THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

PERSONAL INJURY CONFERENCE—2014
PAPER 1.1

2014 Update on Case Law and Legislation

These materials were prepared by Alison L. Murray, QC, Karen E. Jamieson, Kristina L. Koller, and Kyle C. Johnson, all of Murray Jamieson, Vancouver, for the Continuing Legal Education Society of British Columbia, June 2014.

2014 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 2013. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Causation

A. Chen v. Ross, 2014 BCSC 374, Ballance J.

The plaintiff claimed damages for loss of vision in one eye following a surgical procedure. Ballance J. provided a thorough analysis of causation in a medical malpractice context, noting that the concepts of etiology in the medical sphere and causation at law are not synonymous. This is because the "but for" test need only be proved on a balance of probabilities in contrast to the more rigorous standard that approaches scientific certainty familiar to the medical field. Great care must be had in assessing medical evidence and caution exercised about the wording used by the expert so as not to unduly discount or over-weigh the expert's choice of language when describing medical causation.

In addition, she recognized that the court must exercise caution in inferring legal causation by exclusive or substantial reference to a temporal sequence of events. "But the judicial insistence of caution does not signify judicial thinking that temporal reasoning is an illegitimate analysis or a branch of logic to be seldom invoked."

B. Hansen v. Sulyma, 2013 BCCA 349, per Newbury J.A. (Groberman and Bennett JJ.A. concurring)

The defendant driver appealed an assessment of liability which found him 25% at fault for a collision which occurred when his car was parked off the roadway and was struck by a drunk driver. The defendant argued that the trial judge misapplied the law on causation because she held that his failure to activate the hazard lights "contributed to" the severity of the impact.

In its decision, the court explained that the phrase "contributed to" when articulating the "but for" test describes the analysis when there is more than one tortfeasor. In this context, it is not the alternative "material contribution to the risk" test set out in *Clements* and *Resurfice.*

Newbury JA explained that where there are several "necessary factors," each alone may not have been "sufficient cause" but each is necessary to lead to the plaintiff's injury. Thus, the injury would not have occurred "but for" the negligence of each actor. The combination of breaches of duty by two or more defendants "causes" that injury, each defendant's act or omission being necessary and "contributing" to the result.

The phrase material contribution test is a separate inquiry into the material contribution to the risk of injury occurring in exceptional cases such as *Cook v. Lewis.*

In the result, the defendant's apportionment of liability was reduced to 10% with 70% of fault attributed to the drunk driver and 20% to the establishment that overserved that driver.

The court held that on a "robust and pragmatic approach," it was a reasonable conclusion that if the defendant had activated his hazard lights, the drunk driver would likely have been alerted to the presence of the parked car (which had run out of gas) and would have had adequate, or more, reaction time in which to decelerate.

C. Lourenco v. Pham, 2013 BCSC 2090, Gropper J.

The action concerned damages arising from a pedestrian accident. During the trial, the defence argued that the plaintiff's ongoing complaints at trial were caused by two subsequent accidents which she had failed to disclose to her treating physicians. On cross-examination, the plaintiff's family physician retreated from his opinion that the pedestrian accident caused the current symptoms and testified that they may, instead, have been caused by the later accidents of which he was unaware.

Despite the physician's concession on causation, the trial judge found that the pedestrian accident caused the plaintiff's ongoing injuries based on the evidence of the plaintiff and the nature of the accident itself.

D. Mawani v. Pitcairn, 2013 BCCA 338, per Bennett J.A. (Tysoe and Garson JJ.A. concurring)

The defendant appealed a liability finding in which he was found to be 50% at fault for striking a pedestrian on a roadway on a dark and foggy morning. He was driving in the curb lane very close to the curb such that his right tire was in the gutter. The pedestrian was walking down a footpath along the side of the road. While there was no sidewalk on that side, there was one on the opposite side. At a certain point, the path narrowed and came close to the curb of the road. The area was overgrown and the plaintiff left the path and stepped or fell onto the road.

The defendant was found to be negligent for driving too fast for the conditions and driving too close to the curb. His conduct left him unable to react to dangers such as dogs, cyclists or pedestrians. The defendant appealed on the basis that, *inter alia*, the trial judge did not properly apply the "but for" test in causation as there was no evidence that, if the defendant was driving more slowly, he would not have struck the plaintiff.

The appeal was dismissed on the basis that the evidence, although sparse, supported a finding of fact that speed was a cause of the accident as it was too fast for the foggy conditions and the expert evidence supported the conclusion that it deprived him of an opportunity to avoid a collision when a hazard came into view. There was no "reverse onus" imposed on the defendant as suggested on appeal.

E. Sangha v. Chen, 2013 BCCA 267, per Saunders J.A. (Tysoe and Bennett JJ.A. concurring)

The plaintiff suffered from pre-existing chronic depression before the accident and the trial judge found that the injuries from the accident aggravated her mood symptoms. The expert evidence recognized the active pre-existing mental illness but stated that the accident aggravated the mood symptoms, which in turn fed into the pains and they have continued like that all along. The trial judge found that the physical injuries aggravated the previous depressed state and caused "at least some of" the psychological symptoms. On appeal, the court concluded the trial judge then fell into error by assessing damages on the basis that the plaintiff "would have suffered his current symptoms in any event." The assessment of damages was remitted to the trial judge to assess damages on a crumbling skull basis, adjusting for the plaintiff's original symptomatic condition.

F. Van Tent v. Abbotsford (City) et al., 2013 BCCA 236, per Groberman J.A. (Garson and Harris JJ.A. concurring)

The defendants appealed the liability decision of the trial judge who found the defendant City and defendant contractor 80% at fault for a motorcycle accident caused when the plaintiff's motorcycle drifted over the fog line which ended with a two-inch drop off on account of highway construction.

The Court of Appeal confirmed that the circumstances of the case allowed for the application of the "but for" test as it was not exceptional on its facts. The trial judge found that: the signage was inadequate to inform a driver of the hazard presented by the cut pavement; the plaintiff could not be faulted for failing to see the uneven pavement sign; the accident was caused by the plaintiff riding his motorcycle over the uneven cut in the pavements; and the plaintiff was contributorily negligent in permitting his motorcycle to drift over the fog line. The fact that the plaintiff allowed his motorcycle to drift over the fog line made him contributorily negligent but did not wholly displace the breach of the standard of care of the defendants on a "but for" analysis.

III. Contingency Fee Agreements

A. Klein Lyons v. Aduna, 2013 BCSC 1250, Registrar Sainty

The plaintiff was injured in a 2005 car accident that was witnessed by a Klein Lyons case manager. The plaintiff met with the manager a week after the accident to retain the law firm. The plaintiff did not meet with a lawyer at that time and it was the case manager that explained the contingency fee agreement. The lawyer responsible for handling the plaintiff's claim left the firm in 2009 and,

thereafter, the file was handled by a different lawyer at Klein Lyons. Each lawyer was assisted by the case manager. In 2011, the file settled at mediation. Klein Lyons issued an account based on the contingency agreement with a reduction in the percentage amount of the fee from 29% as provided in the contingency fee agreement to 25%.

The plaintiff sought to have the contingency fee agreement set aside on the basis that he was not capable of properly agreeing to it within a week of the accident. Registrar Sainty found that the plaintiff had the basic capacity to enter into a contract, was sophisticated enough to understand it and did not raise any concerns at the original meeting with the case manager. Nor was the fact that the plaintiff failed to try negotiate on the terms of the agreement any indication that the agreement was unfair or that he was coerced into signing it. However, the agreement was set aside on the grounds that a lawyer (i.e., not a case manager) has an obligation to discuss the agreement with a client as part of the fundamental duty of good faith owed by a lawyer to a client.

A lawyer is not required to advise a client that they ought to get independent legal advice before entering into a contingency fee agreement but they are obliged to advise "fully and fairly concerning the terms of that contract." Because a lawyer is entering into a bargain with a client, the lawyer has a duty ensure that the terms are explained and, in this case, it was not sufficient to have a lawyer on "stand-by" to be called into the room to discuss the contingency agreement if the plaintiff had any questions about it. The fact that the plaintiff was still under some duress, taking medication and in some pain when he first meet with the case manager made it even more pressing that the lawyer ensure that the plaintiff fully grasped the consequences of the retainer agreement.

