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Update on Case Law and Legislation

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UPDATE ON CASE LAW AND LEGISLATION

I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference held in October 2010. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Adverse Inference

There are two cases of note in which the courts have recently addressed the law of adverse inference in the failure to call a party to testify on their own behalf.

A. O'Connell v. Yung, 2012 BCCA 57, per Kirkpatrick J.A. (Levine and Neilson JJ.A., concurring)

This was an appeal from a motor vehicle accident claim in which the plaintiff was awarded significant damages for a serious brain injury that left the plaintiff with a lack of insight into her difficulties. The plaintiff appeared briefly on the first day of trial but did not remain in the courtroom and did not testify. Her counsel explained that the plaintiff would not testify because "she was an unreliable historian and could not add anything to the truth of the evidence she would be giving." Defence counsel made no comment on the plaintiff not testifying either at that time or later in the trial.

An appeal was undertaken on the grounds that the damage awards were too high and that the trial judge had failed to draw an adverse inference from the plaintiff having not testified.

In addressing the adverse inference argument, Madam Justice Kirkpatrick provided the following reasons:

> [16] I first observe that this court stated in *Jones v. Trudel*, 2000 BCCA 298 at para. 34, 185 D.L.R. (4th) 193, that the failure to address the question of whether an adverse inference should be drawn is not, in and of itself, reversible error: per Southin J.A. Mr. Justice Lambert agreed that the trial judge made no reversible error and stated at para. 52:
>
> > In particular, it is my opinion that the trial judge was neither obliged to draw an adverse inference from the plaintiff's failure to call the witnesses named by the appellants, nor to give reasons for not doing so. If a trial judge is asked to draw an adverse inference from a failure to call a particular witness, then whether the trial judge ought to deal with that point in her reasons must depend on an assessment of the significance of the point in the case, and on the trial judge's concern to deal with all the points that might be thought to be significant by the losing party. I do not think that any more general rule than that is desirable.
>
> [17] The application of that general rule is dispositive of this ground of appeal. I will nonetheless address the arguments raised in this case as they are important to the ultimate outcome of the appeal.

The appellants argued that the natural inference to be drawn is that had the plaintiff testified she would have presented better at trial than as portrayed in the expert reports or as described by the witnesses. The Court of Appeal acknowledged that there is no doubt that in the absence of an explanation, it is permissible to infer that if a party does not testify that their evidence would have harmed their case referencing the SCC case, *Levesque v. Comeau*, which the court distinguished from the car at bar as follows:

> [30] The circumstance in the instant case are distinguishable from *Levesque*. The judge heard six days of evidence in the plaintiff's case that described in great detail Ms. O'Connell's abilities before and after the accident. She heard evidence form six

> expert medical witnesses and from Ms. O'Connell's husband, son, and sister, all of whom testified to her cognitive deficits. The defendants did not object when plaintiff's counsel advised that Ms. O'Connell would not be called to testify. The defendants did not ask to examine her as an adverse witness. The defendants did read in excerpts from Ms. O'Connell's examination for discovery. Those excerpts, as the respondent argues on appeal, demonstrated Ms. O'Connell's unreliability. For example, she was unable to recall her son's birth date and misstated the number of years she had been employed prior to the accident. Even in submission, the defendant made no reference to Ms. O'Connell not testifying.
>
> [31] In my opinion, the adverse inference advocated by the appellants cannot fairly be drawn in the circumstances of this case. First, the defendants at trial did not ask that an adverse inference be drawn. Second, the medical evidence supports the judge's conclusion that Ms. O'Connell had limited ability to testify. Further, the evidence suggests that had Ms. O'Connell testified she may have left a false impression as to the extent of her severe brain injury. As Dr. Hirsch noted, [AB V. 4, p. 573] "On the surface, she looks fine and she has intact social skills, however, she would not be able to look after her needs properly." Similarly, Dr. Anderson testified that Ms. O'Connell is "easily influenced by others" and tends to say whatever they want to hear. In my view, Ms. O'Connell's limited ability to testify would have complicated rather than aided in the assessment of her claims.
>
> [32] The judge recognized the difficulty presented by Ms. O'Connell not testifying but accepted the explanation given by her counsel. Her decision would obviously be informed by her assessment of all of the evidence.
>
> [33] In these circumstances, I consider the explanation given to be adequate and would reject the submission that the judge erred in not drawing an adverse inference from Ms. O'Connell's failure to testify.

B. McIlvenna v. Viebig, 2012 BCSC 218, Sigurdson J.

This was the second trial of this personal injury claim after the court of appeal ordered a new trial. The infant plaintiff suffered significant injuries as a result of a collision while riding his bicycle. The only issue at trial was who was at fault for the accident.

The plaintiff asked that the adverse inference be drawn because the defendant did not testify. The defendant was 71 years old at the time of the accident and 86 at the time of the second trial. He was examined for discovery but did not testify at trial because he was in poor health, living in Germany and not able to travel as a result of a number of medical conditions. The plaintiff argued that the defendant could have testified by video conferencing and that the court should infer that his evidence would not have assisted the defendant.

The defendant asked that that an adverse inference be drawn with respect to the plaintiff's and his father's failure to be called. The defendant argued that the plaintiff had some memory of the accident, as demonstrated by the discovery evidence that was read in. In respect of the father, the defendant argued that because the father had attended the accident scene, he would have evidence about the location of the car when it came to rest after the collision.

At paras. 70 to 73, Mr. Justice Sigurdson provides a summary of the law relating to adverse inference and at para. 74 finds:

> [74] In the case at bar, I have concluded that in the circumstances, I will not draw an adverse inference from the failure of the plaintiff to call either the plaintiff or his father or by the defendant failing to call the defendant himself. In the case of the plaintiff, he was subject to discovery and was examined and I was advised that the plaintiff does not recall much of the accident. In the case of the father, the adverse inference sought related to the fact that he could give evidence on the location of the

> vehicle at rest. Given that the father attended at the scene after being brought there by the plaintiff's brother, and that (as the evidence shows) he was upset, I doubt his attention was focused on the precise location of the car and I decline to draw an adverse inference against the defendant on this point. In terms of the defendant, there was good explanation given his age and his medical condition for his non-attendance at trial. Moreover, although it is possible, and becoming more common, to have witnesses testify by video, I think that to draw an adverse inference here, where I find the plaintiff has not advanced a *prima facie* case that the accident occurred in the intersection, would be to effectively reverse the burden of proof.

III. Appellate Review

A. Bjornson v. Shaw, 2010 BCCA 510, per Neilson J.A. (Smith and Bennett JJ.A., concurring)

The defendant appealed an award of damages in the amount of $565,405, including an award for past income loss of $75,000 and a loss of future earning capacity of $350,000. The central issue on appeal was whether the trial judge provided adequate reasons for the award.

The plaintiff suffered soft tissue injuries as a result of the accident, but had a pre-existing kidney condition that resulted in a kidney transplant shortly after the accident.

At trial, the parties had widely divergent positions with respect to the amount of damages the plaintiff should recover. Her substantial claims for past income loss and loss of earning capacity were based on the fact that, prior to the accident, she earned commission income from a direct sales company selling gourmet food and cookware. Her kidney disease precluded her from working until she received the transplant. But she did not return to her previous occupation after the transplant because her soft tissue injuries affected her ability to transport boxes of product to food shows and home parties.

The Court of Appeal identified three contentious issues raised by the evidence that were not adequately explained by Scarth J. in his reasons:

1. The plaintiff's claim for substantial income loss prior to trial was not supported by her past record of earnings in a seven year period prior to the accident.
2. There was evidence that the respondent's anti-rejection medication was contributing to her ongoing disability.
3. The plaintiff worked part-time after her kidney transplant and her past and potential future earnings from that employment had to be considered.

In making his awards, the trial judge described the divergent views of the parties and then made awards without explaining how he reached conclusions and quantified the claims.

The Court of Appeal concluded that the reasons failed to explain or justify the awards made, did not let the appellant know why she did not succeed in limiting damages and precluded meaningful appellate review in that the absence of critical factual findings and analysis limited the parties' ability to identify reviewable errors.

Deficient reasons constitute an error of law. The Court allowed the appeal and directed a new trial.

B. Ralph's Auto Supply (B.C.) Ltd. v. Ransford Holding Ltd., 2011 BCSC 999, Fenlon J.

These reasons are of interest because of Fenlon J.'s suggestion that it is time for a reconsideration of the standard of review of masters' orders established by *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.) [*Abermin*]:

1. Review of a purely interlocutory decision of a master is a true appeal and the master's decision is not to be interfered with unless it is clearly wrong.
2. A question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master.

In establishing the standard of review, the Court in *Abermin* adopted an Ontario Court of Appeal decision that has been recently overruled: *Stoicevski v. Casement* (1984), 43 O.R. (2d) 436 (C.A.). A five-member panel of the Ontario Court of Appeal overturned *Stoicevski* in *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415. It did so on the basis that there was no justification in principle why the standard of appeal from judges ought not to be applied equally to masters. The difference in standards of appeal, according to the Ontario Court of Appeal, was driven in large part by historical notions of hierarchy and prerogative that warranted re-examination in light of several factors:

1. the evolution and rationalization of standards of review in Canadian jurisprudence;
2. the expansion of the role of the master within Ontario's civil justice system;
3. the values of economy and expediency expressed in the general principles underlying the Rules of Civil Procedure (similar to Rule 1-3(2) of the BC Supreme Court Civil Rules);
4. the difficulty and contentiousness in deciding in each case which standard to apply.

Fenlon J. stated that, with the exception of the second factor, the factors set out by the Ontario Court of Appeal in *Zeitoun* applied equally to BC. She concluded, however, that it was not open to her to change the standard of review. *Abermin* has been confirmed by the BC Court of Appeal as the governing decision on appeals from masters. A change in the standard of review must come from that Court.

C. Balaj v. Xiaogang, 2012 BCCA 211, Hall J.A.

The plaintiff's action for damages arising from a 2003 accident was dismissed by Brown J. (2012 BCSC 231) in November 2011 for want of prosecution and failure to comply with the Rules and with court orders. The plaintiff appealed the dismissal and applied for indigent status.

During the course of the litigation, the plaintiff retained and fired several counsel, ignored court orders for production of documents, necessitated the adjournment of examinations for discovery twice because of her obstreperousness, caused the adjournment of trial, failed to attend a trial management conference and failed to comply with orders made at the trial management conference. The defendants applied for an order dismissing the action. Brown J. granted the order, finding the plaintiffs delays and non-compliance with court orders wholly unacceptable, stating:

> [39] ... I think it is almost shocking how long this matter has continued, with successions of orders ignored by the plaintiff, and, nearly nine years after the motor vehicle accident, the plaintiff has yet to produce a medical report attesting to the injuries allegedly sustained in the accident.

Hall J.A. was satisfied that the plaintiff met the financial threshold required for an order for indigent status, but refused to so order on the basis that the appeal had no merit and no possibility of success. Brown J. had little alternative but to dismiss the action.

IV. Causation

A. Clements (Litigation Guardian of) v. Clements, 2010 BCCA 581, per Frankel J.A. (Tysoe and Garson JJ.A., concurring)

The Court of Appeal confirmed that the material contribution test of causation as articulated by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC7 must be restricted to two very narrow sets of factual circumstances.

The appeal involved a finding of liability by Grauer J. in a motorcycle upset collision. The plaintiff was a passenger on a motorcycle being operated by her husband. The couple were on a road trip and their motorcycle was loaded with luggage. The defendant husband, while passing another vehicle at approximately 120 kilometers per hour, lost control of his motorcycle which capsized, dumping both. The plaintiff suffered a catastrophic head injury. It was later determined that the rear tire had picked up a nail which caused the tire to rapidly deflate and the bike difficult to control.

The issue at trial was whether, but for the overloading of the bike and its speed at the time it went out of control, the defendant would have been able to maintain control of the motorcycle. The engineering evidence was that, without tests, it was impossible to determine the threshold of speed over which a motorcycle operator would be unable to control a motorcycle with a punctured rear tire. Similarly, the engineer was unable to give an opinion whether the extra load on the motorcycle contributed to its instability.

The trial judge found that the defendant was negligent by driving the vehicle at an excessive rate of speed in poor weather conditions and by failing to ensure that it was not overloaded. He found, however, that the plaintiff had not established the but for test of causation. She failed to prove that, but for the overloading and speed, the defendant would have been able to bring his motorcycle under control.

Grauer J. fell into error, however, when he applied the material contribution test to find causation. He felt justified in doing so because the science of motorcycle dynamics was such that, through no fault of her own, it was not possible for the plaintiff to prove that but for the defendant's breaches she would not have been injured.

Much of the Court's analysis relies on a paper written by Dalhousie University law professor, Erik S. Knutsen entitled "Clarifying Causation in Tort." Frankel J.A., writing the Reasons for Judgment, agreed with the following statement by Professor Knutsen:

> The "but for" test rarely fails, and currently only in situations involving circular causation and dependency causation:
>
> 1) Circular causation involves factual situations where it is impossible for the plaintiff to prove which one of two or more possible tortious causes are the cause of the plaintiff's harm;
>
> 2) Dependency causation involves factual situations where it is impossible for the plaintiff to prove if a third party would have taken some action in the face of a defendant's negligence and such third party's action would have facilitated harm to the plaintiff;
>
> If the "but for" test fails, the plaintiff must meet two pre-conditions to utilize the material contribution test for causation:
>
> 1) It must be impossible for the plaintiff to prove causation (either due to circular or dependency causation); and
>
> 2) The plaintiff must be able to prove that the defendant breached the standard of care, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that type of injury.

The Court of Appeal concluded that the material contribution test was not open to the trial judge because this case did not involve the facts to establish either circular or dependency causation. The appeal was allowed and the action dismissed.

The Supreme Court of Canada heard the plaintiff's appeal of this decision earlier this year and reserved judgment.

B. Anderson v. Minhas, 2011 BCSC 203, Bernard J.

In this decision, Bernard J. relied on both *Resurfice* and *Clements* to find that the plaintiff was unable to prove that her fibromyalgia was caused or exacerbated by the motor vehicle accident. He states:

> [73] Having regard to the foregoing [*Resurfice* and *Clements*] and the issues raised by the circumstances herein, I must conclude that the case at bar is not one for which the "but for" test is unworkable, and for which resort to the "material contribution" is appropriate, as if it were available as a mere alternative if proof of causation failed on application of the "but for" test.

The plaintiff was involved in a low velocity impact accident. She had a significant history of symptoms, including a significant neck injury, and the evidence indicated that after approximately two months of physiotherapy treatment, she had significantly recovered from her post-accident symptoms. She was subsequently diagnosed by both Dr. Yorke and Dr. Shuckett with fibromyalgia. Dr. Shuckett testified that the accident "significantly materially contributed" to her fibromyalgia.

In reaching his conclusion that the evidence fell short of proving, on a balance of probabilities, that but for the negligence of the defendant, the plaintiff would not have developed fibromyalgia, Bernard J. relied on the following:

- the absence of convincing medical opinion;
- the minor nature of the collision;
- the absence of credible evidence of a temporal nexus between the collision and the onset of symptoms;
- the reliable evidence of the plaintiff's return to her pre-collision state within two months of the collision;
- the chronic and acute pre-collision health complaints;
- the significant hiatus in doctor visits in a critical post-collision period.

He assessed her non-pecuniary damages at $6,000.

C. Farrant v. Laktin, 2011 BCCA 336, per Neilson J.A. (Finch C.J.B.C. concurring; reasons concurring in the result by Frankel J.A.)

The plaintiff appealed an award of damages of $20,000 on the basis the trial judge did not properly apply the law of causation.

