of liability and damages in that the standard of adjusting disability claims by insurers had changed in recent years as a result of an increased drive for profits to satisfy new public shareholders.

Arnold-Bailey J. refused to grant the orders sought by the plaintiff. While the defendants' financial records may at some stage of the litigation become relevant to assess the quantum of punitive damages if such were awarded, it was premature to order their production at this stage when the plaintiff's entitlement to disability benefits was in issue and could possibly be the subject of a bifurcated trial.

Furthermore, in the absence of evidence indicating systemic denial of disability claims by the defendants, the information sought was not relevant to the plaintiff's own claim. The plaintiff's allegation of bad faith was grounded on a bald assertion that the defendants had not acted in utmost good faith, with no particulars of the defendants' conduct to support the claim. Arnold-Bailey J. states:

> [35] Thus, without the specific facts of the case giving rise to allegations of bad faith or failure to act in the utmost good faith, the plaintiff is simply fishing in the wide ocean of all insurance decisions taken by the defendants in the hopes of turning up systemic conduct that would found their claims of bad faith, from which they could impute the same conduct in the case at bar.

Arnold-Bailey J. granted the defendants' application for production of the plaintiff's vehicle maintenance and insurance records and credit card and bank statements. The plaintiff's employment duties had involved a significant amount of driving. Her vehicle maintenance and insurance records were therefore relevant to the issue of liability.

By pleading mental distress, punitive and aggravated damages and referring to distress caused by financial hardship, the plaintiff had put her financial circumstances squarely in issue.

D. Laxton v. Coglon et al., 2006 BCSC 1458, Sinclair Prowse J.

In this decision, Sinclair Prowse J. reaffirms the validity of the test of relevance in document production as set out in *Peruvian Guano* and that privacy concerns must be outweighed by the potential prejudice to the party seeking the production of documents that are of more than marginal relevance.

The plaintiff brought an action against her ex-husband and several companies in which she sought to set aside or vary the property division made in their divorce proceedings on the grounds of fraudulent non-disclosure. She alleged that the defendants, Deltech Worldwide Limited and Benures Investment Ltd., had been involved with her husband in a scheme to divert funds she claimed were family property.

In this application, she sought from the defendants, Deltech and Benures, affidavits verifying whether various classes of documents were, or ever had been, in their possession, control or power, and if no longer in their possession, control or power, when that situation occurred and what happened to them. The defendants cross-applied for an order under Rule 26(1.2) excusing them from complying with their document production obligations on the basis that such production would reveal the identity of the beneficial owners and business partners of the defendants and particulars of their business affairs that did not relate to the transactions alleged in the action.

While Sinclair Prowse J. acknowledged that the documents sought by the plaintiff if produced would result in the loss of privacy for some individuals and companies that ultimately would be shown to have no connection with her action, that result was outweighed by the prejudice suffered by the plaintiff if the documents, which were of more than marginal relevance, were not produced.

At para. 47 she reiterates the test of relevance in *Peruvian Guano* and states at para. 48:

> There is no special onus on a party to adduce evidence of *a prima facie* case of relevance before production is ordered. Rather, whether a document falls within the ambit of *Peruvian Guano* is usually determined by a consideration of the description of the nature of the documents sought to be produced and a reasonable interpretation of the pleadings: *Boxer v. Reesor* (1983), 43 B.C.L.R. 352 (S.C.); *Goldman, Sachs & Co. v. Sessions*, 2000 BCSC 67; and *Park v. Mullin*, [2005 BCSC 1813].

E. Prasad v. Sedivy et al. (22 September 2006), Vancouver Registry No. M032068, Master Caldwell

The defendants sought production of the plaintiff's bank and credit card statements in light of a recent disclosure that the plaintiff had a gambling problem which was, according to one medical report, contributing to the anxiety and depression he claimed resulted from the accident.