A contingency fee agreement is not a joint venture of equals, in that the law firm generally has a more thorough understanding of the law, the legal process and the potential outcomes of litigation than does a client.

The law firm was directed to issue a new bill to the client within 30 days, which bill was subject to further review.

B. Slater Vecchio LLP v. Cashman, 2014 BCCA 6, per Chiasson J.A. (Tysoe and Goepel, JJ.A. concurring)

The lower court decision in this case was cited in our paper last year as a cautionary tale regarding the terms of retainer agreements in the context of a plaintiff personal injury action. The case stood for the proposition that the terms of a retainer agreement addressing both a Part 7 and tort claim required the law firm to represent the client to a conclusion in both actions to be entitled to any fee. Mr. Cashman's tort claim was settled and thereafter the parties and the lawyer who had previously acted for Mr. Cashman negotiated a settlement for the fees payable in respect of the tort claim. Slater Vecchio then refused to continue to represent Mr. Cashman in the Part 7 action. The court held that refusal was a repudiation of the retainer agreement and the law firm was required to disgorge their fees.

The law firm successfully appealed the decision. The Court of Appeal accepted the Slater Vecchio's argument that, on these facts, the contingency fee agreement had been amended or supplanted by the settlement agreement.

The court commented that it remains an open question as to whether the legal principles governing "entire contracts" apply to retainer agreements which cover multiple proceedings which individually can be concluded with the client succeeding or failing irrespective of the actual or potential results of other proceedings.

IV. Contributory Negligence

A. Bergen v. Guliker, 2014 BCSC 5, Savage J.

In this case, the RCMP were aware Gerald Guliker was suicidal and had stated a desire to jump into traffic to kill himself. The RCMP nonetheless pursued him in a street chase. Guliker then struck another vehicle, causing two fatalities. The court attributed 20% of the liability to the RCMP as it was reasonably foreseeable that he would flee.

The court found a duty of care "exists anytime the police pursue or chase a suspect, within the ordinary meaning of those words" (para. 217). This duty is not a general or overarching duty, but specifically limited to those using the public roadway. The court inferred this duty of care from the relevant statutory provisions applicable to police and the "E" Division Practice manual as well as the proximate connection between the police actions and the victims. Additionally, the court did not find any policy reasons for the police not to owe a duty in these circumstances.

The standard of care for police pursuit was found to be that of a "reasonable police officer, acting reasonable and within the statutory powers imposed upon him or her, according to the circumstances of the case" (para. 231). The police failed to meet that standard as, "A proper risk assessment … would have alerted the officers to the significant public safety risk of chasing a suicidal individual who is determined to evade apprehension down unfamiliar rural roads at high rates of speed" (para. 249).

B. Chabot v. Chaube, 2014 BCSC 300, Brown J.

The plaintiff was rollerblading through a cross-walk at the speed of a brisk jog and could not see the traffic in the far right hand turn lane as there was a bus in the way. She was then hit at low speed by a vehicle turning right. The court found her to be 10% contributorily negligent due to her speed; if she had been going at the speed of a walk she would not have been found negligent. The court distinguished cases in which a pedestrian was crossing and couldn't see on the grounds that the rollerblader was unable to stop as quickly.

C. Sikora v. Brown, 2014 BCSC 30, Verhoeven J.

In this matter, both parties blamed the other for an accident in which the defendant grabbed the steering wheel. He alleged that he was asked to do so by the driver because the wheel was shaking. Despite credibility issues in regard to both parties, the court found that the defendant grabbed the steering wheel at the request of the driver and that the combined effect of a bumpy road, the plaintiff's driving, and the defendant's actions caused the vehicle to go into the ditch. Each party was found to be equally at fault. The court distinguished these circumstances from earlier cases in which a passenger grabbed the wheel for no reason and without the invitation of the driver.

D. Tabor v. Bridge, 2013 BCSC 1427, Cohen J.

This case involved the plaintiffs being injured after riding in their vehicle while it was being towed. The plaintiffs had returned to the site of an accident at 3:00 am to retrieve insurance papers. However, they then discovered the vehicle they arrived in did not have insurance and the police insisted it be towed. They obtained a ride in their vehicle as it was towed away mounted on a dolly. The dolly broke and the vehicle detached, injuring the plaintiffs in the process. Absent evidence as to why the dolly broke, the court found the defendant tow truck driver to be liable from "the

reasonable inference" that it broke due to a combination of human error and speed. The plaintiffs were found to be 25% contributorily negligent for accepting the ride despite the foreseeable risk associated with driving in a towed vehicle.

E. Tatarum v. Browne, 2014 BCSC 13, Hyslop J.

In this case, several farm workers were being returned to the city in the back of a pick-up truck. An accident occurred and they were injured. The issue was whether they were contributorily negligent for riding in the back.

The court reviewed several cases where seatbelts were not used but where no contributory negligence was found as the seatbelt was not available and it would have been unreasonable to refuse the ride (*Bissky v. Trottier* (1984), 54 B.C.L.R. 288 (S.C.); *Massey (Guardian ad item of) v. Donze*, [1984] B.C.J No. 162 (S.C.); *Iannone v. Hoogenraad* (1990), 50 B.C.L.R (2d) 390 (S.C.)).

Following those cases, the court ruled that the farm workers were not contributorily negligent as they were aware of no other means to return to Kamloops. The court also did not find any contributory negligence on the part of the farm as it was not their practice to transport workers without seatbelts and the driver had been instructed to transport the workers in two trips rather than one.

V. Costs & Disbursements

A. Akbari v. ICBC, 2013 BCSC 1432, Baker J.

The plaintiff succeeded in establishing liability against an unidentified driver and was awarded just over $13,000 in damages. The action was brought under Rule 15-1 Fast Track Litigation and the plaintiff's award exceeded his formal offer to settle. He applied for double costs.

Baker J., however, awarded the plaintiff disbursements only, applying Rule 14-1(10). The award fell below the small claims limit and there was insufficient reason for having brought the action in Supreme Court.

B. Babb v. Doell, 2013 BCSC 2204, Master McDiarmid

The claim for interest on disbursements was disallowed where the fee agreement contained a term that interest would be paid on disbursements at the interest rate of 15% per annum. It also contained the phrase: "which interest shall be considered a disbursement for the purposes of this Agreement." The affidavit in support of the claim at the assessment calculated interest on disbursements at 6%. In the absence of any other evidence justifying the necessity of the interest, it was disallowed.

C. Bodeux v. Tom, 2013 BCSC 2327, Master McDiarmid

On the issue of interest on disbursements, Master McDiarmid held that the mere fact that the plaintiff entered into a fee agreement which provided for charging disbursements at a rate appropriate to be charged between the client and her lawyer, does not mean that the amount of the disbursements should be automatically passed on to an unsuccessful litigant. The claim for 10% was reduced to 6%, relying on *Franzman v. Munro*, 2013 BCSC 1758.

D. Bradshaw v. Stenner, 2013 BCCA 61, per Saunders J.A. (Kirkpatrick and Garson JJ.A. concurring)

Decisions as to the type of costs appropriate to a given matter engaged the discretion of the judge making the order who is in the best position to appreciate the relevant factors. In this case, an award of special costs was made to reflect the conduct of the litigants, the judge's view of the credibility of the partier, her assessment of the use of court resources and her view of the honour of the parties in conducting the litigation. Exercise of discretion that is made reflecting these factors is most unlikely to be disturbed by the Court of Appeal.

The Court of Appeal also did not disturb the trial judge's assessment of special costs at $5,000 per half day of trial.

E. Codling v. Sosnowsky, 2013 BCSC 1220, Smith J.

In a matter that was not litigated under Rule 15-1 Fast Track Litigation, Smith J. fixed doubled costs at the Fast Track daily rate on the basis that it should have should have been conducted under Rule 15-1 but was not.

F. Cooknell v. Quinn, 2013 BCSC 1653, Master Bouck

It is a fine line to be drawn between "second guessing" competent counsel and determining that counsel acted with excessive zeal or extravagance in incurring disbursements. The law as stated in *MacKenzie v. Darke* does not mean that the registrar must defer to counsel's judgment on all matters and essentially issue a *carte blanche* to incur disbursements at the ultimate cost to the opposing party. The accounts of a neuroradiologist were disallowed where there was no medical evidence to justify an investigation in that regard. The account of Barbara Phillips was disallowed as it was premature to have retained her services within days of the accident and one meeting with the plaintiff. The MRI was disallowed where there was no explanation justifying a private clinic over a publicly funded scan.

