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PAPER 1.1

Update on Case Law & Legislation

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UPDATE ON CASE LAW & 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 2008. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Administrative

A. Tepei v. ICBC, 2009 BCCA 28, per Kirkpatrick J.A. (Newbury and Smith JJ.A. Concurring)

The Court of Appeal upheld the Chambers judge's decision to remove an arbitrator and vacate his rulings on the basis of reasonable apprehension of bias. The arbitrator had failed to disclose that his firm had signed a Strategic Alliance Agreement with ICBC and that the arbitrator was the principal contact between his firm and ICBC.

III. Commercial Host Liability

A. Donaldson v. John Doe et al., 2009 BCCA 154, per Frankel J.A. (Rowles and Prowse JJ.A. Concurring)

This was an appeal from the dismissal of a claim against the promoter of an Oktoberfest event and the owner of the Commodore Ballroom at which the event was held. After the event concluded and when the appellant was short distance from the Commodore, he was struck in the face by a souvenir glass beer mug held by another patron, Briggs. Briggs and the appellant did not know each other and it was not known whether Briggs acted intentionally or accidentally. The appellant suffered serious injury.

The trial judge found that neither the promoter nor the owner owed a duty of care to the plaintiff. Firstly, he found that there was no evidence of actual or constructive knowledge that Briggs was drunk. The trial judge also found that even if Briggs had been over-served and the promoter and owner knew or ought to have known that he was drunk, he would not have found a duty of care because allowing Oktoberfest patrons to leave with souvenir glass mugs did not create a foreseeable risk of harm to others in the area. At para. 66 of the judgement, the trial judge said:

> In *Stewart v. Pettie* the court held that a commercial host has a duty of care to see that an intoxicated patron does not drive. As observed by McLachlin C.J.C. in *Childs*, a duty of care is justified in such circumstances because "the risks of impaired driving and their consequences for motorists and their passengers are well known" (at para. 28). The same cannot be said about the risks and consequences of a drunken man walking with a glass mug in his hand.

The appeal was dismissed. However, the Court of Appeal held that the trial judge had committed an error by conflating the concept of foreseeability in a duty of care analysis and foreseeability in a standard of care analysis:

> These are two different legal concepts. In determining whether A owes a duty of care to B, foreseeability is a factor with respect to whether *the relationship between them* warrants imposing such a duty. The question is whether B falls within a class of persons who could reasonably be expected to be harmed by A's conduct. If a duty of care is found to exist, then foreseeability with respect to *the specific risk of harm* is considered in determining whether A was negligent, i.e., whether there has been a breach of the standard of care.

In finding that the promoter and owner did owe a duty of care to protect such persons as the appellant from injury by patrons of Oktoberfest, Frankel J. said:

> Turning to the case at bar, in my view, the duty of care question is not whether a commercial host owes a duty to third-parties to protect them from injuries caused by intoxicated patrons who leave the host's premises with souvenir beer mugs, but rather, whether a commercial host owes a duty to protect them from alcohol-related injuries caused by intoxicated patrons. Based on what the Supreme Court of Canada has said about the duties of commercial hosts, the answer to that question is "yes."
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> ...
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> In my view, the Supreme Court of Canada determined that alcohol-serving commercial host/third party *is a category of relationship* that gives rise to a duty of care. In that case, a passenger in a motor vehicle was injured when the driver, who had been drinking alcohol at a dinner theatre, lost control and drove off the road. As I read that case, it rests on an acceptance of the proposition that alcohol-serving establishments owe a duty of care to persons who may be harmed by intoxicated patrons. This duty is not restricted to third-party users of the highways.

The Court did not conduct an analysis of the standard of care because the appellant had failed to adduce evidence with respect to Brigg's drinking and conduct. Briggs had not been called as a witness at trial. The appellant had read in some of Brigg's testimony on discovery, but pursuant to Rule 40(27)(a) that evidence is only evidence against the adverse party who was examined. Accordingly, there was no admissible evidence against the promoter and the owner to establish that Briggs: (a) drank six or seven beer before he went to the Commodore; (b) arrived at the Commodore at the beginning of the event; (c) drank eight to ten beers while there; or (d) considered himself drunk when he left. The court confirmed that a plaintiff need not prove that the commercial host had actual knowledge of the patron's level of intoxication; merely that they ought to have known.

The evidence in this case was, at best, only able to show that Briggs was intoxicated to some unknown degree. This was not enough to establish liability against a commercial host.

In respect of causation, the Court said:

> In the present case, the evidence admissible against Pacific Promotions and the Commodore is capable of proving only that Mr. Briggs drank some beer at Oktoberfest, left the event carrying a glass beer mug and, for some unknown reason, raised his arm, injuring Mr. Donaldson with that mug. This, in my view, is not sufficient to satisfy the "but for" causation test, as it would be speculation to infer that alcohol was a factor in Mr. Brigg's actions. In other words, even assuming that the monitoring system at the Commodore was inadequate, the evidence is not capable of proving, on a balance of probabilities, that Mr. Donaldson would not have been injured had a proper system been in place.

IV. Costs

A. Catalyst Paper Corporation v. Companhia de Navegacao Norsul, 2009 BCCA 16, per Hall J.A. (Smith and Chiasson JJ.A. Concurring)

The Court of Appeal reaffirmed the purpose of costs rules and the general principle that the discretion to depart from the normal rule, that costs follow the event, must be exercised on a principled basis.

Hall J.A. reviewed a number of cases in the Court of Appeal that made the point that costs rules should be seen as having a purpose beyond indemnification of the successful party in the litigation and stated:

> [16] It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

B. Moses v. Kim, 2009 BCCA 82, per Smith J.A. (Finch C.J.B.C. and Bauman J.A. Concurring)

The Court of Appeal upheld the trial judge's apportionment of damages of 65% against the plaintiff and 35% against the defendant and third party. The defendant appealed the trial judge's award of 90% of the costs of the action to the plaintiff.

Section 3(1) of the *Negligence Act* states:

> Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

The trial judge relied on the opening words of s. 3(1) and the following factors to justify departing from the usual operation of the section:

1. the plaintiff suffered serious injuries and was no longer competitively employable;
2. liability was denied by the defence, arguing that the plaintiff was 100% liable for the collision;
3. the trial lasted nine days with only one day of evidence relating to liability and one half day of argument on liability;
4. the damages award (after apportionment) was for $218,050;
5. the plaintiff's legal expenses amounted to $118,000; and
6. the plaintiff's calculation of taxable costs was approximately $84,000.

The Court of Appeal concluded that the trial judge erred in considering the amount of the plaintiff's legal fees as a relevant factor in departing from the usual rule. The difficult financial circumstances of the plaintiff, particularly as a consequence of the accident, is not an appropriate factor in the court's exercise of discretion. The trial judge also failed to consider the defendant's degree of success on their claim of contributory negligence. In order to give deference to the trial judge's exercise of discretion in the circumstances of this case, the Court of Appeal fixed the plaintiff's recovery of costs at 75%.

C. Ostovic v. Foggin, 2009 BCSC 58, Savage J.

The plaintiff was awarded $7,500 in damages for soft tissue injury symptoms lasting approximately six months. In considering whether to deprive the plaintiff of costs under Rule 57(10), Savage J. commented that "[i]t was apparent to both parties that prior to the commencement of the action the matter of damages was within the monetary jurisdiction of the Provincial Court." He nevertheless found there was sufficient reason for the plaintiff to have commenced his action in Supreme Court. He cited as justification that the defendant had denied liability, contested causation and refused reimbursement for special damages and was able to take advantage of the discovery process in order to bolster his defence.

He cites an additional factor:

> [42] There is the additional factor that, as in *Faedo* and *Kanani*, the Plaintiff faced an institutional defendant which, in the ordinary course, has counsel. To obtain any recovery the Plaintiff is forced to go to court, where he is facing counsel and counsel is reasonably required, but in Provincial Court there is no way of recovering the costs of counsel.

This decision, and a number preceding it, has significantly lowered the threshold imposed by Rule 57(10) for a plaintiff to overcome in order to recover costs.

D. Raju v. Bui and ICBC, 2008 BCSC 1230, Registrar Sainty

Prior to accepting a defence offer of $25,000, the plaintiff had obtained reports from five medical experts, including the plaintiff's general practitioner, two psychiatrists, a rheumatologist and a physiatrist (amounting to a cost of $12,230). On the assessment of the plaintiff's bill of costs, defence counsel argued that Rule 68 allows only one expert witness of the plaintiff's choosing, absent consent or a court order, and that the plaintiff should therefore be restricted to recovering disbursements for one expert.

Registrar Sainty disagreed. Rule 68 limits expert evidence at trial to one expert per party; it does not prevent the plaintiff from recovering disbursements for more than one expert when it was reasonable and necessary to engage such experts to determine the extent and causation of the plaintiff's injury.

E. Shearsmith v. Houdek, 2008 BCSC 1314, Romilly J.

After an 11-day trial at which the plaintiff sought damages of $576,738, including significant damages for loss of future care and loss of earning capacity, Romilly J. awarded damages of $81,694. The plaintiff's claims for damages for cost of future care and loss of earning capacity failed completely.

The defendant applied for an order, in accordance with subrules 57(9) and (15), granting him costs and disbursements for the part of the proceedings relating to the heads of damages which the plaintiff failed to prove.

In granting the order, Romilly J. commented that "the plaintiff's original claim was grossly exaggerated and ... as a result, the trial took much longer than it should." He was satisfied that the three criteria set out in the leading authority, *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, 77 B.C.L.R. (4th) 142 were met:

- there were discrete issues upon which the defendant succeeded at trial;
- many of the witnesses called by the plaintiff testified entirely or primarily with respect to the claims for loss of earning capacity and cost of future care and the time spent on their testimony was readily ascertainable;
- there was divided success in this case and therefore apportionment of costs would effect a just result.

Romilly J. denied the plaintiff her costs of two days of trial and her disbursements associated with the issues of loss of future earning capacity and cost of future care, including the cost of care reports from two experts. The defendants were awarded the costs and disbursements for two days of trial.

F. Bagasbas v. Atwal, 2009 BCSC 512, Satanove J.

The plaintiff claimed non-pecuniary damages of $40,000 for injuries suffered as a result of a low velocity impact accident, but conceded that she suffered no loss of income, past or future and had no residual injuries three years after the accident.

