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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 June 2012. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Appeal Practice

A. Koch v. Koch, 2012 BCCA 280, MacKenzie JA in Chambers

The discretionary power to compel production of documents exercised in *Coulter v. Ball*, 2004 BCCA 309 continues after the adoption of the new Supreme Court Civil Rules and further extends to documents in the possession or control of non-parties.

III. Causation

A. Edinger v. Johnston, 2013 SCC 18, per Rothstein and Moldaver JJ. (McLachlin C.J. and LeBel, Cromwell, Karakatsanis, and Wagner JJ., concurring)

The 15 year old plaintiff suffered from bradycardia during birth that resulted in severe and permanent brain damage. The trial judge found that the defendant obstetrician breached the standard of care required of him by failing to ensure that back-up surgical staff would be immediately available to deliver the plaintiff by caesarean section upon complications arising from the forceps delivery, and by failing to inform the plaintiff's mother of the material risks associated with the forceps procedure. This finding in negligence was overturned by the BCCA. The sole issue before the SCC was causation of the plaintiff's injuries.

The appeal involved the application of the "but for" test articulated in *Clements v. Clements*, 2012 SCC 32 and *Resurfice Corp. v. Hanke*, 2007 SCC 7 which requires the plaintiff to show on a balance of probabilities that the injury would not have occurred without the defendant's negligence. On an analysis of the evidence before the trial judge, the SCC found that she made no palpable or overriding errors in her causation findings.

In particular, there was evidence to support the trial judge's finding that the forceps procedure displaced the baby's head position such that it likely obstructed and compressed the umbilical cord on the next labour contraction. The trial judge concluded that although she could not be *certain* of the precise mechanics leading to cord compression, the only reasonable inference from all the evidence is that the mid-forceps attempt likely caused the cord compression that in turn caused the bradycardia (para. 135).

The next issue in the analysis was whether the defendant's failure to arrange for immediately available surgical back-up caused the plaintiff's injury. Importantly, the defendant did not dispute that he made no attempt to arrange for surgical back up. He argued, however, that this breach did not cause the injury because the damage would have already occurred.

However, the evidence was that a baby begins to suffer injury approximately ten minutes from the onset of bradycardia. Minutes mattered and had back-up been available even five to ten minutes more quickly, most—possibly even all—of the plaintiff's injuries could have been avoided.

The SCC stated that it did not suggest that a standard of care must prevent injury in all circumstances, at all costs. The standard of care is determined on the specific facts of each case before the court. In this case, there was no dispute that the defendant did not meet the requisite standard of care in taking reasonable precautions that would have been responsive to the recognized risk of bradycardia after a forceps procedure. Such steps would have resulted in a faster delivery and likely prevented the injury. Accordingly, the trial judge's causation finding was sound.

IV. Costs

A. McKay v. Marx, 2012 BCSC 484, Dorgan J.

Where a defendant raises a successful defence pursuant to s. 10 of the *Workers Compensation Act*, the action is statue-bared and dismissed, entitling the defendant to costs under Rule 14-1(9).

Litigation Guardian's Liability for Costs

B. McIlvenna v. Vieberg, 2012 BCSC 1371, Sigurdson J.

This case considered the question of whether a litigation guardian remained liable for costs after the infant plaintiff attained the age of majority and filed and served his affidavit pursuant to Rule 20-2(13) of the Supreme Court Civil Rules. The action in this case was ultimately dismissed and the defendant sought to recover costs from the litigation guardian for prosecution of the action prior to the infant's attainment of the age of majority.

Applying *Miller v. Decker* (1956), 20 W.W.R. 388 (B.C.C.A.), Sigurdson J. agreed that an infant ratifying the action after attaining the age of majority does not inherit and replace the litigation guardian's liability for costs. Rules 20-2(12) and (13) do not suggest that the filing an affidavit upon attaining the age of majority removes any possible past liability of the litigation guardian for costs.

Conduct of Counsel

C. Boutin v. MacPherson, 2013 BCSC 831, Baker J.

Rule 14-1(14) permits the court to deny a successful party costs that result from an improper or unnecessary act or omission in the conduct of litigation. In this case, Baker J. denied a successful plaintiff a portion of the fixed costs in a Fast Track matter on account of his lawyer's failure to comply with orders made at a Trial Management Conference; and to provide income loss particulars and documents well in advance of the Trial Management Conference. Baker J. stated that the fact that a party cannot clearly demonstrate "prejudice" arising from another party's failure to comply with a court order does not mean that there should not be some sanction for the failure to comply.

Interest on Disbursements

D. Chandi v. Atwell, 2013 BCSC 830, Savage J.

The appeals of two conflicting Registrar decisions concerning the recoverability of interest on disbursements were heard together and released as *Chandi v. Atwell*, 2013 BCSC 830. Both cases considered the applicability of Burnyeat J.'s earlier decision in *Milne v. Clarke* which allowed recovery of interest on disbursements on a bill of costs under Rule 57(4) now Rule 14-2(15).

Savage J. reviewed the decision of *Chandi v. Atwell* where Registrar Cameron held that interest on disbursements was recoverable but restricted the recovery to the prevailing rate under the *Court Order Interest Act*. Defence counsel in that case conceded that Burnyeat J.'s decision in *Milne* applied to the case.

Savage J. also reviewed the decision of *MacKenzie v. Rogalasky* in which Registrar Sainty disallowed interested incurred on a loan to fund disbursements, finding that the statements of Burnyeat J. in *Milne* were *obiter dicta* and that the decision did not consider the impact of the *Court Order Interest Act*.

The appeal in *Chandi* considered whether *Milne* was a correct statement of the law concerning the recoverability of interest on disbursements and a binding authority. In that case, the plaintiff claimed the cost of three MRI reports plus the interest on the unpaid account under former Rule 57(4).

Burnyeat J. held that on the evidence presented in that case, the plaintiff had no choice but to pay interest to fund her expert reports as she did not have the money to pay these costs up front. He stated that the law in BC is that interest charged by a provider of services where the disbursement has been paid by counsel for a party is recoverable as is the disbursement.

A twist arose during the appeal in *Milne* when the defendants successfully adduced fresh evidence of the terms of the settlement agreement which provided for taxable costs and disbursements. The settlement agreement was not before Burnyeat J. Therefore, the issue before the Court of Appeal concerned a different question—that being the characterization of the interest charged under the settlement agreement. The reasons of Burnyeat J. dealt with recoverability of interested under Rule 14-1(15). In these circumstances, the Court held that *Milne* was not the right case to address the issue of the right of interest recoverability under Rule 14-1(15) and declined to interfere with Burnyeat J.'s decision.

In *Chandi*, Savage J. held that:

1. The reasoning of Burnyeat J. was not *obiter dicta*. The case before Burnyeat J. was determined under Rule 14-1(15) and the Court of Appeal did not overturn the decision. He concluded that the introduction of the settlement agreement at the appeal was immaterial to the ratio decidendi.

2. If interest is necessarily or properly incurred in the conduct of a proceeding, a reasonable amount is recoverable whether the interest charged is paid to a financier, service provided or a solicitor.

3. Accepting disbursement interest as an allowable disbursement does not amount to an award of interest on costs as contemplated by section 2 of the *Court Order Interest Act*.

4. The Registrar in *Chandi* erred in limiting recovery to the registrar's rate. In so finding, he determined that the determination of a reasonable amount required a weighing of circumstances as opposed to a formulaic approach. The onus remains on the party seeking reimbursement for interest to establish on the evidence that it was necessarily or properly incurred and that the amount is reasonable.

In conclusion, Savage J. remitted the matters back to the Registrars to make the appropriate determinations on the records before them.

Photocopies

E. Perone v. Baron, 2012 BCSC 912, Master McDiarmid

The Court in *Perone* was asked to determine the appropriate amount allowable for photocopying in advance of the cost of reproduction and service, as set out in Rule 7-1(16) of the Supreme Court Civil Rules ("Civil Rules"). The documents to be copied from the plaintiff's list in that case amounted to approximately 240 pages of clinical records, resulting in a dispute over the difference of $0.05 per page or $12.00.

However, the case was recognized as a test case for the cost of reproducing documents under Rule 7-1(16). Numerous authorities are cited, recognizing a range of photocopying rates in various circumstances, including the Registrar's rate of $.25 as set out in Administrative Notice 5. However, on the authority of *Giuliani v. Saville*, [1997] B.C.J. No. 2685, Master McDiarmid concluded that copies of documents were more akin to solicitor-client costs for copies which have generally been allowed at a higher rate than the Registrar's rate. In *Guiliani*, Koeningsberg J. specifically rejected the proposition that the amount to be paid under now Rule 7-1(16) is to be equated with party-party costs. Therefore, while recognizing that technological advances have substantially reduced the costs of photocopying, Master McDiarmid took judicial notice of the fact lawyers' photocopying charges to their own clients had a built in profit component. In the end, he allowed the copies at $.30 per page.

In *Guiliani*, Koeningsberg J. suggested that "it is highly desirable to encourage litigation to be carried on without undue squabbling over petty trifles" and, that there be consistency in the amount allowed in each type of situation. These cases together may allow for greater traction in resisting copying accounts for greater than $.30 per page when requesting copies under Rule 7-1(16).

Photocopying as part of party-party costs are still generally awarded at $.25 per page in the absence of evidence to show the actual costs*: Chow v. Nguyen*, 2012 BCSC 729.

Disbursement Potpourri

F. Kezel v. Greenslade, 2012 BCSC 1131, Registrar Cameron

The Registrar reviewed a variety of disbursements on assessment. In particular, he confirmed that where the opposing party requires strict proof of the necessity and reasonableness of the disbursement in issue, such evidence must be proffered. The registrar rejected a claim by counsel in that case for the fees associated with the lawyer's consultation with outside counsel to assess the validity of that proposition. Expert fees were allowed where the evidence established that they did not duplicate each other and, with respect to a functional capacity evaluation, there was a basis in the evidence to argue that certain vocations were no longer viable. The mediation administration fee was disallowed in the absence of evidence demonstrating the necessity of retaining a service to schedule a mediation. A cancellation fee was also disallowed where the plaintiff could have cancelled an assessment with an occupational therapist upon receipt of the offer and reschedule if the offer was not ultimately accepted. Office supplies were rejected as overhead.

V. Coverage

A. Lau v. ICBC, 2012 BCSC 1226, Verhoeven J.

This case reviews the law regarding the burden on ICBC to establish misrepresentation in denying insurance coverage. The plaintiffs unsuccessfully sought a declaration of insurance coverage and indemnity after ICBC denied coverage based on material misrepresentation and providing a willfully false statement. The plaintiff and his father purchased a new vehicle but the father told ICBC that he would be the principal operator when, in fact, it was his son. The 22 year old son was involved in an accident which resulted in the total loss of the vehicle and claims from the occupants of the other vehicle involved. ICBC found the son to be solely liable for the accident and denied coverage on the basis of the father's misrepresentation of the principal operator when he applied for insurance. ICBC also stated that the father made a wilfully false statement with respect to the claim in his statement to ICBC after the accident.

Since the claims fell within their policy coverage, ICBC had the onus to prove coverage was forfeited under the terms of s. 75 of the Act: *Bevacqua v. I.C.B.C.*, 1999 BCCA 553, at para. 24. Verhoeven J. reviewed the relevant authorities on the burden of proof required in the circumstances.

In *Bevacqua*, proof of an allegation of fraud would require "something substantially more than a mere tilting of the evidentiary scale. Clear and cogent proof would have been required."

> [17] However, more recently, in *F.H. v. McDougall*, 2008 SCC 53 [*F.H.*], the Supreme Court of Canada clarified the law relating to the burden of proof in civil cases. At para. 40, the Court stated that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. The Court added that, of course, context is all important and, where appropriate, a judge should not be unmindful of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. (See also *Booth v. I.C.B.C.*, 2009 BCSC 1346, at para. 8 [*Booth*].)

Based on the foregoing, the judge found that the reference in *Bevacqua* to "something substantially more than a mere tilting of the evidentiary scale" is not the law, as the standard of proof applicable is simply a balance of probabilities. What was not as clear was whether the reference in *Bevacqua* to the need for "clear and cogent proof" was still required.

The judge reviewed *Lexis Holdings Int'l Ltd. v. Insurance Corporation of British Columbia*, 2009 BCSC 344 ["*Lexis Holdings*"], which referred to *F.H.*, and made reference to the requirement for "clear and cogent evidence" in cases of this nature. As a result, it was his view "the concept of 'clear and cogent proof' must now be interpreted as essentially equivalent to the cautionary remarks in *F.H.* concerning the importance of context, and the need to be mindful of inherent probabilities or improbabilities or the seriousness of the allegations and consequences of the issue at stake.."

The judge concluded with the following legal principles:

- suspicious circumstances and speculation are not enough for ICBC to meet its burden of proof;
- the question of whether there has been a knowing misrepresentation is to be determined on the basis of the circumstances that existed at the time the policy of insurance was issued; and
- for ICBC to succeed in its defence of the plaintiffs' claim, it must show that when he made the application for insurance coverage, the father knew that he was not going to be the principal operator of the vehicle, and that he knowingly misrepresented that fact.

The Court concluded that the father knowingly misrepresented the identity of the vehicle's intended principal operator when he applied for the insurance, and therefore the insurance coverage was forfeited. ICBC was not required to prove that the plaintiffs were aware of the consequences of a misrepresentation concerning the insurance. ICBC failed to show that the false statement was material and did not succeed on that issue.

Contractual Interpretation

B. Poole v. Lombard General Insurance Company of Canada, 2012 BCCA 434, per Newbury J.A. (Frankel and Bennett JJ.A. concurring)

Mr. Poole sought coverage from Lombard General Insurance Company of Canada ("Lombard") arising out of a "professional package" insurance policy issued by Lombard to Alexander Holburn Beaudin & Lang. At a law firm function, Mr. Poole fell on an associate who suffered injuries as a result. The associate was awarded over 5.9 million dollars in damages.

The question before the court was whether the trial judge erred in concluding that Mr. Poole's liability to Ms. Danicek was not covered by the Lombard insurance policy. The primary rule enunciated by the Supreme Court of Canada is that judge's should "give effect to clear language, reading the contract as a whole" (*Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*, 2010 SCC 33 at para. 22).

The Court of Appeal dismissed the appeal, holding that the contextual factors, who was in attendance, where the incident took place, whether business was being discussed, time and place, did not support a finding that the incident occurred "in respect of employment":

> The line was crossed when some of those attending the dinner decided to go to the nightclub. This visit seems to be to be almost indistinguishable from the more common situation of a few associates going out for a drink together after work and one of them being injured in a bar. The social aspects of the occasion by far outweighed the very tenuous "connection" between going to Bar None and the employment of Mr. Poole and Ms. Danicek by AHBL (at para 50).

VI. Credibility

A. Bialkowski v. Banfield, 2013 BCCA 130, Low, Chaisson and Bennett JJ.A.

This was an appeal from a jury verdict finding that the appellant had not suffered any injury or loss as result of a motor vehicle accident. The appeal was dismissed on the basis that, although there was evidence upon which the jury could have found that the appellant was injured, it was open to the jury to conclude otherwise. In discussing the serious credibility issues raised in the appeal, the court adopted the following words of Madam Justice Southin in *Le v. Milburn*, [1987] B.C.J. No. 2690:

> When a litigant practices to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame.

VII. Damages

A. Wong v. Hemmings, 2012 BCSC 907, Fitch J.

The plaintiff worked as a server at the Fairmont Hotel and derived her income from a combination of wages and tips. The plaintiff testified that she made about $63,000 a year and that it was her practice to declare only about $5,000 on her tax returns when in reality her tips were about $30,000. She admitted to knowing that failing to declare all of her tips and gratuities was wrong. She testified that she could not support herself and her daughter had she declared and paid tax on the full amount of her income. ICBC argued that the plaintiff's income loss should be determined solely by comparing her pre-accident and post-accident tax returns and should not include any undeclared income.

The defendant conceded that the court was bound by *Iannone v. Hoogenraad*, which holds that failure to declare income is no bar to recovery. However, the defendant argued that the plaintiff failed to discharge her burden of proof where there was no confirmatory evidence such as documents addressing tips on cash sales. There was confirmatory evidence about tips on credit cards. The judge found the plaintiff met her burden of proof because there was evidence of the fact of cash sales and accepted the plaintiff's evidence that she received an average of 12% tips on cash sales.

Degenerating Spine

B. Bouchard v. Brown Bros. Motor Lease, 2012 BCCA 331, per Newbury J.A. (Saunders and Tysoe JJ.A. concurring)

The plaintiff in this case was diagnosed at the age of 20 with a narrowing of the L5-S1 disc. He experienced apparent recovery and then was injured in a motor vehicle accident that was found to have significantly contributed to his subsequent disc herniation. The plaintiff appealed the trial judge's finding that there was a "very significant risk" that he would have gone on to develop serious low back pain in any event of the accident and on that basis reduced the plaintiff's award by 40%.

The Court of Appeal held that the trial judge erred in two ways: in his analysis of the medical diagnoses on which he relied; and in applying the reduction to all heads of damages.

While the Court of Appeal agreed that the trial judge had the discretion to reduce the plaintiff's award where there was a measurable risk that he would have suffered the same symptoms absent the accident, the court noted that in this case, there was no evidence that "absent the 2005 accident, Mr. Bouchard would have experienced serious and symptomatic degeneration of the spine at the age of 31 (his age at the time of trial) or within a brief time thereafter" (at para. 20). In fact, the evidence indicated that

such degeneration occurs gradually and there was no evidence as to what age the plaintiff's disc degeneration would become symptomatic.

Further, the trial judge did not describe the timeline over which he found there was a 40% chance that the plaintiff's spine would degenerate to its state as at the time of trial. The Court of Appeal considered that a reduction of damages by 40% suggested a very steep timeline, which was contrary to the evidence of a gradual deterioration. In order to prevent further delay, the Court of Appeal chose to substitute its own decision and held that a reduction of 20% was suitable in the circumstances.

The Court of Appeal also held that the trial judge erred in applying the 40% deduction to every head of damage. Given that the reduction was based on a future contingency, it did not make sense to apply the reduction to past income loss and special damages. The Court of Appeal relied on *Zaharas v. Leys*, 2005 BCCA 560 as authority for the proposition that non-pecuniary damages can be reduced to reflect a pre-existing condition. The Court of Appeal applied the 20% reduction to the non-pecuniary damages.

Failure to mitigate

C. Rozendaal v. Landingin, 2013 BCSC 24, Holmes J.

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

The defendant alleged that the plaintiff had failed to mitigate her damages by taking all therapies recommended by her doctors. The Court began by citing *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 for the proposition that a plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries. "The defendant must then prove that he plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para 202."

The plaintiff attended some physiotherapy, and found some aspects of that treatment helpful. However, she did not continue with physiotherapy treatment because it took time away from her children, it was less helpful to her than her husband's massages and pain medication, and she continued to do the stretches she was taught by the physiotherapist. The Court found that her reasons were sincere.

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

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

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

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

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

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

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

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

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

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

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

The Court went on at para. 47:

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

Apart from erring in the application of the failure to mitigate test, the Court of Appeal went on to discuss inconsistencies in the reasons for judgment with respect to the issue of causation. In the circumstances, a new trial was ordered.

Cost of Future Care

E. Gignac v. ICBC, 2012 BCCA 351, per Bennett J.A. (Kirkpatrick and Neilson JJ.A. concurring)

The appellant Insurance Corporation of British Columbia, third party at the trial, appealed the award for cost of future care on the basis that there was no evidentiary link between the medical evidence and reasonable necessity of most of the items claimed.

The accident was a minor one in which the defendant scraped the rear corner of the plaintiff's vehicle as he attempted to change lanes. Damage to the plaintiff's vehicle was scratched paint. The plaintiff was awarded non-pecuniary damages, past wage loss, special damages, and $115,975 for cost of future care, the full amount of the plaintiff's claim. Future care items were derived primarily based on the opinions of an occupational therapist and a rehabilitation consultant.

The appellant argued that the trial judge erred by: (1) awarding a large sum for cost of future care when not proved to be reasonably medically necessary; and (2) failing to apply any contingencies to the award for future care.

The appellant argued that there was no medical evidence with respect to many of the items claimed. Furthermore, the appellant argued that since compensation for cost of future care is a future, hypothetical, and pecuniary award, the plaintiff is required to prove there is a real and substantial possibility that the expense claimed will in fact be incurred and the plaintiff failed to do so. The appellant argued that only the workplace aids (totaling $3,042) were properly allowable.

The plaintiff argued that the future care costs were reasonably necessary and on the whole of the evidence before the judge, such a finding was supported. He further argued that the items were recommended by a health professional and were directly related to his accident injuries, and thus not for the purpose of making his life more bearable or enjoyable. The plaintiff also took the position that "even if the court is satisfied that there is a real and substantial possibility that an expense claimed as a cost of future care will not ultimately be incurred, it is not obligated to discount the award accordingly" (at para. 25).

