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PERSONAL INJURY DAMAGES
PAPER 1.1

Non-Pecuniary Damages

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NON-PECUNIARY DAMAGES

I. The Law

A. The Nature of Non Pecuniary Damages

While most commonly interchanged with the nomenclature "pain and suffering," non pecuniary damages by their history are damages awarded to a plaintiff to address non economic losses accounting for not only pain and suffering but also loss of amenities, loss of enjoyment of life and, in serious cases, loss of expectation of life. Before the Supreme Court of Canada issued is reasons in

Andrews v. Grand & Toy Alberta Ltd.[1], *Arnold v. Teno*[2], *and Thornton v. Board of School Trustees of School District No. 57 (Prince George)*[3] (the "Trilogy"), some courts awarded separate amounts for each of these categories for non economic losses. In *Andrews*, the court recognized held that each of these non-economic related heads of damage were analytically distinct but that they "overlap and merge at the edges and in practice such that one figure is set for all non-pecuniary loss."[4]

The assessment of non-pecuniary damages is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no objective yardstick for translating pain, suffering, loss of amenities or loss of enjoyment of life into money. Pain and suffering and loss of amenities are intangibles with no monetary value. As explained in further detail below, non-pecuniary damages are assessed according to a functional approach.

> The award under non-economic related heads of damage should be a Canadian conventional award, adjusted to meet the specific circumstances of the individual case.[5]

The courts repeatedly assure that compensation must be fair to all parties. In awarding non-pecuniary damages, fairness is measured against awards made in comparable cases, adjusted for the individual circumstances particular to the plaintiff. Although the Supreme Court of Canada cautioned that a tariff system could not be developed for non-pecuniary awards under such an approach, the result has, indeed, been characterized as a "rough tariff system."[6]

B. The Trilogy

The current approach to the assessment of non-pecuniary damages traces its roots to the Trilogy decided in 1978. In the Trilogy, the Supreme Court of Canada embarked on an exercise to "fashion a body of rational and cohesive principles to guide trial courts in the assessment of damages in personal injury cases."[7] Until that time, the question of "million dollar" awards had not arisen in the country's highest court, yet judges were conscious of the trend in the United States of ever-increasing awards, including excessively high non pecuniary damages.

In the Trilogy, the court determined that the time had come to stabilize awards for non-pecuniary damages which were also ever increasing in Canada. In setting an upper limit of $100,000 for very serious injuries, the court sought uniformity and predictability on a national level so that there would be no variation based upon the province in which the plaintiff resides. Looking to the United States, the court expressed concern over the "soaring" and "exorbitant" amounts of such awards[8] and remarked that without a limit, these excessive awards failed to accord with the requirement of reasonableness—a proper gauge for all damages.

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1 [1978] 2 S.C.R. 299

2 [1978] 2 S.C.R. 287

3 [1978] 2 S.C.R. 267

4 *Thornton* at 264

5 *Thornton* per Dickson J.

6 *Dilello v. Montgomery*, 2005 BCCA 56, citing Stephenson, Personal Injury Damages in Canada, 2nd ed. (Toronto: Carswell, 1996) at 114.

7 *Lindal v. Lindal*, per Dickson J [1981] 2 S.C.R. 629

8 (*Arnold, supra* at 332)

The facts in the Trilogy involved serious and catastrophic injuries. Mr. Andrews was 21 when he was rendered a quadriplegic in a car accident. At trial, he was awarded $150,000 in non-pecuniary damages as part of a $1,022,477.48 total judgment. In *Thornton*, an athletic high school student was rendered a quadriplegic after a badly executed somersault in gym class. His trial award was just over $1.5 million, $200,000 of which was for non pecuniary damages. Ms. Teno was 4 1/2 years old when she was hit by a car while crossing the street with her brother to buy ice cream. She suffered a brain injury and physical injuries and was awarded $200,000 in non pecuniary damages as part of a $950,000 judgment.

To put the category of non pecuniary damages in context, Dickson J. in *Andrews* explained the paramount concern of the court ought to be to ensure that the plaintiff receives sufficient care for his injuries and compensation for pecuniary losses flowing from the injuries, including income loss. Once those damages are assessed, the non economic damages are awarded over and above such compensation. In that way, policy considerations limiting such non economic damages to fair and reasonable sums are appropriate. Since there is no objective yardstick to translate pain and suffering and loss of amenities into monetary terms, moderation is justified:

> Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.
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> However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.
>
> It is also the area where there is the clearest justification for moderation. [9]

Similarly, in *Arnold,* Spence J. remarked upon the social impact of very large non-compensatory awards for non-pecuniary damages:

> The very real and serious social burden of these exorbitant awards has been illustrated graphically in the United States in cases concerning medical malpractice. We have a right to fear a situation where none but the very wealthy could own or drive automobiles because none but the very wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards.[10]

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9 *Andrews, supra* at 260-261

10 *Arnold, supra* at 333

Interestingly, in *Dilello v. Montgomery*[11], Finch C.J.B.C. stated that there was no logical foundation for the choice in 1978 of $100,000 as the upper limit, citing Dickson J.'s acknowledgement that the assessment of damages was not logical. The award was below the amounts awarded to all of the plaintiffs in the Trilogy. Finch C.J. commented that it was not apparent to him why $100,000 would better provide for "reasonable solace" than any of the trial awards in the Trilogy.

1. Damages to Provide Solace

The assessment of non pecuniary damages is based upon a functional approach. In establishing the applicable principles of such an approach, Dickson J. distinguished both the tariff or "bot" approach which prevailed in the days of King Alfred when thumb was worth thirty shillings, and the subjective "personal approach" to each particular victim. Instead, the functional approach accepts the personal premise of the subjective approach but rather than attempting to set a value on lost happiness, it attempts to:

> assess the compensation required to provide the injured person "with reasonable solace for his misfortune." "Solace" in this sense is taken to mean physical arrangements which can make his life for endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way.

Dickson J. further refined this discussion three years later in *Lindal* where he stated that pain and suffering and loss of amenities are intangibles. They are not possessions that have an objective, ascertainable value,[12] and, therefore damages do not compensate for the loss of something with monetary value. The purpose of making the award is to substitute other amenities for those that have been lost.[13]

Dickson J. went on to state that since damages for non-pecuniary loss are viewed from a functional perspective, it is "reasonable that large amounts should not be awarded" once a person is properly provided for in terms of future care for his injuries and disabilities. He reasoned that the coordinated approach to provide additional money above and beyond those relating directly to the injuries (for assistance, equipment and the like) is a more rational justification for non-pecuniary loss compensation and such non economic awards should be modest.

The court in *Lindal* quoted the following from Professor Beverly McLachlin (as she then was) from her article "What Price Disability? A Perspective on the Law of Damages for Personal Injury" (1981), 59 Can.Bar Rev. 1:

> The essential point is that the plaintiff must demonstrate a reasonable or fair function which the money claimed will serve. As these examples illustrate, *what is a reasonable or fair function many involve reference to the restitutionary concept of what the plaintiff would have enjoyed or have been able to provide for his dependants had he not been injured.* This reflects the fact that the functional approach to damages is not in conflict with the ideal of *restitutio in integrum*, but

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11 2005 BCCA 56

12 *Lindal, supra* at 636

13 *Lindal, supra* at 637

> rather provides a basis for calculating the closest practical equivalent to the goal of restoring the plaintiff to his original position. Viewed thus, the functional approach shows promise of providing the comprehensive and just rationale for the calculation of damages for personal injuries which has heretofore been wanting. at pp. 11-12
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> ...
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> The attractions of a functional approach to the assessment of non-pecuniary damages are considerable. It provides a much needed rationale for such damages. It solves the problem inherent in the traditional compensation model of what the compensation is for. And it is in conformity with the conclusion of Lord Person's Commission:
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> > We think the approach should be to [award] non-pecuniary damages only where they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace on that he has lost.

Given this rationale, the courts have reasoned that in one sense, damages for non pecuniary loss are not really compensatory because they do not compensate for the loss of something with a monetary value. Instead, they provide a source of funds to substitute other amenities for those that have been lost. Dickson J. stated that this means that non pecuniary damages should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. An appreciation of the individual's loss is the key.

The court in *Lindal* criticized the approach of the trial judge in formulating the award, holding that he seemed to have assumed that the upper limit of $100,000 was a measure of the "lost assets" of the plaintiffs. The issue was seen as one of quantifying and comparing the losses sustained. Once this premise is accepted, the question then became whether the plaintiff had lost more "assets" than did the plaintiffs in the earlier cases. This approach is in error because the upper limit does not valuate an asset. Injuries do not have a money value and, therefore, an objective valuation is impossible. The award is to provide more general physical arrangements above and beyond those directly relating to the injuries in order to make life more endurable. The court did not foreclose the possibility of ever exceeding the guideline of $100,000 but said that if the purpose of the guideline is properly understood, it will be seen that the circumstances in which it should be exceeded will be rare. The limit was selected because, without it, there would be no limit to the various uses to which a plaintiff could put a fund of money. The defendant, and ultimately, society at large, would be in the position of satisfying extravagant claims by severely injured plaintiffs.

The ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable.[14]

2. Upper Limit is Adjusted for Inflation

The court in *Lindal* considered whether an adjustment for inflation would justify the trial award of non pecuniary damages that exceeded the upper limit. In that case, since it was only three years since the Trilogy had been decided, inflationary factors did not apply. However, the court concluded that since non pecuniary damages are meant to provide funding for alternative sources of

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14 *Andrews, supra* at 243

satisfaction, the purchasing power of such an award is relevant. In that regard, the court determined that the cap should be varied in response to economic conditions and account may be taken of inflation. As at November, 2015, the adjusted upper limit was $362,108 and the projected value for May, 2016 is $367,237.[15]

3. The Upper Limit Applies to Jury Awards

As a general rule, juries are not instructed on the upper limited established in the trilogy except in cases involving total or near total paralysis, loss of all cognitive function or other devastating physical injury, i.e. "catastrophic" cases: *ter Neuzen v. Korn*[16]. In *Black v. Lemon* (1983), 48 B.C.L.R. 145 (B.C.C.A.), 1983 CanLII 545 (BCCA), Marcfarlane J.A. held:

> A judge does not instruct a jury on questions which are academic in the circumstances. Judges endeavour to assist juries by giving them clear, relevant instructions. A judge will direct a jury on the policy with respect to a limit on non-pecuniary loss when there is a sense of reality to such a direction. A judge conducting a jury trial will know when an award for non-pecuniary loss may reasonably approach or exceed the limit and will warn the jury accordingly. (at para. 55)

The upper limit on non pecuniary damages as a rule of law is a legal limit on what may be awarded. Therefore, a jury award which exceeds the limit must be reduced to conform with the cap and adjusted for inflation. In *ter Neuzen v. Korn*, Sopinka J. stated:

> Whether the jury is or is not advised of the upper limit, if the award exceeds the limit, the trial judge should reduce the award to conform with the "cap" set out in the trilogy and adjusted for inflation. While a trial judge does not sit in appeal of a jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgment for an amount that as a matter of law is excessive. (at para. 127)

Again, of interest, are the comments of Finch C.J.B.C. in *Dilello* in which he noted that by operation of section 6 of the *Negligence Act*, the amount of damages or loss are questions of fact and the rationale of the court in *ter Neuzen* from transforming a question of fact into a question subject to a "legal limit" is not explained.