The majority of the two-day trial was spent on which activities the plaintiff enjoyed before and after the accident. Satanove J. concluded, after the plaintiff's detailed examination-in-chief and cross-examination, that her activities had changed little after the accident. Photographs of the plaintiff posted on her facebook page showed her kayaking, hiking and bicycling after the accident, activities which the plaintiff testified she could no longer do.

Based on her finding that the plaintiff suffered "some injury and pain, but not much loss of enjoyment of life," Satanove J. awarded her $3,500 in non-pecuniary damages.

In subsequent Reasons (May 7, 2009, Vancouver Registry No. M081193, Oral Reasons) Satanove J. concluded that had the plaintiff properly advised her counsel of her true state of health prior to the commencement of the action, her counsel would have known that there was no sufficient reason to bring the action in Supreme Court. The plaintiff was awarded disbursements only under Rule 57(10).

V. Rule 66 Costs

The courts are showing a disposition, in Rule 66 actions, to depart from the fixed costs provisions set out in Rule 66(29) where the trial of the action extends beyond two days and to award costs on Scale B of the tariff:

In *Kailey v. Kellner*, 2008 BCSC 224, the plaintiff brought two motor vehicle actions, the first under Rule 66 and the second under Rule 68. The parties agreed that the actions should be heard at the same time. At a case management conference, Pitfield J. refused to accede to the defendants' request to have the actions removed from Rule 66 and Rule 68 and to set the matter for a five-day trial. He ordered that the trial of the matter be set for three days and that it be heard pursuant to Rule 66.

The trial took four days. At the costs application, Parrett J. concluded that the length of the trial constituted special circumstances and awarded the plaintiff her costs of both actions at Scale B to the date of delivery of the defendants' offers to settle (both of which exceeded the damages awarded in the actions) and costs at Scale B to the defendants thereafter.

In *Majeska v. Partyka*, Oral Reasons for Judgment, March 20, 2009, Vancouver Registry No. M080944, Sewell J. considered the factors that there were "issues of some complexity" raised at the trial, that the trial took three and a half days to complete and that both parties made formal offers to settle (none of which were more favourable than the judgment) to justify departing from the fixed costs provisions under Rule 66(29) and to award costs to the plaintiff at Scale B.

In *Schnare v. Roberts*, 2009 BCSC 656, the trial took four days to complete. Adair J. was satisfied that the length of the trial constituted special circumstances and awarded the plaintiff costs at Scale B. Approximately six days prior to trial, the plaintiff applied to remove the matter from Rule 66. The master adjourned the trial and directed that a third day be added and that the matter remain within Rule 66.

VI. Damages

A. Frankson v. Myre, 2008 BCSC 795, Savage J.

The plaintiff, a 21 year old college student at the time of the accident, suffered a back injury. He made an in-trust claim for the care provided by his mother after the accident. Savage J., after considering the six relevant factors for such a claim as set out in the leading case of *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735, aff'd 2004 BCCA 124, concluded that there was no support for an in-trust claim:

> [55] In the circumstances here, even if services went beyond that which might be performed out of a sense of love, friendship or family duty, which in my opinion they did not, the plaintiff's mother suffered no opportunity loss, that is, she did not suffer any economic loss as a result of caring for the plaintiff since she was off work on medical leave and under full salary.

B. Ashcroft v. Dhaliwal, 2008 BCCA 352, per Huddart J.A. (Kirkpatrick and Tysoe JJ.A. Concurring)

The plaintiff suffered injuries as a result of two motor vehicle accidents occurring a year apart. The trial judge found that the first accident caused the plaintiff to develop post-traumatic stress disorder, a major depressive episode and chronic pain disorder which were exacerbated by the second accident.

Prior to trial, the plaintiff accepted an offer to settle delivered by the defendants in the second action in the amount of $315,000. The trial judge was aware of the settlement, but was unaware of the

amount. He ultimately concluded that the injuries suffered by the plaintiff in both accidents were indivisible, such that the defendants in the first accident were fully liable for the entirety of the plaintiff's injuries and their consequences. He awarded damages to the plaintiff in the amount of $400,000 and then deducted the settlement amount from the award.

In case he was wrong with respect to his finding of causation, the trial judge apportioned damages between the two sets of tortfeasors, in accordance with the *Long v. Thiessen* approach, by attributing 70% to the defendants in the first action and 30% to the defendants in the second action.

The issue on the appeal brought by the plaintiff was whether the settlement amount received from a subsequent tortfeasor should be deducted from a damage award made against the original tortfeasor where both tortfeasors caused an indivisible loss.

The Court of Appeal affirmed the trial judge's deduction of the settlement monies from the award on the basis that it complied with the rule against double recovery as set out by the Supreme Court of Canada in *Ratych v. Bloomer,* [1990] I S.C.R. 940, 69 D.L.R. (4th) 25. The appellant essentially argued that, in circumstances such as these, the court should ignore the rule against double recovery for settlement proceeds in order to satisfy the public interest of encouraging settlement. Huddart J.A. concluded that "the concern to prevent double recovery outweighs the public interest in encouraging settlements" (at par. 30).

The Court also confirmed that the principle remains the same, whether the tortfeasors are concurrent, as was the case in *Dixon v. British Columbia* (1980), 24 B.C.L.R. 382, 128 D.L.R. (3d) 389 (C.A.) in which the same issue arose, or are consecutive, as was the case here. Where a court finds that the losses suffered by a plaintiff are indivisible, such that the negligence of more than one tortfeasor combined to cause the losses, it is irrelevant, for the purposes of deductibility of settlement proceeds, whether the tortfeasors are concurrent or consecutive.

C. Greaves v. Grace, 2008 BCSC 1529, Brown J.

These reasons are of interest for the treatment given by the court for unsubstantiated allegations of aggravated and punitive damages.

The plaintiff was injured in a single vehicle accident while a passenger in a vehicle being driven by his employer and long-term friend. The driver of the vehicle admitted he was impaired by alcohol at the time of the accident, although he was not convicted of an alcohol-related offence.

Brown J. could find very little factual basis relating to the claim for aggravated damages which he described as "a sub-set of non-pecuniary damages usually awarded in cases involving some harm that has fright, misery and humiliation associated with it." The actions of the defendant after the accident, rooted as they were in the close relationship between the plaintiff and defendant, did not amount to an intention to inflict further suffering on the plaintiff. These actions were: the subsequent lay-off of the plaintiff from his employment, a delay in preparation of his record of employment and an offer by the defendant to pay the plaintiff's medical expenses in exchange for dropping the law suit. Brown J. concluded that "a claim for aggravated damages would rarely find factual foundation in a motor vehicle accident case such as this."

Similarly, Brown J. could find nothing in the defendant's behaviour leading up to the accident that would satisfy the purpose of punitive damages, which are awarded when "the nature of the actions of the defendant are so harsh, vindictive or reprehensible as to attract the full condemnation and punishment of the community."

Brown J. stated:

> [412] Dismissal of claims for aggravated, punitive/exemplary damages should be reflected in costs. A claim for punitive damages especially involves allegations of a serious nature; the evidence should be proportionate.

The defendant was awarded costs for preparation and attendance at trial for one day and an additional 10 units for all other items on the tariff in relation to the dismissal of the claims for aggravated and punitive damages.

In further reasons (*Greaves v. Grace*, 2009 BCSC 394), after hearing arguments by counsel for both parties, Brown J. reaffirmed his position that apportionment of costs was warranted in the circumstances of this case, but amended his costs award to "make it fairer." He awarded the defendant costs for preparation and attendance at trial for one day.

D. Travis v. Kwon, 2009 BCSC 63, Johnston J.

These Reasons for Judgment are of interest because of Johnston J's comments with respect to excessive claims for cost of future care. The plaintiff claimed $179,000 for this head of damage, based largely on the opinion of her expert witness, Russell McNeil, an occupational health consultant, which was endorsed in part by her physiatrist, Dr. Anton.

Johnston J. comments:

> [109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.
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> [110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.
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> [111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.

In dealing with one of the items recommended by her expert, future housekeeping services, he had the following to say:

> [114] Part of the housekeeping portion of these claims arises out of the fact that the plaintiff's husband is not terribly helpful in that regard. While the defendants cannot expect a family member to take on an unreasonable burden created by injuries to another member of the family, it is not reasonable to expect defendants to pay to have someone perform services that can and should reasonably be taken on by members of the family.

He disallowed the claims advanced for future housekeeping services as not being medically justified, preferring instead to make an allowance in her award for non-pecuniary damages. Her cost of future care award, which included a Tens machine, a back rest and an exercise program, was allowed at $12,575.

E. Pett v. Pett, 2009 BCCA 232, per Hall J.A. (Mackenzie and Bauman JJ.A. Concurring)

The Court of Appeal held that the trial judge erred when, in assessing the plaintiff's claim for loss of earning capacity, he found that the plaintiff's pre-accident choice to limit his education in order to embark on a career involving heavy labour a negative contingency. At para. 16 the Court said the following:

> I am not sure that I would have considered the education level of the appellant to be what the trial judge described as a negative contingency. In my view, this was simply a factual circumstance concerning this appellant because his modest educational level circumscribes the range of possible avenues of employment open to him. He, like several others of the family connection, had made a decision to not pursue higher education because of a history of available employment in occupational activity with a heavy physical component. That choice may have been an unreasonable one when made, but in the altered circumstances now facing the appellant. He is perhaps more affected than would be the case of someone who possesses enhanced education credentials. I do not concur with the language of the judge in para. 77 when he speaks about the "educational level for which the defendant is not responsible." While, of course, the defendant has nothing to do with the earlier choice the appellant made about his education, the defendant is responsible for the impact the accident has had, and will have, on this young appellant of limited educational attainment. He must take the appellant as he finds him. In my respectful view, the judge's treatment of this issue is problematic for the reasons I have discussed.

VII. Damages—Bad Faith

A. McGee v. ICBC, 2008 BCCA 508, per Huddart J.A. (Frankel and Neilson JJ.A. Concurring)

The Court of Appeal considered allegations of bad faith against ICBC for its failure to have accepted a post judgement settlement offer, rather than the customary pre-trial settlement offer. The appeal court upheld the lower court's decision to dismiss the claim.