The plaintiff had a history of back problems prior to the motor vehicle accident, resulting in significant spinal degeneration, but had been minimally symptomatic in the six years preceding the accident. He was diagnosed with soft tissue injuries and a recurrence of back pain after the accident. His back pain improved significantly for several months, but thereafter became increasingly worse until two years after the accident he was permanently disabled and unable to work as a manager at Home Depot.

The central issue at trial was whether the plaintiff could establish a causal connection between the accident and his permanent disability. The trial judge concluded, preferring the evidence of the defendant's medical expert, that the accident had caused an exacerbation of his pre-existing condition, but that his current condition was a result of his pre-existing spinal degeneration.

On appeal, the plaintiff argued that the trial judge erred by casting the issue of causation as an either/or choice between the accident and his pre-existing spinal degeneration. In doing so, he misapprehended the legal test for causation.

The Court of Appeal agreed with the appellant, finding that two uncontentious facts demonstrated that the trial judge considered only whether the accident was the sole cause of the disabling pain and failed to turn his mind to whether there was a substantial connection between that pain and the accident, as he was required to do by *Athey v. Leonati*, [1996] 3 S.C.R. 458 and *Resurfice v. Hanke*, 2007 SCC 7. Those facts were:

- the consensus of the medical witnesses that the plaintiff's spinal degeneration made him more vulnerable to the injuries he sustained in the accident. This should have led the judge to consider whether the accident accelerated and aggravated the spinal degeneration, causing the disabling pain to develop earlier than it would have absent the accident.
- the trial judge's finding that the plaintiff's condition after the accident never resolved to its pre-accident state. The trial judge was obliged to consider the extent to which the accident injury continued to contribute to the plaintiff's disabling pain and whether it was substantially connected to the disabling pain beyond a de minimus range. The crumbling skull doctrine would have come into play, requiring an assessment of what the plaintiff's condition would have been had the accident not occurred.

Neilson J.A. was satisfied that the trial judge's misapprehension of the threshold issue of causation as an either/or proposition permeated the balance of his decision, and he erred in failing to consider whether there was a substantial connection between the accident and the plaintiff's disabling pain. She ordered a new trial.

V. Costs

A. Baiden v. Vancouver (City), 2010 BCCA 375, Neilson J.A. (Frankel and Smith JJ.A., concurring)

The Court of Appeal overturned a decision of the trial judge who, in awarding costs and disbursements to the plaintiff in this police assault action, allowed as a disbursement the fees paid by plaintiff's counsel to retain counsel with the requisite expertise to represent the plaintiff at a WCAT hearing. The trial judge distinguished *Noble v.* Wong (1982), 38 B.C.L.R. 246 (S.C.) in which Esson J. held that only services beyond the scope of the kind normally provided by lawyers could properly be charged as disbursements. The Court of Appeal, in *Baiden*, has entrenched this principle (per Neilson J.):

> [25] The limited authority on this issue in this province supports the view that if counsel retains another lawyer to perform a specialized function due to his or her own lack of experience, it does not follow that such fees are recoverable from the opposing party, but remains a matter between the original lawyer and his client: *Noble v. Wong, Bell v. Fantini* (1981), 32 B.C.L.R. 322 (S.C.). That is a practical and appropriate approach, and should have been followed here. Outsourcing portions of legal work during litigation and then permitting recovery of that lawyer's fees as a disbursement undermines the policy of party and party costs. While there may be cases in which this can be justified, they would be limited and exceptional.

B. Majewska v. Partyka, 2010 BCCA 236, per Neilson J.A. (Ryan and Bennett JJ.A., concurring)

The issue on this appeal was the ambit of a trial judge's discretion to depart from the fixed costs provisions of Rule 66 in the face of special circumstances.

After a 3.5 day Rule 66 trial in which the plaintiff 's damages exceeded the amount offered in her Rule 37B offer to settle, the trial judge exercised his discretion to depart from the fixed costs provisions of Rule 66(29) because of special circumstances: the trial lasted longer than two days. He awarded the plaintiff costs at Scale B to the date of delivery of the offer and double costs thereafter.

The Court of Appeal overturned this decision, stating that the fixed costs provisions of Rule 66 were not designed with the intention of depriving a successful litigant of costs she might obtain under the usual tariff, but with the objective of avoiding the time and expense of calculating tariff items and proceeding through a taxation.

The Court confirmed that where a Rule 66 trial lasted longer than two days, the courts must assess costs with reference to the lump sum provisions set out in Rule 66(29) and not in accordance with the tariff, unless there are exceptional—not just special—circumstances.

This decision puts to rest the uncertainty created by inconsistent judgments below where some judges ordered tariff costs, some ordered lump sum costs without taking into account the extra days of trial and others used the approach which the Court of Appeal endorsed in *Majewska*. This approach uses a modified *Duong v. Howarth / Anderson v. Routbard* approach where the pretrial portion of the lump sum is $3,400 and each day of trial is $1,600. These amounts can then be easily manipulated to take into account offers to settle and extra days of trial.

Rule 15-1 of the Supreme Court Civil Rules contains a similar provision for fixed costs in fast track actions and it appears that the rationale in *Majewska* may apply to Rule 15-1 actions in which the trial lasted longer than three days. However, the pre-trial portion of the lump sum under Rule 15-1 is now $6,500 and the per diem trial portion is $1,500.

C. Farrokhmanesh v. Sahib, 2010 BCSC 1797, Ehrcke J.

The plaintiff appealed Registrar Sainty's order on an assessment disallowing two disbursements: MRI scans and an expert report prepared by a psychologist (2010 BCSC 497).

The plaintiff submitted that the Registrar erred in disallowing the cost of the MRI's despite counsel's affidavit evidence that he believed them to be necessary and proper. Ehrcke J., citing *Bell v. Fantini* (1981), 32 B.C.L.R. 322 (S.C.), stated that it was not an error in principle for the Registrar to disallow a disbursement that counsel has said was justified. He also held that the Registrar had not erred when she took into account that no medical professional had advised counsel of the probable utility of an MRI in concluding that their cost was not necessarily or properly incurred.

There were no errors in principle in the Registrar's disallowance of the psychologist's report when plaintiff's counsel had already in hand the opinion of a psychiatrist. She clearly set out in her decision why she found the counsel's reasons for retaining both experts to be unsatisfactory. She furthermore had sufficient basis to conclude that plaintiff's counsel had been engaged to some extent in "doctor shopping." Counsel's affidavit set out that when he retained both experts, he had not decided whether to use one, both or neither of them. This suggested that he wanted to see which expert's opinion would be more beneficial to his client.

Ehrcke J. concluded he would not interfere with the Registrar's decision.

D. Axten v. Johnson, 2011 BCSC 1005, Ker J.

This decision, an appeal from a master's order, clarifies the transition of Rule 66 and Rule 68 actions into the Supreme Court Civil Rules regime and the effect of the costs provisions set out under Rule 14-1(1)(f) and the fast track rule, Rule 15-1. Rule 14-1(1)(f) states:

> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> (f) subject to subrule (10) of this rule,
>
> (i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100,000 or less, exclusive of interest and costs, or
>
> (ii) the trial of the action was completed within 3 days or less,
>
> in which event, Rule 15-1(15) to (17) applies to the action unless the court orders otherwise.

The action was started as a Rule 68 action, but by consent of the parties, was removed two months prior to July 1, 2010 when the Supreme Court Civil Rules came into effect. The action settled for under $100,000 after July 1, 2010. The defendant argued that Rule 14-1(1)(f) applied to limit the plaintiff's costs to those fixed by the fast track rule, Rule 15-1. The master concluded that because the action was taken out of Rule 68, Rule 15-1 and hence Rule 14-1(1)(f), no longer applied.

On appeal, Ker J. agreed with the master, and in doing so clarified some important issues relating to the application of Rule 14-1(1)(f) and transition issues with respect to former Rule 66 and Rule 68 actions:

1. Ker J. confirmed that Rule 14-1(1)(f) places actions that should have been fast-tracked but were not, under the fast track costs schema.
2. Although Rule 14-1(1)(f) speaks only of the plaintiff recovering a "judgment," the jurisprudence with respect to the former Rule 66 confirmed that the fast track rule, although silent about the costs consequences upon settlement, nevertheless contemplated settlement. Given the similarity of the wording and purpose between Rule 66 and the current Rule 15-1, the Rule 66 jurisprudence applies to Rule 15-1. By extension—as Rule 14-1(1)(f) refers to the Rule 15-1 costs provisions—Rule 14-1(1)(f) also contemplates settlement.
3. By virtue of the transitional rules, steps taken in an action prior to July 1, 2010 are deemed to apply to the current rules. Therefore, actions subject to Rule 68 or Rule 66 that were removed from fast track before July 1, 2010 are not subject to Rule 15-1.
4. When an action is fast-tracked and then removed by court order (whether upon application or by consent), the fixed costs provisions under Rule 15-1 (and by extension Rule 14-1(1)(f)) cease to apply.

And although Ker J. did not deal directly with the following scenario, it follows logically that actions subject to Rule 68 and Rule 66 that were never expressly removed by court order are subject to Rule 15-1 and its fixed costs.

E. Mehta v. Douglas, 2011 BCSC 714, Harris J.

The infant plaintiff recovered damages of $18,400 which fell within the jurisdiction of the Provincial Court. In finding that the plaintiff showed sufficient reason for bringing the action in Supreme Court, Harris J. considered the leading authorities of *Gehlan v. Rana*, 2011 BCCA 219 and *Gradek v. DaimlerChrysler Canada Inc.*, 2011 BCCA 136 and the following factors:

- The infant plaintiff required counsel to present her case. As in *Gradek*, it would be unjust to deprive her of costs that would permit her partially to defray the expense of retaining counsel.
- The availability of procedures such as examination for discovery and summary trial in Supreme Court, which are unavailable in Provincial Court, and their potential to promote a proportionate and efficient use of resources would have been known prior to the commencement of the action. It would be unjust to deprive the plaintiff of costs where she subsequently used them efficiently.
- The fact that the plaintiff was an infant made it appropriate for her counsel to be cautious in assessing her potential damages and choosing Supreme Court, even where on the facts that were known concerning the minor nature of her injuries and the speed with which she recovered, it was unlikely that her damages would exceed the jurisdiction of the Provincial Court.

Given the broadness and universality of the factors considered by Harris J., it seems unlikely that any infant plaintiff will be deprived of costs regardless of the severity of the injuries suffered.

F. Morris v. Doe, 2011 BCSC 1053, Ker J.

The plaintiff's action against an unidentified motorist was dismissed for her failure to take all necessary and reasonable steps to establish the identity of the unidentified motorist who caused the accident as required by s. 24(5) of the *Insurance (Vehicle) Act*. In this costs application, the plaintiff submitted that the defendant, ICBC, notwithstanding its success in the action, should be deprived of its costs because of its failure to advise the plaintiff that she should retain counsel for legal advice on the steps she was required to take to ascertain the identity of the unidentified motorist. She also argued that the plaintiff's financial circumstances were a factor for the court to consider when exercising its discretion with respect to costs. She was unemployed, had no assets and had no means to pay the defendant's bill of costs or the significant amount of disbursements she owed her counsel.

Ker J. embarked on an analysis of the authorities dealing with general costs principles and quickly disposed with the plaintiff's latter argument. The authorities have definitively established that sympathy and the financial circumstances of a party are not grounds upon which a court may depart from the general rule that costs follow the event.

The plaintiff argued, in support of her first submission, that ICBC, because of its superior position of authority, ought to be required to inform a plaintiff that she should seek independent legal advice. Its failure to do so in this case fell within the exception to the general rule of "some reason connected with the case or leading up to the litigation" that permits denying the defendant its costs.

Ker J. held the following:

> Although it would appear that fairness dictates that ICBC should advise persons with claims against unidentified motorists of the provisions of section 24(5), neither the jurisprudence or the governing statutory provisions place any sort of positive obligation on ICBC to do so or to advise of the need to obtain independent legal advice.
>
> The jurisprudence since 2003 establishes that denying a successful litigant its costs because of pre-litigation conduct or for reasons that appear to impose quasi-liability on the successful party and to sanction non-actionable conduct is not an appropriate or principled application of the costs rules.

She awarded ICBC its costs of the action and the application.

G. Fan v. Chana, 2011 BCCA 516, per Levine J.A. (Hall and Garson JJ.A, concurring)

The plaintiff appealed the trial judge's order disallowing the costs of two expert reports tendered by her at trial. He disallowed the cost of one report because the opinion expressed by the expert was based on an unsound factual premise: the expert uncritically accepted facts asserted by the plaintiff and her parents that were not borne out at trial and that, with some investigation, would have alerted the expert to their unreliability. The cost of the second report was disallowed because he had ruled it inadmissible at trial on the basis that the expert had given medical opinions outside her expertise as a psychologist. The trial judge based his decision on Rules 57(14) and (15) (now Rules 14-1(14) and (15)) and the inherent jurisdiction of the court.

The Court of Appeal agreed with the plaintiff that the judge had applied the wrong legal test in disallowing the first expert report. The principle in *Van Daele v. Van Daele* (1983), 56 B.C.L.R. 178 (C.A.), according to the Court, remains the appropriate guiding principle for a trial judge in deciding under the Rules whether to disallow disbursements for expert reports. The point from which to assess the reasonableness of a disbursement is when the disbursement was incurred, and not, as occurred here, after judgment has been rendered and it has been determined whether or not the report was helpful.

The Court concluded that the considerations in disallowing the second report were different. The report, expressing as it did opinions outside the expert's area of expertise, did not comply with the Rules and the law which require that an expert's report must be based on her qualifications. While it was not unreasonable for counsel to obtain the report, it should have been obvious to counsel, once the report was obtained, that it would be found inadmissible. On that basis, incurring the expense for the report, at the time it was obtained, was not reasonable.

The Court clarified that the appropriate rule grounding the trial judge's discretion to disallow the disbursements is Rule 14-1(14), which addresses the disallowance of costs arising from an improper or unnecessary act or omission. This rule is consistent with the principle in *Van Daele*. The trial judge was not entitled to invoke the inherent jurisdiction of the court to justify a decision that was contrary to the principles guiding the application of the Rules.

H. Wittich v. Bob, 2011 BCSC 1471, District Registrar Cameron

District Registrar Cameron disallowed the defendant's claim for travel costs under Item 48 of the tariff, as well as associated hotel, parking and mileage expenses. The plaintiff lived in Meritt, BC and retained counsel whose office was located in Coquitlam. She started her action for personal injury in the New Westminster Courthouse.

ICBC retained the firm of RDM Lawyers LLP, located in Abbotsford, to defend the action. The defendant's bill of costs included several attendances at pre-trial applications and trial at the New West Courthouse. As defence counsel's office was located 56 kilometres from the courthouse, he claimed travel time under Item 48 which states:

> 48 Travel by a lawyer to attend any trial, hearing, application, examination, reference, inquiry, assessment or other analogous proceeding if held more than 40 km from the place where the lawyer carries on business, for each day on which the lawyer travels.

It was conceded that a pool of competent and suitably experienced defence counsel within a 40 kilometre radius of the New Westminster Courthouse was available to ICBC. The registrar concluded that it was not reasonable or necessary for ICBC to retain "out of town" counsel.

He also disallowed the associated expenses of hotel, parking and mileage. He was of the view that even if he had allowed something under Item 48, he would have disallowed the cost of the hotel where defence counsel stayed during 15 days of trial. Counsel argued that it was more efficient and convenient for his co-counsel and him to stay at a hotel during the trial, rather than driving back and forth to Abbotsford. Convenience is considered a luxury in the law of costs and luxury falls outside the test of reasonableness and necessity.