The contribution that juries bring to an assessment of non pecuniary damages is the subject of several instructive cases and is beyond the scope of this paper.

4. The Upper Limit Survives Appellate Challenge

In *Lee v. Dawson*, 2006 BCCA 159 the plaintiff was awarded $2,000,000 in non pecuniary damages by the jury hearing the case. The plaintiff suffered a traumatic brain injury, dramatic personality changes, permanent psychological injury, permanent scarring and permanent physical injuries which left him with constant and disabling pain. The trial judge reduced the award to the upper limit adjusted for inflation which amounted to $294,600 at the time. On appeal, the plaintiff sought to reinstate the original jury award, arguing on a Charter values analysis, that the rough upper limit contravened the Charter values embodied in section 15 of the Charter to be free from discrimination (a Charter rights analysis not being engaged because the matter did not involve a

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15 many thanks to Mark Szekely of Columbia Pacific Consulting for providing these figures.

16 [1995] 3 S.C.R. 674 at para. 125

government actor. Instead, Charter values were invoked to attempt to modify the common law). The plaintiff argued that the upper limit had the effect of discriminating between classes of persons injured in tort actions founded in negligence because only those suffering catastrophic injuries are subject to a limitation on damages. The plaintiff also argued that the policy underpinning the rough upper limit is no longer appropriate in light of present day policy and a greater understanding concerning the effect of various disabilities.

In the result, the Court of Appeal confirmed that it remained bound by the Trilogy, citing *ter Neuzen,* and the finding that the rough upper limit is to be applied as a rule of law. In addition, the court held that the argument that the upper limit unduly discriminates against the most severely injured because they are not fully compensated when compared to victim of less serious injuries, misconstrues the nature of non pecuniary damages. The court returned to the analysis of the Supreme Court of Canada that such damages do not truly compensate for what is lost. Rather, damages provide solace and a substitute for lost amenities. The nature of such damages does not depend on the seriousness of the injury alone.

5. The Upper Limit Does Not Apply to Defamation or Sexual Assault

In *Hill v. Church of Scientology of Toronto,*[17] the Supreme Court of Canada rejected the notion of a cap on damages for defamation. Cory J. held that the injury suffered by a person as a result of false statements is entirely different from non pecuniary damages suffered in a personal injury case. In a personal injury matter, the plaintiff is compensated for every aspect of the injury (past income loss, estimated future loss of income, past medical care, estimated costs of future care, and non pecuniary damages). In addition, at the time of the Trilogy, assessment of non pecuniary damages had become "a very real problem for the courts and for society as a whole." The damage awards varied widely between the provinces and between individual judges. Such disparities were affecting insurance rates and businesses of all kinds. None of those considerations were found to apply to an action in defamation, an intentional tort, where, in practice, the whole basis for recovery for loss of reputation lies in the award for general damages.

The same result was reached in respect of damages for sexual assault. *S.Y. v. F.G.C.*[18] involved an action by the plaintiff against her step father for physical, verbal and sexual abuse perpetrated against her during her teenage years. The jury awarded her $350,000 in non pecuniary damages. After citing *Hill,* the Court of Appeal concluded that the policy reasons which gave rise to the cap on non pecuniary damages in the Trilogy did not have any application to actions involving sexual assault which are intentional torts involving criminal behaviour. There was no evidence of an impact to the public purse or any crisis arising from the size of awards in such cases. There was no identified need to protect the general public from a serious social burden such as exorbitant insurance premiums.

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17 (1995), 126 D.L.R. (4th) 129

18 (1996), 78 B.C.A.C. 209 BCCA at para. 30

C. Stapely v. Hejslet

A non exhaustive list of common factors that influence an award of non pecuniary damages is found in the oft-cited case of *Stapley v. Hejslet*[19]:

(a) age of the plaintiff;

(b) nature of the injury;

(c) severity and duration of pain;

(d) disability;

(e) emotional suffering;

(f) loss or impairment of life[20]

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton,* 2005 BCCA 54.

Of interest are the reasons for judgment in *Dilello,* involving the appeal of a jury verdict in which the defendant argued that the jury's award for non pecuniary damages was inordinately high. In reviewing the court's jurisdiction to overturn a jury award, Finch C.J.B.C. exposed the paradox of a non tariff approach to the assessment of damages with the "philosophical/policy exercise" described by Dickson J. in *Andrews*, and the requirement to make subsequent awards conform to the rough upper limit. As noted in the Trilogy, fairness of the award is meant to be achieved by conformity with similar cases. However, Dickson J. also emphasized in *Lindal,* that awards must be varied to according to the individual's need for solace and, accordingly, a "tariff" approach cannot be developed for such awards.

Following the guidance in Stapley, the task of counsel is to select for the court, those cases which most closely resemble the issues at bar to set a range of damages. The range serves as a rough guide for the court's assessment.[21] Counsel must then draw upon the evidence to demonstrate the unique effect of the injuries on the individual plaintiff. Variation in awards should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss. Damages awards are not to be scaled down according to the upper limit solely on the basis that the injuries are not "catastrophic" brain or physical injuries.[22] The cap's purpose is not to scale one plaintiff's non pecuniary award against another who suffer

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19 2006 BCCA 34 at para. 46

20 citing *Boyd, supra* at para.

21 *Trites v. Penner*, 2012 BCSC 882 at 188-189

22 *Linda, supra; Penso v. Solowani* (1982), 35 B.C.L.R. 250 (C.A.); *Black v. Lemon* (1983), 48 B.C.L.R. 145 (C.A.); *Bracchi v. Horsland* (1983), 44 B.C.L.R. 100 (C.A.); *Leischner v. West Kootenay Power & Light Co. Ltd. (1986), 24 D.L.R. (4th) 641; Boyd v. Harris* 2004 BCCA 146.

from catastrophic injuries.[23] As noted in *Lindal* the award does not depend upon the seriousness of the injury alone; an appreciation of the individual's loss is key.

The assessment of non pecuniary damages is influenced by the individual's experiences in dealing with the injuries and their consequences, and the plaintiff's ability to articulate that experience. The court has also emphasized that care should be taken where there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.[24]

1. Subjective Complaints and Minimal Physical Damage

Both the nature of the injuries and the accident itself have been considered in assessment of non pecuniary damages. In cases where the plaintiff's primary complaint is in the nature of soft tissue injury ("musculo-ligamentous injury," "whiplash") plaintiff counsel should anticipate that the defendant will argue that the plaintiff is entitled to minimal, if any, non-pecuniary damages for continuing complaints of pain on the basis that the complaints are subjective and there is no evidence of objective injury. In support of this argument are the decisions in Price v. Kostryba, 1982 CanLII 26 (BS SC), wherein Chief Justice McEachern relies upon his own decision in Butler v. Butler v. Blaylock Estate. In Butler, the court cautioned:

> I am not stating any new principles when I say that the Court should be exceedingly careful when there is little or no objective evidence of continuing injury, and when complaints of pain persist for long periods extending beyond the normal or usual recovery period.[25]

Most often, the Supreme Court decision in *Butler* is cited for the proposition that the trier of fact must exercise care when relying on subjective reports of injury, and cite the line of cases that follow *Price*. While this proposition remains true, it is important to note that the decision in *Butler* was overturned on appeal and damages were significantly increased, including the non pecuniary award. Having been an unreported decision for many years, the decision of the Court of Appeal is less often cited. Of particular note, the court in *Butler* on appeal[26] confirmed a different philosophy:

> There are three basic reasons which, in my view, support the conclusion that the plaintiff continued to suffer pain as of the date of trial. Firstly, the plaintiff testified that he continued to suffer pain. His wife corroborated this evidence. The learned trial judge accepted this evidence but held that there was no objective evidence of continuing injury. *It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the Plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident.* I would add that a plaintiff is entitled to be compensated for pain, even though the pain

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23 *Lindal, supra; Penso v. Solowan (1982),* 35 B.C.L.R. 250 (C.A.); *Black v. Lemon* (1983), 48 B.C.L.R. 145 (C.A.); *Bracci v. Horsland* (1983), 44 BCLR 100 (C.A.); *Leischner v. West Kootenay Power & Light Col. Ltd.* (1986), 24 DLR (4th) 641 (B.C.C.A.)

24 *Mirsaeidi v. Coleman*, 2014 BCSC 415; *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.)