G. Franzman v. Munro, 2013 BCSC 1758, Master McDiarmid

In an assessment of costs after trial, Master McDiarmid allowed the plaintiff's claim for interest on disbursements payable to her lawyer. The affidavit evidence before the court demonstrated that it was necessary for the plaintiff to incur the charges to finance the cost of the experts and provide access to the courts. The interest charged by the law firm was essentially the interest it was paying on its operating line of credit.

Master McDiarmid disallowed the plaintiff's claim for the account of Vancouver Litigation Support Services Ltd. which transcribed a volume of medical records. While satisfied that the services were of assistance to the plaintiff, they were really the sort of work which would, in some law firms, be performed in-house by paralegals. He did not view the expense as reasonable or justifiable to the extent that it should be borne by the unsuccessful litigant. He also reduced the account of a second OT who prepared a cost of future care report as he found her efforts amounted to a substantial duplication of what had already been done by OT consulting in its functional capacity evaluation. Similarly, he reduced the fee where two vocational consultants were retained and there was duplication in opinions provided.

H. Harvey v. Tooshley, 2014 BCSC 433, Master Bouck

The plaintiff commenced two actions under Rule 15-1 arising from two motor vehicle accidents and consented to having the trials heard at the same time. The cases settled prior to trial with costs assessed under Rule 15-1. Master Bouck awarded two sets of costs at $6,500 for each action and in so doing, rejected the defendants' contention that only one set of costs should be awarded because if the efficiencies in having the actions joined for trial.

In her reasons on disbursements, she made the following general observations:

> 1. the approach by the Registrar in determining the necessity, propriety or reasonableness of disbursements ought to be the same whether or not an action is litigated in fast-track.
>
> 2. the amount of settlement or judgment should not play any part in the costs assessment process. The most that an assessing officer could consider is whether the cost of the disbursement, when incurred, was proportionate to the reasonably anticipated loss or damages. The concept of proportionality as it relates to the amount involved should not be applied retrospectively once judgment is rendered or settlement accomplished.
>
> 3. the assessing officer must be careful not to step into the shoes of the trier of fact and decide the utility or evidentiary weight to be given particular expert reports. The content of reports can be reviewed to determine whether there is unnecessary narrative or duplication or the opinion offered is preposterous. Factual errors, oversights and omissions are not relevant to determining the necessity or propriety of commissioning the report in the first place.
>
> 4. a party does not have free licence to canvas every conceivable contingency or issue, no matter how remote and expect indemnification for the costs of those efforts.

Master Bouck reduced the charges of the occupational therapist, finding that some of the work went beyond the opinion sought in the retainer letter and amounted to a "Cadillac" report.

I. Kumanan v. Achim, 2013 BCSC 1867, District Registrar Cameron

A disbursement claim for an MRI was disallowed where the medical evidence demonstrated that the plaintiff's condition was non urgent, a trial date had not been set and there was no evidence before the court of the wait time to have an MRI done in the public health care system.

J. Laktin v. (Vancouver) City, 2014 BCSC 484, Pearlman J.

A jury dismissed the plaintiff's claims in assault, battery and negligence after a five-week trial. The plaintiff argued that, despite being the successful party in the action, the defendants ought to be deprived of their costs due to the plaintiff's catastrophic injuries and financial hardship, as well as the conduct of the defence in applying to strike the jury and applying for a mistrial on three occasions.

The court determined that there were no special circumstances to warrant a departure from the usual rule that costs follow the event. It was not a matter that fell within the public interest exemption and the conduct of the defence fell within the bounds of vigour in advocacy.

K. Lee v. Jarvie, 2013 BCCA 515, per Groberman J.A. (Chiasson and Wilcock JJ.A. concurring)

In a personal injury action, the defence was successful on the issues of past income loss, loss of future capacity to earn income, and cost of future care. Each of those heads of damages constituted a discrete issue at trial to which approximately one half of the days of trial had been devoted. The trial judge awarded each party 50% of their costs pursuant to Rule 14-1(15) to be set off against each other.

The Court of Appeal confirmed that Rule 14-1(15) retained a judge's discretion to award in respect of specific issues and found no significance to the use of the word "matter" rather than "issue" in the new rule. The discretion to award costs with respect to an issue in a proceeding is at least a broad under Rule 14-1(15) as it was under form Rule 57(15).

The Court of Appeal also upheld the trial judge's decision to award the plaintiff only 15% of his disbursements relating to certain experts, citing Rule 14-1(15) and the finding that they were only marginally helpful on the general damages issue where the plaintiff achieved some success.

L. Loft v. Nat, 2014 BCCA 108, per Goepel J.A. (Hall and Stromberg-Stein JJ.A. concurring)

The plaintiff was awarded damages for personal injuries but in an amount substantially less than he claimed. Credibility of the plaintiff was a key issue and he was found to have grossly exaggerated his claims. Although the successful party, the trial judge awarded the defendants their costs of the action as they were largely successful in all areas of the claim. The Court of Appeal found that this latter statement was wrong in principle and could not stand. The trial judge was required to consider whether there was any basis to depart with the usual rule in Rule 14-1(9) that costs in a proceeding must be awarded to the successful party. Such reasons can include: misconduct in the course of litigation, a formal offer to settle, or success on one or more issues that took a discrete amount of time at trial. Costs were remitted back to the trial judge.

The court also commented that there is nothing inherently wrong with the trial judge commenting on costs in reasons for judgment. However, when a judge does so, he or she should make clear that the costs conclusions are tentative in nature and invite the parties to make submissions on costs if they seek a different result.

M. Mazur v. Lucas, 2014 BCCA 19 per Groberman J.A. (MacKenzie, Stromberg-Stein JJ.A. concurring)

The plaintiff proceeded to a second trial before a jury after the first verdict award was overturned on appeal. After the second verdict in which she was awarded damages (but in a substantially lesser amount than the first verdict), the trial judge awarded her the costs of the first trial on the basis that the second verdict exceeded the defendants' offer to settle on the first trial. She was awarded the costs of the second trial as well on the basis that the defendants' offer was not one that ought reasonably to have been accepted given the generous damages she received after the first trial.

Finding that the award of costs was entirely discretionary, there is no basis for appellate intervention absent an error in principle.

N. Ripnicki v. 616696 BC Ltd., 2013 BCSC 1421, District Registrar Cameron

The cost of a privately funded MRI was disallowed where there was no evidence to explain the necessity of the cost of a private clinic over the public healthcare system.

O. Ross v. Logan, 2014 BCSC 548, Master Young

The plaintiff claimed accounts on a Bill of Costs from Viewpoint Medical Assessment Service Inc. in her damages action for soft tissue injuries. As a booking agency, Viewpoint located an expert in physical medicine and rehabilitation to provide an assessment and report. Viewpoint charged $900 per hour for the assessment, including additional time in excess of standard. The defendant also challenged the doctor's cancellation fee of $2,670. There was no evidence of the amount kept by Viewpoint as a service fee over and above what it paid to the physician.

Master Young applied the principle of proportionality, considering the significance of the claim; either small or large. In evaluating the reasonableness of the charge, Master Young compared the $900 per hour charge to the BCMA guidelines and concluded that the hourly rate was an overcharge. She reduced the amount to $400/hour, noting it was a "fairly simple medical-legal opinion." Master Young stated:

> If Viewpoint has evidence of what their costs are in acting as a booking agent, they did not share it with me. In the future if they wish to claim a surcharge, they should particularize it in their bill and provide supporting evidence. I have increased the hourly rate for this account because I know there was a booking agent involved.
>
> In an assessment of party-and-party costs, it is not sufficient for the plaintiff to say, "We entered into a contract with View point and we are bound to pay *whatever* they bill. That may be the case and the plaintiff may be out of pocket because counsel chose to contract at this high rate, but that does not mean that the court should condone passing this rate on to the defendant.
>
> ...
>
> The court has an obligation to assess proportionality, and if the court blindly approves accounts because that is what the plaintiff has agreed to pay, there will be no limit to what the service providers will charge. They will charge what the market will bear. Here is a clear message from the court that the market will not bear a $900-an-hour rate for a fairly simple medical-legal opinion. (At paras. 50-52 emphasis in the original).

