PERSONAL INJURY CONFERENCE—2006

PERSONAL INJURY CASE LAW AND LEGISLATIVE UPDATE 2005 - 2006

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I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference in 2005. Some case summaries have been published in ICBC's quarterly publication, *The Defence.*

The full text of most of the cases can be found on the B.C. Superior Court's website at www.gov.bc.ca.

II. Cost of Future Care

A. Fullerton (Guardian ad litem of) v. Delair et al., 2005 BCSC 204, Goepel J.

This medical malpractice case is of interest because of Mr. Justice Goepel's finding that government programs that provide funding and care for disabled persons must be taken into account when assessing the plaintiff's cost of future care award.

He relied on the Supreme Court of Canada decision in *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205 in which that Court reviewed the philosophical underpinnings of awards for future care costs and held that such an award should account for the benefits or services provided through the social safety net, with an appropriate contingency allowance for the possibility of such programs changing or ending. Goepel J. noted that Madam Justice Humphries came to the same conclusion in *Jones (Guardian ad litem of) v. Rostvig*, (2003), 17 C.C.L.T. (3d) 253 (B.C.S.C.) and states:

> [275] I intend to follow the course charted by Humphries J. The defendants do not have to pay for services the government makes available to the plaintiffs, as they are not costs the plaintiffs must bear. This award is not intended to duplicate or replace existing government programs or support. The amounts awarded are in addition to

> the amounts the plaintiffs are entitled to receive from government programs. At the end of this section, I will make a contingency allowance for the possibility that government programs may not continue to be available in the future.

It appears that *Fullerton* is headed for appeal as is the decision in *Strachan (Guardian ad litem of) v. Reynolds*, 2004 BCSC 915, where Hood J. refused to take government funding into account.

III. Costs

A. Walia v. Ulmer et al., 2005 BCSC 601, Sigurdson J.

Sigurdson J. awarded the plaintiff the sums of $8,280.75 and $6,660.78 respectively in two actions heard together on a Rule 18A application. At para. [8] he states:

> If the plaintiff shows that there was sufficient reason for bringing the action for the first accident in the Supreme Court, the defendants do not dispute that the later proceeding, for reasons of efficiency and judicial economy, should be brought in the Supreme Court as well.

He followed *Banji v. Quezada*, 2003 BCCA 445 to determine whether there was sufficient medical or other evidence reasonably capable of supporting a larger claim in the first action. He concluded there was not:

> [20] I will summarize. Early on, liability was not in issue, the wage loss issue was straightforward and was for a rather short period of time, the injuries had resolved, and the medical evidence was uncomplicated. There were no conflicting medical reports. I think that this claim ought to have been brought in the Provincial Court as there is no basis on the evidence for there to be a reasonable possibility that the damages for either accident might exceed $10,000, nor was there any procedural advantage that justified continuing the proceeding in this Court.

This case emphasizes the onus on the plaintiff to be cognizant throughout the proceedings, even to the eve of trial, of the level of damages that could reasonably be awarded.

B. Hodgson v. Walker (30 August 2005), Port Alberni Registry No. S20360, Master Patterson

The plaintiff commenced an action in Supreme Court close to the end of the two-year limitation period. Subsequent to examinations for discovery, the plaintiff applied for and was granted an order transferring the action to Provincial Court. He recovered damages of $1,800 at trial. His application before Master Patterson was for an order for costs of the Supreme Court action to the date it was transferred to Provincial Court.

The master dismissed the application. The decisions of *Banji v. Quezada*, 2003 BCCA 445 and *Gill v. Mansour*, 2004 BCSC 1537 emphasize the proposition that the plaintiff must justify his choice of forum in order to recover costs. These decisions, together with Rule 57(10), extend to cases in which the matter has been transferred to Provincial Court. Master Patterson concluded that when the action was commenced in the Supreme Court, it should have been clear to plaintiff's counsel that damages in excess of $10,000 were unlikely. The $1,800 in damages were, according to Master Patterson, "at the low end of the Provincial Court scale when the limit is $10,000."

IV. Insurance Issues

A. Johnny v. Palmantier, 2005 BCSC 713, Halfyard J.

The plaintiff and defendant had been involved in a single vehicle accident in which both were ejected from the vehicle. The identity of the driver of the vehicle was the only issue at trial. Counsel for ICBC applied to cross-examine the breached defendant on prior statements that were inconsistent with his evidence at trial that he was the driver.

Halfyard J. granted the order. He considered that he was not bound by *Dyk v. Protec Automotive*, [1997] B.C.J. 1874 and *Singh v. Brar*, [1998] B.C.J. 369 in which Burnyeat J. concluded that the right to cross-examine a defendant was not included in the rights granted to ICBC as statutory third party under s. 21(8) of the *Insurance (Motor Vehicle) Act*. The Court of Appeal, in *Patterson v. Rankel* (1998), 59 B.C.L.R. (3d) 226, subsequently held that s. 21(8) gives ICBC all the rights of a defendant.

Halfyard J. states:

> [18] I adopt the following statement of Mr. Justice Burnyeat made at paragraph 30 of *Singh v. Brar*:
>
> > It is ordinarily the case that co-defendants whose interests are different will be allowed to cross-examine one another or one another's witnesses.
>
> [19] The Court of Appeal has interpreted the statute as giving 'all the rights of a defendant' to ICBC. From these two propositions I conclude that ICBC as a statutory third party may cross-examine any defendant where the third party and the defendant are adverse in interest with respect to an essential element of the cause of action between the plaintiff and the defendant.

B. ICBC v. Schmidt, 2004 BCSC 1786, Gray J.

The Court confirmed, following *ICBC v. Joseph* (1989), 36 B.C.L.R. (2d) 248 that a Consent Dismissal Order entered in a personal injury action to which ICBC added itself as third party pursuant to s. 21 of the *Insurance (Motor Vehicle) Act* did not raise the defence of *res judicata* in the subsequent recovery action by ICBC against its breached insured.

To be successful in the recovery action, ICBC must establish that it had complied with the provisions of s. 21 and that its settlement with the plaintiff was reasonable and made in good faith. It did so in this case. The issue of liability in the first action was determined by the Consent Order Dismissal Order, thereby barring the breached insured from proceeding against the plaintiff in the original action as third party in the recovery action.

C. Young v. ICBC et al., 2006 BCSC 211, Barrow J.

The plaintiff was an infant when she was injured in a motor vehicle accident in 1992. Shortly after her 19th birthday, she signed a release, releasing her claim against the tortfeasor and her Part 7 claim against ICBC in exchange for $18,000.

Approximately three years later, she started a personal injury action against the tortfeasor and a Part 7 action against ICBC. The statements of defence in each action pleaded that the plaintiff's claims were barred by virtue of the expiration of the respective limitation periods and the release. In 2003, the plaintiff started an action against ICBC and the adjuster who handled her claim seeking an order setting aside the release, judgment for accident benefits, general damages and damages for economic loss flowing from the plaintiff's injuries, general damages for ICBC's breach of duty against the

plaintiff and aggravated and punitive damages against ICBC (the "ICBC action"). The plaintiff subsequently discontinued the action against the adjuster.

The basis of the ICBC action was that it owed the plaintiff a duty of "fairness and reasonableness" in dealing with her claim, as well as a contractual duty under Part 7 of the Regulations to deal with her in utmost good faith, thereby giving rise to an independent cause of action against ICBC.

During a Rule 18A application brought by the defendant seeking dismissal of the action, plaintiffs' counsel conceded that the plaintiff's separate Part 7 action was statute-barred. The issues before the Court, after it held that the matter was appropriate for resolution under Rule 18A, were:

1. Is the claim for Part 7 benefits barred by s. 103 of the Regulations?
2. Did ICBC owe the plaintiff a duty in relation to her third party claim for damages arising from the accident?

Barrow J. concluded that all claims within the ICBC action with respect to Part 7 benefits, including the claims for damages for breach of duty to the plaintiff, were statute-barred by s. 103 of the Regulations.

He further concluded that there is no duty of fairness and reasonableness owed by ICBC to a person in her capacity as third party claimant. The fact that the plaintiff was also an insured of ICBC by virtue of her claim under Part 7 does not impose such an obligation. He dismissed the plaintiff's action.