Master Caldwell ordered their production, from the date of the accident, following the decision in *Astels v. The Canada Life Assurance Company*[25] in which Arnold-Bailey J. ordered production of similar records where the plaintiff claimed damages for mental distress in light of the defendant's refusal to pay disability benefits.

The documents sought in this case were relevant, given that the plaintiff had put his financial circumstances in issue by claiming for past and future loss of income due to his psychological condition.

F. Lewis v. Frye et al., 2007 BCSC 89, Hood J.

The plaintiff appealed a Master's decision ordering him to sign authorizations for records on a non-*Halliday* basis directed to two doctors and to the Medical Services Plan. Plaintiff's counsel argued that a Master does not have the jurisdiction to make such an order, basing his argument, by analogy, on the decision of Davies J. in *Allen-Trenholme v. Simmie*[26] that a master has no jurisdiction to make such an order with respect to records held by non-parties outside of the jurisdiction. In dismissing the plaintiff's appeal, Hood J. stated the following:

- Masters and judges have the jurisdiction to make orders compelling parties to produce relevant documents in their possession, control or power using alternative mechanics or means of production, such as by signing authorizations directed to non-parties, without regard to inherent jurisdiction.
- Such jurisdiction extends to records held by non-parties, both within and outside the Province.
- The authority for such orders can be found in Rule 1(12):

  > When making an order under these rules the court may impose terms and conditions and give directions *as it thinks just*. (Emphasis added by Hood J.),

  in Rule 26(10):

  > The court may order the production of a document for inspection and copying by any party or by the court at any time and place and *in the manner it thinks just.* (Emphasis added by Hood J.)

  and in numerous authorities in BC and other provincial jurisdictions.
- Rule 26(11) applies only to documents in the possession of non-parties over which the plaintiff has no power or control—in the case at bar, the documents sought, although within the possession of a non-party, were clearly within the plaintiff's power to obtain.
- Such an order is not merely an order to sign a piece of paper. According to Hood J: "In substance it is an order for production by the Plaintiff of documents within his power with an additional term 'attached' providing for production in a particular manner, that is, by executing authorizations enabling the records to be produced to the Defendants."

He summarizes the law at para. 110:

> [110] In the case at bar there is no doubt that the documents in question are within the power of the Plaintiff, are relevant and are compellable. There is also no doubt that the Court has substantive jurisdiction or power pertaining to the discovery and

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25 2006 BCSC 941.

26 2006 BCSC 542.

> inspection of documents under Rule 26, particularly the compelling or ordering of production of documents. As I have already said, in my view, regardless of the precise wording of the order, it is an order for the production of the documents by the Plaintiff, and in a particular manner. It is this means of achieving production, that is, by the Plaintiff signing the necessary authorizations releasing the documents, to which the Plaintiff objects. In my opinion, the manner in which production is achieved is for the Court. The Court's substantive jurisdiction or power to compel the production of documents includes the jurisdiction or power to create the mechanisms or the means by which production is made. It is not necessary that the Court rely on its inherent jurisdiction to do so; and it follows that the Master had jurisdiction to make the order.

This decision injects elements of convenience, practicality and common sense into the issue of Rule 26 production of documents in the possession of non-parties. It provides a simple and inexpensive mechanism consistent with the purpose and objectives of the Supreme Court Rules and it releases documents otherwise not producible under Rule 26(11): documents in the possession of non-parties outside the jurisdiction or in the possession of federal government entities (e.g., Canada Customs and Revenue Agency). And finally, by circumventing the necessity to provide notice to non-parties, it protects the privacy of the party to whom the documents relate.

XV. Rule 30 Examinations

A. Wong v. Wong, 2006 BCCA 540, per Finch, CJBC (Hall JA concurring and Saunders JA concurring in the result)

The Court of Appeal dismissed an appeal by the plaintiff from an order of a judge in chambers refusing to allow the plaintiff to audio-record a Rule 30 psychiatric examination.

