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PAPER 1.1

Update on Case Law and Legislation

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UPDATE ON CASE LAW AND LEGISLATION

I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference held June 2007. Some case summaries have been published in ICBC's quarterly publication, *The Defence*.

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

II. Administrative Law

A. Tepei v. Insurance Corporation of British Columbia, 2007 BCSC 1694, Cullen J.

An arbitrator was appointed to determine entitlement to and quantum of benefits under UMP. The arbitrator had signed a document of independence and impartiality. After some preliminary rulings against the petitioner, the petitioner learned that the arbitrator and his firm had an ongoing contractual and financial relationship with ICBC, which had not been disclosed. The arbitrator declined to remove himself and a petition to do so was allowed. Although there was no evidence of actual bias, the nature and extent of the arbitrator's relationship with ICBC and the petitioner's incomplete knowledge and understanding regarding that relationship, supported the arbitrator's removal. The fact that the relationship was not confidential to the public did not detract from the issue that a reasonable apprehension of bias was inherent in the relationship.

III. Causation

A. Taylor v. Liong, 2008 BCSC 242, Cullen J.

The only issue in this Rule 18A application was whether the plaintiff could prove, on a balance of probabilities, that trauma can make multiple sclerosis ("MS") symptomatic or otherwise alter the natural course of the disease. Following a thorough analysis of the expert evidence tendered by the parties as well as the law relating to causation, Cullen J. concluded that she failed to do so.

The plaintiff was involved in a motor vehicle accident in May 1998 in which she incurred soft tissue injuries to her right hand, arm and shoulder and low back. She was diagnosed four months later with MS which, according to her medical specialists, had developed some years prior to the accident.

The issue before Cullen J. was not whether the plaintiff's MS symptoms were triggered or exacerbated by the accident, but rather the more fundamental legal question of whether the evidence adduced proved on a balance of probabilities that trauma, including mild head trauma or whiplash, is capable of triggering or exacerbating MS symptoms.

Cullen J. clearly articulated that in deciding the issue, it was not his role to definitively solve the decades old scientific debate with respect to trauma and MS.

He undertook a thorough examination of the evidence forming both sides of the debate, including the "biological plausibility" of the plaintiff's experts' theory, their clinical experience and various studies conducted by experts in the field during the past several decades.

He was assisted by the 1998 decision of *Dingley v. The Chief Constable, Strathclyde Police*[1] in which Lord Rodger considered the same issue and similar expert evidence and concluded, after examining and weighing the evidence, that the plaintiff had not proved on a balance of probabilities that "trauma in general, or whiplash injury in particular, can trigger the onset of symptomatic MS."

Cullen J. came to the same conclusion:

> [115] In a similar vein, the question before me of whether trauma, including mild head trauma or whiplash injury, can cause the exacerbation of MS symptoms, was the precise question before the court in *Dingley*, *supra*. As did the Lord President and the House of Lords in that case, I conclude that the plaintiff has not proved on a balance of probabilities that such a causal connection exists.
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> [116] My conclusion is neither intended to nor capable of resolving any lingering scientific debate on the effect of trauma on MS. My reference to and reliance on the scientific evidence in this case, as I expressed in my ruling on admissibility, is necessary to understand whether the plaintiff's MS exacerbation could fall within the scope of the risk of injury to which the defendants' tortious behaviour exposed her.
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> [117] In finding that the evidence falls short of establishing a causal link on a balance of probabilities, I also rely on the fact that a substantial majority of the relevant scientific community has rejected the notion of a causal connection based on developments in understanding the pathogenesis of the disease, epidemiological studies, reanalysis of previous studies said to support the link, and a weakening of the biological plausibility of the theory through studies such as the *Werring Study* and the *Filippi Study*. In the result, I have an advantage over the court in *Dingley*, *supra*, in knowing what the future held for the issue in the scientific community in the years following that judgment.
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> ...

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1 [1998] Sess. Cas. (C.S.I.H.) 548 (Scot.).

> [122] I find that the likelihood of a causal connection between trauma and MS exacerbation is significantly less than that of a coincidental connection, in light of all the evidence adduced, and the opinion of a substantial majority of the scientific community.
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> [123] I thus conclude that even on a robust and pragmatic view of the evidence, it does not support proof of a causal connection between mild trauma, including whiplash, and MS exacerbation, on a balance of probabilities.

B. Farrant v. Laktin, 2008 BCSC 234, Slade J.

These Reasons provide a very thoughtful analysis of the "but for" and "material contribution" tests for causation recently revisited by the Supreme Court of Canada in *Resurfice v. Hanke*[2] as well as a rejection of the temporal connection test for causation.

The plaintiff, a 53-year-old Home Depot employee, had an extensive history of low back pain, including surgery and two work-related injuries and was minimally symptomatic at the time of the motor vehicle accident. He felt immediate low back pain after the accident. His symptoms gradually improved, but then worsened significantly to the point where he became unable to work, claiming permanent disability. At the time of his accident, he was in the process of transferring to a new store where his duties would eventually involve more labour-intensive work.

The plaintiff's general practitioner placed primary reliance for the plaintiff's condition on the temporal relationship between the accident and the onset of back pain. His expert, Dr. Christian, opined that the injury suffered in the accident, superimposed on his pre-existing condition, affected his central nervous system with the result that he developed chronic pain. It was the opinion of the defence expert, Dr. McGraw, that the accident had escalated the plaintiff's pain symptoms for a few months after the accident, but had not altered his pre-existing degenerative condition. His worsening condition could be attributable to the effect of his increased exertion, as required in his new job, on his degenerative disc disease. He was unfamiliar with Dr. Christian's theory of causation.

The conflict in the medical evidence impelled Slade J. to consider whether it was impossible for the plaintiff to prove that "but for" the defendant's negligence, the plaintiff would not have suffered an injury such that resort to the "material contribution" test was required. He concluded, however, that the plaintiff could not rely on the material contribution test (an ostensibly lower standard) merely because his medical experts were in conflict with each other and with the defendant's expert and because his expert, Dr. Christian, testified that his theory was not well understood. He did not accept his general practitioner's reliance on a temporal connection between the accident and his back pain. Dr. McGraw's opinion was the only opinion that took into account the plaintiff's post-accident improvement and subsequent worsening of his condition. He held that the evidence supported a finding that the plaintiff suffered soft tissue injuries as a result of the accident which resolved within four months. He awarded him non-pecuniary damages in the sum of $20,000.

C. Deo v. Wong, 2008 BCSC 110, per Low JA (Lowry and Chiasson, JJA concurring)

The plaintiff was awarded $30,000 in non-pecuniary damages for soft tissue injuries to his neck and back and a knee injury which required surgery, $5,000 for past wage loss and $1,150 for special damages for a total award of $36,650.

The plaintiff's grounds of appeal were that the award for non-pecuniary damages was inordinately low and that the trial judge erred in failing to find that the plaintiff's second knee problem was attributable

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2 2007 SCC 7, [2007] 1 S.C.R. 333.

to the accident (he suffered further problems subsequent to his surgery) and in failing to award damages for loss of future earning capacity. The defendant cross-appealed, asserting that the trial judge erred in finding that the plaintiff's first knee problem (a meniscal tear) was proven to be casually connected to the motor vehicle accident.

The Court heard the cross-appeal first and ruled that the evidence with respect to the knee injury was incapable of satisfying the "but for" test set out in *Athey v. Leonati*. Nor was the Supreme Court of Canada decision in *Snell v. Farrell* able to assist the plaintiff in plugging holes in his evidence:

> [19] The plaintiff relies on *Snell v. Farrell*, [1990] 2 S.C.R. 311, at para. 34, for application of the statement of the law that the trier of fact may draw an inference of causation from proven facts without being assisted by medical certainty, using the 'robust and pragmatic' approach to causation stated by Lord Bridge in *Wilsher v. Essex Area Health Authority*, [1988] 1 All E.R. 871, [1988] 2 W.L.R. 557 (H.L.). *Snell*, however, does not stand for the proposition that the plaintiff need only prove a sequence of events to prove causation. Nor does it relieve the plaintiff of the need to provide medical opinion evidence on the issue when, as here, such an opinion is clearly needed to establish possible causes of the injury in question. All the plaintiff proved was that the accident occurred on 21 April 1999 with no manifestation of an injury to the knee; that he had one incident of knee pain more than two months later; that he did not complain of knee pain during numerous subsequent visits to his doctor and to the physiotherapist; that his first complaint of knee pain to his doctor was on 21 October 1999, exactly six months after the accident; and that the diagnosis and treatment of the meniscal tear occurred in November. More evidence was needed of a causal link between the accident and the first knee injury.

In light of its finding on the cross-appeal, the Court could find no basis to overturn the judge's findings with respect to the second knee problem, the award of non-pecuniary damages or the claim for loss of future earning capacity. It reduced the plaintiff's overall award by $7,000 to accord with its conclusion regarding causation for the first knee injury.

D. Gilmour v. Machibroda et al., 2008 BCSC 260, Allan J.

The causation issue in this case turned into a battle of the experts over the cause of the development of chronic low back pain in a healthy 24-year-old plaintiff. The plaintiff's expert was of the opinion that the motor vehicle accident caused a compression fracture and disc herniation. The defendant's experts, a radiologist and an orthopaedic surgeon, held the consistent opinion that the plaintiff's ongoing symptoms were caused by a congenital or developmental anomaly at L2 which was rendered symptomatic by the accident. The plaintiff's disc protrusion would have become symptomatic regardless of the accident. At any time during the five years since the accident, the plaintiff's symptoms could have been caused by a slip, a fall, a jolt, a bending episode or an impact activity.

Allan J. accepted the opinion of the defence experts and concluded that the plaintiff's pre-existing condition was inherent in his "original position." The defendants were only responsible for the additional soft tissue damage. His pre-existing condition would have detrimentally affected him in the future regardless of the defendant's negligence. She awarded the plaintiff $45,000 in non-pecuniary damages for moderate soft tissue injuries and nothing for loss of income earning capacity.

E. Penland v. Lofting, 2008 BCSC 507, MacKenzie J.

The two principle issues in this case were whether the plaintiff's pre-existing osteoarthritis rendered her a "crumbling skull" such that her damages should be reduced and whether she had proved a loss of future earning capacity.

The defence conceded that there was no evidence of a progressive degenerative condition, but asked the court to take judicial notice that osteoarthritis is degenerative and progressive.

Allan J. reviewed the leading Supreme Court of Canada decisions, *R. v. Spence*, 2005 SCC 71 and *R. v. Find*, 2001 SCC 32, on the issue of judicial notice and concluded that the issue before her did not meet the strict test for judicial notice. That osteoarthritis is a progressive and degenerative disease is neither "so notorious or generally accepted as not to be the subject of debate among reasonable persons," nor is it "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy." Such a finding is the subject of medical expertise which requires evidence.

She concluded further that, even though she could not apply the crumbling skull doctrine to reduce the plaintiff's damages, the plaintiff's soft tissue injuries were not as severe as she indicated because, based on the evidence adduced, her symptoms would improve with exercise. Allan J. was not persuaded that the plaintiff would not substantially recover to at least her pre-accident condition.

She awarded the plaintiff $30,000 in non-pecuniary damages.

The Court held, on the basis of the leading cases, that there was no evidentiary foundation for an award for loss of earning capacity. The plaintiff failed to satisfy any of the criteria set out in *Brown v. Golaiy* (1997), 26 B.C.L.R. (3d) 353 (S.C.). She earned more and worked more hours at her current job than she did at the job she was forced to leave because of her injuries. Nor was there sufficient evidence to prove any permanent partial disability, or that there was a substantial possibility that her ability to earn future income was diminished.