District Registrar Cameron commented that perhaps it was time to reconsider the 40 kilometre yardstick, given that it was implemented in 1988 and the population in the Lower Mainland had expanded since then to the extent that many counsel were likely travelling more than 40 kilometres to attend court in either Vancouver or New Westminster and should no longer be considered "out of town" counsel.

I. Parmar v. Lahay, 2011 BCSC 1628, Burnyeat J.

The plaintiff was awarded damages in the amount of $12,120 after a summary trial. Burnyeat J. awarded him costs at Scale B, finding that the plaintiff had "sufficient reason" for bringing the action in Supreme Court based on the following factors:

- Burnyeat J. concluded that the action reached the Court for decision much more quickly than if it had been commenced in the Provincial Court. He took judicial notice of the absence of a considerable number of judges at the Provincial Court level and the backlog in hearing matters that the failure to appoint more judges has produced.
- It was necessary for the plaintiff to retain counsel in order to battle an institutional defendant.
- It may well be economically unrealistic for counsel to be retained for up to three appearances in Small Claims Court when the Supreme Court provides for only one appearance if the summary trial procedure is used. The institutional defendant with its unlimited financial resources could better afford the processes of Small Claims Court.

J. MacKenzie v. Rogalasky, 2012 BCSC 156, Registrar Sainty

The only issue before Registrar Sainty was whether the plaintiff's claim of an interest charge of $11,324.71 on a $25,000 loan provided by Lexfund Inc. was recoverable as a disbursement from the defendant.

Registrar Sainty disallowed the plaintiff's claim for interest as a disbursement. She accepted defence counsel's argument that s. 2(c) of the *Court Order Interest Act*, which excludes payment of pre-judgment interest on costs, suggests that the Legislature did not intend such interest to be recoverable. Further, she agreed that the object of the costs scheme is partial—not full or perfect—compensation or indemnity, and this favoured not allowing interest to be recoverable. Ultimately she concluded that the interest claimed was not a "necessary or proper" adjunct to the litigation and was not, therefore, recoverable under Rule 14-1(5).

K. Chandi v. Atwell, 2011 BCSC 1498, District Registrar Cameron

The plaintiff claimed in his bill of costs interest in the amount of $25,668.92 on a loan arranged by his counsel with a private lender to finance his disbursements. The lender charged 12% interest compounded annually.

Registrar Cameron held that while he was bound by *Milne v. Clarke*, 2010 BCSC 317 to make some allowance for the interest charged to the plaintiff, he was not bound to award full indemnity for the amount of interest. Only disbursements that are necessary and reasonable in amount are recoverable. Registrars should endeavour, whenever possible, to strive for consistency when assessing the amount to allow for a specific disbursement. To attain that consistency, the Registrar made an allowance for disbursement interest based upon the Registrar's rates with the calculation of the interest to be akin to the calculation of interest payable on special damages in accordance with the *Court Order Interest Act.*

L. Briscoe v. Smyth, 2011 BCSC 1492, Master Donaldson (as Registrar)

Master Donaldson distinguished the type of interest being claimed as a disbursement in *Milne v. Clarke*, 2010 BCSC 317 from that being claimed before him: interest on a loan taken out by the plaintiff to fund his litigation, including a $1,750 "underwriting fee." Plaintiff's counsel deposed that the loan was required to finance potential expert reports and other assorted trial expenses. There was no evidence before the Master of interest actually being charged by experts on existing accounts or that the experts required payment up front before testifying at trial. The plaintiff was unsuccessful in bringing this disbursement within the type allowed in *Milne* which was interest charged by a supplier on an account for services already provided.

VI. Damages—Non-Pecuniary Damages

A. Lee v. Dueck, 2012 BCSC 530, Gray J.

The plaintiff injured her wrist and ankle in a motor vehicle accident in 2009. Her ankle resolved after ten days and her wrist resolved after seven months, except for flares of pain. She was a homemaker and had to substantially modify her cooking and housework for less than a month. According to Gray J., her substantial modification to her housework was similar to a person who would take a couple of weeks entirely off work and then gradually increase work. After three years, she still suffered brief flare-ups of pain with heavy lifting or frequent use of her wrist. She was at risk for future flares of pain. She was awarded $5,000 in non-pecuniary damages.

B. Stein v. Kline, 2012 BCSC 573, Bracken J.

The plaintiff suffered a low back injury in a motor vehicle accident in 2008. He missed only a few weeks from his full-time job as a municipal worker whose duties required some physical activity and returned to full participation in most of his usual recreation activities within a few months, although at a reduced intensity. He continued to work at construction jobs in addition to his full-time work. While the evidence was that he avoided heavy lifting, he was still able to function well enough to perform his full-time work and then find time to perform part-time construction work as well as participate in recreational activities such as hockey and fishing. At the time of trial, he was still experiencing some pain on occasion more than three years later.

He was awarded non-pecuniary damages of $40,000. Bracken J. states:

> [33] Based on the evidence presented and a review of the applicable case law, I find an appropriate award for non-pecuniary damages in this case is $40,000. This award is perhaps somewhat generous given the evidence, but it reflects the fact that the plaintiff is still experiencing some pain more than three years post-accident. While he is able to continue with these activities, he has occasional limitations that are attributable to his injuries from the accident and he still experiences some activity-induced pain.

VII. Damages—Cost of Future Care

A. O'Connell v. Yung 2012 BCCA 57, per Kirkpatrick J.A. (Levine and Neilson JJ.A., concurring)

The Court of Appeal confirmed that the tests for assessing damages for loss of housekeeping capacity and for cost of future care are different. In this case, the trial judge erred when she applied the housekeeping capacity test in her assessment of the plaintiff's damages for cost of future care.

The plaintiff suffered significant brain damage as a result of a motor vehicle accident. She established at trial that she required substantial personal care, which was provided primarily by her husband after the accident and up to trial. There was evidence before the court that the plaintiff did not want the services of professional caregivers. The trial judge found, however, that notwithstanding the plaintiff's current resistance to the recommended personal care services, she would in future accept them. She assessed damages for cost of future care as if the plaintiff required immediate personal care services, rather than applying a contingency that took into account that the need would arise only at some point in the future. She applied the principle in *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, which dealt with the assessment of damages for loss of housekeeping capacity, to award the plaintiff the full cost of personal care services from the date of trial, reasoning "that the same principle can be applied in the circumstances of this case with respect to personal care services that may or may not be hired in the future" (para. 63).

The Court of Appeal stated that *Kroeker* stood for the principle that when awarding damages for loss of housekeeping capacity "it is the loss of a capacity—an asset—that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required" (para. 67).

The Court of Appeal reduced the personal care component of the damages for cost of future care by applying a contingency of 20% that reflected the plaintiff's current needs and the substantial likelihood that her needs would gradually increase over time.

VIII. Damages—Future Earning Capacity

A. Morlan v. Barratt, 2012 BCCA 66, per Frankel, J.A. (Lowry and Neilson, JJ.A., concurring)

The 50 year old plaintiff was injured in a head on collision and, shortly thereafter, while she was retrieving her insurance papers from her vehicle she was rear ended. As a result of the two accidents, the plaintiff developed fibromyalgia and had to change occupations because she could not longer make the long commute to her pre-accident place of employment. She was able to secure a higher paying but less satisfying job. The plaintiff recovered damages of $610,553. The defendants appealed the non-pecuniary award of $125,000, the loss of future earning capacity award of $425,000 and the costs of future care award of $53,243. The appeal was allowed in part.

The Court of Appeal agreed that there was evidence to support an impairment of the plaintiff's earning capacity as a result of the continuous pain and endorsed the trial judge's recognition that "common experience" shows pain could have a cumulative effect on her ability to work. Mr. Justice Frankel commented:

> [41] Accepting that, to use the expression used at trial and at the hearing of this appeal, Ms. Morlan's condition had "plateaued," the fact remains that she would forever suffer from debilitating chronic pain along with headaches, symptoms that could be reduced, but not eliminated, by medication. In other words, throughout each and every day of her life, Ms. Morlan would have to cope with some level of discomfort. In my view, it was open to the trial judge to find—essentially as a matter of common sense—that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make. Indeed, with regard to Ms. Morlan, this is reflected in Ms. Craig's report: see para. 34 above.

However, the Court of Appeal disagreed with the trial judge's conclusion that there was a real and substantial possibility that, but for the accident, the plaintiff would have obtained a promotion and pay raise from her pre-accident employer. There was evidence that the plaintiff was qualified for and interested in pursuing a promotion; however, this was not enough to establish a real and substantial possibility that she would in fact have been promoted. The plaintiff had not called any evidence to demonstrate the availability of such higher positions or the likelihood of the respondent being chosen over any other candidate. Thus, the trial judge's findings were speculative at best. The award for loss of future earning capacity was reduced by $150,000. The cost of future care was also reduced by $10,000 to factor in negative contingencies. The non-pecuniary damages was described as a generous award but not being so inordinately high as to warrant appellate intervention.

IX. Defences

A. Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144, per Garson J.A. (Newbury and Kirkpatrick JJ.A., concurring)

This case contains a helpful succinct summary of the law of mitigation of damages in the context of personal injury claims. Ms. Gregory's overall award had been reduced by 10% for her unreasonable failure to follow doctor's recommendations that she undergo cortisone injections. The plaintiff appealed arguing that there was no evidence that the injections would have improved the plaintiff's symptoms. The Court of Appeal agreed stating:

> [53] In *Chiu v. Chiu*, 2002 BCCA 618, at para. 57, this Court set out the test for failure to mitigated a follows:
>
> > [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
>
> ...
>
> [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all of the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages *would have been reduced*" by that treatment. The *Turner* case, on which the trial judge relies, uses slightly different language than this court's judgment in *Chiu*: "there is some likelihood that he or she *would have received substantial benefit from it* ..."

> [57] In this case the trial judge found as a fact that the cortisone shots were "not necessarily curative, they reduce the inflammation ... Sometimes the relief is only temporary but sometimes the injections bring long term benefits." She did not find that the treatment *would have* reduced the symptoms. In addition there is the fact that the plaintiff reasonably believed the diagnosis was a tear and that the injections would have no healing effect on a tear.
>
> [58] Regardless of whether the trial judge erred in finding on the evidence that it was objectively reasonable for the plaintiff to undergo the injections, I conclude that she erred in her application of the correct test, as articulated in *Chiu*. The physicians testified only that it was a reasonable treatment t try, and it might afford some relief. In my view such an opinion does not meet the threshold for reducing an award as described in *Chiu*.

This case also discusses what type of expert evidence is necessary to establish a claim for cost of future care. The trial judge had rejected the evidence of an occupational therapist suggesting that a medical doctor's evidence was necessary to prove a future cost of care claim. The Court of Appeal disagreed saying that courts accept testimony from a variety of health care professionals as to necessary and reasonable costs of future care and that there is no requirement that the evidence of the specific care required by a plaintiff be provided by a medical doctor. The Court commented:

> [39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify as to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional ...
>
> ...
>
> [46] And, there was a consensus among the physicians that Ms. Gregory has difficulty lifting above shoulder height, difficulty with prolonged heavy or repetitive motion above shoulder level, and that in general she will continue to have persistent pain and weakness.
>
> [47] The evidence of the physicians does therefore provide some evidentiary basis for the recommendations for assistance with heavy housework, and yard maintenance. In my view the trial judge fell into error by failing to consider these claims on the basis only that, "there are no recommendations from the medial practitioners for housekeeping assistance, or home and yard maintenance ..."

X. Disabilty Insurance

A. Sander v. Sun Life Assurance Company of Canada, 2011 BCCA 3, per Finch C.J.B.C. (Saunders and Neilson, JJ.A., concurring)

This case addressed when a limitation period begins to run under a group disability insurance policy.

The appellant was a dentist who became disabled as a result of cataracts. The respondent paid disability benefits under a group disability policy to the appellant until June 2001 when benefits were terminated because the appellant had refused to undergo cataract surgery as required under the policy. The respondent set a letter dated June 29, 2001 setting out the denial of further benefits. The appellant underwent the surgery in 2003 but alleged that he was still unable to practice dentistry. The appellant commenced an action against the respondent on November 9, 2004. The action was dismissed on a summary trial on the basis that the limitation period expired on June 29, 2002. The trial judge applied the one-year limitation period provided by s. 22(1) of the *Insurance Act* which mandates that: "... every action on a contract [of insurance] must be commenced within one year after the furnishing of a reasonably sufficient proof of loss or claim under the contract ..."

The appellant undertook an appeal arguing that the limitation period did not begin to run until his counsel had provided a "proof of loss or claim" by letter dated April 23, 2004 and so the writ filed on November 9, 2004 was well within the one year statutory limitation. Further, that the governing limitation period was that contained in the policy which is "two years after the date the insurance money became payable ..." Therefore, because the policy provided for periodic income replacement benefits, there was a continuing cause of action with a "rolling" limitation period that applies to each monthly benefit payable.

The appeal was successful on the basis that the learned trial judge had erred in failing to apply the two year limitation period set out in the policy. An insurer must be held to the terms of the contract it provided where those terms are more favourable to an insured than the provision of the Act. The policy provided that the appellant's claim to disability benefits accrued monthly. Therefore the limitation period had to be viewed as commencing anew on each successive entitlement—it is a rolling limitation period. The matter was remitted to trial to determine whether the appellant was disabled and entitled to disability benefits under the policy for the two years preceding the date on which he issued the writ of summons and anytime thereafter.

XI. Document Production

A. Fric v. Gersham, 2012 BCSC 614, Master Bouck

These reasons by Master Bouck include a fairly comprehensive and helpful analysis of the law respecting the production of photographs generally and other digital content on social media sites.

The plaintiff was a first year law student at the time of the accident. In her Notice of Civil Claim, she alleged she suffered headaches, neck pain, back pain and rib pain. She claimed damages for pain and suffering, loss of amenities of life, past and future loss of earning capacity, loss of educational advancement, past and future loss of domestic maintenance capacity and loss of mobility. At her examination for discovery, she testified that: she had been involved in her law school's Law Games shortly after the accident, she had a Facebook profile containing photographs, since the accident she had travelled extensively and had taken her camera with her, she had in her possession approximately 12,000 photographs and she continued to be involved in physical activities since the accident, including hiking, scuba diving and wakeboarding, albeit with limitations. Her physical injuries remained unabated since the accident.

The defendant applied for orders that the plaintiff produce the following:

- A complete copy of her Facebook profile including all photographs, metadata associated with those photos, including the dates they were added to her Facebook profile and all comments related to the photos.
- All photographs in her possession or control.
- The metadata associated with all digital photographs.

Some principles may be gleaned from these reasons:

- When physical impairment, as opposed to cognitive impairment, is alleged, the relevancy of photographs showing the plaintiff engaged in activities that require some physical effort "seems rather clear." This addresses arguments by opposing counsel that photographs are not relevant as they show "only snapshots in time and without a proper context."
- In this case, the pleadings defined the issues between the parties and presumably, photographs depicting physical activity fall within the first tier or Rule 7-1(1) test of materiality.

- The concept of proportionality (given the sheer number of photographs in issue) was addressed by the fact that the plaintiff was a professional and could very well recover significant damages for future losses.
- The courts will rarely order the production of digital content other than photographs contained on a social media site as the probative value of such content is outweighed by the competing interest of protecting the private thoughts of the plaintiff and third parties.

Master Bouck ordered the plaintiff to produce all photographs in her possession in which she is featured participating in the Law Games and on a vacation since the date of loss. The photographs are to be identified by location, date and time if such information is available. The photos could be edited to protect the privacy of other individuals.

B. Houston v. Kine, 2011 BCCA 358, per Hinkson J.A. (Prowse and Newbury JJ.A., concurring)

The defendants appealed rulings by the trial judge disallowing the admission of video recorded surveillance and viva voce evidence proffered by the defendants at the trial of the plaintiff's motor vehicle accident claim.