V. Damages

A. Geremia v. Nielsen (Estate), 2006 BCSC 229, Rogers J.

The plaintiff, who was not involved in the motor vehicle accident, claimed loss of income as a result of his missing work in order to care for his injured wife and their children and household. The plaintiff relied on the Supreme Court of Canada decision in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 which opened the door for recovery of pure economic loss where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss.

Rogers J. concluded, however, that the plaintiff's circumstances were analogous to those of the plaintiff employer in the Supreme Court of Canada decision of *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 who sued for pure economic loss resulting from the loss of a key employee injured in a motor vehicle accident. The employer was unable to satisfy the proximity test, nor would the loss have been allowed on public policy grounds. If, on the basis of *D'Amato*, a reasonable person cannot reasonably foresee that the victim of his negligence was a key employee, that same reasonable person could not reasonably foresee that the victim would have a devoted spouse. As well, allowing the claim would open tortfeasors to liability to an indeterminate class of claimants, including other family members of the injured person.

VI. Juries

A. Reischer v. Love & ICBC, 2005 BCSC 1352, Drost J.

In this application by the plaintiff for orders pursuant to Rules 39(27) and 3(2) that two actions be heard by the court without a jury and for an extension of time to make the application, Drost J. confirmed or implemented the following principles governing such applications:

- for the purpose of determining when a jury notice may be issued, there is only one notice of trial, and that is the first to be issued: *Hoare v. Firestone Canada Ltd.*, [1989] B.C.J. No. 2362 and *Robertson v. CIBC* (1994), 99 B.C.L.R. (2d) 246.
- when multiple actions are to be heard together, the mode of trial first elected in one of the several actions applies to all of the other actions: *Bumen v. British Columbia Transit*, [2001] B.C.J. No. 610.
- a test similar to the test set out in Hoare is not applicable to an application to strike a jury notice brought during the course of a pre-trial conference; a judge or master presiding at a pre-trial conference has a wide discretion to reassess the mode of trial to ensure fairness and is not limited to the time limit set out in Rule 39(27): *Patterson v. Rankel*, [2001] B.C.J. No. 1335.
- a test similar to the test set out in Hoare is, however, applicable in an application brought outside of a pre-trial conference; a party applying to extend the time to strike a jury notice must show: (1) an intention early in the proceeding to strike the jury notice or (2) a change in circumstances that materially alter the character of the proceeding and render it inappropriate for trial by jury.
- lack of timeliness does not necessarily preclude an application to strike a jury notice and the time restrictions in Rule 39(27) may be overcome if considerations of fairness so require: *Harder v. Nikolov*, [2001] B.C.J. No. 1528.
- in considering the requirements of Rule 39(27), even if a prolonged examination of documents is required and the issues are complex, if the plaintiff's credibility is a crucial issue, a jury's involvement is appropriate because its finding on the issue of credibility will not be too intricate or complex for it to understand and apply: *Esposito v. Abbotsford (City)*, [2003] B.C.J. No. 364.

In this case, the defendants had delivered jury notices within time after Notices of Trial had been filed with respect to two actions. The plaintiff applied to extend the time to strike the jury notices within the time required for the second jury notice but not the first. He was therefore out of time. He was unable to satisfy the modified Hoare test: early in the first proceeding his counsel had communicated to defence counsel his desire to proceed with a jury trial; the facts known at the time of his application were known to him when the first jury notice was delivered and had not significantly changed. While the issues to be tried were somewhat intricate and complex, Drost J. was satisfied that they could, with proper direction, be conveniently determined by a jury.

B. Narang v. Bhattal, 2006 BCSC 513, Martinson J.

In an application seeking an extension of time to file a jury notice, it is sufficient if the evidence supporting the party's intention to proceed by jury trial is contained in an affidavit sworn by counsel. The question at issue, the intention to proceed by jury trial, is a question of legal procedure, a decision made on advice of counsel. Counsel is well placed to provide evidence on questions of legal procedure.

VII. Jury Mistrials

A. Ennis v. Allenby, 2006 BCSC 145, Slade J.

A jury mistrial was declared because defence counsel had crossed examined the plaintiff's expert on an inadmissible opinion. The opinion in question was contained in WCB records put into evidence as part of the clinical records before the jury.

Leave to appeal has been granted (2006 BCCA 213).

VIII. Offers to Settle

A. Thom v. Conner, 2005 BCSC 451, Ross J.

Ross J. held that the principles of unilateral mistake apply to Rule 37 offers to settle. She did not accept the defendant's argument that the formal structure created by Rule 37 is a complete code that ousts the application of a plea of mistake. In this case, the defendant accepted an offer to settle delivered by the plaintiff. The plaintiff applied to have the offer set aside based on her former counsel's mistake: he had forgotten the existence of the offer to settle. At the time the offer was accepted, the amount offered had not included an assessment of the plaintiff's lost earning capacity claim.

Ross J. concluded that while the evidence established that a mistake had been made, there was no evidence to show that the defendant was or should have been aware of the mistake when the offer was accepted. She upheld the defendant's acceptance of the offer to settle.

B. Harris v. British Columbia (Workers' Compensation Appeal Tribunal), 2005 BCSC 359, Boyd J.

This decision lends further support to the notion that Rule 37A offers to settle are valid in situations in which the party making the offer wishes to avoid the normal cost consequences resulting from the acceptance of a Rule 37 offer. It also highlights a crucial difference between Rule 37 and Rule 37A offers: the court retains discretion with respect to Rule 37A offers to refuse to give effect to the cost consequences mandated by Rule 37.

The petitioner's application for judicial review against the Workers' Compensation Appeal Tribunal ("WCAT") and other respondents was dismissed. The respondents, other than WCAT, had delivered *Calderbank* offers offering to settle the proceeding on the basis that the petitioner would discontinue the proceeding and the petitioner and respondents would bear their own costs.

Boyd J. had to determine whether the *Calderbank* offers were valid, and if so, whether the respondents were entitled to the same cost consequences as provided for in Rule 37(24)(b): double costs from the date of delivery of the offers.

The respondents, other than WCAT, were forced to use *Calderbank* offers for the following reason: WCAT, which was a joint respondent in the proceeding, has a policy that it will not participate in an offer to settle which requires a losing party to pay costs. Therefore, because of subrule 37(31), Rule 37 was not available to the other respondents. Boyd J. concluded that, in the circumstances of this case, Rule 37 did not apply and the *Calderbank* offers were valid.

However, she noted that it was clear that the Court retains a discretion under Rule 37A (the successor to *Calderbank* offers) with respect to awarding costs, as opposed to Rule 37 in which there is no discretion to depart from the cost consequences set out therein. She exercised her discretion and awarded the respondents ordinary costs of the action, rather than double costs from the date of the delivery of their offers.

C. Coutu et al. v. San Jose Mines Ltd. et al., 2005 BCSC 1451, Pitfield J.

A petition brought by the plaintiff shareholders against the defendant was dismissed. One of the issues in the application before Pitfield J. was the validity of a Rule 37A offer of settlement delivered by the defendant that contemplated consent dismissal of the petition without costs to either party.

The parties agreed that the effect of the Court of Appeal decision in *Cao (Guardian ad litem of) v. Schroeder*, 2005 BCCA 351 is that Rule 37A cannot be invoked in circumstances where an offeror can formulate an offer in conformity with Rule 37.

Pitfield J. held that subrule 37(26) governs offers in respect of a claim for non-monetary relief and it must be construed to contemplate offers that provide for the outright dismissal of the offeree's claim and no other relief. Therefore, Rule 37A was unavailable in these circumstances. In response to the defendant's submission that such an interpretation of Rule 37A would discourage offers of settlement in cases in which the absorption or allocation of costs is the material sticking point, Pitfield J. suggested that an amendment to the rules may be the only solution:

> [12] If there is a defect in the combined operation of Rules 37 and 37A, it is a defect that may only be cured by an amendment to Rule 37A so that, for example, it could apply, upon application and in the discretion of the trial judge, to any offer of settlement that was not specifically made, for any reason whatever, pursuant to Rule 37.