F. Jacobs v. McLaughlin, 2008 BCSC 483, Metzger J.

The plaintiff was involved in three motor vehicle accidents during a three-year period, incurring soft tissue injuries in each one. Approximately five months after the first accident, she was diagnosed with multiple sclerosis ("MS"). Although she pleaded in her Statement of Claim that her underlying MS condition was aggravated by the trauma and stress resulting from the accidents, she abandoned this position on the first day of trial. She continued to assert, however, the concept of "a synergistic or compounding effect" of the MS on her soft tissue injuries. She sought global damages in the amount of $223,550.

After a thorough review of the evidence of lay and expert witnesses, Metzger J. concluded that the plaintiff suffered nothing more than soft tissue injuries in the three motor vehicle accidents. Her expert witness on the issue of the effect of the injuries on her MS was Dr. Devonshire, a neurologist and the director of the UBC MS clinic. She expressed the opinion that soft tissue injuries can cause a worsening of the functioning of a person with MS and that such was likely the case for the plaintiff. Metzger J. found, however, that this opinion was based on one episode during her treatment of the plaintiff where she complained of "doing a little bit poorly" and this episode was as much connected with the impact of a chemotherapy session as it was to her soft tissue injury complaints. There was therefore insufficient evidence to support the plaintiff's contention that she suffered a compounding effect between her MS and the soft tissue injuries caused by any of the accidents.

Metzger J. made the following further findings of fact:

- The first accident caused a minor whiplash injury which resolved within five months. She suffered no loss of income during this time nor did she adduce any evidence to support claims for cost of future care or impairment of earning capacity.
- The plaintiff had completely recovered from the effects of the first accident when the second accident occurred. Fifteen months later, she suffered a relapse in her MS symptoms which completely and continuously disabled her. The maximum duration of the soft tissue injuries from the second accident was the time between the accident and her MS relapse, which "overwhelmed all other concerns." There was no evidence upon which to base any awards for past or future loss of earning capacity or cost of future care.

- The third accident involved a speed of 3 km/h and was trivial. Whatever aggravation of her soft tissue injuries she suffered was resolved within two weeks.

Metzger J. distinguished the case before him from the Court of Appeal decision in *Hutchings v. Dow*, 2007 BCCA 148, where there was a combination of two or more tortuous causes insufficient in themselves but necessary together to create an indivisible harm. Nor was *Athey v. Leonati*, [1996] 3 S.C.R. 458 applicable. The facts before him supported only discrete, time limited soft tissue injuries. The only truly separate cause of injury and loss was the plaintiff's MS condition which was part of her "original position" and was not initiated, aggravated or accelerated by the motor vehicle accidents. He awarded her non-pecuniary damages of $8,500, $23,500 and $1,500 respectively, and awarded global special damages of $2,616.

(CAUSATION - MEDICAL NEGLIGENCE)

There are two BCCA decisions on causation in the context of medical malpractice litigation of interest:

G. Bohun v. Segal, 2008 BCCA 23, per Kirkpatrick JA (Frankel and Tysoe JJA concurring)

This was an appeal from the finding of liability against a physician for the negligent delayed diagnosis of cancer. The issue was whether the trial judge had erred by adopting the material contribution test of causation. The delay had decreased the plaintiff's chances of survival. The plaintiff had not been able to prove that the cancer had metastasized before or after she first sought medical attention from the defendant and so the trial judge adopted the "material contribution" test of causation and found in the plaintiff's favour. The appeal was allowed on the basis that the plaintiff had to prove that it was more probable than not that a proper and timely diagnosis would have prevented her loss (i.e., allowed her to live longer had the physician not been negligent). It was not enough to show that the delay had increased the likelihood of damage and may have caused it. It was not open for the trial judge to consider the material contribution test as there was unique and highly accurate medical evidence that provided a sufficient and appropriate basis for a "but for" analysis (i.e., the evidence was that the delay resulted in a 20% increase in the relative risk of death and therefore represented a causation probability of 20%).

H. Seatle (Guardian ad litem of) et al. v. Purvis et al., 2007 BCCA 349, per Kirkpatrick JA (Newbury and McKenzie, JJA concurring)

The infant plaintiff suffered cerebral palsy caused by asphyxia. He had been delivered by a vacuum device but the delivery was delayed by a complication known as "shoulder dystocia" which caused the asphyxia. The plaintiff alleged that the defendants were negligent for failing to anticipate the shoulder dystocia and consult with an obstetrician earlier. The trial judge found that there was insufficient evidence from which negligence could be inferred (i.e., that excessive traction was applied when using the vacuum device). The plaintiff failed to prove the doctor's breach of duty caused the injuries. The plaintiff argued that the trial judge did not require expert evidence to determine causation but should have drawn a common sense inference that had the doctor met the requisite standard of care, injury would have avoided or diminished. The appeal was dismissed.

IV. Costs

A. Phelan v. Newcombe, 2007 BCSC 714, Registrar Blok

The plaintiff claimed as disbursements in her bill of costs five MRI scans in the amount of $6,405. The plaintiff alleged she suffered a head injury as a result of the accident. An X-ray and a CT scan of the plaintiff's skull taken shortly after the accident revealed no matters of concern. Plaintiff's counsel advised he ordered the MRI scans based on the advice set out in an article in the September 2005 edition of *BC Medical Journal*.

Registrar Blok disallowed the MRIs. He found that the article was expressed so broadly that MRIs would be considered necessary and reasonable as a disbursement in virtually every personal injury case. This sort of blanket approach was rejected by Registrar Blok in an earlier decision, *Ward v. W.S. Leasing et al.*, 2007 BCSC 877. He adds:

> [17] I should add that the mere fact that a physician has recommended that an MRI scan be done will not guarantee its recovery as a disbursement. For the most part, diagnostic imaging will be a medical matter (and any private medical costs would fall under special damages) and its role as an aid in litigation will be relatively narrow.

B. Bakker v. Nahanee, 2008 BCCA 12, Prowse JA (In Chambers)

This decision illustrates that it is open to the court to order the plaintiff to pay the costs of non-liable defendants forthwith, even where such costs are substantial and judgment has yet to be obtained against the liable defendant.

The plaintiff brought an action for damages against the lessor, lessee and driver of a stolen vehicle. Following an examination for discovery of the defendant lessee and prior to a Rule 18A application for an order dismissing the action against the leasing company and lessee, the plaintiff agreed to dismiss the action against those defendants. The only issue at the Rule 18A application was costs. The chambers judge ordered the plaintiff to pay costs (of approximately $12,000) forthwith.

Madam Justice Prowse refused to grant the plaintiff leave to appeal. She did not consider that the appeal raised any question of general principle or any issue of general importance to the practice. There was little prospect of success. It was open to the chambers judge to exercise his discretion as he did.

C. Roeske v. Grady et al., 2008 BCSC 247, Slade J.

D. Roeske v. Brickwood Holdings Ltd., 2008 BCSC 248, Slade J.

After a 32-day trial, Slade J. held that the plaintiff suffered no more than soft tissue injuries arising from two motor vehicle accidents and awarded her $7,500 and $15,000 in respect of each action. The plaintiff called nine expert witnesses and the defence called five expert witnesses, all of whose evidence related solely to the plaintiff's claim that she suffered a mild traumatic brain injury in the two accidents. In earlier reasons,[3] Slade J. ruled that offers to settle in the amount of $50,000 delivered by the defendants in each action were invalid in that they were "global offers" made by defendants who were not joint tortfeasors. The defendants applied in this application for an order for costs pursuant to Rule 57(9).

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3 2007 BCSC 1037; 2007 BCSC 1038.

In succinct Reasons, Slade J. ruled that the matter was of more than ordinary difficulty and that the defendants were substantially successful in both actions. The defendants in the *Grady* action were awarded their costs at Scale 4 and the defendants in the *Brickwood* action were awarded costs at Scale 4 for 31 of 32 days of trial. The plaintiff was awarded costs of one day of trial, but was not entitled to any costs or disbursements relating to the claim of traumatic brain injury.

E. Clark v. Hebb November 29, 2007, Vancouver Registry No. M043416, Smith J.

The plaintiff alleged he suffered severe and disabling injuries such that he was very unlikely ever to be employable. Smith J. concluded, after a 14-day trial, that while the plaintiff established that the defendants were negligent and had caused the plaintiff to suffer a mild traumatic brain injury and soft tissue injuries, he had not proved that the effect of his injuries continued beyond two years following the accident. She awarded him non-pecuniary damages, income loss for two years, a modest sum for cost of future care and special damages.

At issue on the costs application was which party was entitled to costs and to what extent, given the plaintiff's conduct and the fact that he was "substantially successful" in recovering damages.

Smith J. balanced the plaintiff's success with his conduct. At para. 32 of her Reasons, she pointed out that although a significant portion of the trial related to his claim that he was permanently incapacitated, it was the defendants' position that he had suffered no brain injury at all. Therefore, it would have been necessary to call many of the same expert witnesses even if the plaintiff's claim "had been more realistic."

At para. 33, she states:

> There is no doubt, though, that the scope of the plaintiff's claim had the effect of lengthening the trial. In addition, I found that Mr. Clark seriously exaggerated his symptoms and that there was an element of willful deception in his conduct, as evidenced by the surveillance videotapes. My assessment is that there was also an element of self-deception and that, while he did consciously exaggerate his symptoms, Mr. Clark had come to believe he had suffered a serious injury.

She awarded the plaintiff 50% of his costs and disbursements.

F. McHardy v. Contois, 2008 BCSC 292, Crawford J.

Crawford J. unravels the somewhat tortured common law history of *Sanderson* and *Bullock* orders (now codified in Rule 37(18)) and clearly articulates the conditions under which each is applied in circumstances involving successful and unsuccessful defendants.

The plaintiffs were passengers in a van being driven by one of the defendants. The van was being used to transport a number of youths who had spent an evening partying at a bowling lane. The front seat passenger, who was inebriated, grabbed the steering wheel causing the van to crash. He was added as third party in the action. The only serious allegation of negligence against the driver was that, as the designated driver, she was under a duty of care to her passengers and should not have allowed the third party to sit in the front seat where he could interfere with her driving. The trial judge found that the third party passenger was solely at fault for the accident and dismissed the action against the defendant owner and driver.

On this costs application, the plaintiffs sought a *Sanderson* order against the successful defendants, which would result in the successful defendants having to recover their costs from the unsuccessful third party. The defendants opposed the application, seeking a *Bullock* order which required the plaintiff to pay their costs and add them to the costs payable by the unsuccessful third party, who took no part in the proceedings.

After embarking on what he called "an historical diversion," Crawford J. set out the following principles with respect to *Sanderson* and *Bullock* orders:

- The threshold question in considering these costs orders is: was it reasonable for the plaintiff to join both the successful and unsuccessful defendants in order that the matter be thoroughly threshed out?
- The reasonableness of the decision to add both parties is not necessarily to be judged from the perspective of plaintiff's counsel. A *Sanderson* order can apply in circumstances where the unsuccessful defendant blames the successful defendant or where the unsuccessful defendant acts in a manner to cause the successful defendant to be brought into the action.
- In the absence of special circumstances, a *Sanderson* order is not appropriate. The plaintiff, as the party which initiated proceedings, must bear the primary risk of meeting the costs of parties against whom it is eventually unsuccessful.
- The financial circumstances of the unsuccessful party may be a factor in choosing one or the other order.

On the application before him, Crawford J. concluded that a *Sanderson* order was not appropriate even though the plaintiffs met the threshold question of reasonableness in bringing the action against the parties. The claims against the defendant driver and passenger were inextricably connected with each other. Although the allegation of negligence against the driver was novel, it was not foreclosed as a potential tortious claim involving similar fact patterns.