The Court relied on *Milinia v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) (adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420) for the proposition that an award for future cost of care "is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff." The Court further noted the comments of Garson JA in *Gregory v. ICBC*, 2011 BCA 144 at para. 39 that while it is not necessary that a physician testify as to each and every item 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" (citing *Aberdeen* at paras. 43 and 63).

The Court found that the trial judge's failure to assess whether there was "some evidentiary link" between each item sought and the medical evidence constituted a legal error. As the trial judge was retired at the time of the appeal, the Court of Appeal assessed each item claimed for cost of future care and reduced the award for cost of future care by $44,905.

With respect to the issue of reducing the cost of future care award to reflect a contingency that such items may have been purchased in any event or that certain therapies would have been advisable even without the accident, the court distinguished between general contingencies and specific contingencies citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.): "A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest."

The Court of Appeal considered that there was evidence that the plaintiff may not use some of the services which he had been awarded, for example, psychological counseling. Since the plaintiff was only "considering" counseling, despite the fact the evidence was clear it would be useful to him, the Court of Appeal reduced the award for counseling.

Loss of earning capacity

F. Ibbitson v. Cooper, 2012 BCCA 249, per Garson J.A. (MacKenzie and Harris JJ.A. concurring)

The plaintiff worked in the forestry industry as a heli-faller for 17 years prior to the accident. He was highly regarded in the industry. He missed three months of work following the accident and then returned to the forestry industry in a different position. Although the plaintiff managed to replace his income, doing so required him to work longer shifts at a lower rate of pay.

The trial judge awarded the plaintiff $125,000 for loss of income earning capacity divided into $105,000 for past and $20,000 for future earning capacity. The appellant, defendant at trial, argued that the trial

judge erred by awarding damages for past loss of income earning capacity in circumstances where the plaintiff had replaced his income. The defendant argued that the hardship of having had to work longer hours to replace his income should be included under the award for general damages, akin to inefficiency at performing housework.

The trial judge put the question this way at paragraph 58 of his reasons for judgment:

> This raises the following question: does a plaintiff who, as a result of a defendant's wrong, has to work harder to earn the same money he did before the accident, have a claim for loss of income earning capacity?

The trial judge found (1) the plaintiff was unable to work as a faller, but was able to work operating logging and heavy equipment, the type of work he was engaged in at the time of trial; and (2) the plaintiff had to work longer hours to earn the same income as he did pre-accident. The trial judge cited *Falati v. Smith*, 2010 BCSC 465, *Moore v. Brown*, 2010 BCCA 419, and *Perren v. Lalari*, 2010 BCCA 140 and stated:

> [66] Putting a value on Mr. Ibbitson's impairment is a difficult task because his ability to remain working in a different capacity and earn essentially the same income—while working longer hours—has to be taken into account. This is a case where the assessment really is at large and resembles an assessment of general damages. The figures I have discussed above cannot be plugged into a formula.
>
> [67] Further, the dividing line between past loss and future loss becomes somewhat artificial, both because the assessment is at large and, given the medical evidence I referred to above, the end-period for future loss must be no later than 2012.
>
> [68] I must factor into account the downturn in demand for hand fallers after the accident. I have found that Mr. Ibbitson would be likely to be employed but that does not mean for the same number of hours per year.
>
> [69] Considering all of the above factors, I consider the appropriate value for loss of income earning capacity to be $125,000: $105,000 of this is for past and $20,000 for future earning capacity.
>
> [70] If I were wrong in my conclusion that Mr. Ibbitson's situation did not sound in a loss of income earning capacity I would have increased his general damages.

The Court of Appeal quoted heavily from *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 in which the Court considered whether Mr. Rowe's inability to work resulted in a compensable loss of earning capacity. In *Rowe*, the Court concluded that the compensable loss was not the actual lost income but the loss of the capacity to earn. In so finding, the Court considered commentary from Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed.:

> The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of value of work" is the substance of the claim—loss of the value of any work the plaintiff would have done but for the accident but will now be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the *actual earnings* the plaintiff would have received; sometimes by a *replacement cost evaluation of tasks* which the plaintiff will now be unable to perform; sometimes by an assessment of reduced *company profits*; and sometimes by the amount of secondary income lost, such as *shared family income*.
>
> [Smith J.A.'s underscoring; other emphasis in original]

The Court of Appeal noted at para. 19:

> While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the

> distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para 11 ... the overall fairness and reasonableness of the award must be considered taking into account all of the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

In sum, the Court of Appeal agreed with the trial judge's analysis and his conclusions.

G. Tsalamandris v. McLeod, 2012 BCCA 239, per Harris J.A. (Levine and MacKenzie JJ.A. concurring)

The plaintiff was involved in two motor vehicle accidents and as a result, she suffered from debilitating chronic pain and chronic depression. The medical evidence established that as a result of her injuries, the plaintiff was unemployable. The defendant appealed the awards for loss of future earning capacity and cost of future care.

The defendant appealed on the basis that the trial judge made two errors: (1) she awarded damages for a theoretical or speculative loss for future earning capacity; and (2) she over compensated certain future care costs, principally by failing to apply contingencies to the likelihood that the costs would reasonably be incurred.

The Court of Appeal summarized the basic principles, quoting from *Perren v. Lalari*, 2010, BCCA 140 in which Madam Justice Garson adopts the language of *Steward v. Berezan*, 2007 BCCA 150:

> The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur: *Parypa* para 65.

And two basic principles from *Athey v. Leonati* and *Andrews v. Grand & Toy Alberta Ltd.*:

> 1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para 27], and
>
> 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

The defendant relied on *Morlan v. Barrett*, 2012 BCCA 66 in which the Court of Appeal considered there was no evidence upon which the trial judge could find there was a real and substantial possibility that but for the accident, the plaintiff would have gained the employment she claimed. The defendant argued that the same lack of evidence was present in this case (i.e., that there was no evidence that the plaintiff would have actually attained the type of position she claimed she would).

Considering the evidence that was before the trial judge and the reasons for judgment, the Court of Appeal held that the trial judge's findings were not speculative or lacking an evidentiary foundation.

As to whether there was a real and substantial possibility of an event leading to an income loss, the court noted the evidence that the plaintiff was totally disabled from gainful employment. The Court of Appeal further noted that the trial judge's reasons for judgment were "replete with reference to contingencies, both negative and positive, affecting the range of possible earnings the respondent might have earned ..." and per *Parypa*, "the task of the court is to assess the damages, not calculate them according to a mathematical formula."

The Court of Appeal allowed the appeal in respect of the future care award and reduced the portions of the future care award for Pilates and a community centre membership by 10% to reflect contingencies that reasonably could affect the plaintiff's use of those programs.

Non-pecuniary damages for athletic individuals

H. Travelbea v. Henrie, 2012 BCSC 2009, per Barrow J.

The plaintiff was a 53 year old woman injured in a relatively minor motor vehicle accident that left her with ongoing neck and upper back pain continuing for four years after the accident. Experts opined she would probably always have some level of pain, even if stretching and exercise might improve her function.

The plaintiff had been running marathons since 1994 and met her husband while participating in a relay race. Exercise provided the plaintiff with health benefits, a social circle and gave her self-esteem. It was also an important component to her relationship with her husband. The plaintiff sought non-pecuniary damages of $100,000, the defendant suggested that $35,000 was appropriate.

The Court began its analysis by referring to *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32 with respect to the basic principle of tort law being that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence.

The trial judge dealt with various attacks on the plaintiff's credibility and concluded that although she was not a very reliable historian, she did not intend to mislead the court. Rather, she held an exaggerated sense of her pre-accident abilities and her post-accident limitations. Having regard to these findings, the trial judge accepted that she suffered a mild to moderate soft tissue injury to her neck and upper back which significantly curtailed her ability to participate in certain activities, such as cycling, and train and compete in events such as triathlons. The trial judge stated at para. 37:

> Ms. Travelbea's injuries have affected her much more significantly than they would someone whose life did not revolve around the kinds of athletic endeavours she and her husband enjoy. Ms. Travelbea enjoyed training and did it four, five, or six days a week. She enjoyed training as much or more than competing. It was in the midst of athletic pursuits that she met her husband. Training together was a significant part of their relationship. They trained together and often raced together. It was the focus of much of their social activity. Her ability to train and the level of fitness she was able to sustain as a result was an important aspect of her sense of self worth.

On a review of the various authorities cited by the parties, the trial judge awarded the plaintiff $50,000 in non-pecuniary damages which was decreased slightly to reflect a failure to mitigate.

Non-pecuniary damages - Subjective Complaints

I. Prince v. Quinn, 2013 BCSC 716, per Williams J.

The plaintiff claimed she sustained headaches, back and neck pain as a result of a motor vehicle accident. She attended upon her doctor a couple of times and on her doctor's recommendation attended physiotherapy and massage a couple of times. She pursued yoga and exercise to deal with her symptoms. She testified that her symptoms had plateaued, and that she experienced flare-ups every four to six weeks. The plaintiff relied on her own testimony as well as that of her husband and a friend. She called one expert, a physiatrist who saw her sometime after the accident. Her GP did not give evidence nor was an expert report produced by her GP. As a result, the court noted that the usual documentary evidence was not present in this case.

The Court noted that in such cases, reference is inevitably made to a passage from the judgment of McEachern C.J.S.C. (as he then was) in *Price v. Kostryba* in which McEachern C.J.S.C. refers to an earlier decision, *Butler v. Blaylock*, [1981] B.C.J. No. 31, where he stated: "the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery."

The Court noted that subsequent to the decision of *Price, Butler v. Blaylock* was successfully appealed. The Court of Appeal stated: "it is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover." In dealing with the present action the court said at paras. 26 and 27:

> In my view, the point to be observed is this: where a plaintiff's claim is founded quite substantially on self-reported evidence, it is necessary for the trier of fact to scrutinize the plaintiff's evidence carefully and evaluate it in light of other evidence, such as the circumstances of the collision, other relevant information concerning the plaintiff's activities and statements made by the plaintiff on other occasions. However, where the evidence of physical injury is substantially based on subjective evidence—the testimony of the plaintiff—that should not constitute an effective barrier to proof of a claim.
>
> In the final analysis, it is the court's duty to examine the evidence carefully and critically. That is what I have done in this case.

The Court ultimately accepted the plaintiff's evidence regarding her symptoms and the difficulties she suffered as a result and awarded $40,000 for non-pecuniary damages.

Special Damages

J. Redl v. Sellin, 2013 BCSC 581, per Saunders J.

The plaintiff suffered from chronic myofascial pain syndrome secondary to chronic pain disorder which diagnosis was uncontested. The issue for the court was an assessment of damages including a claim of over $46,000 for special damages. The judge found the plaintiff was a credible witness. She was a dedicated employee and led an active lifestyle prior to the subject accident, despite pre-accident setbacks including a prior motor vehicle accident and treatment for thyroid cancer.

The plaintiff's special damages included, *inter alia*, claims for massage therapy ($14,245.08), acupuncture ($7,268.85), chiropractic ($5,510.00), Pilates ($3,974.92), naturopathic treatment ($457.31), kinesiology ($453.00), reflexology ($370.69), physiotherapy ($210.00), medication ($115.90) along with miscellaneous expenses of $13, 895.47 including: mileage, cleaning services, MRI's, office equipment and personal training. In her direct evidence the plaintiff stated that the various treatments she received provided her with temporary relief. She thought that chiropractic and massage therapies had allowed her to return to work relatively quickly (the plaintiff began a graduated return to work approximately one month post-accident) and permitted her to increase her activity level.

The plaintiff was cross-examined regarding her reasons for pursuing multiple treatments on the same day. She responded that she did "what made her feel good." The plaintiff's GP referred her to massage and chiropractic therapy, and to a kinesiologist. In his direct evidence, he supported the plaintiff's ongoing massage and chiropractic treatments. However, under cross-examination he testified that he would normally advise a patient such as the plaintiff to pursue limited massage and chiropractic treatments, and that further treatments would be appropriate as advised by a specialist. If the patient's complaints were not resolved after the limited treatments, then he would recommend active rehabilitation.

Dr. Frobb, the plaintiff's chronic pain specialist, stated that his first priority was ensuring the patient is doing strength exercises aimed at the abdominal core and aerobics to mitigate fatigue. He said almost all therapies have a ceiling effect, at which point there are diminishing returns and thereafter the therapy has only a palliative effect. He testified that there is unlikely to be any modality of therapy that will resolve the underlying complaints. The plaintiff's physiatrist, Dr. Bohorquez, supported whatever treatments the patient undertook to get the patient active and working.

Claims for special damages are subject to reasonableness, but where an expense has been incurred for treatment aimed of promotion of physical or mental well-being, evidence of the medical justification

for the expense is a factor in determining the reasonableness (citing *Juraski v. Beek*, 2011 BCSC 982 and *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.)).

The Court stated:

> ... plaintiffs are not given carte blanche to undertake any and all therapies which they believe will make them feel good [at para 55].

And further noted that:

> There is no medical evidence that the therapies she undertook accelerated her return to work or have otherwise improved her physical condition. With regard to the palliative effect of the therapies, Ms. Redl did not experiment with trying one modality at a time. She did not experiment with lengthening time between appointments. There is no evidence that the palliative effect of these therapies was any greater than what may have resulted from the use of over-the-counter medications. Ultimately, the evidence does not persuade me on a balance of probabilities that Ms. Redl's physical or mental well-being is or could reasonably have been expected to be any greater as a result of undertaking these frequent therapies, than it would be if she had stuck to her pre-accident pattern of weekly or bi-weekly massage and monthly chiropractic treatments.

In the result, the Court allowed the cost of the plaintiff's first 12 massage therapy and chiropractic treatments as well as further massage appointments taken during periods of flare-ups. Physiotherapy and kinesiology expenses were allowed as they were taken on the GP's recommendation and acupuncture with Dr. Frobbs was allowed. Pilates expenses in the amount of $3,974.92 further to Dr. Frobb's opinion that core strengthening was a priority. Claims for naturopathic and reflexology treatments were disallowed along with the balance of the massage, chiropractic and acupuncture treatments.

VIII. Definition of Owner of a Motor Vehicle

A. Aucoin v. Shepherd, 2013 YKCA 1, per Chiasson J.A. (Frankel and Hinkson JJ.A. concurring)

The plaintiff was a passenger injured in a motor vehicle accident. The plaintiff's vehicle had recently been purchased by Mr. Mendelson from Mr. Shepherd. Mr. Mendelson paid the purchase price, and received the necessary papers and keys from Mr. Shepherd.

At the time of the purchase, Mr. Shepherd understood that Mr. Mendelson was going to take the vehicle home and then the vehicle would not been driven for a couple of weeks until Mr. Mendelson took the vehicle for a safety inspection and had it registered and insured. Mr. Shepherd did not remove the license plates from the vehicle, as required by the *Motor Vehicle Act* because he had no need for them. He planned to move to BC.

The Court of Appeal's analysis began by noting that the Supreme Court of Canada in *Hayduk (Next friend of) v. Pidoborozny*, [1972] S.C.R. 879 made it clear that the language of the legislation controls.

The Court of Appeal also agreed with Hudson J's finding in *Burton v. Fluth Estate (Public Administrator of)*, [1994] Y.J. No. 91 (S.C.) that the use of the words "means" rather than "includes" in the definition is significant. "Means" is more restrictive.

Furthermore, the word "or" in the definition of "owner" is disjunctive. The Court stated at paras. 35 and 36:

> Section 47(2) states that when a change in ownership occurs, the owner' registration expires immediately. He or she no longer is the registered owner. The former registered owner has an obligation to remove the license plates from the vehicle, but

> the legislation provides in s. 47(4) that if this is not done, the purchaser of the vehicle must do so.

The Court held that "the fact that a registered owner does not comply with the obligation to remove license plates, while a breach of the legislation, does not affect who is the owner as defined by the *Act*." The Court found that Mr. Shepherd was not an "owner" as defined by the *Motor Vehicle Act* on the day the plaintiff was injured.

IX. Disability Insurance

A. Dueck Chevrolet Cadillac Hummer Limited v. Insurance Corporation of British Columbia, 2012 BCCA 493, Low, MacKenzie and Harris JJ.A.

At issue on this appeal was the applicable limitation period for the respondent's claim for insurance coverage which is one year after the cause of action arose pursuant to s. 17 of the *Insurance (Motor Vehicle) Act*. The sole issue was the interpretation of the phrase "the cause of action arose" in s. 17 of the Act.

Dueck owned and leased a Lincoln Navigator vehicle that was destroyed in a fire on February 5, 2006. On May 24, 2006 Dueck filed a proof of loss. The proof of loss was filed late pursuant to s. 134 of the Regulations; but ICBC raised no defence on that basis. Under s. 144 of the Regulations, any insurance money payable by ICBC was to be paid "within 60 days after the corporation receives a proof of loss ... from the insured." On December 15, 2006, ICBC finished its investigation into the claim and sent a letter denying the claim. Dueck never received the letter. Dueck commenced the action on October 31, 2008 claiming insurance money.

On a summary judgment application the judge held that a cause of action arises under s. 17 when there has been a clear and unequivocal denial of coverage by the insurer. As the respondent had never received ICBC's letter denying coverage, the trial judge found that the cause of action never arose and the respondent had started his action in time.

An appeal was allowed. The judge erred in concluding a cause of action only arises under s. 17 upon a clear and unequivocal denial of coverage by the insurer. The principle in *Dachner Investments Ltd. v. Laurentian Pacific Insurance Company* (1989), 36 B.C.L.R. (2d) 98 (C.A.) was applicable; the cause of action arose after the filing of proof of loss and expiration of the insurer's time to pay under the Act or Regulations, or sooner, upon a clear and unequivocal denial of coverage. In this case, the cause of action arose when ICBC failed to pay the respondent's claim within 60 days after the filing of the proof of loss, as prescribed by the Act. Thus the limitation period had expired.

B. Bain v. Great-West Life Assurance Co., 2012 BCSC 1335, Burnyeat J.

This was a claim for disability benefits brought by a former employee of the City of Calgary against their group disability carrier. The plaintiff had been employed as a carpenter before he became disabled as a result of degenerative disc disease. Great-West Life paid disability benefits to the plaintiff during the initial two year "own occupation" period and terminated him at the change of definition on the grounds that he was not disabled from "any occupation." The action was dismissed. The defendant had identified appropriate alternate occupations. There were serious credibility issues raised and surveillance demonstrated the plaintiff was leading a normal, active lifestyle. The Court could not conclude that the plaintiff was disabled merely because he had not been able to find work when he had not looked for work.

The decision is of interest because it contains an analysis of the duty to mitigate in the context of a disability claim. The trial judge found that in addition to the plaintiff's obligation to pursue reasonable and customary medical treatment as prescribed by the terms of the policy, he had a common law duty to mitigate by looking for employment.

C. Jackson v. The Standard Life Insurance Co, 2012 BCCA 503, Finch CJBC, Garson and MacKenzie JJ.A.

Standard Life appealed an order following a summary judgment application that it must pay disability benefits to the plaintiff. Standard Life submitted that the trial judge had erred in finding that Ms. Jackson was covered by the plan in issue on the date of her disability. The plaintiff had started work on August 15, 2005 and had become disabled on August 27, 2005. The policy provided that the eligibility period was determined as "the 1st of the month coincident with or immediately following employment date." The summary trial judge found that this could mean that she was not eligible until September 1st or it could also mean that she was eligible on August 15 or 16, 2005. Adopting either of the latter meanings, the trial judge found that she was covered on August 27th.

The appeal was allowed. The term in issue was unambiguous and the plain meaning of the words had to be given their full effect. While the trial judge accepted a possible interpretation, he was concerned about the unfairness that it created. There is no reason to consider unfairness if no ambiguity has been identified.

X. Document Production

A. Hadani v. Hadani, 2012 BCSC 1142, Master Muir

This was an application for production of clinical records in the context of a claim by a son against his father for physical and emotional abuse. The plaintiff had produced redacted copies of various records. The defendant sought production of un-redacted copies but provided no evidence to demonstrate that the redacted portions were actually reasonably connected to any issues in the proceeding. The Court accepted the son's evidence regarding the completeness of disclosure and the irrelevance of the redacted material.

Master Muir found that medical records were not a single document but rather a "series of records complied over time from a number of interactions with the plaintiff." Therefore, each entry required a separate analysis as to whether it may prove or disprove a material fact or relate to a matter in question in the action. Since medical records are not a single document, there can be no presumption that the entirety of the records should be produced.