Judgement had been awarded at trial in excess of the third party liability policy limits. The defendant/insured in the original action had been advised to seek independent legal advice shortly before the trial. After the trial, the insured assigned his cause of action against ICBC to the plaintiff in exchange for an agreement not to take execution proceedings against him. The allegations were that ICBC had refused to accept a post-judgement structured settlement offer which would have reduced the excess judgement by approximately $80,000. ICBC was entitled to refuse to accept the offer because the plaintiff was not offering a full release of the insured from any further liability. ICBC was doing no more than insisting on its contractual right in furtherance of its policy to accept structured settlements only where it could obtain a full release from liability for its insured. ICBC was not obliged to expose itself to a contingent liability in addition to the policy limits. The Court also held that the insured was not entitled to be indemnified for the costs of independent legal advice he sought on the recommendation of ICBC.

B. Pearlman v. American Commerce Insurance Co., 2009 BCCA 78, per Finch C.J.B.C. (Smith and Frankel JJ.A. Concurring)

An insurer brought an 18A application to have a bad faith claim advanced against it dismissed. The claim was for medical expenses relating to a car accident. The Chambers judge dismissed the application because there were "valid questions" concerning the insurer's conduct which he was unable to answer on the record before him.

The appeal was allowed. There was "absolutely no evidence" to support the allegations of deceit, fraud, abuse of process or misrepresentation. There was sufficient evidence to find the facts necessary to support the insurer's application and, accordingly, the insurer was entitled to have the action dismissed.

VIII. Defences

A. Qiao v. Buckley, 2008 BCSC 1782, Sinclair Prowse J.

This decision is an example of a recent judicial trend to reduce damages awarded to the plaintiff for failure to undergo treatment recommended by the plaintiff's physicians.[1] The plaintiff developed chronic pain and an accompanying anxiety disorder as a result of injuries suffered in a motor vehicle accident. Her general practitioner and her psychiatrist recommended she undergo psychological counseling, including participating in group psychotherapy sessions, which recommendations the plaintiff failed to follow.

Sinclair Prowse J. held that the defendants met the onus of establishing that the plaintiff failed to mitigate her damages. She found that such treatment would have been effective in developing techniques to reduce or control her stress levels leading to an improvement in her chronic pain. The plaintiff's embarrassment in disclosing her psychological problems in a group session, due in part to her cultural heritage, and the cost of the sessions were not sufficient to excuse the plaintiff from complying with her duty to mitigate. Sinclair Prowse J. reduced her non-pecuniary damages by 30%.

B. Antoniali v. Massey, 2008 BCSC 1085, Preston J.

In this case, Preston J. relied on the opinion of the plaintiff's own expert to reduce the plaintiff's damage award significantly for failure to mitigate.

The plaintiff sustained soft tissue injuries to her neck and back in a motor vehicle accident, the effects of which she still suffered more than four years later.

Preston J. concluded that the plaintiff failed to mitigate her damages by resorting to passive chiropractic treatment instead of undertaking an active exercise program, the latter of which had been suggested by her treating physicians soon after the accident and at other intervals thereafter. In particular, he accepted the opinion of her physiatrist, Dr. Stewart, about the benefits of such a program:

> [32] Dr. Stewart is a specialist in physical medicine and rehabilitation. I am satisfied that her evidence provides the safest guide to the likely efficacy of an exercise program. She expressed the opinion that even at the time of trial a program of stretching and conditioning would be likely to improve her functioning. However, it was clear from her evidence and that of Drs. Cameron and Leung that this has been true for some time. Dr. Stewart commented that in the early stages of an injury individuals are usually so sore that they cannot engage in an exercise program. She said that many people are not ready to perform active rehabilitation for as much as a year after the injury.
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> [33] She observed that, in Ms. Antoniali's case, she assumed household and child care duties after the collision that reduced the time that she had to devote to both work and rehabilitation.
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> [34] She agreed that injured persons improve most with active rehabilitation in the first two or three years after an injury.
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> [35] I am satisfied that, had Ms. Antoniali engaged in an active rehabilitation program beginning one year after the collision, she would have significantly reduced the disability that she has experienced.

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1 See *Middleton v. Morcke et al.*, 2007 BCSC 804; *Taggart v. Yuan et al.* (11 January 2008), Vancouver Registry No. M062358; *Antoniali v. Massey*, 2008 BCSC 1085; *Papineau v. Dorman*, 2008 BCSC 1443.

Preston J. reduced her award for past damages (including 50% of her non-pecuniary damages and past wage loss from one year after the accident to trial) by 15% and her award for future losses (including 50% of her non-pecuniary damages) by 50%. Her overall award of $135,677 was reduced to $87,027.

C. Papineau v. Dorman, 2008 BCSC 1443, Brown J.

The plaintiff was injured in a motor vehicle accident and at some point developed low back pain with right-sided symptoms. He was subsequently diagnosed with a pre-existing degenerative back disease. The main issue in this case was causation, the assessment of which was made more difficult by the fact that the plaintiff did not seek medical treatment for his injury until eight months after the accident. There were, therefore, no early reports to a physician to document the timing of the back and right-sided symptoms. Expert evidence led by the plaintiff established that symptoms arising more than four to six weeks following the accident were likely not related to the accident.

The Court relied on the plaintiff's testimony and that of his co-workers to establish that the symptoms arose within days or weeks of the accident and therefore were caused by the accident.

The plaintiff provided the clinical records of his general practitioner, but no report. In deciding whether to draw an adverse inference from the failure to produce an opinion from the general practitioner, Brown J. concluded that, with respect to the issue of causation, there was no adverse inference to be drawn. The general practitioner's clinical records contained nothing that would contradict the opinion of the orthopedic surgeon on the issue of causation and it was reasonable to assume that the general practitioner would have deferred to the orthopedic surgeon's opinion on the issue.

However, Brown J. concluded that he could draw an adverse inference with respect to the issue of the plaintiff's failure to mitigate. The clinical records showed that the general practitioner had recommended that the plaintiff undergo physiotherapy and conditioning programs which the plaintiff failed to do. The plaintiff's failure to seek immediate medical treatment after the accident was a somewhat minor factor to consider when assessing the more important ultimate failure to follow treatment.

Brown J. applied a 20% reduction to the plaintiff's non-pecuniary damages and past loss of income, but assessed his future losses differently "based on the assumption that he will choose to act reasonably and to mitigate his losses by following treatment recommendation, with corresponding benefit."

In assessing whether the plaintiff was entitled to damages for future loss of earning capacity, the Court found no difficulty in concluding that the plaintiff, who had worked in a labour-intensive job at the time of the accident but had since found a more sedentary occupation, had suffered a permanent loss of earning capacity. He followed the guidelines set out in *Brown v. Golaiy* and awarded the plaintiff $40,500 for loss of earning capacity.

IX. Disability Insurance

A. Wafler v. ICBC, 2008 BCSC 1387, Meiklem J.

These reasons deal with the application of s. 96(f) of the Insurance (Vehicle) Regulation which provides an exclusion to coverage under Part 7 where "the injury or death is caused, directly or indirectly, by sickness or disease."

The plaintiff suffered a back injury in a motor vehicle accident. At the time of the accident, he was a roofing and siding installer, although he had previously worked as a locksmith. He suffered from a degenerative back condition which, although asymptomatic at the time of the accident, had caused him problems prior to the accident. ICBC paid temporary total disability benefits under section 80 of

the Regulation for several months, until it received an opinion from an orthopedic surgeon that his continuing total disability was attributable to his underlying back condition and no longer to the accident. The plaintiff brought a Rule 18A application for a declaration that he was entitled to further benefits. ICBC invoked s. 96(f).

The plaintiff countered that an extreme application by ICBC of s. 96(f) would mean that, in light of the prevalence of degenerative spine conditions in the general public, no person over 30 who suffered a whiplash-type injury in a motor vehicle accident would ever be entitled to Part 7 benefits.

Meiklem J. commented that ICBC did not follow such an extreme application of s. 96(f) in this case, having paid benefits to the plaintiff until it was satisfied that his continuing total disability was caused by his underlying degenerative condition, and was no longer the result of his accident injury.

He concluded that the drastic consequence suggested by the plaintiff is avoided so long as it is understood that a pre-existing disease which is aggravated must meet the "but for" test in respect of the total disability in order to bring it within the s. 96(f) exclusion. In this case, the defendant demonstrated that, but for the pre-existing disease, the plaintiff would not have been totally disabled after the date on which benefits were terminated. Therefore, the s. 96(f) exclusion applied in this case.

Alternatively, if he had found that s. 96(f) did not apply, Meiklem J. would have found that the plaintiff was not precluded by his injury from engaging in employment for which he was reasonably suited, namely locksmithing.

B. Andreychuk v. RBC Life Insurance Co., 2008 BCCA 492, Chiasson J.A. (Low and Lowry JJ.A. Concurring)

The appellant, a lawyer, ceased practicing law when she became disabled as a result of serious depression in 2000. She sought disability benefits under her own occupation disability policy on the basis that she was permanently disabled. The respondent paid benefits to the appellant until 2004. At that time, the appellant's treating psychiatrist reported to her family doctor that the appellant had been free of depressive symptoms for a prolonged period of time and that she should be weaned from medication. The appellant next sought medical treatment for depression in March 2006, long after the policy had expired.

The policy contained a provision that that required her to be under the regular care of a physician to be entitled to benefits. The appellant argued that she was suffering from an undiagnosed anxiety disorder during the relevant period and was entitled to benefits even though she had not been under the care of a physician. The trial judge found that she had recovered from her illness and dismissed the claim because she had not been under the care of a physician in 2004 as required under the policy. In doing so, he distinguished the Ontario Court of Appeal decision in *Kirkness Estate v. Imperial Life Assurance Co. of Canada* (1993), 12 O.R. (3d) 285 and a line of American authorities that stand for the proposition that "where permanent disability is established and no useful purpose would be served by regular attendance on a physician, the law will not compel the performance of futile acts." Instead, the trial judge found that the appellant's condition was treatable and so could not be distinguished from the BC Court of Appeal decision in *Rose v. Paul Revere Life Insurance Co.* (1991), 85 D.L.R. (4th) 433. The trial judge quoted the following passages from *Rose*:

> [52] ... continuing at paras. 28-29:
>
> The first ground of appeal which asserts that a person who withdraws from an occupation because of sickness and becomes healthy again may still be disabled from returning to that occupation, does not seem to me [to] raise a point relevant to the validity of the appellant's claim.
>
> Where the insured recovers and "becomes healthy as a result of withdrawal," his or her employment benefits necessarily cease because the coverage does not extend to

> inability to work due to a condition not under medical treatment which renders the insured physically or psychologically allergic to his or her occupation. It extends only to inability to work due to sickness for which regular medical treatment is given, and continues so long as sickness and treatment continue.
>
> [53] ... finally at paras. 33-35:
>
> The fact that sickness was likely to return should he return to dentistry did not, in my view, entitle Dr. Rose to benefits, unless and until those things happened.
>
> The thrust of the appellant's case, as was emphasized by the last point, seems to be that an insured who develops a psychological incompatibility with his or her work should not, after recovering from its effects, be obliged to return to work and become sick In order to receive continuing benefits.
>
> It seems to me that this argument flies in the face of the clear wording of the policy. The fact that taking a particular course of action will probably result in sickness is a reason why it is unlikely an insured will take that course, and a factor tending to limit the insurer's risk which no doubt goes into the economic equation by which premiums are calculated. It is not, in my view, inconsistent with the nature of the coverage that sickness benefits should end when sickness no longer requires treatment, or that it would be expected that the insured would then pursue some other means of livelihood, rather than return to the occupation which caused his or her sickness.