25 *Butler v. Blaylock Estate*, [1981] B.C.J. No. 31 (S.C.), para 18

26 1983 CarswellBC 2066 (BCCA)

> results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms.[27] [emphasis added]

In some cases, the challenge to subjective complaints is coupled with the argument that the minimal forces of impact could not have caused or contributed to the plaintiff's— common known as the "low velocity impact defence." This argument has enjoyed some success in the past. However, the fact that a collision may have involved minimal forces does not rule out injury.[28] Calling expert engineering evidence on forces of impact does not defeat the collective evidence of a plaintiff, supporting medical evidence, and lay witness testimony.[29] Furthermore, independent or scientific evidence is not required to prove injury in low velocity impact claims.[30] While this type of argument is becoming less common, it has survived, and was recently addressed by Mr. Justice Ball in *Duda v. Sekhon*, 2015 BCSC 2393.[31] The court ultimately awarded damages to address the plaintiff's injuries arising out of two relatively minor collisions, and in doing so made the following comments:

> Counsel for the defendants spent considerable time and effort making the submission that the two accidents did not cause significant motor vehicle damage. However, it has been clearly established in Canadian law that minimal motor vehicle damage is not "the yardstick by which to measure the extent of the injuries suffered by the plaintiff". Mr. Justice Macaulay stated in Lubick v. Mei and another, 2008 BCSC 555 at para. 5:
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> > The Courts have long debunked as myth the suggestion that low impact can be directly correlated with lack of compensable injury. In Gordon v. Palmer, [1993] B.C.J. No. 474 (S.C.), Thackray J., as he then was, made the following comments that are still apposite today:
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> > > I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.
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> > He goes on to point out that the presence and extent of injuries are determined on the evidence, not with "extraneous philosophies that some would impose on the judicial process". In particular, he noted that there was no evidence to substantiate the defence theory in the case before him. Similarly, there is no evidence to substantiate the defence contention that Lubick could not have sustained any injury here because the vehicle impact was slight.[32]

To be clear, the standard of proof does not change for "subjective soft tissue injuries" arising out of minor collisions. In *Rabiee v. Rendleman,* 2015 BCSC 595, Madam Justice Sharma addressed the standard of proof in low velocity impact cases, providing a neat summary of the foundational cases:

> The defendants emphasize that Ms. Rabiee's injuries were very mild and that there is little "objective" evidence of her injuries. They rely on Price v. Kostryba (1982),

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27 *Butler v. Blaylock Estate,*1983 CarswellBC 2066 (BCCA), para 13;

28 *Dao v. Vance*, 2008 BCSC 1092; *Naidu v. Gill*, 2012 BCSC 1461

29 *Pitcher v. Brown*, 2015 BCSC 1415

30 *Pacheco v. Antunovich*, 2015 BCCA 100

31 *Duda v. Sekhon*, 2015 BCSC 2393

32 *Duda v. Sekhon*, 2015 BCSC 2393, para 62

> 70 B.C.L.R. 397 at 399 (S.C.) where McEachern C.J. quoted his own words in Butler v. Blaylock, [1981] B.C.J. No. 31 (B.C.S.C.) that "the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery" and that no one can expect citizens to be responsible for compensating a plaintiff "in the absence of convincing evidence."
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> I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in Butler v. Blaylock, [1983] B.C.J. No. 1490 (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages."
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> .... Thus, the fact that the evidence of her injuries is based largely on subjective reports does not detract from the application of the Stapley factors...[33]

2. Golden Years Doctrine

Although the issue is cited in some cases as a "doctrine," the proposition is that an injury to a person in or nearing retirement or in their "golden years" may be more difficult to endure and that this should be reflected in the non-pecuniary damages award. In practice, there is no hard and fast rule that this consideration invariably applies to all persons in their advanced age. The extent to which this may be a relevant factor will depend upon the evidence in the case.

The courts have recognized that a person's age may render an impairment more serious than it would be with a younger person. In those cases, since a person may not have as long a life expectancy, the time that remains is now negatively affected by pain and impairment. As stated in *Giles v. Canada (Attorney General*[34]*)*, quoting from the English Court of Appeal in *Fank v. Cox*: "...it is important to bear in mind that as one advances in life one's pleasures and activities particularly do become more limited, and any substantial impairment in the limited amount of activity and movement which a person can undertake, in my view, become all the more serious on that account." The court in *Giles*, concluded that life expectancy must be balanced with the impact of age on a loss of physical capacity.

In *Fata v. Heinonen,*[35] Madam Justice Griffen articulated the "golden years doctrine" in this way:

> The retirement years are special years for they are at a time in a person's life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age.

See also: *Dulay v. Lachance*[36] and *Harris v. Xu.*[37]

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33 Paras 64-66

34 No. 3212 (S.C.), rev'd on other grounds (1996), 21 B.C.L.R. (3d) 190 (C.A.)

35 2010 BCSC 385 at para. 88

36 2012 BCSC 258

Against the golden years doctrine, the courts have recognized the competing factor of a more limited life expectancy in elderly plaintiffs. Some awards have been reduced to account for a person's advanced years and "the necessarily limited duration of the plaintiff's future suffering."[38]

Further still, in the recent cases of *Duifhuis v. Bloom*[39] and *Mathroo v. Edge-Partington,*[40] the courts have determined that the limited life expectancy and golden years principle effectively cancel each other out, such that neither consideration have an impact on the award for non pecuniary damages.

3. Loss of Housekeeping Capacity

In *Eaton v. Regan*[41], Joyce J. concluded that it was open to him to award an amount for loss of housekeeping capacity as part of the plaintiff's non pecuniary damage award (although he declined to do so in that case due to a lack of evidence). This approach has been held to be appropriate where the evidence does not otherwise permit a quantification of the loss. See *Travelbea v. Henrie*[42] ($3,000 was awarded as part of the non pecuniary damages); *McConvey v. Hart*[43] (amount not stated); *Ahmadi v. West*[44] ($5,000 was awarded as non pecuniary damages); *Chong v. Lee*[45] (amount not stated); *Hsu v. Choquette*[46] (amount not stated).

Where there is sufficient evidence to value the loss, by reference to the replacement cost, damages are assessed as a separate loss of capacity claim for pecuniary damages: *Kroeker v. Jansen;*[47] *Westbroek v. Brizuela;*[48] *O'Connell v. Yung.*[49]

D. Mitigation

The duty to mitigate derives from the general proposition that a plaintiff cannot recover from the defendant damages which he or she could have avoided by taking reasonable steps.[50] A plaintiff has an obligation to take all reasonable measure to reduce his or her damages, including undergoing treatment to alleviate or cure injuries.[51]

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37 2013 BCSC 1257

38 *Olesik v. Mackin*, B860356, Vancouver Registry, 12 February 1987.

39 2013 BCSC 1180

40 2015 BCSC 122

41 2005 BCSC 3

42 2012 BCSC 1532

43 2013 BCSC 1058

44 2014 BCSC 2050

45 2014 BCSC 2258

46 2015 BCSC 1123

47 1995 CanLII 761 (BCCA)

48 2014 BCCA 48

49 2012 BCCA 57

50 *Janiak v. Ippolito* [1985] 1 SCR 146

51 *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111

Where a failure to mitigate is alleged, the onus is on the defendant to establish on the evidence that:

(1) the plaintiff unreasonably failed to follow a course of treatment recommended by the medical advisors; and

(2) the treatment would have resulted in a reduction of the damages had it been followed.[52]

A plaintiff's duty to mitigate his or her damages is set out in *Janiak v. Ippolito*[53] where the court was asked to determine whether a plaintiff's refusal to undergo back surgery for a disc protrusion caused by a rear end collision. The evidence at trial established that the surgical option had a 70% chance of success. The plaintiff was fearful of the surgery and refused the procedure in the absence of an absolute guarantee of success. As a result, his injury did not improve and he continued to be disabled from work.

The court confirmed that whether a plaintiff's refusal to undertake recommended treatment is a question of fact. The test of reasonableness is an objective one unless the evidence establishes that the plaintiff suffers from a constitutional incapacity to act reasonably. In the absence of such an incapacity, a plaintiff cannot make the defendant bear the burden of his unreasonable behaviour. The analytic focus in each case is on the capacity of the plaintiff to make a reasonable choice.[54]

Where there are conflicting medical opinions, a plaintiff is not generally found to have failed to mitigate as long as the plaintiff follows any one of the courses of treatment recommended by the medical advisors.[55] The trier of fact is also entitled to consider the degree of risk to the plaintiff from the proposed treatment, the gravity of the consequences of refusing it and the potential benefits to be derived from it.[56]

In *Gregory*, the Court of Appeal articulated the test as a subjective/objective one:

> That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages *would have been reduced*" by that treatment. The *Turner* case, on which the trial judge relies, uses slightly different language than this Court's judgment in *Chiu:* "there is some likelihood that he or she *would have received substantial benefit from it...*". [emphasis in the original]

In *C.(J.F.) v. Ladolcetta,*[57] Lowery JA explained the analysis in determining whether a plaintiff has failed to mitigate:

> ...if by virtue of the injury sustained in an accident, a plaintiff is unable to make a reasonable decision about treatment, the plaintiff is in no different position with respect to mitigating the loss suffered than would be the case if, for other reasons unrelated to the accident, the plaintiff's capacity to make reasonable decisions about treatment was lacking. But I cannot accept that means the law prescribed a subjective test, modified or otherwise. *Janiak* is clear; the test is objective. I

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52 *Janika, supra*; *Chiu v. Chiu* 2002 BCCA 618

53 [1985] 1 SCR 146

54 *Janiak, supra* at para. 26

55 *Janiak, supra* at para.29

56 *Janiak, supra* at para. 31

57 2012 BCCA 27 at para. 26

> consider that if a plaintiff had the capacity to make the decision about treatment it is said ought to have been made, and the advice was sound, the mitigation question in each instance must be what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment. If, through no fault of his own, the plaintiff did not have the capacity to make the decision, or the advice was not sound, the question would not arise.

A failure to mitigate may apply to one or more heads of damage but the effect of the failure must be assessed accordingly to the circumstances of each case. For example, in *Anderson v. Rizzardo,*[58] Balance J. reduced non pecuniary damages by 5% for the plaintiff's failure to follow recommendations made in the functional capacity assessment and by his consulting physiatrist. However, damages for past loss of earning capacity was reduced by 12% and future earning capacity reduced by 15% where on account of the plaintiff's failure to pursue alternate employment commensurate with his capacity. In *Kosoric v. Kosoric,*[59] the plaintiff's failure to mitigate by following the recommended regular exercise regimen affected the award for non pecuniary damages only.

The following is a sampling of recent cases on the issue of mitigation:

(1) *Abbot v. Gerges,* 2014 BCSC 1329, Warren J.

The plaintiff had a long-standing history of obesity and walked for exercise prior to the accident. Following the accident, she found that exercise aggravated her symptoms. She modified her diet and reduced her portion sizes in an effort to lose weight after the accident. She was not successful in her efforts. Warren J. concluded that given the plaintiff's history and the soft tissue injuries to her neck and back, the plaintiff did not act unreasonably in failing to lose weight and improve her fitness level. Further, the evidence fell short of establishing that the plaintiff's neck and back injuries would have improved materially had she lost weight.