D. Butterfield v. Choufour, 2005 BCSC 550, Stromberg-Stein J.

The issue in this case was whether a Rule 37 offer to settle delivered by fax in accordance with Rule 11(6.5)(b) at noon on the seventh day before the first day of trial was sufficient to trigger the costs consequences of Rule 37. Plaintiff's counsel argued that while his office had received the fax at approximately noon, it was not brought to his attention until after 4:00 PM. Therefore, the effective date of the delivery of the offer was the next day, or six days before the start of trial.

Stromberg-Stein J. concluded that the delivery was sufficient and Rule 37 applied such that the defendant was entitled to costs from the date of its delivery. Rule 11(6.5)(b), which deals with the delivery of documents by fax, refers to "transmission" of a fax, and transmission is effective on the day of transmission if the document is faxed before 4:00 PM. The operative word is "transmission" which precludes the interpretation of "received into the hands of counsel."

E. Van de Mortel v. Flagg et al., 2005 BCSC 1125, Smith J.

The plaintiff had been involved in two accidents six weeks apart. Seven days before the first day of trial of both actions, the defendants delivered two separate Rule 37 offers in the amounts of $5,500 for the first action and $44,500 for the second action. A jury awarded the plaintiff $15,567.66 in respect of the first accident and $28,466.80 in respect of the second accident for a total award that was approximately $6,000 less than the combined total of the two offers.

The issue before Smith J. was how to apportion the costs of trial between the two actions in light of the mixed success of the parties. She concluded that a fair apportionment, "taking all the circumstances into account," was to apportion 65% of trial costs to the first accident (and therefore to the plaintiff) and 35% to the second accident.

F. Sandhu v. Kang, 2005 BCSC 1475, Shabbits J.

Prior to commencing her action, the plaintiff had received $5,501.96 in advance payments and Part 7 benefits. A jury subsequently awarded her damages that were less than the amount she had already received and less than two offers to settle delivered by the defendant. The second offer to settle was delivered six days prior to the first day of trial. The defendant applied for an order for costs from the commencement of the action and double costs from the date of delivery of the first offer to settle.

Shabbits J. agreed that the defendant was entitled to costs from the date the action was commenced. As of that date, the plaintiff had already received more in advance payments and Part 7 benefits than she would eventually recover at trial. She was not entitled to enter judgment and her action was therefore dismissed.

He concluded, however, that the defendant's second offer revoked the first offer, such that only the second offer was valid at the time of the jury verdict. Although the offer was delivered within seven

days of the start of trial, Shabbits J. exercised his discretion to order double costs to the defendant from the date of the second offer.

G. Clark v. Sidhu, 2005 BCSC 914, Johnston J.

Johnston J. refused to give effect to a Rule 37 offer in the amount of $1.00 delivered by the defendant. A jury subsequently dismissed the plaintiff's action, answering "No" to the question of whether the plaintiff had suffered an injury in the accident. The defendant sought double costs from the delivery date of the offer pursuant to subrule 37(24).

While Johnston J. acknowledged the authorities that confirm that subrule 37(24) confers no discretion on the Court to depart from its consequences and that Rule 37 makes no reference to the reasonableness of an offer, he nevertheless imported the concept of "reasonableness" into the rule and refused to order double costs. He states at para. 24:

> I find that a defendant seeking double costs under Rule 37(24), following a dismissal of the plaintiff's claim, must show an offer to settle that was reasonable in the circumstances of the claim in which it was made. I find further that, in the circumstances of this case, where liability for an accident was admitted by the defendant, where one or more other persons suffered injury in the accident, and where there was evidence of some injury, albeit slight, to the plaintiff whose claim was dismissed, an offer of $1.00, plus disbursements only, is not reasonable, and the defendant here is not entitled to double costs after the offer to settle.

H. Biernaczyk v. Alford, 2006 BCSC 116, Bernard J.

Bernard J. refused to follow *Clark v. Sidhu*, *supra*, in circumstances where the defendant delivered a Rule 37A offer to settle the action by accepting a waiver of all costs in exchange for a release of all claims against him. The Court accepted the defendant's argument that *Clark* was contrary to the Court of Appeal decision in *Cridge v. Harper Grey Easton & Co.*, [2005] B.C.J. (Q.L.) No. 74 and concludes:

> [14] I am satisfied that an independent assessment of 'reasonableness' is not a valid inquiry under Rule 37; similarly, it is not a proper basis for invoking the discretion afforded by the permissive language of Rule 37A. No other basis was advanced; accordingly, I am satisfied that there is no reason to depart from the double cost consequences as they are set forth in of [sic] Rule 37(26)(b).

I. Reddemann v. McEachnie et al., 2006 BCSC 332, Burnyeat J.

Burnyeat J. also concluded that the concept of "reasonableness" has no application to Rule 37 offers to settle. The decision in *Cridge*, *supra*, is binding authority that Rule 37 is a complete code and the Legislature would have included the word "reasonable" if it had intended that only reasonable offers were subject to the complete code set out in Rule 37.

J. Kennedy v. Kiss and ICBC, 2006 BCSC 296, Williams J.

Williams J. held that the reasonableness of a Rule 37 offer is still a valid consideration for the court when exercising its discretion to give effect to an offer to settle delivered within an action subject to Rule 66. He relied on the decision in *Lee v. McGuire*, 2005 BCSC 428, in which Burnyeat J. concluded that *Cridge* does not apply to limit the discretion under subrule 66(29) and that the reasonableness of an offer is a factor to consider when exercising a discretion to depart from the lump sum costs set out in Rule 66.

In summary, it appears that the courts have acknowledged that the "reasonableness" of an offer is not a valid consideration in relation to Rule 37 or Rule 37A offers in ordinary actions, but continues to be a valid consideration in the exercise of discretion conferred by Rule 66(29).

K. Reischer v. ICBC, 2006 BCSC 198, Macaulay J. and Menduk v. Ashcroft, 2006 BCSC 274, Ehrcke J.

These two decisions deal with the interpretation of the July 1, 2003 amendment to Rule 37(37). The subrule currently reads:

> (37) Despite subrule (22), the plaintiff is not entitled to costs other than disbursements if
>
> (a) an offer is accepted for a sum within the jurisdiction of the Provincial Court under the Small Claims Act, and
>
> (b) the proceeding in which the offer was made could appropriately have been brought in the Provincial Court.

Paragraph (b) was added to the subrule in 2003.

Until *Reischer v. ICBC*, the courts had interpreted paragraph (b) as conferring a discretion to award costs to the plaintiff upon acceptance of an offer to settle wherein the amount is within the jurisdiction of the Provincial Court if the action could not appropriately have been brought in the Provincial Court for various reasons. It was assumed that the wording in paragraph (b) is similar in effect to the wording found in subrule 57(10):

> A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

For example, in *Kuehne v. Probstl*, [2004] B.C.J. (Q.L.) No. 1383, Master Groves concluded that there could be any number of tactical reasons for commencing an action in the Supreme Court, including the need for document production in a case involving a number of documents; a *bona fide* need for examinations for discovery (i.e., when liability is in issue; a judgment that needs to be enforceable abroad; the desire for a jury trial or access to the summary trial process; and complex legal issues).

In *Icecorp International v. Nicolaus et al.*, 2006 BCSC 25, Pitfield J. held that the likely magnitude of the claim as pleaded would alone determine entitlement to costs in accordance with Rule 37(37).

In *Reischer*, however, Macaulay J. concluded that such an interpretation of subrule 37(37)(b) is incorrect. He found that paragraph (b) was added to the Rule in order not to penalize plaintiffs who are precluded from starting an action in Provincial Court because it lacks jurisdiction: for example, actions for libel, slander and malicious prosecution. If the Legislature had intended to incorporate an exercise of discretion in subrule 37(37)(b), it would have used the exact wording set out in subrule 57(10). He further states:

> [12] Because the costs outcome can be ascertained with certainty by both sides at the time the Offer to Settle is accepted, the subrule also furthers the policy goal of encouraging settlement. Pre-trial settlement is less likely to be achieved if there is uncertainty as to the cost consequences of accepting the offer. See *Seaspan Coastal Intermodal Co. v, Sea-Link Marine Services Ltd.*, [2005] B.C.J. No. 2225 (S.C.), at para. 24. There would always be uncertainty if the court had to determine whether the plaintiff had sufficient reason to bring the proceedings in Supreme Court whenever a plaintiff accepted an offer within the monetary jurisdiction of the Provincial Court.