The trial was initially set for five days in October 2009. When it became evident that more trial days would be needed, the trial was adjourned to March 2010. During the hiatus, the defendants undertook video surveillance of the plaintiff in October 2009 and in November 2009, the latter period being when the plaintiff was on holiday in Mexico. When the trial recommenced in March 2010, the defendants sought to admit into evidence the video surveillance and the viva voce testimony of operatives hired by the defendants who observed the plaintiff during the two periods she was under video surveillance.

The trial judge ruled the video surveillance inadmissible because the defendants had failed to list it in their list of documents until shortly before the reconvening of the trial, in breach of Rule 26(13) (now Rule 7-1(9)). She refused to allow the *viva voce* evidence of the operatives who had conducted the surveillance on the bases that to allow the evidence would undermine her ruling regarding the video surveillance as well as her ruling at the outset of the trial that the defendants would provide a witness list. She found the plaintiff to be a credible witness and awarded damages in the amount of $525,415.

The Court of Appeal dismissed the defendant's appeal with respect to the video surveillance ruling. It found that the trial judge had not erred in exercising her discretion to disallow the video surveillance. The fact that the defendants had produced the video surveillance in compliance with Rule 40(13) (now Rule 12-5(10)) does not negate the party's obligation to disclose the video on a list of documents in accordance with Rule 26. Rule 26(13) required that documents be listed "forthwith" (Rule 7-1(9) now says "promptly"). A finding of prejudice to the party objecting to the admission of evidence is not necessary in order to justify the exclusion of the evidence where no satisfactory reason has been offered for the late disclosure. Delaying listing the video surveillance for tactical reasons was not sufficient to justify the delay.

The trial judge erred, however, in refusing to allow the viva voce evidence of the operatives who had conducted the video surveillance or who had observed the plaintiff. It did not appear that the trial judge turned her mind to whether the exclusion would prevent the determination of the issue of the plaintiff's credibility on its merits (which was a significant issue at trial) or whether, in the circumstances of the case, the ends of justice required that the evidence be admitted. Once the video surveillance was ruled inadmissible, the trial judge should have considered the proposed viva voce evidence as a separate issue. While the video surveillance was the best evidence available of the plaintiff's physical activities during the hiatus, the option to call the observers remained. The trial judge's first reason for refusing to allow the evidence was therefore incorrect.

The order to identify witnesses was given prior to the start of trial, and did not cover the situation where further witnesses may have materialized during an adjournment of the trial. To constrain the defendants' ability to react to the plaintiff's evidence to "prevent surprise or ambush" unfairly restricted their ability to have the proceeding determined on its merits.

The Court of Appeal ordered a new trial.

C. Nikolic v. Olson, 2011 BCSC 125, Williams J.

In these Reasons for Judgment, Williams J. restored the practical and cost-effective means of compelling production of documents in the possession of third persons approved by Hood J. in *Lewis v. Frye*, 2007 BCSC 89 and rejected by Hinkson J. in *Stead v. Brown*, 2010 BCSC 312.

The defendant applied for an order requiring the plaintiff, a Saskatchewan resident, to provide signed authorizations to allow them to obtain documents in the possession of third persons residing in Saskatchewan. The plaintiff did not object to such an order on the grounds that they were irrelevant, privileged, private or confidential, but rather that the court had no jurisdiction to compel the plaintiff to sign authorizations.

The application was heard prior to the introduction of the Supreme Court Civil Rules on July 1, 2010 and therefore Williams J.'s analysis is primarily confined to the former Rule 26. However, at para. 36 he provides a helpful table summarizing and comparing the former and current document discovery rules relevant to his analysis of the issue.

Williams J. embarked on an analysis of the Rules and the jurisprudence interpreting them and concluded, as did Hood J. in *Lewis v. Frye*, that a master or judge has the jurisdiction to create mechanisms by which relevant non-privileged documents in a litigant's "power" will be produced, including the jurisdiction to order him or her to execute the necessary documentation allowing a record-holder, whether residing in or outside of BC, to effect the release of those documents. He declined to apply the reasoning in *Stead v. Brown*, finding that the Court of Appeal decision in *Peel Financial Holdings Ltd. v. Western Delta Lands*, 2003 BCCA 180, was distinguishable. That decision dealt with the power of a lower court to order a party to consent to an order of the Court of Appeal.

It appears that the reasoning in *Nikolic* will apply to the current document discovery rule. In particular, Rule 7-1(11) specifically provides that a party may demand that the opposing party list additional documents within his or her "possession, power or control" that relate to any or all matters in question in the action.

Four recent decisions have considered the broader test for document production under Rules 7-1(11) and (14):

D. Burgess v. Buell Distribution Corporation, 2011 BCSC 1740, Master Baker

The defendant applied under Rule 7-1(14) for an order that the plaintiff produce Worksafe BC records from 2000 to 2005, based on evidence that the plaintiff had a longstanding history of work-related injuries that were similar in nature to his post-accident condition and symptoms. Master Baker embarked on an analysis of Rule 7-1 and in particular, the two tests for production under Rule 7-1(1) ("the evidentiary and reliance documents test") and Rule 7-1(11) ("the *Peruvian Guano* test"). He concluded that the defendant had met the first test under Rule 7-1(1) in that the records could disprove, in whole or in part, the alleged cause of the plaintiff's post-accident injuries. He further concluded that the defendant had met the broader test under Rule 7-1(11) where the court's discretion under Rule 7-1(14) should be applied.

In *obiter*, he queried whether the defendant could also have proceeded under Rule 7-1(18), which deals with documents in the possession of third parties. Rule 7-1(18) is silent with respect to the applicable

test to invoke. He concluded that Rule 7-1(14)'s general reference to "... an application brought under subrule (13) *or otherwise* ..." (his emphasis) would capture non-party documents and then impose the wider *Peruvian Guano* test. See also *Kaladjian v. Jose* below, in which Davies J. confirmed that the test for production under Rule 7-1(18) is the same as that under Rule 7-1(14).

E. Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141, 2011 BCSC 1752, Dillon J.

The test for production under Rule 7-1(11) and (14) is closer to the test traditionally known as the *Peruvian Guano* test of relevancy: documents that may, either directly or indirectly, enable a party to advance his own case or to damage his adversary's case or that may fairly lead him to a train of inquiry. Pleadings can justify the application of the wider, more *Peruvian Guano*-type disclosure. In this breach of contract case, the pleadings went beyond mere breach of contract to include claims of *quantum meruit* and unjust enrichment and required the wider test under Rule 7-1(14). The proportionality rule can be used to either expand or restrict the required production of materials.

F. Edwards v. Ganzer, 2012 BCSC 138, Master Bouck

The defendant applied for an order under Rule 7-1(14) that the plaintiff produce post-accident MSP records and pre- and post-accident Med Profile (Pharmanet) records. Master Bouck agreed with the defendant that such records fell within the broader Rule 7-1(14) test for production which, according to her, was "close" to the *Peruvian Guano* test.

Master Bouck also concluded that authorities decided under the former Rule 26 may assist the court in the exercise of its discretion under Rule 7-1(14). She found that the pleadings and evidence established that the post-accident records were relevant to the issue of mitigation as well as on the basis of *Creed v. Dorio*, [1998] B.C.J. No. 2479 (a 1988 decision that established the rationale for producing MSP records under Rule 26) that the records would allow the defendant "to test the credibility and reliability of the evidence presented by the plaintiff to date on her post-accident health." She was not persuaded that either the pleadings or the evidence provided the requisite grounds to compel an inquiry into the plaintiff's pre-accident medical history.

At para. 54, Master Bouck, as did Dillon J. in *Global Pacific Concepts Inc.*, *supra*, expressly imported the concept of proportionality under Rule 1(3)(2) into the broader disclosure analysis.

G. Kaladjian v. Jose, 2012 BCSC 357, Davies J.

The defendant appealed an order of a master dismissing his application under Rule 7-1(18) for an order for production of the plaintiff's pre-accident MSP records in the possession of a third party. The master concluded that the defendant failed to adduce sufficient evidentiary support for such an order.

Davies J. agreed with the master and dismissed the defendant's appeal. In doing so, he articulated the following principles respecting document production under Rule 7-1:

> The *Peruvian Guano* test for production under the former Rule 26—documents that "may fairly lead to a line of inquiry which may either directly or indirectly enable the party ... to advance his own case or damage the case of his adversary"-and which required no further proof of relevance beyond the pleadings is no longer the test under Rule 7-1.
>
> Rule 7-1(1) changed the test for documentary relevance at first instance by requiring listing only documents that could be used at trial to prove or disprove a material fact and documents the disclosing party intends to rely upon at trial.
>
> Pleadings alone will usually continue to govern issues concerning the initial disclosure obligations of a party under Rule 7-1(1).

> Rule 7-1 also provides processes by which broader disclosure can be demanded by a party under Rules 7-1(11) through (14) under which the court can decide whether, and if so, to what extent, broader disclosure should be made.
>
> A demand for production of additional documents under Rule 7-1(11) and an application under Rule 7-1(14) requires evidentiary support to establish entitlement to the additional documents sought. Mere pleadings are insufficient.
>
> Although Rule 7-1(18), which deals with documents in the possession of third parties, is silent with respect to the test required for production, Rule 7-1(18) should be substantively and procedurally interpreted and applied in a way that is consistent with the interpretation and application of Rules 7-1(10) to (14) with necessary modification to ensure protection of the independent interest of third parties whose records are sought.
>
> A requirement for evidentiary support in requests for additional documents and third party records prevents against unwarranted "fishing expeditions" based solely upon *pro forma* pleadings.
>
> Decisions under former Rule 26(11) based upon a *Peruvian Guano* analysis and test of relevance may offer some assistance in the assessment for relevance for disclosure purposes under Rule 7-1(18), but they must now be read in accordance with all of the provisions of Rule 7-1, including Rule 7-1(14) and the object of proportionality.

H. Cochrane v. Heir, 2011 BCSC 477, Harris J.

The defendants applied to be released from the implied undertaking of confidentiality with respect to transcripts of examination for discovery evidence given by the plaintiff in a previous action.

The plaintiff's current action involved injuries suffered in a motor vehicle accident which were similar to the injuries that formed the subject matter of the previous action. Plaintiff's counsel opposed the order.

Gaul J. stated:

> [5] In my view, there should be no need to relieve counsel for the defendants of his obligation under the implied undertaking. The documents are either in the possession of the plaintiff or they were in her control or possession. The plaintiff has an independent obligation to list and produce them further to her obligations under Rule 7-1(1)(a)(i) of the Civil Rules. The plaintiff cannot shield herself from her obligation to list and produce relevant documents by invoking the implied undertaking against opposing counsel who came into possession of those documents in the previous litigation: see *Wilson v. McCoy*, 2006 BCSC 1011.

He granted the order, nevertheless, commenting that as the transcripts had yet to be listed or produced by the plaintiff in the current action, he was prepared to release counsel for the defendants of the implied undertaking.

XII. Experts

A. Warkentin v. Riggs, 2010 BCSC 1706, Gropper J.

Gropper J. ruled that the report and rebuttal report of the plaintiff's expert, Dr. Hunt, whom plaintiff's counsel described as "a clinician with a specific scientific interest in chronic pain matters" were inadmissible on the basis that he acted as the plaintiff's advocate, rather than as an independent expert. Her findings are set out as follows:

> [81] I find that Dr. Hunt is not a neutral and impartial expert providing assistance to the court, but rather an advocate on behalf of the plaintiff. The report is argument, not opinion. He did not provide a balanced discussion of fibromyalgia and its possible application to the plaintiff's case. His discussion of the medical principles and their application to the plaintiff's case is biased, argumentative and contrary to the requirements for the admissibility of an expert report.
>
> [82] Dr. Hunt's own description of his role as an "Expert Medical Legal Consultant providing opinions on behalf of patients with chronic pain who are seeking legal remedies with respect to their condition" indicates that he does not consider his role as an expert to be that of an objective advisor to the court.
>
> [83] Dr. Hunt's perceived role is amply demonstrated in his report. The format he uses is designed to emphasize matters which support the plaintiff's claim and his diagnosis.
>
> [84] Dr. Hunt presents the medical literature in a manner that suggests that there is consensus about the causal connection between motor vehicle accidents and the onset of fibromyalgia. He attempted to mislead the court regarding the medical literature upon which he relies by referring only to portions which support his diagnosis and prognosis and omitting portions which do not. He does not refer to the cautions and qualifications in the medical literature. He is not current with the medical literature, notably the 2006 prospective longitudinal study by Tischler, which was conducted specifically in order to test the conclusions of the Buskila study.
>
> [85] Dr. Hunt's testimony, particularly in cross-examination, supports my conclusions about his report; he acted as the plaintiff's advocate rather than as an independent expert.

B. Mazur v. Lucas, 2010 BCCA 473, per Garson J. (Kirkpatrick and Hinkson JJ.A., concurring)

This decision by the Court of Appeal deals with the treatment to be given to references in an expert report to opinions provided by other experts whose opinions had not been tendered in evidence.

The plaintiff developed chronic pain as a result of a motor vehicle accident. Prior to the accident, she had been on a leave of absence from her 26-year career as a legal assistant because of anxiety and a major depressive disorder. The issue at trial was whether her pre-existing condition would have disabled her from returning to work regardless of the accident.

The report of the plaintiff's expert, Dr. O'Shaughnessy, referred to the opinions of two psychiatrists who were not called as witnesses at trial and whose reports had not been served. The trial judge ordered that any reference by Dr. O'Shaughnessy to these opinions be redacted from the report. She also precluded defence counsel, in her cross-examination of Dr. O'Shaughnessy, from referring to these opinions, and redacted references in the defence reports to opinions not before the jury.

The jury subsequently awarded the plaintiff $528,400, including $307,000 in future loss of earning capacity which is the amount the plaintiff claimed she would be entitled to solely as a result of the accident.

The Court of Appeal allowed the defendant's appeal and ordered a new trial. The trial judge erred in her treatment of hearsay opinion contained in the expert reports and by not allowing the defence counsel to fully cross-examine Dr. O'Shaughnessy on the facts and assumptions on which his opinion relied. References to hearsay opinions did not render such references inadmissible, but rather went to the weight of the opinion that relied on such opinions.

The Court of Appeal summarized the law as follows:

> [40] From these authorities, I would summarize the law on this question as to the admissibility of expert reports containing hearsay evidence as follows:
>
> • An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others—this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-35)
>
> • An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.
>
> • The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
>
> • The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

C. Helgason v. Bosa, October 21, 2010, Vancouver Registry No. M084365, Silverman J.

Although there is no time requirement for service of a supplementary report under subrule 11-6(6), that subrule cannot be read in a vacuum. Rule 11-7 deals generally with the need to comply with the Civil Rules before opinion evidence is admissible and states that such evidence is presumptively inadmissible unless properly served. Subrule 11-7(7) gives the court discretion to admit opinion evidence despite improper service, based on three disjunctive considerations: due diligence, prejudice and the interests of justice.

Thus where a second general practitioner's report in which the doctor's opinion had materially changed from that contained in her first report was served just 13 days before trial, the court was required to consider subrule 11-7(7) in order to decide whether to exercise its discretion to let the report into evidence.

The facts underlying the second opinion were known to the plaintiff long before plaintiff's counsel interviewed the doctor during his trial preparation and discovered the change in opinion. Neither the plaintiff nor her counsel exercised due diligence in ensuring that the doctor's change in opinion was served as soon as practicable as is required by Rule 11-6(6).