(2) *Abdalle v. British Columbia* (Minister of Public Safety & Solicitor General), 2012 BCSC 128, Ross J.

The plaintiff in this case argued that his spiritual and religious believes prevented him from using medications recommended for his injuries. The medical evidence established that the recommended treatments, including physical rehabilitation, would likely have assisted the plaintiff in hastening recovery. Noting that the issue of religious or cultural practices had not yet been considered in Canada in assessing a failure to mitigate, Ross J. concluded that she did not need to decide the question because the evidence did not establish a factual foundation upon which she could conclude that those were the reasons for his failure to follow medical advice. The plaintiff testified that he had spiritual objections to alcohol and certain drugs. He did not specifically testify that he failed to take Nortriptyline because of spiritual or religious objections. Nor was there any evidence that his spiritual objections were formal tenets of his faith.

(3) *Benson v. Day*, 2014 BCSC 2224, Skolrood J.

The plaintiff suffered from chronic pain as well as psychological injuries as a result of a motor vehicle accident. The court agreed with the defendant's expert who characterized the plaintiff's treatment to the date of trial as "woefully inadequate." The plaintiff had

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58 2015 BCSC 2349

59 2009 BCSC 108

attended six chiropractic appointments over the course of 18 months. He gave evidence that he did not recall being advised to do physiotherapy, and that he was unaware of recommendations provided by experts his lawyer referred him to. This evidence was not accepted. Despite the diagnosis of anxiety, he attended only one counselling appointment because he was too tired to attend at the end of the day.

The trial judge found that the plaintiff took virtually no personal responsibility for treatment. At trial, several doctors testified as to the benefit of early treatment. The trial judge determined that a reduction of 15% was appropriate in the circumstances, and further to *Zawadzki v. Calimso*, 2011 BCSC 45 and *Penner v. Silk*, 2009 BCSC 1682, he considered the applicability of the reduction under each head of damage separately. The reduction was applied to the plaintiff's non-pecuniary damages, past wage loss, and loss of future earning capacity, but not to the awards for cost of future care or special damages.

(4) *Glesby v. MacMillan*, 2014 BCSC 334, Baird J.

In this case, the defence argued that the plaintiff had failed to mitigate her damages by not taking medical cannabis for pain management as recommended by one of her IME doctors. In rejecting the argument, the court accepted the plaintiff's evidence that she had reservations about the legality of the acquisition and use of it. She also testified that she was a committed life-long abstainer from narcotics and drugs of all sorts.

(5) *Maltese v. Pratap*, 2014 BCSC 18, Kelleher J.

This case addressed what the judge described as a "textbook example of a failure to mitigate."

The plaintiff sustained soft tissue injuries in a car accident which continued to bother him to the time of trial and were expected to continue into the future. There was consensus among his treating professionals that the plaintiff needed to undertake a program of physical rehabilitation and fitness with a kinesioloigst or personal trainer. Mr. Maltese chose to ignore the advice.

The court found that the first stage of the test in Gregory had been met in that the plaintiff, having all of the information at hand that he possessed at the time, ought reasonably to have undergone the recommended treatment. Mr. Maltese testified that he felt worse after physiotherapy and so had made a decision not to pursue an active rehabilitation. However, the medical evidence on the whole established that he would have experienced significant improvement in his symptoms had he followed his doctor's advice.

On such "a clear case", the court ordered a 30% reduction in his non-pecuniary damages, wage loss after his return to work and loss of future earning capacity

Further, because it was unlikely that he would avail himself of these services in the future there was no award for cost of future care.

(6) *Rasmussen v. Blower*, 2014 BCSC 1697, Funt J.

The plaintiff was off work for approximately three months following the accident. During that time, he was counselled to do physiotherapy and massage; however, he only attended one appointment of each. The plaintiff argued that he was not able to afford such treatments, that his initial visit had caused him pain, and that he was too busy to attend these treatments. The trial judge rejected these reasons noting that: while he was off work, he was available to attend treatment; perseverance is key to allowing medical treatments to work; and he had sufficient funds for treatment or could have applied for coverage through Part 7 benefits. Furthermore, the trial judge noted at paragraph 42: "he

also consumed alcohol in quantity which, pragmatically viewed, probably reduced or nullified the effectiveness of the prescribed medications." The trial judge applied a reduction of 20% to the plaintiff's award as a result of his failure to mitigate.

(7) *Rozendaal v. Landingin*, 2013 BCSC 24, Holmes J.

The plaintiff suffered from soft tissue injuries and related headaches as a result of two motor vehicle accidents. The court was asked to determine causation for the plaintiff's ongoing injuries which continued four and a half years after the accident. The court concluded that the plaintiff's ongoing injuries were caused by the accidents.

The defendant alleged that the plaintiff had failed to mitigate her damages by taking all therapies recommended by her doctors. The plaintiff attended some physiotherapy, and found some aspects of that treatment helpful. However, she did not continue with physiotherapy treatment because it took time away from her children, it was less helpful to her than her husband's massages and pain medication, and she continued to do the stretches she was taught by the physiotherapist. The court found that her reasons were sincere.

The plaintiff was also referred to active rehabilitation at a cost of $50 per session. The plaintiff gave evidence that the cost was more than she could manage. As an alternative, the plaintiff began working out with a close friend doing exercises that she believed would approximate active rehabilitation training.

The trial judge found that the plaintiff "likely could have improved to a greater extent and more quickly had she undertaken a focused course of strengthening and conditioning therapy or training designed for her particular injuries, such as Dr. O'Connor outlined in his second report." However, the trial judge found that the plaintiff did not act unreasonably in failing to undertake the recommended therapies and programs. "It is clear from the evidence that life was not easy for them. I have no difficulty accepting that other financial priorities displaced ongoing physiotherapy or active rehabilitation for Ms. Rozendaal, particularly since it seemed to her that massages from Mr. Landingin and exercises she did at home were just as helpful."

The court cited Gilbert v. Bottle, 2011 BCSC 1389, stating: "the law does not require perfection in the pursuit of rehabilitation. It requires instead that a plaintiff make efforts which are reasonable and sincere in the plaintiff's own personal circumstances." The court also relied on Tsalamandris v. MacDonald, 2011 BCSC 1138 and held that the plaintiff's efforts at rehabilitation were reasonable and sincere and as such, there was no failure to mitigate.

(8) *Sendher v. Wong*, 2014 BCSC 140 Verhoeven J.

The plaintiff was found to have failed to mitigate her damages by failing to engage in any of the many activities her physicians recommended to exercise and be as active as possible. The trial judge found that the plaintiff resigned herself to her pain situation and believed that she was not going to improve. She remained inactive and relied on passive treatment. He found that her fear that exercise may cause problems and her explanation that she spends her non-work days recovering her energy unreasonable and reduced her non pecuniary damages by 20%.

(9) *Stull v. Cunningham*, 2013 BCSC 1140, MacKenzie J.

The defendants unsuccessfully argued that the plaintiff failed to mitigate by failing to embark on an exercise program with a kinesiologist and utilize other pain management

strategies as recommended by an occupational therapist who assessed him for the purposes of the litigation. The defendant argued that the plaintiff was assessed by this OT for the express purpose of assessment of his rehabilitation needs yet he did not follow them.

The plaintiff testified that he participated in a strenuous rehabilitation program with the Canadian Back Institute that resulted in him participating in a graduated return to work program which allowed him to return to work in a limited capacity. He also continued with a home exercise and weight loss program. While the trial judge found that a more stringent rehabilitation regime would probably have assisted the plaintiff, he did not find that the plaintiff acted unreasonably in the course of action he followed.

(10) *Wahl v. Sidhu*, 2012 BCCA 111, per MacKenzie J.A. (Finch CJBC. and Smith JA. concurring)

The plaintiff claimed damages as a result of a motor vehicle accident in June 2006. The trial judge awarded damages for non-pecuniary damages, past wage loss, special damages and cost of future care. The trial judge cut off damages as at June 2009 having found that the plaintiff would have recovered by that date had he mitigated his damages by attending a pain clinic and undergoing a needle test on his shoulder. The trial judge dismissed the plaintiff's claim for loss of earning capacity and an in-trust claim arising out of care and services provided by the plaintiff's roommates following the accident.

On appeal, the plaintiff argued that the trial judge erred, inter alia, in finding that the appellant would have been completely recovered by June 2009.

The Court of Appeal held that the trial judge's reasons for judgment "contain irreconcilable findings on the issue of causation and demonstrate a confusion of the issues of causation and mitigation" (at para 8).

The test for mitigation is set out in *Chiu v. Chiu*, 2002 BCCA 618:

> In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

The Court of Appeal noted that Chiu was directly on point and determinative of the mitigation issue. The court stated at paragraph 45:

> Specifically, as in *Chiu*, the fact that the appellant was not cross-examined on his failure to follow recommended treatment impaired the judge's ability to assess the reasonableness of such conduct from the appellant's point of view. As the appellant submits, there were a number of possible explanations that would have made the appellant's failure to attend the pain clinic reasonable under the first step of the mitigation analysis as set out in *Chiu*.

The court went on at paragraph 47:

> Furthermore, with regard to the second step of the analysis in *Chiu* regarding the impact of the recommended treatment, there was no medical evidence that, by attending the pain clinic, the appellant would have made a full recovery by June 2009.

1. Practical Considerations

As the onus rests with the defendant to prove on a balance of probabilities that the plaintiff failed to mitigate his or her damages, the issue should be addressed by counsel early in the case to obtain admissible evidence on the issues. The defence must lead evidence to demonstrate that the plaintiff's refusal to follow recommended treatment was unreasonable and that the treatment would have resulted in an amelioration of the condition or substantial benefit to the plaintiff. In some cases, the defendants may have succeeded on the evidence on one branch of the test, but failed on the other. Consideration should be given to:

- Examination for discovery of the plaintiff: was the plaintiff was aware of the recommendations in the first instance. Plaintiffs may or may not have seen the expert reports containing the treatment recommendations or may not have otherwise been made aware of them. Reasons for the plaintiff's treatment decisions should be explored at this stage so that further investigations can be made before trial to test their reasonableness. For example, a plaintiff may assert that he or she does not have the funds to pay for treatment. There may be evidence of benefit plans or Part 7 coverage to counter this. The location of treatment centres may at first blush provide a reasonable excuse but alternate service providers can then be explored.
- Expert evidence: the defence expert should be asked to address whether the treatment recommended but not undertaken would have resulted in substantial benefit to the plaintiff. This evidence can also be fertile ground for cross-examination of the plaintiff's own experts.