Chief Justice Finch considered both the broad issues raised on appeal as well as the narrow issue of whether the chambers judge erred in prohibiting the plaintiff from audio-recording the examination.

The broad issues raised on appeal were:

(a) Whether a judge or master of the Supreme Court of BC on an application for a medical examination under Rule 30(1) has authority or jurisdiction to permit, or to prohibit, the person being examined from making an audio tape recording of the examination; and

(b) If the judge has such authority or jurisdiction under Rule 30(1) what are the considerations or factors that should inform the exercise of the judge's discretion in permitting or refusing an audio tape to be made.

The Chief Justice held that "while a master or judge has a discretion under Rule 30 to permit the use by a plaintiff of an audio tape recorder on an independent medical examination, it is in my opinion a discretion that should be exercised rarely and with restraint, and only in circumstances where there is cogent evidence that the use of an audio tape recording will advance the interests of justice."

He commented that, in the absence of any evidence of bias or lack of integrity on the part of the examining doctor, "the examination should proceed on the footing that the medical examiner, or the expert, will conduct the examination, report what the patient says, and express his or her opinions, in a fair and objective manner." The ability of the party requesting the examination to learn the case it has to meet by obtaining an effective evaluation is the predominant consideration in applications of this type.

The Court also found that the chambers judge did not err in prohibiting the audio-recording in this case.

While Madam Justice Saunders agreed that the appeal should be dismissed on the narrow issue of whether the order was in error, she was of the opinion that "a robust attitude to the use of recording devices should be the norm, such that any reasonable explanation for their presence may justify their use, absent clear and convincing reason for their curtailment."

B. Bhimji v. Graham, 2007 BCSC 607, Garson J.

Digital recordings made surreptitiously by the plaintiff while being examined by several physicians on behalf of the defendant were unlawfully obtained and were ruled presumptively inadmissible at trial, subject to further order on application by either party where the interests of justice require their admission. The Court of Appeal decision in *Wong v. Wong*, *supra*, governs the law in personal injury lawsuits: a plaintiff is not entitled to record Rule 30 examinations without first obtaining leave of the Court.

The plaintiff was ordered to deliver all but one of the copies of the digital recordings to defence counsel.

C. Tanner v. Walker (27 March 2007), Victoria Registry No. 031095, Master Keighley

The plaintiff sought to attach to a Rule 30 order a condition that the defendant pay to the plaintiff an advance payment of $60,000. The plaintiff had been injured in an accident in 2001. Trial was scheduled to be heard in 2008. The plaintiff had been a worker at the time of the accident and was therefore not entitled to receive accident benefits from ICBC. He claimed he continued to be totally disabled from the injuries received in the accident and subsisted on CPP benefits.

Master Keighley held that orders for advance payments were not confined to situations in which an adjournment of trial was sought, but such orders should be made only in special circumstances. The plaintiff must show prejudice as a result of the granting of an order under Rule 30 compelling him to attend a medical examination. In this case, the plaintiff would not be prejudiced by his attendance for a medical examination. In fact, the examination and resulting opinion may expedite the resolution of his claim.

XVI. Rule 68

A. Louch v. DeCicco, 2007 BCSC 393, Edwards J.

An appeal of Master McCallum's two rulings in this case[27] has had mixed results. Edwards J. held that Rule 68 does not abolish either solicitor/client privilege or litigation privilege. He states:

> [62] In short, nothing in Rule 68 expressly abrogates the right to claim either type of privilege. No such abrogation of a common law right can be implied in the absence of a clear expression of legislative intention.

However, Edwards J. upheld Master McCallum's ruling that Rule 68 gives no jurisdiction to the Court to compel production of documents in the possession of third parties.

His explanation of the mechanics of document production under subrule 68(16) can be summarized as follows:

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27 2006 BCSC 1911.