However, it was known by everyone involved from the outset that it was the passenger's action of grabbing the steering which directly caused the accident. By failing to file an appearance, he did nothing to attract liability for the successful defendants' costs. The only real issue at trial was the liability of the driver. There was no evidence before Crawford J. of the unsuccessful defendant's ability to pay the costs. He concluded that a *Bullock* order was appropriate.

G. Hassell v. Chu et al., April 2, 2008, Vancouver Registry No. M063551, Pitfield J.

Following the settlement of his Rule 66 action, the plaintiff applied for an order for costs other than in accordance with the fixed costs provision in Rule 66(29). He argued that special circumstances warranted the court to depart from Rule 66(29). The special circumstances included:

- there was a disparity between the fixed costs, costs assessed according to the tariff and the legal costs he owed to his counsel;
- the defendants complicated the process by making two pre-trial applications for document production;
- the course of settlement discussions was protracted.

Pitfield J. concluded that no special circumstances existed such as to compel departing from Rule 66(29). Rule 66 was designed to facilitate the conduct of litigation on an expeditious basis at reasonable cost. The plaintiff invoked Rule 66 which provided him with the advantage of a reduced pre-trial process and precluded a jury trial. Issues with respect to the need for and extent of document production will arise and will need to be dealt with, regardless of the litigation path chosen. Finally, costs are not meant to be an indemnity for legal fees. He awarded costs to the plaintiff in the amount of $3,400 (the pre-trial portion of the fixed costs provision).

V. Damages

A. Ellis v. Star 2008, BCCA 164, per Mackenzie JA (Levine and Lowry, JJA concurring)

The defendant appealed the awards for future economic loss totalling $75,000 and for an in-trust claim of $3,500, pleaded as special damages, on the ground that they were not supported by the evidence.

The plaintiff, a police officer, suffered a fracture of the base of the fourth metacarpal in his right hand, which resulted in some limitation to movement of his wrist. His argument at trial was that his injury rendered him less confident in his ability to perform in special police squads to which he had aspired prior to the accident and would reduce his opportunities for post-retirement employment. Membership in these special squads usually resulted in increased overtime pay. The trial judge awarded him damages for "future tactical squad loss," "future callout loss," and "post-retirement income loss." The defendant contended that the medical evidence did not support a finding that the plaintiff's injury was occupationally disabling for tactical service, especially in light of the trial judge's comments in his reasons that he had exaggerated the extent of his physical injury.

The Court dismissed the appeal of the awards for future economic loss, finding that there was sufficient evidence for the trial judge to conclude that the psychological component of the plaintiff's injury played a significant part in his deciding not to join a tactical squad.

The trial judge awarded the plaintiff $3,500 for yard maintenance services performed by his wife. The Court of Appeal accepted the defendant's argument that in-trust awards should be confined to care or other support services provided to seriously injured plaintiffs beyond those services normally to be expected in a marital relationship to adjust for minimally debilitating injuries. In this case, the services provided by the plaintiff's wife did not rise to such level and the plaintiff's physical disability was of minimal significance in terms of routine yard work.

Although not an issue in the appeal, Mackenzie JA felt impelled to comment on the fact that the claim for the wife's services had been pleaded as special damages and not specifically pleaded as an in-trust claim. He stated that "good practice suggest that in future cases [an in-trust claim] ought properly to be pleaded."

VI. Defences

A. Middleton v. Morcke et al., 2007 BCSC 804, Stromberg-Stein J.

This case is of interest because of the significant deduction from the plaintiff's award of non-pecuniary damages for failure to mitigate. Stromberg-Stein J. found that, as a result of two motor vehicle accidents, the plaintiff suffered soft tissue injuries and developed depression, including a major depressive episode which prolonged her pain and symptoms. She was referred for treatment for her depression to a specialist "in psychosocial health" who prescribed a program of anti-depressant medication, bio-feedback and group therapy, all of which she eschewed, preferring to focus on her physical, not her psychological, complaints. She focused on her physical complaints by undergoing passive therapy instead of an active exercise program.

Madam Justice Stromberg-Stein concluded that the plaintiff failed to mitigate both her psychological and physical injuries.

With respect to the first, she stated:

> [49] I agree with the defendants' comment that this is a case of a patient thinking that she knows better than her health practitioners. In cross-examination

> when asked why she did not pursue group therapy and biofeedback, the plaintiff stated 'I didn't have time to do all that.' This response indicates that the plaintiff's priority was not her recovery.

With respect to the second, she stated:

> [54] The defendants submit that the plaintiff has failed to pursue an adequate, active exercise program. Instead, she has unreasonably relied almost exclusively on passive therapy modalities, such as prolotherapy, acupuncture and physiotherapy. The evidence adduced demonstrates the value of exercise to aid quick recovery for the plaintiff's type of injuries. In addition, exercise has a positive effect in alleviating the symptoms of depression. The medical evidence establishes there is an overlap between pain and depression; there is a connection between a person's mood and their perception of physical pain. For someone like the plaintiff, an exercise program is a key part of her recovery, not a recreational activity that she may discontinue if she does not find it enjoyable. The evidence establishes that the plaintiff put minimal effort, at best, into an exercise regime.

Stromberg-Stein J. assessed the plaintiff's non-pecuniary damages for both actions at $60,000 and then reduced that amount by 40% for failure to mitigate.

B. Fountain v. Katona, 2007 BCSC 441, Bruce J.

The plaintiff claimed he suffered injuries as a result of a motor vehicle accident which included concussion, whiplash and stiffness and pain in his lower back. He settled his injury claim with the adjuster four months later for the amount of $3,060, signing a release of all claims against the defendant and ICBC. He advised the adjuster the following day that he had changed his mind. He subsequently retained counsel to pursue his injury claim and brought a Rule 18A application challenging the enforceability of the release based on an unconscionable bargain. Medical evidence tendered at the application indicated that the plaintiff was a candidate for chronic pain.

Bruce J. was required to decide whether the plaintiff had established the two elements of an unconscionable bargain: the inequality of the bargaining positions and the unfairness of the settlement. She concluded that the plaintiff satisfied the first element but not the second.

The plaintiff was a 29-year-old musician who did not ordinarily reside in BC. The adjuster was very experienced and knowledgeable and had the resources of a large insurance corporation at her disposal. There was a disparity in their bargaining positions in terms of resources, knowledge, experience and information.

The settlement, however, was fair based on the medical and other evidence available to the adjuster at the time. The plaintiff did not disclose to the adjuster that he continued to experience symptoms, nor did he disclose to her the reason for his failure to seek treatment during the four months since the accident. While there were many facts unknown to the adjuster at the time of the settlement, these facts were known only to the plaintiff and not communicated to the adjuster.

Bruce J. concluded the following:

- an adjuster does not stand in the place of a claimant's legal counsel and has no duty to explain a claimant's legal rights with respect to claims for personal injury;
- the adjuster in this case did not discourage the plaintiff from retaining legal counsel;
- there was no evidence of overbearing conduct on the part of the adjuster nor was there any evidence that the plaintiff was pressured into settlement or that deadlines were imposed;
- it was the plaintiff's lack of attention to his injuries and their treatment that led to his decision to settle his claim.

C. British Columbia v. Zastowny, 2008 SCC 4, Rothstein J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

The issue before the Supreme Court of Canada was whether the doctrine of *ex turpi causa* applied to deny an individual the right to recover damages for lost wages while incarcerated.

The respondent, Zastowny, brought an action against a prison official and the Province for damages resulting from two sexual assaults while he was imprisoned in a correctional facility. It was established at trial that the assaults significantly exacerbated his substance abuse which led to criminal behaviour and further periods of incarceration. He was awarded general and aggravated damages as well as past and future wage loss. The award for past wage loss included compensation for his time spent in incarceration. The Court of Appeal reduced the award for past wage loss in order to compensate Zastowny only for the time he spent in prison after he became eligible for parole (on the basis that the sexual assaults had adversely affected his behaviour such that he was unable to secure early release) and reduced his future wage loss by 30% to reflect his high risk of recidivism.

The Supreme Court of Canada allowed the Province's appeal with respect to the award for past wage loss and dismissed Zastowny's appeal with respect to the award for loss of future income.

Rothstein J. confirmed that the doctrine of *ex turpi causa*, as clarified by the Supreme Court of Canada in the seminal case of *Hall v. Hebert*,[4] applied in this case to preserve the integrity of the legal system by precluding the respondent Zastowny from evading a penalty prescribed by the criminal law. He expands at para. 30:

> The judicial policy that underlies the *ex turpi* doctrine precludes damages for wage loss due to time spent in incarceration because it introduces an inconsistency in the fabric of the law that compromises the integrity of the justice system. In asking for damages for wage loss for time spent in prison, Zastowny is asking to be indemnified for the consequences of the commission of illegal acts for which he was found criminally responsible. Zastowny was punished for his illegal acts on the basis that he possessed sufficient *mens rea* to be held criminally responsible for them. He is personally responsible for his criminal acts and the consequences that flow from them. He cannot attribute them to others and evade or seek rebate of those consequences. As noted by Samuels J.A. in *State Rail*, to grant a civil remedy for any time spent in prison suggests that criminally sanctioned conduct of an individual can be attributed elsewhere ...

The Court also held that it was not unreasonable for the Court of Appeal to conclude that the award for future wage loss had to be reduced in order to reflect the likelihood of Zastowny being sent back to prison.

D. Joe v. Paradis, 2008 BCCA 57, per Mackenzie JA (Donald and Frankel, JJA concurring)

The Court of Appeal has firmly closed the door to the defence of voluntary assumption of risk (the "volenti" defence) in actions involving allegations of negligence.

The plaintiff appealed a jury verdict dismissing his action against the driver of a vehicle in which he was a passenger and which was involved in a single-vehicle accident.

Prior to the accident, the plaintiff and defendant had been engaged together in a lengthy drinking session. Although the judge was reluctant to do so, he felt he had no choice but to put the issue of the plaintiff's voluntary assumption of risk to the jury. One of the plaintiff's grounds of appeal was that the judge erred in leaving the defence to the jury in the absence of evidence to support it.

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4 [1993] 2 S.C.R. 159.

The Court of Appeal confirmed that in order to constitute a defence there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action in negligence. The error to which the trial judge fell, in his charge to the jury, was to confuse the plaintiff's acceptance of the risk of physical harm with an acceptance of the legal risk. There was no evidence supporting an agreement, either express or implied, that the plaintiff absolved the defendant from legal liability for negligent driving. According to Mackenzie JA, "[i]nterjecting the volenti defence short circuits the process and invites the jury to use the defence as a subterfuge to assign all responsibility for the accident to [the plaintiff] notwithstanding that the theoretical basis of the doctrine, an implied agreement to waive legal liability, may be unsupported by the evidence."

The modern approach is to use the *Negligence Act* to apportion fault as between the tortfeasor and the injured person whose conduct contributed to his injuries.

The Court ordered a new trial.

E. Taggart v. Yuan et al., January 11, 2008, Vancouver Registry No. M062358, Slade J.

Slade J. applied a deduction of 30% reduction to the plaintiff's awards for non-pecuniary damages, loss of earning capacity and loss of housekeeping capacity due to her failure to mitigate her damages. The plaintiff, who suffered whiplash-type injuries, had engaged in various treatment modalities recommended by her family physician soon after the accident, but failed in the years since to follow advice to undertake a regular exercise regimen. The evidence of her medical expert, a rheumatologist, was that the likelihood of improvement in her condition at the time of trial was at best ten percent. He conceded on cross-examination that there was an 80% probability that she would recover over a period of several years with appropriate exercise.