While counsel for the plaintiff must understand the test for failure to mitigate, and put the defendant to the strict proof thereof, the practical approach to meeting the failure to mitigate argument is to prepare both plaintiff and experts and treatment providers testifying on their behalf:

- experts should be prepared to explain their recommendations, whether the plaintiff complied, and the actual impact, if any, of alleged non-compliance to the Plaintiff's recovery.
- the plaintiff should be aware of the allegation and what it means; and prepared for cross examination on the relevant points.
- the Plaintiff should be aware of the recommendations made by specialists involved in the case, and be prepared to answer to criticism if they have not followed the advice of a medical professional.

II. Proving Non Pecuniary Damages

A. Use of Clinical Records To Prove Non Pecuniary Damages

1. Statutory Framework— Evidence Act, RSBC

Clinical records are admissible for limited purposes and only in certain situations. As noted by the Court of Appeal in *Rados v. Pannu*, 2015 BCCA 459, "[c]linical notes cannot simply be shovelled

into evidence by the litigants."[60] Whenever we talk about documentary evidence at trial, we must first consider whether the evidence is admissible. The *Evidence Act*, RSBC, 1996, c. 24, s. 42 governs admissibility of "business records", under which category clinical records fall, and is a consideration for the trial judge whenever records are tendered in evidence:

> **Admissibility of business records**
>
> 42(1)In this section:
>
> "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
>
> "document" includes any device by means of which information is recorded or stored;
>
> "statement" includes any representation of fact, whether made in words or otherwise.
>
> (2)In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
>
> (a) the document was made or kept in the usual and ordinary course of business, and
>
> (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.
>
> (3)Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
>
> (4)Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.
>
> (5)For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

2. Application of Statute and Principles

Seaman v. Crook, 2003 BCSC 464 sets out the foundational principles that developed in the case law preceding this decision.[61] This was an application during a trial, wherein the Court agreed that:

> the current law permits the clinical records to be admitted as evidence as they meet the *Evidence Act*, R.S.B.C. 1996, c. 124, s. 42 requirements set out in the first four of the eight points enumerated by Mr. Justice Burnyeat in *McTavish v. MacGillivray*(18 July 1997), Vancouver Nos. B944248 and B951646 (B.C.S.C.). Quoting from my Reasons, I said this.
>
> > It must be kept in mind that the purpose of admitting the clinical notes as evidence is that these notes set out in detail the information the expert has relied on in forming the opinion set out in the Rule 40A report. And further that the clinical records

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60 *Rados v. Pannu*, 2015 BCCA 459, para 55

61 See also the following cases cited in the judgement: *Ares v. Venner*, 1970 CanLII 5 (SCC); *Olynk v. Yeo*, 1988 CanLII 3101 (BCCA); *Butler v. Latter*, 1994 BCJ no. 2358 BCSC, *McTavish v. McGillivray*, (18 July 1997), Vancouver Nos. B944248 and B951646 (B.C.S.C.) and also cited as Mctavish v. Boersma, 1997 CanLII 4372 (BC SC); *Coulter and Ball et al*, 2002 BCSC 1740

> will contain hearsay and opinion is a given. These records are not the expert opinion. The expert opinion is that which has been sent to opposing counsel with the qualifications of the expert, the facts and assumptions on which the opinions are based and the name of the persons primarily responsible for the content of that statement attached.[62]

The issue was that the defendants objected to the admissibility of the doctor's clinical records on the basis that "they contained the unsworn self-serving hearsay evidence of the plaintiff, plus opinions which have not been tendered pursuant to Rule 40A" (predecessor to Rule 11-6). The Court framed the question as follows: "Does the B.C. *Evidence Act* business records exception admit the doctor's opinions for the truth of the opinion without further proof thereof?" In answer to the question, the Court stated the applicable principles as follows:

> (1)That the observations by the doctor are facts and admissible as such without further proof thereof.
>
> (2 That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof.
>
> (3)That the statements made by the patient are admissible for the fact that they were made but not for their truth.
>
> (4)That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth.
>
> (5)That the diagnoses made by a person to whom the doctor had referred the patient are *admissible* for the fact that they were made but not for their truth.
>
> (6)That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not *admissible* for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the *clinical records* as this is a judge alone trial.[63]

Accordingly, the Court held that any opinions contained in the clinical records were "inadmissible for their truth." The opinions were admissible "only for the fact that they were made at the time." These principles have been adopted through subsequent jurisprudence. Later in that same year, Mr. Justice MacKenize addressed a similar application in *Cunningham v. Slubowski* et al, 2003 BCSC 1854. Without reference to the decision in *Seaman*, but referencing *McTavish v. McGillivray*, he outlined the application of section 42 of the *Evidence Act* to clinical records:

> (1)The notes taken must be made contemporaneously.
>
> (2)The notes must be made by someone having a personal knowledge of the matters being recorded.
>
> (3)The notes must be made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.
>
> (4)The matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.

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62 *Seaman v. Crook*, 20013 BCSC 464 at para 4.

63 *Seaman v. Crook*, para 14.

> (5)A statement in the records of the fact that a certain diagnosis was made will be admissible.
>
> (6)Recorded observations, diagnosis and opinions will be admissible providing they are recorded in accordance with points 1 through 4.
>
> (7) The fact that the referring doctor relied upon another doctor's opinion to assist in coming to his or her own diagnosis and opinion is only evidence of that fact so that the other opinion does not become evidence unless it is otherwise admissible. Accordingly, it is only evidence of the fact that the referring doctor wished or required that opinion to be received before forming his or her own opinion.
>
> (8)Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within s. 14 of the *Evidence Act* which allows for the *admissibility* of such statements if it can be shown that they are proof of a prior inconsistent statement.[64]

It should be noted that *Cunningham* arose in the context of a jury trial, and the trial judge added an extra caution about clinical records before a jury. As such, the records were limited to being used in cross examination of the plaintiff, allowing the doctor to refresh his memory while giving evidence, and in cross examination on the doctor's expert opinion. Given the risk that a jury would misuse the documents, it was unlikely that the records would actually be marked as exhibits to be provided to jury members.

3. What Can the Clinical Records Prove?

Clinical records are typically used to illustrate a plaintiff's pre-accident history, as well as course of treatment and recovery up to the date of trial. Typically, experts will have reviewed— and perhaps relied on to some extent—clinical records produced in an action. Given the fact that clinical notations are typically made contemporaneously they provide a useful snapshot in time and can illustrate important details when, as is certain to happen, an individual does not have a specific recollection. Furthermore, the notations can assist in presenting a bigger picture view of an individual's health over long spans of time.

Well before trial, and in the least, as you are preparing your Trial Brief, focus on what you want—and need— to prove, the witnesses you plan to call, and what documents you may wish to rely on. Before tendering clinical records, identify how the records will advance both yours and the opposing parties' case, and more specifically, identify those parts of the records your wish to rely on. More specifically, consider the following:

- Is the author available to testify?
- Was the document created by one or more authors? Who will be speaking to the document?
- Is the document legible?
- Does the document contain abbreviations?
- Does the document contain diagrams or drawings? Who made them?

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64 *McTavish v. McGillivray, para 11*

- Does the document contain records from other sources (plaintiff, specialists, lab testing)?
- Is it necessary to tender the whole document, or portions of the document?
- Does the document contact information that would be distracting from the central theme of the case?
- Should the documents be edited? And how?
- How will opposing counsel use the documents?
- Do you have complete records?
- Do the experts have complete records?
- Are their inconsistencies in the documents?

Despite our focus on admissibility and uses of clinical records themselves, not every case calls for reliance on the actual clinical records. What is most important is the *information* contained in the records, and not the records themselves. Consider what the document actually contains. It may be that you wish to use the records:

- To refresh the witnesses memory
- For purposes of cross examination

In such cases, you may choose not to actually tender the records, but to still rely on them in presenting your case. Having the author of the records testify, simply referencing records, can be quite effective. Furthermore, using clinical records to cross examine a doctor, or the plaintiff, without tendering the documents as evidence, can also be a compelling technique.

With reference to using clinical records to prove the plaintiff's condition, *Samuel v. Chrysler Credit Canada Ltd,* 2007 BCCA 431 demonstrates the danger in the practice of filing clinical records, especially large volumes, without a clear understanding of the purposes to be made of them. The principles in *Seaman* were followed and the Court upheld the trial judge's decision to restrict the plaintiff from not only referring to, but relying on for the truth, previous consistent out of court statements. The Court found that do permit otherwise, would be to offend the rules against oath-helping.[65] Additional applicable principles in respect of the use of clinical records and prior statements that are not contemporaneous statements of bodily sensations were endorsed by the Court of Appeal in *Samuel:*

> (1)It was open to the plaintiff to emphasize the point that she testified that she was truthful with her doctors and therapists when they asked about her condition, to counter the suggestion of improvement or recovery which emerged during cross-examination.
>
> (2)There may be circumstances in which it is appropriate for the plaintiff to refer to previous consistent statements in the records to put into context the defence assertion that the records contained admissions that the plaintiff had recovered.
>
> (3)Where a plaintiff's complaints to doctors and therapists were not confirmed by her at trial, the opinions of those treatment-providers may carry less weight than

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65 You will recall that in *Seaman* the specific issue was whether the opinions of doctors, as recorded in clinical records, were admissible for the truth. In *Samuel*, the specific issue was whether the plaintiff's prior statements to third parties, as recorded in clinical records, were admissible for their truth.