Where there is uncontroverted evidence that parts of the records relate to something that does not on its face touch on the matters in issue and those parts of the records are irrelevant and would be embarrassing if produced, the demanding party must do more than simply assert that all medical records must be relevant given the pleadings. Instead, there must be some evidence to support the application demonstrating that the redactions would prove or disprove a material fact or that a broader class of documents should be disclosed. The party must demonstrate a connection beyond a mere possibility and there must be some air of reality between the documents sought and the issues in the action.

The evidence could come from an examination for discovery since although the scope of document production has narrowed under the new rules, the scope of examinations for discovery is unchanged and very broad.

B. Bains v. Hookstra, 2012 BCSC 1707, Master Muir

The plaintiff consented to production of his post-accident medical records in the course of an action arising from a motor vehicle accident that took place on July 9, 2009. The plaintiff would not agree to production of pre-accident records. He testified at discovery that he had not had any related injuries in the two years prior to the accident.

The defendant applied for production of the plaintiff's records for two years preceding the accident on an Affidavit sworn by an adjuster based on information and belief, without identifying the source. The adjuster deposed that the plaintiff was the driver of a vehicle involved in a car accident on December 3, 2008 in which his car sustained over $4,000 in damage and that the plaintiff was an at fault driver in an accident on March 8, 2009 in which his car sustained $10,966 in damage. The adjuster also attached, without explanation, a form described as a "claims history" and that the two prior accidents took place during the course of the plaintiff's employment. However, an exhibit from the employer indicated that the plaintiff did not take time off work but did take three weeks of banked time not recorded as sick time.

Master Muir found that the evidence based on information and belief was deficient and inadmissible pursuant to Rule 22-2(13).

The application was dismissed. The plaintiff clearly denied that he was suffering from any pre-existing injuries and the evidence put forward by the defendant did nothing more than to raise the mere possibility of a prior existing condition. In the circumstances of the plaintiff's denial, that evidence was insufficient to warrant the order sought.

C. Ahadi v. Valdez, 2013 BCSC 714, Adair J.

In the course of the trial of this matter, Madam Justice Adair commented on the obligation of counsel to canvass the use of social media and other electronic records prior to trial.

During the trial, plaintiff's counsel put an email to a witness that he had not previously disclosed and which he acknowledged had been received from the plaintiff shortly before the commencement of trial. This led to a delay of the trial and the necessity for further discovery of the plaintiff. In final submissions, defence counsel argued that the plaintiff's failure to disclose the documents demonstrated a general lack of honesty on her part. The Court rejected those submissions and made the following comments in respect of counsel's obligations:

> [157] ... Ms. Ahadi's solicitors need to accept at least some of the responsibility for what occurred. Prior to trial, they should have investigated the existence of relevant electronic documents much more thoroughly than they did. Had they made a proper and thorough investigation, Ms. Ahadi's solicitors could have avoided placing their client in the uncomfortable position in which she found herself on the third day of trial. Defendants' counsel also had the opportunity to pursue the matter of electronic documents (such as Facebook postings and email), when Ms. Ahadi was examined for discovery some nine months before trial, but they did not.

Vacation photographs

D. Dawn-Prince v. Elston (14 June 2012), Victoria 09/4178 (B.C.S.C. Chambers) per Master McCallum

The plaintiff claimed injuries as a result of a motor vehicle accident. The defendant sought production of the plaintiff's vacation photographs further to her examination for discovery in which she testified about her activities on her vacations. The master was referred to *Fric v. Gershman* (no citation provided) in which Master Bouck ordered production of vacation photographs on the basis they were relevant to establishing the plaintiff's physical capacity since the accident.

In *Dawn-Prince*, the plaintiff relied on an affidavit sworn by someone in plaintiff counsel's office stating that she reviewed the photographs, and they depicted the plaintiff sitting, standing or walking. The master held that the vacation photographs in dispute neither confirmed nor denied the plaintiff's evidence about what she could and could not do (i.e., she didn't claim that she couldn't sit, stand, or walk). The master declined to order production of the vacation photographs.

XI. Duty of Care

Duty of care re infant

A. Annapolis County District School Board v. Marshall, 2012 SCC 27, per Deschamps J. (McLachlin C.J. and Abella, Rothstein, Moldaver, and Karakatsanis JJ. concurring); Cromwell J. dissenting

The plaintiff was catastrophically injured when he ran out onto a highway and was struck by a school bus. At trial, the jury found that the school bus driver was not negligent. The Court of Appeal sent the matter back to trial on the basis that the trial judge had improperly instructed the jury regarding a statutory right-of-way provision and improperly invited the jury to treat the plaintiff like an adult and therefore find him responsible for the accident.

The Supreme Court of Canada held that the trial judge correctly instructed the jury. Read as a whole, the charge to the jury invited the jury to consider the conduct of a reasonable pedestrian in assessing the school bus driver's conduct, and the charge made it clear that the child plaintiff's negligence was not at issue.

Deschamps J., writing for the majority, disagreed with the Nova Scotia Court of Appeal that by referring to the right of way provisions the trial judge "effectively invited the jury to find Jonathan legally responsible for the accident." In fact, at the beginning of the charge, the trial judge made it clear that the plaintiff's liability was not in issue because of his young age.

XII. Evidence

A. Saadati (Litigation Guardian of) v. Moorehead, 2013 BCSC 636, Funt J.

This case addressed the admissibility of various out of court statements made by a plaintiff.

The plaintiff in this motor vehicle accident claim had been declared incompetent five years after the Accident and approximately two years before the trial. The plaintiff could not testify. Counsel for the plaintiff sought to introduce various statements made by the plaintiff when he was competent for the truth of their contents.

The Court allowed the testimony of the plaintiff's cousin, an occupant in the car, to the plaintiff's immediate statements after the accident "my head, my head." The statement was a traditional exception to the hearsay rule as a declaration of bodily feeling and condition. Although there may be reservations as to the plaintiff's motivations in respect of other statements, these were not sufficient to take away from the spontaneity of this statement.

The Court accepted that the necessity principle was readily satisfied in respect of the other statements, but would not admit the plaintiff's statements to physicians, family members and friends finding that the statements did not meet the test of reliability. The Court identified the following concerns regarding reliability:

- the plaintiff may have made the statements with an action for damages and monetary gain in mind;
- the plaintiff made differing reports to his family and friends than he did to his doctors;
- close relations were under the impression that he had been buying and selling cars, yet his income tax returns failed to show such a source;

- a close relation testified that she had been told by him that he was no longer driving and believed the plaintiff but her belief was ultimately wrong; and
- a doctor had considered the possibility that the plaintiff was exaggerating his injuries.

Mr. Justice Funt doubted that the statements made by the plaintiff to his doctor would fall under the traditional exception based on "contemporaneous bodily feelings" since "spontaneity" is the hallmark. But even so, this was a case in which there were too many unanswered questions to admit the statements.

B. Charles v. Dudley, 2012 BCSC 1301, McEwan J.

Mr. Justice McEwan was critical of any practice calling medical evidence before a plaintiff's testimony:

> [2] The trial proceeded in a fashion I would have described as unorthodox until recently, with the medical evidence called before the plaintiff testified. Counsel advised that they understand this to be the preferred way to run a personal injury case. I do not know where they get this idea. If persuasion of the trier of fact is the objective, the practice of leading medical opinion unattached to any factual foundation is the most awkward way to go about it. I have observed elsewhere that doctors do not subject their patients to a forensic examination. They generally assume that what the patient tells them is true and attempt to treat their symptoms. Their observations are of assistance to the trier of fact to the degree to which they reasonably conform to the facts that have been established after the plaintiff's assertions have been tested. It is very difficult to assimilate medical evidence provisionally, that is, with no means of sorting what matters from what does not. A trier of fact obliged to hear a trial this way must go back over such evidence to put it in context. This Court is not alone in making this point. In *Yeung v. Dowbiggin*, 2012 BCSC 296, Humphries J. said
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> > [27] Since the plaintiff was one of the lay witnesses called and was in the courtroom very rarely prior to her testimony, it was difficult to assess the evidence about the effects of the accidents as I listened to the various witnesses. I had no idea who the plaintiff was, had no sense of her, and had heard no evidence about the accidents as I listened to all these witnesses. I do not know if this was a tactical decision or whether it was necessitated by schedules, but it meant the evidence I heard was all without context.
>
> [3] In any event, owing to gaps in the scheduling of the opinion witnesses, I persuaded counsel to call the plaintiff after the first medical witness had testified to fill out the court day. The case then proceeded with interruptions of the plaintiff's evidence to accommodate the scheduled witnesses. While occasional scheduling issues may dictate such a course, plaintiffs in personal injury cases should generally be called first, if the point is to put across a coherent case.

C. Ram v. Rai, 2012 BCSC 1718, Holmes J.

In this motor vehicle accident claim, the plaintiff testified after her mother and sister had given evidence. The defendants submitted that the trial judge ought to be cautious about relying on the plaintiff's subjective complaints and draw an adverse inference from the fact that the plaintiff was in the courtroom when her family testified. Madam Justice Holmes noted that the order of testimony is a matter of practice or effective advocacy, and not one of law, evidence or civil procedure.

In this case, her Ladyship was confident that the plaintiff's evidence had not been contaminated by hearing her mother and sister testify first; she found each to be impressive and entirely credible witness.

D. Frech v. Langley, 2012 BCSC 1230, Truscott J.

The defendant sought to have the court draw an adverse inference from the failure to file a report from Dr. Cox, although the doctor did give evidence at trial at the instance of the defendant. However, the defence counsel did not ask Dr. Cox the same question in the witness box because she wasn't sure she knew what his evidence would be. The Court declined to draw an adverse inference based on the reasoning that the doctor would not have given any different opinion if it had been sought by the plaintiff or the defence.

E. Liversidge v. Wang, 2012 BCSC 1974, Burnyeat J.

A plaintiff sought to introduce evidence obtained on an examination for discovery of a third party in support of a summary trial application against the defendant. Supreme Court Civil Rule 12-5(46) provides that evidence given at an examination for discovery is only admissible against the party examined and only if that party is adverse in interest. The interests of the plaintiff and a third party are not adverse; except in limited circumstances where the third party is an insurer. The Rule is equally applicable to trial and summary trial. Evidence obtained from an examination for discovery of a representative of the Third Party cannot be used in the summary judgment application to assist the plaintiff in advancing the claim against the defendant.

XIII. Examinations for Discovery

A. Morgan v. B.C. Transit, 2012 BCSC 909, Betton J.

In this car accident case, the Court criticized counsel for unilaterally scheduling discovery. The defendant unilaterally set a date, which the plaintiff advised he could not attend. Defence counsel attended the discovery, noted the plaintiff's non-appearance and brought a motion seeking to have the plaintiff's claim dismissed. The defendant subsequently retreated from the request and sought an order that the plaintiff attend discovery on another date and costs.

The Court dismissed the defendant's application for costs thrown away for the previous discovery date and in respect of the application and, instead, awarded costs to the plaintiff for the following reasons:

> [14] Obviously the system would be challenged if appointments were routinely taken out without consultation with opposing parties and applications for dismissal followed non-attendance at such appointments. There is a balance that requires considered utilization of Rule 22-7(5). Circumstances must justify the application. Those who have an obligation to submit to an examination for discovery must cooperate reasonably in allowing the examinations for discovery to occur. Indeed it is a relatively unusual application and quite rare that such a severe remedy is granted. The reasons for this are numerous and most are self-evident. Most parties are represented and counsel are well aware of their own and their client's obligations. They make accommodations appropriately and reasonably to assist in achieving the objectives of the *Rules*. Even those who are not represented understand that procedural rules exist, and are to be followed, and there are consequences for failing to do so.
>
> [15] I note in this case, there is no evidence before me indicating that there was any particular urgency to having the examination for discovery of the plaintiff concluded by the end of December. The trial date, as I noted, is set for December of 2012. When the December 1 date was adjourned on November 8, there was some discussion, but nothing done to formally set the examination for discovery until November 28, approximately three weeks later, when the issues quite quickly emerged. In this case, it is of significance that plaintiff's counsel advised on December 18, approximately one month before this application was filed, that he had become available to have the examination for discovery of the plaintiff conducted in early January 2012. That is now some two months ago.

> [16] There are cases where parties with or without counsel either use the *Rules* or ignore them to frustrate another's legitimate efforts to prepare their case. In my view, this is not one of those cases. There are also cases where the Rules are used in ways which serve to defeat the broader objectives as described in the *Rules* of having cases proceed in an efficient and fair way. In all of the circumstances, it is my conclusion that the defence in these circumstances was overly aggressive in its utilization of this Rule and making application to have the action dismissed with costs to the defendants; pressing to set the date on December 15 without consultation or without agreement was not necessary. Of most significance is the fact that before this application was set, plaintiff's counsel had advised that they were now available to accommodate the examination for discovery occurring in early January. That discovery would have long since been concluded, rather than now being set in March and this application having had to proceed.

B. LaPrairie Crane (Alberta) Ltd. v. Triton Projects Inc., 2012 BCSC 1594, Master Bouck

This case stands for the proposition that a failure to object or take under advisement a request made at discovery does not equate to consent to comply; silence is not deemed to be consent. In fact, even if the witness agrees to a request they can later change their mind on reflection or after taking legal advice.

In view of the limited length of examination for discovery in the new rules, it is not desirable to required parties to intervene, formulate a position or engage in argument during discovery as that would use up valuable discovery time.

The court does not have the power to order that answers to questions outstanding at an examination for discovery be put in writing.

C. Blackley v. Newlands (1 January 2012), New Westminster Registry, M121592, Williams J.

The plaintiff sought to read in a number of questions and answers obtained from the examination for discovery of the defendant. The matter was set to proceed to trial before a jury on the question of quantum only. The questions asked the defendant about her knowledge of the plaintiff's injuries (the plaintiff was not known to the defendant). For example:

> Q. Okay. Do you have any facts known or knowable to you that relate in any way to whatever injuries Mr. Blackley received in this collision?
>
> A. No.
>
> Q. Okay. Do you have any facts known or knowable to you that relate in any way to what pain or suffering Mr. Blackley has had because of this collision?
>
> A. No, vaguely.
>
> Q. You have a question in your voice, so tell me what you are thinking.
>
> A. I have been told by my parents that it is possible that there is post traumatic stress.
>
> Q. In Mr. Blackley?
>
> A. Yes.
>
> Q. Or in you?
>
> A. In Mr. Blackley.

The defendant objected to the questions both being asked on discovery and to the answers being read in at trial on the basis of hearsay.

Mr. Justice Williams found that the questions were properly asked on discovery and had been shaped by the general denials in the Statement of Defence. However, the questions and answers were not admissible at trial on the grounds that the probative value of the evidence was minimal at best; "probably close to nil." Further, if the evidence were to be tendered, it would be prejudicial since the judge would be obliged to instruct the jury that the answers had no relevance to the issues they were to decide, causing the jury to become perplexed.

D. Evans v. Parsons, unreported, June 1, 2012, Master Caldwell

In issue was whether a defendant could ask a plaintiff on discovery, in respect of a medical legal report prepared for the plaintiff's counsel the broad question: "was there—the facts in Dr. Aiken's report, was there anything that struck you as incorrect?" plaintiff's counsel objected to the question. Defence argued that the question was fair and that the limited scope of two hour discovery in Rule 15 matters allowed this type of a short question.

Master Caldwell found the question was too broad and vague. He also found that there had been an opportunity for counsel to explain what facts were being referred to and that counsel had refused to further qualify. The application to force the plaintiff to answer such a general question was dismissed.

XIV. Experts

Rule 11-6(8) limits to scope of expert witness file disclosure

A. First Majestic Silver Corp v. Davila, 2012 BCSC 1250, Myers J.

Mid-way in a trial and before the defence experts testified, the plaintiff made an application, pursuant to Rule 11-6(8) and common law principles, to obtain the defendant's experts' notes made by them during trial while the plaintiff's witnesses were testifying. The plaintiff had been provided with the defence expert's files up to the time they prepared their reports.

Myers J. ruled that Rule 11-6(8) limits production to what was clearly stated in the rule, namely the "contents of the experts files *relating to the preparation of the opinion*" [emphasis added]. Since the experts had served their opinions in a written report, the notes they were making at trial were unrelated.

The Court rejected the notion that the new formulation of the disclosure rule merely modified the timing of disclosure of the expert's file and that the common law requirement of production of the whole expert file still prevailed. On the plain reading of the rule, Myers J. found that the words "relating to the preparation of the opinion" must be given meaning and that disclosure was thereby limited.

Expert evidence and rebuttal

B. Lennox v. Karim, 2012 BCSC 930, Armstrong J.

The plaintiff obtained a report from Dr. Stewart that contained a key opinion that the plaintiff had a tear of the medial meniscus which was caused by the motor vehicle accident at issue which had occurred 9 years earlier. The report was served 87 days before trial and was the first notice to the defendant that such an injury was alleged. The defence obtained a responsive rebuttal opinion from Dr. Leith who critiqued Dr.Stewart's report. The plaintiff objected to the admissibility of Dr. Leith's report as a responding report on the grounds it was fresh opinion and did not meet the requirements of admissibility under 11-6(3) or (4).

The Court allowed the admission of the report, finding that it was limited and truly responsive to the evidence of Dr. Stewart. In view of the lack of specific reference to the type of knee injury alleged

until 86 days before trial, and failure to disclose Dr. Stewart's upcoming report at the CPC, the judge remarked:

> [42] If I am wrong in this decision, it would have also been my further opinion that in the circumstances of this case the defendant would have otherwise been entitled to an adjournment of the trial to secure the medical report of Dr. Leith if it was not otherwise admissible under 11-6(4). It seems to me that 11-1(2) is purposely directed at requiring the plaintiff and defendant to avoid the last minute introduction of medical evidence in cases which may have proceeded for many years on a different track or a different theory. I note that neither of the experts described in the CPC report have been or are going to be called as witnesses in this case, but I am not required to deal with that issue.

Late expert reports are to be used sparingly

C. Perry v. Vargas, 2012 BCSC 1537, Savage J.

A supplementary expert report was sent to the defendant without notice on the eve of trial by email and fax. The expert of this report was set to testify on the afternoon of the first day of trial. The plaintiff relied on Rules 11-6(6) and 11-7(6) to support its arguments for admissibility. The Court rejected the arguments and ruled the report was not admissible for the following reasons:

- Rule 11-6(6) was not intended to allow experts to add fresh opinions or bolster their opinions after reviewing further material under the guise of there being a material change in their opinion.
- Rule 11-7(6) focuses on whether there is prejudice to the party against whom the evidence is sought to be tendered. This was not a case where the report was delivered a few days late and there was no prejudice. The extremely tardy delivery of the report placed the defendants in obvious difficulties and resulted in some prejudice.

The Court also remarked that the purpose of serving reports in compliance with the Rules is to ensure reasonable notice and considered review of the expert opinions. Rule 11-7(6)(c) is a residual provision giving courts discretion to admit expert evidence in the interests of justice when the provisions of (a) and (b) are not met and override the requirements of Rule 11. However "the discretion provided in 11-7(6)(c) must be exercised sparingly, with appropriate caution and in a disciplined way given the express requirements contained in Rules 11-6 and 11-7. The "interests of justice" are not a reason to simply exclude or ignore the requirements of other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the *Supreme Court Civil Rules*."

Limits of court to order litigants to reveal experts they intend to rely on at trial

D. Amezuca v. Norlander, 2012 BCSC 719, Master D. Baker

At a case planning conference, defence counsel sought confirmation of which experts and reports the plaintiff planned to rely on at trial pursuant to Rule 5-3(1).

The Master held that while Rule 5-3(1) sets out the rules for a court to deal with experts at a case planning conference, it does not specifically require a party to disclose the identity or area of expertise of the expert before serving the report. This was consistent with the reasoning in *Galvon v. Hopkins*, 2011 BCSC 1835 where the concern was that early disclosure would infringe on litigation privilege.

However, an order for early production of the plaintiff's reports was granted in this case given the unusual circumstances of the 13-year passage of time since the first accident and the dearth of useful information identifying the extent of the injuries claimed.

E. Nowe v. Bowerman, 2012 BCSC 1723, Dickson J.

At a case planning conference, defence counsel sought an order that plaintiff's counsel disclose the area of expertise of his proposed experts approximately 10 months before the trial date. Dickson J. refused the order, applying the principles articulated in *Galvon v. Hopkins*:

- litigation privilege or the solicitor's brief rule, was alive and well as the BC Court of Appeal in *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 made it clear that it would be rare, if ever, that the need for disclosure would displace privilege;
- a defendant has no right to know what a plaintiff, as litigant, does in the preparation of his/her claim because it is not relevant to the matters contained in the pleadings and is an aspect of confidentiality that is worthy of protection;
- there is nothing in Rule 5-3 governing case planning conferences that clearly, expressly, and specifically allows the presider to compel a party to provide another party with the details of any potential expert witnesses before that party has even consulted with the or made an election whether to call the witnesses' evidence at trial;
- Rule 5-3 cannot be read as to allow the case planning conference judge or master to disregard the common-law principle of privilege; and
- requiring the plaintiff to disclose the very fact of her attendance before a medical expert, and run the risk of an adverse inference if she did not call the expert at trial, interferes with the plaintiff's right to elect which witnesses to call. Such interference is not sanctioned, nor warranted, by our Supreme Court Rules.