- Subrule 68(16) does not require the listing of documents a party is aware of but does not control.
- If a party intends to refer at trial to documents in the possession of a third party, that party must obtain control of the documents before they can be listed and referred to at trial pursuant to subrule 68(16)(a)(ii).
- If a party is aware of but does not control a document that "could be used by any party to prove or disprove a material fact" under Rule 68(16)(a)(iii), that party need not list the document even if it is within that party's power to gain control of the document unless that party intends to rely on the document at trial.
- The only option open to a party who does not have control of a document but who intends to rely on the document at trial is to issue a *subpoena duces tecum* to a representative of a non-party document holder to testify at trial and bring relevant documents.

B. Dettling v. Close, 2007 BCSC 356

Master Baker, following Master McCallum's interpretation of Rule 68 in *Louch*, refused to give effect to a consent order for the production of documents in a file in the possession of the RCMP. Since neither party had control over the contents of the file, their consent could not grant the court jurisdiction it does not otherwise have.

Ironically, in both the *Dettling* and *Louch* decisions, Master Baker and Edwards J. commented that in the "real world"—in actions not subject to Rule 68—the courts have sanctioned procedures intended to simplify the production of relevant documents in the possession of non-parties that would either assist the court in deciding issues or help the parties in negotiating a settled result: *Taber v. Fritz*[28] and *Lewis v. Frye*.[29] These procedures are precluded by Rule 68, a rule that expressly has as its overarching goals the injection of expedition and proportionality into claims with a value of less than $100,000.

XVII. Section 25 Deductions

A. Kerpan v. ICBC, 2006 BCSC 1752, Shaw J.

Following a trial against ICBC as nominal defendant under s. 24 of the *Insurance (Motor Vehicle) Act*, the jury awarded damages in the amount of $150,000. At issue in this application was the deductibility of the following amounts from the plaintiff's award:

Payments in advance	$28,500.00
Employment Insurance Benefits	$6,178.00
Disability Benefits Level Two from the Ministry of Human Resources	$51,849.43
Past Part 7 Benefits	$14,000.00
Future Part 7 Benefits	$20,000.00
Total Deductions	$120,527.43

The parties agreed that the payments in advance made by ICBC to the plaintiff from time to time should be deducted.

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28 (1996), 24 B.C.L.R. (3d) 101.

29 *Supra.*

The parties further agreed that the employment insurance benefits received by the plaintiff should be deducted from her award pursuant to s. 106(1)(b) of the *Revised Regulation (1984) Under the Insurance (Motor Vehicle) Act.*

With respect to the disability benefits received by the plaintiff from the Ministry of Human Resources, plaintiff's counsel argued that while payments categorized as social welfare benefits are ordinarily deductible from damage awards, section 106 constitutes a complete code such as to preclude the deduction of other benefits not falling within its ambit. Shaw J. disagreed that s. 106 nullifies the common law principle which forbids the double recovery of losses and applied the Supreme Court of Canada decision in *M.B. v. British Columbia*[30] to deduct these benefits from the award. Shaw J. held that the observations of the Supreme Court of Canada with respect to social assistance benefits applied with equal force to benefits paid under the *Employment and Assistance for Persons with Disabilities Act* and Regulations, and the fact the plaintiff was disabled did not change the nature of the payments, which were a form of income replacement.

Finally, after the trial, ICBC had paid to the plaintiff in respect of past and future Part 7 benefits, the total amount of $34,000. Shaw J. concluded, on the combined authority of *Gurniak v. Nordquist*[31] and *Sovani v. Jin*[32] that the Part 7 benefits paid by ICBC were properly deductible from the jury award.

The Court ordered that the entire amount of $120,527.43 be deducted from the plaintiff's damage award.