The defendant had cancelled a medical examination after the first opinion was served and it would be prejudiced now by the inability to schedule another examination and obtain a report before the start of trial. It was not incumbent upon the defendant to request an adjournment to rectify this problem. The report was ruled inadmissible.

D. Rabanes v. Pureza, April 27, 2010, New Westminster Registry No. S81726, Ker J.

During the course of a jury trial, Ker J. ruled on the admissibility of reports of the plaintiffs' treating physiotherapist. The defence objected to their admissibility on the grounds that they failed to comply with the last two criteria for expert opinion evidence as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9:

1. The evidence must not contravene an exclusionary rule; and
2. The witness must be a properly qualified expert.

A large portion of his reports reiterated what the plaintiffs had told him over the years as recorded in his clinical records. Moreover, the plaintiffs did not begin treatment with the physiotherapist until a year after they had commenced their action. The plaintiff's statements to the physiotherapist were largely prior consistent statements and thus self-serving. There was a danger that if admitted under the guise of experts' reports, they may very well be improperly used by the jury as confirming the truth of what the plaintiffs said to the physiotherapist, despite any admonitions to the contrary. They were not admissible as part of the plaintiffs' case and therefore failed the third *Mohan* criterion.

The physiotherapist's qualifications as governed by the College of Physiotherapists did not provide him with the expertise to proffer medical opinions on as to the source, diagnosis and prognosis of the plaintiffs' injuries which his reports purported to do.

E. Bialkowski v. Banfield, 2011 BCSC 1045, Bracken J.

Bracken J. ruled on a *voir dire* on the admissibility of expert opinion evidence the plaintiff wished to introduce in this personal injury action and, for the time-being, closed the door on the admissibility in BC courts of evidence relating to a controversial diagnostic tool for traumatic brain injury.

The challenged expert opinion evidence was derived from quantitative electroencephalograph analysis ("QEEG") sought to be introduced by the plaintiff through Dr. Malcolm, a neuropsychologist. The most significant issue in the action was whether the plaintiff had suffered a traumatic brain injury. Dr. Malcolm, after conducting QEEG analysis, opined that his analysis provided a 75% probability that the plaintiff had suffered a brain injury.

The defendant objected to the admissibility of evidence of the QEEG analysis on the grounds that Dr. Malcolm was not a qualified expert and that the results of QEEG testing are unreliable and prone to many false positives for brain injury.

QEEG is a relatively new neuroimaging technique which uses computer-assisted analysis of electroencephalography ("EEG") tests. EEG is a means of recording the electrical activity of the brain, the results of which are visually examined by a clinician to analyze patterns of activity. QEEG analysis is intended to supplement subjective visual examination of paper EEG recordings with a rapid and accurate digital analysis that can be displayed as an image and can be used to detect subtle abnormalities in EEG signals.

After six days of hearing evidence from Dr. Malcolm and Dr. Peter Wong, a neurologist tendered by the defence, Bracken J. ruled that:

> 1. Dr. Malcolm, a neuropsychologist, was not qualified to provide opinion evidence on the results of a diagnostic tool that is designed to conduct testing of the physical activity of the brain. Only a trained electroencephalographer who has the skill, knowledge and training to recognize the potential for error is qualified to give opinion evidence of QEEG analysis.
>
> 2. QEEG evidence is novel science and not sufficiently reliable for admission into evidence for the purpose of diagnosing brain injury on the principles established in *R. v. J.L.J.*, 2000 SCC 51 and *R. v. Mohan*, [1994] 2 S.C.R. 9.

Bracken J. concluded that there was nothing in the evidence before him to suggest that QEEG would "become clinically useful in diagnosing traumatic brain injury in the near future; however, it remains open for such evidence to be offered through an appropriate expert if and when it satisfies the evidentiary requirements of Canadian Courts."

XIII. Indivisible Injuries

A. Estable v. New, 2011 BCSC 1558, Gropper J.

These reasons provide an example of a fact pattern supporting findings by the judge that several pre- and post-accident incidents caused injuries that were both divisible and indivisible from the injuries suffered by the plaintiff as a result of a motor vehicle accident.

The plaintiff suffered pre-existing conditions including fibromyalgia, scoliosis and degenerative changes in her neck. She suffered injuries to her neck and back as a result of a motor vehicle accident in 1992. In August 2003, three months before the accident which was the subject of her current action, she was involved in an incident where the hood of her vehicle flew open while she was driving. She suffered an injury to her wrists as a result. In October 2003, she alleged she suffered injuries to her chest, neck, back and shoulder as a result of a motor vehicle accident (the "subject action"). She claimed this accident exacerbated her wrist injuries. Subsequent to the October 2003 accident, she was involved in several injury-producing events, including:

- a motor vehicle accident in November 2004, where her wrists may have been reinjured;
- a physical altercation with another person in July 2005 which produced pain in her right wrist, shoulders, arms, legs and knees;
- physical attacks by her son in late 2008.

Although Gropper J. discusses the principles of "crumbling skull" versus "thin skull" in her causation analysis, she does not expressly state which principle she applied in assessing the plaintiff's damages. It appears, however, that she applied the "thin skull" principle. The evidence of the plaintiff's rheumatologist was that she had a long-standing history of neck complaints, mechanical back pain and fibromyalgia which both accidents in 2003 likely aggravated and which likely contributed to more prolonged and severe symptoms. Absent in her Reasons is any mention of expert opinion confirming or negating whether the plaintiff's pre-existing condition would have caused her to suffer similar symptoms regardless of the two 2003 accidents.

Gropper J. also considered whether the injuries suffered by the plaintiff in the October 2003 accident were divisible or indivisible from the injuries she suffered in August 2003 or subsequently. She relied on the medical evidence to find that the October 2003 accident did not aggravate her wrist injuries, which significantly contributed to her inability to perform her occupation as a freelance videographer, artist, performance artist, writer and musician. The defendant in the subject action was not responsible for the plaintiff's wage loss claim, special damages and future losses that were solely attributable to the wrist injuries.

He was, however, responsible for the aggravation of her ongoing symptoms of neck, back and shoulder pain. Gropper J. applied *Bradley v. Groves* to find that her pre-existing symptoms were indivisible from the injuries to which the accident contributed. As well, any injuries she suffered after the accident were indivisible and the plaintiff was entitled to recover all her damages arising from those incidents from the defendant in the subject action.

In assessing the plaintiff's claims for past wage loss, special damages, and future losses, the Court made global assessments of damages arising from both 2003 accidents and attributed two thirds to the August accident and one third to the October accident. She was awarded damages in the subject action of $56,625 in total including non-pecuniary damages of $30,000.

XIV. Insurance Issues

A. Laxdal v. Robbins, 2010 BCCA 565, per Hinkson J.A. (Prowse and Low JJ.A., concurring)

The plaintiff was off work for approximately six weeks in a calendar year. She was awarded $3,306 for gross past wage loss. Gerow J. refused to reduce the plaintiff's gross wage loss by the tax that would be payable on that amount in accordance with ss. 95 and 98 as if the past wage loss was "stacked" upon the remainder of the plaintiff's earnings for that year. Instead, Gerow J. applied *Hudniuk v. Warkentin*, 2003 BCSC 62, as if the gross past wage loss was the only income earned in that period.

In *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, the Court of Appeal dealt with a different issue (the assessment of tax on past wages lost over multiple periods). H The "stacking" issue was not dealt with by the Court of Appeal in *Lines*. Gerow J. reasoned that *Hudniuk* and the authorities following it continued to support the conclusion that where the gross award is at or below the amount exempt from taxation, there would be no tax payable so that the net past wage loss would be the same as gross past wage loss.

The Court of Appeal in *Laxdal* held that the trial judge was incorrect in her interpretation of ss. 95 and 98 of the *Insurance (Vehicle) Act* and allowed the defendant's appeal.

Hinkson J.A. acknowledged that ss. 95 and 98 could have been drafted with greater precision, but the words of those sections must be read in their grammatical and ordinary sense. He was satisfied that, where an income loss can be attributed to a particular tax year or years, the language of ss. 95 and 98 requires a resort to the stacking approach. Once the court has determined the applicable period or periods of income loss, the legislation requires a deduction from the gross income loss to take into account the provisions of the *Income Tax Act* of BC, the *Income Tax Act* of Canada and the *Employment Insurance Act* of Canada for the relevant year or years.

The application of the stacking approach in accordance with the legislation necessarily involves a cumbersome calculation. Hinkson J.A. set the means of calculating the respondent's net income loss as follows:

> a) to determine her income from other sources during 2006 ($40,175.00);
>
> b) add that figure to her income loss after taking into account the sick benefits she received ($3,306.24);
>
> c) determine the tax that would be payable on $43,481.24, based upon the 2005 income tax rules and regulations by computing the amount in accordance with the provisions of the *Income Tax Act* of British Columbia, the *Income Tax Act* of Canada and the *Employment Insurance Act* of Canada applicable to the calendar year ending December 31, 2005 and on $40,175.00 based upon the 2006 income tax rules and regulations by computing the amount in accordance with the provisions of the *Income Tax Act* of British Columbia, the *Income Tax Act* of Canada and the *Employment Insurance Act* of Canada;
>
> d) subtract the difference between the two tax figures determined in c, above;
>
> e) then deducted from the income loss award, net of sick benefits that she received.

B. Raguin v. ICBC, 2011 BCCA 482

The Court of Appeal confirmed that massage therapy falls within the ambit of "physical therapy" and is therefore a mandatory benefit under s. 88(1) of the Insurance (Vehicle) Regulation ("the Regulation").

Section 88(1) provides:

> 88(1) Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall, subject to subsections (5) and (6), pay as benefits all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing services, or for necessary physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis.

The Court of Appeal embarked on an analysis of the Regulation and its legislative history and relevant legislation including the *Health Professions Act*, the Physical Therapists Regulation and the Massage Therapists Regulation to assist with interpreting s. 88(1). In particular, the court noted that "physical therapy" is not defined in the Regulation.

The Court concluded that, when all the relevant provisions of the legislation it reviewed are read together, physical therapy may properly be interpreted as including massage therapy. In response to ICBC's argument that interpreting the section to include massage therapy would "open the floodgates to all manner of questionable procedures," the Court intimated that the Regulation's requirements that benefits under s. 88(1) be reasonable and necessary and provided by a registered health professional in accordance with the *Health Professions Act* would serve as adequate safeguards.

XV. Liability Waiver and Release

A. Loychuk v. Cougar Mountain Adventures Ltd., 2012 BCCA 122, per Frankel J.A. (Newbury and Bennett JJ.A., concurring)

This case represents an application of the Supreme Court of Canada's decision in *Tercan v. British Columbia*, 2010 SCC 4, to recreational waivers.

Two plaintiffs suffered injuries during a zipline adventure in Whistler which the defendant admitted were sustained as a result of its negligence. Prior to engaging in the activity, the plaintiffs had executed a waiver and release of liability for, *inter alia*, negligence. Both had some experience with releases; Ms. Loychuk owned a business that offered kick boxing/fitness programs to women and which required clients to sign waivers, which she explained to them. Ms. Westgeest had just graduated from law school. The plaintiffs were injured when they collided while travelling on the same zip-line as a result of miscommunication by employees of the defendants.

The plaintiffs pursued an action in negligence and the defendant brought on a summary dismissal application based on the waiver. The application succeeded and the plaintiffs appealed arguing that the trial judge had erred in finding that the release was not unconscionable or unenforceable at common law and under the *Business Practices and Consumer Protection Act*. They also argued that the Release should be void because the defendant had advertised the safety of ziplining on its website and that the release was unenforceable for lack of consideration.

The appeal was dismissed. The release was not unconscionable at common law nor under the *BPCPA*, assuming that Act applied to recreational activities. The test for unconscionability was outlined as follows:

> [29] The language used to express the test for unconscionability has varied over the years. It was put this way by Mr. Justice Davey, as he then was, in *Morrison v. Coast Finance Ltd.*(1965), 55 D.L.R. (2d) 710 (B.C. C.A.), at 713:

> [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].

[30] That test was recently discussed in *McNeill v. Vandenberg*, 2010 BCCA 583 (B.C.C.A.), and *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500 (B.C. C.A.). In *McNeill*, Madam Justice Garson stated:

> [15] In order to set aside a bargain for unconscionability, a party must establish:
>
> (a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
>
> (b) proof of substantial unfairness in the bargain.
>
> This test was articulated in *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (B.C.C.A) at 173 and reiterated in *Klassen v. Klassen*, 2001 BCCA 445.

31 In *Roy*, Mr. Justice Tysoe (at para. 29), quoted the following from the judgment of Madam Justice McLachlin, as she then was, in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 (B.C. C.A.), at 263:

> Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrsion v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

Mr. Justice Tysoe went on to state (at para. 30), that in *Tercon*, Binnie J. was "not intending to signal a departure from the usual test for unconscionability."

The appellants argued that the authorities establishing recreational releases are not unconscionable were inapplicable because they do not relate to activities in which the operator has total control of the risk. This argument was also rejected by the court of appeal. There is no overriding public policy reason for refusing to enforce a waiver that releases an operator from liability for its own negligence in activities where the participant has no control over the risk.

The court also rejected the argument that there was no consideration for the release. The appellant argued that they had entered into the contract to go zip-lining before they had left to travel to Whistler by having made the reservations using a credit card and so argued "past consideration." The Court of Appeal relied on *Delaney v. Cascade River Holidays Ltd.* in dismissing the past consideration argument. As in *Delaney*, the consideration received for signing the release was that the plaintiffs were allowed to participate in the zip-lining.

XVI. Limitation Act

A. Iezzie v. British Columbia, 2012 BCCA 200, per Donald J.A. (Lowry and Neilson JJ.A., concurring)

The plaintiff contacted Hepatitis C from a foster child in her care. In 2001, she was stuck by a hypodermic needle during a scuffle with the child who, unknown to her, was Hepatitis C positive. In 2002, she was diagnosed with the disease and underwent chemotherapy for nine months in 2003. In 2006, a social worker advised her that the records of the Ministry of Children and Family Development confirmed that the child had Hepatitis C at the time of her placement in 2001. She advised the Ministry about her contracting the disease. The Ministry thereafter conducted an investigation and offered her an ex gratia payment. It advised her to consult a lawyer and told her how to make a request for records under the *Freedom of Information and Protection of Privacy Act*. In 2008, she made a *FIPPA* request and received records confirming the information she required. She did not commence an action until 17 months later.

The trial judge held that a *limitation* period for a claim of negligence was postponed until the plaintiff had obtained documents from the defendant that substantiated her claim. The judge took into account that the plaintiff was under intense stress and acted reasonably in not bringing an action while settlement negotiations were ongoing.

The Court of Appeal allowed the appeal. It agreed with the appellant that the time began to run when the respondent was advised by the social worker in 2006 that the child had Hepatitis C. The record did not support an explanation as to why the plaintiff did not take steps within two years of being informed in 2006 that the defendant breached its duty of care to her. The fact there were ongoing negotiations after 2006 does not support a basis for postponement. She did not attempt to confirm the information given to her by the social worker until 2008 when she made the *FIPPA* request. Had she done so in 2006, she would have allayed her concerns about a reasonable prospect of success. The Court allowed the appeal and dismissed the action.

B. Field v. Harvey, 2012 BCSC 456, Bracken J.

The plaintiff, injured in a 2008 car accident, failed to commence her action before the limitation period expired. She had dealt directly with ICBC and received Part 7 benefits until late 2008. By letter dated December 15, 2008 the adjuster advised that certain massage therapy expenses incurred beyond ICBC's typical time period for payment would not be paid under Part 7 and that the plaintiff should retain the bill and "we can discuss this at the time of settlement." The plaintiff responded with a note that the expenses were incurred within the allowable eight week period. Thereafter, the only other activity on the matter was a telephone message left by the adjuster on July 31, 2009 asking the plaintiff about her injuries. The plaintiff was advised that her action was statue barred when she next contacted ICBC after her file was closed and the limitation period had expired.