Madam Justice Dickson also remarked that the type of expert a plaintiff intends to retain is a mater of trial strategy and which is a key component of a solicitor's brief. In view of the fact that intentions change as the process unfolds, there must be a compelling reason for such disclosure delving into a solicitors brief such as a complex brain injury case.

Bias

F. Moll v. Parmar, 2012 BCSC 1835, Meiklem J.

This was an appeal from a Master's decision granting a defence application to compel the plaintiff to attend, *inter alia*, an independent medical examination with a neuropsychologist, Dr. Williams. Dr. Williams had previously provided defence counsel with a strong written critique of the some of the plaintiff's expert reports.

The case is noteworthy because the appeal was allowed on the basis of anticipated bias on the part of the proposed examiner. It is also a warning for counsel to take care in considering whether to engage an expert in any preliminary review of the opposing side's expert opinions.

Mr. Justice Meiklem provided the following reasons:

> [13] Turning first to the Master's errors alleged by the appellant, I initially gave rather short shrift to Mr. Harris' submissions that Drs. Craig and Williams had been recruited as advocates for the defence by virtue of the nature of the defence request to them and the nature and content of their reports, that they would be viewed as lacking the necessary objectively to warrant being appointed by the court to conduct IMEs of the plaintiff. After considering the retainer letters and the reports of Drs. Williams and Craig, I see considerable merit in the appellant's argument with respect to Dr. Williams' compromised objectively. The circumstances in respect of Dr. Craig's report are somewhat different.
>
> [14] The appellant's concern was not only the advocacy bias apprehended by the plaintiff, but also the bias concerning the plaintiff's condition that was already

> demonstrated by the roles these experts were retained for and the reports that they had already delivered. He considered it highly improbable and purely theoretical that either of these specialists would be able to change any previously expressed views after their examination of the plaintiff.
>
> [15] Dr. Williams' report emanated from a retainer letter wherein the pertinent paragraph stated simply that Mr. Moll was advancing a claim for a head injury in a highway collision and then stated: "I ask that you please kindly review the enclosed report of Dr. Jeffrey Martzke dated May 1, 2012, together with the enclosed documentation set out in the attached schedule "A", with a view to discussing Mr. Moll's claim with me." The letter promised to forward Dr. Martzke's raw test data, which was forwarded in due course and reviewed by Dr. Williams.
>
> [16] Dr. Williams described the purpose of his report as responding to the reports of Dr. Martzke and Dr. Wallace (the plaintiff's vocational consultant) and he said he limited his comments to aspects pertaining to the methods, procedures and process of the reports, as well as the sufficiency of the conclusions, recommendations or diagnosis of Drs. Martzke and Wallace.
>
> [17] Dr. Williams' report is, however, a very rigorous critique of Dr. Martzke's methods and testing, as well as his conclusions, and in my view does at least border on advocacy, as argued by Mr. Harris. Dr. Williams' criticisms of Dr. Martzke's report and findings may well be found to be completely correct, and my comments will not fetter the trial judge's rulings if the report is tendered, but I do not think it is appropriate for the court to order a medical examination of a plaintiff by an expert who has previously taken such a strong stance in accepting the role as a reviewer of a previous examiner's report, particularly in view of the specific provisions of Rule 11-2(1) of the *Civil Rules*.

Weight Given to Opinion Based on Records Review

G. Rizzotti v. Doe, 2012 BCSC 1330, Tinsdale J.

In this case, the plaintiff suffered psychological injuries as consequence of a serious motor vehicle accident. The defendant relied upon a psychiatric report which disagreed with the plaintiff's experts regarding the extent of her related psychological injury. The defence psychiatrist had failed to meet with the plaintiff and had based his opinion on a review of the material, including materials that were not introduced into evidence.

The Court admitted the report but, ultimately, found that a psychiatric opinion could be given very little weight if the expert does not interview the plaintiff and the psychiatrist testified that he could not do a proper assessment without interviewing the plaintiff.

XV. Implied Undertaking of Confidentiality

A. British Columbia v. Tekavec, 2012 BCSC 1348, Williams J.

This was a claim by the BC Government for recovery of their health care costs under the *Health Care Costs Recovery Act*. The defendant had been found liable for damages to an individual, Mr. Jack, who fell from a balcony in a building owned by the defendant. The defendant was ordered to pay significant damages to the plaintiff and, subsequently, sued by the BC Government to recover their health care costs.

The government requested production of certain documents from the defendant including the transcripts from the discovery conducted in the original tort action. The defendant objected on the grounds of the implied undertaking of confidentiality.

The Court ruled that the implied undertaking of confidentiality is set aside for the purposes of a Health Care Costs Recovery action. The principal issues in the government's action were compellingly similar to the original tort claim. Mr. Jack had indicated he had no objection to the disclosure and there was no prejudice to Mr. Jack if the materials were disclosed. Finally, the same questions and topics that were canvassed with the defendant on discovery in the tort claim could be quite properly raised in his examination for discovery in the present action. In effect, disclosure of the materials represented a proper means of proceeding more efficiently.

B. Denny v. Wong (21 November 2012), New Westminster Registry, M137581, Master Keighley

In *Denny*, counsel for the defendants was in possession of documents obtained from the plaintiff in a previous action. When the plaintiff refused to list the documents, the defendants created a list or schedule of the documents and then forwarded it to the plaintiff. The Court said that it would not "endorse" the practice followed by the defendants in this case but found that no breach of the implied undertaking had occurred. The Court then outlined the following four-step process for dealing with such documents:

1. Advise opposing counsel that he or his client has documentation obtained on discovery previous litigation in his possession which may be relevant in or to the instant action;
2. Request a listing of such documentation in the other party's list of documents;
3. Respond to any request for a list of or copies of the documents; and
4. Failing production of a list of documents including such documentation, apply to the court for an order compelling the listing of such documentation.

The Court did not address the possibility that the documents could be listed in the privileged section of the list of documents as suggested in *Chonn v. DCFS Canada Corp*., 2009 BCSC 1474 and endorsed at para. 19 of *Tekavec*.

XVI. Juries

A. Moore v. Kyba, 2012 BCCA 361, per Levine J.A. (Frankel and Hinkson JJ.A. concurring)

The defendant appealed on the basis that the trial judge's charge to the jury did not provide clear instructions to the jury on how to assess damages if they determined that the plaintiff's injuries were indivisible. The plaintiff was awarded $823,962 for loss of future earning capacity. Despite a pre-accident injury and a post-accident injury, the plaintiff claimed the loss of his naval career was caused by the motor vehicle accident.

As the Court states at para. 35 "the basic principles at play in this analysis are that a 'defendant is not liable for injuries which were not caused by his or her negligence' (*Athey* at para. 24), and 'the defendant need not put the plaintiff in a position better than his or her original position' (*Athey* at para. 35)."

The Court went on:

> [36] Thus, whether a defendant is liable to a plaintiff for an injury is a matter of causation; the amount of compensation the defendant must pay is a matter of assessment of damages.
>
> [37] The concepts of divisible and indivisible injury are relevant at both stages of the analysis. At the stage of determining causation, the characterization of the plaintiff's

> injury or injuries as divisible or indivisible is relevant in determining what the defendant is liable for.
>
> ...
>
> [43] If the injury is indivisible, then the plaintiff is entitled to be compensated for the loss flowing from the indivisible injury. However, if the plaintiff had a pre-existing condition and there was a measurable risk that the condition would have resulted in a loss anyways, then that pre-existing risk of loss is taken into account in assessing the damages flowing from the defendant's negligence. This principle is called the "crumbling skull" rule. As explained in *Athey* (at para. 35): "This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position."

At trial, the defendant argued that the plaintiff was not injured as a result of the motor vehicle accident and therefore the defendant was not liable for any of the plaintiff's claimed losses.

At trial, neither the plaintiff nor the defendant made submissions that the plaintiff's various injuries produced an indivisible injury and there was no submission that the plaintiff had a pre-existing condition which had to be taken into account in assessing damages. However, on appeal, the defendant argued for the first time that since it was open to the jury to conclude that the plaintiff had suffered an indivisible injury, the trial judge should have instructed the jury on how to take into account whether there was a measurable risk that the pre-accident rotator cuff injury by itself would have resulted in the plaintiff leaving his navy career early.

The plaintiff argued that there was no real evidence that his rotator cuff injury would have shortened his career in the navy, and in fact, there was evidence that showed that by the time the plaintiff left the navy, his rotator cuff injury had resolved.

The Court of Appeal held that the trial judge did not err "in failing to instruct the jury on the impact of a pre-existing condition on the assessment of damages, in particular for loss of earning capacity." While a trial judge has a duty to instruct the jury on issues that arise further to the evidence, she also had a duty "not to confuse the jury with legal theories for which there was no evidentiary foundation" (at para. 51).

B. Moll v. Parmar, 2012 BCSC 1373, Abrioux J.

This case confirms that parties cannot rely on an opposing litigant's jury notice under the new Supreme Court Civil Rules.

The plaintiff commenced an action for damages arising from a car accident. The defendant filed a jury notice and plaintiff's counsel did not do so within the requisite period.

At a trial management conference, defence counsel confirmed that his "present instructions" were to have a jury trial. The plaintiff suspected that the defendant may not proceed with the jury and on the date that the jury fees were due brought an application before the trial judge seeking an order that he secure a trial by jury by paying the jury fees or, alternatively, that the time limit under Rule 12-6(3) for filing and serving the jury notice be extended. The defendant opposed the application and confirmed that the defendant no longer wanted to have the trial proceed before a jury.

As referenced above, the Court found that, as was the case under former Rule 39(26), the plaintiff is not entitled to have a jury trial by merely paying the jury fees associated with the defendant's jury notice.

However, the Court agreed to exercise its inherent jurisdiction and grant the extension of time to allow the plaintiff to file a jury notice.

Subsequently, the jury notice was struck on the grounds that the case was too complex for a jury (see *Moll v. Parmar*, 2012 BCSC 1915).

C. Moll v. Parmar, 2012 BCSC 1915, Abrioux J.

After the plaintiff was granted an extension and filed his jury notice, the defendant applied promptly to have the action heard by a judge sitting without a jury (i.e., "striking" the plaintiff's Notice of Trial by Jury).

Liability and damages for significant injury claims were in issue. The plaintiff alleged a brain injury, ongoing cognitive dysfunction, psychological injury and chronic pain. He intended to call 18 witnesses, 9 of whom were experts. The defence identified 16 potential witnesses in his trial brief. Experts included a GP, psychiatrists, neurologist, neuro-radiologist, sleep medicine specialist, physiatrist, occupational therapist, vocational consultant, registered nurse, neuropsychologist, economists and an accountant. The parties disputed the existence of an "organic" brain injury and each had numerous objections to the opposing experts' reports.

The defendant argued that the issues required prolonged examination of documents or that the issues were of an intricate or complex character.

The plaintiff argued that the defendant was estopped from raising any matter or state of affairs which existed at the time the expert reports were exchanged because he was insisting on his right to a jury trial at that time. Abrioux J. rejected that position, concluding that he should consider the application on the merits, given the history of the matter and the defence submission that the assessment of the case and finalizing trial strategy is a process which takes place over time.

In the end, Abrioux J. found that the "sheer volume" of medical reports and the scientific aspect of the evidence militated against the action proceeding before a jury. He referred to the fact that he reviewed many of the reports, comprising approximately 475 pages, and the reports refer to other reports and assessment. The neuropsychological, vocational and functional capacity evaluations report dealt with many tests and data. He found that the issue of whether the accident caused an organic brain injury, which included neuroradiological reports, was scientifically complex. While not identifying the content of the reports of concern, he concluded that there was "little doubt" that the issues would require a prolonged examination of documents or accounts or a scientific or local investigation.

Abrioux J. declined to award the successful defendant his costs of the application on the basis that he maintained his own right to a jury trial under after the Trial Management Conference but should have been in a position to advise the plaintiff of his decision not to proceed with a jury much earlier.

D. Demello v. Chaput, 2012 BCSC 1964, Maisonville J.

The jury was empanelled to hear this motor vehicle accident claim. During his opening address, plaintiff's counsel inappropriately referred to the plaintiff by his first name, to the pleadings to say that liability had not been admitted until last week and made the following comments:

> His wife is pregnant during this period of time. She'd like a little bit more support. He's not able to give that to her. In July, Michael was supposed to do a number of things in anticipation of having some friends over, July of 2012, and at that point his wife was pregnant with her third child. He didn't get around to doing it. Out of frustration, she did it herself. She did all the work he was supposed to do that day in addition to getting the house ready for a party that they were having. They were having some friends over. She started bleeding and two weeks later she has a miscarriage. Now, whether or not or what caused the miscarriage is not the point here. The point is that she blamed Michael for that, so you can see that's an obvious point of tension.

The remarks were found to be inflammatory and inappropriate. Her Ladyship reviewed the purpose of an opening; to give a general notion of what will be given in evidence and not the opportunity for

detailed argument. Comments which impede the objective consideration of the evidence and which encourage assessment based on emotion are objectionable, at any time. There should be no reference to irrelevant or inadmissible evidence.

Madam Justice Maisonville found that, in the circumstances, it would be impossible to dispel the chain of reasoning that the accident ultimately led to the miscarriage and to make any further comment would only underscore that and any correction would be impossible to effect without drawing attention to the problem and, again, refer to what is not going to be led in evidence.

The remarks relating to miscarriage were sufficient to cause grave concerns such that the jury was directed to be discharged.

E. Henshall v. Plona, 2012 BCSC 1852, Master Taylor

The plaintiff applied approximately one month before a 25-day jury trial for an order that the actions be heard by a judge sitting without a jury. Liability was in issue.

The plaintiff claimed that he suffered traumatic brain injury, chronic pain and psychological disorders as a result of the accident. The matter was scheduled to be heard at the same time as other actions arising from two other motor vehicle accidents.

The plaintiff argued that by virtue of the volume of documents and witnesses, a determination of the issues could not conveniently be made with a jury, citing 14 lay witnesses, 13 expert witnesses for the plaintiff, and 22 expert reports in total. As well, the defendant included 12 lay witnesses, 6 expert witnesses and 10 expert reports in their Trial Brief. The nature of the expert evidence is not disclosed in the reasons. The plaintiff also argued that the plaintiff's past history of head trauma would render the causation issue too complicated for a jury.

Master Taylor referred to a party's *prima facie* substantive right of "great importance" to a jury trial and the heavy onus on an application to deprive a party of that right. He referred to the actual substance of the expert reports and concluded that they all appeared well-written and easily understandable. He found the opinion of the authors easily extractable from the minutiae of the author's scientific jargon.

He quoted extensively from *Cliff v. Dahl*, 2012 BCSC 276 which held that in applications of this kind:

- the application must identify the actual issues which are deemed too complex and an explanation of why a jury will have difficulty understanding him;
- simply because medical, economic and actuarial evidence is to be called does not give rise to a scientific investigation or render the issues complex;
- the judge must explain the legal principles and direct the jury as to how they must be applied;
- it is not sufficient for the application to list expert reports and assert that these will require the jury to spend prolonged periods of time studying them;
- the onus is on the applicant to demonstrate why, in the circumstances of the case, the jury will be required to spend prolonged periods of time examining the raw data in support of various expert opinions. Such raw data and background materials are often not presented to the jury at all.

As a final matter, Master Taylor rejected the plaintiff's argument that the extra time and costs involved in a jury was disproportionate to the amount that the defendants argued was involved (by denying causation of a brain injury). Given the wide range of possible damages involved in the matter, he held that it was not disproportionate to have the matter tried with a jury.

XVII. Lawyers' Fees

A. Slater Vecchio LLP v. Cashman, 2013 BCSC 134, Adair J.

Slater Vecchio LLP v. Cashman, 2013 BCSC 134 is a cautionary tale regarding the terms of a retainer agreement in the context of a plaintiff's personal injury action. In that case, Adair J. upheld the registrar's decision that the terms of the retainer agreement required the law firm to represent Mr. Cashman in both the tort and Part 7 actions in order to be entitled to a fee. The settlement of the tort file was complicated by Mr. Cashman's dispute with his former solicitor's over their share of the fee. That dispute resulted in a settlement agreement which defined the amount to be paid to the law firm and the former solicitor. The Court held, however, that the settlement agreement did not change the terms of the retainer agreement. By refusing to continue represent Mr. Cashman in the Part 7 action after the tort file had settled, the law firm had repudiated the contract and was required to disgorge their fee.

B. FitzGibbon v. Piters, 2012 BCCA 269, Finch CJBC, Saunders, Frankel JJ.A.

In *FitzGibbon*, Mr. Maglio acted for the plaintiff, Ms. FitzGibbon, in a personal injury action arising from a motor vehicle accident. After failed attempts to negotiate a settlement, he withdrew as her counsel and she then retained Mr. Piters. Mr. Piters settled the case and funds were paid to him by ICBC in trust. Mr. Piters then transferred the settlement funds to Ms. FitzGibbon.

Mr. Maglio's firm successfully applied for a charge against the settlement funds pursuant to the *Legal Profession Act* and for an order that Ms. FitzGibbon and Mr. Piters be held jointly and severally liable for an amount to be assessed by the Registrar. The Court of Appeal upheld these findings.

In particular, Chief Justice Finch held that s. 79 of the *Legal Profession Act*, by its express terms, gives a lawyer who is retained to prosecute a proceeding in court a charge against any property that is recovered. Therefore, it was not relevant in this case that the charging order granted in chambers was made after Mr. Piters paid out the funds. The charge arose upon the lawyer having done the work that resulted in some recovery. The charge became enforceable upon a declaration by the Court under s. 79(3).

In addition, the Court agreed that Mr. Piter's conduct operated or tended to defeat the charge: he was aware of the law firm's claim; he ignored the claim; and he took the position that it was a matter solely between the law firm and Ms. FitzGibbon.

As a final matter, Finch CJBC stated:

> While it is true that lawyers have a duty zealously to pursue their clients' interests, this obligation is not without limit, as the *Professional Conduct Handbook* specifically acknowledges. Lawyers also have duties to the state, to the judiciary, to the bar, and to other lawyers, which must be balanced against their responsibilities toward their clients. With respect to the present case, it would not advance the public interest to allow new counsel in a matter to act so as to frustrate a lawful charge imposed for the benefit of former counsel. (at para. 43).

The Court of Appeal did not rule on whether the law firm was, in fact, entitled to a fee. That issue was directed by the Chambers judge to be decided before the Registrar. The Court of Appeal confined its ruling to whether the law firm was entitled to enforce the charge against the settlement proceeds.

XVIII. Liability

A. Demarinis v. Skowronek, 2012 BCSC 1281, Voith J.

The issue at summary trial was the determination of the dominant driver with the right of way at an intersection controlled by 4 stop signs but with unusual distances of the stopping lines for each sign. The unusual degree to which the defendant's stop sign was set back from the intersection allowed the defendant to leave his stop line well before the plaintiff left hers, and for the two vehicles to arrive at the "intersection" almost simultaneously.

The plaintiff argued that since both parties entered the intersection almost simultaneously, she had the right of way pursuant to s. 173(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "Act") as she was on the right. The plaintiff also relied on an ICBC publication "Road Sense for Drivers, British Columbia Driving Guide" that provided guidance for four way stops, which also gave the vehicle to the right the right of way.

The Court found the plaintiff 100% responsible for the accident, emphasizing the distinction between arriving at an intersection and stopping at the prevailing stop line. The Road Sense Guide was not helpful in this analysis. The Court held:

> [32] The pre-eminence which the plaintiff ascribes to the question of which vehicle arrives at an "intersection" first, would enable a party who had failed to properly stop at a stop sign and who by virtue of that failure arrived in an "intersection" in advance of another party to argue that they had the right-of-way. The plaintiff's analysis ignores the question of whether the plaintiff arrived at her stop sign first, whether she stopped fully, and whether she left that stop sign before the defendant left his stop sign. It, incorrectly, shifts the critical point in time away from what occurred at each parties' stop sign or stop line to the point in time a few seconds later when each party entered the "intersection".

B. Nerval v. Khehra, 2012 BCCA 436, per Harris JA (Finch CJBC and Garson JA, concurring)

The plaintiff appealed the 60% apportionment of fault attributed to her as the left turning driver. While she was making her left turn, she claims she could not have reasonably anticipated the defendant would speed through the intersection and swerve to the right around a stationary white van that was making a left turn in front of her.