P. Salsman v. Planes, 2014 BCSC 45, Master Bouck

Rule 1-3(2) invites a more vigorous approach to the questions of necessity, propriety and reasonableness of disbursements than what is seen in decision rendered in the decade before the introduction of the Supreme Court Civil Rules. Proportionality now enjoys a greater or more specific recognition on assessments. On a review of a neuropsychological assessment bill, Master Bouck disallowed a charge for propriety test costs which she found was more appropriately part of the overhead. She reduced the cost of the report by 50%, noting the evidence of lower fees charged by other neuropsychologists and the uncomplicated nature (and boilerplate passages) of the assessment.

Q. Sheikh v. Struys, 2013 BCSC 1148, Fitzpatrick J.

In determining costs for a Fast Track matter, the trial judge held that the "special circumstances" discussed by the Court of Appeal in *Majewska v. Partyka*, 2010 BCCA 236 (in the context of an offer to settle) continue to apply to the exercise of the court's discretion under Rule 15-1(15) in determining whether to award costs in excess of the capped amounts. In that regard, she considered the complexity of the matter and the fact that a trial extended beyond three days in awarding an additional $1,500 for the fourth day of trial. *Peacok v. Battel*, 2013 BCSC 1902 provides a similar analysis.

R. Smith v. Moshrefzadeh, 2013 BCSC 1623, Dardi J.

In an application heard after judgment before the trial judge, the defendant disputed the disbursement of Dr. Helper, an expert for the plaintiff. The defendant claimed that the plaintiff's lack of affidavit material justifying the disbursement was fatal to allowing the fee as necessary or proper. Dardi J. held that it is settled law in this province that if the necessity or propriety of a disbursement is disputed in a registrar's assessment, an affidavit of justification is an indispensable requirement: *Wheeldon v. Magee*, 2010 BCSC 491 at para. 24.; *Bereti v. Schuette* (1980), 17 C.P.C. 259 at 262 (B.C.S.C.).

However, Dardi J. held that it was important to appreciate that there is a key difference between an assessment by a taxing officer under Rule 14-1(5) and a direction by a judge under Rule 14-1(7). In circumstances where the disputed expert report has been produced and the author cross-examined at trial, the trial judge may have a unique and distinct advantage in assessing a disputed disbursement because of his or her knowledge of the issues and evidence at the trial: *New Brunswick v. Stephen Moffett Ltd.*, 2008 NBCA 9, at para. 17. She held that an affidavit was not necessary and that she could draw on her knowledge gained at trial as to the propriety of the disbursement.

S. Walker v. Doe et al., 2013 BCSC 2005, Voith J.

The trial judge declared a mistrial following the closing submissions of plaintiff's counsel. The defendant applied for special costs against plaintiff's counsel for causing the mistrial. Voith J. referred to the line of authorities stating that costs of an abortive trial should follow the result of the second trial except under very exceptional circumstances. Here, the application for special costs against the solicitor was such a circumstance. In addition, the benefits of having the judge who heard the trial and counsel's submissions which gave rise to a mistrial also hear the special costs application was seen as "obvious."

T. Walker v. Doe et al., 2014 BCSC 294, Voith J.

In the later application, the defendant sought such special costs against the plaintiff's solicitor personally. Voith J. held that the mistrial arose solely as a result of the closing address of plaintiff's counsel but was mindful that "excessive zeal" on the part of counsel does not necessarily warrant an award of special costs. In this case, however, Voith J. found that the voluminous instances of disparaging comments about opposing counsel; unsupported allegations against an expert; misrepresentations of the evidence; and misstatements of legal principles were deliberate and reflective of an obdurate belief held by counsel that his conduct was acceptable. The court referred to many examples of pre and post trial conduct of plaintiff's counsel which was wholly inconsistent with his having made a mistake or with some lapse in judgment. The evidence as a whole

demonstrated a pattern of conduct consistent with an indifference to what, on a principled basis, is permissible and appropriate conduct for counsel. In the end, Voith J. awarded the defendants increased costs or the "uplift" in s. 2(5) of Appendix B of 1.5 times the value of the Scale B costs.

U. White v. Reich, 2013 BCSC 1234, Master Caldwell

A $500 booking fee charged by an expert to diarize him to testify at trial was disallowed.

V. Wu v. Ly, 2013 BCSC 1419, District Registrar Cameron

Counsel paid for an MRI directly which had been recommended by the plaintiff's treating physician. It was held that the MRI was obtained for both diagnosis and to assist the plaintiff and her counsel in the evaluation and presentation of her claim for damages. Defence counsel argued that it should have been included in a claim for special damages. In the circumstances, it was allowed as a disbursement.

VI. Credibility

A. Harris v. Xu, 2013 BCSC 1257, Adair J.

In this personal injury case, Madame Justice Adair questioned the credibility of a plaintiff who was described as active and energetic prior to the accident. She noted that the plaintiff "demonstrated a strong and stubborn tendency to attribute almost every problem and every difficulty in her life to the accident" and ruled that "this dictated caution before accepting [the plaintiff's] version of events" (para. 83). Notably, the weakness of the plaintiff's credibility extended to what she told various doctors and impacted the court's interpretation of their reports. In addition, the plaintiff's testimony at the time of trial regarding her injuries on the day of the accident was seen to be an attempt to attribute her current ailments to the accident.

B. Harshenin v. MacLeod, 2013 BCSC 2219, Cole J.

The plaintiff sought damages as a result of a motor vehicle accident and claimed that he had to sell his business to his son as a result of his accident injuries.

While the plaintiff's experts found that he continued to experience symptoms and had a poor prognosis, the defendant's expert was of the opinion that there were no objective findings of injury, no long term sequela were expected, no further treatment was required an a reasonable period of disability following the accident was two years.

The plaintiff claimed $100,000 for non-pecuniary damages, $200,000 for past wage loss, $120,000 for future wage loss, special damages of $36,162.29 and $20,000 for cost of future care.

As a result of contradictions between the plaintiff's evidence and that of other witnesses; documentary evidence that indicated that the plaintiff did continue to do paper work in respect of his business in the months following the accident; and the plaintiff's inability to explain various special damages claimed or produce receipts for various special damages claimed; the court came to the opinion that the plaintiff was not a credible witness.

In particular, during the trial, it came to light that the plaintiff was capable of doing the same tasks on his farm as he was doing before the accident. It was also revealed that the plaintiff asked a

witness to lie to ICBC about his injuries. The witness was able to corroborate her testimony with documentary evidence and the court accepted her evidence wherever it contradicted the plaintiff's evidence.

The documentary evidence was also inconsistent with the plaintiff's allegation that he had to sell his business, that he was worried about losing his farm, and that he was broke. In fact, following the accident, he made several large purchases and incurred debt in the range of $85,000 to $100,000.

In the result, the court found that the plaintiff was not credible and that his soft tissue injuries were mild and should have resolved within two months. The plaintiff was awarded $25,000 for non-pecuniary damages and $1,000 for special damages.

C. Mazur v. Lucas, 2014 BCCA 19, per Groberman J.A. (MacKenzie, Stromberg-Stein JJ.A. concurring)

In this appeal from a jury award of damages, the plaintiff alleged that there was improper cross-examination of the witness for the plaintiff's employer. The plaintiff was a legal secretary in the same firm as her trial counsel. On cross-examination of the law firm's human resources manager, defence counsel suggested that personal injury cases were generally dealt with by contingency fee agreements and that the firm stood to gain from any award the plaintiff received. The witness testified that she had no knowledge of the fee arrangement. On appeal, the court held that the questions were appropriate regarding the issue of any potential basis arising out of her dual role as a witness from the plaintiff's employer and a management employee of her counsel. The cross-examination of a witness with respect to potential bias is a legitimate subject of questioning.

The plaintiff also appealed on the ground that the duration of the jury's deliberations in the amount of three hours was insufficient to consider all of the evidence in the 15-day trial. The court dismissed this ground, noting that each juror was bound by his or her oath and that the *Jury Act* anticipates a unanimous verdict after three hours.

D. Pacheco v. Antunovich, 2014 BCSC 176, Romilly J.

This is a case in which the plaintiff's claim for damages resulting from a rear end motor vehicle accident was dismissed.