> the opinions of those treatment-providers whose opinions were supported by the plaintiff's testimony.[66]

A central issue in many personal injury claims is credibility of the plaintiff. Counsel most often rely on clinical records as proof of a fact, or to illustrate inconsistencies. However, counsel defending a claim may also wish to use clinical records as the basis of an argument built on the absence of reported symptoms. In *Edmondson v. Payer, 2012 BCCA 114,* much significance was placed on the infrequency of the plaintiff's medical visits.[67] Defence counsel used the clinical records to argue that there were gaps in reported symptoms, and that the gaps were evidence of recovery. Specifically, there was a 31 month period in the medical records in which there were no accident-related complaints recorded. Defence counsel attacked the plaintiff's credibility using this argument, along with arguing that reports of symptoms to medical assessors were not reliable, as they were made for purposes of litigation.

So much can depend on what is, or is not, in clinical records. The trial judge, Mr. Justice Smith, in reviewing the limits on uses of clinical records, reminds the reader that "it is easy to lose sight of those limitation in cases of this kind, where the time spend parsing a single note made by a doctor often far exceeds the length of the medical appointment that the note records."[68]

With specific reference to uses of clinical records in cross examination of a party, the Court provides some practical observations and advice of which counsel should take note (para 29 – 37):

(1) Clinical records containing descriptions of symptoms made by the plaintiff are evidence of the fact the plaintiff made the recorded statements on the dates on which they are recorded.

(2) Where the recorded statements are inconsistent with the plaintiff's evidence at trial, they may be used in cross-examination to impeach the plaintiff's credibility.

(3) Prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content.

(4) There are important qualifications that apply to such statements in clinical records, whichever purpose they are being used for. On this point, Mr. Justice Smith cites *Diack v. Bardsley*[69], at 247:

> ... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

(5) Clinical records are usually not, nor intended to be, a word for work account of everything that was said by the plaintiff at a medical appointment. We should also

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66 *Samuel v. Chrysler Credit Canada Ltd*, 2007 BCCA 431 paras 47-49.

67 The trial decision can be found at 2011 BCSC 118.

68 *Edmondson v. Payer* (SC) at para 23.

69 (1983), 1983 CanLII 541 (BC SC), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.)

keep in mind that there is no record of the questions that were asked to elicit the information in the records.

(6) When statements of a party are relied on for the truth of their content it is open to the party to take the stand to explain the statement or to deny it was made.

(7) If clinical records contain statements that assist a party or thwart their claim, whomever tenders the evidence takes that risk.

(8) The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

(9) Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470 (CanLII), at paragraph 104:

> ...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

(10) While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

(11) The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

The Court of Appeal accepted that the trial judge made no error, finding that the judge fully explained his reasons for accepting the Plaintiff's testimony despite the absence of clinical records supporting her claims of continuing symptoms. In terms of the approach taken by defence counsel in building the argument, the Court of Appeal's remarks are instructive:

> [38]Lastly, Ms. Edmondson was extensively cross-examined with reference to the clinical records and the gaps in the reported symptoms relating to the accident. She conceded that there were gaps. However, she was not directly confronted with what the appellant now says was the theory of the defendant's case – that the gaps demonstrated that she had recovered by 2006 and she was reporting symptoms only to Dr. Iriarte or Dr. Stewart to gain advantage in the litigation. Accordingly, she was never afforded an opportunity to dispute the defendant's theory.[70]

This highlights the point that not only must records be properly admissible, but counsel should be clear on what must be done to support any argument based thereon.

4. Document Agreement

It is wise to have a document agreement to guide the Court and counsel on the intended uses of clinical records. Refer to *Appendix A* to this paper for examples of document agreements. Your agreement may be as broad or as narrow as counsel prefer, but ensure the language of the agreement actually accomplishes your goals for each of the documents. Counsel may find themselves in a conundrum if the language of the document agreement allows for more or less uses of the documents than anticipated.

B. Using Expert Opinion Evidence to Prove Non-Pecuniary Damages

The trial judge may be capable of exercising common sense to draw inferences from the factual evidence presented; however in personal injury litigation the complexity of the facts and medical details, result in the need to involve a person with specialized knowledge to assist the Court in interpreting the factual evidence. Generally, expert medical opinion evidence is of critical importance in advancing a personal injury claim. In the majority of personal injury cases, expert opinion evidence will be necessary to prove the existence of an injury, and its relationship to the trauma caused by the defendant's negligence, as well as assist with the appropriate assessment of both non-pecuniary (and pecuniary) damages.

Before tendering any opinion expert, be guided by the following considerations:

(1) Know what you need to prove,

(2) Choose your expert carefully, and

(3) Instruct your expert wisely.

An expert's primary role is to assist the court—it is an educative role. Experts must draw upon their specialized education and experience, to facilitate the trial judge's ability to interpret and draw appropriate inferences from the evidence as a whole.

1. Selecting an Expert

Most cases will require more than a single medical/legal report from a treating practitioner. Counsel for both plaintiff and defendants should make some efforts to learn the medicine of injury and functional consequences. Furthermore, understanding that not all injury, dysfunction and disability arises from an objectively classified injury is an asset in advancing and defending a claim.

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70 *Edmondson v. Payer* (CA) at para 38.

In catastrophic injury cases, or cases involving orthopaedic injuries (*e.g.* fracture), a Court will have a much easier time accepting the proposition that a plaintiff continues to experience pain and dysfunction arising from the injury. It is at the other end of the spectrum of personal injury claims —claims involving chronic pain, neurogenic pain, headache sequelae and the like— where a Court, and the parties before it, wrestle with "why" (and sometimes "if") a Plaintiff continues to experience pain and dysfunction. In all cases, it is important to appropriately educate the trier of fact.

Understanding the nature of some common post-traumatic medical conditions will assist counsel in selecting the appropriate expert(s) for the case. Not all injuries immediately present themselves after the trauma of an accident, for instance:

- It may take weeks or months for depression to develop
- Injuries to structures such as intervertebral discs, ligaments, and facet joints may only come to light when the plaintiff's acute symptoms have begun to diminish, and the patient attempts to return to regular activities.
- Shoulder injuries, including rotator cuff tears, inflammatory processes, and impingement syndromes can sometimes become an issue several weeks, or even months, after the traumatic event.

Furthermore, counsel should understand the nature of the education and training and scope of practice of different medical experts, that are commonly called upon to be involved in a personal injury claim, whether on a treating or assessment basis: neurologist, neurosurgeon, physiatrist, psychiatrist, psychologist, occupational therapist, general practitioner, rheumatologist, anaesthesiologist, radiologist, vascular surgeon, orthopaedic surgeon, to name a few.

2. Statutory Framework—Supreme Court Civil Rules—Rule 11-6

Rule 11-6 governs the admissibility of expert opinion evidence at trial:

> Rule 11-6 — Expert Reports
>
> Requirements for report
>
> (1)An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:
>
> (a)the expert's name, address and area of expertise;
>
> (b)the expert's qualifications and employment and educational experience in his or her area of expertise;
>
> (c)the instructions provided to the expert in relation to the proceeding;
>
> (d)the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
>
> (e)the expert's opinion respecting those issues;
>
> (f)the expert's reasons for his or her opinion, including
>
> (i) a description of the factual assumptions on which the opinion is based,
>
> (ii)a description of any research conducted by the expert that led him or her to form the opinion, and

> (iii)a list of every document, if any, relied on by the expert in forming the opinion.

Reports should be served in accordance with Rule 11-6(3) (84 day deadline). Counsel should consider also obtaining responding reports in accordance with Rule 11-6(4) (42 day deadline), which a truly responsive evidence and need not be restricted to critique of the opposing experts' methodology.

3. Case law and Foundational Principles for Expert Opinion Evidence

The factors for the admission of expert evidence were stated by the Supreme Court of Canada in *R. v.* Mohan, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9. Simply stated, Sopinka, J., writing for the Court said:

> Admission of expert evidence depends on the application of the following criteria:
>
> (a) Relevance;
>
> (b) Necessity in assisting the trier of fact;
>
> (c) The absence of any exclusionary rule;
>
> (d) A properly qualified expert.[71]

More recently, the Supreme Court of Canada gave further guidance on the approach required of a judge faced with an application to qualify a potential expert witness. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), Cromwell, J. held:

> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose. Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement.
>
> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka, J. spoke of the "reliability versus effect factor". while in *J.-L.J.*, Binnie, J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion". Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence".[72]

It is very important that counsel instruct experts appropriately. Counsel should take time to guide the expert, and this starts with the instruction letter and the documents enclosed for review. It is appropriate for counsel to have input to ensure the report complies with Rule 11-6. In *Maras v. Seemore Entertainment Ltd*, 2014 BCSC 1109, the Court seemed to signal a crackdown on quality and content of reports, and a desire to move away from the approach of letting a report in and

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71 *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, p. 20.

72 *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), paras 23-24

allowing the objection to go to the weight of the opinion. It would appear that Mr. Justice Abrioux focused on whether the report actually assists the decision-maker, and was critical of such approaches to report writing as long appendices. He was looking for reports that are clear, objective and brief. The case arose out of a pre-trial application to deal with objections to several reports.[73]

The Court was presented with reports in various formats, noting that:

> in some circumstances it may be of assistance to the expert, prior to preparing his or her report, to summarize and comment on various documents or test data provided. However, in assessing the admissibility of an expert's report, the issue is whether these summaries are relevant and of necessity in assisting the trier of fact.[74]

Mr. Justice Abrioux considered appendices containing summaries and comments as a working paper which done not need to be included as a part of a report. It should remain in the expert's file, is producible and could be referenced in cross examination. The judgment reviews each of the challenged reports, outlining the areas of objection, and offering an analysis and application of the applicable Rules and considerations. For instance, some of the experts were directed to rewrite their reports, after reviewing the appendices to identify what the expert actually considered necessary to forming an opinion and the facts and assumptions upon which it is based, and incorporating just that into the final report.