The Court of Appeal agreed with the trial judge's conclusions, but not by distinguishing *Kirkness* and the American authorities because the appellant's condition was treatable. The Court was of the view that the fact that a medical condition was not treatable did not make *Rose* inapplicable. A provision in a disability policy that stated "total disability" included being under the care of a physician was a provision that defined coverage.

X. Fiduciary Duties

A. Peterson v. Proline Management Ltd., 2008 BCCA 541, per Mackenzie J.A. (Levine and Tysoe JJ.A. Concurring)

The appellant was injured when she fell over a low wall outside her condominium patio. The existence of the wall was well known to her and she had complained to the respondents, the management company and strata corporation, about its danger. The subject of the appellant's safety was the topic of several strata council meetings and ultimately, the respondents agreed to install a railing to comply with the building code. Unfortunately, the appellant, a known binge drinker, became heavily intoxicated and fell over the wall before the railing was installed. She sued in contract and tort. The action was dismissed on a limitations defence but the appellant was given leave to amend her Statement of Claim to plead breach of fiduciary duty. That claim was dismissed on the basis that no fiduciary duty was owed in the circumstances.

The appeal from the decision was dismissed. The respondents' relationship to the appellant was defined by the bylaws of the strata council and their control and occupation of the common property. The appellant was not vulnerable to any discretion or power assumed by the respondent to exercise selflessly on her behalf related to the wall or the railing. There was no trust like relationship between the appellant and the respondent. Accordingly, there was no fiduciary relationship.

B. Richard v. British Columbia, 2009 BCCA 185, per Saunders J.A. (Low and Neilson JJ.A. Concurring)

This was an appeal from an order made in the Woodlands School abuse class action amending the certification order to exclude all claims advanced by residents for abuse occurring prior to August 1, 1974, the date that the *Crown Proceedings Act* first came into effect. The plaintiffs had argued that *Arishenkoff No. 2* had not determined whether crown immunity extended to actions in equity for breach of fiduciary duty that arose prior to August 1, 1974. The Court of Appeal dismissed the appeal, confirming that *Arishenkoff No. 2* was determinative and that claims for damages for breach of fiduciary duties are blocked by crown immunity in the same way as an action for damages in tort.

XI. Health Care Costs Recovery Act

A. MacEachern (Committee of) v. Rennie, 2009 BCSC 652, Ehrcke J.

This is the first case to consider the *Health Care Costs Recovery Act*. The action involved a claim for damages for serious injuries sustained by the infant plaintiff when her head came into contact with a tractor-trailer. The plaintiff's trial commenced on March 23, 2009 (i.e., before the Act came into force). As the end of the plaintiff's case approached, she filed a notice of motion dated April 21st, seeking leave to amend her statement of claim to recover approximately $700,000 in hospitalization costs paid by the province.

His Lordship reviews the Act in detail and conducts an analysis of the Act's application to personal injury claims filed, but yet unresolved. The application was dismissed on the basis that it would be prejudicial for the plaintiff to amend her claim to pursue these costs so late in the day. Commencing at para. 30 his Lordship said:

> Counsel for the plaintiff and counsel for the intervenor submit that it might not be necessary for the defendants to call evidence if the claim were limited to a claim for hospital costs. The suggestion is that these costs are calculated on a simple per diem basis, and there would be no realistic basis on which the defendant could contest hospital costs.
>
> I cannot accept that submission. During the argument on this motion, counsel for the defendants advised that they still have not seen a copy of the Minister's certificate. Since counsel have not seen what would actually be in the certificate, it is speculative to hypothesize that the defendants would have no factual basis to challenge it. The salient point is that in law, the defendants are at liberty to lead evidence to challenge the facts asserted in a s.16 certificate. Their opportunity to lead such evidence has been irreparably compromised by the fact that the application to amend the statement of claim, to add the claim for past health care costs was brought so late in the trial.
>
> Because of the prejudice that the proposed amendments would cause to the defendants, and in light of the fact that the plaintiff would not enjoy any personal benefit from the addition of a claim for past health care costs, the application for leave to amend the statement of claim is dismissed.

XII. Implied Undertaking Rule

A. Beazley v. Suzuki Motor Corporation, 2008 BCSC 850, Goepel J.

The plaintiffs in this products liability action applied for an order that the defendants produce documents, including trial and deposition transcripts, from litigation in the US involving similar allegations with respect to the identical product, a 4 x 4 Suzuki Geo Tracker automobile.

The defendants opposed the production of documents from the foreign litigation, arguing that the documents were subject to confidentiality orders and to the implied undertaking of confidentiality, relying on the Supreme Court of Canada decision of *Juman v. Doucette*, 2008 SCC 8.

Goepel J. concluded that *Juman* was of no assistance to the defendants as that decision involved an application by a stranger to the action seeking production of discovery transcripts. The Supreme Court of Canada noted that when 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, leave will generally be granted. He concluded that, regardless of the fact that documents in another action may be subject to an implied undertaking of confidentiality, if such documents are relevant in the current proceeding, parties are required by Rule 26 to produce all such relevant documents in their possession or control.

B. International Brotherhood of Electrical Workers, Local 213 v. Hotchstein, 2008 BCSC 1009, Halfyard J.

After the trial of a defamation action which took place in 2006, the defendants applied for a declaration that they were no longer subject to an implied undertaking of confidentiality with respect to documents produced by the plaintiff and put in evidence at trial and relied on the Supreme Court of Canada decision in *Juman v. Doucette*, 2008 SCC 8. The plaintiff argued that, at the time the documents were tendered at trial, the law with respect to the implied undertaking of confidentiality was that it continued to apply to documents that had been put in evidence at trial and that it was changed only when the Supreme Court of Canada rendered its decision in 2008. Alternatively, the plaintiff argued that the court retained discretion to prohibit further disclosure of the documents by the defendants.

Halfyard J. concluded that although the law was uncertain at the time of the trial, the *Juman* decision did not change the law. At the time of the trial in 2006, there was no established rule to the contrary that the implied undertaking survived trial.

However, the uncertainty of the law at the time of trial and the fact that the plaintiff had not sought an order with respect to the documents, perhaps in reliance on a mistaken belief that their confidentiality would survive the trial, were factors to take into account in exercising the court's inherent discretion to control its own processes in acceding to the plaintiff's position to continue the implied undertaking.

The defendants' appeal of this decision was heard on May 26, 2009.

XIII. Infant Settlements

A. Beaurivage (Litigation Guardian of) v. Strand, 2009 BCCA 690, per Frankel J.A. (Hall and Smith JJ.A. Concurring)

This was an appeal from an Order that the proceeds of an infant settlement from a case in which the mother of the children had been killed in a car accident be paid to the law firm acting on their behalf, in trust, rather than to the Public Guardian and Trustee ("PGT"). The PGT was the guardian and

litigation guardian of the children. The Order was made on an application by the Public Guardian seeking approval of the settlement and, inter alia, that the funds be paid to him to hold in trust until each child turned 19. The Chambers judge expressed the view that the fees charged by the PGT for managing the settlement proceeds, set out in the Public Guardian and Trustee Fee Regulation, were "excessive and unwarranted."

The Court of Appeal found the judge to have made a palpable and overriding error in finding the fees charged by the PGT excessive. He had failed to properly consider how fees would be charged by the PGT over the life of the trust. In fact, the PGT fees were lower than that would be charged by a bank. It was also wrong for the judge to impose a trusteeship on the law firm without determining that it was prepared to act.

XIV. Insurance Issues

A. McEvoy v. McEachnie, 2008 BCSC 1496, Rogers J.

The vehicle owner, who lived in the Lower Mainland, purchased a vehicle and gave it to his daughter in Vernon for her day-to-day use. The owner instructed his daughter not to let anyone else drive the vehicle. On the day of the accident, the daughter and some friends used the vehicle to drive to and from a pub. While the daughter consumed alcohol, her friend abstained and therefore was in a better state to drive the daughter and two other friends home. En route, the daughter, sitting in the front passenger seat, grabbed the steering wheel and caused the vehicle to crash.

The two issues before Rogers J. were:

- whether the owner of the vehicle consented to its being driven or operated by the daughter's friend;
- whether a passenger who grabs the steering wheel can be considered to be driving or operating the vehicle.

With respect to the first issue, having considered the Court of Appeal decisions in *Morrison (Committee of) v. Cormier Vegetation Control Ltd.*, [1996] B.C. J. No. 2601 and *Barreiro v. Arana*, 2003 BCCA 58 Rogers J. concluded that it is the law in BC that so long as the transfer of car keys from owner to second party is done by an exercise of free will, and the second party gives the keys to a third party by exercise of free will, the owner will be deemed to have consented to the third party's possession of the vehicle, regardless of use restrictions imposed by the owner on the second party.

The Court held that it was the negligence of the daughter, in grabbing the steering wheel, that caused the accident. The friend who was driving the vehicle did not contribute in any way to the crash. The second issue was therefore whether the owner of the vehicle was vicariously liable for the negligence of his daughter. This required a consideration of whether the daughter was "driving or operating" the vehicle so as to impose vicarious liability on the owner under s. 86 of the *Motor Vehicle Act*. Rogers J. concluded that, when the daughter grabbed the steering wheel, she was both driving and operating the vehicle:

> [48] The concept of "driving" does not necessarily imply that only one person at a time can "drive" an automobile. There is no logical reason why a vehicle can not be driven by two people at the same time. Doing so would be unwise and probably dangerous, but it can be done. Similarly, the concept of "driving" does not necessarily imply good driving. One can operate a car completely without sense or skill and still "drive" it. In fact, "driving" in this context means nothing more than having a degree of control over the speed and trajectory of a motor vehicle.