The accident occurred in stop and go traffic and the trial judge found as a fact that the defendant was travelling at no more than 2 kilometers an hour at the time of the impact. There were two very small scratches on the plaintiff's bumper, and no repairs made to the defendant's vehicle.

The plaintiff claimed that one hour after the accident she felt pain in her low back and right hip, and those symptoms led her to see a doctor. She said that her neck started to feel sore the evening of the accident and her low back pain did not subside. The plaintiff had a pre-existing injury to both of her shoulders for which she received long term disability benefits. The plaintiff claimed over $100,000 for non-pecuniary damages, as well as damages for wage loss, future cost of care, loss of earning capacity, and special damages.

Romilly J. reviewed the following cases with respect to the issue of credibility: *Jezdic v. Danielsisz*, 2008 BCSC 1863; *Price v. Kostryba* (1982), 70 B.C.L.R. 397; and *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131. Defence counsel submitted that if the plaintiff had not met the threshold of providing objective evidence of her injuries, then her claim must be dismissed; but if she met the threshold, and the weight of the evidence was suspicious due to exaggeration, then the court could consider that in assessing damages.

Ultimately, the court concluded that the plaintiff was not a credible witness at trial. The plaintiff's evidence was not reasonable in the circumstances of a very minor "fender bender" and she had a strong penchant for gross exaggeration.

Furthermore, the court held that the plaintiff had not proved on a balance of probabilities that her injuries were caused by the accident. The trial judge accepted that the only connection between the pain complaints and the accident was a temporal one, which is not sufficient.

E. Raikou v. Spencer, 2014 BCSC 1, Skolrood J.

The plaintiff suffered mild to moderate soft tissue injuries to her neck and low back. The trial judge found that her symptoms had persisted by her emotional and psychological issues.

The trial judge found the plaintiff to be generally credible, but with a tendency to overstate or exaggerate her condition, particularly her evidence that her symptoms were constant and unremitting. As an example, the trial judge referred to a statement posted to the plaintiff's Facebook page:

> From the airport to Eleni's and Nick's wedding. Missed the ceremony but made it to the reception. From the airport home to change and off to the reception. Made it through and had an awesome time. 48 hours without sleep, jet lagged and still partying.

Although the court agreed with plaintiff's counsel that caution must be used in assessing Facebook posts since they are just a "snapshot in time" (see *Guthrie v. Narayn*, 2012 BCSC 734), the court noted that this particular snapshot was inconsistent with the plaintiff's testimony that her pain condition is continuous and unrelenting and that it prevented her from enjoying any of her pre-accident activities.

VII. Damages

A. Aggravated and Punitive

1. Reimer v. Rooster's Country Cabaret Ltd., 2013 BCSC 2211, Jenkins J.

The plaintiff was ejected from the defendant pub after trying to sneak in a beer hidden in his cargo shorts. He was then seriously beaten by the defendant bouncer and another individual. The bouncer was acquitted of the criminal charges arising from the beating.

Jenkins J. found that the conduct of the bouncer involved in the beating and, to a lesser degree, of the pub's manager who failed to take steps to end the assault being carried out by his staff was unnecessary, totally unacceptable, high-handed, arbitrary and reprehensible to a major degree. He further found that compensatory damages were inadequate to compensate the plaintiff. The defendants should be provided with their "just desserts" and the objectives of retribution, deterrence and denunciation of their actions warranted a punitive damage award of $20,000.

2. P. (C.) v. RBC Life Insurance Co., 2014 BCSC 117, Funt J.

The plaintiff was a physician who had received residual disability benefits from the defendant insurer as a result of partial disability due to depression and anxiety. The plaintiff intended to return to full time work in August 2009 so the defendant closed her claim without following its

own internal procedure for dealing with such situations. The plaintiff was not able to resume full-time work and sought reinstatement of benefits which were denied until the plaintiff suffered an overdose at the end of April 2010 allegedly as a result of the defendant's actions.

After benefits were reinstated, the plaintiff brought an action seeking aggravated damages in the range of $50,000 to $100,000 and punitive damages in the range of $1,300,000 to $1,600,000 (these latter figures represented three times the estimated net present value of the monthly average benefit payable over the remainder of the policy term).

In dismissing the claim for punitive damages the court said:

> [67] In argument, defendant's counsel submitted that her client's actions were "sloppy, very sloppy". After hearing all of the evidence and, in particular, the testimony of Ms. Davidson and Ms. Wadhwani, I find defendant's counsel's description of sloppiness is apt. The evidence does not support plaintiff's counsel's general assertion of deft deflection and delay aligned with the defendant's financial interests or an "egregious level of stone-walling and dishonesty".
>
> [68] I note that whenever a business is sloppy with a customer it may affect its business reputation with possible financial consequences. In the case at bar, in addition to this general risk, there was a specific risks that the plaintiff's mental health could be so affected that she would need to be on full long-term disability rather than residual disability.
>
> [69] In short, the plaintiff's file should not have been closed and after being closed, it should, as Ms. Gauthier testified, have been reopened much earlier than it was. The defendant admits that its own AP&C procedures were not followed and that the plaintiff's file should not have been closed without the plaintiff's consent. The cause was the defendant's sloppiness which in part may have flowed from Ms. Davidson's and Ms. Wadhwani's caseloads. As noted, Ms. Wadhwani described her caseload as a "bit overwhelming".
>
> [70] In my view, this explains why the plaintiff's claim remained closed without credible grounds, the second of the plaintiff's counsel's outlier reasons. Sloppiness may give rise to damages for mental distress but, without more, will not give rise to punitive damages.
>
> [71] With respect to the first of the outlier reasons, there was not a "shred of evidence" to believe that the plaintiff would be able to earn more than 80% of her income, the plaintiff herself had stated that she planned to return full-time. The plaintiff is a medical doctor who other than for some brief periods was capable of providing quality medical care. If in July 2009 Ms. Davidson had checked with Dr. C., the plaintiff's psychiatrist, she would have found the plan to be plausible. In sum, there is evidence which contradicts this outlier reason.
>
> [72] As to the third outlier reason, the plaintiff almost died, I am not satisfied that, on the balance of probabilities, any of the defendant's actions were any of the "effective causes" of, or gave rise to, the plaintiff's hospitalizations, suicidal ideations or overdoses: see H.G. Beale, ed. *Chitty on Contracts*, 31st ed. (London: Sweet & Maxwell, 2012) at paras. 25-057; *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) (B.C.C.A.), at 8; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.) at para. 19.
>
> [73] The fourth outlier reason, the plaintiff has found it difficult to pursue her action and to attend court, is not relevant to the assessment of damages. The defendant, like most defendants, defended with vigour.

Aggravated damages were appropriate because the court recognized that the defendant's actions in wrongfully terminating her benefits would have caused a reasonable person mental distress beyond reasonable norms and that the defendant's actions were an effective cause of, or gave rise to, mental distress unrelated to any other mental health condition. However, the court did not accept that the defendant's actions caused the plaintiff's hospitalizations, suicidal ideations or overdoses.

The court did not accept the plaintiff's submissions that damages for mental distress should be higher than they otherwise would be if punitive damages were not awarded. The plaintiff had argued that "because of loss of peace of mind that C.P. will experience if there is no message of deterrence regarding what she has suffered to date." This argument was rejected as "the law does not compensate for that which a plaintiff wishes the law was but is not."

In *Fidler*, the insured was without benefits for more than five years and was awarded $20,000. Here, the plaintiff was fully reinstated, with all arrears paid within a year. Using *Fidler* as a guide and considering that it was made in 2002, the court awarded the plaintiff $10,000.

The reasons for judgment also address the necessity for there to be an application at the outset of an action for permission to use any party's initials in a notice of civil claim statement of claim in lieu of a party's name. Instead, plaintiff counsel had merely issued the notice of civil claim using only initials. The court reviewed the relevant case law to granting such a special order and made the order *nunc pro tunc* on the basis that there was well-founded concern about potential adverse impact of wide spread publicity on the plaintiff's mental health and general wellbeing.