4. The Qualified Expert and Bias

Any perceived or actual bias on the part of the expert will impact your argument for an assessment of damages. When choosing an expert, do not focus solely on the qualifications of the expert, but consider any other matters that might diminish the strength of their opinion. Counsel should investigate how an expert has fared at trial— not only to discover the weight of their opinions and how well their expertise has been received by the Court, but also whether any bias has been exposed. Seriously consider any judicial commentary in respect of prior opinions. For instance:

(a) In *Litt v. Hassan*, 2015 BCSC 1920, the trial judge expressed divergent views of the experts on behalf of the Plaintiff and the defendant. Whereas the plaintiff's experts were characterized as "impressive", and provided their testimony in an "objective," "helpful", "forthright" manner; the defendant's expert was rejected for bias. With reference to the defence expert, the court commented:

> His opinions regarding the plaintiff's complaints of neck pain and mid and lower back pain arising from each of the First Accident and the Second Accident are based upon:

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73 The Court was referred to a number of commonly referenced authorities which will not necessarily be reproduced or specifically referenced in this paper: *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9; *Neudorf v. Nettwerk Productions Ltd.*, [1998] B.C.J. No. 2690, 1998 CarswellBC 2516 (S.C.); *R. v. J.-L.J.*, 2000 SCC 51 (CanLII) *R. v. Abbey*, 2009 ONCA 624 (CanLII), 97 O.R. (3d) 330 and *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2007 BCSC 899 (CanLII). In addition, there is the recent decision of the Supreme Court of Canada in *R. v. Sekhon*, 2014 SCC 15 (CanLII), aff'g 2012 BCCA 512 (CanLII) and *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009), beginning at para. 12.48.

74 *Maras v. Seemore Entertainment Ltd*, 2014 BCSC 1109, para 26

> a)his unyielding and previously judicially rejected view that a muscle is not injured if pain is not immediate;
>
> b)a lack of objectivity during his examination of the plaintiff over 3 ½ years after the First Accident;
>
> c)an argumentative analysis of the plaintiff's previous medical history and clinical records;
>
> d)the incorrect assumption that the plaintiff was wearing a seatbelt at the time of the accident; and
>
> e)in at least one case, the opinions of others who were not before the court.[75]

(b) *Moll v. Parmar* was an application for a defence medication examination by a neuropsychologist. Prior to the proposed exam the doctor wrote a "very vigorous critique" relating to the Plaintiff's expert's conclusions. The Court held that, in such circumstances, it is "not appropriate for the court to order a medical examination...by an expert who has previously taken such a strong stance in accepting the role as a reviewer of a previous examiner's report, particularly in view of the specific provisions of Rule 11-2(1) of the Civil Rules."

Furthermore, failure of an 'independent medical examiner' to physically examine a patient is not, in and of itself, a reason for an expert report to be inadmissible. However, when a litigant relies on such a report the weight the court attaches to it is often negatively impacted. For instance:

(c) In *Johal v. Mevede* 2013 BCSC 2381, in the course of defending the claim ICBC retained a neurologist who did not examine the Plaintiff and provided a more conservative opinion with respect to the plaintiff's limitations and care needs. In placing less weight on this opinion, in part for failing to examine the plaintiff, Mr. Justice Funt provided the following rationale:

> For two reasons, I have given less weight to Dr. Kemble's report and testimony than the other medical experts. First, he did not meet or examine the plaintiff. Second, in cross-examination, Dr. Kemble conceded that the basis for his report could be incorrect to the extent it was based on the assumption that the plaintiff's symptoms would become intermittent.[76]

(d) In *Rizzotti v. Doe*, 2012 BCSC 1330, the Plaintiff suffered psychological injuries in a serious collision. The Defendant tendered a report from a psychiatrist, Dr. Levin, who disagreed with the Plaintiff's experts with respect to the extent of her accident-related psychological injuries. Dr. Levin did not examine the Plaintiff prior to authoring his report and in the course of trial acknowledged that "that he could not do a proper assessment without interviewing the plaintiff". Although the report was deemed admissible, the court accorded little weight to Dr. Levin's opinion.

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75 *Litt v. Hassan*, 2015 BCSC 1920, para 84

76 *Johal v. Mevede* 2013 BCSC 2381 at para 22.

5. Objections

Objections to expert opinion evidence are governed by Rule 11-6(10) and (11). Some commonly cited objections to expert opinion evidence include:

- The expert does not have the appropriate qualifications to give the opinion evidence
- The report was served outside of the timelines for service of expert reports in accordance with the Supreme Court Civil Rules
- The report fails to set out the instructions provided to the expert in relation to the proceeding
- The report fails to set out the nature of the opinion being sought and the issues in the proceeding to which the opinions relate
- The report fails to set out the expert's opinions respecting the issues in the proceeding to which the opinions relate
- The report relies on documents not disclosed or provided to the Plaintiff
- The report fails to set out the expert's reasons for his/her opinion, including:
- A description of the factual assumptions on which the opinions are based;
- A description of any research conduct by the expert that led him or her to form the opinions; and
- A list of every document, if any, relied on by the expert in forming the opinions
- There is no foundation for the opinions expressed in the report
- The foundations for the opinions are flawed
- The report provides opinions that fall outside the area of expertise of the author
- The report provides opinions on issues that are matters of fact and are within the jurisdiction of the Court and, accordingly, offend the ultimate issue rule
- The report provides no value to the Court as the report provides opinions concerning matters upon which the Judge would be able to formulate his/her own conclusions based upon the evidence
- The report fails to set out the facts and assumptions on which the opinions are being based and, where such facts and assumptions are set out, it fails to indicate whether this information is from person knowledge or was provided by a third party
- The report presents conclusions and/or opinions as facts
- The report is generally unclear as to what is fact, assumption or opinion
- The report inappropriately makes reference to the opinions of other doctors and the report does not specifically state which of the opinions are attributable to the various authors
- The report is advocacy in the guise of expert opinion evidence
- The report contains opinions that usurp the role of the Court

In *Paur v. Providence Health Care*, 2015 BCSC 1008, Madame Justice Griffin was clear that technicalities should not defeat the interests of justice or the overall purpose of Rule 1-3. In her

view, "[t]he exercise of reviewing expert reports for their admissibility at trial ought not to be so technical that it will defeat the ability of parties to retain experts at first instance, make it cost-prohibitive, or unnecessarily bog down the trial of the merits of the case and thereby also undermine the ability for the court to receive the expert assistance that is needed on technical issues."[77]

Prior to the TMC, counsel should ensure objections are narrowed. Often times, counsel will send a letter outlining a multitude of objections shortly after the report is served. Whether this is a boilerplate letter or whether done out of abundance of caution, counsel should determine whether objections are truly being pursued for purposes of trial. It may be that some grounds of objection can be dealt with to the satisfaction of each party. Counsel should work with the expert to address any objections, but more importantly to guide the expert at the point of retainer.[78]

6. Lay Witnesses

In many instances, lay witnesses can make or break a case. Those witnesses who have a direct involvement with the Plaintiff, but not the litigation, can bring force to the parties' duelling arguments. Lay witnesses bring a critical perspective and observations that often goes to supporting some of the foundational facts for the expert opinions. A Plaintiff will call lay witnesses can support, corroborate and advance her case; a defendant will call lay witnesses who can minimize, detract from and challenge a plaintiff's case. Lay witness evidence should not be minimized. If the duelling hired experts cause the scales to balance, lay witnesses can tip the balance. In assessing a claim for damages, the Court may not be so attached to a label or diagnosis, as it is to the extent to which the condition has affected the plaintiff in all aspect of her life.[79]

Before selecting your lay witnesses, identify what you need to prove for general damages: pain and suffering, loss of amenities, loss of enjoyment of life. The measure of such losses in each case is unique to each individual. So how does one measure a loss with the assistance of lay witness? Lay witnesses evidence illustrates who the Plaintiff is both pre—and post injury by providing evidence of on each of the ten factors set out in *Stapely*, but more specifically, such things as:

- Social and recreational activities
- Involvement in house chores and child care activities
- Job performance and job satisfaction
- Future goals
- Personality traits

And the key is to ensure you have a picture of all of the above both pre—and post-accident. As stated above, this evidence is to be used to demonstrate the impact on the individual plaintiff. Lay witness, through their accounts and observations, can assist in proving subjective complaints— such as pain, low mood, stress, and cognitive challenges.

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77 *Paur v. Providence Health Care*, 2015 BCSC 1008 para 80

78 The practice of assisting an expert on form, as opposed to substance, of opinion was endorsed in *Surrey Credit Union v. Willson* (1990), 1990 CanLII 1983 (BC SC).

79 *Bricker v.Danyk*, 2015 BCSC 2404, para 123, citing Bagnato v. Viscount, 1995 CanLII 418 (BC SC)

Typical lay witnesses include friends, family members, care workers, coworkers, instructors, teammates. Lay witnesses should not be an afterthought, nor should you wait until you are drafting the TMC Brief to put together your list. The goal is to identify and interview key lay witnesses. In *Zawislak v. Karbovanec*, 2012 BCSC 666 the comments of Madame Justice Gerow highlights the importance of lay witnesses to a plaintiff's case:

> [25]Ms. Zawislak's evidence in that regard is consistent with co-workers called to testify, as well as her son and ex-husband. All of the lay witnesses who knew Ms. Zawislak before and after the accident testified that the injuries she suffered had caused a dramatic change in her energy level and what she could do physically.
>
> [26]Their evidence was not challenged. The evidence of the lay witnesses who knew her both before and after the accident establishes that Ms. Zawislak was in good health before the accident. She was an energetic and personable woman without any health problems. Ms. Zawislak has not been the same since the accident. She cannot participate to the same extent, or at all, in many of the fitness, household, social or work activities she used to do. It is apparent that she is a stoic person and has attempted to carry on with as many of her daily and work activities as possible, but that the effects of the injuries she sustains impact every aspect of her life. Ms. Zawislak has done her best to adapt to the injuries, but she suffers from ongoing symptoms which cause her pain.
>
> [27]In my view, there is a significant temporal connection between the accident and the ongoing symptoms that Ms. Zawislak has suffered. The evidence from Ms. Zawislak and the lay witnesses establishes that there has been a dramatic change in Ms. Zawislak's physical abilities and energy before and after the accident.