XVIII. Disability Insurance Limitations

A. Pekarek v. Manufacturers Life Insurance Co., 2006 BCCA 250

The Court of Appeal upheld the summary dismissal of the plaintiff's claim for disability benefits as being out of time. The policy of insurance provided for a one-year limitation period. By letter dated June 1, 1994, the defendant terminated the plaintiff's disability benefits effective December 1, 1994 based on her physician's advice that she should be able to return to work by that date. The plaintiff provided a further note from her doctor in August 1994. By letter dated October 12, 1994 the defendant advised that it was denying her appeal to provide ongoing benefits and that her file would be closed. The defendant had made efforts during 1996 and 1997 to obtain further information from her solicitor, to no avail. The plaintiff filed a Writ of Summons in July of 2000.

The Court found that the defendant had provided a clear and unequivocal notice of the denial in its letter of October 12, 1994 such as to trigger the commencement of the one year limitation period. The fact that the defendant reviewed further medical information did not postpone the running of the limitation period nor was it necessary for the letter to reference the limitation period.

Mr. Justice Hall, in concurring with the reasons of Thackray J.A., made further comment on Madam Justice Levine's remarks in *Esau v. Co-operators Life Insurance Company* around consideration for an amendment to the *Insurance Act* to reflect the discoverability provisions in ss. 6 and 7 of the *Limitation Act*, and which would allow consideration of the reasoning in *Novak v. Bond.*

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30 [2003] 2 S.C.R. 477, 2003 SCC 53.

31 [2003] 2 S.C.R. 652, 2003 SCC 59.

32 [2005] 47 B.C.L.R. (4th) 97, 2005 BCSC 1285.

XIX. Structured Settlements

A. Andrist Estate v. Mason, 2006 BCSC 1762

The Court declined to approve an infant structured settlement on the grounds, *inter alia*, that there must be some basis to justify a conclusion that the infant should be denied access to the settlement funds upon reaching the age of majority contrary to the presumption of entitlement to the funds as an adult.

XX. PST

A. British Columbia (Attorney General) v. Christie, 2007 SCC 21

Allowing the appeal from the BC Court of Appeal, the Supreme Court of Canada, declared the BC 7% tax on the purchase of legal services created to fund legal aid within the province as constitutional. The constitution does not foreclose the possibility that there is a right to counsel in specific and varied situations but there is no constitutional entrenched entitlement to legal services in relation to proceedings in court and tribunals addressing rights and obligations. The historic right to counsel is a limited right which arises, typically, in the context of criminal proceedings notably under s. 7 of the *Charter* which implies a right to counsel as an aspect of procedural fairness where life, liberty and security of the person were affected.

XXI. Small Claims Court Practice

A. Figueroa v. Fitzpatrick (7 November 2006), North Vancouver Registry No. 03 14956, Rodgers J.

The issue before Rodgers J. was whether the Court had jurisdiction to award costs to the defendant after the claimant abandoned his action by filing a Notice of Withdrawal. This issue had been answered affirmatively in *Bucan v. Fernandez*,[33] but was subsequently ruled in the negative in *Preston v. Connolly*[34] and *Northwest Waste Systems v. Szeto*.[35]

Rodgers J. concluded that *Preston* and *Northwest Waste Systems* had been wrongly decided. Rule 20(6) of the Civil Rules permits a judge to order costs against a party whose conduct causes another party to incur expenses. If the legislature intended to foreclose an award of costs following the filing of a Notice of Withdrawal, it would have indicated so in the wording of Rule 8(4) (which governs Notices of Withdrawal).

B. Lindener and Lefaive v. Bilick, 2007 BCPC 0135, Rodgers J.

The claimant applied for an order pursuant to Rule 20(2)(c) of the Small Claims Rules that the defendant pay the wages of a lay witness who testified on behalf of the claimant at trial. The witness had foregone a week of wages at a remote oil industry worksite in order to be available to testify. He claimed his lost wages amounted to $3,200.

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33 [2002] B.C.J. 2999.

34 2003 BCPC 156.

35 2003 BCPC 431.