Mr. Justice Bracken dismissed the plaintiff's action finding that it is clear from the case law that ICBC is not under an obligation to warn a plaintiff that the limitation period had commenced, was not postponed and would soon expire. There was nothing in the December 15, 2008 letter that could be construed as either an admission of liability on the part of the insured or a waiver or extension of any applicable limitation period.

XVII. Negligence

A. Hussack v. Chilliwack School District No. 33, 2011 BCCA 258, per Bennett J.A. (Prowse and Neilson JJ.A., concurring)

The plaintiff was a13-year old Grade 7 student who was hit in the face with a field hockey stick during a PE class and suffered a concussion which developed into a serious somatoform disorder. There was an unusually overprotective relationship between the plaintiff and his father, who was the source of complaints from teachers and other parents throughout the plaintiff's education. The father attended the school daily to have lunch with his son, attended school functions to take pictures and often disrupted classes. The teachers characterized the relationship between the plaintiff and his father as "unhealthy." That relationship continued post accident. The plaintiff had a chronic history of school absences and was home taught for periods of time. The plaintiff missed about 38% of his Grade 7 year by the time of the accident. As a consequence the school arranged a meeting with the plaintiff's father, the principal and PE teacher, who recommended that the plaintiff attend the field hockey class so that he could start to reintegrate himself into the school. The plaintiff had a background in ice hockey, roller hockey and floor hockey and so the PE teacher felt that the plaintiff could participate in the field hockey scrimmage games. However, he had already missed the first few weeks of instruction in field hockey. Part of the instruction had been around basic rules which included safety rules.

At the start of the class before the plaintiff was injured, the teacher reminded the students that they should not raise their sticks above their knees or to check from behind because of the risk that of being smacked in the face by their stick. During a game the plaintiff approached another player who was taking a shot and was smacked in the face by their stick. He was treated by the PE teacher with ice. The plaintiff's father arrived at the school and elected to take the plaintiff to the hospital where he was diagnosed with a mild concussion and bruising and swelling. The plaintiff did not recover as expected and went on to develop a severely disabling somatoform disorder. His recovery was complicated by his father's interference with the medical care and his refusal to allow his son to take any psychiatric medication prescribed by the family doctor. At the time of trial, the plaintiff spent most of his time in his room watching TV or on his computer. His father made most of his meals for him and looked after most of his needs. He had no set schedule for sleeping or waking, had difficulty getting around and described his life as a "living hell." The trial judge recognized that the relationship between the father and his son was unhealthy and touched on nearly every aspect of the case.

At trial, the Court reviewed the standard of care to which teachers are held:

> [60] ... Four major criteria are considered as part of the test, namely (a) whether the activity was suitable to the age and mental and physical condition of the student; (b) whether the student was progressively trained and coached to do the activity properly and to avoid the danger; (c) whether the equipment was adequate and suitably arranged; and (d) whether the performance, having regard to its inherently dangerous nature, was properly supervised.

The trial judge found that despite the PE teacher's rules regarding stick raising and the plaintiff's knowledge of ice hockey, he was inadequately prepared for field hockey and was not properly instructed in the sport's safety requirements. In particular, he should not have been allowed to participate in the scrimmage game without having participated in the progressive instruction to the sport.

Expert evidence had been called by both sides. The plaintiff's expert testified that warnings for the students not to check from behind was insufficient and that learning to not check from behind must be "progressively" taught to the students. The school called an expert who testified that not checking from behind is not something that one could "teach" but was a rule to be obeyed. Madam Justice Boyd found that because the plaintiff had missed the initial lessons and had not been "progressively taught" the PE teacher had breached the standard of care and was negligent.

The trial judge applied the "but for" test of causation and concluded that the somatoform disorder would not have occurred "but for" the head injury.

The Court of Appeal largely confirmed the trial decision (there was a modest reduction in the wage loss award). One of the arguments advanced on appeal by the school was that the plaintiff's severe psychiatric dysfunction was not a foreseeable consequence of the event. In rejecting that argument, the Court of Appeal said:

> [71] It is not necessary for the plaintiff to show that the precise injury of the full extent of the injury was reasonably foreseeable. What he must show is that the type or kind of injury was reasonably foreseeable...
>
> ...
>
> [74] The principle of reasonable forseeability in relation to psychiatric injury is subject to a qualification: where the psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury even if this injury was unforeseeable ...

The Court of Appeal also rejected the ground of appeal that the actions of the plaintiff's father amounted to a *novus actus interveniens* which broke the chain of causation. The school had argued that reasonableness rather than forseeability was the appropriate test and cited a number of cases that applied *novus actus interveniens* to unreasonable subsequent actions by family members. The Court of Appeal rejected the argument and characterized the "family cases" as dealing with "unusual" circumstances, rather than creating new law. The trial judge was correct in concluding that it was foreseeable that the father would conduct himself generally in the manner in which he did.

XVIII. Occupiers Liability

A. Chamberlain v. Jodoin, 2012 BCCA 108, per Smith J.A. (Finch, C.J.B.C and MacKenzie J.A. concurring)

This case is of interest because it addresses the standard of care under the *Occupiers Liability Act* of a business owner during the winter when their business is not open.

This was an appeal from the dismissal of an action against the defendants, Jodoin and New Orient Enterprises, for damages to compensate the plaintiff, Mr. Chamberlain, for injuries sustained when he slipped and fell on an icy sidewalk apron immediately in front of a hair salon operated by Jodoin in New Orient's building. Mr. Chamberlain fell just before noon on a Sunday after leaving a treatment center in New Orient's building. There had been a light snow fall that morning and some ice had formed as a result of water dripping from Jodoin's business sign. Jodoin's salon was closed at the time. The claim was dismissed at trial on the basis that New Orient was not an occupier of the sidewalk. Jodoin was found to have been an occupier under the Act but the case was dismissed on the basis that Jodoin had taken reasonable care in maintaining the safety of the sidewalk. The trial judge found that it was not foreseeable that pedestrians would be using the sidewalk apron on Sunday and that it was reasonable for Jodoin to assume that the treatment center would keep the area in front of its entrance cleared on days when it was open. Further, that the formation of ice from her sign was not reasonably foreseeable.

The Court of Appeal dismissed the appeal holding that for liability to attach under the *Occupiers Liability Act*, the alleged occupier must have both responsibility for and control over the condition of the premises, the activities carried out thereon and the conduct of the third party who use the premises. Having assigned the responsibility for the maintenance of the sidewalk to its tenants, New Orient did not have the requisite degree of control to fall within the definition. The Court of Appeal

agreed with the trial judge's findings that Jodoin had meticulously maintained the sidewalk in front of her business, had no knowledge of the risk of ice forming on the sidewalk when her business was closed and that little foot traffic could be anticipated in front of her business when it was closed.

XIX. Practice

A. Piso v. Thompson, 2010 BCSC 1746, Master Caldwell

This decision confirms that inadvertence on the part of counsel in responding to a Notice to Admit will likely always result in leave being granted to withdraw the deemed admissions, especially if the party avows it was never his intention to make such admissions.

In this case, the plaintiff's former counsel through inadvertence failed to respond to a Notice to Admit that significantly reduced the plaintiff's personal injury claim. It was not until defence counsel scheduled a summary trial that plaintiff's counsel became aware of the deemed admissions. The plaintiff applied for leave to withdraw the admissions. Master Caldwell stated:

> [21] In my respectful view Rule 7-7 does not, nor was it intended to, create a trap or add an inescapable obstacle to ensnare or trip up sloppy or inattentive counsel to the detriment of the parties to the litigation.

The defendant's argument that the plaintiff had a remedy against his original counsel failed to recognize the further delay and expense such a remedy would entail and would not appropriately serve the concept of proportionality.

B. Gill v. A & P Fruit Growers Ltd., 2011 BCSC 1809, Schultes J.

In this occupier's liability action the parties obtained an order that the issues of liability and quantum be severed under the former Rules 39(29) and (30). The trial of all issues had been set down to be heard by judge alone. The trial of the liability issue went ahead before a judge who apportioned liability between the parties. The plaintiff issued a notice of trial for the quantum issue and the defendant issued a jury notice. A master subsequently struck the jury notice as a nullity. The defendant appealed the master's order.

Schultes J. dismissed the appeal, confirming the master's order that the jury notice was a nullity but for different reasons than those of the master. The master had embarked upon an analysis as to whether the original order under Rule 39(29) was an order that the original trial be severed into different issues or whether it contemplated two separate trials. He concluded that the former was the case and that since the trial was set down for judge only, that mode of trial governed the hearing of the quantum issue.

Schultes J. concluded that the master's analysis had been unnecessary, given the wording of Rules 39(29) and (30):

> (29) The court may order that one or more questions of fact or law arising in an action be tried and determined before the others, and upon the determination a party may move for judgment, and the court, if satisfied that the determination is conclusive of all or some of the issues between the parties, may grant judgment.
>
> (30) The court may order that different questions of fact arising in an action be tried by different modes of trial.

He stated that it did not matter whether the order created two trials or two hearings of separate issues of one trial. If the court directs that issues be tried and determined before others, the mode of trial

must be the same as the single original trial absent further order under Rule 39(30) or its successor, Rule 12-5(68). It was not open to the defendant to unilaterally choose a different mode of trial for the hearing of the quantum issue.

C. Litt v. Grewal, 2012 BCSC 202, Master Caldwell

The infant plaintiff applied for an order extending the time for filing a Notice Requiring Trial by Jury, stating that her former counsel had not advised her of her right to elect a jury trial during the time period when she was required to do so. Her former counsel deposed in an affidavit that he had not advised his client of her right to a jury trial.

The authorities on the issue have established that:

1. The party wanting a jury must satisfy the court that the intention to have a jury trial must have existed during the period when the election could have been made and the notice delivered: *Hoare v. Firestone Canada Inc.*, [1998] B.C.J. No. 2362 (C.A.).
2. It is not enough for the party to show negligence on the part of the party's solicitor and that the other party would suffer no prejudice: *Ngai v. Cho et al.*, 2001 BCSC 333.
3. A party cannot show the requisite intent to have a jury trial if he was never advised of his right to a jury trial: *A.D. v. Tadros*, [2005] B.C.J. No. 2218.

Master Caldwell found he was bound by the decisions in *Ngai* and *Tadros* unless he was able to distinguish them from the case before him. He did so.

In *Ngai*, the Court commented that the evidence as to the plaintiff's intention at the relevant time was poor at best and insufficient to establish such intention. This was not the case before Master Caldwell because the plaintiff's litigation guardian swore in an affidavit that had she been advised by her former counsel that she could elect trial by jury, she would have done so. Her former counsel confirmed his lack of advice.

In *Tadros*, the Court pointed out that there was no evidence from the defendant's former counsel with respect to what advice if any had been given about his right to a jury. He may have suffered prejudice as a result of having to change counsel twice through no fault of his own, but such prejudice was outweighed by the prejudice the plaintiff would suffer if the upcoming trial was adjourned to allow trial by jury.

Master Caldwell confirmed that a discretion exists to extend the time for filing a jury notice where:

1. a party has not been advised of his or her right to a jury trial; and
2. that assertion is supported by cogent evidence; and
3. there is no prejudice to the other party.

D. Tompkins v. Bruce, unreported, Vancouver Registry, M070137, December 14, 2011, Curtis J.

Pursuant to Rule 12-5(28), Mr. Justice Curtis refused to allow the defendant to call a witness, Mr. Simm, at trial due to the failure to disclose the witness on the defendant's list of witnesses either 28 days before trial or at the Trial Management Conference. Instead the defendant had only listed "lay witness number one" and "lay witness number two," when the defendant was aware that Mr. Simm existed. Such a description fails to conform to the Rules and if permitted would deliberately frustrate them. The purpose of identifying witnesses is to allow the other side to properly prepare their case and the judge, if they desire, can order a statement concerning the witness as well as estimate the proper length of trial. Mr. Justice Curtis held:

> [7] In the circumstances of this case, I am not prepared to allow Mr. Simm to testify, because one, I do not think his evidence is going to be particularly relevant in the circumstances of the case; two, his name was not disclosed, although it was known at the Trial Management Conference, and three, the name was not disclosed, although known, on the date that the Trial Management Conference Judge had directed that his name be given.

E. Luis v. Haw, 2011 BCSC 815, Groves J.

This case contains a helpful summary of the considerations for when a party may attend a Trial Management Conference by telephone. An applicant must show urgency or extreme inconvenience in order to attend a TMC by phone. It is not enough to say that you have "appointments" and cannot guarantee your personal attendance.

XX. Psychological Injury

A. Schulze v. Strain, 2010 BCSC 1516, Halfyard J.

The infant plaintiff was four years old when the vehicle in which he was restrained in a child safety seat was involved in an accident. He sustained a bruise to his neck, likely from the seat belt. He demonstrated emotional upset, fear of being in a vehicle, nightmares and the like, for six months after the accident. His general practitioner, whom the court described as having "had more training about mental health issues than most general practitioners," diagnosed post traumatic stress disorder. He testified, however, that he was not qualified to make a diagnosis of recognized psychiatric illnesses.

Plaintiff's counsel claimed that his psychological injuries should be assessed at $30,000. The defence position was that there should be no damages for the psychological injury because the plaintiff had not demonstrated that he suffered a recognized psychiatric injury or that his psychological disturbance was causally connected to his minor physical injury.

The trial judge agreed with defence counsel, citing *Kotai v. Queen of the North*, 2009 BCSC 1405 as authority for the principle that a person suffering psychological injury unconnected to any physical injury must establish that the injury was a "recognized psychiatric injury" for there to be an award of damages. He awarded $1,500 for the bruise and would have awarded $6,000 for post traumatic stress disorder if it had been proved.

XXI. Rule 7-6—Medical Examination

A. Mund v. Braun, 2010 BCSC 1714, Brown J.

The plaintiff consented to attending a medical examination by a neurologist, Dr. Makin, but objected to two conditions required by the neurologist that the plaintiff:

1. submit to electro-diagnostic testing, if required;
2. execute a copy of Dr. Makin's Governing Law and Jurisdiction Agreement prior to attending the examination.

The plaintiff claimed multiple symptoms including neck pain, right shoulder pain and numbness and tingling in his right arm and fingers. In issue in the action was the appropriate diagnosis for his symptoms. The plaintiff had already been examined by his neurologist who had conducted nerve conduction studies. The defence expert, Dr. Makin, stated that electro-diagnostic testing is an extension of a neurological examination rather than a routine laboratory test. The nerve conduction studies performed by the plaintiff's own neurologist were over a year old.

Brown J. was satisfied that the studies were required as part of the neurological examination, were minimally intrusive and would not invade the plaintiff's privacy. He ordered the plaintiff to submit to the testing.

Although it appears the court had jurisdiction to order the plaintiff, against his will, to submit his body for testing, it lacked jurisdiction to order the plaintiff to sign an authorization the doctor required for insurance purposes. The document the doctor required the plaintiff to sign was an agreement that he would "not sue Dr. Makin outside of BC." Brown J. felt bound by the authorities, including *Stead v. Brown*, 2010 BCSC 312, to find that he lacked jurisdiction to order the plaintiff to sign the document.

B. Breberin v. Santos, 2011 BCSC 961, Willcock J.

Plaintiff's counsel consented to an examination of the plaintiff by a psychiatrist, but opposed the location of the examination. The plaintiff resided in Edmonton, Alberta, and, according to a letter from the plaintiff's general practitioner, was unfit to travel, with no further explanation. The issue before Willcock J. was whether the examination should take place where the plaintiff resided, or whether the defendants were entitled to choose the place of the examination as well as the expert to conduct the examination.