3. Dhillon v. Jaffer, 2013 BCSC 1860

The plaintiff was awarded damages for mental distress arising from solicitor's negligence. The court confirmed that damages for mental distress do not attract Court Order Interest as such damages are excluded under s. 2(e) of the *Court Order Interest Act.*

B. Cost of Future Care

1. Langille v. Nguyen, 2013 BCSC 1460, Fitzpatrick J.

The plaintiff was permanently partially disabled after three separate accidents. The court discussed the cost of future care and noted that:

> The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care:
>
> (1) there must be a medical justification for claims for cost of future care; and
>
> (2) the claims must be reasonable.
>
> Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. (paras. 232-33).

Two other cases have subsequently relied on this test, but have adopted the language of a medical justification and deemed it a lesser requirement than a medical necessity. *Riding-Brown v. Jenkins*, 2014 BCSC 382, *Donovan v. Parker*, 2014 BCSC 668.

C. Crumbling Skull

1. Andrews v. Mainster, 2014 BCSC 541, Pearlman J.

The plaintiff was diagnosed with a pain disorder following a motor vehicle accident which involved a "complex interaction between her pre-accident physical and mental health problems and the effects of the accident." In considering damages, Pearlman J. held that given the long-standing pre-existing pattern of waxing and waning depression and anxiety, the plaintiff would have suffered recurrent bouts of elevated depression or anxiety absent the accident. He concluded that 50% of the plaintiff's current psychological symptoms were attributable to the accident, 40% attributable to her pre-existing condition and 10% to subsequent intervening events which included two frightening encounters with dogs and the witnessing of an assault.

D. Depreciation

1. Pan v. Sidhu, 2014 BCSC 504, Punnett J.

The plaintiff claimed damages for accelerated depreciation of his 2004 BMW M3 which required over $18,000 in repairs following the accident. He attempted to sell the BMW following the accident, but was unable to do so.

Although the defendant acknowledged that the claim was good in law, the defendant argued that the plaintiff had failed to satisfy the heavy burden on a plaintiff to adduce sufficient evidence that the depreciation has actually taken place. The defendant relied on *Miles v. Mendoza*, a 1994 decision of the BC Supreme Court, for the proposition that the evidence required must amount to more than a general "stigma" associated with selling a car that has been repaired after an accident.

The trial judge rejected the defendant's argument for two reasons: first, the court held that the evidentiary standard described in *Miles* had not been applied so strictly in recent judgments; and second, even if the standard in *Miles* did apply, the plaintiff's evidence did go beyond a bare assertion of the "stigma" attached to a repaired vehicle. In this case, the plaintiff presented evidence regarding the quality of the repair, that repaired areas of the car might wear differently, an opinion from an expert with a long history of appraising cars, a review of a Gold Book valuation guide, and market research. The plaintiff's claim was allowed in the amount of $4,000.

E. Future Income Loss

1. Jurezak v. Maura, 2013 BCCA 507, per Stromberg-Stein J.A. (Newbury and Frankel JJ.A. concurring)

On appeal, the court found reversible error in the trial judge's award for future lost income, as the court did not articulate its analysis of the quantum and the quantum did not mathematically accord with either the findings of fact or the trial judge's methods for determining past income loss.

The court noted that while an assessment of damages is a judgment rather than a calculation, the quantum must still accord with either the judge's reasons or the fact and mathematical determinations are an appropriate method of doing so.

2. Kim v. Morier et al., 2014 BCCA 63, per Newbury J.A. (Saunders and Lowry JJA. concurring)

The plaintiff suffered low back and hip injuries in a motor vehicle accident and was left with ongoing pain which was predicted to continue indefinitely. Her doctor assessed her disability as "mild" and "fairly small." The plaintiff was employed as a floor plan technician and continued to work 12-15 hours per day. She was awarded future earning loss of $10,000 on the "capital asset" approach because of her own perception that she is less valuable as an employee.

The future capacity award was overturned on appeal on the basis that the trial judge erred in equating the loss of capital asset with the plaintiff's own perception. In order for an award to be made, the plaintiff must show that it is a realistic possibility that she would be less able to compete in the marketplace—with economic consequences, not merely psychological ones. In addition, the trial judge's statement that the plaintiff "may" be less capable of maintaining her disciplined approach to work also fell short. The word "may" is essentially speculative and does not equate to a finding of a real possibility. The court declined to award the defendants the costs of the successful appeal on the issue because it was "brought as a matter of principle."

3. Mirsaeidi v. Coleman, 2014 BCSC 415, Harris J.

No future earning capacity award was made where the plaintiff was successfully completing his software engineering program and physical occupations were not determined to be realistic occupations for consideration. The court also rejected the argument that he will experience greater difficulties in his chosen field than those who are free of pain and do not require accommodation in terms of stretching breaks.

4. Peters v. Ortner, 2013 BCSC 1861, Harris J.

The plaintiff was an accountant who began to make critical numeric mistakes following a motor vehicle accident. The plaintiff's physical injuries and psychological reaction to the accident produced anxiety and failures of attention. The plaintiff's perceived "failings" became "self-generating" which undermined his self-confidence and sense of ability to be successful in the field of accounting and corporate finance. In looking for alternative employment, he would have to "sell" himself to prospective employer and, on this basis, the trial judge found a real and substantial possibility that his future earnings would be affected for a period of time. On the evidence, the condition was treatable and not permanent.

5. Riding-Brown v. Jenkins, 2014 BCSC 382, Baird J.

The 32-year old plaintiff suffered serious orthopedic injuries to his knee and leg as a result of a bicycle accident and which rendered him permanently disabled from physical labour work. His average annual income was under $10,000 based on intermittent employment at low-paying jobs and reflected "a long term aversion to serious work." However, in the year before the accident, he worked for six weeks in Fort McMurray doing construction and earned a large amount of money. On this basis, he claimed $1.8 - $2 million in loss of future earning capacity.

In view of his pre-accident earnings records, Baird J. approached the assessment with a "healthy caution, even skepticism." He recognized that people often mature later in life or change course after settling down with a partner and having children. A construction worker from the oilsands provided evidence of the earnings potential of $130,000 or more in annual income. Baird J. concluded that, despite the plaintiff's evidence that he had indeed turned his life around, the

likelihood that the plaintiff would have had had such a future could not be lightly assumed given his weak employment history and his failure to pursue further oilfields employment or additional training after his initial stint in the area. In the result, he based a more modest award of $450,000 on a balanced approach of positive and negative contingencies.

6. Tarasevich v. Samsam, 2013 BCSC 1914, Rogers J.

The plaintiff was injured in a motor vehicle accident while she was still young and developed persistent hip and back pain. The defendant forwarded the proposition that as she intended to be a sedentary office worker, no loss of income of income could be awarded. The court, while supporting defence counsel, lampooned this position:

> It is disappointing that in this day and age, nearly 30 years after *Brown v. Golaiy*, a defendant would cleave to such a wrong-headed approach to a claim for reduction of earning capacity. In so saying, I do not levy criticism at defence counsel Mr. Poon. He, in my view, presented his client's position as best as any good counsel could. (para. 53)

F. Homemaking

1. Savoie v. Williams, 2013 BCSC 2060, Johnston J.

The trial judge awarded the plaintiff $20,000 for her diminished homemaking capacity. The plaintiff led no evidence by which any of the household services not performed could be valued. However, the court found that since it was a loss of asset that was being compensated, a calculation approach based on replacement cost was not necessary.

2. Westbroek v. Brizuela, 2014 BCCA 48, per Bennett J.A. (Garson, Hinkson (as he then was) JJ.A.)

At trial the plaintiff was awarded some $32,000 under the cost of future care banner for the cost of replacement homemaking, representing his share of the domestic chores and maintenance he was no longer able to do. On appeal, the court held that the trial judge miscatergorized the homemaking award under the head of future cost of care. Citing *O'Connell v. Yung*, 2012 BCCA 57, the court confirmed that homemaking costs are awarded for loss of capacity and are distinct from possible future cost of care claims.

Homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries. It is a lost asset and distinct from future care costs which is the value of services that are reasonably expected to be rendered *to* the plaintiff rather than the plaintiff rather than *by* the plaintiff. In this case, the reorganization of chores meant that there was no reasonable expectation that a financial loss would be incurred in the future. However, his lost capacity for doing the work was properly compensated by an award for loss of homemaking capacity assessed conservatively in the amount of $7,000.