The plaintiff argued that the trial judge was in error when he gave primacy to her obligation to yield under s. 174 of the *Motor Vehicle Act* over the obligation of the defendant under s. 158 to refrain from passing on the right in a single lane when it was unsafe to do so.

The Appellate Court followed the oft-cited case of Pacheco *(Guardian ad litem of) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (B.C.C.A.) in which the party making the left turn was found to have an absolute obligation. Thus, the trial judge correctly concluded that the plaintiff was the servient driver by virtue of s. 174. Section 174 casts a burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver. The Court also made these statements concerning the through driver:

> [38] Whether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard. Dominance identifies who must yield the right of way. One consequence of this analysis is that negligence on the part of a through driver does not disqualify that driver as the dominant driver. The through driver remains dominant, even though their conduct may be negligent. Indeed, the through driver's fault may be greater than the servient driver's fault. In other words, a through driver may be an

> immediate hazard even though that driver is speeding and given her speed would have to take sudden action to avoid the threat of a collision if the left turning driver did not yield the right of way. The correct analysis is to recognize that the through driver is breaching his or her common law and perhaps statutory obligations and to address the issue as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of her obligations.

C. Schneider v. DeMarco, 2012 BCSC 1875, Savage J.

Two of the plaintiffs were injured as passengers in a Dodge pickup that was involved in a collision at a controlled intersection with a tractor-trailer. Liability between the drivers of the motor vehicles was at issue as well as whether the plaintiffs were contributorily negligent for riding in the pickup when they knew the driver was impaired.

The driver of the Dodge pickup, DeMarco, pleaded guilty to impaired driving. The occupants of the Dodge pickup had been at a party at the plaintiff Schneider's home where they had been drinking alcohol and playing Guitar Hero. At about 4 am, the two plaintiffs and Demarco drove to Denny's for a meal. No alcohol was served by Denny's at that time.

A key issue was the determination of which vehicle entered the intersection against the red light. After hearing conflicting evidence from independent witnesses on the colour of the traffic lights and contrary opinions from expert witnesses, the judge determined the Dodge pickup driver entered the intersection on a green light at a very low rate of speed.

There was no evidence that DeMarco had the chance to avoid the collision as he entered the intersection on a green light and, therefore, the trial judge was unable to conclude that his impairment caused or contributed to the collision. On the basis of this finding, the plaintiffs' decision to ride with him when he was impaired did not cause or contribute to their injuries as the injuries were caused by the sole negligence of the driver of the semi-trailer.

No Negligence/Agony of Collision

D. Brook v. Tod Estate, 2012 BCSC 1947, Affleck J.

This trial concerned liability as between two defendants for a motor vehicle accident on the TransCanada Highway when a Toyota driven by the defendant Mr. Tod collided with an oncoming vehicle in which the plaintiff was a passenger. Mr. Tod was killed in the accident. It was alleged that the accident was caused by a third vehicle driven by the defendant Ms. Goodrick whose vehicle was not involved in the actual collision between vehicles. The parties alleged that Ms. Goodrick changed lanes abruptly into the path of Mr. Tod, causing him to swerve into the oncoming lane.

At trial, Mr. Justice Affleck found that the defendant Ms. Goodrick did encroach into Mr. Tod's lane as she planned to pass a camper in her slow lane. Ms. Goodrick's sudden intrusion into the fast lane caused Mr. Tod to take evasive actions. Ms. Goodrick argued that Mr. Tod was negligent in swerving into the oncoming lane to avoid her. She argued that he should have only applied his brakes so that his car would have fallen back behind hers. She argued that Mr. Tod ought to have weighed that the risk of contact with her vehicle would be acceptable in comparison to the risks that came from swerving to the left across the double solid line.

Affleck J. rejected these arguments, finding that Ms. Goodwin's sudden movement presented Mr. Tod with an agonizing choice with no time to make a considered decision. It was not realistic to expect Mr. Tod to make an instantaneous decision to accept a collision with Ms. Goodrick's vehicle, no matter how minor it might have been in retrospect. In the negligible time available to him, he could not have been expected to weigh that fine calculation. In addition, it was not available on the evidence to rule out that Mr. Tod braked and swerved.

Ms. Goodrick also advanced the argument that Mr. Tod had a higher standard of care imposed on him because Ms. Goodrick's car had an "N" on the back, indicating that she was a novice driver. While not definitively addressing the point, Affleck J. stated that he "doubted" that the presence of the "N" changes the standard of care of other drivers.

E. Chow-Hidasi v. Hidasi, 2013 BCCA 73 Reasons by Newbury JA (Hall JA concurring in the result; Garson JA dissenting)

This appeal concerned the dismissal of an action by summary judgment arising from a single vehicle accident in which the plaintiff was a passenger in a vehicle driven by her husband. The accident occurred when the defendant was proceeding up a gentle slope of the Coquihalla connector. He heard a clunking noise and suddenly felt that he could not steer or brake. Afraid of losing complete control, he applied his emergency brake, causing the Jeep to veer left. He disengaged the brake, the vehicle struck the median, turned, and traveled back across his lane where it abutted the right-side barrier and stopped.

The Chambers judge accepted the defendant's defence of explanation that the sudden loss of steering and braking ability was caused by an unexpected mechanical failure. The plaintiff's own engineering expert suggested that a "reasonable possibility" was a failure of the power assist mechanism.

The Court of Appeal confirmed that there is no presumption of negligence when a car loses control. Rather, the court may infer from the circumstances that the driver was negligent. The explanation required to rebut that inference will vary in accordance with the strength of the inference sought to be drawn by the plaintiff. Interestingly, Newbury JA held that she disagreed with some of the trial judge' inferences, noting "holes" in the evidence and the weight afforded to it. She concluded, however, "with some reluctance" that it could not be said that the conclusions of the Chambers judge were entirely unsupported by the evidence.

Similarly, the majority of the Court upheld the conclusion of the Chambers judge that the defendant's reaction to the emergency met the standard of reasonableness "bearing in mind the tolerance the law affords to what may be described as errors in judgment committed by a driver faced with an emergency situation." The plaintiff argued that the defendant should have "tried harder" to regain steering and braking (in view of the expert evidence that it was possible) or that he should have geared down the automatic transmission. The engineering evidence was that it was the engagement of the parking brake that caused the Jeep to veer out of control. The Chambers judge found that engaging the parking brake was not unreasonable in the emergent circumstances and that when he realized that this created a further danger, he released it immediately. The issue was not whether he took the best course of action, but whether he responded reasonably.

XIX. Life Insurance

A. Khosah v. Canada Life Assurance Company, 2013 BCCA 25, Low, Smith and MacKenzie JJ.A.

The issue on this appeal is whether the appellant's deceased husband obtained temporary insurance coverage from Canada Life while it processed his application for reinstatement of a term life insurance policy that had lapsed due to non-payment of premiums.

Canada Life denied the application for reinstatement of the life insurance policy but had not communicated that decision before Mr. Khosah died. His wife sued arguing that she was entitled to benefits under a policy of temporary life insurance. Canada Life successfully brought on a summary dismissal application. Ms. Khosah appealed on the ground that the trial judge erred in his identification and application of principles of contract law as it applied to contracts of insurance.

The appeal was dismissed. The trial judge had properly considered whether a new contract of temporary insurance had come into existence. The evidence did not support a finding that a reasonable person in the husband's position would have understood he had been offered a contract for temporary insurance. The finding was correct that a temporary insurance agreement was never requested, offered, accepted, paid for, completed or delivered.

XX. Offers to Settle

A. Gonzales v. Voskakis, 2013 BCSC 675, Fitzpatrick J.

In a personal injury action, the plaintiff recovered a modest award in damages but in an amount less than the defendant's formal offer to settle made one month before trial.

The key issue at trial was the cause of the plaintiff's right shoulder condition. The trial judge ultimately found that the plaintiff had not proven that the motor vehicle accident contributed to that injury.

Fitzpatrick J. held that the defendant's offer was one that ought reasonably to have been accepted because with all of the defendant's experts, she would have been quite aware that she faced the rather "daunting prospect" of challenging the expert report of Dr. Regan, "a renowned orthopaedic surgeon who specialized in shoulder injuries." The unanticipated pre-accident records of a GP produced during the trial revealed evidence of a pre-accident shoulder injury. However, since the plaintiff did not recollect the earlier incident and injury and it was unknown to the defendant, this was an irrelevant factor in her costs analysis.

The trial judge found that the defendant's representation by ICBC appointed counsel did not create any unfair advantage. She noted that:

> ... although ICBC is well-funded, its resources largely come from the premiums of many individual insurers, who expect that these funds will be managed for the benefit of the insurance system as a whole. As such, costs either against or in favour of the defence must reflect the decisions that are generally made in litigation-such as making an offer to settle-in light of the benefits and detriments that the underlying policy holders would have borne themselves. These policy holders should not be penalized *per se* simply because they have insurance. (at para. 39)

On the issue of other factors, Fitzpatrick J. rejected the plaintiff's argument that to deprive her of trial-related disbursements will negate her entire judgment and leave her significantly in debt. The trial judge held that while one might have great sympathy for such circumstances, the underlying "behaviour modification objective" of the Rule is to encourage settlement of claims where appropriate and not to encourage plaintiffs to "take a flyer" and litigate each and every claim in any circumstances, without any costs consequences.

In the end, Fitzpatrick J. awarded the plaintiff her costs up to the one-week mark following the defendant's offer to settle. The defendant was awarded his costs from that date to the end of the first 8 days of a 12 day trial. From the 9th day of trial onward, each party was to bear their own costs. This outcome was influenced by the fault she attributed to both parties for failing to obtain the important pre-accident clinical records. Additionally, had the defendant renewed its offer when the new records came to light, a settlement could have been achieved given the increased risk to the plaintiff in continuing to proceed.

As a final matter, Fitzpatrick J. weighed in on the analysis of Rule 9-1(5)(d) on whether an award of costs to a defendant includes disbursements. Rule 9-1(5) (a) specifically refers to "disbursements" whereas (d) does not.

The trial judge declined to follow the decision in *Moore v. Kyba*, 2012 BCSC 577 where Brown J. declined to award double disbursements on the basis that the wording of s. 5(b) did not include disbursements. However, Fitzpatrick J. cited various comments from the Court of Appeal supporting the proposition that "costs," properly interpreted, includes both fees and disbursements.

She noted that the "Costs options" heading in Rule 9-1(5) was clearly intended to guide the court in deciding what costs award is just. She did not view subcategory (d) as intending to limit the discretion of the court to award a defendant's disbursements in all cases when rewarding a defendant for making a reasonable offer. Since the driving force behind an offer to settle may be the desire to avoid having to pay disbursements, limiting the court's discretion would defeat the clear intention of the Rule. She urged clarification of the "awkward and confounding" language of the Rule by possible amendments.

B. Paskall v. Scheithauer, 2012 BCSC 1859, Smith J.

Paskall concerned a 19-day jury trial in which the jury found the defendant 80% liable but awarded damages that amounted to less than 10% of the defendant's last formal offer to settle. The plaintiff had claimed damages of over $2 million for a severe and permanent brain injury as well as acceleration of physical deterioration that might have occurred in the future due to her pre-existing cerebral palsy.

The jury awarded damages in the total amount of $82,400 which was reduced to a judgment of $65,920 after taking into account the 20% reduction for liability.

The defendant had made two formal offers to settle. The first was for $300,000 before the first trial date and the second was for $700,000 before the ultimate trial date.

On the issue of costs, Smith J. applied s. 3 of the *Negligence Act* and apportioned costs according to the division of liability. On the application of *Moses v. Kim*, 2009 BCCA 82, he found no cogent reasons to depart from the usual rule.

Smith J. declined to give effect to the defendant's offers to settle in the context of the "evidentiary vacuum" from the defence in which they were presented. A key issue was whether the offer ought reasonably to have been accepted. The trial judge held that the plaintiff must be able to consider the offer in relation to the evidence expected at trial and the apparent range of possible outcomes. In a personal injury case, that the exercise usually includes consideration of conflicting medical opinions, along with the possibility and likely consequences of the court preferring certain opinions over others.

In this case, the plaintiff had supportive opinions from a neuroradiologist, neuropsychologist, psychiatrist, otolaryngologist and two physiatrists. The defence experts on quantum issues consisted of only an occupational therapist dealing with the cost of future care and an economist. No medical opinions were tendered despite the plaintiff having attended two IMEs at the request of the defence.

Smith J. noted the distinction of the onus of proof at trial and the question of whether an offer ought reasonably to have been accepted. He held that the defendant is under no obligation to produce medical evidence and may rely entirely on cross-examination of the plaintiff and her experts to support an argument that the plaintiff has failed to prove damages at trial. However, in choosing to defend the case in that manner, the defendant also chose not to provide the plaintiff with evidence on which she could judge the reasonableness of the offers to settle. Smith J. concluded that with "the plaintiff's medical reports in hand, and the in the absence of contrary medical opinions, I do not see how reasonable counsel could have recommended acceptance of either of the defendant's offers or justified such a recommendation to the plaintiff." In the end, he awarded the plaintiff her costs as if the offers had not been made.

C. Menoto v. Phagura, 2013 BCSC 379, Smith J.

The plaintiff in this case was awarded damages in an amount $300 less than the defendants' formal offer to settle. Smith J. emphasized that in personal injury cases, a major consideration for the court at trial and for the parties considering settlement is the extent to which the plaintiff's evidence is supported or contradicted by medical evidence. The defendants produced no medical evidence. He held that even where the trial is before a judge alone where the range of damages is more predictable than when before a jury, the complete absence of medical opinion evidence from the defence makes it difficult for a plaintiff to assess the reasonableness of the offer. In this case, the plaintiff was a minor and the absence of defence medical evidence may have made it more difficult for plaintiff's counsel to persuade the PGT of the appropriateness of the settlement. The defence offer was not given any effect in the award of costs to the plaintiff.

D. Russell v. Parks, 2012 BCSC 1962, Abrioux J.

In this personal injury action, a liability split rendered the amount of the damage award less than payments the plaintiff had received under Part 7. In determining entitlement to costs, the court declined to treat the Part 7 payments as akin to a settlement offer or tort advance, concluding that it would be unreasonable for a plaintiff to decline statutory benefits before trial out of fear that he may have to pay the defendant's costs.

E. Varga v. Shin, 2012 BCSC 1643, Registrar Sainty

Costs were limited to the fixed fast track costs under Rule 15-1(15) where a matter was set for a five day trial, not designated a fast-track action, but was settled before trial for an amount less than $100,000.

F. Meghji v. Lee, 2012 BCSC 379, Johnston J.

At trial, the plaintiff was awarded damages in excess of her formal offer to settle. She successfully applied for double costs after the date of her offer. Of note, however, Johnston J. did not place any weight on the fact that one of the defendants was insured by ICBC and the other was the Ministry of Transportation and Highways. He relied on evidence before him that showed that the plaintiff was prosecuting the matter under a contingency fee agreement, his lawyer was funding disbursements and his lawyer was taking an active role in the plaintiff's medical management. Since counsel was providing significant financial support to the plaintiff it was unnecessary to delve into any respective disparities between the financial ability of plaintiff's counsel and either defendant.

G. Tripp v. Ur, 2013 BCSC 785, Savage J.

The plaintiff's medical malpractice action was dismissed after a summary trial. The defendants had made a formal offer to settle and sought double costs. In declining to make that award, Savage J. noted that the offer was a nuisance value offer made after the defendants delivered their expert reports. The plaintiff thereafter proceeded unrepresented and without an expert opinion on standard of care. He stated that physicians and hospitals are "formidable adversaries" in proceedings such as these and there was an imbalance of resources between them. The defendants were awarded ordinary costs following the event.

H. Wepryk v. Juraschka, 2013 BCSC 804, Ercke J.

The plaintiff recovered damages at trial which amounted to $131.95 less that the defendant's formal offer to settle after s. 83 deductions for Part 7 benefits. Ercke J. awarded the plaintiff her full ordinary costs and disbursements following the event without deduction or set off on account of the defendants' offer to settle. He found that there is no mathematical certainty to an assessment of damages and there was uncertainty here about the amount that might be subsequently deducted for future benefits.

The amount awarded was slightly less than the offer but it might just as easily been slightly more. In the circumstances, he declined to punish the plaintiff by depriving her of costs or awarding the defendant costs.

I. Jampolsky v. Shattler, 2013 BCSC 373, Harvey J.

The plaintiff was awarded $15,000 in damages following a 15 day trial of four actions heard at the same time. Harvey J. found against the existence of a MTBI and determined his proven injuries were mild to moderate soft tissue injuries. He further found that Rule 9-1 places no restrictions on the court's discretion in relation to global settlement offers and determined that he was entitled to consider the defendants' $125,000 global offer to settle all four actions.

Harvey J. concluded the offer ought to have been accepted under Rule 9-1(5)(a). However, he declined to award the defendant costs from the date of the offer, taking into account "other factors" under (5)(d), and in particular:

- the defence conduct in applying at the start of trial to withdraw three admissions of liability, relying on evidence from defence counsel, rather than the instructing adjuster, that fell below the standard of what the court is entitled to expect in matters where counsel elects to give evidence; and
- the trial judge's finding that the defence expert, Dr. Rees, failed in several instances to appreciate the neutrality required of an expert witness and gave evidence in fields far outside the scope of his expertise. In cross-examination, he admitted that he was "guessing" about matters requiring scientific certainty. He held:

> The degree to which the evidence of Dr. Rees crossed the boundary from expert opinion into advocacy is a matter which rests at the feet of the defendants. He was their witness and the defendants assume responsibility for his conduct. (at para. 73).

In the result, the plaintiff was entitled to his costs up to the date of the formal offer but not thereafter. The defendants received no costs.

J. Ward v. Klaus, 2012 BCSC 99, Goepel J.

In this decision, the Court provides a summary of the development of Rule 9-1(5) and the broad discretion it confers on trial judges to award or deny costs. Although this case did not involve a nominal offer, he specifically noted that in certain circumstances, a nominal offer may be reasonable and to completely discount nominal offers as a general rule is counter to the guiding principles set out by the Court of Appeal in *Hartshorne v. Hartshorne*, 2011 BCCA 29.

The defendant in this case made a significant offer of settlement which was more than generous and well in excess of what was awarded at trial. However, on the evidence before trial, the plaintiff assessed her past and future wage loss as markedly higher than what was awarded. A relatively modest increase in the trial judge's award would have enabled the plaintiff to best the defendant's offers. Accordingly, he did not conclude the offer ought to have been accepted.

In the result, he found that to deprive the plaintiff of her costs and pay the defendant's costs was too great a penalty. The plaintiff was awarded costs up to the date of the first offer to settle with each party bearing their own costs thereafter.

K. Bevacqua v. Yaworski, 2013 BCSC 29, Curtis J.

The defendant was awarded costs, but not double costs, for delivery of a reasonable offer to settle presented in sufficient time to be properly assessed (8 months before trial). Curtis J. held that in this case, the plaintiff and her counsel were of the opinion that it was worth taking the chance that she

would do better than the offer at trial. However, he held that she and her counsel should have engaged in a rigorous analysis of the evidence for the claim for costs of future care at the time the offer was open which would have lead to the conclusion that the offer ought to be accepted.

L. Thompkins v. Bruce, 2012 BCSC 833, Curtis J.

The plaintiff in this case suffered serious injuries and was awarded $980,721 in damages. The defendant made an offer to settle before trial of $950,000 "new money" in addition to advances and benefits paid or payable under s. 83 for a total offer of just over $1.1 million. Curtis J. held that although the purpose of reasonable offers to settle is to encourage settlement, onerous cost penalties should not discourage the seriously injured from a proper hearing and a chance to obtain a higher award. Nor should penalties seriously subtract from what the court has found is appropriate compensation for the injury. The interests of justice were best served in that case by awarding the plaintiff her costs up to the date of the offer with each party to bear their own costs thereafter.

M. Burnett v. Moir, 2012 BCSC 1286, Cullen ACJ.

The plaintiff sued multiple parties for assault and battery which occurred at a bar. He settled with the corporate defendant before trial for a significant sum and proceeded to trial against the Delta police. The Delta defendants made formal offer to settle in which they would forego any entitlement to costs in exchange for a dismissal of the action. The Delta defendants sought double costs after the claim was dismissed.

In denying the claim for double costs, Cullen ACJ noted that this was not a case where a plaintiff stubbornly pursued a claim of very doubtful merit, finding that:

> [t]he line between the dogged pursuit of a very dubious claim and the determined exploration of a legitimate but ultimately unsuccessful theory of liability is not always clear-cut. The Court, however, must be careful not to too readily assume the former in making costs awards which would deter the latter. In this case, while clearly the plaintiff faced the prospect of failure, I am not prepared to conclude that the merit of his claim was such that it should factor into a consideration of double costs. (at para. 53).