Willcock J. relied on the reasons of Master Bouck in *Parsons v. Mears*, 2011 BCSC 397 where she faced a similar issue. He agreed with Master Bouck that the plaintiff's convenience should be considered in determining where the examination should take place. However, the onus should fall upon the plaintiff to show that there is a reason to depart from the general rule that the defendants are entitled to choose the expert to conduct the examination. In this case, the plaintiff's evidence fell short of establishing that she should be examined by an expert in Edmonton.

C. Mahil v. Price, 2011 BCSC 808, Voith J.

The defendant applied for an order compelling the plaintiff to submit to an examination by an orthopaedic surgeon in order to obtain a responding report that would be served in accordance with Rule 11-6(4). Voith J. concluded that it would not be prudent or appropriate for him to pre-determine whether the report resulting from the examination would be properly responsive to the plaintiff's experts' reports. The fact that the defendant intended the expert to confine his opinion to very narrow issues provided some safeguard against the expert's report straying beyond its permitted ambit.

D. Narayan v. Malhi, July 21, 2011, New Westminster Registry No. M114869, Master Keighley

The defendant applied for an order that the plaintiff be examined by an orthopaedic surgeon, Dr. Schweigel. The plaintiff opposed the application on the basis that the plaintiff had already been examined by another orthopaedic surgeon, Dr. Yu and that if the plaintiff were to be examined again, the examination should be conducted by Dr. Yu.

The adjuster stated in his affidavit that he had scheduled the examination by Dr. Yu pursuant to s. 99 of the *Insurance (Vehicle) Act* at a time when litigation had not been commenced and was not contemplated by him. ICBC had not retained defence counsel nor was counsel consulted prior to Dr. Yu's engagement. The adjuster's instructing letter to Dr. Yu specifically requested an examination pursuant to s. 99 for the purpose of determining "whether the insured required as a result of her injury further specific medical or rehab benefits or treatments that may be required now or in the future."

Master Keighley was satisfied that the examination requested by the adjuster was for the purpose of a Part 7 examination. He further found that Dr. Yu's report, which plaintiff's counsel characterized as a "thorough examination of the plaintiff's condition" was confined, for the most part, to issues relating

to the plaintiff's Part 7 claim. In concluding that Dr. Yu's report was not a "first examination" for the purpose of Rule 7-6, Master Keighley agreed with the following factors cited by defence counsel:

- litigation had not been commenced or contemplated at the time of the examination;
- counsel for the defendants had no input into the choice of expert or the instructions provided;
- while the adjuster handled both of the plaintiff's Part 7 and tort claims, his concerns at the time of the referral to Dr. Yu were limited to Part 7 issues;
- the letter requesting the report dealt exclusively with Part 7 issues;
- the adjuster's letter did not ask the expert to deal with issues more commonly addressed in tort claims, such as differentiating between pre-and post-accident symptoms or attributing injuries to one accident or the other.

E. Tchakedjian v. Rooney, November 4, 2011, Vancouver Registry No. M100588, Master Baker

Plaintiff counsel sought an order that the medical examination to be conducted by a psychiatrist, Dr. Solomons, either be recorded or attended by a chaperone. He relied on the Court of Appeal decision of *Wong v. Wong*, 2006 BCCA 540 which held that audio recording of a medical examination may be justified where the plaintiff can establish a reasonable apprehension of bias on the expert's part.

Plaintiff's counsel referred to several decisions in which Dr. Solomons' opinion was given little weight. In one case, the Court found that Dr. Solomon's evidence was not impartial or balanced. Defence counsel, on the other hand, produced several decisions in which other experts had accepted and relied on his opinions which had been upheld by the court.

Master Baker concluded that the plaintiff had not met the relatively high threshold for such an order. The criticism of Dr. Solomons' evidence in the cases to which the plaintiff referred did not demonstrate bias on his part, but rather was the result of "advocacy, trial work, cross- examination, the usual hard slugging that trial counsel do."

F. Colby v. Stopforth, 2011 BCSC 1560, Dardi J.

The plaintiff's litigation guardian in this medical malpractice action sought an order that he be allowed to audio record the examinations by three defence experts, a neuropsychologist, a psychiatrist and a speech language pathologist. The litigation guardian had been ordered earlier by Dardi J. to attend the examinations with the plaintiff and to answer questions with respect to the plaintiff's medical history and condition. Each expert deposed that in his or her view the use of audio recording would disrupt or inhibit the examination. None of the examinations conducted by the plaintiff's experts had been recorded. There was no evidence that the litigation guardian had difficulty recalling conversations or understanding questions put to him. Dardi J. was satisfied that the evidence fell short of establishing any of the circumstances enumerated in *Wong* which justified recording.

However, Dardi J. felt obliged to consider the request in light of the unique circumstances of this case. Counsel for the plaintiff argued that an audio recording was necessary to protect the litigation guardian in the event there were evidentiary conflicts between the litigation guardian and the examiner. The litigation guardian was a key witness whose credibility at trial would be a central issue. Furthermore, his status as a committee required him to act in the plaintiff's best interests by accurately capturing the examination.

Dardi J. concluded that the litigation guardian was in no different position than a plaintiff who had been ordered to attend a Rule 7-6 examination to answer questions by the examiner and whose credibility would be challenged at trial. The litigation guardian's status as a committee was not a

sufficiently compelling reason to warrant the use of audio recording. To permit the litigation guardian to audio record the examinations would place him in an advantageous position to that of a plaintiff who attends an examination on his or her behalf.

G. Kalaora v. Gordon, 2011 BCSC 1360, Hyslop J.

Hyslop J. ruled that the court may order a plaintiff to sign a consent form routinely required by some doctors before they will proceed with a Rule 7-6 examination. The plaintiff attended the examination to be conducted by Dr. Smith, but refused to sign the consent form which the College of Physicians and Surgeons recommend non-treating doctors obtain in order to protect them from claims of assault and battery. Plaintiff's counsel argued that the court does not have the jurisdiction to force the plaintiff to sign the consent form or give verbal consent, relying on the case of *Kobzos v. Dupuis*, 2006 BCSC 2047.

Hyslop J. relied primarily on *Nikolic v. Olson*, 2011 BCSC 125 in which Williams J. stated that when it comes to the rules pertaining to discovery there is little room for consideration of a party's consent. Litigating parties are lawfully obligated to effect full and complete disclosure and the court has the power to make orders to compel compliance with the rules. The rationale in *Nikolic*, although applied to the issue of document production, applies to all the discovery rules, including Rule 7-6, according to Hyslop J. Read together, Rule 7-6 and Rule 13-1(19) which gives the court power when making an order to impose terms and conditions that will further the object of the rules, permit the court to order a plaintiff to sign a consent or authorization.

Hyslop J. distinguished *Kobzos*, where the consent in issue was overly broad, giving the examining doctor permission to make independent inquiries and to interview collateral sources for information.

XXII. Rule 9-1 Offers to Settle

A. Hunter v. Anderson, 2010 BCSC 1591, Cullen J.

In this occupier's liability case, the defendant delivered an offer in the amount of $25,000 three days before trial. The plaintiff was found to be 75% liable for her injuries and was awarded net damages of $9,127.

The plaintiff argued that the court should take into account the fact that the defendant was insured when considering the relative financial circumstances of the parties under Rule 9-1(c), citing *Smith v. Tedford*, 2009 BCSC 905 and *Radke v. Parry*, 2008 BCSC 1397. Cullen J. distinguished those authorities, stating that he understood them to mean that it is "in circumstances where a defendant's insurance coverage creates an unfair advantage leading to unnecessary costs through testing the plaintiff's case, where an insurer's financial circumstances supplant those of the litigant as a factor to consider in determining costs." Since such was not the case in *Hunter*, Cullen J. awarded costs to the defendant after the first two days of trial.

B. King v. Insurance Corporation of British Columbia (Costs), 2010 BCSC, Pearlman J.

Pearlman J. distinguished *Smith v. Tedford*, 2009 BCSC 905 to find that ICBC's financial position was not a factor to take into account when assessing the costs consequences of an offer to settle delivered by ICBC that bettered the result obtained by the plaintiff at trial.

The plaintiff brought an action against ICBC for declaration of insurance coverage and ICBC counterclaimed for damages of $36,613.63 representing the amount paid by ICBC to all other drivers and owners of vehicles involved in the accident.

ICBC delivered an offer to settle its counterclaim upon payment of $33,000 and dismissal of the plaintiff's claim, with costs to ICBC from the date of the offer. The plaintiff's action was dismissed at trial and ICBC was awarded the damages it sought.

Pearlman J. first observed that there was no evidence before him of the plaintiff's financial circumstances. Furthermore, in *Smith*, it was the defendant's insurer's conduct in defending the action that warranted its financial circumstances, rather than those of the defendant, to be considered as a factor under then Rule 37B(6)(c). Pearlman J. found that "[i]n this case, in the absence of evidence of the plaintiff's financial circumstances and, I would add, in the absence of any material failure on the part of the defendant to perform its obligations to the plaintiff, "the relative financial circumstances of the parties" is not a factor that weighs in favour of the plaintiff."

ICBC was awarded its costs from the start of the action until a date before which the plaintiff was given a reasonable amount of time to consider it, and double costs thereafter.

C. Bomford v. Wayden Transportation Systems Inc., 2010 BCSC 1721, Macaulay J.

In this wrongful dismissal action, Macaulay J. held that Rule 9-1 does not contemplate offers made before litigation has started:

> [13] The reach of the current rule does not extend, in my view, to pre-litigation offers. While England has adopted rules setting out mandatory pre-litigation protocols with cost consequences, this jurisdiction has not. I do not accept that the broadening of judicial discretion as set out in the offer to settle rule permits the court to fashion a remedy of double costs absent a proceeding.
>
> [14] The opening words of subrule (5) refer to "a proceeding in which an offer to settle has been made." The additional requirements respecting the form and delivery of the offer become meaningless if there is no proceeding. There must first be a proceeding and then an offer to settle before Rule 37B or Civil Rule 9-1 applies.

The following two decisions dealing with Rule 9-1 make it clear that the courts are not prepared to award double costs to a successful defendant who makes a nominal offer to settle, unless it is obvious that the plaintiff's action is bound to fail. In doing so, it appears that the courts are moving away from the principle, proposed by Hinkson J. very early in the life of Rule 37B, that to deprive a successful defendant of double costs would be to undermine the function and purpose of offer to settle rules.

D. Brooks-Martin v. Martin, 2011 BCSC 497, Halfyard J.

The plaintiff was seriously injured when she upset her motorcycle while following her husband on his motorcycle. She sued her husband, alleging that he had negligently driven his motorcycle directly into her path of travel without warning, causing her to lose control of her motorcycle. She also sued a gravel company in the vicinity of the accident, alleging that its trucks had deposited loose material on the roadway which the company failed to clean off. She claimed, in the alternative, that the loose material caused her to lose control of her motorcycle. The gravel company delivered an offer to settle for $1.00 plus costs to the date of the offer.

The trial judge found the husband to be 70% liable for the accident and the plaintiff to be contributorily negligent to the extent of 30%. He dismissed the action against the gravel company.

The gravel company sought double costs from the date of delivery of its offer to settle. Throughout the action, it had sought from the plaintiff dismissal of the action against it in exchange for a waiver of costs, supported by various reasons as to why the gravel company was not liable for the plaintiff's injuries.

Halfyard J. stated that dismissal of an action does not necessarily impose double costs against an unsuccessful plaintiff, citing *Bailey v. Jang*, 2008 BCSC 1372. He concluded that the nominal offer by the defendant did not provide a genuine incentive to settle where "[t]he strength of the plaintiff's case against the defendant MacNutt, and the likelihood of a trial judge finding some liability against the defendant McNutt were...questions about which reasonable lawyers could disagree" (para. 38). It was not obvious that the plaintiff's action against the gravel company would fail.

E. Aujla v. Kaila, 2011 BCSC 466, Harris J.

The plaintiff's action against the defendants claiming an interest in property registered in the name of the defendants was dismissed. The defendants sought double costs from the date of its delivery of an offer to settle for $20,000. If the plaintiff had succeeded at trial, she would have recovered damages considerably in excess of the offer. The defendants submitted that the offer was one that the plaintiff ought reasonably to have accepted. The parties had engaged in an unsuccessful mediation and it ought to have been obvious to the plaintiff that her case was of very doubtful merit.

Harris J. refused to award double costs. He was not prepared to accept that the mediation provided the plaintiff with a basis to understand the rationale behind the offer. He found that while the plaintiff's case was objectively fraught with risk, the offer amounted to little more than a nuisance offer given the value of the claim being advanced and the fact that the credibility of the respective parties would be a significant issue at trial. The plaintiff's claim was not frivolous and this was not a case in which to exercise a discretion involving a "punitive measure" against a litigant for failing to accept an offer.

The following two decisions confirm that courts are prepared to consider an earlier revoked offer when assessing costs consequences after trial:

F. Dempsey v. Oh, 2011 BCSC 627, Myers J.

The plaintiff recovered $20,629.96 at trial. The defendant sought three costs orders:

1. that the plaintiff be deprived of his costs under Rule 14-1(10) (Small Claims Court jurisdiction);
2. that the defendants be awarded their costs and disbursements from the date of the defendant's first offer of $40,000 delivered approximately two years before trial. A subsequent offer of $165,000 was made shortly before trial;
3. that costs be awarded as fixed costs in accordance with Rule 14-1(1)(f), because the judgment recovered by the plaintiff was less than $100,000.

Myers J. refused to deprive the plaintiff of his costs under Rule 14-1(10). He concluded that at the time the plaintiff started his action, he had sufficient reason—because of a potential for wage loss as a realtor who had earned a substantial income—to conclude that his damages would exceed the Small Claims jurisdiction.

With respect to the second costs issue, he cited *ICBC v. Patko*, 2009 BCSC 578, in which Grauer J. first articulated the principle that there is nothing in the offer to settle rule that would place a limitation on the court's discretion to consider an offer that has been revoked. He agreed with the defendant that by the time he delivered his first offer, the plaintiff had sufficient information with which to assess his claim and to realize that his significant pre-accident medical history would likely preclude a significant recovery of damages. The state of affairs at the time the first offer was delivered were such that the offer was one that the plaintiff ought reasonably to have accepted.

In response to the plaintiff's submission that depriving the plaintiff of his costs after the date of the offer and awarding the defendant his costs would eradicate the plaintiff's modest damages award, Myers J. stated:

> [19] It is not the court's function to ensure that a plaintiff makes a net recovery from an action when it has ignored a reasonable offer to settle. That would defeat the purpose of the Rule and does not accord with common sense.

He awarded the defendant his costs and disbursements from the date of the first offer.

He did not award fixed costs under Rule 14-1(1)(f), finding that the case was more complicated than that contemplated by the combination of Rules 14-1(f) and 15-1.

G. Miller v. Boughton, 2011 BCSC 632, Hyslop J.

The defendant delivered four Rule 9-1 offers to settle, starting with an offer of $22,000 two years before trial and ending with an offer of $62,500 a few days before trial, none of which the plaintiff accepted. She recovered net damages of $3,880 after a jury apportioned liability against her in the amount of 45%.

Hyslop J., also relying on *ICBC v. Patko,* agreed with the defence that the plaintiff ought to have accepted the first offer, albeit some six months later, when she should have known that she had no evidence to support damages in excess of that amount.

Hyslop J. awarded the plaintiff 55% of her costs to the date on which she ought to have accepted the first offer and 100% of costs to the defendant thereafter.