G. Indivisible Injuries

1. Lawson v. Kirk, 2014 BCSC 461, Johnston J.

At issue in this trial were non-pecuniary damages, loss of earning capacity, and loss of housekeeping capacity.

The plaintiff alleged, and the defendant accepted, that the she was injured in a motor vehicle accident which caused ongoing back pain. The plaintiff had been in a previous accident five years before the subject accident which caused very similar symptoms. The trial judge concluded that the injuries were divisible. The plaintiff gave evidence that her injuries from her first accident were completely resolved at the time of the subject accident. At para. 46 the trial judge said:

> ... I find there was no measurable risk that the injuries caused in the first accident which would have resulted in ongoing losses in any event, so that pre-existing risk need not be taken into account in assessing damages flowing from this defendant's negligence. See *Moore v. Kyba*, 2012 BCCA 361 at para. 433.

The trial judge based his reasoning on the fact that in the time before the subject accident, the plaintiff had been able to do the housework in the home she shared with her boyfriend, she was able to drive the considerable distance between Fort St. John and Campbell River on several occasions without difficulty, she was working at jobs requiring bending and lifting without difficulty, and she was playing soccer without difficulty.

Therefore, the trial judge found that Ms. Lawson's damages ought to be assessed on the basis that she was a "thin skull" rather than a "crumbling skull."

H. Infant Settlement under the Family Compensation Act

1. Gaida v. McLeod, 2013 BCSC 1168, Pearlman J.

In an infant settlement, the review by the PGT and court approval is not conditions precedent to the formation of a binding settlement agreement. The allocation of specific amounts to minor claimants, which is always subject to court approval, and may vary from the amount proposed by the parties, is not an essential term for the formation of an enforceable settlement agreement.

A change of mind about accepting a settlement offer based on further consideration of the law or facts concerning the possibility of success is not sufficient to set aside a settlement.

I. Marriageability

1. Liu v. Bourget, 2014 BCSC 291, Skolrood J.

The plaintiffs, a married couple, separated after the accident in question. The court acknowledged that an individual's marital status was no barrier for an award based on "loss of family income" (as loss of marriageabilty is more appropriately termed) as the accident was found to be one of several contributing factors to their marital difficulties. However, the court declined to make such an award noting the absence of evidence from an economist or other expert determining the additional costs created by the separation.

J. Mild Traumatic Brain Injury

1. Fadai v. Cully, 2014 BCSC 290, Schultes J.

The plaintiff was involved in a rear end accident which resulted in both vehicles being written off. Following the accident, the defendant observed that the plaintiff failed to pull over to the side of the road after the accident, instead staying stopped in the middle of the lane for traffic. The plaintiff complained of pre-accident amnesia, and had memory problems following the accident. While the

ambulance assessed his GCS as 15, a nurse at Burnaby Hospital assessed his score to be 14 out of 15 because he was "alert but disoriented to time."

Following the accident, the plaintiff described a myriad of problems that he did not have before the accident. He described problems with his short-term memory that persisted for a couple of years, but eventually improved. The plaintiff described himself as calm, not prone to fighting and good with people before the accident. After the accident, he was angry, started fights, including physical altercations, and there were instances of irrational impatience and anger that did not escalate to violence. He alleged that after the accident he began to abuse alcohol and did so for about a two month period, he also stopped working out and gained 45 pounds whereas before the accident he was very fit and involved with a martial arts practice.

The plaintiff became financially irresponsible, borrowing thousands of dollars from family members, credit cards, and bank loans, and spending it on impulse purchases such as dozens of pairs of sunglasses. The plaintiff also became hyper sexual; he went from having a modest number of romantic partners to having hundreds.

The plaintiff attempted to return to the type of work he did before the accident: working for his father at a furniture repair shop; working in sales; and working as a bouncer. All of these attempts failed. He could no longer take direction from his father, was no longer adept at dealing with clients and caused the business to lose a few customers. At sales jobs he could not deal with customers without becoming angry. Prior to the accident his communication skills and calm demeanour made him an excellent bouncer, with an ability to diffuse tense situations without violence, after the accident he resorted to violence to solve disputes. The plaintiff attempted to study pharmacy in the Philippines, but failed all of his classes (that said, his academic performance in high school, prior to the accident, was not good).

Although the expert evidence indicated that the plaintiff's symptoms were "not generally typical of the residual effects of a mild to moderate traumatic brain injury," there was evidence that "difficulties with short term verbal memory, spelling, language comprehension and impaired self-regulation are consistent with the direct effects of mild to moderate traumatic brain injury." The court rejected the evidence of Dr. Samrau, expert for the defendant, on the basis that he made findings of credibility about the plaintiff's version of events as told to him.

Most of the plaintiff's physical complaints had resolved within one year of the accident, and the court noted that for the first six months after the accident his headaches were quite severe. Considering all of the facts, the court awarded the plaintiff $100,000 for non-pecuniary damages.

K. Post Concussive Syndrome

1. Wallman v. John Doe, 2014 BCSC 79, G.C. Weatherill J.

The plaintiff was an emergency room physician commuting from home to work when he was rear ended by a Whistler transit bus. Although the vehicles did not sustain much physical damage, the plaintiff alleged, and the court accepted, that his life changed instantly and dramatically as a result of suffering a debilitating concussion.

At the time of the trial, the plaintiff had not returned to his job as an emergency room physician, or to his work as developer of real estate properties, though he had made some efforts to return to work as a physician. Following the accident, the plaintiff professed difficulty with his memory, difficulty concentrating, nausea, confusion and disorientation. His vision was blurred and he was

seeing double. He found that he was sensitive to light and noise and had constant unbearable headaches. He was easily upset and did not understand what was wrong. At the time of trial the plaintiff was suffering "most if not all" of these symptoms. He admitted improvement with his memory, dizziness and confusion.

The plaintiff called expert evidence that he continued to suffer from post-concussion syndrome with accompanying headaches approximately 70% of the time, 1-2 migraines per week, decreased energy, a sleep disorder, decreased memory, concentration and ability to cope with stressors, an inability to multi-task, a balance disorder and vestibular dysfunction. The plaintiff submitted expert reports from eight experts in fields including occupational therapy, neurology, physiatry, vocational rehabilitation, speech pathology, and opthamology.

The trial judge was impressed with the lay witnesses for the plaintiff and the plaintiff himself. He found that the defendant bus driver was not a reliable witness. In the result, the trial judge made the following awards: $210,000 for non-pecuniary damages; $1,445,023 for past wage loss; $3,665,169 for future loss of earning capacity related to the plaintiff's medical career; $500,000 for future loss of earning capacity related to the plaintiff's work in real estate; $90,231 for special damages including over $39,000 for treatment by an occupational therapist and the cost of a nanny to care for the plaintiff's children at a rate of $16,800 per year.

L. Sick Bank Benefits

1. Jordan v. Lowe, 2013 BCCA 520, per Low J.A. (Hinkson J.A. (as he then was) and Harris JA. concurring)

The plaintiff was awarded damage for past wage loss, *inter alia*, in an action against an unidentified driver. ICBC appealed the order of the trial judge which held that ICBC was not entitled to deduct sick bank benefits under s. 106 of the Insurance (Vehicle) Regulation.

In *Lopez v. Insurance Corporation of British Columbia* (1993), 78 B.C.L.R. (2d) 157 (C.A.), the court determined that s. 106 required a deduction from recovery of monies received by a plaintiff through some form of insurance. Since that decision, s. 106 has been amended to include the phrase "compensation similar to benefits and ICBC argued that *Lopez*, *supra* was no longer binding authority."

However, in reviewing the section as a whole yet again, the court concluded that the inclusion of the additional language did not remove the requirement that a "benefit" received have an element of insurance, and it found *Lopez*, *supra* could not be distinguished. In addition, on the evidence, the court found that the plaintiff's sick leave was no more than an entitlement in the contract of employment to some payment of wages during work absences caused by injury or illness. There was no evidence of an outside insurer or internal scheme in the nature of insurance.

2. Gormick v. Amenta, 2013 BCSC 1998, Sigurdson J.

Further to his reasons issued in *Gormick v. Amenta*, 2013 BCSC 1128, Mr. Justice Sigurdson was called upon to clarify the issue of whether the amount awarded to the plaintiff for sick time paid out, $17,850.03, should be awarded on a gross or a net basis.