The issue in *Menduk v. Ashcroft*, 2006 BCSC 274, was the applicability of subrule 37(37) in circumstances where the action was commenced in the Supreme Court prior to the effective date of the increase in monetary jurisdiction of the Provincial Court and the plaintiff subsequently accepted

an offer to settle within the new monetary jurisdiction. It was the defendant's position that the law in effect at the time the offer to settle was accepted should govern the application of subrule 37(37).

Ehrcke J. found the analysis in *Reischer* to be helpful and in particular "the insight that the cost rules dealing with settlement should be interpreted in a way that yields certainty to both sides." Nevertheless, he did not feel bound to follow *Reischer* because it did not involve the change in the monetary jurisdiction of the Provincial Court. Instead, he concluded that at the time the plaintiff commenced his action in Supreme Court, the value of his claim was such that he could not appropriately bring it within the Provincial Court.

L. Anderson v. Routbard, 2006 BCSC 87, Humphries J.

Humphries J. concluded that the offer to settle delivered by the defendant was uncertain and therefore invalid. The offer to settle contained the following wording:

> The sum of Five Thousand Five Hundred Dollars ($5,500.00), after taking into account Part 7 benefits paid or payable pursuant to s. 25 of the *Insurance Motor Vehicle Act* ... and any advance paid to date.

Humphries J. states:

> [10] In my view, the plaintiff is correct. This offer is uncertain. First, ICBC has a contractual obligation to its insured to deal with Part 7 benefits; such a claim can be the subject of a separate action. This is not part of the tort action between the plaintiff and defendant which went to trial before me and in which the offer is purported to have been made. The offer conflates the two causes of action, when the parties are not the same. Second, the defendant purports to hold back an amount as yet undetermined. The plaintiff could not know, at the time of the offer, what Part 7 claims, if any, would be the subject of dispute. This offer is not capable of being accepted and paid out, as the words "or payable" mean an amount would have to be held back or dealt with by an arrangement for a future payment back. In these circumstances, the offer did not afford to the plaintiff a meaningful opportunity to assess the amount that might actually be forthcoming, should the offer be accepted, and does not trigger the consequences of Rule 37(24).

On March 31, 2006, Mr. Justice Donald granted leave to appeal *Anderson*.

IX. Part 7

A. Bennison v. ICBC, 2005 BCSC 1503, Romilly J.

The plaintiff applied for reinstatement of total temporary disability benefits. At the time of the accident, the plaintiff worked as a painter whose injuries interfered with his ability to work. The defendant, ICBC, paid temporary total disability benefits until a specialist retained by ICBC examined the plaintiff and concluded that there were no contra-indications for him to return to work and resume all normal work-related duties. Romilly J. dismissed the plaintiff's application after considering the following factors:

- the expert retained by ICBC was fully apprised of the plaintiff's occupation, work-related duties and physical requirements and addressed them in his opinion;
- none of the plaintiff's five experts specifically addressed the physical requirements of the plaintiff's occupation or explained why he could not meet those requirements;
- the medical evidence of the plaintiff's experts was inconclusive and contradictory.

The plaintiff was unable to establish a *prima facie* case that he continued to be disabled from his occupation as a result of injuries suffered in the motor vehicle accident as required by the Court of Appeal decisions in *Halbauer v.* ICBC (2002), 96 B.C.L.R. (3d) 297 and *Carter v. ICBC* (2002), 100 B.C.L.R. (3d) 53.

B. Stitt v. ICBC, 2006 BCSC 360, Halfyard J.

The fact that the plaintiff had been in receipt of disability benefits under s. 80(1) of the Regulations, which were subsequently terminated by ICBC, does not preclude ICBC from introducing evidence that such benefits had been paid in error. While the plaintiff was able to establish a *prima facie* case that she was totally disabled by the motor vehicle accident and continued to be totally disabled from working in her occupation, ICBC's conduct in paying the disability benefits does not constitute an irrevocable admission of these two facts.

X. Practice

A. Meisenholder v. Wikdahl, 2005 BCSC 630, Master Keighley

Master Keighley granted the defendant's application to withdraw an admission of liability on the basis of the factors set out in *Nesbitt v. Miramar Mining Corporation*, 2000 BCSC 187 (delay, loss of trial date, party changing evidence, inadvertence of admission, and triable issue) and *Squamish Indian Band v. Canadian Pacific Ltd.*, [1998] B.C.J. No. 1726 (S.C.) (procedural efficiency).

The accident occurred when the defendant turned left in front of the plaintiff's oncoming vehicle. Defence counsel prepared the Statement of Defence on instructions that the evidence at the time indicated there was no explanation for the defendant's failure to see the plaintiff's vehicle. Shortly after the Statement of Defence was filed, an investigator retained by defence counsel located an eyewitness to the accident whose evidence indicated that the defendant had already begun his left turn when the plaintiff's vehicle crested a hill at high speed.

In light of the facts that the litigation was at a very early stage, no trial date had been set, there was new evidence rather than a change in evidence, the admission was inadvertent in that it was based on the evidence known at the time it was made, liability was a triable issue and there was no demonstrated prejudice to the plaintiff, Master Keighley concluded that the admission should be withdrawn in the interests of justice.

B. Telosky v. Ash (15 February 2006), Campbell River Registry No. S5320, Shabbits J.

The defendant applied for a declaration that a number of medical reports be available for use by him at the trial of the tort proceeding, subject to determinations of admissibility by the trial judge. The plaintiff objected to such use of the medical reports on the ground that they had been obtained by the plaintiff's no-fault accident benefit insurer, ICBC, under s. 99 of the Regulations to the *Insurance (Motor Vehicle) Act* and that such use was unjust and an intrusion on his privacy.

Shabbits J. concluded that such a position was unsupported by earlier authorities in which the issue was whether the defendants in the tort action were entitled to a medical examination under Rule 30 when a s. 99 examination had already been undertaken. Implicit in these decisions is the understanding that the defendants could make use of the Rule 99 medical reports in the tort action. He cited two Ontario decisions (*Worthington Trucking Inc. v. Klingbeil*, 43 O.R. (3d) 697, *Tanner v. Clark* (2002), 60 O.R. (3d) 304, affirmed by the Ontario Court of Appeal) that explicitly sanctioned the use in the tort action of relevant medical information obtained outside the tort action.

Furthermore, in the circumstances of the case before him, the plaintiff was fully aware that the defendant intended to use the results of the s. 99 examination in the tort action and tacitly agreed to such a condition by submitting to the examination. His counsel had taken the position, prior to the s. 99 examination, that the medical report obtained as a result would be the defendant's sole opportunity to have the plaintiff examined in the tort action. Given this position, there clearly was no expectation of privacy on the plaintiff's part.

C. Spurr v. Brawn, 2005 BCSC 1663, Boyd J.

There is nothing in the *Rules* prohibiting a party from covering the same ground at an examination for discovery as was covered in the responses to interrogatories by the opposing party. Each form of discovery has its strengths and weaknesses, but their combined use affords a powerful tool to litigants.

D. Jackman et al. v. Jackman et al., 2006 BCSC 507, McEwan J.

The infant plaintiff was a passenger in a vehicle driven by his father and owned by his mother when it was involved in a motor vehicle accident. Liability was conceded. The infant claimed he suffered a closed head injury as a result of the accident. The plaintiff sought a declaration allowing his counsel to communicate freely with the defendant parents, invoking the *parens patriae* jurisdiction of the court.

McEwan J. acknowledged the conflicting obligations of the defendant parents in this case, but concluded that he did not have the power to look behind the position of the parties as defined and governed by the Rules of Court:

> [14] ... While in a case of this nature, relationships that would otherwise be natural and unrestricted have an artificial legal framework imposed upon them, that framework exists for the benefit of all the parties to the litigation. It is not difficult to imagine situations where the insurers' rights could be prejudiced were different, *ad hoc* rule, imposed.

Instead, he adapted the process suggested by defence counsel:

- Both defendant parents could be examined for discovery on matters relevant to the action, including the plaintiff's injuries, symptoms and behaviours.
- Requests for interviews with experts, including psychiatrists and psychologists, shall take place only with the permission of the defendants' solicitors, which permission, if withheld, may be the subject of an application to the court.
- There shall be no contact between the defendants and solicitor for the plaintiff without the permission of the defendants' solicitors. Informal discussions with the defendants would take place in the presence of their solicitor subject to his agreement as to the propriety of the questions.