N. Byer v. Mills, 2012 BCSC 777, Harris J.

The parties settled on quantum of damages before the liability trial in the amount of $120,000. The defendant made a formal offer to settle for $5,000. The plaintiff's claim was dismissed following the trial on liability. The key issue was the identity of the driver, whom the trial judge ultimately found to be the plaintiff. The plaintiff's prospects of success at trial were difficult to assess as the plaintiff had no memory of the accident, there were no eyewitnesses, the evidence about who was driving was circumstantial, expert evidence was tendered on both sides, and the plaintiff was acquitted of driving offences arising from the accident. The case was not a "long shot" and the offer ought to have been more substantial to serve the purposes of the Rule to promote settlement.

O. Cyr v. Blaine et al, 2012 BCSC 1106, Saunders J.

The plaintiff's damage award after a liability trial in a Fast Track proceeding exceeded her formal offer to settle. The offer made no explicit reference to Rule 15-1 but to costs "in accordance with the Rules." Saunders J. held that Rule 15-1(15) sets mandatory limits on costs which apply regardless of whether the Rule is specifically referred to in the offer.

XXI. Part 7 Benefits

Deducting Part 7 benefits

A. Wepryk v. Juraschka, 2012 BCSC 1584, per Ehrcke J.

The plaintiff was awarded damages as a result of a motor vehicle accident which included amounts of $2,937 for special damages and $1,000 for cost of future care. After trial, the defendant applied for an order reducing the damages on account of deductions to be made pursuant to s. 83 of the *Insurance (Vehicle) Act*. The defendant sought to deduct $835.55 from the award for special damages being the costs of physiotherapy treatments, parking and mileage. They sought to deduct $1,000 being the cost of future care award which was made to permit the plaintiff to hire a personal trainer.

The defendant's position was that $835.55 in special damages was properly deductible pursuant to s. 88.1 and that the $1,000 award for cost of future care should be deducted since it was either a medically necessary and reasonable service covered by s. 88(1) or a discretionary benefit payable under s. 88(2)(e).

The Court cited *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) (C.A.) for the Court of Appeals' statement that judges should be "cautious in their approach" to deductions since the deduction lessons the award in the tort action. The court further cited *Ayles v. Talastasi*, 2000 BCCA 87 which noted that where the future expense is mandatory, the plaintiff does not stand to lose anything, but that "It is only in circumstances where the classification of the future cost is unclear or an issue arises whether the item is covered by Part 7 at all, that some caution is required."

Justice Ehrcke agreed that $835.55 in special damages was properly deductible. However, he did not agree that the future care award for a personal trainer was covered under s. 88(1) of the Act. He noted that whether the plaintiff chooses to hire a personal trainer or not is her choice and the award is "nevertheless payable to her" citing *Thompkins v. Bruce*, 2012 BCSC 833 at para. 8. Despite an affidavit of the Part 7 adjuster stating that she would, in her discretion, "provide funds for an 'active rehabilitation program,'" Ehrcke J. was not satisfied the $1,000 was likely to be paid by ICBC to the plaintiff. On that basis he declined to deduct the cost of future care award.

B. Russell v. Parks, 2012 BCSC 1962, per Abrioux J.

The plaintiff claimed damages for personal injury as a result of a motor vehicle accident. The plaintiff was awarded damages of $85,000; however, the trial judge found that the plaintiff was two thirds liable for the accident. Therefore, the award against the defendant was $28,305. Prior to trial, the plaintiff received Part 7 benefits in the amount of $28,695.51 (i.e., $390.51 more than the amount owed to the plaintiff).

The defendant's position was that pursuant to s. 83 of the *Insurance (Vehicle) Act*, the plaintiff's action should be dismissed since there was no outstanding amount owing to him. The plaintiff argued that the amount awarded to him was exclusive of costs, and when costs are taken into account his award will exceed $28,695.51.

"There is no requirement for any deductions to match certain specific heads of damages": *Gurnial v. Nordquist*, 2003 SCC 59. The Ccourt further relied upon *McElroy v. Embleton* (1969), 19 B.C.L.R. (3d) 1 (C.A.) in which a plaintiff was awarded $17,000 but had previously been paid $24,000. Southin J.A. held "when there is nothing to be recovered, an action ought to be dismissed."

The plaintiff's claim was dismissed.

C. Li v. Newson, 2013 BCSC 675, per Abrioux J.

In this case, the court was asked to determine what items of the plaintiff's cost of future care award were properly deductible pursuant to s. 25 of the *Insurance Vehicle Act* (now s. 83).

While the defendant submitted that most of the items reflected in the cost of future care award would be covered by Part 7, and therefore deductible, the plaintiff argued that most or all of the costs would be covered by his or his wife's extended health plan and therefore only a nominal amount should be deducted from his cost of future care.

A complicating factor was the fact that the plaintiff did not lead evidence at trial as to the potential costs and duration of the various items recommended by the experts. Also, the plaintiff had not accessed much treatment prior to the trial through either Part 7 benefits or his extended health plan.

The Court held that there were significant limitations inherent in the plaintiff's extended health plans that make them unsuitable for the rehabilitative process. As there are limits to the plaintiff's extended health benefits, those plans may not adequately respond to the plaintiff's rehabilitative needs. The Court said:

> This conclusion, in combination with the fact that Dr. Caillier and Dr. Kan's recommendations will be covered under Part 7 to the extent they are not covered by the EHP plans ... makes it appropriate to make more than a nominal deduction from Mr. Li's cost of future care award [at para 40].

The Court reduced the award for cost of future care by 25%.

D. Paskall v. Scheithauer, 2012 BCSC 1859, Smith J.

Paskall concerned a 19-day jury trial in which the jury found the defendant 80% liable and awarded her damages of $82,400 which amounted to a judgment of $65,920 after taking into account the 20% reduction for liability.

The defendant argued entitlement under s. 83(2) of the *Insurance Motor Vehicle Act* to deduct $37,104.20 for future rehabilitation benefits. That deduction, along with the $20,000 advance, would have reduced the plaintiff's net award to $7,914.90.

The deductions sought by the defendant were based on figures for the future cost of replacement hearing aids, physiotherapy and occupational therapy which were contained in the defendant's cost of future care expert report. After reviewing the governing principles set out in *Li v. Newson*, 2012 BCSC 675, Smith J. rejected the defendant's claim for deductions, finding insufficient evidence in the material before to the Court to meet the onus of proving the plaintiff's entitlement. In particular:

- the ICBC claims examiner deposed in his affidavit that he "expected" that ICBC would continue to re-imburse the plaintiff for reasonably incurred hearing aid expenses. Smith J. rejected this as an unequivocal statement of entitlement to the future benefit. He found it to be no more than an opinion about what his employer (ICBC) will do in the future. There was no evidence that he had the authority to make that decision and no explanation of the basis upon which he "feels able to express an opinion on what the corporation will do for the remainder of the plaintiff's life." Smith J. also noted that s. 88(2) requires an opinion from the corporation's medical advisor in order for ICBC to consider discretionary benefits and that no such opinion was before the court. There was no express endorsement of the defendant's occupational therapist as a "medical advisor" for the purpose of s. 88.
- on the issue of physiotherapy and occupational therapy, Smith J. noted that while they were mandatory benefits under s. 88(1), their necessity had to be the result of an injury sustained in the accident. Section 96 of the Regulations states that ICBC is not liable

> to pay benefits if the expenses were arose from an unrelated illness. Smith J. concluded that the Regulations would allow ICBC to refuse to pay these expenses on the basis that their need arose from her pre-existing cerebral palsy, a position consistent with what the defendant had argued at trial. There was no evidence that ICBC disavowed that position taken at trial in its S. 83 argument.

Summary trial too complex

E. Young v. ICBC, 2012 BCSC 1421, per Bowden J.

By way of a summary trial, the plaintiff sough a declaration that he was entitled to benefits pursuant to Part 7 of the *Insurance (Motor Vehicle) Act* and the Regulations thereto. The defendant paid $13,564.64 in Part 7 benefits, but stopped payments pending a determination of the plaintiff's entitlement to such benefits. The defendant took the position that the issues were too complex to be resolved on a summary trial and that the plaintiff's injuries were not caused by the accident.

Prior to the accident the plaintiff had suffered from back pain and as a result he had back surgery two years prior to the accident. He alleged that following the subject motor vehicle accident he experienced increased pain and new symptoms in his neck and back. The plaintiff was the owner and chief employee of Bar Smart The Performance Bartending Company Inc. where he performed and taught 'flair bartending.' The plaintiff had two further surgeries on his back, at the same site as his pre-accident surgery.

The plaintiff's affidavit evidence was that prior to the accident he was in good health and did not suffer from any limitations at work, recreationally, or in his home life. That evidence was contradicted by various expert reports. Psychological evidence indicated a chronic pain disorder, although not the cause of the disorder, as well as pre-accident personality disorders that placed the plaintiff at a high risk for further deterioration of emotional and physical well being

Bowden J. drew a comparison to *Toukaeva v. ICBC*, 2006 BCSC 1140 and held that as in *Toukaeva*, the plaintiff's condition was very complex, complicated by his pre-accident condition, and there were contradictory expert opinions which raised questions regarding the plaintiff's entitlement to Part 7 benefits. The claim was not suitable for summary trial.

XXII. Practice and Procedure

A. Wallman v. Gill, 2013 BCCA 110, Neilson JA

This was an application for directions as to whether leave is required to appeal an order striking a jury notice, made under Rule 12-6(5) of the Supreme Court Civil Rules. Leave is not required as an order arising from that Rule is not prescribed as a limited appeal order under Rule 2.1 of the Court of Appeal Rules.

Madam Justice Neilson commented on the limits of the trial management process as a procedure for determining the appropriate mode of trial as follows:

> [23] By analogy, although the application to strike the jury in this case was heard by the judge who had been appointed to manage the action, he did not hear it in the course of a trial management conference under R. 12-2(9), but in regular chambers under R. 12-6(5). Indeed, he could not have heard it at a case management conference since it is evident the parties filed affidavits on the application, and this would not have been permitted under R. 12-2(11)(a). Thus, the order striking the jury is not a limited appeal order.

> [24] I would be sympathetic to the plaintiff's argument that the Legislature did not intend to create a "two-tier" system for appealing orders directing the mode of trial if I were satisfied that was the practical effect of this ruling. However, I am not convinced that this is the case. This argument fails to recognize the unique role of the case management conference. It is held late in the proceeding, when the trial is sufficiently imminent that the parties have been able to prepare a comprehensive trial brief, and meet in person with the judge to make informed decisions about how the trial will proceed. In this limited context, R. 12-2(9)(b) permits a trial management judge to decide whether the trial should be heard with or without a jury, either on application by one of the parties or on his or her own initiative, and without affidavit evidence. I venture the view that this power will be exercised rarely. If the parties have been unable to agree on the mode of trial, it seems most unlikely they would leave this to be determined late in the day at a case management conference, without the benefit of affidavit evidence. It is reasonable to assume that, instead, there will have been an earlier application under R. 12-6(5) to determine this issue. Further, it seems unlikely a trial management judge would then consider revisiting an earlier order dealing with mode of trial, or if no earlier application had been brought, alter the mode of trial in a summary way late in the day.

B. Landis v. Witmar Holdings Ltd., 2012 BCSC 762, Punnett J.

The claimant unilaterally set down a trial management conference and the respondent sought to be relieved of the requirement to attend arguing it was a nullity because no notice of trial had been issued.

A trial management conference cannot be set down until a trial date has been fixed and the notice of trial issued. Rule 12-2(1) provides that the conference is to take place before the scheduled trial date. Without a trial date, a judge is unable to address the issues referred to in Rule 12-29(9), nor would counsel be in a position to comply with the requirements of Rule 12-2(3) respecting the filing of trial briefs.

The trial management conference was struck.

C. Moll v. Parmar, 2012 BCSC 1372, Abrioux J.

Although a loss of interdependency claim is "closely connected" to a loss of earning capacity, it is nonetheless a separate head of damage and it should be specifically pled and accompanied, pursuant to Rule 3-1(2)(a), by a concise statement of the material facts giving rise to the claim.

D. Narain v. Gill, 2012 BCSC 1468, Meiklem J.

This case stands for the proposition that the mere filing of a Notice of Fast Track does not turn any action into a fast track action.

At a four day trial of a motor vehicle personal injury claim, plaintiff sought damages of $282,200 and ICBC, as third party, submitted $60,400 would be appropriate. The plaintiff recovered damages under all heads sought, but only to a total of $116,700. The third party had filed a notice of fast track at an early date, but no subsequent documents containing the "Subject to Rule 15-1" notation mandated by R. 15-1(2)(b), and the parties' conduct indicated that the third party counsel had tacitly agreed with plaintiff's counsel that R. 15-1 should not apply. The Court declined to treat the action as fast track in awarding costs.

The Court commented that it hopes, in the future that counsel will clarify opposing counsel's intention where there is doubt regarding whether a matter is proceeding under fast track and, if necessary, seek an appropriate Order.

E. Singh v. McHatten, 2012 BCCA 286, per Donaldson JA (Ryan and Neilson, JJ.A. concurring)

The plaintiff brought two separate actions for claims arising from a single motor vehicle accident; the first in Small Claims Court and the second in Supreme Court.

In the Small Claims action, the plaintiff named the other driver and owner to dispute ICBC's determination that he was 100% at fault for the accident. Damages involved the payment by ICBC of his deductible and an adjustment by ICBC to his insurance premiums in accordance with the correct assessment of fault. No damages for personal injuries were sought. Judgment was granted in favour of the plaintiff.

The plaintiff commenced an action in Supreme Court against the same defendants for personal injury damages. In that forum, the defendants pleaded *res judicata* and moved to dismiss the action on the basis that the matter of personal injury damages ought to have been raised and dealt with in the earlier proceeding. The application was dismissed but overturned on appeal on the basis that the causes of action in both proceedings were the same: damages for negligence. The Court held that in order for the plaintiff to reverse ICBC's fault determination and recover the deductible the plaintiff was required to sue the driver and owner and prove all the elements of negligence: duty of care, standard of care, causation and loss. The same process would be repeated in the Supreme Court action to recover personal injury damages. Therefore, the matter was *res judicata*.

The case was distinguishable from the circumstances of *Innes v. Bui*, 2010 BCCA 322 where the Court of Appeal held that the *res judicata* doctrine did not apply where the action was intended to be against ICBC for breach of contract or statutory duty (and not tort) to determine if ICBC acted properly in administratively assigning liability to the plaintiff.

F. Spiering v. Trevor, 2012 BCSC 1653, Hyslop J.

This case provides a comprehensive summary of the law on severance of issues and suitability for summary trials in the context of motor vehicle accident litigation. The plaintiffs applied for a summary trial on the issue of liability for a motor vehicle accident. The defendants had filed a Notice of Trial by Jury in the proceedings. At issue was whether the plaintiffs met the onus to sever liability from the quantum issues in the context of the Rule 1-3 promoting proportionality and a just, speedy and inexpensive determination of the proceeding.

Madam Justice Hyslop reviewed the principles of severance and whether the case is fit for summary trial as set out in *Element v. DelMar*, 2012 BCSC 868 at para. 98:

> Splitting of the issues of liability and damages should be governed by the following principles:
>
> a) The court should lean against splitting issues of liability and damages where issues of general credibility arise.
>
> b) A judge's discretion to sever an issue is restricted to "extraordinary, exceptional or compelling reasons, and not merely that it would be just and convenient to order severance..." (*Bramwell v. Greater Vancouver Transportation Authority*, 2008 BCSC 1180). A genuine likelihood of significant savings in time and expense may constitute a "compelling reason" to order severance.
>
> c) Only after a determination is made pursuant to Rule 12-5(67) for severance is the assessment made respecting whether the discrete issue is fit for summary trial using the factors set out by Macaulay J. in *Marine Masters Holdings Ltd. v. Greater Victoria Harbour Authority*, 2009 BCSC 953 taken, in part, from *Dahl v. Royal Bank*, 2006 BCCA 369). Those factors are articulated in para. 5 of Macaulay J.'s judgment as follows:

- the amount involved;
- the complexity of the matter;
- the cost of a conventional trial in relation to the amount involved;
- the course of the proceedings;
- the time required for summary trial; and
- whether the application will really save time and complexity.

> d) The practice of litigating in slices should generally be avoided. Only when piecemeal litigation will result in a just, speedy and inexpensive procedure should it be pursued.

The accident in this case occurred when the defendant rounded a curve in the highway over the posted speed limited, and steered her vehicle onto a rocky shoulder of the road. Upon easing her vehicle back onto the road, her vehicle fishtailed across her lane and into the plaintiffs' oncoming lane, striking the plaintiff's vehicle. There were no independent witnesses. It appears that the denial of liability was based to some degree on policy limits, a factor Hyslop J. did not take into account in her decision.

Hyslop J. allowed severance on the basis that on the evidence before her, the parties agreed how the accident occurred and on those agreed facts, there was no defence for the defendant. The defendant apparently agreed that there was nothing the plaintiff driver could do to avoid the collision.

As to its suitability for a summary trial, Hyslop J. quoted extensively from the Affidavits of the plaintiffs and discovery evidence of the defendant which revealed clear evidence upon which findings of fact could be made without any credibility issues.

G. Dazham v. Nachar, 2012 BCSC 1389, Master Baker

This case may reflect the court becoming more receptive to applications to sever the issues of liability and quantum.

The plaintiff brought on an application to adjourn the trial on the grounds that the medical issues regarding his injuries were not resolved; notwithstanding that it had been three years since the accident. The trial was adjourned but the Court decided to hear the liability aspect of the claim. Master Baker acknowledged that, generally, the court prefers not to sever the issues of liability and quantum, particularly where there are credibility issues. However, he found that because liability was very much in issue, there was a lay witness and it was in everyone's interest that liability be resolved first relying on Chief Justice Finch's comments in *Radke v. M.S.*, 2006 BCCA 12:

> If the plaintiff's injuries have not resolved to the point where damages can fairly be tried, the parties may still try the liability issues while the events are fresh in the witnesses' memories.

H. Lutter v. Smithson, 2013 BCSC 119, Macaulay J.

This case concerned liability arising from a motor vehicle accident involving a driver who became intoxicated at a birthday party at the home of his friend and her parents. The action involved multiple defendants. A summary trial application was brought by the defendant homeowners for an order dismissing the claims against them.

In refusing the application, Macaulay J. held that the court should be cautious in deciding a discrete issue in the litigation because of the allegations of negligence against multiple parties, including the plaintiff. He observed that depending on the circumstances at the end of trial, the court may have to consider the degree to which the fault of a non-party caused damaged. That raised the spectre that a finding now by summary trial that the homeowners were not liable may embarrass the trial judge if she or he is required to assess individual fault. Further, Macaulay J. held that that problem would be exacerbated if he were to conclude on the summary trial application that the homeowners owed a

duty of care which they breached. The additional evidence before the trial judge might support a different conclusion.

In addition, the Chambers judge held that the novel question of liability arising out of the consumption of alcohol by a minor at a party hosted on a defendant's property is best addressed after a full trial. That approach ensures the most complete record possible.

XXIII. Punitive and Aggravated Damages

There are a number of judgments of significance addressing extra-contractual damages in insurance claims. There are two judgments, in particular, sending serious shock waves through the insurance industry because of size of the awards. Both came down in March 2013, days apart; the first from Saskatchewan and the second from Ontario. It is anticipated that both will be appealed so time will tell as to whether these authorities represent a substantial shift in the amounts awarded for aggravated and punitive damages.

A. Branco v. American Home Assurance, 2013 SKQB 98, Acton J.

This case sets the new high-water mark. In this disability insurance action, two insurers were ordered to pay $4.5-million in punitive damages and $450,000 in aggravated damages.

The plaintiff suffered a work place injury to his foot while working at a mine in Kyrgyzstan for a Saskatchewan mining company, Kumtor Operating Company ("Kumtor"). The plaintiff, originally from Portugal, had immigrated to Canada in 1962 at the age of 24. He became a welder and worked throughout western Canada and the North until he, with his family, returned to live in Portugal in 1994. Thereafter he worked in the mining industry in Kyrgyzstan and had been employed by Kumtor since 1997. He was an excellent employee with a perfect attendance record and no WCB Claims.

On December 25, 1999 he was injured when he dropped a steel plate on his foot. He was able to continue to work his shift and to the end of his 28 day rotation and then went home to Portugal to recuperate. He reinjured his foot near the end of his next 28 day work rotation but was able to complete the rotation. He returned to Portugal, missed his next rotation and on the subsequent work rotation immediately attended Kumtor's doctor instead of heading to the mine. Kumtor paid his salary to the end of his contract, being March 31, 2001.

After returning home, it was determined that his cumulative injury was very serious and that he would not be able to return to work.

He sought the equivalent of WCB claims from the defendant, American Home Assurance Company ("AIG") and, initially, AIG paid. They required Mr. Branco to be assessed by their appointed physician. The AIG doctor determined that surgery was necessary. Surgery was performed but unsuccessful and AIG's doctor accepted that the plaintiff was permanently disabled from working.