Some lay witnesses may have special expertise and training that could blur the line between expert and lay witness. For example, a chiropractor could be qualified as an expert, but is instead called as a lay witness. The chiropractor will have direct knowledge about the plaintiff's condition and treatment. As a lay witness and treatment provider the chiropractor can provide factual evidence such as when the treatment began, the areas of the body being treated, the plaintiff's complaints, how many treatments attended, the cost of treatment, and the nature of the treatment administered. Typically, this evidence is based on reference to their clinical notes, rather than from memory. Hands-on treatment providers can provide important evidence in cases where plaintiffs have sustained an injury being characterized as subjective. Furthermore, typically treating clinicians have more interactions with the plaintiff than experts, and even the general practitioner. Through observations, treating clinicians such as an occupational therapist, rehab assistant or kinesiologist can address such issues as:

- Can the individual perform specific tasks— related to recreational, vocational or housekeeping activities— or activities of daily living?
- Is the individual compliant with treatment strategies and recommendations?
- What is the impact of performing the tasks or activities? (such as increased pain, fatigue, noticeable accommodation or adaptation).
- Whether objective assessments (such as range of motion, muscle recruitment, and strength testing) match with objective observations and client report.

In some instances, counsel may prefer the family doctor to testify as a lay witness, rather than provide expert evidence. In such case, the doctor and counsel must take care that no opinions are given. It is possible that the treating doctor could testify as to the fact that a diagnosis was made, but counsel should take care to ensure that the trier of fact is not left with the impression that counsel is

intending to do something improper, by not tendering expert evidence in accordance with Rule 11-6. This is a permissible practice in our courts. The recent Ontario case *Westerhof v. Gee Estate*, 2015 ONCA 206 highlights these blurred lines. At para 16 the Court states:

> Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness's evidence must relate solely to their observations of the underlying facts or whether they may give opinion evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".

7. Evidence of the Plaintiff

With some exceptions, the Plaintiff is the most important lay witness to testify. The role of counsel for the Plaintiff is to assist the Plaintiff in telling her story, and also preserving and enhancing the Plaintiff's credibility. The latter is very much about whether the Plaintiff survives— or even thrives through— cross examination. Counsel for the Plaintiff should choose a compelling, succinct and common-sense theme for the case, and the Plaintiff should understand that theme. By the time the Plaintiff is testifying at trial, he or she should be able to speak to the changes to their life which go to non pecuniary damages and the loss of enjoyment of life being claimed:

- Areas of injury and symptoms—how symptoms developed or improved over time
- Specific examples of functional impairments and changes in activities/lifestyle— at work and at home, in social and recreational activities
- Employment history, specific job demands/duties, and future goals—and whether and how this has been changed by an accident/injury
- Changes in relationships—with friends, family members, romantic partner
- Any emotional component related to the changes—not necessarily diagnosed psychiatric conditions but disappointment, frustration, sadness associated with loss of lifestyle and not being able to pursue goals

Practically speaking, the examination for discovery is the main pre-trial process that will aid in preparation for the Plaintiff to testify at trial. But neither plaintiff, nor defence counsel can bank on the examination for discovery predicting precisely how well or how poorly the Plaintiff will do at trial: if the Plaintiff does not do well at the discovery, you may not necessarily have a problem for trial; similarly, if the Plaintiff does well at discovery, it might not be smooth-sailing at trial.[80] Furthermore, examinations for discovery do not always unearth the strengthens or weakness of a case, since these examinations vary in length and additional documents are likely produced following the discovery. That said, examinations for discovery are important for both advancing and defending claims, and the plaintiff should understand the importance of this pre-trial process, and what use can be made of the transcript.

Preparing the plaintiff for direct and cross examination includes:

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80 If counsel has significant concerns about how the plaintiff or some facts of the case will present in front of a jury, counsel may wish to consider convening a focus group. Focus groups can provide an opportunity for counsel to test their case theories and strategies on a sample "jury."

- Reviewing the theory of the case with the plaintiff—reviewing that compelling, succinct, common-sense theme that counsel has developed.
- Reviewing the defence's theory of the case with the plaintiff—and reviewing the examination for discovery transcript, documents and surveillance video that are likely to be used in cross examination or form a part of the evidence.
- Reviewing the outline of areas of topics that will be addressed.
- Explaining that counsel cannot lead the plaintiff through their direct evidence.
- Identifying weaknesses in the case—if counsel going to make a pre-emptive strike on weaknesses of the case in the direct examination, identify those weaknesses to the and explain why you are getting it all out in the open.
- Reviewing the documents in the book of documents— this can mean giving copies of books of documents, practicing handling the exhibits to develop a comfort level, and explaining the importance of the documents.
- Emphasizing that making a good impression is important— be polite, dress appropriately (conservatively), keep their speaking voice up (without shouting)
- Getting comfortable using an interpreter

The cross-examination of the plaintiff is a challenging and often rewarding part of the trial process and its success is directly related to the extent of the preparation by counsel for the task. Factors to consider include:

- having a solid command of the theory of the defence. This will determine whether a question even need be asked in the first place. Every question should have a purpose. A pithy and tight cross-examination is effective and should give the trier of fact a clear message of where the defence theory is going.
- using admissions from the examination for discovery to confine the injuries or their effects.
- knowing the factual foundations of the expert opinions. Knocking out an assumed fact or assumption can undermine the use that can be made of the expert opinions. Comb through the expert reports thoroughly.
- whether there are statements in clinical records of admissions of recovery or engagement in activities. As noted above, however, cautioned needs to be exercised in this process because if the plaintiff does not adopt or recall the statement, the author of the record needs to be called to prove the statement. Covering this in the examination for discovery or by Notice to Admit are useful methods to deal with such statements. Physiotherapy, massage, and chiropractic records often contain useful nuggets in this regard.
- identify contradictory evidence from lay witnesses to bolster pre-existing problems and confine post-accident differences.
- identify all sources of treatment recommendations if alleging a failure to mitigate. The plaintiff must be cross-examined on his or her knowledge of the recommendations, and reasons for not following them. Ideally, this will have been explored on discovery so that your cross can counter any excuses with reasonable alternatives. For example, be prepared to question on the availability of alternate sources of funding if finances are raised as the reason.

III. Appendix A—Document Agreements

Document Agreement— Example #1

The Parties agree that the following documents tendered as evidence or referenced by the Parties, whether as a Book of Documents, or otherwise, will be admitted into evidence on the following basis, in all cases subject to proof to the contrary and subject to arguments of weight to be ascribed:

(1) The documents are accurate photocopies of originals.

(2) Doctors and therapists' clinical records, hospital records, Medical Services Plan records, College of Pharmacists records, financial and/or income tax documents, extended health insurance documents, disability insurance documents, special damages receipts and employment documents are kept in the ordinary course of business of the author.

(3) Purported signatures appearing on the documents are authentic.

(4) If dated, the documents were prepared on or about the date shown.

(5) Unless otherwise proven and admitted under Rule 11-6, opinions contained in doctors and therapists' clinical records are permitted to be referenced by counsel and witnesses as proof of the fact that opinion was made, but not as to the truth of the opinion.

(6) The doctors' and hospital records, ambulance records and therapists' clinical records are permitted to be referenced by counsel and witnesses on the following basis:

   (a) the observations of the doctor and/or health care provider are facts and are admissible without further proof thereof;

   (b) the treatments prescribed by the doctor and/or health care provider are facts and admissible without further proof thereof;

   (c) the statements made by the patient are admissible for the fact that they were made but not for their truth;

   (d) the diagnoses made by the doctor are admissible for the fact that they were made, but not for their truth;

   (e) the diagnoses made by a person to whom the doctor had referred the patient are admissible for the fact that those were made but not for their truth; and

   (f) any statement made, and recorded, that is not within the observation of the doctor, health care provider, and/or therapist who recorded the statement will be inadmissible.

(7) Medical Services Plan records are admitted as prima facie proof that the Plaintiff attended on the date recorded, with the health practitioner recorded;

(8) College of Pharmacists records are admitted as prima facie proof that the Plaintiff was prescribed the medication recorded, that the medication was purchased on the date recorded, and the medication was prescribed by the health practitioner recorded.

(9) The parties reserve the right to challenge the accuracy of any fact or statement recorded in the documents.

Document Agreement—Example #2

(1) The parties agree that medical records and economic-loss documents that were prepared independent of the litigation (the "Documents") shall be treated as business records pursuant to Section 42 of the *Evidence Act* as proof of their contents, with the right of any party to lead evidence to the contrary.

(2) In this agreement the words "Documents" and "records" carry the same meaning.

(3) Specifically, the parties are agreed that Documents will be admitted into evidence on the following basis, in all cases subject to proof to the contrary or specific objection as to admissibility and subject to the unfettered discretion of the trial judge as to matters of weight

- (a) photocopies of the records are accurate photocopies of originals;
- (b) if dated, the records were prepared on or about the date shown;
- (c) the records were prepared by or on behalf of the author;
- (d) purported signatures appearing on the records are authentic;
- (e) if the records include a letter, memorandum or other form of correspondence, the document was received by the intended recipient in the ordinary course on or about the date shown;
- (f) the author of the document saw or spoke with the plaintiff on the day noted on the record;
- (g) events occurred on the dates and at the times noted in the records;
- (h) any observation recorded by the author of the records, and within the personal knowledge of the author, is evidence that the observation was made;
- (i) the history was taken as recorded;
- (j) any notes or recording of statements made by Ms. Russell to the author of the record is admissible as evidence that the statements were made, but neither party shall be taken to have accepted the truth of the facts contained therein;
- (k) treatments were prescribed as recorded;
- (l) medication was prescribed as recorded; and
- (m) any medical procedures or tests occurred as stated in the records.

(4) Unless otherwise proven and admitted under Rule 11-6 or by agreement, any opinions contained within the Documents are only admissible as evidence that they were recorded and not for the truth of the opinion.

(5) Any opinion contained within any of the Documents is only admissible if the party who wishes to rely on the opinion has served that opinion in accordance with Rule 11-6(3).

(6) The parties reserve the right to challenge the authenticity or truth of any Document, or contradict it in any way, or lead evidence, including another document, tending to contradict such document or the accuracy of any fact or statement recorded in the Document.

(7) Nothing contained in this agreement shall limit or restrict the rights of any party to produce evidence or prove Documents in any other manner.

(8) By making this Agreement, neither party shall be taken to have accepted the truth of the facts contained in the Documents, or the accuracy of any diagnosis made.

(9) The parties agree that expert reports are only admitted as to authenticity of the report and not as to proof of the facts and assumptions contained therein. Either party may challenge the admissibility of the reports, or portions of the reports. Any notes or recordings of statements made by Ms. Russell to the expert are admissible as evidence that the statements were made.

(10) The parties agree that the trier of fact will be made aware of this Agreement.