XI. Rule 26: Production of Documents

A. Pereira v. Rodrigue et al., 2005 BCSC 1778, Bennett J.

Bennett J. dismissed the defendants' appeal of a master's order (2004 BCSC 1289) denying production of banking, credit card and telephone records. The defendants had argued before the master that since the plaintiff had alleged in his Statement of Claim that he had suffered a loss of enjoyment of life, such records were relevant to assess the extent of such loss. On appeal, they contended that the master had erred by focusing on the privacy of the plaintiff and by misapplying the test for relevance.

She concluded that the master had not erred. The banking and phone records were clearly not relevant. The broad nature of the request for banking records (including RRSP's, securities, etc.) pointed to the conclusion that the defendants were on a fishing expedition. The plaintiff had provided the defendants during his examination for discovery with the names of friends and their contact numbers and that information was sufficient to render his phone records irrelevant. The probative value of the credit card records was minimal and the intrusion on the plaintiff's privacy was significant.

B. McKay v. Lavis et al., 2005 BCSC 570, Smith J.

The defendants applied for an order requiring the plaintiff to authorize the release of her Manitoba WCB records. While Smith J. conceded she had jurisdiction to grant such an order, in the absence of any evidence that the plaintiff had made any claims to the Manitoba WCB, the defendants had not met the test of relevance as set out in *Dufault v. Stevens.*

C. Pritchard v. Crossfield, 2005 Carswell BC 3312, Master Patterson

The defendant sought an order for production of the plaintiff's hard drive on her home computer, including all records electronically stored on the computer relating to her business as well as all other electronic mail and correspondence stored in the hard drive and a record of internet searches conducted by the plaintiff.

The plaintiff alleged she suffered a head injury as a result of a motor vehicle accident. A few years after the accident, she began to work in her family business from her computer at home. The defendant argued that the hard drive was being sought for the purpose of determining the plaintiff's pattern and frequency of use of her computer as well as the information she accessed.

Master Patterson refused to allow the motion in its entirety. To have an independent expert strip the hard drive of all information, including personal e-mails, deleted records and internet searches, was an invasion of privacy that was not justified by a sufficient assertion of the relevance of such information. The defendant was entitled, however, to an order that the plaintiff list and produce all business documents stored on the computer.

D. Park v. Mullin, 2005 BCSC 1813, Dorgan J.

Dorgan J. refused to order production of the plaintiff's home computer and hard drive based on the defendant's submission that the information contained in the hard drive would provide an objective measure of the extent and complexity of the plaintiff's intellectual functioning and was therefore relevant to her income earning capacity.

Dorgan J. confirmed that the issue of privacy was a "robust and real" issue in Rule 26 applications where the order sought is so broad it has the potential to unnecessarily delve into private aspects of the opposing party's life. In this case, there were significant privacy issues for the plaintiff, her clients and other users of the computer and no plausible evidence relating to how such documents might be used or interpreted by the triers of fact. There existed other means by which the defendants could challenge the plaintiff's alleged level of cognitive functioning. Even if the documents sought by the defendant were relevant, she would exercise her discretion under Rule 26 and dismiss the application on the basis that the plaintiff's privacy interest outweighed the defendants' interest in pursuing full disclosure.

E. Gasior v. Bayes, 2005 BCSC 1828, Master Caldwell

Master Caldwell refused to grant an order for production of the plaintiff's vacation photographs taken since the accident. He concluded that the production of personal photographs was far more invasive than probative, given that they were snapshots in time and could be taken out of context.

F. Shilton v. Fassnacht, 2006 BCSC 431, Ehrcke J.

The plaintiffs alleged they each suffered a head injury as a result of a motor vehicle accident. At their examinations for discovery, each plaintiff referred to lay witnesses with whom they associated after the accident. Despite repeated requests, the plaintiffs refused to provide contact information, such as the names, addresses and phone numbers of these witnesses citing the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("*PIPA*") and privilege. It was the defendants' contention that the evidence from these witnesses would be relevant insofar as they would be able to give observations of the plaintiffs' post-accident level of mental and psychological functioning.

The defendants also sought an order for production of the plaintiffs' credit card statements and banking records on the basis that such may be able to show how the plaintiffs managed their financial affairs after the accident.

Ehrke J. allowed, in part, the first motion. There is nothing in *PIPA* that would limit the defendant's right under Rule 27(22) to obtain the names and contact information of relevant witnesses. *HMTQ v. Bugbusters*, 2001 BCCA 531 established that the names and addresses (but not the phone numbers) of witnesses having personal knowledge of facts in issue in the lawsuit must be disclosed.

He refused to order production of the plaintiffs' credit card statements and banking records. The asserted relevance of such documents was tenuous and was outweighed by the substantial privacy concerns.

G. Koebernick v. Ewald (28 February 2006), New Westminster Registry No. S71590, Master Keighley

The defendant applied for an order for the full production of specific documents, portions of which had been edited by counsel for the plaintiff. The edited documents had the following information redacted from them: information contained in hospital records relating to the plaintiff's next of kin; information relating to the plaintiff's drug use; and information about which no reason was given for their redaction.

Master Keighley ordered the production of the unedited records. On the basis of the tests for relevance in *Peruvian Guano* and *Dufault v. Stevens*, the master concluded that there was a possibility that the next of kin might have evidence with respect to the plaintiff's injuries and there was nothing before him upon which to assess any embarrassment or prejudice that might accrue to the person whose name had been blacked out merely by virtue of being identified as next of kin.

The possible probative value with respect to the plaintiff's drug use, specifically in connection with his wage loss claim and the functional capacity evaluation performed on him, was significant and outweighed any potential embarrassment on the plaintiff's part.

In the absence of any explanation for the redaction in the remaining category of documents, such documents were to be produced in their unedited form

H. Holbeche v. Jack Crewe Ltd. and City of Coquitlam, 2006 BCSC 117, Master Caldwell

The plaintiff was significantly injured when he lost control of his motorcycle at a construction site. He sued the construction company and the City of Coquitlam. The construction company's liability insurer hired an independent adjuster who subsequently produced 14 reports. The plaintiff sought production of the reports over which the defendant had claimed privilege.

Master Caldwell, considering *Kaiser v. Bufton's Flowers Ltd.*, [1993] B.C.J. No. 1695, agreed that adjusters' reports often serve a dual purpose: to investigate the incident and to provide information that would assist in litigation and that it is not often clear which was the dominant purpose for the creation of the report. Hence, clearly privileged information may be redacted from the reports provided the claim of privilege is based on proper and cogent evidence. In this case, an affidavit sworn by a legal secretary employed by the defendant's solicitors fell short of providing such evidence.

XII. Rule 30: Medical Examinations

A. McKay v. Lavis et al., 2005 BCSC 570, Smith J.

In these Reasons, Smith J. provides a helpful summary of the law with respect to second Rule 30 examinations as well as confirmation that Rule 40A expert reports are in compliance if they are delivered at least 60 days before they are tendered in evidence.

The defendants applied for an order under Rule 30 to compel the plaintiff to attend a second examination by the same specialist. The examination was scheduled to take place just over 60 days before the first day of a 10-day trial. Subsequent to her first examination, the plaintiff amended her Statement of Claim to add a sacroiliac joint injury. A report from an orthopaedic surgeon delivered by the plaintiff shortly before the application opined that the plaintiff's sacroiliac joint injury precluded her from returning to work as a licensed practical nurse. The issue of the sacroiliac joint injury could not have been dealt with during the first examination as the first complaint of problems in the sacroiliac area did not arise until afterwards.

With respect to the timing of the second report, Smith J. cited *C.A. v. Critchley*, [1996] B.C.J. No. 3055 and *Gibson v. Rickett*, [1995] B.C.J. No. 2426 as supporting "the view that the expert report is to be delivered at least 60 days before it is tendered, in other words, [supporting] the proposition that the rule means what it says [para. 26]." In this case, there was no reason to expect that the delivery of the report would be noncompliant with Rule 40A.

Smith J. concluded that the defendants had met the relatively high burden of convincing her that she should exercise her discretion and grant the order to ensure reasonable equality between the parties.