> [49] The same analysis applies to the verb "operating" as it is used in the Act. Ergo: operating simply means having some, but not necessarily exclusive, control over the functioning of an automobile.
>
> ...
>
> [51] When Ms. Forster grabbed the steering wheel, she exerted an effort to control the Jeep's trajectory. As such, she was, for a brief period of time, "driving" the Jeep by moving the steering wheel, and she was, for an equally brief period of time, "operating" the Jeep by inputting some control over its steering function.

Rogers J. distinguished the facts in this case from those in *Paulus v. Robinson*, [1991] B.C.J. No. 2958 (C.A.). In *Paulus*, the passenger who grabbed the steering wheel did not have the owner's consent to drive or operate the vehicle. Section 20, the uninsured motorist provision of the *Insurance (Motor Vehicle) Act*, was not available to the injured passengers because the use of the word "motorist" in s. 20 coloured the definition of a "person who uses or operates a motor vehicle," such that an uninsured motorist could be only the person in the driver's seat.

B. Lines v. W & D Logging Co. Ltd., 2009 BCCA 106, per Tysoe J. (Saunders and Bauman JJ.A. Concurring)

The Court of Appeal has interpreted ss. 95 and 98 of the *Insurance (Vehicle) Act* (formerly ss. 52 and 54 of the *Insurance (Motor Vehicle) Act*) so as to provide flexibility to the courts when assessing net income loss.

As Tysoe J.A. acknowledges, the predecessor ss. 52 and 54 were enacted in response to a perception that common law damage awards of gross income loss amounted to overcompensation.

He further notes, however, that the provisions must be interpreted in a manner so as not to depart from the fundamental principle that a plaintiff is entitled to a damage award that reflects, as accurately as possible, his or her exact pecuniary loss.

Sections 52 and 54 were interpreted for the first time in 2003 by Pitfield J. in *Hudniuk v. Warkentin*, 2003 BCSC 62. He concluded that these provisions require a determination of tax on gross income as if the past income had been earned in a lump sum on the first day of trial. This interpretation meant that plaintiffs who suffered income loss over a number of years as a result of injuries sustained in motor vehicle accidents were subjected to a higher marginal tax rate and deprived of annual deductions and tax credits for the calendar years between the accident and the trial. Alternatively, plaintiffs who incurred income loss for only a portion of one year were subject to little or no reduction. *Hudniuk* has been applied by other judges, some with reservation, in numerous cases.

(a) The trial judge in *Lines* applied Pitfield J.'s reasoning to reduce the plaintiff's gross income loss incurred over a five-year period. The plaintiff appealed, arguing that the income tax payable on the plaintiff's past income loss should be calculated on an annual basis so as to more accurately reflect his actual loss.

(b) The Court of Appeal concluded, after a review of the wording of the two sections, that the Legislature contemplated the possibility of multiple periods of calculation of net income loss during the period between the accident and trial and that the court is not confined to the one period, lump sum approach advocated by Pitfield J.

(c) However, there may be situations where it would be appropriate to calculate net income loss using the *Hudniuk* approach. Two such situations identified by Tysoe J.A. are: (1) where a jury makes a finding of gross income loss without being asked to allocate the loss to any calendar year or other period and the judge does not wish to speculate on the jury's reasoning process; and (2) where the plaintiff was unemployed at the date of loss and the judge or jury could make an award for loss of past earning capacity, but it would be artificial to allocate it among different periods. Tysoe J.A. states:

> [184] In my opinion, by the use of the phrase "for any period," it was the intention of the Legislature to give a discretion to the judge to determine what period or periods are appropriate for the determination of net income loss in all of the circumstances. In the two examples I have given, it would be appropriate for the judge to use only one period for the calculation of net income loss (namely, the entire period from the date of the accident to the first day of trial). In such a case, net income loss would be calculated as if the gross income award was received by the plaintiff on the first day of trial.
>
> [185] By way of contrast to the two examples I have given, in the situation where, at the time of injury, the plaintiff was working at a job and returned to that job after sufficiently recovering from the injuries, it would be appropriate, absent any complications, for the judge to allocate the gross income loss to the calendar years between the date of the accident and the date of trial as if the plaintiff had continued working. This would accord with the principle that, insofar as is possible, the plaintiff should be put in the position he or she would have been in if not for the injuries caused by the defendant's negligence.

Tysoe J.A. further confirmed Pitfield J's conclusion in *Hudniuk* that it was not the intention of the Legislature to allow for nominal deductions in respect of RRSP contributions when calculating net income loss under ss. 95 and 98.

XV. Jury Trials

A. Cleeve v. Gregerson, 2009 BCCA 2, per Kirkpatrick J.A. (Mackenzie and Ryan JJ.A. Concurring)

The defendants appealed an order for mistrial granted by the trial judge who continued the trial without the jury. The trial judge's reason for granting the mistrial was based on her perception that defence counsel had either referred to evidence that was not before the jury or misstated evidence on material issues during his closing submissions. Defence counsel had not completed his closing submissions before plaintiff's counsel raised his objections and applied for a mistrial.

In granting the appeal and ordering a new trial, the Court reinforced the following principles relating to jury trials, orders for mistrial and closing submissions:

- The party who files a jury notice is entitled to a jury trial which ought not to be taken from it unless there is a reasonable assurance that the process was irretrievably unfair.
- There is a heavy onus on the applicant for mistrial to establish that the prejudice is so great that it cannot be remedied by the court. Ultimately, the trial judge must be of the opinion that the comments or conduct in issue caused a substantial wrong or miscarriage of justice so that it would be unfair to continue with the jury.
- Some restrictions apply to both opening and closing submissions: counsel are not to express personal opinions, beliefs or feelings regarding the merits of a case. However, greater latitude is given to closing addresses in that counsel are permitted to make "an impassioned" address to the jury without straying over the line of using language that is likely to prejudice the opponent's case to the extent that the jury would be influenced by it to reach a verdict without due consideration of the evidence.
- Counsel are entitled to complete their closing submissions before opposing counsel may raise any complaint which must be done in the absence of the jury.

B. Oberreiter v. Akmali, 2009 BCSC 318, Kelleher J.

Kelleher J. ordered a mistrial after the jury had rendered a verdict following a two-week trial. During the trial, the jury was shown video surveillance of the plaintiff. After the trial was completed and the jury discharged, plaintiff's counsel discovered that the DVD containing the video surveillance and given to the jury before their deliberations inadvertently contained ten extra minutes of surveillance that had not been admitted into evidence.

Kelleher J. refused to view the ten minutes of video. Nor did he accede to the defendant's request that the foreperson be contacted to ascertain whether the jury had watched the video during their deliberations. Although he acknowledged that there were exceptions to the general principles regarding jury secrecy, he was not persuaded that it was appropriate to contact the foreperson as the intervening weeks since the trial rendered the foreperson's recall impractical and of questionable reliability.

The extraneous material made available to the jury was relevant to the issues at trial and was potentially prejudicial. As the jury had already been discharged, there was no way to correct the irregularity except by declaring a mistrial.

C. Joy v. Atkinson, 2009 BCCA, per Lowry J.A. (Ryan and Groberman JJ.A. Concurring)

The fact that there was no express order as to costs on a successful application for mistrial did not preclude the Court of Appeal from entertaining an appeal of the trial judge's declaration of mistrial. The order for mistrial was not one that could be set aside as the jury had been discharged and could not be reconstituted. The Court of Appeal can, however, hear an appeal of the costs order associated with the mistrial application in order to grant a remedy in costs to the appellant, should the appeal succeed. In this case, while there was no express order as to costs, the practical effect was that the parties would each bear their own. Such was a sufficient disposition of costs to hear the appeal and for the Court to substitute a different disposition of costs should the appeal be allowed.

The trial judge declared a mistrial after plaintiff's counsel's opening address to the jury. The defendant's objection to the opening address was predicated largely on the fact that plaintiff's counsel had described the accident and the defendant's fault in causing the accident when liability for the accident had been admitted. The Court of Appeal did not consider whether such comments were sufficient to cause a mistrial, focussing instead on other comments made during the opening address. Plaintiff's counsel expressed his personal belief with respect to the genuineness and severity of the plaintiff's injuries and losses. His comments were incapable of being corrected by jury instruction and bore directly on the fairness of the trial. The appeal was dismissed.

D. Ramcharitar v. Gill, 2008 BCCA 430, per Lowry J.A. (Ryan and Neilson JJ.A. Concurring)

This appeal is another reminder that if no objection is made during the course of a jury trial to admissibility of expert evidence, improper statements during counsel's address or the judge's instructions, the Court of Appeal will only intervene in exceptional circumstances.

XVI. Limitation Act

A. Brooks v. Jackson, 2009 BCCA 150, 2009 BCCA, per Tysoe J.A. (Ryan and Saunders JJ.A. Concurring)

The issue in the appeal in this medical malpractice action was whether the running of time in the limitation period under the *Limitations Act* was postponed during the time in which the plaintiff was aware that she suffered a transient injury as a result of the defendant's negligence, but was not aware that the transient injury caused another injury of a permanent nature.

The plaintiff's physician, while performing a forceps delivery of her child, caused a paravault tear that resulted in significant haemorrhaging. The plaintiff was advised by her physician that she had "bled in" during the delivery and that she could expect to feel unwell for a period of two years. In a follow-up visit with the defendant physician a few months later, she was reassured by him that she was doing well and had no physical sequela from her delivery. Nevertheless, the plaintiff continued to feel unwell, and it was not until five years after the delivery that she was diagnosed with Sheehan's Syndrome, a condition caused by significant postpartum haemorrhaging and resulting in pituitary necrosis.

She commenced an action against the defendant within the six-year ultimate limitation period set out in the *Limitation Act*. The chambers judge dismissed the defendant's Rule 18A application to dismiss the plaintiff's claim on the basis it was statute-barred. The chambers judge could not conclude that, at any point more than two years prior to the commencement of the action, "a reasonable person knowing these facts and having taken appropriate advice would regard the facts as showing that an action would have a reasonable prospect of success" (a condition precedent under s. 6 of the *Limitation Act* to the commencement of running of time in the limitation period).