F. Nguyen v. Johnson, 2008 BCCA 218, per Rowles JA (Prowse and Kirkpatrick, JJA concurring)

The Court of Appeal has reaffirmed that payments made in respect of a cause of action can only be a confirmation of the cause of action under s. 5(2)(a)(ii) of the *Limitation Act* if the payment was made to the person with the cause of action or to a person through whom the person claims (s. 5(6)). As well, carefully worded letters to plaintiff's counsel which do not acknowledge liability for a cause of action (as opposed to acknowledging the existence of a cause of action) will not extend the limitation period.

The plaintiff was driving her husband's leased vehicle when she was involved in an accident. She did not advise ICBC of her injury claim for nine months. Meanwhile, ICBC paid for the repairs to the vehicle and for a rental vehicle and eventually reimbursed the deductible to the husband. The Court of Appeal confirmed that the plaintiff had no property interest in the vehicle. It was irrelevant that she was, by definition, an insured while driving her husband's vehicle with his consent. Only her husband had the right to pursue a cause of action for property damage against the other driver. Her only cause of action arising from the accident was for personal injury against the other driver. Since the payments were not made to her, or to a person through whom she claimed, they did not extend the limitation period.

The adjuster's letter to plaintiff's counsel was not fully set out in the reasons, but the trial judge had held that it was an unequivocal denial of liability. The letter stated:

- that no payment by ICBC to a doctor shall be construed as confirming the cause of action;
- it was normal corporate practice not to pay for medical reports resulting from plaintiff's counsel's referral until the claim was finalized;

- causation was an issue because of the length of time it took for the plaintiff to report her injury to ICBC;
- "I look forward to working with you to resolve this issue."

The BCCA agreed with the trial judge that the letter, when viewed objectively, could not be taken to be a confirmation of the cause of action. It contained neither an admission of liability nor did it make any reference to settlement.

VII. Disability Insurance

A. Gibbens v. Co-operators Life Insurance, 2008 BCCA 153, per Newbury JA (Frankel JA concurring and separate concurring reasons by Saunders JA)

The plaintiff, a beneficiary under a group disability policy, was infected by Type 2 Herpes simplex virus as a result of unprotected sex with three women. He did not know any of the women to suffer Herpes. The Herpes led to a virus, transverse myelitis, that inflamed his spinal cord and rendered him a paraplegic. The subject policy provided for a $200,000 payment if the plaintiff furnished proof of paraplegia resulting directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means, without negligence on the plaintiff's part.

The trial judge applied the Supreme Court of Canada decision in *Martin v. American International Assurance Life Co.*, 2003 SCC 16 and the "expectation test" concluding that the paraplegia was "accidental" because the plaintiff had not expected such a consequence from unprotected sex. On appeal the insurer argued that the "expectation test" should only apply to where there is doubt as to whether the insured intended death or injury and not due to disease or other natural causes. Of equal importance to the insured's expectation is whether the injury is accidental or due to accident in the ordinary meaning of the words. Accident did not normally refer to an illness or an unexpected but totally natural event. Normally some unexpected mishap or external factor is present. Here the plaintiff's transverse myelitis did not arise naturally but from an external factor or an unlooked-for mishap and should be regarded as accidental. Alternatively, if the expectation test was determinative the plaintiff had not expected to become paralyzed.

VIII. Implied Undertaking Rule

A. Juman v. Doucette, 2008 SCC 8, per Binnie J. (McLachlin C.J., and Bastarache, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. Concurring)

The Supreme Court of Canada handed down its ruling in *Juman v. Doucette* on March 6, 2008. The case involved an application by a party to a civil action to prevent the Vancouver police from getting access to discovery information that might tend to incriminate her. In its decision, the Court goes well beyond the narrow issues raised by the case and discusses the implied undertaking of confidentiality in general.

The intent of the implied undertaking, according to Binnie J., is to encourage full disclosure in civil proceedings even where that disclosure might tend to incriminate the party. To achieve that goal, there must be a near absolute prohibition against any use of material generated through the discovery process, or as Binnie J. states, "[T]he law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature)" (emphasis in original).

The Court suggests a range of possible remedies for a breach of the implied undertaking: a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings.

The Court acknowledges that there may be some situations where disclosure is appropriate, but states that the party wanting to use the discovery material must first apply to the court for an order varying or setting aside the undertaking.

Binnie J. provided a non-exhaustive list of such exceptions:

- statutory exceptions;
- public safety concerns;
- impeaching inconsistent testimony;
- disclosure of criminal conduct.

Such an application will require a balancing of interests: the party bringing the application will have to demonstrate the existence of a public interest of greater weight than privacy and the efficient conduct of civil litigation. Undertakings should only be set aside in exceptional circumstances. Binnie J. provided some guidance to the exercise of the court's discretion:

- where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted;
- leave will not be granted where the use of the material is for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceedings in which discovery was obtained in the absence of some compelling public interest;
- the undertaking survives the resolution of the litigation, unless the answers or documents obtained on discovery are incorporated as part of the court record at trial, in which case it is spent.

IX. Insurance Issues

A. Godara v. ICBC, 2008 BCSC 183, Russell J.

The plaintiff sought a declaration against ICBC that he was entitled to past and continued payments pursuant to Part 7 of the Insurance (Vehicle) Act Regulation. He also sought damages for mental distress arising from ICBC's denial of benefits, citing *Fidler v. Sun Life Assurance Co. of Canada*, [2006] SCC 30, in support.

The defendant argued that the plaintiff did not meet the definition of "insured person" under Part 7 as he was not a resident of BC at the time of the accident. In the alternative, if the claim was granted, the *Fidler* case did not apply, since the claim in that case related to a private insurance contract for which the parties had bargained.

The plaintiff had been struck as a pedestrian by an unidentified motorist. At the time of the accident, he had recently moved from Ontario, but the evidence established he lived a transient lifestyle with many changes of residence and employment. In order to be entitled to Part 7 benefits, he had to meet the definition of an insured under s. 78(f) of the Regulation:

> (f) a resident of the Province who is entitled to bring an action for injury or death under section 20 or 24 of the Act.

There is no definition of "a resident of the Province" within the Regulation and no authorities dealing with its interpretation. Russell J. reviewed the authorities dealing with the interpretation of "ordinarily resident" (the test for deciding whether a person has a valid driver's licence) and concluded that the test for "ordinarily resident" is more onerous than mere residence. She found that the plaintiff met the standard of a "resident in the Province."

The plaintiff was, however, unable to meet the second branch of the definition of "insured" under s. 78(f) in that he was not entitled to bring an action under s. 24. He was unable to prove that he made all reasonable efforts to ascertain the identity of the driver of the vehicle that struck him, as required by s. 24(5) of the *Act*.

She also concluded, albeit in *obiter*, that she would have refused to award him damages for mental distress. The nature of Part 7 benefits is more akin to social welfare benefits and not to ordinary contractual benefits, such as those provided by disability insurance contracts. Such contracts were categorized in *Fidler* as "peace of mind" contracts, where the expectation of the contracting parties is that there will be protection afforded should illness or disability within the conditions of the contract strike the purchaser of the insurance.

B. Citadel General Assurance Co. v. Vytlingam, 2007 SCC 46 and Lumberman's Mutual Casualty Company v. Herbison, 2007 SCC 47

These two decisions were released concurrently by the Supreme Court of Canada, on appeal from decisions of the Ontario Court of Appeal. They deal with the similar issue of "use or operation" in the context of motor vehicle indemnity insurance policies.

In *Vytlingam*, the plaintiff was seriously injured when the vehicle in which he was a passenger was struck with a large boulder that was dropped by two men standing on a highway overpass. They had transported the boulder to the overpass by a vehicle that was inadequately insured. The plaintiff sought damages from his own insurer under his inadequately insured motorist coverage.

Both the Ontario Court of Superior Justice and the Court of Appeal, relying on *Amos v. ICBC*, [1995] 3 S.C.R. 405, found the insurer liable to pay the plaintiff's damages, on the basis that, as the perpetrators had used a truck to transport the boulder and thereafter to escape from the scene, the injuries arose directly or indirectly from the use or operation of an automobile.

In *Herbison*, the plaintiff was injured when a hunter, driving to a hunting spot, shot him with a rifle. The hunter had stopped his vehicle and got out, using his headlights to illuminate what he thought was a deer. He was found liable in negligence to the plaintiff who sought recovery from the hunter's insurer under a standard motor vehicle liability policy which provides coverage for loss or damage arising from the ownership or directly or indirectly from the use or operation of an automobile. The trial judge dismissed the claim against the insurer, but a majority of the Court of Appeal found the insurer liable.

The Supreme Court of Canada allowed the insurers' appeals of both decisions. In both instances, the Court of Appeal erred in applying the "relaxed" causation test in *Amos*, a no-fault statutory accident benefits case, to the different context of indemnification insurance. In the context of no-fault accident benefits insurance, the mutual expectation of the parties is that no-fault benefits will be available when an accident occurs during the "ordinary and well-known use" of their vehicles, provided that some nexus or causal relationship between the use of the vehicle and the injuries can be established. Under indemnification insurance, it must be shown that the tortfeasor is liable as a *motorist*. In *Vytligam*, the relevant tort consisted of dropping the boulder from a highway overpass, not transporting it to the overpass. The tort was an intervening event severable from the use and operation of the tortfeasor's vehicle. In *Herbison*, the tortfeasor interrupted operating his vehicle in order to start hunting. This constituted a break in the chain of causation. For coverage to exist, there must be an unbroken chain of causation linking the conduct of the motorist as a motorist to the injuries in respect of which the claim is made.

C. Cowichan Bay Contractors Ltd. and Jackson v. ICBC, 2008 BCSC 475, Macaulay J.

This case confirms the propriety of the manner in which ICBC seeks recovery from breached insureds of monies paid as damages to persons injured by the breached insureds' negligence.

The individual plaintiff was involved in a rear-end accident involving two other vehicles. At the time, the plaintiff's driver's licence was suspended as a result of a conviction for impaired driving. ICBC settled the various injury and material damage claims of the occupants of the other vehicles involved in the accident. It refused to provide insurance to the vehicle owner (a company closely held by the individual plaintiff) pursuant to s. 30.1 of the *Insurance (Motor Vehicle) Act* and to issue a driver's licence to the individual plaintiff pursuant to s. 26(1)(b) of the *Motor Vehicle Act.*

The plaintiffs alleged in their statement of claim that ICBC had breached its duty of good faith toward them by invoking its remedies to recover "motor vehicle indebtedness" under ss. 30.1 and 26(1)(b), without having first obtained judgment against the plaintiffs confirming their liability for the accident. The plaintiffs had provided notice to ICBC denying liability for the accident.

ICBC counterclaimed for reimbursement of the monies it paid to the injured third parties under s. 21(6). The Court was satisfied on the evidence before it that ICBC had established liability for the accident against the plaintiffs.

Macaulay J. reviewed the relevant legislation and came to the following conclusions:

- ICBC is statutorily entitled to settle third party claims where there has been a breach by an insured but, if the insured denies liability to the third party in writing to ICBC within the applicable time limit ICBC cannot recover the settlement amount from the insured unless it successfully brings a subrogated claim on behalf of the third party claimant (ss. 21(12) and 20(12), (13) and (15), *Insurance (Motor vehicle) Act*).
- ICBC's counterclaim in which it established liability against the plaintiffs satisfied these sections.
- ICBC may invoke its remedies under s. 30.1 of the *Insurance (Motor Vehicle) Act* and s. 26(1)(b) of the *Motor Vehicle Act*, concurrently with a subrogation action against a breached insured without having first obtained judgment against the breached insured, despite having received notice that liability was being denied.

Macaulay J. concluded that as all the actions taken by ICBC for collection purposes were authorized by statute, ICBC did not breach its duty of good faith in dealing with the plaintiffs under the principles in *ICBC v. Hosseini*, 2006 BCCA 4.