B. Belke v. Bennett, 2006 BCSC 536, Barrow J.

Barrow J. overturned on appeal a master's order declining to compel the plaintiff to attend a Rule 30 examination by a neurologist with expertise in headaches. The plaintiff had a lengthy history of significant and debilitating pre-existing migraine headaches and originally pleaded in her statement of claim that the headaches were caused by the accident. She subsequently abandoned her claim with respect to the headaches, and on that basis the master dismissed the defendants' application.

There was evidence that the plaintiff's migraine headaches had worsened over the years and the extent to which her pre-existing condition would affect her future income-earning capacity was an issue in the proceeding. An investigation of the plaintiff's past and future pattern of migraine headaches was therefore relevant to issues raised in the pleadings.

C. Gordon v. Bill, 2005 BCSC 840, Master Keighley

The defendant applied for an order that the plaintiff submit to an examination by a physician and, at such examination, provide blood and urine samples. The physician who would be examining the plaintiff provided an opinion that the plaintiff's extensive use of narcotic opioid analgesic medications since a prior accident may actually be increasing her level of discomfort and decreasing her level of function. Only a thorough biopsychosocial assessment, including the analysis of blood and urine samples, would indicate whether her medication regime was appropriate.

Master Keighley held that the defendant met the test set out by Burnyeat J. in *Siemens v. Motruk and Coote*, 2000 BCSC 1593 that there was at least a possibility that the plaintiff was addicted to her medications. He included the following conditions:

- the plaintiff would provide samples of her blood and urine sufficient to allow testing by the defendant's medical expert and any testing undertaken by her own physicians;
- any unconsumed samples must be preserved;
- any report prepared by the defendant's medical expert would be provided to the plaintiff;
- testing would be limited to testing for prescription and non-prescription medication;
- any medical reports based on such testing introduced into evidence would be sealed in the records of the court.

D. Astels v. Canada Life Assurance Company et al., 2005 BCSC 1232, Arnold-Bailey J.

The plaintiff appealed a master's decision ordering her to submit to a Rule 30 medical examination by a physiatrist chosen by the defendant disability insurer. The defendant had not previously required the plaintiff to attend a medical examination under the terms of her disability insurance policy.

The plaintiff argued that as she had sought in her action a declaration that she was totally disabled for a period up to the date of the action being commenced, an "after-the-fact" Rule 30 examination to assess her current condition was not relevant to the proceeding before the court. She further argued that in view of the defendant's denial of disability benefits without the benefit of a pre-litigation examination, a Rule 30 examination should only be ordered for the soundest reasons.

Arnold-Bailey J. was not persuaded that the master failed to exercise his discretion judicially. The plaintiff's condition continued to be an issue in the proceeding and the Rule 30 examination was required to achieve a level playing field. Furthermore, to deny the defendant's prima facie right to an examination because it had not sought a pre-litigation examination would be "unduly restrictive" as contemplated by Master Groves in *Roberge v. Canada Life Insurance Co.*, 2002 BCSC 1500.

This decision was affirmed by the Court of Appeal on March 7, 2006 (2006 BCCA 110).

E. Narayan v. Urbano (8 March 2006), Vancouver Registry No. M040428/M040429, Master Bolton

Master Bolton granted the defendants a Rule 30 examination within approximately a month of trial even though such an order would probably lead to an adjournment of the trial. Master Bolton weighed the prejudice to the plaintiff of the loss of the trial date with the prejudice to the defendants if they were unable to respond to a medical expert's report served on them just prior to the 60-day mark that raised for the first time the potential for permanent disability. He concluded that the prejudice to the defendants in being denied a fair trial outweighed the loss of the trial date.

He distinguished cases that refused defendants' motions for Rule 30 examinations brought late in the proceedings because of delay on the part of those defendants. No such delay occurred in this case, apart from a few weeks after receipt of the plaintiff's report while counsel for the defendants assessed the impact of the new report and sought instructions to schedule an appointment. Such a delay was reasonable in the circumstances.

XIII. Audio-Recording Rule 30 Examinations

1. *Nabess v. Willerton et al.* (24 June 2005), New Westminster Registry No. C913397, Cullen J.
2. *De Stefanis v. Marshall*, 2005 BCSC 1474, Master Donaldson
3. *Osborne v. Dzenkiw* (24 August 2005), Kamloops Registry No. 34440, Master Hyslop
4. *Johns v. Powell et al.* (8 September 2005), New Westminster Registry No. S081003, Singh J.
5. *Mercer v. Desmarais*, 2005 BCSC 1660, Grist J.
6. *Chatwin v. Denny* (16 November 2005), Vancouver Registry No. M034137, Bolton J.
7. *Narvaez v. Zhang et al.*, 2006 BCSC 458

The above decisions deal with audio-taping Rule 30 medical examinations.

In *Nabess v. Willerton et al.*, Cullen J. articulated the policy reasons for limiting the circumstances for permitting the recording of medical examinations:

- the necessity of ensuring that the defendant is not put on an unequal footing for want of similar recording of the plaintiff's experts;
- the possibility that recording such interviews will interfere with or intrude upon the examination; that it will displace the traditional method of challenging expert evidence through cross-examination; that it will add unnecessary layers of complexity to the conduct of examinations and to the conduct of trials by creating a real time record on which to cross-examine the expert;
- the risk of introducing an unwarranted element of contention to the examination process.

He nevertheless concluded that circumstances existed in the case before him that clearly demonstrated that audio-recording the examination was necessary to achieve the objectives of a fair trial. The plaintiff was an infant and alleged he had suffered a head injury accompanied by various cognitive impairments, including difficulty with comprehension and memory. His evidence was bolstered by his mother's affidavit evidence and by medical evidence.

In *De Stefanis v. Marshall*, Master Donaldson permitted the recording of the plaintiff's examination on the basis that, as there was little, if any, objective evidence to support or contradict her alleged injuries, a recording of her self-reporting to the doctor would assume greater importance than the doctor's findings on physical examination.

In *Osborne v. Dzenkiw*, Master Hyslop refused to allow the plaintiff to record the examination or to attend with a chaperone. The plaintiff deposed that she experienced comprehension and memory difficulties due to her pain and medication. In the absence of evidence from anyone else that her difficulties would preclude a fair examination by the doctor, Master Hyslop concluded that there were no compelling reasons to allow the chaperone or the recording.

In *Johns v. Powell et al.*, the plaintiff sought to record her examination on the basis that, given her lack of comprehension of the English language, and in particular medical terms, it would provide an accurate, indisputable record of the questions asked and answers given. Singh J. refused to permit the

audio-recording. The plaintiff's affidavit evidence, according to Singh J., averred to her personal conclusions which were "self-serving, without any independent or corroborating evidence." Moreover, her responses to questions asked of her on discovery indicated she was capable of understanding and responding.

Singh J. further held that while the courts have the jurisdiction to consider whether to permit audio-recording of Rule 30 examinations, such jurisdiction, in the absence of rules, does not extend to permitting the video-recording of examinations.

In *Mercer v. Desmarais*, the fact that the plaintiff was 14 years old with psychological problems that inhibited him from communicating with his lawyer was sufficient to permit audio-recording. Grist J. did not accept the defendants' argument that the audio-recording would be so intrusive as to render the examination ineffective.

With respect to the mechanics of the audio-recording, the courts in both *Nabess* and *Mercer* ordered that the audio-recording must be done professionally by an independent third party who would not be present in the examination room.

In *Chatwin v. Denny*, Bolton J. ordered the examination to be audio-taped, on the conditions that the recording be conducted by an independent third party at the plaintiff's expense. Master Barber attached the same conditions to his order allowing audio-recording in *Narvaez v. Zhang et al.*

XIV. Rule 30 Examination Reduced to Writing

1. *Kelln v. Stevens et al.* (13 April 2005), Kelowna Registry No. S62248, Master Bishop
2. *Morey v. Lemon* (11 May 2005), Kamloops Registry No. S62085, Master Bishop
3. *Edgar v. Moore* (23 August 2005), Nanaimo Registry No. M41464, Stromberg-Stein J.
4. *Elder v. Stewart et al.* (25 October 2005), Victoria Registry No. 03-2077, Master McCallum
5. *Idzior v. Stephens*, 2006 BCSC 401, Master Taylor

The above decisions all deal with the condition imposed by Beames J. in *Inhoff v. Irwin*, 2005 BCSC 280 on a Rule 30 application by the defendant that the defendant reduce the doctor's opinion to writing and provide it to the plaintiff.