The Court of Appeal dismissed the defendant's appeal of the chamber's judge order. Tysoe J.A. concluded that a reasonable person in the position of the plaintiff would not have sought legal advice or further medical advice prior to the diagnosis of Sheehan's Syndrome. Prior to that date, the plaintiff had no reason to believe that the temporary loss of blood had caused a permanent injury of a qualitatively different nature. A reasonable person would not have sought legal advice until realizing the damage was more than transient in nature.

XVII. Negligence

A. Michel v. Doe, 2009 BCCA 225, per Rowles J. (Newbury and Hall JJ.A. Concurring)

The issue on this plaintiff's appeal of the dismissal of her action was whether the trial judge erred by failing to apply correctly the law as stated in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424.

The plaintiff was struck in the head and seriously injured by an object that was dislodged from a fully-loaded logging truck being operated by an unidentified driver. The trial judge made a finding of fact that the object, a baseball-sized rock, fell from within the truck's load as opposed to being picked up off the road. He stated that the common-law standard of care imposed upon logging truckers who drive on public roads was "that they must diligently perform a complete inspection of their vehicle and their load to identify and remove debris or any foreign matter that might foreseeably dislodge and pose a hazard to the person or property of any member of the public who might foreseeably be harmed by such debris falling from the vehicle or load."

The trial judge framed the issue before him as whether he could conclude that a prudent inspection of the truck and its load ought to have uncovered the rock, leading him to infer that such an inspection had not been done. He concluded that, in the absence of evidence establishing the location of the rock within the load, he was unable to infer that a prudent inspection would have uncovered it, and dismissed the plaintiff's action.

The plaintiff argued that the trial judge misapplied the applicable legal principles by not requiring the defendant to show how the rock could have become dislodged without negligence since rocks do not normally become dislodged from logging trucks.

The Court of Appeal concluded that the plaintiff's argument misstated the reformulation of the law with respect to circumstantial evidence by the Supreme Court of Canada in *Fontaine*. In that case, the Supreme Court replaced the outmoded doctrine of *res ipsa loquitur* with a simpler approach that required the finder of fact to weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established, on a balance of probabilities, a *prima facie* case of negligence against the defendant. The defendant would then be required to present evidence negating that of the plaintiff, failing which the plaintiff would succeed.

In the case before it, the Court of Appeal concluded that the judge had correctly applied *Fontaine* and had not erred in finding that the plaintiff failed to establish a *prima facie* case of negligence against the trucker. The evidence was equally consistent with the possibility of the rock being located in a place within the load where it could have eluded detection without negligence as with the possibility that it was located where it ought to have been discovered. The analysis was properly ended at that point. There was no requirement for the defendant to establish a non-tortious explanation for the dislodging of the rock in the absence of a *prima facie* case of negligence.

XVIII. Psychological Injuries

A. Thiessen v. Kover, 2008 BCSC 1445, Chamberlist J.

These reasons provide a thorough analysis and review of the law with respect to causation for psychological injuries where the plaintiff was pre-disposed to psychological disorders.

The plaintiff was involved in a motor vehicle accident in 1999. Although she admitted she had a pre-existing histrionic personality, she claimed that the accident triggered her ongoing physical and emotional symptoms such that her entire life had changed since the accident and she was now unable to cope with life.

The Court was therefore left with the task of ascertaining whether the accident, superimposed on her psychological pre-disposition, was the cause of her current symptoms, or whether they would have arisen in any event.

The position of the defence was that on material points, the plaintiff's own evidence at trial was contrary to that of almost every other witness who testified. There was evidence that the plaintiff had, prior to trial, requested third parties to provide false or misleading evidence to bolster her claim. Furthermore, her lack of reliability and trustworthiness cast into doubt the reliability of the opinions expressed by experts called on her behalf, many of whom relied on the plaintiff's self-reporting.

Chamberlist J. chose to rely on the evidence of defence lay witnesses who knew the plaintiff before the accident and testified as to her psychological instability and all the stressors in her life both before and after the accident.

He also preferred the opinion of the psychiatrist called by the defence whose opinions were described as "enlightened," over the opinions of the plaintiff's experts which were given little weight.

The Court concluded:

> [142] Looking at the totality of the evidence regarding the ongoing psychological conditions of Ms. Thiessen, I repeat again that the burden or onus of proof is on the plaintiff to show that but for the negligence of the defendant Kover the psychiatric or psychological conditions now experienced by the plaintiff would not have occurred.
>
> [143] For the reasons set out I have concluded that Ms. Thiessen has not met this onus. Given her history of pre-existing psychiatric illnesses and the numerous stressors of the plaintiff that have been experienced by her prior to the accident and subsequent to the accident, I have concluded the burden has not been met by the plaintiff. I accept the evidence of Dr. Zoffman that it is, in all probability, that her psychiatric or psychological conditions would have evolved from the other stressors in her life other than stress related to the motor vehicle accident.

The plaintiff was awarded damages of $14,624.

XIX. Practice

A. F.H. v. McDougal, 2008 SCC 53, per Rothstein J. (McLachlin C.J. and Lebel, Deschamps, Fish, Abella & Charron JJ., Concurring)

The Supreme Court of Canada established that the standard of proof in all civil cases, including cases in which criminal or morally blameworthy conduct is involved, is the balance of probabilities and not some higher standard as was the approach followed by the BC Court of Appeal in this sexual assault case.

The trial judge found for the plaintiff and awarded damages. The Court of Appeal overturned the trial judge's decision, finding that, although she expressly stated the correct standard of proof, she had failed to consider the serious inconsistencies in the plaintiff's testimony in determining whether the sexual assault had been proven to the standard of proof that was commensurate with the allegation, and failed to scrutinize the evidence with the care required when the allegation was serious.

Rothstein J. summarized the law with respect to the civil standard of proof across Canada and in Britain and concluded that there are no degrees of probability within that civil standard. He states at para. 49:

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

The Supreme Court concluded therefore that the Court of Appeal erred in holding the trial judge to a higher standard. Although this dispensed with the appeal, Rothstein J. went on to consider other aspects of the Court of Appeal's treatment of the trial judge's decision in order to provide guidance in future cases dealing with criminal or morally blameworthy conduct:

- Inconsistencies in testimony: where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.
- Assessment of credibility: Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility.

- Corroboration: corroboration is not a legal requirement in sexual assault cases. Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

B. Lines v. W & D Logging Co. Ltd., 2009 BCCA 107, per Saunders J.A. (Tysoe and Bauman JJ.A. Concurring)

The Court of Appeal confirmed that an order for an advance payment cannot be made in the absence of an order made pursuant to the Supreme Court Rules and that a court cannot find support for making such an order either by invoking Rules 1(12) and 35(3) or its inherent jurisdiction.

After pronouncing judgment for damages, but prior to a continuation of the trial in respect of outstanding issues, including the application of s. 99 of the *Insurance (Vehicle) Act* (structured judgment), the amount of management and committee fees and tax issues, the trial judge ordered the defendants to pay $50,000 " as a partial payment on the judgment."

The defendants appealed the order, arguing that the court had no jurisdiction to make such an order. Neither the Rules of Court nor the inherent jurisdiction of the court provides a foundation for the order.

Saunders JA allowed the appeal. The opening words of Rule 1(12), "when making an order," necessarily import a temporal connection between the impugned order and another order.

Rule 35(3), which deals with pre-trial conferences, provides for orders limited to pre-trial issues that may arise in simplifying the trial process and does not extend, in the words of Saunders J.A., "to realization of the fruits of the litigation."

Finally, inherent jurisdiction, according to the authorities cited by Saunders J.A., is a special and extraordinary power which should be exercised sparingly and in a clear case and cannot be used by a court to adopt a practice or procedure inconsistent with the Rules of Court. In the case before her, there was no gap in the Rules requiring invocation of inherent jurisdiction.

C. Buksh v. Miles, 2008 BCCA 318, per Saunders J.A. (Kirkpatrick and Frankel, JJ.A. Concurring)

The Court of Appeal overruled its earlier decision in *Barker v. McQuahe* (1964), 49 W.W.R. 685, with respect to the drawing of an adverse inference, preferring instead a more modern approach that takes into account the reality of the current model of medical care, the expanded role of document discovery and the necessity to control increased litigation costs.

The trial judge ruled that the plaintiffs' clinical records, including those of doctors from whom no opinion evidence was tendered, could not be left with the jury as part of a book of documents. The trial judge subsequently instructed the jury that it may draw an adverse inference with respect to the failure of the plaintiffs to call all physicians whom they had attended, unless they were satisfied with the plaintiffs' explanation for failing to call the doctors. Plaintiff's counsel, in his closing address, advised the jury that the doctors whose opinions were not tendered in evidence were doctors at walk-in clinics who had seen the plaintiffs when their own doctor was too busy to see them.

Saunders J. confirmed that the leading case on the issue was the 1964 decision in *Barker*, in which Davey J. admonished that a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so."

Saunders J. commented that the proposition stated by Davey J. did not contemplate the modern model of medical care in which there is a proliferation of walk-in medical clinics and where the role of the walk-in clinic physician may be more limited than the role of family physician in 1964. Furthermore, the much more expanded document discovery procedures of today, with the free exchange of information and clinical records, makes it more likely that a party would have knowledge of the existence of an opinion that is adverse to the opposite party's case. She concludes at para. 35:

> In this case, in my view, the judge herself should have heard the explanations, considered the degree of disclosure of that witness's files and the extent of contact between the party and the physician, received submissions and determined whether a reasonable juror could draw the inference sought before giving the instruction to the jury for its consideration in its fact finding role. If not, the instruction had no place in her charge to the jury.

Buksch has been applied in several subsequent decisions by courts who refused to draw an adverse inference for failure on the part of the plaintiff to tender opinion evidence from medical practitioners: *Ponipal v. McDonagh*, 2009 BCSC 461; *Job v. Van Blankers*, 2009 BCSC 230; *Eccleston v. Dresen*, 2009 BCSC 332; *Travis v. Kwon*, 2009 BCSC 63; *Turner v. Coblenz*, 2008 BCSC 1801; *Papineau v. Dorman*, 2008 BCSC 1443; and *Barnes v. Richardson*, 2008 BCSC 1349.