H. Garcha v. Gill, 2011 BCSC 1125, Cohen J.

The plaintiff was a chiropractor in private practice. A significant issue between the parties was the amount of income lost by the plaintiff as a result of his injuries. Several months before trial, the defendant made an offer to settle of $19,000. The plaintiff failed to make timely disclosure of business records and other documents that would have assisted the defendant in assessing the income loss and forced him to bring several applications for document production. The plaintiff delivered an offer to settle in the amount of $22,499 eight days before trial. He recovered non-pecuniary damages of $25,000 but failed to establish that he suffered the income loss he claimed beyond a modest award of $3,500.

The plaintiff applied for an order for double costs from the date of his offer and the defendant sought an apportionment of costs based on the fact that the income loss claim was a discrete issue upon which the defendant succeeded at trial.

In denying the plaintiff an award of double costs, Cohen J. stated:

> [37] In my opinion, the defence has correctly analyzed the principles of the authorities dealing with the awarding of costs, and I accept the defence contention that the plaintiff has failed to establish any justification for his delay in making his offer to settle. As the defence stated, "A litigant should not be punished for failing to accept an opponent's eleventh hour [offer] when the litigant made bona fide efforts to resolve the matter at a much earlier date and had since incurred otherwise unnecessary costs, some of which were ordered to be paid by the plaintiff in any event [of the cause]."

The Court also accepted the defendant's contention that costs should be apportioned, "given the amount for past income loss awarded to the plaintiff, when compared with his claimed amount; the fact that the plaintiff abandoned his claim for future income loss at the commencement of trial; and, the inordinate amount of time which had to be spent by the defence prior to the trial to secure proper disclosure of the plaintiff's business records."

Costs were apportioned 70% to the plaintiff and 30% to the defendant and the defendant was awarded his costs of the separate costs proceedings.

I. Gatzke v. Sidhu, 2011 BCSC 1214, Saunders J.

The plaintiff was found to be 70% liable for the accident and was awarded damages of $31,500 plus physiotherapy user fees. Her net award was therefore less than $10,000. The defendants argued that, pursuant to Rule 9-1(5)(d), they were entitled to their costs after the date of delivery of an offer to settle in the amount of $50,000.

In considering the factors under Rule 9-1(6), Saunders J. found that at the time the offer was delivered, the plaintiff should have known that there was a significant liability issue and that the potential damage award would be modest. The offer was very generous and ought to have been accepted by the plaintiff.

However, Saunders J. also found, in considering the relationship between the offer and the judgment amount, that this was a case where, given the significant gap, the defendants were in a better position for having gone to trial, even taking their counsel's fees into account. He states:

> [15] Defendants should not be discouraged from making generous settlement offers. But where the end result is dramatically different than the offer resulting in a net savings to the defendant, a defendant found to be partially at fault can reasonably expect to bear some of the cost of obtaining that result.

Given the plaintiff's financial circumstances and the very modest damages, the purpose of Rule 9-1 was met by awarding the plaintiff 30% of her costs to the date of the offer and the defendants their disbursements associated with the attendance of their expert witness who was required by the plaintiff for the purpose of cross-examination.

J. Mazur v. Lucas, 2011 BCSC 1685, Humphries J.

The circumstances in this case were unusual. In 2009, a jury awarded the plaintiff damages in the amount of $528,400. Prior to the accident, the plaintiff had been on a leave of absence from her 26-year career as a legal assistant because of anxiety and a major depressive disorder. The issue at trial was whether her pre-existing condition would have disabled her from returning to work regardless of the accident.

The defendants appealed the jury verdict on the ground that the trial judge had erred in ordering the redaction of hearsay opinion contained in the expert reports and by not allowing defence counsel to fully cross-examine the plaintiff's psychiatrist on the facts and assumptions on which his opinion relied. The Court of Appeal concluded that the trial judge had erred and ordered a new trial, stating that "the errors amounted to a substantial wrong or miscarriage of justice because a jury apprised of all the relevant information might very well have arrived at a different verdict."

Several weeks before the second jury trial was scheduled to start, the defendants delivered an offer to settle in the amount of $300,000. The jury awarded the plaintiff $84,000 in damages. The defendants applied for orders, among others, that they be awarded costs from the date of their offer to settle. Because of the unusual circumstances before her, Humphries J. considered the factors under Rule 9-1(6) in reverse order.

Under subrule 9-1(6)(d),other factors, she considered the effect of the judgment of the Court of Appeal. She acknowledged that it was difficult for her, without reading and comparing each transcript and the volumes of documents that were used in each trial, to determine the differences between the two trials in order to establish what made such a difference to the second jury. She concluded that although there were differences between the two trials, some small, some more significant, it was difficult to say that the verdicts differed so substantially because of the ruling of the Court of Appeal.

Under subrule 9-1(6)(c), relative financial circumstances, Humphries J. stated that the Court of Appeal decision in *Smith v. Tedford*, 2010 BCCA 302 has overtaken all earlier decisions which held that the availability of insurance coverage was not relevant to a consideration of the parties' relative financial

circumstances. In this case, the plaintiff was awarded a generous jury award, was required to defend the award on appeal, lost the appeal and was required to pay the appeal costs to the defendant and face a new trial. She concluded that the relative financial circumstances of the parties "should be given some consideration in these particular circumstances."

Under subrule 9-1(6)(b), the relationship between the terms of the settlement offered and the final judgment, Humphries J. acknowledged that the final judgment was obviously much less than the defendants' offer.

Under subrule 9-1(a), ought the plaintiff reasonably to have accepted the defendants' offer, Humphries J. concluded that, having in mind the amount of the first award, the narrow issue upon which a new trial was ordered, the amount of the second offer (which was three-fifths of her original award) and the expected similarity of the evidence at the second trial, the plaintiff was reasonable in deciding not to accept the offer and to have the action adjudicated by a second jury. She was awarded her costs of the entire action, including the costs of the first trial.

K. Khunkhun v. Titus, 2011 BCSC 1677, Willcock J.

A jury awarded the plaintiff damages in the amount of $45,000. In her trial brief, she advanced a claim worth $961,000. The defendant applied for an order for costs in light of his offer to settle in the amount of $70,000 delivered three weeks before trial.

Willcock J. prefaced his assessment of costs by stating that "[w]here [a] successful party fails to accept a pre-trial settlement offer that exceeds her ultimate recovery, that failure should have some cost consequences." In assessing those cost consequences, Willcock J. considered all four factors.

He concluded that it was reasonable for the plaintiff to have rejected the offer. He did not consider that reasonable counsel, aware of all the evidence in this case but unaware of the jury award, would have encouraged the plaintiff to accept the offer. He adopted the statement in *Sartori v. Gates*, 2011 BCSC 419, that "the plaintiff had the right to test the extent of the range of damages by trial adjudication."

He agreed with the statement of Kelleher J. in *Smagh v. Bumbrah*, 2009 BCSC 623 that when considering the relationship between the terms of the settlement offered and the judgment of the court, "the court should be cautious in placing too much weight on this factor."

In considering the relative financial position of the parties, he states:

> [28] In my view, ICBC should now regard this question as settled and ought not to persist in the argument made before me that insurance cannot be considered in an assessment of costs. As Mr. Justice Burnyeat stated in *Martin v. Levigne*, 2010 BCSC 1610, at para. 25, the question has been settled.

When considering "other factors" he adopted the reasoning in *Lumanlan v. Sadler*, 2009 BCSC 142 that although costs consequences should follow a successful offer, requiring the plaintiff to pay the defendant's costs after the date of the offer would be unfair and excessively penal to the plaintiff. He awarded the plaintiff her costs up to the date of the offer with the parties bearing their own costs thereafter.

XXIII. Unidentified Motorist

A. Morris v. Doe, 2011 BCSC 253, Ker J.

These reasons for judgment are of interest because, in concluding that the plaintiff had failed to establish that she had taken all necessary and reasonable steps to ascertain the identity of an unidentified motorist as she was required do under s. 24(5) of the *Insurance (Vehicle Act)*, Ker J.

embarks on a thorough analysis of the jurisprudence interpreting s. 24(5). At para. 55, she sets out 17 principles emerging from the jurisprudence and in doing so provides a very useful tool for counsel to use when ascertaining whether s. 24(5) is a viable defence in the circumstances of their case.

Briefly, the facts are as follows:

The plaintiff was a passenger in a vehicle being driven by her husband which was stopped for a red light at a major intersection in Abbotsford. Their vehicle was rear-ended by another vehicle. The plaintiff felt immediate pain in her neck. Her husband left the vehicle and motioned to the driver whose vehicle hit theirs to pull into a nearby parking lot. The driver nodded his head. The plaintiff's husband pulled into the parking lot and realized immediately that the other driver had not followed them. Neither he nor the plaintiff had seen where the other driver had gone, but assumed he carried on through the intersection. The plaintiff called 911 and reported the accident and later reported it to ICBC, but did nothing further to attempt to ascertain the identity of the other driver.

Ker J. concluded that the plaintiff could not be faulted for failing to ascertain the identity of the driver at the time of the accident. The plaintiff's husband acted reasonably in not immediately recording the other vehicle's licence plate, electing instead to remove the vehicles from the busy intersection. Nor could the plaintiff's failure to canvas potential witnesses in the aftermath of the accident be fatal to her claim. Both she and her husband were flustered by the accident and by the fact that the other driver had fled the scene.

However, the plaintiff's failure to take any steps at all in the days and possibly weeks following the accident could not amount to discharging the clear onus placed upon her to take reasonable steps to ascertain the identity of the unknown driver. Ker J. restated the test required by section 24(5) and first articulated by the Court of Appeal in the leading authority, *Leggett v. ICBC* (1992), 72 B.C.L.R. (2d) 201:

> [52] To put it another way, the appropriate test to determine whether all reasonable efforts have been made is: Did the plaintiff do all that she would have to identify the other parties involved if she intended to pursue legal action against them, if ICBC were not potentially liable under s. 24 of the Act?: *Goncalves v. Doe*, 2010 BCSC 1241 [*Goncalves*], at para. 6.

In responding to plaintiff's counsel's suggestion that it would have been pointless for the plaintiff to search for potential witnesses in the days after the accident by posting signs or advertising in a local newspaper, Ker J. stated that such could not be used as a justification for failing to do so. The efforts would not have been onerous and could well have provided a source of potential witnesses, given that the accident had occurred at a busy intersection at a time when several businesses in the area were catering to customers. Such efforts, albeit with no results, have been accepted by the jurisprudence as meeting the test under s. 24(5).

Finally, Ker J. concluded that the failure of ICBC's adjusters to advise the plaintiff of the obligation under s. 24(5) to take steps to ascertain the identity of the driver did not relieve the plaintiff of that obligation. She dismissed the action and subsequently awarded ICBC its costs of the action.

B. Nicholls v. ICBC, 2011 BCCA 422, per Smith J.A. (Neilsen and Bennett JJ.A., concurring)

The plaintiff lost control of his motorcycle while travelling on an isolated stretch of highway. The accident was caused by a two-foot wide diesel spill. The plaintiff did nothing to ascertain the identity of the owner or driver of the vehicle that caused the spill, beyond reporting the accident to ICBC and the police. ICBC brought a summary trial application to dismiss the plaintiff's claim for failure to comply with s. 24(5) of the *Insurance (Vehicle) Act*. ICBC claimed that, by doing nothing, the plaintiff had failed to make "all reasonable efforts" to identify the owner or operator of the vehicle.

The trial judge dismissed ICBC's application, finding that in the circumstances of this accident the plaintiff had no positive duty to do more than he had done. He rejected ICBC's suggestions that the plaintiff could have taken additional steps, including:

> making further inquiries of the operator of the sanding truck; attempting to contact any residents in the remote area where the accident occurred; placing a sign on the highway; or posting an ad in the newspaper seeking witnesses. The trial judge concluded that none of these steps would have been reasonable in the circumstances.

The Court of Appeal confirmed that the test created by the section is one of reasonableness in the circumstances of each case and is a fact-driven inquiry. In this case, given the lack of a temporal link between the spill and the accident, and the seriousness of the plaintiff's injuries, the trial judge did not err in concluding that the plaintiff had made "all reasonable efforts" to ascertain the identity of the owner/driver of the vehicle.

The Court of Appeal distinguished the case before it from the recent decision in *Morris v. Doe*, 2011 BCSC 25 in which the Court found that where the accident occurred between two vehicles at a busy intersection with a lot of open businesses, the plaintiff who took no steps at all to canvass witnesses at the scene or to advertise for witnesses failed to meet the reasonable efforts test.

Nicholls therefore sets the factual parameters for the test under s. 24(5): a fact pattern at one end where the accident occurred because of a diesel spill in a rural area and at the other end where the accident occurred between two vehicles in a populated area.

XXIV. Legislation

A. Limitation Act

Bill 34 introduces sweeping changes to the *Limitation Act*. Bill 34 has received Royal Assent but it has not yet received proclamation. The key changes include:

- A single two-year limitation period will apply to all types of claims instead of the variety of basic limitation periods based on the type of legal action. The new two-year period does not apply to claims that enforce a monetary judgment, exempted claims and actions that have limitation periods set under other statutes;
- The two-year limitation period starts to run when a claim is "discovered." A claim is discovered on he first day on which the person knew or ought to have known all of the following:
    1. that injury, loss or damage had occurred;
    2. that the injury, loss or damage was caused by or contributed to by an act or omission
    3. that the act or omission was that of the persona against whom the claim is or may be made; and
    4. that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
- The inclusion of a specific limitation period for third party claims for contribution and indemnity;
- A 15-year ultimate limitation period based on when the wrongful act or omission on which the claim is based took place instead of a general 30-year ultimate limitation period;
- There are still postponement provisions for infants and persons under disability.

The 2012 *Limitation Act* contains transitional provisions to address situations where the act or omission providing the basis of the claim took place under the 1975 *Limitation Act*, but a claim is not made until after the 2012 Limitation Act comes into force. Where a potential claimant has discovered the cause of a claim before the 2012 *Limitation Act* comes into force, the tiered limitation periods under the 1975 *Limitation Act* will apply whether or not the claim has already expired. Where a potential claimant has not discovered the cause of a claim when the 2012 *Limitation Act* comes into force, the ultimate limitation will be the earlier of expiration of the 30-year final claim period under the 1975 Limitation Act or 15 years after the coming into force of the 2012 *Limitation Act*, subject to any extensions to the 15-year period provided therein. The 2012 *Limitation Act* also contains special transition provisions applicable to hospital and medical practitioners.

B. Supreme Court Civil Rules

A number of amendments to the Rules and forms were made pursuant to Order in Council 191 dated May 26, 2011 and effective July 1, 2011 including:

- The timeframe for responding to a notice of civil claim, counterclaim and third party notice is now tied to the place where the person is served rather than to the place where the person resides;
- Default judgment is now available in relation to certain claims within an action rather than only for actions that have but one claim and that default judgment against a defendant on one claim does not, on its own, preclude proceeding against that defendant or any other defendant on any other claims;
- Rule 12-4(5) previously provided that a trial must be removed from the trial list if no party of record files a trial certificate. The rule now allows the court to relieve the parties from that result in appropriate circumstances;
- The time frame for filing a jury notice is increased from 28 to 30 days to conform with the notice requirements under the *Jury Act*;
- The trial Brief form is amended to include reference to the scheduled duration and the start date of the trial, to add a section listing prior orders which may affect the conduct of the trial and to add a section in which to identify whether the action is to be heard by a jury.

Order in Council 192 dated March 29, 2012 and effective April 25, 2012 amended Rule 12-2 to permit masters to now hear Trial Management Conferences.

C. Practice Directions

PD – 32, 2011/12/01 directs that the correct way to address a registrar or district registrar is as "Your Honour."