In *Kelln* and *Morey*, Master Bishop considered himself bound by *Inhoff* and imposed conditions on the defendants that they must obtain reports from each of the doctors conducting the examinations containing the history taken from the plaintiffs; the doctors' observations and findings; and the doctors' opinion or opinions with regard to the plaintiffs' condition and that they must deliver such reports to the plaintiffs.

An appeal of both orders to Brooke J. was dismissed (2005 BCSC 280). Brooke J. concluded that Master Bishop was clearly not wrong in following the decision of a superior court.

The defendants were granted leave to appeal the decision of Brooke J. on October 31, 2005.

Three courts have since refused to follow *Inhoff*. In *Edgar v. Moore*, Stromberg-Stein J. was unable to reconcile *Inhoff* with the Court of Appeal decision in *Stainer v. Plaza* (2001), 87 B.C.L.R. (3d) 182. She states:

> [18] *Stainer v. Plaza*, along with many other cases, establishes the purpose of an independent medical examination is to put the parties on equal footing with respect to medical evidence. The requirement that a physician undertaking an independent medical examination prepare a report containing his opinion, and that the report be provided to the plaintiff, in light of the authorities, would be an infringement of the solicitor's brief and would tend to create an inequality between the parties.

Master McCallum, in *Elder v. Stewart et al.*, agreed with Stromberg-Stein J. He states:

> [8] Rule 30, the opportunity to put the parties on an equal footing or a level playing field as some of the authorities say, gives the defendants the right to have the plaintiff examined by their nominees, to receive the nominees' opinions in confidence at that stage and to decide whether they want to rely on those opinions or whether they want to pursue other areas of investigation. Once they make the decision they are going to rely on the opinions, then they have to disclose them in accordance with Rule 40A. Nothing the Court of Appeal said in *Stainer* suggests that the court meant to derogate from that principle.

In *Idzior v. Stephens*, Master Taylor refused to order such a condition. He agreed with the decision of Stromberg-Stein J. in *Edgar v. Moore* and her treatment of *Inhoff.*

XV. Rule 66: Fast Track

A. Keizer v. Radovanovic, 2005 BCSC 1241, District Registrar Sainty

District Registrar Sainty ruled that *no taxes are payable on costs awarded under Rule 66.* She agreed with defence counsel's submissions and concluded at para. 17:

> In my opinion, had the drafters of Rule 66 meant to include an additional amount for GST and PST in an award of costs under that Rule, they would have either included an amount in the Rule specifically, or provided for an additional provision under Rule 57(8.1) referring to an additional amount for tax to be included on an award of costs under that Rule.

B. Nicholson v. Pham et al., 2005 BCSC 1737, Fisher J.

Fisher J. agreed with Registrar Sainty in *Keizer, supra*, and held that GST and PST were not payable with respect to the fixed costs set out in Rule 66.

C. Kullar v. Kullar, 2006 BCSC 50, Wilson J.

Wilson J. felt bound by the principles set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) to follow *Nicholson, supra*, although he stated that if the issue had come before him as a matter of first instance, he would have held that Rule 57(8.1) applied to costs payable under Rule 66 and that amounts for GST and PST would be therefore payable. He concluded that it would appear appropriate that there be an amendment to the Rules to clarify that taxes payable on legal services are payable on costs awarded under Rule 66.

The plaintiff is seeking leave to appeal this decision.

D. Amiri v. Lee et al. (8 May 2005), Vancouver Registry No. M041115, Master Scarth

The plaintiff's statement of claim, alleging back injury, neck injury and depression, was not endorsed under Rule 66. The defendants subsequently delivered a jury notice and trial was estimated for five days. Following discovery of the plaintiff, which took less than half a day, the plaintiff amended her statement of claim to include a Rule 66 endorsement. The defendants applied to remove the action from Rule 66.

Master Scarth considered the following factors in concluding that the defendants had met the onus in their application to remove the action from Rule 66:

- the plaintiff's evidence at discovery was that her depression caused a complete change in her and interfered with her ability to work; her soft tissue injuries had not improved and had actually worsened;
- causation would be a significant issue at trial due to the plaintiff's similar pre-existing medical condition;
- the defence was in the process of seeking an engineering opinion and scheduling medical examinations by an orthopaedic surgeon and a psychiatrist.

Master Scarth agreed with defence counsel's submission that taking into account the defendants' plans to obtain further expert evidence in deciding whether the trial would go beyond two days was not mere speculation, but reasonable expectation based on information currently available and specifically the plaintiff's own evidence. She further held that the fact that the examination of the plaintiff took less than half a day, while a consideration, was not determinative of trial length. The issues before and after the examination for discovery remained the same.

XVI. Rule 68

A. Servos v. Insurance Corporation of British Columbia, 2005 BCSC 1423, Macaulay J.

This decision appears to be the first to consider Rule 68 in a personal injury action. The plaintiff applied for an order to transfer his action to Rule 68. The action had been commenced in 2002 and oral and documentary discovery was largely complete. The trial was set for two to three weeks before a jury. The defendant had retained several experts and intended to rely on their reports at trial.

The issue was whether the court retained discretion to override the lack of consent by the defendant and direct that actions not falling within subrule 68(2) be governed by Rule 68. Macaulay J. concluded that it did not. Rule 68 expressly requires the consent of the parties and the court's inherent jurisdiction does not extend to overriding the defendant's lack of consent in the absence of any procedural gaps.

Even if the court had such discretion, Macaulay J. would not have exercised it in the circumstances of this case. To transfer the action on the eve of trial would greatly prejudice the defendant. It would lose the opportunity to have the trial heard by a jury (subrule 14); would only be entitled as of right to rely on one expert (subrule 33); and would be required to disclose particulars of evidence it had until then chosen not to (subrule 31).

XVII. Section 25 Deduction

A. Sovani v. Jin et al., 2005 BCSC 1285, Neilson J.

One of the outstanding post-trial issues before Madam Justice Neilson was the deductibility of Part 7 benefits from an award for cost of future care pursuant to s. 25 of the *Insurance (Motor Vehicle) Act*.

Neilson J. agreed with defence counsel's arguments that the present value of approximately $150,000 worth of medical and rehabilitation benefits payable under s. 88 of the Regulations must be deducted from the plaintiff's award for cost of future care. In doing so, she established or confirmed the following principles in relation to s. 25:

- Section 25 constitutes a legislative mandatory framework; its general purpose is to shift responsibility for items covered by Part 7 from the tortfeasor to the no-fault insurer.

- On a s. 25 application, it is essential to recognize the distinction between the defendant/tortfeasor and ICBC. A denial by ICBC to pay Part 7 benefits will not deprive the tortfeasor of the ability to seek a s. 25 deduction. (In arriving at this conclusion, Madam Justice Neilson conceded that her previous decision in *Cole v. Smith*, 2002 BCSC 1896 was in error.)
- The test for deductibility under s. 25 is whether the plaintiff is "entitled or would have been entitled" to receive benefits. Deduction does not depend on the plaintiff actually receiving benefits. Issues between ICBC and the plaintiff over delivery of such benefits are not relevant considerations.
- A plaintiff cannot avoid a s. 25 deduction by offering to release ICBC to the extent of his or her claim for Part 7 benefits.
- The Court has no authority to direct ICBC to pay to the plaintiff the amount deducted from the tort award under s. 25.

It is not necessary for the court to match specific heads of damage under the tort award to specific benefits under Part 7. Neilson J. concluded that the Supreme Court of Canada in *Gurniak v. Nordquist*, [2003] 2 S.C.R. 652 has given clear direction that the matching requirement is no longer the law.

B. St. Germain v. Pacific Cutting & Coring Ltd. et al., 2006 BCSC 56, Ralph J.

After trial the defendants sought to deduct from the plaintiff's award for cost of future care an amount payable to the plaintiff under a plan of automobile insurance wherever issued or in effect pursuant to s. 25 of the *Insurance (Motor Vehicle) Act*. The plaintiff had been a passenger in an automobile insured by Allianz Insurance Company of Canada ("Allianz") when it was involved in an accident in B.C. with an ICBC-insured vehicle.