D. ICBC v. Holland, 2007 BCSC 628, Maczko J.

This was an appeal from a Provincial Court decision in which the claimant was awarded $24,000 in respect of a stolen vehicle, despite the Court's finding that the claimant had made wilfully false statements to his insurer, ICBC, with respect to the value of the vehicle. The trial judge found that he could not conclude that the false statements were material because there was no evidence before him that the false statements were capable of affecting the mind of the insurer.

Maczko J. allowed ICBC's appeal. The question of whether a false statement is capable of affecting the mind of an insurer is a question of law to be answered by the court. It is not necessary for the insurer to call evidence that the false statement was capable of affecting its mind. The subjective view of the insurer cannot decide the question.

X. Legal Profession

A. Morrison Voss v. Smith, 2007 BCCA 296, per Finch CJBC (Saunders and Chaisson JJA concurring)

It is an implied term of a retainer agreement that if a lawyer terminates the agreement without good reason, the lawyer forfeits the right to any remuneration. The contingency fee agreement in issue provided that the lawyer may terminate the agreement for "good reason" and still be entitled to be paid. The lawyer terminated the retainer after the plaintiff informed them of an arrangement she had with her brother, which the lawyers considered to be welfare fraud. The defendants were demanding her welfare records and she was told that her case was all but hopeless once the defence had the records and advised her to accept an outstanding offer or else they would withdraw. She retained new counsel. The solicitors were not entitled to a fee because they did not have "good reason" to terminate the relationship. The plaintiff had not been totally dishonest with her solicitors and there was evidence to show welfare authorities would not have cared about the arrangements with her brother. Her subsequent acknowledgement of that arrangement did not destroy the solicitor client relationship.

XI. Negligence

A. Nason v. Nunes, 2008 BCCA 203, per Newbury JA (Levine and Lowry, JJA concurring)

The plaintiffs, passengers in a vehicle that lost control on black ice, appealed from a dismissal of their action on a Rule 18A application. The trial judge had found that the plaintiffs had failed to prove that the vehicle had been driven in a negligent manner. The defendant's evidence was that the truck fishtailed when it went over a bump between the road surface and a bridge. There was direct evidence that he had been travelling between 30 and 40 kilometers per hour and that he geared down when he skidded rather than applied his brakes. The appeal was dismissed, noting that the Supreme Court of Canada in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424 took the opportunity to decide that the doctrine of *res ipsa loquitur* should be treated as "expired" and "no longer used as a separate component in negligence actions." Instead the Supreme Court provided a "simpler formulation" as set out by Major J. as follows:

> Should the trier of fact choose to draw an inference of negligence from the circumstances, that will be a factor in the plaintiff's favour. Whether that will be sufficient for the plaintiff to succeed will depend on the strength of the inference drawn and any explanation offered by the defendant to negate that inference. If the defendant produces a reasonable explanation that is as consistent with no negligence as the *res ipsa loquitur* inference is with negligence, this will effectively neutralize the inference of negligence and the plaintiff's case must fail. Thus, the strength of the explanation that the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff (para. 24).

Thus, an inference of negligence does not arise as a matter of law whenever a vehicle went off the road in a single car accident; it is "highly dependent on the facts." Wherever the court found that negligence had not been proven or that the defendant had shown he drove with reasonable care, the defendant must succeed, whether or not he was able to explain how the accident occurred.

XII. Offers to Settle

A. Bowen v. Martinec, 2008 BCSC 104, Pitfield J.

The defendant brought a special case seeking the Court's opinion on the following issue:

Where a formal offer to settle made under Rule 37 and in form 64 of the Rules is accepted before trial in an action to which Rule 66 of the Rules applies, are the costs in the action to be assessed by reference to the fixed scale of costs under Rule 66(29) of the Rules or by reference to Appendix B to the Rules?

Pitfield J. ruled that costs in a Rule 66 action when an offer to settle has been accepted "must be assessed by reference to the fixed scale of costs under Rule 66(29), and not by reference to Appendix B to the Rules of Court."

He stated that the principles that can be derived from *Duong v. Howarth*[5] and *Anderson v. Routbard*[6] should be applied in these circumstances. At para. 24 of the reasons, he states:

> It will be incumbent upon the parties to agree on the proportion of the pre-trial preparation which had been undertaken by the plaintiff to the date of the defendant's offer to settle. In the absence of an agreement, the parties may resolve differences on taxation whereupon the court will exercise the discretion conferred upon it by Rule 66(29.1).

B. Lewis v. Abel, 2008 BCSC 140, Baker J.

This is another case to add to the *Coutu v. San Jose Mines Ltd.*[7] line of cases dealing with Rule 37A. The plaintiff sued multiple defendants for defamation. Three of the defendants delivered an offer, pursuant to Rule 37A, offering to settle the matter in exchange for a consent dismissal order without any costs to the parties. The plaintiff's action against all defendants was dismissed. The defendants argued that where a party wishes to make an offer of settlement that does not include payment of the offeree's costs, Rule 37 does not apply and therefore Rule 37A comes into play.

In considering whether to give effect to the Rule 37A offer, Baker J. stated the following:

> [27] This submission appears to me to be logical and persuasive. I see no underlying policy reason to require a party who believes his or her opponent's case to be entirely lacking in merit or prospect of success, to be obliged to make an offer that will result in an obligation to pay that opponent's costs in the event the offer is accepted in order to bring about the consequences provided for by subrule 37(24)(b).

She reluctantly concluded, however, that the weight of authority[8] was against this position. *Coutu* and the cases following it have consistently concluded that an offer which excludes the payment of costs falls outside both Rules 37 and37A.

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5 2005 BCSC 128.

6 2007 BCCA 193.

7 2004 BCSC 1451.

8 See *Cao (Guardian ad litem) v. Natt*, 2004 BCSC 813; *Coutu v. San Jose Mines Ltd., supra*; *P.G. Restaurant Ltd. v. Northern Interior Regional Health Board*, 2006 BCSC 1680; and *Kerpan v. ICBC*, 2007 BCSC 203.

C. Dykeman v. Porohowski et al., 2008 BCSC 293, Crawford J.

The plaintiff brought an action against the drivers of two vehicles in respect of one motor vehicle accident and against another driver in respect of a subsequent motor vehicle accident. Shortly before trial, she settled the action against the driver in the second accident. The jury was asked to apportion liability as between the drivers in the first action, and to apportion damages as between the two actions. The jury found the defendant, Porohowski, 100% liable for the accident, awarded damages for both accidents in the amount of $44,400 and apportioned damages between the accidents on a 50-50 basis. The defendants in the first action had delivered an offer to settle pursuant to Rule 37 for the amount of $50,000.

Crawford J. concluded that the weight of appellate authority precluded his giving effect to the offer to settle, given that it had been made by multiple defendants who were not joint tortfeasors. He recognized, however, a need for revision of the Rule:

> [19] Given these rulings of the Court of Appeal and this Court, there is plainly a need for a rephrasing of the Rule regarding multiple defendants. Any car accident case brought by a passenger with more than two cars involved with a potential split in liability lends itself to a collective offer being made on the part of the defendants to satisfy the claim of the plaintiff.

He found that given that the plaintiff enjoyed some success, but lost on her one large claim for loss of future earning capacity (for which the jury awarded nothing), the appropriate award was to allow the plaintiff 50% of her costs and disbursements.

D. Silver v. Kohut, 2008 BCSC 120, Smith J.

The plaintiff accepted the defendant's Rule 37 offer to settle in the amount of $10,000. The issue before Smith J. was whether she was precluded from recovering costs pursuant to Rule 37(37).

Smith J. was satisfied that, at the time the action was brought, there was a very real possibility that damages would be within the Provincial Court limit. However, he concluded that there was "good reason" for the plaintiff to have started his action in Supreme Court because liability was in issue and the plaintiff required a "vigorous and thorough cross-examination" of the defendant at examination for discovery, a process not available in Provincial Court. According to Smith J., the desire for discovery in this case was not merely a tactical consideration, "[i]t was fundamental to establishing a case and determining whether the action could proceed."

Leave to appeal has been granted.

E. Carvalho v. Angotti and Carvalho v. Huang and Liu, 2008 BCSC 386, Smith J.

The defendants in these two actions delivered separate Rule 37 offers to settle in the amounts of $5,000 (*Agnotti* action) and $15,000 (*Huang* action), neither of which the plaintiff accepted. She was awarded at trial $15,000 in non-pecuniary damages and $15,000 in past wage loss for the *Angotti* action and $10,000 in non-pecuniary damages for the *Huang* action. The defendants in the *Huang* action applied for an order for costs from the date of delivery of their offer to settle which exceeded the judgment.

Smith J. acknowledged *Cridge v. Harper Grey Easton*[9] in which the Court of Appeal ruled that there is no room for judicial discretion where sub-rule 37(24) applies and *Cao (Guardian ad litem of) v. Schroeder*[10]

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9 2005 BCCA 33.

10 2005 BCCA 351.

and Lacerte v. Singh[11] in which the Court of Appeal held that Rule 37 does not allow for global offers by defendants in multiple actions. Nevertheless, he concluded that the defendants in the *Huang* action were not entitled to costs.

There was a substantial overlap in the plaintiff's damage claims and therefore the offers had to be considered together. The plaintiff could have accepted both or rejected both, but neither offer was capable of acceptance in isolation. He found that this was a situation to which Rule 37(24) did not apply.

XIII. Practice

A. Reilly v. ICBC, 2007 BCSC 261, per Thackray JA, Finch CJBC and Levine JA concurring

One of the issues to be decided by the Court of Appeal in this case was whether ICBC was entitled to set off costs it recovered against the plaintiff from outstanding costs owing to the plaintiff. The plaintiff recovered substantial damages and costs at trial. The damages were reduced on appeal. The plaintiff applied unsuccessfully for leave to appeal to the Supreme Court of Canada. Costs were awarded to the defendant in respect of the Court of Appeal hearing and Supreme Court leave application.

The plaintiff argued that he owed costs to the defendant, not to the defendant's insurer. The key to entitlement of a set-off is that the parties to each debt must be the same.

Thackray JA concluded that a set-off at law was not available to ICBC, because there was no mutuality of debt obligations. However, he reviewed the law regarding equitable set-off which requires no mutuality of debt obligations. Equitable set-off is available where the party relying on set-off can show some equitable ground for being protected against his adversary's demand and his cross-claim is so clearly connected with the other party's demand that it would be manifestly unjust to allow the other party to enforce payment without taking into consideration the cross-claim.

In applying equitable set-off in the case before him, Thackray JA stated:

> [43] In my opinion the trial costs award owed by Mr. Lynn to Mr. Reilly arises out of the same or interrelated proceedings as does the appeal costs award and unsuccessful leave application to the Supreme Court of Canada owed by Mr. Reilly to Mr. Lynn. Although these debts are not mutual cross obligations so far as ICBC is concerned, mutuality is not a precondition of equitable set-off, as it is in legal set-off. The requirement for a 'clear connection' (per *Coba Industries*, point 3 at page 22, [[1985] 6 W.W.R. 14 (BCCA)]) is satisfied in this case because ICBC's claim for costs arose from its successful appeal against the trial judgment in which the plaintiff was awarded costs and from the plaintiff's unsuccessful application for leave to appeal to the Supreme Court of Canada to restore the trial judgment. Because of that clear connection, it would be manifestly unjust to allow Mr. Reilly to enforce payment without taking into consideration the cross claim.