The Court relied on *Northland Properties v. Equitable Trust* (1992), 71B.C.L.R. (2d) 124 (S.C.), which held that lay witnesses are entitled only to the daily witness fee of $20 set out in the Supreme Court Rules. He declined to follow *Ward and Pacific Fast Ferries Ltd. v. The BC Ferry Corporation and Martin*, Cowan J., April 15, 1998, SCBC. Victoria Registry 94/4852 in which wages paid to a lay witness brought from Norway were allowed. He concluded that *Ward* was wrongly decided and was contrary to the purpose of the *Small Claims Act* to resolve claims in a just, speedy, inexpensive and simple manner.

Rodgers J. also ruled that it is only in the clearest of cases that a penalty should be imposed under Rule 20(5) or a further order made with respect to expenses pursuant to Rule 20(6) and this was not one of those cases.

XXII. Sexual Assault

A. R.C. v. McDougall [F.H. v. McDougall], 2007 BCCA 212

This case addresses the burden and standard of proof in a historical sexual abuse claim.

The trial judge had found a teacher sexually assaulted the plaintiff, his student, on four occasions 30 years earlier (between 1968 and 1969). The student first made the allegations in 2000, when he was having marital problems. The plaintiff had a troubled history, suffered from alcoholism, and had given different descriptions of the four assaults at different times. He also testified that he had been strapped by the same teacher and other former students had testified that Mr. McDougall had frequently resorted to the strap as a form of punishment.

The appeal was allowed in respect of the finding that McDougall had sexually assaulted the plaintiff, while the finding that the plaintiff had been strapped was sustained. The trial judge had provided adequate reasons for finding that the plaintiff had been strapped and for accepting the plaintiff's evidence over that of McDougall in that regard. There was insufficient evidence to conclude that there had been sexual assaults in the absence of a connection between any non-consensual sexual activity at the school and Mr. McDougall. Mr. McDougall having strapped the plaintiff did not lead to an inference that he had sexually assaulted the plaintiff. The layout of the school supported Mr. McDougall's argument that he had not had the opportunity to have committed the assaults. In light of the serious inconsistencies in the plaintiff's evidence regarding the assaults the trial judge had erred in finding the sexual assaults had taken place.

XXIII. Legislation

A. Insurance (Vehicle) Act, R.S.B.C. 1996, Chapter 231 and Insurance (Vehicle) Regulation, B.C. Regulation 447/83

The Act and Regulation came into force on June 1, 2007.

The purpose of the new legislation is to create a single legislative framework for all automobile insurers operating in BC.

The new legislation will continue to govern basic insurance (third party liability of $200,000, Part 7, Underinsured Motorist Protection of $1 Million, uninsured and unidentified motorist coverage) within the exclusive purview of ICBC. It will also govern all optional automobile insurance policies provided by all insurers operating within BC, including ICBC.

Transition provisions will govern the application of the old or new legislation based on the inception or renewal date of the policy in question:

81(1) The *Insurance (Motor Vehicle) Act* and the regulations under that Act as they read before the coming into force of this Act apply to

(a) insurance under that Act that took effect before the coming into force of this Act,

(b) claims under that insurance, and

(c) insureds and the corporation in relation to that insurance.

(2) The *Insurance Act* and the regulations under that Act as they read before the coming into force of this Act apply to

(a) insurance under Part 6 of that Act that took effect before the coming into force of this Act,

(b) claims under that insurance, and

(c) insureds and insurers in relation to that insurance.

(3) For the purposes of subsections (1) and (2), insurance that took effect before the coming into force of this section includes any of the following that occur during the term of the certificate or policy evidencing the insurance:

(a) an amendment or addition made to a certificate or policy that was issued before the coming into force of this section;

(b) a special coverage certificate, as set out in the regulations, issued in respect of a vehicle for which a certificate or policy was issued before the coming into force of this section.