However, in *Hodgins v. Street*, 2009 BCSC 673, the Court drew an adverse inference from the failure of the plaintiff to tender a report from her general practitioner or to call him to testify. His clinical records were produced at trial as records kept in the ordinary course of business. The plaintiff's general practitioner was the only physician, other than a chiropractor, who treated the plaintiff extensively before and after the accident. A central issue at trial was the plaintiff's pre-accident history and the extent to which the accident caused her ongoing symptoms. The Court inferred that the plaintiff did not call her doctor because he would not have provided evidence favourable to her case and touching upon the central issue of causation. He reduced her award of non-pecuniary damages by $30,000.

D. Azeri v. Esmati-Seifabad, 2009 BCCA 133, per Finch C.J.B.C., Smith J.A. Concurring, Frankel J.A. Dissenting)

The wife of a man killed in a motor vehicle accident brought a *Family Compensation Act* action on her and her two infant children's behalf. Shortly after the action was commenced in 2002, the wife and children (who had claimed Refugee Status) were deported to Turkey. Other than setting the matter down for trial twice, the plaintiff did nothing further to advance the action from Turkey. Despite efforts on her part to return to Canada, the plaintiff was unsuccessful in obtaining a temporary visa to attend the trial. The trial judge granted the defendant's application to dismiss, for want of prosecution, the plaintiff's action, finding that there was very little possibility that the plaintiff would ever return to prosecute it.

The majority allowed the plaintiff's appeal, Chief Justice Finch stating that the overriding concern in this case—that essential justice must be done—outweighed what little prejudice was suffered by the defendant. The defendant was deceased, and the *de facto* defendant, ICBC, suffered little prejudice beyond the difficulties associated with quantifying the loss. In dissent, Frankel J. concluded that the trial judge had not erred in his finding that not only had the action not been prosecuted, it was unlikely it ever would be prosecuted. Plaintiffs are not entitled to keep a dormant action alive on the off-chance that it may one day proceed to trial. Defendants are entitled to closure.

XX. Production of Documents

A. Stephen v. McGillivray, 2008 BCCA 472, per Smith J.A. (Donald and Levine JJ.A. Concurring)

The defendants listed video-surveillance, conducted prior to the start of the action, in Part I of their list of documents and sought an order to postpone its production based on Rule 26(1.2). Their application was dismissed by a master, and an appeal of the master's decision was dismissed by a judge in chambers.

The Court of Appeal dismissed the appeal. It distinguished the cases on which the appellants relied (*Daruwalla v. Shigeoka* (1992), 72 B.C.L.R. (2d) 344 (S.C.) and cases following it) and, resorting to what it called "the modern approach to statutory interpretation", concluded that the purposes of Rule 26(1.2) were to place limits on the broad scope of discovery allowed by *Peruvian Guano* and to exempt parties from producing documents based on issues of time, cost, efficiency and marginal relevance. To read into the rule language importing a temporal factor (postponing rather than exempting the production of a document) is not in keeping with the modern approach to statutory interpretation.

The Court also rejected the defendants' argument that the key issue in this case was the plaintiff's credibility and the defendants would be prejudiced if she was allowed to tailor her evidence after viewing the video:

> [47] With respect, I do not accept this argument as representing a valid purpose for an application of R. 26(1.2). In this case, there has been no factual determination regarding the respondent's truthfulness, or lack thereof. This is the appellants' theory of liability, and it is for them to establish in the course of the trial. Nor am I persuaded that the *Rules of Court* were intended to be used in a manner that would displace a right of a party granted under them, in favour of creating an opportunity for an adverse party to advance their theory of a fact in issue.

B. Lee v. Schenoni, December 10, 2008, Vancouver Registry No. M072648, Groves J.

Groves J. held that defendants who have chosen to plead pre-existing injuries are entitled to production of pre-motor vehicle accident MSP and Pharmanet records, even absent any evidence to support a pre-existing injury. According to the court, such records are somewhat "generic" and do not constitute an obtrusive level of inquiry. He explicitly overruled previous rulings at the masters' level in this regard.

C. British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd., 2009 BCCA 124, per Hall J.A. (Saunders and Low JJ.A. Concurring)

The Court of Appeal confirmed that Rule 26(11) is a complete code as it relates to production of relevant material in the possession or control of a third party. Its provisions for service on non-parties has primacy over the general provisions for service contained in Rule 44(5).

The plaintiff, in an action brought under the *Civil Forfeiture Act*, sought production of records in the possession of the RCMP relating to private communications intercepted under wiretap authorizations. None of the subjects of the wiretap interceptions were parties to the action. The chambers judge, relying on Rule 44(5), adjourned the application until the plaintiff served the application on each person who was a subject of a wiretap interception and hence may be affected by the order sought.

In allowing the plaintiff's appeal, the Court of Appeal concluded that recourse to Rule 44(5) was unnecessary and inappropriate and would result in unnecessary expense and complications. The

chambers judge had other options available to him to protect the privacy interests of the non-parties identified in the documents sought. These included the ability to allow the defendant to apply for an order relieving it from disclosure or permitting deletions, as well as the implied undertaking of confidentiality which precludes the use of documents other than that which is necessary for the conduct of the action in which their disclosure was compelled.

D. Bishop v. Miniciello, 2009 BCSC 358, Melnick J.

In this case, the defendant was successful in obtaining an order for production of the plaintiff's hard drive for the sole purpose of retrieving metadata showing the plaintiff's pattern of log-ins and log-outs of his facebook account between specified hours during the night. The court underwent an exhaustive review of the jurisprudence and granted the order for the following reasons:

(a) the scope of the defendant's request was narrow and did not amount to an "fishing expedition" trawl through the plaintiff's computer for documents that may be relevant to the plaintiff's claims;

(b) the defence provided the evidentiary groundwork necessary to show that the plaintiff's late night usage of his computer was relevant to his claims for past and future wage loss: the plaintiff alleged that fatigue was preventing him from maintaining employment;

(c) issues of privacy were overcome by the evidence of the plaintiff's mother that the plaintiff would be the only family member to access the computer during night time hours.

Much of the preceding case law on this issue has been concerned with whether a computer hard drive was merely a repository of documents (akin to a filing cabinet) or whether it was a document. While Melnick J. held that in this case the hard drive was a repository, he agreed with the decision in *Chadwick v. Canada (Attorney General)*, 2008 BCSC 851 that such a distinction was not determinative of the issue:

> [55] It is true the Bishop family computer is more akin to a filing cabinet than a document; however, it is a filing cabinet from which the plaintiff is obligated to produce relevant documents. This sentiment was approved in *Chadwick*. Simply because the hard drive contains irrelevant information to the lawsuit does not alter a plaintiff's duty to disclose that which is relevant. If there are relevant documents in existence they should be listed and produced (or simply listed if they are privileged).

He directed that the parties agree on an independent expert to review the hard drive of the plaintiff's family computer and isolate and produce to counsel for the defendant and counsel for the plaintiff the information sought or a report saying that the information sought is not retrievable, in whole or in part, if that is the case.

E. Leduc v. Roman, 2009 O.J. No. 681 (Ont. S.C.) Brown J.

The plaintiff in a motor vehicle accident claim, advised doctors that he could no longer engage in the same physical activities that he had prior to the accident and that he "did not have friends in his current area, although he had a lot of friends on Facebook." The plaintiff had not been questioned at discovery about his Facebook profile because the disclosure did not take place until after the discovery. Counsel for the defendant conducted a search and found that the plaintiff's Facebook profile showed only his name and restricted access to his site. The defendant moved for an order for production of all of the information on the site. The master refused to order production on the basis that the defendant had failed to demonstrate relevance, noting no such questions had been asked at discovery. The Master also noted that the plaintiff should list any lifestyle information on his Facebook profile as part of his supplementary affidavit of documents. On the appeal from the Master's order, Judge Brown

said that it was reasonable to infer that a social networking site contained content relevant to the issues. Accordingly, the defendant was not on a "fishing expedition." Trial fairness dictated that the defendant should be entitled to cross-examine the plaintiff on the affidavit filed in the application to ascertain the relevance of the content posted by the plaintiff on his site.

As referenced above, in *Bagasbas v. Atwal*, 2009 BCSC 512 photographs which had been posted on Facebook were used to prove that the plaintiff's injuries had not interfered with her physical activities as she had alleged.

F. Scott v. Erickson, 2009 BCSC 489, Master McCallum

The plaintiff produced a neuropsychologist's report to the defendants who sought two orders:

- production of the neuropsychologist's raw test data;
- permission to interview the neuropsychologist in accordance with *Swirski v. Hachey*, [1995] B.C.J. No. 2686.

The neuropsychologist, who treated the plaintiff, contended that the raw test data should be disclosed only to another professional qualified to interpret the data. His report was not provided to the defendant in accordance with Rule 40A and there was no confirmation by the plaintiff that the neuropsychologist would be called to give evidence in the upcoming trial. Nevertheless, Master McCallum concluded that the defendant ought to be able to test the expert's opinions in defence of the claim.

He employed the same mechanism used by Master Horn in *Davies v. Milne*, [1999] B.C.J. No. 550, and ordered that the raw test data be delivered to plaintiff's counsel who would immediately provide the data to defence counsel. The raw test data was not to be copied or disclosed to or discussed other than with members of the defendant's law firm and any instructing adjuster. The data may be disclosed to and discussed with any person who, in the opinion of the neuropsychologist, is competent to use the data. In the event of a dispute, the College of Psychologists of BC would determine whether such person is competent.

With respect to the second application, Master McCallum confirmed that no order was required to interview the plaintiff's neuropsychologist. Rule 28 was available to the defendant to compel an interview in the event the neuropsychologist refused to be interviewed.

G. Duncan v. Mazurek, 2008 BCSC 1842, Silverman J.

A witness statement listed in Part III of the defendant's list of documents and not previously disclosed to the plaintiff could not be used to cross-examine the witness at trial because the description of the statement was not sufficient to comply with Rule 26(2.1.).

The witness statement was described in the list of documents as "Document marked P12 – grounds, B, C, E, F, G and H."

Silverman J. concluded that it was not open to the defendant to argue that the plaintiff could have sought a better description of the document. The description was deficient in that it did not disclose the type of document, its date or the specific ground for the claim of privilege in respect of it. He declined to exercise his discretion under Rule 26(14) to allow the defendant to use the statement. If the disclosure of the document had been properly described and made, the plaintiff's tactics may have been different and to allow its use would create an injustice.

H. Wong v. Antunes, 2008 BCSC 1739, Pitfield J.

This case raises interesting issues with respect to the application of Rule 26(11) to a case involving criminal charges on the very subject matter of the civil action and the treatment of police investigation results in civil proceedings while criminal charges are outstanding.