B. Lines v. Gordon and ICBC, 2007 BCCA 306, Rowles JA

The Court of Appeal granted the defendants leave to appeal an order of the trial judge requiring the defendants to make an advance payment to the plaintiff after judgment was rendered but before the ancillary issues of tax gross-up, cost of investment counselling and structured judgment under s. 55 of

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11 2006 BCCA 289.

the *Insurance (Motor Vehicle) Act* were heard. The defendants contended that the trial judge was without jurisdiction to order partial payment of the judgment. Rowels JA concluded that the question of whether the trial judge had jurisdiction to make such an order was arguable and was a point that is of some significance to the practice.

C. Samuel v. Chrysler Credit Canada Ltd., 2007 BCCA 431, Kirkpatrick JA (Newbury and Ryan, JJA concurring)

At the start of the plaintiff's trial before a jury, the defendant tendered a 325-page book of clinical records. Plaintiff's counsel advised the court that the documents were admissible under either the doctrine of past recollections recorded or the hearsay exception for statements of contemporaneous bodily sensations. The plaintiff was cross-examined on the records. In some cases she could recall telling the doctor or therapist that she was experiencing pain at the time; in other instances her memory was unclear but she alleged that she continued to suffer pain to the time of the trial. At the close of the case, the trial judge was asked to rule on the permissible use of the documents. The plaintiff submitted that the statements made to the medical professionals were admissible for proof that she suffered the complaints (i.e., for the truth of the statements). The trial judge correctly instructed the jury that the clinical records could not be used as proof that the plaintiff suffered from the complaints unless she or the treatment providers confirmed that she uttered the contemporaneous complaint.

The case is yet another reminder that the practice of tendering copious volumes of clinical records is "folly" and should be discouraged. The mere filing of the documents, with the other party's consent, does not mean that all of the statements contained therein must be taken as being true. The purpose for which the documents are entered should be clearly understood at the time the documents are tendered (and counsel should use document agreements). The preferable practice is to introduce discrete portions of the records when they become relevant so that their admissibility can be ruled on at that time.

D. Demarzo v. Michaud, 2007 BCSC 1736, Shabbits J.

The defendant applied for a declaration that the plaintiff had waived solicitor-client privilege with respect to consultation reports, medical reports and hospital records etc. seeking a declaration that three doctors be permitted to discuss their examinations, treatment and opinions with defence or plaintiff counsel in the absence of the other. The application was denied on the basis that the proper procedure was to follow Rule 28. If a Rule 28 application proved necessary, only then should there be a determination of any confidentiality concerns of the medical witnesses. Except as expressly provided by the rules, a trial judge ought not to be bound by pre-trial findings of fact or pre-trial rulings of law.

E. British Columbia (Civil Forfeiture Act, Director) v. Angel Acres Recreation and Festival Property Ltd., 2008 BCSC 584, Pearlman J.

This was a Rule 26(11) application in the context of an action for forfeiture of the clubhouse and its contents of the Nanaimo Hells Angels pursuant to an Order made under s. 8 of the *Civil Forfeiture Act*. The plaintiff sought production of records in the possession of the Special Enforcement Unit of the RCMP relating to private communications intercepted under a criminal wiretap authorization. The defendants sought an adjournment, *inter alia*, on the basis that the plaintiff should have served "persons who may be affected by the order sought" within the meaning of Rule 44(5).

At para. 18, his Lordship said:

> The aim or object of Rule 26(11) is to provide a procedure for the production of documents in the possession or control of a person other than a party to litigation. The language of Rule 26(11) understandably focuses on achieving that objective.

> Rule 44(5), on the other hand, addresses the service of applications on persons who may be affected by the order sought and who it is just should have the opportunity, should they so chose, to attend and make submissions on the application before the court makes an order that may affect them. The language of Rule 26(11) does not provide either expressly or by necessary implication, that persons who may be affected by the order sought, other than the parties and the custodian of the record, need not be served with the motion and supporting affidavits.

The Court found that persons whose private communications had been surreptitiously intercepted and recorded during a police investigation had a significant privacy interests that may be affected by the disclosure and were entitled to be served with the application.

Mr. Justice Pearlman distinguished the authorities of *P.(D.E.) v. P.(N.J.)* and *McGarva v. HMTQ* in which the Court took into consideration privacy issues without hearing from those persons affected on the basis that Rule 44(5) had not been drawn to the court's attention. In order for the Court to fulfil its duty to consider the privacy interest of third party whose privacy interests may be affected, those individuals should have the opportunity to make submissions.

XIV. Production of Documents

A. Murphy et al. v. Perger, October 3, 2007, Superior Court of Justice - Ontario, Court File No. 45623/04

This case illustrates how another jurisdiction dealt with an application for production of photographs from the plaintiff's private webpage in www.facebook.com. Interestingly, many of the authorities considered by the Ontario court are from BC.

The plaintiff claimed damages for injuries, including temperomandibular joint dysfunction and fibromyalgia, caused by a motor vehicle accident. She had served photographs depicting her participating in various forms of activities pre-accident. The defendant applied for an order compelling her to produce photographs from her private webpage in facebook.

Rady J. had to deal with the competing interests of relevance and privacy.

She reviewed and distinguished several cases from BC[12] where orders for production of information from the plaintiff's computer were denied on the basis that the existence of relevant information was speculative and where orders for production of photographs were denied because they had little probative value. She acknowledged that facebook is a social networking site in which a large number of photographs are deposited by its audience. Further, given that the plaintiff's public site contained photographs, it seemed reasonable to conclude that her private site would as well. The photographs were relevant to assess the value of her claim for damages for loss of enjoyment of life. By serving pre-accident photographs of herself, the plaintiff must be taken to consider that such photographs were relevant.

With respect to the privacy issue, Rady J. concluded, after reviewing two other BC decisions,[13] that any invasion of privacy would be minimal and was outweighed by the defendant's need to have the photographs in order to assess the case.

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12 *Desgagne v. Yuen* (2006), 56 B.C.L.R.; *Gasior v. Bayes*, 2005 BCSC 1828; *Watt v. Meier*, 2005 BCSC 1834.

13 *United Services Funds v. Carter* (1986), 5 B.C.L.R. (2d) 222 (B.C.S.C.); *M(A) v. Ryan* (1994), 98 B.C.L.R. (2d) 1 (B.C.C.A.).

See also *Kourtesis v. Joris*, [2007] O.J. No. 2677 (S.C.J.) in which photographs of the plaintiff discovered by defence counsel from a Facebook website were effectively admitted into evidence during trial.

B. Cikojevic v. Timm, 2008 BCSC 74, Master Keighley

The Master declined to order an advance, in part because of 600 photographs on Facebook showing the plaintiff being advice.

C. Stevanovic v. Petrovic, 2007 BCSC 1392

The plaintiff applied for an order compelling the defendant to produce the edited portions of the adjuster's electronic file notes ("CWMS notes"), including notes created after the plaintiff started his action.

The plaintiff was injured when he was struck as a pedestrian by a vehicle being driven by his friend who drove at him at a high rate of speed, apparently in jest. The defendant initially gave a statement to ICBC which was false and subsequently gave a revised statement reflecting the foregoing facts. The plaintiff started his action several months later. The defendant did not file an appearance until five months after defence counsel was retained. The plaintiff was provided with documents from the defendant's insurer's file, including edited CWMS notes. The defendant claimed litigation privilege over the edited portions of the notes.

In determining that the defendant did not meet the "dominant purpose" test set out in *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254, Romilly J. listed several purposes for which documents are created in insurance files which fall outside the test:

> [25] First, when an insurer receives notice of a claim, it must determine whether there is coverage for the incident in question. The insurer must enquire as to whether the insured has fulfilled his or her obligations under the insurance contract. In other words, there must be a determination as to whether there is a breach.
>
> [26] Second, the insurer must establish whether the incident is an insurable risk. This is another coverage question. In order to determine this, the insurer must investigate the circumstances of the matter to determine whether the insurance policy covers the factual scenario, and then decide whether there is any risk at all to the insurer.
>
> [27] Third, the insurer then decides whether it should consider funding interim payments to an injured party. These payments can include wage loss, special damages, or other out of pocket expenses. Many adjusters will deal directly with a claimant or counsel and reimburse expenses incurred during a claim.
>
> [28] Fourth, the insurer may consider **whether to offer compensation to resolve the matter, whether a lawyer is involved or not**. For example, if a layperson made an offer which was well within the reserve to resolve the file, the insurer cannot claim that litigation was the dominant purpose since the layperson had every intention of resolving the matter without litigation. [Emphasis in original]

The defendant's bare assertion that the documents were created for no other purpose than for litigation was insufficient to meet the dominant purpose test. The only logical explanation for the delay in filing an appearance was that the insurer was still investigating coverage and the cause of the accident. This was a case where it would be unwise to hold that all of the documents created after the filing of the writ was for the dominant purpose of litigation.

D. Roeske v. Grady, 2006 BCSC 1975, Slade J.

The defendants applied for an order compelling production of the plaintiff's laptop computer, including its hard drive and any removable CD's or other DVD's originating on the computer.

The plaintiff alleged she suffered a mild traumatic brain injury as a result of two motor vehicle accidents which adversely affected her ability to work. She admitted at her examination for discovery that she continued to use her computer after the accidents for both business and pleasure use.

The defendants proposed that the computer be delivered to a qualified and independent forensic computer expert who would make a "byte stream image" of the hard drive, conduct a by-category analysis of the information and provide information in certain limited categories to counsel for the defendants. Slade J. observed that this proposal did not contain the safeguards required, for example, by US courts, to protect irrelevant or privileged information from disclosure. Those safeguards include providing relevant information from the byte-stream image to plaintiff's counsel who would review the information for relevancy and privilege. The expert would retain the byte-stream image until the litigation concluded, and would provide a report for the court setting out the scope of the work performed and describing in general terms the volume and type of records provided to plaintiff's counsel.

While acknowledging that in some cases the whole of the information contained on a computer hard drive may be relevant, in this case, the potential relevance of the contents of the plaintiff's hard drive was outweighed by the lateness of the request for its production. Trial was imminent and there was no evidence before him of the time required to recover and review computer data covering seven to eight years. Slade J. denied the application.

E. Veltheer v. Prachnau, 2007 BCSC 511, Sinclair Prowse J.

The defendant sought a form of *Halliday* order pertaining to all documentation stored on the plaintiff's electronic aids, including Palm Pilots, Blackberries and all computers used by the plaintiff during a specified time. The application proposed that the devices be delivered to an expert, who would create a report of the documents and deliver it to plaintiff's counsel, in accordance with the guidelines set out in *Roske v. Grady*, *supra*.

Sinclair Prowse J., while acknowledging that in *Roeske*, the Court conceded there may be cases where the entire contents of a computer would be relevant, decided that this was not the situation before her. She preferred instead, the "filling cabinet" analogy articulated in *Northwest Mettech Corp. v. Metcon Services Ltd.*, [1996] B.C.J. No. 1915 (S.C.). in which computers, like filing cabinets, contain both relevant and irrelevant information.

Instead, she directed that the plaintiff to review his electronic devices and computers and make a list of all relevant documentation stored in the devices, including documents that may have been deleted by the plaintiff, but still exist on the devices' hard drives.

XV. Provincial Court Practice

A. Munson v. Devorkin and Peever, March 10, 2008, Kamloops Registry No. 36280, (BCPC). Pendleton J.

The claimant's vehicle was struck by a piece of debris that fell from the truck in front of her. She braked suddenly and was able to pull safely to the side of the road. Her vehicle sustained a small dent near her left front headlight. She alleged that as a result of this incident she suffered injuries to her neck and back and lost time from work. While admitting liability for failing to secure the load, the defendants argued that the claimant failed to prove that the debris hitting her vehicle caused her injuries.

Pendleton J. relied substantially on *Wells v. Basanta*, 2005 BCJ No. 285, aff'd 2007 BCCA 635, a case involving a strikingly similar fact pattern, in which McEwan J. concluded that the plaintiff failed to prove on a balance of probabilities that the piece drywall striking her vehicle caused her injuries.