The *Insurance (Vehicle) Act* imports provisions from both the *Insurance (Motor Vehicle) Act* (which governs ICBC) and the *Insurance Act* (which governs all other insurers):

The provisions applicable solely to ICBC are contained in Part 1 (ss. 1 to 46.2). The provisions applicable to all insurers are contained in Parts 4, 5 and 6.

The new Act does not significantly alter the law as it relates to ICBC. The following provisions, however, now apply as well to private insurers offering optional automobile insurance:

- forfeiture of claims (formerly s. 19(1), now s. 75);
- limitation on recovery for acts of violence or in relation to stolen vehicles (formerly ss. 19.1 and 19.2);
- the absolute liability provision; private insurers can no longer treat a breached third party liability extension policy as void (formerly s. 21; now ss. 76, 77 & 78);
- the s. 25 deduction (now s. 83);
- the provisions relating to the Notice to Mediate regulation, net income and structured judgements.

Significant changes to the Insurance (Vehicle) Regulation include:

- Part 9 of the former regulation dealing with ICBC optional insurance has been repealed. ICBC's optional insurance provisions will now be included in a separate policy called the "ICBC Autoplan Optional Policy" and provided to purchasers of ICBC optional coverage. This aligns the optional side of ICBC's business with the long-standing practice of private insurers of issuing separate contracts or policies.
- The limitation period for Part 7 accident claims can be extended by two years by providing notice to ICBC within two years of the date of loss of an intention to commence an action in respect of benefits. (s. 103(1)(b)(iii), (2) & (3)).
- Section 106(1)(a)(i) & (ii): WCB benefits are no longer deductible from payments made under ss. 20 and 24 (uninsured and unidentified motorist provisions) if the insured

elects not to claim compensation under the *Workers Compensation Act* or the Board pursues its right of subrogation under s. 10(6) of that Act.

The following are highlights of changes to the UMP provisions in the Regulation:

- 148.1(1)(f) The definition of "deductible amount" has been changed to preclude the deduction of WCB payments where the insured has elected not to receive compensation from the Board, or the Board pursues its subrogation rights against the insured (see similar provision in s. 106 of the Regulation).
- Another deductible amount has been included to the list:
  (j) paid or able to be paid by any other person who is legally liable for the insured's damages

  (This would apply, for example, where there are persons or entities such as commercial hosts, pubs, bars, etc. that are liable for damages suffered by the insured.)
- 148.1(11) This is a new subsection which permits ICBC to apply to the court to be added as a party to an action in BC brought by an insured against a potential underinsured motorist.
- 148.1(12) A judgment by a BC court is binding on ICBC and on an arbitrator in arbitration proceedings under s. 148.2.
- 148.2 (1.1) A dispute about whether a person is an UMP insured may be submitted to arbitration under the *Commercial Arbitration Act* regardless of whether there has been a determination that the injury or death was caused by an underinsured motorist.

  This new subsection eliminates the need for an insured to proceed to trial to prove that an underinsured motorist exists prior to a determination of entitlement to UMP coverage (i.e., where the insured may or may not be a willing occupant of a stolen or uninsured vehicle).
- 148.2(2.1) The reasons of an arbitrator (redacted for privacy) must be published by forwarding them to the head librarian at the library of the Supreme Court and Court of Appeal, in Vancouver. (This has been changed. Copies of decisions will be available shortly on icbc.com.)
- 148.2(4.1) This new subsection refers to the exclusion contained in s. 148.2(4)(b) where ICBC is not liable to an insured who, without the written consent of ICBC and to its prejudice, settles or prosecutes an action to judgement. Under s. 148.2(4.1), such consent by ICBC is deemed to have been given if there is no response to the written notice within 90 days of its delivery by registered mail to the appropriate claim office.