AIG first suspended payment of benefits in May 2001 because their doctor failed to give them information in a timely way (even though this doctor had determined that the plaintiff was permanently disabled). AIG made a cash settlement offer of $22,500 to the plaintiff on the same day that it received confirmation from the plaintiff's doctor that he was permanently disabled. The AIG adjuster noted the plaintiff's refusal of offer and her advice that she "hoped he re-considers because he lives in Portugal and he will have to go back to Canada to get an attorney and this whole process is going to take years to settle."

AIG then asked the plaintiff to travel to Saskatchewan for further medical assessments; he complied twice for examinations with three different specialists (a year apart). The examinations confirmed his disability. AIG continued to deny benefits.

In April 2003, almost a year after the Saskatchewan examinations, AIG paid some back benefits and started paying monthly benefits.

The plaintiff engaged in physiotherapy and none of the AIG specialists provided any rehabilitation options to the plaintiff. AIG, on its own initiative, found a rehabilitation facility in Lisbon and insisted that Mr. Branco attend. Mr. Branco travelled the three hours to the appointment and was told that he was not an appropriate candidate (he was too old). AIG wanted him to be retrained as a gardener; an unsuitable occupation since he could not work on uneven ground.

AIG then advised Mr. Branco that his benefits would be terminated if he did not take the Lisbon offer or find other vocational retraining. AIG was informed by Mr. Branco's counsel that Saskatchewan WCB would not consider Mr. Branco for vocational rehab because of his age and the severity of his injury and that they would deem it appropriate to pay full monthly wage loss until age 65 (i.e., if Mr. Branco had been entitled to WCB benefits). AIG ignored this information and deemed the plaintiff as refusing to take rehabilitation and terminated benefits in 2004. No further payments were made until August of 2012, just days before the start of trial (and based on a miscalculation).

Zurich Life Insurance ("Zurich") was to provide long term disability benefits commencing two years after the start of disability. Kumtor had failed to submit claim forms to Zurich, as it was obliged to do on behalf of the plaintiff. The plaintiff commenced an action. Initially Zurich was incorrectly named. Instead of providing claim forms to the plaintiff, Zurich brought an application to strike the claim. That application was unsuccessful. Ultimately, Zurich sent the appropriate claim forms and agreed that the plaintiff was disabled for the first 24 months, during the "own occupation" definition period. Despite this, Zurich refused to pay benefits. Nine years after the first benefit was payable, Zurich sent a cheque to Mr. Branco in the sum of $321,366.50 plus interest and thereafter made benefit payments with the exception of two months (August and September 2010) without explanation.

The plaintiff was without funds for many years. His family survived on loans from family, in-laws, and their daughter. The lack of income caused severe mental stress disabling him further and caused him to become ashamed. His marriage broke down for a period of time and he was forced to live with his parents. His daughter had to buy his clothes and he could not buy his daughter a wedding present. The daughter had to refinance her home at one point to finance the lawsuit. When she was no longer able to do so, the plaintiff's lawyers agreed to postpone further payments until final judgment. The plaintiff's life was virtually destroyed for 13 years.

The Court found that both the workers' compensation coverage provided by AIG and the long term disability insurance provided by Zurich were "peace of mind" contracts for which aggravated damages were permissible. Aggravated damages were awarded against AIG in the amount of $150,000 and Zurich in the amount of $300,000. The judgment clearly considered the conduct of the defendants as a factor in the amount of the damages.

The Court found that the failure to make payments in a prompt and reasonable manner was a breach of duty of good faith and dealing. In assessing the quantum of damages, the Court looked at past bad faith awards and found that they had been insufficient to catch the insurance industry's collective attention. In fact, a bad faith award had been made against AIG for the exact same reasons in 2003, in a claim involving the same adjuster for responsible for decision making on Mr. Branco's claim. The Court found the $60,000 award in that case had done nothing to deter AIG and its adjuster.

The Court also referenced the Supreme Court in *Whiten v. Pilot Insurance Co*., 2002 SCC 18, which involved a $1,000,000 punitive award. The Court identified the factors which warranted a significant award to be the level of blameworthiness including: whether the misconduct was planned and deliberate; the intent and motive of the defendant; whether the defendant persisted in outrageous conduct over a lengthy period of time; whether the defendant concealed or attempted to cover up its misconduct; the defendant's awareness of what he or she was doing was wrong; whether the defendant profited from its misconduct; and, whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or a thing that was irreplaceable.

After considering the defendants' conduct in respect of each of the factors, the Court awarded punitive damages against AIG of $1,500,000 and against Zurich of $3,000,000.

In determining the appropriate amount the Court said:

> [214] The cruel and malicious acts of AIG and Zurich combined with the previously ignored award of punitive damage against AIG is evidence of how calculated and abhorrent the actions of AIG were in dealing with Branco. The actions of AIG and Zurich established a pattern of abuse of an individual suffering from financial and emotional vulnerability.
>
> [215] Although Canadian court[s] may have believed that the $1 million award in the *Whiten* case would catch the attention of the insurance industry and the court's disapproval of such actions, it is apparent that the $1 million was not sufficient. These decisions were rendered during the same period that AIG and Zurich were continuing their pattern of aggressive non-activity on the claim of Branco.
>
> [216] The court is cognizant of the fact that a punitive damages award of $3 million may not be particularly significant to the financial bottom line of a successful worldwide insurance company. It is hoped that this award will gain the attention of the insurance industry. The industry must recognize the destruction and devastation that their actions cause in failing to honour their contractual policy commitments to the individuals insured.
>
> [217] Both AIG and Zurich failed to deal with Branco's claim in good faith. Each tried to take advantage of Branco's economic vulnerability to gain leverage in negotiating a settlement. The fact that Branco was able to continue to withstand this pressure for so many years from two different fronts is truly remarkable and almost superhuman, even though his resistance may have resulted in irreparable mental distress which may last for the remainder of his lifetime.
>
> [218] The court has grave concerns as to how often this type of action occurs in dealing with insurance claims. The court is only cognizant of the cases such as *Sarchuk*, *Whiten* and *Branco* which come before them. If Whiten (in the *Whiten* case) and Branco, in this case, had not been able to withstand the unbelievable pressure to settle on the terms and conditions originally offered these cases would not have received the attention of the courts either. The question remains: how many individuals have been unable to withstand the financial and psychological pressure of these tactics?

The award of aggravated damages is particularly vulnerable on appeal since such damages are supposed to be compensatory and not punitive in nature. The $450,000 is far above the usually modest nature of "mental distress" damages exemplified by the $20,000 awarded by the Supreme Court of Canada in *Fidler v. Sun Life Assurance*.

B. Fernandes v. Penncorp Life Insurance Co., 2013 ONSC 1637, Hambly J.

In this case, the Ontario Superior Court of Justice awarded aggravated damages of $100,000 and punitive damages of $200,000.

The plaintiff was a bricklayer, "a proud self-reliant man who had always worked to the fullest extent possible" who had been denied disability benefits for six years. He owned his own company, which had been profitable and employed others.

He suffered injury when he fell from about eight feet of scaffolding. He was badly hurt and could not return to work. His business ceased to operate.

The insurer paid disability benefits for the first two years accepting that the plaintiff was totally disabled from his own occupation as a brick layer. Penncorp made its decision to stop paying benefits

after two years on the grounds that the plaintiff was capable of doing other work. In coming to that decision, Penncorp primarily relied upon 140.5 hours of surveillance conducted on 19 days over the period August 2005 and February 2010. The surveillance showed the plaintiff working for short periods of time at light work. He was seen: lifting a wheelbarrow and a wooden skid in and out of a truck; shoveling earth in and out of a wheelbarrow; leveling soil with a rake; carrying tool, boxes, panes of glass and bed frames; shoveling cement mix out of a wheelbarrow; caulking and painting a window frame; taking a ride on a gyroscope at a mall after doing maintenance work and doing more maintenance work after the ride; and, working for short periods over four consecutive days. The plaintiff was never observed doing anything like the heavy demands of bricklaying. During the trial, the plaintiff testified that he was in pain while he did the work and that he suffered afterwards.

In respect of the surveillance video, Justice Hambly adopted the following comments from *Lalonde v. London Life*:

> The difficulty with video surveillance is that it is incapable of recording the period of time when Lalonde was out of sight recuperating, and the days when he was unable to leave his residence. As he testified, he has good days, bad days and horrible days. The videotape evidence shows portions of 17 days of a four-year period since May 14, 1997.

In awarding punitive and aggravated damages, Justice Hambly, wrote:

> Aggravated Damages
>
> [63] Avelino chose not to pay into Workers' Compensation or to Employment Insurance. Instead he purchased disability insurance from Penncorp. He did so to give himself peace of mind that if he was unable to work as result of his being injured he would receive a monthly income of $3,000 per month. Penncorp did not pay him for six years from August 2005 until September 2011 for his inability to work at his occupation of bricklaying. They finally conceded in September 2011 that he was entitled to be paid for two years under the policy, by reason of his inability to do his own occupation. The failure of Penncorp to pay Avelino what it contracted to pay him, both from being disabled from doing bricklaying and from doing any other occupation for which he is reasonably suited by education, training and experience, has humiliated Avelino. It has made him dependent on Tracy financially. He was a proud, self-reliant man who always worked to the fullest extent possible. He has suffered great mental distress as a result of the failure of Penncorp to pay him what it contracted to pay him. I find that this would have been in the reasonable contemplation of the parties as the likely result of Penncorp's failure to honour its obligations under the contract of insurance when they entered into the contract.
>
> Punitive Damages
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> [64] Avelino was observed in the surveillance on August 3, 2005 to lift a wheelbarrow and wooden skid in and out of a truck on a single occasion. He was also observed to shovel some dirt. This does not remotely establish that he was able to do the heavy continuous labour for long hours for 6 to 7 days per week that he was doing in his bricklaying occupation, before he was injured. Penncorp received a report from Dr. Huth dated August 10, 2005, in which he expressed the opinion that Avelino would not be able to work at bricklaying again. It never received a medical opinion to the contrary except for Dr. McGonigal's qualified opinion, in his report dated July 6, 2010, after viewing the surveillance video that "it is impossible to say whether Mr. Fernandes could return to work on a full time basis as a bricklayer." There is no evidence that Ms. Mayo ever considered the detailed description of the heavy nature of bricklaying work that Avelino submitted with the questionnaire dated December 6, 2005. After Avelino submitted this document at the request of Penncorp she tried to settle the claim with Avelino on the basis that he was partially disabled. In my opinion there was never any doubt on the information that Penncorp had that Avelino was totally disabled from performing "any of the

> important daily duties pertaining to his occupation" of bricklayer. What this means, as Chief Justice Laskin said in *Paul Revere*, is "unable to perform substantially all of the duties of that position."
>
> I am of the opinion that Penncorp's handling of Avelino's claim demonstrates bad faith. Penncorp breached the duty of an insurer in handling a claim under an insurance contract set out by Justice O'Connor in *702535 Ontario* adopted by the Supreme Court of Canada in *Fidler*. What Ms. Mayo, on behalf of Penncorp, was doing in trying to settle the claim on the basis that Avelino was partially disabled in December 2005 and then in denying any benefits for six years, was what Justice O'Connor stated that an insurer ought not to do, namely "deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement." Ms. Mayo took an adversarial approach to Avelino's claim for benefits for inability to do his own occupation. It is most distressing that she ignored the detailed job description of his occupation of bricklaying that Avelino provided in the questionnaire dated December 6, 2005 requested by Penncorp. She did not deal with this claim "fairly" and in a "balanced" way. This conduct constitutes "an independent actionable wrong". It meets the test for punitive damages as being "highhanded, malicious, arbitrary or highly reprehensible misconduct."

C. Wilson v. Saskatchewan Government Insurance, 2012 SKCA 106, Vancise, Ottenbreit, and Caldwell JJ.A.

This case is notable because damages were awarded, in essence, for the "threat" of denial of no fault benefits payable under the Saskatchewan automobile scheme. The defendant was paying benefits and advised the plaintiff that benefits would be terminated in six months. The plaintiff appealed the claim to deny benefits and the insurer subsequently withdrew its decision to terminate. After benefits were reinstated, the plaintiff amended her claim to pursue damages for breach of duty to act in good faith and for indemnification of her legal fees and disbursements.

The trial judge awarded punitive damages in the amount of $7,500 plus reimbursement of legal fees in the amount of $7,833.26 on the grounds that the insurer had placed unwarranted conditions on the resumption of benefits and failed to act in good faith by declining to pay "undisputed portions" of the claim. Mental distress related to the denial of benefits was not of a degree sufficient to warrant compensation and was not supported by medical evidence.

On appeal, the punitive damage award was varied because the plaintiff had not pled such damages and the court found that SGI's conduct did not meet the higher threshold of "high handed, malicious, arbitrary or highly reprehensible" behaviour. Although Ms. Wilson was successful in establishing that the insurer had wrongfully denied her claim, she sued before termination and therefore had not actually suffered any economic damages. However, the Court converted the $7,833.26 in punitive damages to an award of the plaintiff's reasonable mitigation expense incurred in respect of SGI's breach of the duty of good faith.

D. McDonald v. ICBC, 2012 BCSC 283, Ballance J.

This is a case in which ICBC was ordered to pay $75,000 punitive damages for bad faith as a result of ICBC wrongfully holding the plaintiff in breach of her insurance alleging that she was intoxicated at the time of an accident.

The insured was involved in an accident at about 5:00 a.m. when she took the second exit off Highway 1 at the Mt. Lehman interchange and turned the wrong way and into an oncoming vehicle. She had difficulty providing a breath sample and was arrested at the scene for refusal to provide a breath sample and for impaired driving. She was also given a ticket for driving without reasonable consideration for others using the highway. Subsequently she was charged criminally with dangerous driving.

The only alcohol consumed by the insured was two glasses of wine between 11:30 p.m. and 1:00 a.m. while she hung out with a friend at her parent's home in Abbotsford. The two set out at about 1:00 a.m., to drive to Vancouver for a late night dinner, picking up another friend in Surrey along the way. They got lost in Surrey and again in Vancouver ending up on the east side of Vancouver. There they were stopped by a police officer conducting random checks for driver sobriety, valid driver's licences and insurance. The constable did not detect any indicia of alcohol impairment on the part of the insured. The police officer told them they were in a bad part of town and should head home. They abandoned their dinner plans and it was on the way home that the accident occurred.

The insured suffered injury to her chest from the air bag and it was likely that was the cause of her inability to provide a breath sample at the scene rather than any willful act. Any signs of impairment at the scene could have been the result of fatigue, shock, and injury from the airbag.

Ultimately, the alcohol related charges were stayed five weeks before the criminal trial proceeded and the insured plead guilty to the charge of driving without reasonable consideration for others using the highway.

ICBC conducted very little investigation until after the criminal trial was concluded. At that point, ICBC took steps to obtain statements from the two passengers in the insured's vehicle, speak to the two officers who attended the scene and interview the insured. The only substantive outcome of these efforts was communication with one of the officers involved and ICBC had only made half-hearted attempts to interview the others or to obtain information from the police officer that had conducted the earlier roadside check. No efforts were made to get information from the insured. At the same time, ICBC retained counsel to defend the civil action on behalf of the insured's mother, lessee of the vehicle and the lessor but no counsel was retained to act for the insured. ICBC settled the action for the sum of just over $182,000 without notifying the insured.

After the civil action was settled, ICBC decided to deny the plaintiff's coverage on the basis of an "alcohol incapability breach."

The plaintiff brought action for indemnification by insurer and for damages and succeeded.

In reaching the conclusion that ICBC acted in bad faith Madam Justice Ballance held:

> [249] An insurer does not have to have an iron-clad case in order to deny coverage. It is not expected to investigate a claim with the skill and forensic proficiency of a detective. Nor is it required to assess the collected information using the rigorous standards employed by a judge. The duty of good faith does not impose a standard of absolute liability in respect of and insurer's wrong decision. The duty simply dictates that an insurer bring reasonable diligence, fairness, an appropriate level of skill, thoroughness and objectively to the investigation and the assessment of the collected information with respect to the coverage decision. My criticisms of the caliber of Ms. Baadsvik's investigation and the shortcomings of her ultimate assessment should not be interpreted as suggesting that each individual omission or failing is, of itself, necessarily a violation of good faith and fair dealing. It is their cumulative effect that constitutes a breach of its duty of good faith.
>
> [250] It is not possible to perform a fair and proper evaluation in the absence of a reasonably thorough underlying investigation. The latter precludes achievement of the former. And so it was, in the case at hand. Here, that deficiency was compounded by the other failings of Ms. Baadsvik's evaluation of whether the plaintiff had been incapacitated.
>
> ...
>
> [259] ICBC engaged in settlement negotiations and concluded a settlement binding the plaintiff without appointment legal counsel on her behalf, all the while investigating her potential breach of contract. The plaintiff was never informed of the settlement discussions despite the fact that ICBC knew that the damages in the

> To Action were likely to be significant and that the plaintiff would potentially have to bear them personally. Indeed, after Ms. Baadsvik's final discussion with Constable Wood on April 1, she was essentially on the brink of deciding that the plaintiff was in breach and that ICBC would not be indemnifying her. The nature and sequence of these events, all fully within ICBC"s control, was manifestly unfair.
>
> ...
>
> [263] This is an exceptional case. The nature of ICBC's bad faith behaviour took different shapes through the time line. The overall handling and evaluation of the claim was overwhelmingly inadequate. ICBC also allowed its objectivity to be tainted by the fact that the claim indirectly involved the "very difficult" Mr. McDonald. While I recognize that the tainting of impartiality was only slight, it was nonetheless real and improper.
>
> [264] In my opinion, ICBC's conduct was harsh, high-handed and oppressive as those concepts have been developed in the jurisprudence, and marked a significant departure from the Court's sense of decency and fair play. Some of the acts of Bad faith were inadvertent and others were not and they persisted over a considerable period. The plaintiff was in a vulnerable position and suffered harm in consequence of ICBC's misconduct, not all of which is tidily rectified by this court confirming her right to be indemnified. ICBC would not be accountable for its bad faith in the absence of an award of punitive damages, which it can well afford. Such an award is justified to deter other insures from engaging in similar types of misconduct, and to punish ICBC and condemn its breaches of duty.
>
> [265] The plaintiff asserts that the calculation of damages should start with the figure ICB sought to recover from her, being the damages paid to Ms. To, and work up from there. That approach does not resonate with the *Whiten* principles.
>
> [266] I conclude that, in this case, an award in the amount of $75,000 is appropriately proportionate and rationally accomplishes the objectives of punitive damages.

E. Shaffner v. Insurance Corporation of British Columbia, 2012 BCSC 1263, Jenkins J.

This case was a successful application by ICBC to have the claims of bad faith bifurcated from the claim seeking entitlement to coverage and for an order that there be a stay in respect of all discovery and production of documents relating to the claim for bad faith. The basis was that the proper defence of good faith would potentially require waiver of solicitor client privilege.

The plaintiff owned a Ford pick-up truck that he reported stolen to ICBC, his insurer. The truck was subsequently located in a remote area and it was reported that there was minor damage to the vehicle including a broken window and a minor dent and that the interior of the truck was filled with garbage. ICBC denied the claim alleging that the plaintiff had falsely declared that she was the principal operator and had made false representations material to ICBC's investigation and assessment of the plaintiff's claim.

The plaintiff brought an action against ICBC and two of its employees for coverage under the policy of insurance and, further, alleged that ICBC had breached its obligation of good faith and also claimed damages for defamation.

In support of the bifurcation application, ICBC in-house counsel swore an Affidavit deposing: to having provided confidential legal advice to the adjuster and the investigator working on the claim and had continued to provide confidential legal advice; an inability to disclose further details relating to the substance of the legal advice without disclosing solicitor client communications; and, asserting privilege over that advice and related documents.