Pendleton J. made the following finding of facts:

- the plaintiff suddenly and heavily applied her brakes following the impact of the debris;
- the impact or jarring caused by the collision had almost no effect on the speed of the vehicle;
- the claimant's body moved forward and backward but no part of her body struck any part of the interior of the vehicle;
- she was not susceptible or vulnerable to injury;
- there was no other identifiable factor in the mechanics of the accident that would explain an injury.

He dismissed her action, agreeing with the comments of McEwan J. that to award her damages would be rewarding a coincidence.

B. Tennis v. Stracuzza, March 25, 2008, Richmond Registry No. C204-18536, Rae J. (BCPC)

The issue before Rae J. on this Provincial Court application was: does the Small Claims Court have jurisdiction to allow a post-Settlement Conference application for documents?

The claimant was involved in a motor vehicle accident in which both liability and damages for personal injury were in issue. At the Settlement Conference, the court ordered the bifurcation of the issues of liability and damages, with the issue of liability being decided first. A subsequent trial subsequently confirmed that the defendants were fully liable for the claimant's injuries.

Following the liability trial, the defendants sought, upon application, an order for production of the claimant's pre-accident clinical records. The Court made the order without hearing from the claimant (who was not represented by counsel). She appealed the order to the Supreme Court under the *Judicial Review Procedures Act.* The Supreme Court upheld the Provincial Court order for production of documents. The claimant appealed this decision to the Court of Appeal.

The claimant raised for the first time before the Court of Appeal the argument that Provincial Court judges lack jurisdiction to make post-settlement conference orders. The Court of Appeal set aside the orders of the Supreme Court and Provincial Court judges and remitted the matter to the Provincial Court for a re-hearing on the application for production, stating[14]:

> [18] The question as to when the Provincial Court can grant a production order is an important one in relation to the practice and procedure in that court. This being so, it is only right that that the Provincial Court be given an opportunity to consider and express its opinion on the merits of the respective arguments of the parties before the issue is considered elsewhere.

14 2007 BCCA 480, per Frankel JA (Prowse and Ryan, JJA concurring).

In finding that the Provincial Court does have such jurisdiction, Rae J. came to the following conclusions:

- The Provincial Court's jurisdiction includes not only powers conferred on it by the *Small Claims Act and Rules*, but also powers that are reasonably necessary for it to accomplish the purpose of that legislation.
- A number of decisions[15] have held that the preferred forum for pre-trial applications is at the settlement conference in order that parties might avoid the numerous applications that sometimes overburden litigants who are proceeding in the Supreme Court.
- However, these decisions make it clear that there is a discretion in the court to consider applications made after the settlement conference but that discretion should be exercised sparingly, and only in those situations where it is necessary to do so in order to meet the overarching principles set out in s. 2 of the *Act* ("to have claims resolved in a just, speedy, inexpensive and simple manner").

She chose to exercise her discretion in this application and ordered the claimant to produce the documents within 30 days unless there was a good reason for a delay in their production.

XVI. Psychological Injuries

A. Thompson v. Attorney General, 2008 BCSC 582, Allan J.

The issue before Allan J. on this special case application was:

> Can [the plaintiff] maintain an action against any of the defendants to recover compensation for psychiatric injuries she suffered as a consequence of the deaths of Sherry Heron and Anna Adams?

The plaintiff, for the purposes of the special case, was the sister and daughter of two women who were shot to death by her sister's husband at Mission Memorial Hospital in 2003. After a three-day manhunt, the brother-in-law committed suicide. Prior to the killings, the plaintiff's sister had confided in her that she planned to leave her husband, but was afraid of his reaction based on his previous violent behaviour toward her. As a result, the plaintiff contacted the Mission RCMP and disclosed this information. The RCMP interviewed the sister, but laid no charges against her husband. After the shooting, and while her brother-in-law was still at-large, the plaintiff feared for her and her family's safety and sought police protection. She was not at the hospital during the shooting, nor did she see the bodies of her sister and mother. She was diagnosed as suffering from a number of psychiatric injuries, including post traumatic stress disorder and major depression, and remained disabled from working at the time of the special case hearing.

The plaintiff and her siblings brought action against the husband's estate, the Attorney General of Canada, the Fraser Health Authority and other parties under the *Family Compensation Act* and in negligence for the psychiatric injuries they suffered as a result of the killings.

Allan J. concluded that she was bound by the governing law in BC with respect to psychiatric injury (or nervous shock as it has been previously referred to): *Rhodes Estate v. Canadian National Railway*[16]and *Devji v. Burnaby (District).*[17] In both cases, the Court of Appeal limited the recovery for

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15 See the Appendix of this decision for a list of the cases.

16 (1999), 50 B.C.L.R. (2d) 273, 75 D.L.R. (4th) 248 (C.A.).

17 1999 BCCA 599, 70 B.C.L.R. (3d) 42.

psychiatric injury to circumstances involving locational proximity: the injured person witnessed the traumatic event or its aftermath. Despite the unique facts in this case—the plaintiff warning the hospital and police and fearing for her safety after the shootings—she could not establish the degree of locational proximity required by the leading cases. These unique circumstances went to the issue of reasonable foreseeability, not to locational proximity:

> [32] Ms. Thompson sought to protect her sister from the terrible event that actually transpired. In my opinion, it was reasonably foreseeable that if the defendants failed to meet the requisite standard of care, that Ms. Thompson would suffer a psychiatric injury. However, I am bound by the law in B.C. that reasonable foreseeability is not enough. The plaintiff's claim is barred by the policy based control mechanisms that limit recovery for psychiatric illness. In B.C., there are no decisions where a plaintiff has succeeded in recovering damages for psychiatric illness unless he or she witnessed the event or its immediate aftermath.

B. Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, per Mclachlan CJ (Basterache, Binnie, LeBel, Descamps, Fish, Abella, Charron and Rothstein JJ concurring)

The Supreme Court of Canada has reaffirmed basic negligence principles with respect to psychological injury. The appellant suffered grievous psychological injury after seeing dead flies in a bottle of water delivered by the respondent. The damages he recovered at trial were overturned by the Ontario Court of Appeal on the basis that the standard for reasonable foreseeability was an objective one, based on the "person of normal fortitude and robustness" principle.

In a unanimous nine-member panel decision, Chief Justice McLachlan dismissed the appeal. In doing so, she set out the elements for a successful action in negligence. The plaintiff must demonstrate:

1. that the defendant owed him a duty of care;
2. that the defendant's behaviour breached the standard of care;
3. that the plaintiff sustained damages;
4. that the damages were caused, in fact and in law, by the defendant's breach.

The plaintiff was able to satisfy the first three elements. Under the duty of care requirement, it has long been established that the manufacturer of a consumable good owes a duty of care to the ultimate consumer of that good: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). The respondent breached that duty of care when it supplied contaminated water to the appellant.

In considering whether the appellant suffered damages, McLachlan CJ made it clear that there is no real distinction between psychological and physical injury. However, psychological disturbance that rises to the level of compensable personal injury must be more than upset, disgust, anxiety, agitation or other mental states that fall short of injury. According to the Chief Justice, compensable psychological injury "must be serious and prolonged and rise above the ordinary annoyances, anxieties, and fears that people living in society routinely, if reluctantly, accept." The evidence in this case established that the appellant developed a major depressive disorder with associated phobia and anxiety which were debilitating and had a significant impact on his life. He therefore established that he sustained damage.

Finally, McLachlan CJ's analysis of the fourth element—whether the respondent's breach caused the appellant's damages—involved the concept of "reasonable foreseeability" viewed from the vantage of a plaintiff of "ordinary fortitude." Reasonably foreseeable harm requires a degree of probability or a "real risk," i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co, Pty.*, [1967] A.C. 617 (The Wagon Mound No. 2)).

In order to show that his damage was caused by the respondent's negligence, the appellant must prove that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water. This the appellant failed to do at trial. Rather, the medical evidence was that the appellant's reaction was "highly unusual" and "very individual." McLachlan CJ pointed out that once a plaintiff has met the reasonable foreseeability test, the issue of the "vulnerable" or "thin-skull" plaintiff arises with respect to the assessment of damages.

C. Arnold v. Cartwright, 2007 BCSC 1602, Butler J.

The plaintiff witnessed a motor vehicle accident in which the defendant driver and driver of another vehicle involved in a high-speed accident were both killed. The plaintiff was nearly involved in the accident, called 911 and spent about 90 minutes assisting the victims. Eleven months later he suffered a panic attack and was subsequently diagnosed with PTSD and bipolar disorder which disabled him from working for two and half years. The lack of a pre-existing relationship with the victims was not a bar to recovery of damages for nervous shock. The development of the PTSD was reasonably foreseeable and caused by the exposure to the accident.

XVII. Rule 30 Examinations

A. Holm v. Boos et al., March 27, 2007, Vancouver Registry No. M023197, Scarth J.

The defendants applied for an order compelling the plaintiff to submit to an examination by a psychiatrist, Dr. H. Davis. Scarth J. was satisfied on the material before him that the mental condition of the plaintiff was an issue in the proceeding and that Dr. Davis was qualified under Rule 30 to conduct a psychiatric examination of the plaintiff.

The plaintiff filed no material in opposition to the defendants' application. His objection to the examination was based on the decision in *Grewal v. Brar*[18] in which Cole J. gave very little weight to Dr. Davis' opinion tendered at trial because he had been argumentative and refused to consider material facts which might detract from his opinion.

Scarth J. granted the defendants' application with costs in any event of the cause. He agreed with the rationale in *Sinclair v. Underwood*[19] that issues of the examining physician's fairness, partiality, credibility and objectivity are for the trial judge to decide. A chambers judge on a Rule 30 application must be satisfied on a preponderance of evidence that sufficient grounds exist to interfere with a defendant's choice of examiner.

B. Evans v. Jensen, January 11, 2008, New Westminster Registry No. M94302, Bernard J.

These reasons are primarily useful for their discussion of the standard of review of a master's order pursuant to Rule 30. The plaintiff appealed the master's order compelling her to submit to a second Rule 30 examination by a psychiatrist retained by the defendant. The standard for review of purely interlocutory matters is that the appellant must show that the master was clearly wrong, unless the master's ruling raises an issue which is vital to the final issue in the case, in which case the judge may reconsider the issue and substitute his or her view for that of the master: *Abermin Corporation v. Granges Exploration Limited.*[20]

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18 2004 BCSC 1157.

19 [2002] B.C.J. No. 515 (S.C.) at para. 22.

20 1990 45 BCLR (2d) 25.

Bernard J. was not persuaded that the order in question "raises a question which is vital to the final issue of the case" such that he was entitled to reconsider the matter. He was mindful of *Robertson v. Grist*[21] in which Dillon J. concluded that she was entitled to rehear an application for a second Rule 30 examination because it was "a matter that may have an effect on the quantum of damages" and was therefore vital to the final issue. He states:

> [6] ... In my view the 'vital to the final issue' test must be interpreted much more stringently. If it is not then no order made by a master pursuant to Rule 30 could be regarded as purely interlocutory; all would be subject to a full rehearing on review. I do not think this was Macdonald, J.'s intention when he enunciated the test in *Abermin*.

Bernard J. concluded that the master was not clearly wrong in the exercise of his discretion in a purely interlocutory matter and dismissed the plaintiff's appeal.

C. Kobzos v. Dupuis, 2006 BCSC 2047, Lander J.

The defendant brought an application to compel the plaintiff to submit to a medical examination. The plaintiff had refused to attend the examination on the basis that the physician chosen by the defence required her to sign a consent form which was broad in scope and allowed the physician to have access to her medical records and to interview collateral sources for information.