B. Bill 35—Miscellaneous Statutes Amendment Act (No. 2), 2007 (passed Third Reading on May 16, 2007)

Bill 35, introduced in April 2007, amends both the *Insurance (Vehicle) Act* and the *Motor Vehicle Act* to:

- confirm that vehicle leasing and rental companies ("lessors") are vicariously liable for the negligence of lessees, or of persons operating the vehicle with the lessee's consent (s. 86, *Motor Vehicle Act*);
- limit the amount payable by vicariously liable lessors for any one incident to a maximum of $1 Million (s. 82.1, *Insurance (Vehicle) Act*);
- confirm that lessees are not vicariously liable "owners" but a new category of vicariously liable "lessees" for the negligence of persons operating the vehicle with their consent;

- modifies the existing exception in s. 86(3) of the *Motor Vehicle Act* to clarify that a purchaser of a motor vehicle under a conditional sales contract is the owner for the purposes of vicarious liability, and that the seller under such a contract is not the owner for that purpose.

The cap on the liability of lessors applies to "loss or damage sustained on or after the date this section comes into force" (s. 81.2(4), *Insurance (Vehicle) Act*).

C. Bill 29—Adult Guardianship and Planning Statutes Amendment Act, 2007

This Bill has passed first reading. Bill 29 makes a number of changes to adult guardianship laws, including:

- the *Patient's Property Act* will be repealed;
- a new section of the *Adult Guardianship Act* will come into effect (with the new concepts of a "property guardian" and "personal guardian");
- changes to the *Power of Attorney Act* and *Representation Agreement Act*;
- minor change to the *Insurance (Vehicle) Act*;
- consequential changes to various statutes.

The Attorney General's press release of April 19, 2007 said the following about Bill 29:

> Adult guardianship laws will be modernized and British Columbians will have better tools available to make their own incapacity plans for health and personal care and financial and legal affairs, said Attorney General Wally Oppal today as he introduced Bill 29 to the legislature.
>
> This bill empowers people to make their own decisions about who will look after their welfare in the event that they become incapable of making decisions on their own, said Oppal. With a growing population of elderly citizens, we want to ensure that British Columbians have the legal tools to make effective plans for incapacity. Further, a modernized guardianship system must be in place for a person who has decided not to make a plan or whose plan fails.

Bill 29 will repeal the *Patient's Property Act* altogether. However, a new Part 2 will be added to the *Adult Guardianship Act* which will carry on the general concept of a committee, but using some new terminology and principles. Generally speaking, the new Part 2 of the *AGA* will be an expanded and modified version of the *Patient's Property Act*.

For example:

- a committee was appointed under the *PPA*. A "guardian" will be appointed under the *AGA*. A guardian can be a "personal guardian" (responsible for personal care or health care), a "property guardian" (responsible for financial affairs) or both a personal guardian or property guardian.
- the *PPA* referred to a committee being appointed on behalf of a "patient." Under the *AGA*, a guardian will be appointed on behalf of an "adult."
- the *AGA* will have a blanket definition of "financial affairs," which is defined as "including an adult's business and property, and the conduct of the adult's legal affairs."

Upon the repeal of the *PPA*, each existing committee in BC will be automatically deemed to become a "guardian" instead of a committee, with the full powers and authority set out in the original court order appointing them as committee.

Bill 29 makes changes to the *Power of Attorney Act* and the *Representation Agreement Act* as well. The *Power of Attorney Act* will have two new Parts 2 and 3 which set out in detail the requirements for an "enduring power of attorney." In particular:

- what an adult may do by enduring power of attorney;
- requirements respecting the making of an enduring power of attorney;
- who may act as an attorney and an attorney's powers and duties;
- provisions respecting the operation of an enduring power of attorney, including when the authority of an attorney is suspended or ends;
- provisions respecting investigations by the Public Guardian and Trustee and orders of the court in relation to enduring powers of attorney;
- rules respecting the transition of enduring powers of attorney made under section 8 before the repeal of that section.

The *Representation Agreement Act* will include various changes dealing primarily with personal care decisions.