In granting the bifurcation, the Court relied upon, *inter alia*, the following comments from *Singh v. Insurance Corp. of British Columbia*, 2012 BCSC 870:

> [26] I think counsel for ICBC is correct that, academic or theoretical possibilities aside, the route to a successful bad faith claim here has to pass first through a finding of entitlement to coverage. The real question becomes whether I should take ICBC's assertion about the possibility of having to waive privilege in the bad faith portion at face value at this stage, in light of what Mr. Singh's counsel has submitted are strong indications that it is unlikely to arise. Even if I should weigh that likelihood, how do Mr. Singh's personal circumstances affect that balancing process?
>
> [27] First of all, ICBC is correct that *Brennard* endorses an analysis in which the assertion of a defendant that the privilege issue may arise (see para. 41) is sufficient to trigger the concerns. Judicial comity requires me to take the same approach, although I think it is the correct one in any case. In that regard the affidavit of ICBC's in-house counsel is adequate for the purpose. ...
>
> [28] I found the possibility of counsel for ICBC in this action having to withdraw and testify to give evidence of legal advice somewhat less compelling, and a bit different than the situation in *Brennard* and *Wonderful Ventures*....
>
> ...
>
> [30] However, I also cannot accept Mr. Singh's suggestion that a bifurcation application can well await an issue of privilege actually arising. If pre-trial representations to that effect are not sufficient, then the only alternative is the benefit of severance arising after the leading of evidence on the point in the course of a combined trial on both issues, something that would be even less efficient and more costly than what ICBC seeks. I am not sure what else ICBC could raise in advance of a trial beyond what it raises now.
>
> [31] It is also no comfort to ICBC that Mr. Singh's counsel wants nothing disclosed that is properly determined to be privileged. It is ICBC's ability to defend itself, but only at the cost of waiving privilege, and not simply its ability to resist disclosure applications that is at issue.

XXIV. Standard of Care Applicable to Children

Two decisions, both of Schultes J., considered the well-established test of the standard of care applicable to the conduct of children, being that of a child of similar age, intelligence and experience. The standard introduces a degree of subjectivity into the analysis, to allow for the variation in ability and background among children of a given age. The principles apply to a child defendant as well as considerations of contributory negligence for their own injuries.

A. Gu v. Friesen, 2013 BCSC 607, Schultes J.

In *Gu*, the plaintiff and defendant were both 11-year-old students at Southridge school, playing outside during recess. The plaintiff was carrying a friend piggyback-style when the defendant pushed her from behind, causing the plaintiff to fall and suffer injuries. The school and supervising teachers were also named defendants. Schultes J. found no want of care on the part of the supervising teachers or the level of supervision supplied by the school, concluding that piggybacking in itself was not an inherently dangerous activity. He concluded that the "low key" activities in which the 11 and 12 year olds engaged at recess were largely safe and fairly uneventful interactions such that they did not require supervision at an intensive level. He held the11-year-old defendant 100% liable for the accident on the basis that a child of that age should have foreseen that pushing another child who was being carried piggyback risked both the top and bottom person falling over and being injured in some way by the fall. This was knowledge that is acquired by all children on the playground at a very young age.

B. Bendzak v. Bohnet, 2013 BCSC 435, Schultes J. (Notice of Appeal filed)

In contrast, Schultes J. found no contributory negligence on the part of a 13-year-old plaintiff in *Bendzak* who was injured when he elevated an aluminum irrigation pipe into an overhead powerline. In that case, the plaintiff was visiting the 13-year-old defendant at his ranch after school. The boys were in the front yard of the property where metal irrigation pipes were kept to water the grass for their horses. The defendant, Connor Bohnet, was sent by his mother to the field to move the irrigation line which was one of his chores. The boys heard a gopher in one of the spare pipes that was not connected to system and decided to dislodge it by raising the pipe—a task that could not be achieved by one person acting alone (it was between 20 and 40 feet long). The pipe could only be raised vertically by one boy anchoring an end with the other raising it. In the course of this activity, the pipe contacted an overhead energized line and the boys were injured.

Mrs. Bohnet was in the house but could observe the boys through the window to ensure Connor was on task with his chores. She was not watching them when the accident occurred. Mr. Bohnet instructed his son Conner on the proper method of moving the irrigation pipes but did not specifically warn him not to lift them vertically. Schultes J. found Mr. and Mrs. Bohnet equally at fault for the accident. He found no liability on the part of either the plaintiff or Connor (the plaintiff abandoned his claim against Connor during final argument) on the basis the plaintiff's failure to consider his own safety when embarking on an impulsive but "typical youthful activity" was appropriate for his age, intelligence and maturity.

XXV. Unidentified Motorists

A. Springer v. Kee, 2012 BCSC 1210, Armstrong J.

The plaintiff's action for damages was dismissed for failing to take reasonable steps to ascertain the identity of the unidentified driver.

The defendant was rear-ended by an unidentified driver and pushed into the rear of the plaintiff's vehicle. The plaintiff did not observe the initial collision between the defendant and unidentified driver and saw no evidence of that vehicle in the aftermath of the collision. The defendant told the plaintiff at the scene that she had been struck and pushed into his vehicle. The police attended the scene but the plaintiff made no attempts to ascertain the identity of the other vehicle or driver.

The plaintiff commenced his dealings with ICBC about eleven days after the Accident but was never advised of his obligations to take steps to identify the negligent driver. He was given assurances of settlement offers prior to his starting an action.

The plaintiff sued the defendant, John Doe and ICBC as the nominal defendant and only learned of the s.24 defence when he received ICBC's Response. There was no evidence of negligence on the part of the defendant and the case was brought by way of summary trial for dismissal.

The Court remarked that it was grossly unfair and against the public interest for the plaintiff to be led by ICBC to think his claim had been accepted and that they intended to offer him a settlement and then after some time, without any notice, tell him he failed to meet the technical requirements of the Act.

The Court distinguished s. 24(7) of the Act that gives ICBC the authority to discuss settlement of the plaintiff's claim as a person "entitled to bring a proceeding" and s. 24(5) which gives the court authority to give judgment against the corporation when the Court is satisfied that all reasonable steps have been taken to identify the unidentified motorist.

While reproaching ICBC for failing to warn the plaintiff about his s. 24 duties it held that its failure to do so could not excuse the plaintiff's failure to comply with its provisions. In *obiter* the Court stated that waiver or estoppel may have succeeded if advanced as an argument.

B. Turnbull v. ICBC, 2012 BCSC 819, under appeal, per Master Caldwell

This interlocutory matter saw the plaintiff attempting to substitute the name of the proper defendant for "John Doe #1" in his Statement of Claim.

The plaintiff was employed at Dick's Lumber where he was struck by a vehicle in the parking lot on October 8, 2008. The plaintiff attempted to write down the license plate number but ran out of ink. The plaintiff thought the license plate number was DGH 106 or 106 DGH. He claimed that his efforts to locate the license plate number with the assistance of his employer were unsuccessful.

ICBC denied the claim in November 2008 on the basis that the plaintiff had not obtained particulars of the driver and the vehicle. Further efforts were made to locate the proper defendant, but were unsuccessful. The plaintiff commenced an action in April 2010.

During the plaintiff's discovery in January 2012, defence counsel learned for the first time that part of the plaintiff's duties at Dick's Lumber was to record customers' license plate numbers on related invoices and return a copy to the office. In February 2012, plaintiff's counsel obtained an order requiring production of documents from Dick's Lumber. Those records revealed an invoice with a license plate number 106 GDH.

Master Caldwell was troubled by the fact that plaintiff knew at the time of the incident that license plate numbers were recorded on invoices, yet he did not pursue that information diligently. There was evidence that plaintiff's counsel had contacted Dick's Lumber in search of documents, however, Dick's Lumber refused production. Their letter refusing production was received by plaintiff's counsel seven months prior to the expiration of the two year limitation date. The master contrasted the subject application with those in which no fault could be laid at the feet of the plaintiff. He dismissed the application holding:

> In short the plaintiff, and the plaintiff alone, bears the responsibility for the failure to identify potential defendants in a timely fashion and certainly within two years of the incident plus one year to serve. In such circumstances, if limitation periods are to have any meaning and effect in our system, the interest of justice and the potential prejudice to the intended defendant outweigh the interests of the plaintiff.

C. Bedoret v. Badham, 2012 BCSC 1713, Master Young

The plaintiff was injured on July 9, 2009 when a vehicle, a white Honda Accord, made a right turn in front of his motorcycle against a red light and left the scene. The plaintiff made efforts to identify the vehicle and the driver which included hanging posters and returning to the scene of the accident at the same time of day his collision occurred. On two such occasions he saw a white Honda Accord make a right turn at the same location.

On July 21, 2009 he provided the license plate of the white Honda Accord to an ICBC claims adjuster and completed and signed the Section 24 hit and run form. On March 1, 2010 ICBC confirmed in writing to plaintiff's counsel that the claim would proceed against the registered owner and driver of the white Honda Accord. Relying on this advice, the plaintiff started an action against the defendant on July 4, 2011. The Response filed on July 29, 2011 claimed that the defendant was not involved in the accident.

On June 5, 2012, three years after the motor vehicle accident, the plaintiff applied to amend his notice of civil claim to add ICBC as a nominal defendant. Since the delay was attributed to difficulty with counsel's schedules it was considered without prejudice to either party.

ICBC opposed the application to be added as a nominal defendant. The handling adjuster deposed that he advised the plaintiff on July 21, 2009 that he would conduct an investigation into the identity of the other driver, but that if there was no corroborating evidence from witnesses and insufficient evidence against the defendant, then the claim would proceed as a hit and run. The investigation did not support a link to the suspected driver and the adjuster informed the plaintiff, who was unrepresented at the time, that the claim would be handled as an unidentified motorist claim.

ICBC was made aware that the plaintiff was represented on February 25, 2010 and then sent the March 1, 2010 letter which indicated that the claim would be handled on the basis that the other driver was the defendant. The letter did not state that there was insufficient evidence against the defendant and that ICBC had decided to treat the case as an unidentified motorist claim.

The Court rejected ICBC's "astonishing position" that plaintiff's counsel should not have relied on the particulars set out in the March 1, 2010 letter. Plaintiff's counsel was entitled to rely on the information in the letter and if ICBC later learned that there was an error, it had a responsibility to correct it and not mislead the plaintiff. It was just and convenient to add ICBC as a nominal defendant and because of the unreasonable position taken by ICBC it was ordered to pay costs at Scale C, on the court's own motion.

XXVI. Uninsured Driver

Sick Bank

A. Jordan v. Lowe, 2013 BCSC 151, per Willcock J.

The plaintiff was constable with the Vancouver City Police. At trial the parties agreed that as a result of his injuries the plaintiff missed work for which he was compensated through his sick bank either the Vancouver City Police.

ICBC was added to the action and argued that since the plaintiff's judgment was against an uninsured driver, ICBC's obligation to pay the judgment is determined by the Insurance (Vehicle) Regulation, and s. 106 of the Regulation excludes certain benefits, including the sums paid from the plaintiff's sick bank.

The question for the court was whether the amount paid by the Vancouver Police sick bank was a "benefit" or "compensation similar to a benefit" therefore coming within the definition of s. 106 of the Regulation. The issue had previously been considered in *Lopez v. ICBC* (1993), 78 B.C.L.R. (2d) 157 (C.A.) and *Loeppky v. ICBC*, 2012 BCSC 7 which held that in order to come within s. 106 of the Regulation, it is not enough that there is a benefit, the benefit must also be said to import "at the very least, some element of insurance." This was so because s.106 is included under the heading "Exclusion of other insured loss."

Although there were legislative changes to the Regulation including the additional language "compensation similar to benefits" to the definition of an insured claim, the court held that while the change signaled an intention to broaden the definition of a benefit, but did not remove the criteria that the benefit import some element of insurance. The Court noted that the legislature must have been aware of the Court of Appeal's judgment in *Lopez*; however, there was no legislative change to the title of the section "Exclusion of other insured loss."

The Court held at para. 23: "Payments of sick leave benefits to police officers employed by the City of Vancouver Police Department ... do not have about them an element of insurance. They are clearly benefits or compensation similar to benefits, but that alone does not suffice to cause them to fall within s. 106 of the Regulation."

XXVII. Workers Compensation

A. Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal, 2012 BCCA 392, per Chiasson JA (Lowry and Garson JJ.A. concurring)

This appeal considers whether a worker who fails to obtain worker's compensation for a workplace injury is entitled to sue her employer and fellow employee for a common law breach of duty.

Christianson sued her co-worker Webster after she suffered a stress-related injury as a result of Webster's conduct while the parties were working at Downs Construction. Webster pleaded s. 10 of the *Workers' Compensation Act* which bars an action in lieu of a possible claim under the *Act* where the injury arose out of and in the course of employment.

The plaintiff made a claim pursuant to the *Act*, but she was not successful. The WCB concluded that the event giving rise to the injury was not unexpected, and therefore she did not meet the requirements of s. 5.1 of the *Act*. The Workers' Compensation Appeal Tribunal ("WCAT") upheld the decision of the Board. The WCAT also issued a certificate pursuant to s. 257 of the Act that stated in para. 2: "The mental stress injury suffered by the plaintiff, VICKI LYNN CHRISTIANSON, did not arise out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*."

Downs Construction and Webster filed a petition for judicial review of WCAT's decision to refuse compensation and to issue paragraph 2 of the certificate. The chambers judge dismissed their application and they appealed to the Court of Appeal with respect to paragraph 2 of the certificate.

The Court of Appeal held at para. 38:

> Ms. Christianson made a claim. As part of her claim she had to establish a number of facts, including that the event giving rise to the injury was unexpected. She failed to establish that fact. More precisely, Downs and Mr. Webster, who were advocating for her recovery of compensation, failed to do so. The Board and the WCAT found as a fact that the event was reasonably foreseeable.

The Court then quoted from *University of Saskatchewan v. The Workers Compensation Board of Saskatchewan*, 2009 SKCA 17, where the Court "made clear the distinction between not having a claim and failing to prove a claim" (at para. 35). The Court of Appeal allowed the appeal, setting aside paragraph 2 of the WCAT certificate and substituting the following:

> The mental stress injury suffered by the plaintiff Vicki Lynn Christianson arose out of and in the course of employment within Part 1 of the *Workers' Compensation Act*, but she is not entitled to compensation because the event giving rise to the injury was not unexpected as required by s. 5.1 of the *Act*.

Christianson had a right to make a claim pursuant to the Act. As a result, she did not have a right to a civil claim against Downs and Webster. However, she failed to prove her WCB claim because she did not satisfying the conditions of s. 5.1 of the Act.

XXVIII. Legislation

A. Code of Professional Conduct for British Columbia

On January 1, 2013 the Professional Conduct Handbook was replaced with the new Code of Professional Conduct for British Columbia. The following points are of note.

With respect to contacting an opposing party's expert, the previous Professional Conduct Handbook stated as follows in chapter 8:

> 14. A lawyer acting for one party must not question an opposing party's expert on matters properly protected by the doctrine of legal professional privilege, unless the privilege has been waived.
>
> 15. Before contacting an opposing party's expert, the lawyer must notify the opposing party's counsel of the lawyer's intention to do so.
>
> 16. When a lawyer contacts an opposing party's expert in accordance with Rules 14 and 15, the lawyer must, at the outset:
>
> (a) state clearly for whom the lawyer is acting, and that the lawyer is not acting for the party who has retained the expert, and
>
> (b) raise with the expert whether the lawyer is accepting responsibility for payment of any fee charged by the expert arising out of the lawyer's contact with the expert.
>
> 17. In Rules 14 to 16, "lawyer" includes a lawyer's agent.

There is no similar language in the new Code of Professional Conduct. Instead, the new Code of Professional Conduct addresses interviewing witnesses in the following manner:

> **5.3 Interviewing witnesses:**
>
> Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

The annotation to s. 5.3 states:

> It is not improper for a lawyer to request a witness to decline to talk to the other side unless he is present.

On April 13, 2013 Rule 3.6-3, the rule on disbursements and "other charges" was rescinded for further study and consultation. On the same date, commentary was added to Rule 7.2-1, regarding courtesy and good faith amongst the profession, indicating that before proceeding by default in a matter, a lawyer must give notice to another lawyer who has been consulted.

B. Limitation Act, R.S.B.C. 1996, Ch. 266

The new *Limitation Act* came into force on June 1, 2013. Key changes include:

- moving from a variety of basic limitation periods, based on the type of legal action, to a single two-year basic limitation period for all civil claims. Exceptions to this are civil claims that enforce a monetary judgment, exempted claims and actions that have limitation periods set by other statutes;
- moving from a general 30-year ultimate limitation period to a single 15-year ultimate limitation period;
- changing the commencement model of the ultimate limitation period from an "accrual" model to a model in which the clock starts running based on when an "act or omission" occurred; and
- transition rules.

XXIX. Practice Directions

BC Court of Appeal

A. Costs (Civil Practice Directive, 30 May 2013)

As s. 23 of the *Court of Appeal Act* provides that the successful party is entitled to costs of the appeal, the Court of Appeal does not usually refer to costs in reasons for judgment. If the parties cannot agree on costs, any party may send a letter to the Registrar with copies to all other parties including a brief summary of the dispute. Parties may set out a proposed schedule for submissions or the Registrar will arrange a timetable.

The Registrar may settle the dispute by reference to s. 23 of the Act, or may refer the matter to the division which heard the appeal. The Registrar will not assess a bill of costs in the absence of a costs term in the order. If a party has mistakenly entered an order without a direction for costs, the party may use the slip rule (r. 50) to amend the order to provide for costs.

B. Citation of Authorities (Civil and Criminal Practice Directive, 30 May 2013)

Parties preparing factums or submissions for the Court of Appeal are asked to observe the following:

- Follow the practice set out in the McGill Guide; where there is an inconsistency between the McGill Guide and the practice directive, the practice directive prevails.
- Always use periods within citations where omitted by the McGill Guide; cite as precisely as possible (i.e., to paragraph or section numbers rather than page numbers; never cite court summaries or headnotes as they do not form part of the court's judgment).
- Use the neutral citation for Canadian cases; where no neutral citation is available, cite to the printed report or electronic service first; parallel citations are optional, use no more than two.
- Provide at least one parallel citation where the case is either not from Canada, or not easily found/not available online.
- Omit the term "(available on ...)" when using a neutral citation, contrary to the McGill Guide.
- Omit abbreviated publisher information when citing from CanLII, Quicklaw or Westlaw.
- When relying on an authority cited by another party, cite the same version as the other party and omit it from your book of authorities; the court strong prefers joint books of authority/appeal books.
- Ensure the version of an authority included in the book of authorities matches the format of the version cited in the parties factum (i.e., correct paragraph references).
- Use the following format for unreported judgments: *Green v. Red* (30 April 1981), Victoria 79/0123 (B.C.S.C.).
- When citing a case decided in chambers, include the term "Chambers" or "in Chambers" at the end of the citation with any other bracketed information (i.e. (C.A. Chambers)).
- Add the name of the judge at the end of the citation only when relevant.
- Do not give the full citation to the Rules of the various courts in BC (i.e., "Supreme Court Civil Rules, R. 15-1" is correct).

- For books that are continually updated do not provide the date of consultation, contrary to the McGill Guide, but do include the last revision update instead.

Stylistic Considerations

- Use 12 point Arial font for all text including citations and footnotes; all submissions must be one and a half spaced, except for quotations from authorities or enactments (i.e., footnotes must be one and a half spaced; do not use endnotes).
- Do not capitalize the names of document, titles of pleadings or the status of litigation parties unless required by a court form.
- "Court" should be capitalized only where it refers to a specific court.
- "Judge" or "Justice" are only to be capitalized when naming a particular judge or justice.
- When including citations within paragraphs, do not use "supra," "ibid.," or "hereinafter"; if you refer to an authority several times, use a short form in brackets, but only when the authority must be distinguished from other, similarly named authorities; otherwise, just use a shortened form in subsequent references.
- Avoid formalistic language such as "this Honourable Court," "hereinafter," "heretofore," "aforesaid," or "learned"; use Latin phrases only when necessary.
- When copying authorities provide legible and/or enlarged authorities of at least 12 point font, printed on both sides of the page.
- The court encourages the use of hyperlinks in electronic versions of factums; cite BCSC or BCCA cases to the Superior Courts judgment database or CanLII; cite SCC cases to the LexUM website.
- When referring to a practice directive or practice note, follow the citation style prescribed on each directive or note.

BC Supreme Court

C. Practice Direction 37—Consent Order to Waive Trial Management Conference (04 September 2012)

This Practice Direction applies to civil and family law proceedings in which (a) the trial is set in Vancouver for 9 days or less; and (b) no party is self-represented.

Parties may apply under Rule 8-3(1) for a consent order waiving the requirement for a trial management conference pursuant to Rule 12-2(1).

The Practice Direction requires that the application be made no more than 84 days before trial and no less and 35 days before the scheduled trial date; the application must be filed electronically (efiled) in accordance with Rule 23-3 and must include: (a) a requisition in Form 31 and an attached completed checklist in the form of Schedule A to Practice Direction 37; (b) a draft of the proposed order in Form 34; and trial briefs of each party in Form 41. In addition, the party making the application must also email a copy of the requisition to: waiveTMC@courts.gov.bc.ca

Applications to waive the trial management conference will be reviewed by a judge or master. If the application is denied, parties are expected to schedule and attend a trial management conference in accordance with Rule 12-2(3). If, after receiving an order waiving the trial management conference, there is a change in circumstances that in the opinion of a party warrants a trial management conference, a party may request a trial management conference no later than 28 days before trial. Such a request may be made by requisition in Form 17 and must set out the grounds for the request.