Lander J. concluded that the examination sought by the defendant was warranted, but he was unable to order the plaintiff to sign the consent: *Peel Financial v. Western Delta Lands*, 2003 BCCA 180, in which Finch, CJBC declared that a consent given pursuant to an order to do so would be no consent at all.

D. Shardlow v. Wafler et al., January 4, 2008, Vancouver Registry No. M054065, Master Tokarek

The defendant applied for an order pursuant to Rule 30 compelling the plaintiff to attend an examination before an orthopaedic surgeon. The plaintiff opposed the order, claiming that he had already been subjected to a medical examination by Dr. McPherson which although was conducted prior to the commencement of her action, could only be categorized as a tort examination.

The defendant argued that Dr. McPherson's report related solely to issues pertaining to the plaintiff's entitlement to Part 7 benefits.

Master Tokarek noted that the content of the adjuster's letter to Dr. McPherson contained the same kind of information requests as were the subject of "other decisions in this court."[22] He, however, had no intention of "parsing each and every word of a standard letter issued as a matter of routine." He preferred to consider the following factors in his assessment of the purpose of the first examination:

- the request for the examination came shortly after the adjuster and plaintiff's counsel discussed the necessity for ongoing physiotherapy treatment;
- the letter did not ask the physician to differentiate the injuries caused in this motor vehicle accident (in which liability was in issue) with the injuries caused by a previous accident (in which liability was not in issue), "when clearly, if the adjuster was in fact acting for the defendants in a tort claim, as opposed to inquiring about Part 7 benefits, that would have been, or should have been, the first and foremost thing to consider";

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21 2006 BCSC 1245.

22 Although not specifically referred to in these reasons, previous decisions which closely reviewed the adjuster's instructing letter to the physician were *Robertson v. Grist*, *supra*; *Longva v. Phan*, [2007] B.C.J. No. 1035; and *Antoniali v. Massey*, 2007 BCSC 1458.

- there was no evidence that counsel was involved in the adjuster's decision to retain Dr. McPherson or provided any advice as to the information required of him.

Master Tokarek concluded that the examination by Dr. McPherson was not a "first" tort examination, but even if he had decided otherwise he would have allowed the Rule 30 application in order for the defence to deal with tort issues that had not been addressed to date.

XVIII. Section 25/83 Deductions

A. Uhrovic v. Masjhuri, 2007 BCSC 1096

The plaintiff, a paraplegic at the time of the accident, was injured in a motor vehicle accident. The Court found that he was likely to require one to two hours of attendant care to perform his activities of daily living about a decade earlier than he would have had he not suffered the injuries caused by the accident. The defendant sought to deduct from his damage award, the sum of $137,223 pursuant to s. 83, *Insurance (Vehicle) Act* (formerly s. 25, *Insurance (Motor Vehicle) Act*), on the basis that the plaintiff was entitled, under Part 7, to claim for attendant care.

Gray J. concluded that there were two reasons not to accede to the defendant's request. First, attendant care would be payable under s. 88(2)(f) of the Insurance (Vehicle) Regulation which required ICBC's medical advisor to confirm that these benefits are "likely to promote the rehabilitation" of the plaintiff. Rehabilitation is defined in s. 78 of the Regulation as follows:

> "rehabilitation" means the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self-sufficiency that, allowing for the permanent effect of his injuries, is, with medical and vocational assistance, reasonably achievable by him.

She concluded that the attendant care costs she awarded to the plaintiff would not likely restore the plaintiff to greater self-sufficiency. Rather such assistance would simply enable him to conduct activities of daily living. The future care award reflected costs for maintaining the plaintiff, not rehabilitating him.

The timing of when the benefits would be required was problematic in that the need may arise after the plaintiff resolved his Part 7 action.

She deducted a nominal amount of $1,000 plus the amount of Part 7 benefits already paid.

B. McCreight v. Currie, 2008 BCCA 150, per Huddart JA (Lowry and Frankel JJA concurring)

The plaintiff appealed the trial judge's order deducting, under s. 25 of the *Insurance (Motor Vehicle) Act*, the entire amount of the award for cost of future care. The Court of Appeal was critical of the fact that the judge failed to properly estimate the amount of Part 7 benefits to which the plaintiff is or would have been entitled, as required by section 25, but rather relied on defence counsel's opinion of what ICBC would pay as future Part 7 benefits:

> [13] Difficult as the estimation of potential benefits under Part 7 are to estimate, both counsel acknowledge that task is required of counsel for both parties when considering an appropriate offer to settle. Nothing in these reasons should be taken as suggesting that uncertainties regarding entitlement to Part 7 benefits are not to be evaluated as any other risk of litigation. Nor should anything I have said in these reasons be taken as suggesting evidence as to ICBC policy is not acceptable on a s. 25 application. In *Schmitt*, at para. 26, Hollinrake J.A. noted that it was 'not necessary for us to consider in this case the principles to be applied and the assumptions to be made by a trial judge in reaching an assessment under s. 24(5) [now s. 25(f)]' because there the parties agreed on the 'maximum entitlement.' Thus he left such questions for another day. I intend by these reasons to do the same.

> [14] What I have found unacceptable on an insured's application for a deduction is that an opinion of trial counsel (even one instructed by ICBC) as to what position ICBC might take as to past and future claims under Part 7 can be accepted as a foundation for a valuation of estimated future benefits or considered as evidence of what ICBC will do. This is particularly so when that opinion requires a decision by ICBC to accept the trial judge's decision on causation and reasonableness as a substitute for the opinion of its medical adviser, as an effective waiver of its right to reduce or terminate payments under ss. 87 and 90 of the Regulation, and as reason to pay 'user fees' despite the provision in s. 88(6) limiting its liability for such payments.

The Court of Appeal reduced the amount deducted from $15,000 to $12,000.

C. Ogilvie v. Mortimer, 2008 BCSC 634, Holmes J.

A jury awarded the plaintiff $700,000 in damages, including an award of $150,000 for costs of future care and then reduced the award by finding the plaintiff 75% at fault for the accident and that she failed to mitigate her damages. Her net award was $122,500.

At issue on this application was the amount to be deducted under s. 83 of the *Insurance (Vehicle) Act*. According to affidavit evidence from an ICBC representative, the components of the future care claim that would be payable under Part 7, subject to the $150,000 limit, had a total present value ranging from a high of $276,538 to a low of $132,395.

In estimating the amount of Part 7 benefits to be deducted from the plaintiff's award, Holmes J. summarized the following principles:

- The legislation distinguishes between the tortfeasor and ICBC: a tortfeasor is entitled to seek a s. 83 deduction regardless of a refusal by ICBC to pay Part 7 benefits (*Sovani v. Jin*, 2005 BCSC 1285).
- Issues between the plaintiff and ICBC regarding the benefits are not relevant to their deductibility by a tortfeasor from an award to the plaintiff (*McCreight v. Currie*, 2008 BCCA 150).
- There need not be a match between the heads of damage in a tort award and the specific benefits payable under s. 83 (*Gurniak v. Nordquist*, 2003 SCC 59). Nevertheless, matching damage awards with benefits provides a valuable aid in attempting to assess fairly what portion of the tort award contains Part 7 benefits.
- When a plaintiff is found to be contributorily negligent, the s. 83 deduction is made after the judgment has been reduced for contributory negligence (*Helm v. Bousquet* (1987), 12 B.C.L.R. (2d) 269 (C.A.)).
- The onus to establish that a deduction is appropriate lies with the defendant and it is a difficult one where, as here, a global award has been made by a jury and it is uncertain what components of the claim were allowed and which rejected.
- *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.) advocates a cautious approach when estimating a s. 83 deduction. The components of the plaintiff's claim for costs of future care appeared more weighted to discretionary rather than mandatory Part 7 benefits, and that is a factor for consideration.

Holmes J. decided that an appropriate deduction would be $50,000, based on the evidence known to him from presiding at trial with jury, the affidavits filed, and the legal principles canvassed above. He concluded that this amount "satisfies the need of a substantial excess reserve for the plaintiff to advance Part 7 benefit claims and includes the necessary level of caution having regard to the variables involved in assessment."

XIX. Legislation

A. Proposed Civil Rules

1. Rule 9-1: Offer to Settle Provision

The BC Justice Review Task Force published its latest draft of the proposed Rules of Civil Procedure in March 2008. Called a Work-in- Progress, this most recent draft reflects the amendments made in response to the consultation on the Concept Draft (published July 23, 2007) and a review by judicial members of the Rules Revision Committee. The Work-in-Progress Draft has not been approved by the full Rules Revision Committee, the Attorney General, the Deputy Attorney General or the Chief Justice.

The Work-in-Progress Draft Rules may be viewed on the BC Justice Review Task Force web site at: http://www.bcjusticereviewforum.ca/civilrules

Much has already been written about the proposed Rules of Civil Procedure and therefore they will not be addressed here. However, little, if anything, has been said about the complete revision of Rules 37 and 37A, now Rule 9-1:

> Rule 9-1 – Offers to Settle
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> **Definition**
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> (1) In this rule, "offer to settle" means
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> (a) an offer to settle made and delivered before July 2, 2008 under Rule 37, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,
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> an offer of settlement made and delivered before July 2, 2008 under Rule 37A, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or
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> (b) an offer to settle, made after July 1, 2008, that
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> (i) is made in writing by a party to a proceeding,
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> (ii) has been delivered to all parties of record, and
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> (iii) contains the following sentence: "The ....[name of party making the offer].... reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding."
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> **Offer not to be disclosed**
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> (1) The fact that an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the proceeding, until all issues in the proceeding, other than costs, have been determined.
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> **Offer not an admission**
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> (1) An offer to settle is not an admission.
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> **Offer may be considered in relation to costs**
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> (1) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
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> **Cost options**
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> (1) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:
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> (a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;
>
> (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.

Considerations of court

(1) In making an order under subrule (5), the court may consider the following:

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

It is overwhelmingly evident that the current offer to settle provisions are in need of revision. Rule 37 has been interpreted so strictly by the courts as to render it ineffective in all but the most simple actions. Rule 37A, a codification of the *Calderbank* letter, was introduced to plug any gaps left by Rule 37 but has yet to be effectively applied by the courts:

- Separate offers must be made where there are multiple actions to be heard together (*Cao v. Natt*, 2005 BCCA 351; *Canadian Forest Products Ltd. v. BC Rail*, 2005 BCCA 460).
- Separate offers must be made to or by defendants who are not sued jointly (*Roeske v. Grady et al.*, 2007 BCSC 1037 and *Roeske v. Brickwood Holdings Ltd. et al.*, 2007 BCSC 1038).
- Parties cannot specify costs consequences other than those mandated by Rule 37. Offers that exclude the payment of costs or that apportion costs fall outside both Rules 37 and 37A. (*Coutu v. San Jose Mines*, 2005 BCSC 1451; *P.G. Restaurant Ltd. dba Mama Panda Restaurant v. Northern Interior Regional Health Board et al.*, 2006 BCSC 1680; *Greenfield v. Albion Properties*, 2007 BCSC 226; *Lewis v. Abel*, 2008 BCSC 140).

It is apparent that the drafters of Rule 9-1 intend to sacrifice certainty in favour of more flexibility for the parties and greater discretion in the court to award costs, with an offer to settle being one factor in the exercise of discretion. The inclusion of July 2, 2008 as the starting date for the transition from old to new indicates that the new rule may be introduced earlier than the rest of the proposed civil rules. It is uncertain whether further revisions to the rule are being contemplated. It is also uncertain whether Rule 9-1 will fulfill the purposes generally of formal offer to settle provisions: to promote settlement and to impose costs sanctions where a party has refused to accept a reasonable offer.