Allianz initially paid benefits to the plaintiff, but subsequently terminated them. The plaintiff then submitted her accident-related expenses to her private insurance carrier. Allianz was, by virtue of its being licensed under the *Financial Institutions Act*, R.S.B.C. 1996, c. 141, obliged to pay medical and rehabilitation benefits up to a limit of $150,000, regardless of the limits set out in its policy. It was the plaintiff's position that s. 88(6) of the Regulations placed Allianz in the position as secondary insurer and was therefore not liable for expenses paid by the plaintiff's private insurer.

McEwan J. rejected this argument. Section 25 does not require that the insured be entitled to receive benefits under a plan of automobile insurance before deductions are made. He states:

> [19] The benefits to which the insured is entitled are defined in Part 7 of the Regulation including s. 88. The fact that s. 88(6) exempts ICBC (or Allianz by extension) from covering these benefits where another insurance company is already paying for them does not lead to the conclusion that the benefits do not remain benefits for the purpose of s. 25 deductions. Section 88(6) does not modify the definition of benefits articulated in ss. 88(1) and (2).

XVIII. Adverse Inference

A. Djukic v. Hahn, 2006 BCSC 154, Josephson J.

Mr. Justice Josephson refused to draw an adverse inference from the plaintiff's failure to call certain treating physicians for the following reasons:

- Both parties had produced a volume of medical evidence from a number of doctors;

- The complete clinical records from the physicians were disclosed to the defence;
- The records were considered and subsumed in the opinions of the doctors whose reports were before the court;
- The defence, having the records, could interview and call the doctors as their witnesses; and
- The plaintiff no longer consulted these doctors on a regular basis.

XIX. Workers' Compensation Appeal Tribunal

A. Hommel v. Cooke and Hori (18 October 2005), WCAT Decision Number: WCAT-2005-05495

In *Hommel v. Cooke and Hori*, 2005 BCSC 658, Wedge J. affirmed a master's order granting a stay of proceedings in the Supreme Court action pending a s. 257 determination by the Workers' Compensation Appeal Tribunal of the plaintiff's status as a worker at the time of the accident. The stay effectively precluded the defendants from conducting an examination for discovery of the plaintiff and compelling the production of banking records so as to gather evidence of the plaintiff's status for use at the WCAT hearing.

The decision in *Hommel* created uncertainty as to the extent to which the inability to gather such evidence would impede the WCAT hearing. The subsequent ruling by WCAT has provided confirmation that in the event document disclosure and oral examination are unavailable in the underlying court action, similar procedures are available to the parties in the WCAT proceeding.

Vice Chair Herb Morton pointed out that most applications under s. 257 of the *Workers Compensation Act* include the provision of complete discovery transcripts obtained during the course of the civil action and that there were obvious efficiencies in this practice. He states further:

> Under section 246(2)(f), WCAT may require the pre-hearing examination of a party on oath. Accordingly, in the event that an examination for discovery in the legal action is not available, a party may ask WCAT for an order requiring another party to be examined regarding matters relevant to the section 257 determination. Where discovery in the legal action is not available, it may well be desirable that WCAT give liberal consideration to such requests (particularly where the request for discovery is made early in the process with a view to obtaining evidence prior to the provision of written submissions). There are obvious efficiencies for WCAT in having such evidence provided by the parties. It is evident from section 234(2)(d) and (f), that the 'efficient and cost effective conduct of the appeals,' and the 'effective operation of the appeal tribunal,' are values endorsed by the legislature.

XX. Insurance Issues

A. Milner v. Manufacturers Life Insurance Company, 2005 BCSC 1661, Melnick J.

In addition to her claim for entitlement to long term disability benefits, the plaintiff sought aggravated damages for the manner in which the defendant insurer had dealt with her, including its video surveillance of her and her family. She also claimed damages for breach of privacy with respect to the video surveillance pursuant to the *Privacy Act*.

The defendant had hired private investigators to conduct video surveillance of the plaintiff. The most contentious video was of the plaintiff, her daughter and daughter's friend taken at night through the

window of her home. The interior of the house was well-lit, and the people inside the house were clearly visible to anyone passing by. Another video was taken of the plaintiff's two young sons playing soccer in front of the house.

With respect to the claim for aggravated damages, Melnick J. was not convinced that the plaintiff had suffered any or sufficient emotional injury as a result of viewing the video surveillance to justify such an award.

With respect to the breach of privacy, Melnick J. articulated the issues before him as:

1. Was the plaintiff and her family entitled to privacy?
2. If they were entitled to privacy, did the videotaped surveillance breach their privacy.

Melnick J. considered that while the plaintiff's expectation of privacy may legitimately be higher while in her house, she had been clearly visible from outside her house. She ought to have reasonably known that the defendant was investigating her claim and that video surveillance may be used. Her entitlement to privacy was low. Furthermore, the defendant had a lawful interest in conducting video surveillance (s. 1(2) of the *Privacy Act*), given the nature of the plaintiff's claim and the credibility issues her conduct raised. Weighing that lawful interest against the plaintiff's reasonable expectation of privacy led the Court to the conclusion that the plaintiff was not entitled to an expectation of privacy in the circumstances. Even if he had found that she was entitled to privacy, having regard to the nature, incidence and occasion of the investigator's conduct (s. 1(3) of the *Privacy Act*) her privacy was not violated.

The videotape of the plaintiff's sons was not a violation of their privacy. As they were in a public place, they had no reasonable expectation of privacy.

Melnick J. found that the videotaped surveillance of the daughter was a breach of her privacy. However, she was not a party to the action and therefore not entitled to damages. He would have awarded her $500 if she was entitled to damages.

XXI. Harrassment

A. Sulz v. Canada (Attorney General), 2006 BCSC 99, Lamperson J.

The plaintiff, an ex-RCMP member, successfully sued her former employers for harassment including recovering $600,000 for diminished capacity to earn income as a consequence of having become medically unemployable as result of depression.

XXII. Sexual Assault

A. T.O. v. J.H.O., 2006 BCSC 560, Stromberg-Stein J.

This case involved the sexual abuse of a six year old boy by his 10 year old brother. Stromberg-Stein J., applied the criminal age of consent to the civil tort of sexual battery and awarded the plaintiff $40,000 for damages.

XXIII. Legislation

A. Rules of Court

1. Rule 68, Expedited Litigation Project

Rule 68 creates streamlined litigation for cases less than $100,000 excluding costs and interest. The Rule is a pilot project implemented in four registries: Vancouver, Victoria, Prince George and Nelson. Its features include:

- limited to trial by judge alone;
- earlier exchange of documentation production;
- discovery limited to where there is consent by the parties, or by court order and limited to two hours;
- interlocutory applications held only after a case management conference;
- parties limited to one expert witness at trial and one expert to rebut an adverse parties' expert;
- mandatory case management conferences at which orders directed to the streamlining of the conduct of trial can be made including limiting time limits for evidence, opening and closing statements, making admissions, ordering evidence by affidavit; and
- exchange of comprehensive trial briefs.

B. Practice Directions

1. Request to Appear Back Before a Specific Judge/Master

Commencing January 1, 2006 any party requesting to appear back before a specific judge or master should complete a form which can be found on the Supreme Court website.

2. Correspondence with the Court

This Practice Direction is in response to increasing inappropriate communication directly with the court and sets out the practice that should be followed. It makes it very clear that there should only be communication directly with the court in exceptional circumstances. Any communication must be through the Trial Coordinator and only after counsel have conferred with other counsel or interested parties.

C. Small Claims Act

Effective September 1, 2005 The Small Claims limit increased from $10,000 to $25,000 and claimants may pursue claims against the government.

Rule 7.3 now provides for a notice to mediate option for claims over $10,000 in personal injury actions.

D. Small Claims Notice to the Profession

By Small Claims Notice dated February 2, 2006, Chief Judge Stansfield gave notice that any claim over $10,000 will have a 1 hour and 15 minute judge led settlement conference. Any case estimated to require more than ½ day for trial will now also require a trial preparation settlement conference after any unsuccessful settlement conference. Orders can be made at the settlement conferences requiring statement of fact, will say statements, documents and reports to be brought to the trial preparation settlement conference. The trial preparation settlement conference will also address the trial time.