The plaintiff brought a *Family Compensation Act* action on his and other family member's behalf with respect to the death of his son in a motor vehicle accident. The identity of the driver of the other vehicle in the accident was initially unknown, but police subsequently laid a charge of criminal negligence causing death against the defendant. The Crown, pursuant to its disclosure obligations, provided the defendant with documents from the police file. The defendant refused to produce the documents to the plaintiff. ICBC entered the action as a Third Party under s. 76 of the *Insurance (Vehicle) Act* and denied that the defendant was the driver of the vehicle that caused the accident. The civil trial was scheduled to proceed prior to the criminal trial.

The plaintiff sought an order for production of the police documents in the possession of the Vancouver Police Department. The Crown objected to the application, citing litigation privilege and public interest immunity.

Pitfield J. concluded initially that the plaintiff's application under Rule 26(11) for production of documents in the possession of a third party was appropriate, despite the fact that the documents were also in the possession of a party. The difficulty the plaintiff experienced in attempting to force production from the defendant supported the use of Rule 26(11).

Pitfield J. further held that the documents created by the police during the course of their investigation may have been subject to litigation privilege, but that the privilege was waived when the documents were disclosed to the defendant.

The documents were subject to an implied undertaking not to use them for any purpose other than making full answer and defence in the criminal proceedings. Pitfield J. found that there was sufficient reason to modify the undertaking so as to allow their disclosure to the plaintiff in the civil action. The documents were relevant and material and the plaintiff was unable to obtain the evidence contained in the documents from any other source.

Finally, on a balancing of the public and private interests involved in the issue, Pitfield J. was not persuaded that production of the documents in the civil action would jeopardize the criminal proceeding.

He ordered production of the documents in the police file that were disclosed to the defendant and relating to the identity of the driver or the manner of operation of the vehicle, subject to an undertaking on the plaintiff and his counsel not to use the documents for any purpose other than the conduct of the civil action.

On February 3, 2009, Saunders JA granted leave to the Crown to appeal the decision of Pitfield J. (2009 BCCA 60).

XXI. Rule 30 Examinations

A. Teichroab v. Poyner, 2008 BCSC 1130, Barrow J.

Barrow J., on appeal from a master's order, held that a "further examination" under Rule 30(2) is an examination in addition to one ordered under Rule 30(1) and not an examination in addition to a Part 7 examination compelled under section 99 of the Insurance (Vehicle) Regulation.

Barrow J. points out that such a distinction may make little difference to the analysis in most cases because the factors that guide the exercise of discretion under Rule 30(2) are the same as those a court must consider under Rule 30(1) when there has been an earlier Part 7 examination.

However, this approach focuses the inquiry on the purpose of Rule 30, which is to place the parties on a level playing field, and not, as has occurred before other masters and chambers judges, on whether the previous report was obtained for the purposes of the plaintiff's Part 7 claim or for the tort action.

Barrow J. states:

> To the extent an assessment prepared under a contract of insurance or in relation to a claim for part VII benefits puts a defendant on an equal footing, the need for an assessment under Rule 30(1) will be mitigated.

XXII. Rule 66

A. Sumer v. Lee, Oral Reasons for Judgment, March 19, 2009, Vancouver Registry No. M082291

Two months prior to trial, the plaintiff applied to have the notice of trial set aside on the basis that it had been filed unilaterally by defence counsel and that it misled the court by including the following statement in the notice which was required by the registry in order to set the matter for trial:

> All solicitors of record and unrepresented parties of record in this action agree that not more than two days is a reasonable time for the hearing of all evidence and argument in this action.

Defence counsel argued that plaintiff's counsel did not respond to her requests to provide his estimate of time or to agree to a trial date. She had no choice but to set the trial date unilaterally in order to comply with the time period for applying for a trial date set out in Rule 66(8)(c), the failure to do so automatically ousting the action from Rule 66. She contended that, in the absence of an application by the plaintiff to remove the action from Rule 66, the plaintiff was deemed to agree that the trial would take no longer than two days.

McEwan J. agreed with this analysis, stating that once Rule 66 applies to an action, the implication is that the matter will proceed with alacrity, evidence will be marshalled in short order, the trial date will be set within a particular period of time and the trial will take no more than two days. Absent a successful application by one party (or presumably an agreement between the parties) to remove the action from Rule 66, the parties are deemed to agree that the trial will take only two days.

XXIII. Workers Compensation Act

A. Plesner v. British Columbia Hydro and Power Authority, 2009 BCCA 188, per Prowse J.A. (Frankel J.A. Concurring, Ryan J.A. Dissenting)

In a two-to-one decision, the Court of Appeal struck portions of the Worker's Compensation Board's Policy #13.30, which deals with mental stress, because they contravened s. 15(1) of the *Canadian Charter of Rights and Freedom*.

Section 5.1(1) of the *Workers Compensation Act* provides for compensation for mental stress that does not result from injury to which the worker would otherwise be entitled, but only if, among other conditions, the mental stress meets the following condition:

> [It] is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment.

The Board is empowered by the *Act* to set policies respecting compensation and assessment. Policy #13.30 relates to mental stress, and in particular, more fully defines "traumatic event" as a severely emotionally disabling event that may include the following:

- a horrific accident;
- an armed robbery;
- a hostage taking;
- an actual or threatened physical assault;
- a death threat.

The plaintiff, an employee of BC Hydro and Power Authority, witnessed the rupture of a natural gas pipeline at his work site. The plaintiff was evacuated from the site with all other employees and the gas leak was contained. The plaintiff was subsequently diagnosed with Post Traumatic Stress Disorder ("PTSD") as a result of witnessing the rupture. His claim eventually reached the Worker's Compensation Appeal Tribunal ("WCAT") which accepted that the plaintiff's PTSD was, within the words of the act, an acute onset that was triggered by one specific, work-related cause. It concluded, however, that the event that triggered the plaintiff's condition did not amount to a traumatic event. There was an important difference between a potentially serious event, which the pipe-line rupture was, and an extremely emotionally disturbing event, which it was not.

On a judicial review of the WCAT's decision, the Supreme Court Justice found that the appeal tribunal's findings were internally inconsistent and remitted the matter back to the tribunal for a rehearing, without considering the plaintiff's Charter challenge of the impugned policy. The sole issue before the Court of Appeal was whether the impugned policy, when read together with s. 5.1(1) contravened s. 15(1) of the *Charter* in that it discriminated between workers who suffered physical injuries and workers who suffered purely mental injuries.

Prowse J.A. (Frankel J.A. concurring) concluded that the plaintiff was subjected to differential treatment based on an enumerated ground—mental injury—in that he was treated differently, and less favourably, than his chosen comparator group—those suffering physical injuries. Workers suffering physical injury need only show that the injury was work-related. Workers with purely mental injury must first meet the threshold of proving that the injury was caused by a traumatic event which Policy 13.30 in turn further qualifies by requiring that the traumatic event be "horrifying." Prowse J.A. was satisfied that those suffering from mental disability are "subjected to pre-existing disadvantage, stereotyping, prejudice and vulnerability" (para. 130).

The discrimination arising from the impugned policy was not justified by the purposes for which the policy was developed: to control costs and to clarify coverage for mental stress by limiting the circumstances in which mental stress would be compensated. Neither purpose was supported by sufficient evidence before the Court demonstrating a pressing and substantial basis for overriding the plaintiff's s. 15(1) right in this case.

The Court struck down the language within the policy which defines and describes a "traumatic event", including the examples given. Prowse J.A. commented that there could very well be other aspects of both s. 5.1(1) and Policy #13.30 that were discriminatory (for example, the requirement that the mental stress must be an acute reaction to a single traumatic event as opposed to chronic stress arising from several events), but that since they were not in issue on this appeal, they would have to be left to another day.

XXIV. Legislation

A. Health Care Costs Recovery Act, R.S.B.C. 2008, c. 27

BC was the last province to bring in health-care cost recovery legislation when it enacted the *Health Care Costs Recovery Act*. The Act came into force on April 1, 2009.

The Act grants the Minister of Health an independent cause of action against third party wrongdoers to recover medical costs for treatment of the injuries sustained by a plaintiff.

The Act applies to every personal injury claim brought against a wrongdoer, excluding claims against a wrongdoers insured through ICBC or where the injury is covered by WCB or is a tobacco related wrongs.

The legislation requires plaintiffs to include a health care services claim as part of their lawsuit. Thus defendants and their insurers will have to pay for virtually all government funded health care services including benefits defined in the *Hospital Insurance Act*, *Medicare Protection Act*, emergency services, nursing services, family support, occupational services etc. The exposure to defendants and/or their insurers could be significant. If the injuries are caused by two or more wrongdoers, each are liable for a percentage of the costs equal to the percentage of fault attributed to them.

Some of the features of the Act are as follows:

- The Act applies retroactively to injuries that occurred prior to April 1, 2009 and applies for the recovery of costs in the future.
- There are significant notice requirements and the notices must be given in prescribed form.
- An insurer must notify the government if it becomes aware of an insured having caused personal injury to another person within 60 days. The insurer must comply with any requests from the Ministry for information about the potential claim.
- A plaintiff must notify the government of any proceedings commenced after April 1, 2009 within 21 days of starting the action. The Minister can retain the beneficiary's counsel to act on its behalf or, intervene and assume conduct of that portion of the claim.
- The Minister also has the right to commence its own action. Any lawsuit commenced by the Minister is subject to a limitations period which can be extended up to six months following the expiry of the beneficiary's right to commence action.
- A plaintiff must give notice at least 21 days before entering into a settlement agreement.
- If a plaintiff or defendant fails to notify the government and obtain consent to a proposed settlement before the case can be settled, results in the party who would be liable to make the payments under the proposed settlement to be liable for the full amount of the health care costs, past and future.
- Any settlement or Release is not valid until the Minister consents in writing to the proposed settlement.
- A person who is liable to make the payments under a settlement must remit payment of the health care costs to the Minister within 60 days of the Minister's consent to the settlement.
- The Ministry must consent to any settlement, otherwise any release is void as against the claim for health care costs.

- If an action was commenced after April 1, 2009, the action cannot be discontinued or dismissed until the consent of the Minister is filed with the court.
- A court cannot set aside, dismiss or strike a claim for health care services unless they are satisfied that the government has been given a reasonable opportunity to appear.