The plaintiff was not entitled to cash out her unused sick bank hours upon retirement and her employer had a right of subrogation in respect of an employee who has received sick leave payments. The court referred to *Bjarnason v. Parks*, 2009 BCSC 48 and adopted Balance J.'s

characterization of the loss of sick bank credits as a "potential future loss" from which it is not deducted. The court referred to *DeGuzman v. Ge*, 2013 BCSC 1450 which followed *Bjarnason*.

> As is evident from *DeGuzman*, treating loss of sick bank entitlement as past wage loss undercompensates plaintiff because deductions could be taken from him or her twice.

Sigurdson J. declined to follow *Redl v. Sellin* which did not refer to *Bjarnason* or the other cases following that decision. The plaintiff was awarded the gross amount for sick time paid out.

M. Special Damages

1. Brown v. Bevan, 2013 BCSC 2136, G.P. Weatherill J.

The plaintiff was 59 years old at the time of the collision, and 63 years old at the time of trial. The plaintiff alleged various special damages which were largely accepted by the defendant with only one exception: the plaintiff claimed $33,801.79 comprised of costs of commission, storage, moving and property taxes associated with moving to a single floor residence from her two story townhouse.

The plaintiff alleged that but for her injuries, she would not have moved, and the move was necessary as a result of her accident injuries to her knees and foot which made climbing stairs difficult. The defendant argued that the plaintiff would have moved to a single floor home in any event, and therefore the costs were simply incurred sooner than they would have been without the accident.

The court rejected the plaintiff's claim for the following reasons:

> a. the principles of compensatory damages in tort require the plaintiff to be compensated for all reasonably foreseeable losses directly or indirectly caused by the tort (*BG Checo International Ltd.* at para. 47);
>
> b. the plaintiff is not to be placed in a position better than his or her original one. The court must determine the plaintiff's "original position" before the tort and her "injured position" after the tort. It is the difference between these two positions that is the plaintiff's loss (*Athey* at para. 32).

The court accepted the defendant's argument that the plaintiff would have moved to a one story home in any event of the accident. The costs associated with the plaintiff's move would have been incurred at some point in the future and therefore were not accepted as a part of her special damages.

2. Wilson v. Honda Canada Finance Inc., 2013 BCSC 1137, Fitzpatrick J.

The plaintiff was a firefighter who attended for almost 400 sessions of passive therapy, primarily physiotherapy and massage therapy. At trial the plaintiff sought special damages of over $31,895.52, representing a total of $37,143.22 less the $5,247.70 already paid by ICBC. The plaintiff's claim included: $6,725 for physiotherapy; $17,286 for massage therapy; $7,487 for miscellaneous expenses; and $5,643 for mileage.

The court referred to *Redl v. Sellin*, 2013 BCSC 581 and noted that the plaintiff embarked on his own treatment program "with little, if any, regard for the actual recommendations given by his medical doctors." It appeared to the court that the plaintiff had gone "doctor shopping" and there was no evidence from the advising doctor as to why he referred the plaintiff to physiotherapy or how long he expected the treatment to continue. It was not a sufficient opinion that the massage therapy treatments were of "considerable benefit" to the plaintiff.

The plaintiff was awarded $4,200 for physiotherapy; $1,500 for massage therapy; $658 for miscellaneous items; and $2,600 for mileage.

VIII. Document Production

A. Birch v. Brenner, 2013 BCSC 1862, Melnick J.

This was an appeal from an order of a master dismissing the defendant's application for production of two documents listed under Part 4.3 of a list of documents as "sworn affidavit of prospective witness." The affidavits were obtained in anticipation of a summary trial although no application had been filed. The master dismissed the application on the basis that the witness statements were privileged. An appeal was allowed.

In coming to the conclusion that a sworn witness statement is not privileged as a matter of law, the court referenced the following quotation from the leading BCCA decision of *Abernethy v. Ross* (1985), 65 B.C.L.R. 142:

> ... I presume that discoveries may not be used for an improper purpose. I presume that they are confidential in that sense. But I see no good reason to treat them as privileged. That would only serve to protect a witness against false statement a witness formerly said on oath, or against true statements that the witness formerly made on oath. I would not think either of those to be a worthwhile purpose. I am quite unwilling to adopt a rule that seems to be designed to prevent the court from learning what a party has said on oath in the past. No authority cited to us requires me to adopt such a rule.

The court also pointed out that the practice of having a prospective witness give a sworn statement before trial, in the absence of an intention to use the statement as primary evidence, is improper as it threatens the fact finding process. The danger in doing so was elaborated in the following quote referenced from *Pierre v. Mount Currie Indian Band* (1999), 61 B.C.L.R. (3d) 381:

> ... I agree with the judges I have quoted that it is improper to have a prospective witness provide a statement under oath, before trial, if there is not intention to use it as primary evidence. This is because of the overriding interest of the system—and of society—in having accurate and truthful evidence at trial. Binding a witness to a statement made before trial by having it sworn compromises this interest by setting up serious consequences for a witness who wishes to testify truthfully, when the truth is in conflict with the statement. The threat to the fact-finding process is more insidious when it is understood that if the testimony at trial is consistent with the sworn statement, the Court may never learn of the existence of the statement.

Not only were the affidavits ordered to be produced but also all drafts, working papers and notes related to the creation of the affidavits.

B. Gill v. Gill, 2013 BCSC 2365, Adair J.

The plaintiff sought damages arising from a car accident and was represented by the same counsel in both her Part 7 and tort claims, which actions were defended by different counsel appointed by ICBC. The plaintiff underwent discovery in both actions. The defendant sought a motion for permission to use the discovery transcript from the Part 7 action in the tort action. The motion was dismissed but allowed on appeal.

Although the underlying causes of action are different in the two claims, there were overlapping factual issues in both actions. The plaintiff could be compelled to testify in both actions about the same factual issues and so there was no privacy issue that needed to be protected. The defendant demonstrated the existence of a public interest of greater weight than values (privacy and efficient conduct of litigation) implied undertaking was designed to protect.

C. Minnie v. ICBC, 2013 BCSC 1528, Steeves J.

This was a petition brought by a witness to a car accident seeking production from ICBC of copies of statements made by her when she was interviewed by ICBC about the accident. The petitioner was not a party to the tort action nor did she allege that she suffered any loss or damage from the accident. She merely sought copies of her statements which ICBC refused to provide to her.

ICBC opposed the application on the grounds of litigation privilege (which was acknowledged by the petitioner) and that there were further steps the petitioner could have taken through the freedom of information process.

The court found that the petitioner could choose to make an application to court instead of pursuing remedies under *FIPPA* and ICBC was ordered to disclose the statements to the petitioner on the following basis:

> [41] Although the respondent is entitled to have its litigation privilege protected, fairness requires that the petitioner be provided with a copy of her statement. The petitioner is a stranger to the litigation about the accident; she is not a party and she has no interest in it. I note that, if the petitioner was a party, there would be no question that she would be entitled to her statements, as I will discuss below. I have some difficulty imposing on a private citizen the rules of a "sporting event" that are more onerous than those placed on parties. The risk of applying those rules to a non-litigant without legal representation is that a person can, through accident or ignorance, make a mistake. The mistake can be only embarrassing to the non-litigant and /or it can distort the evidence before the court. Neither is desirable.
>
> [42] Within the bounds of an adversarial system, private citizens should be encouraged to participate in the litigation process and disclosure to them of previous statements, as in this case, is a modest way to accomplish that objective. The petitioner could have insisted on some kind of legal document that assured her that she would get a copy of her statement before she gave it. She did not do that. In my view, she did not have to do it and nor should she now be at a disadvantage greater than a party for failing to do it.
>
> [43] The petitioner is entitled to a copy of her statements as soon as practicable in order to review them herself and with her solicitor. However, I set conditions on that disclosure to recognize the litigation privilege that also attaches to the statements. The disclosure of the statements does not extend to disclosure by the petitioner to other persons, including the plaintiff in the accident that she witnessed (or counsel for that plaintiff). If, ultimately, there are issues at trial that involve the petitioner's statements, they will have to be resolved by the trial judge.

D. Spenst v. Reemeyer, 2013 BCSC 1394, Master Caldwell

The case is a cautionary tale reminding counsel about the care required in drafting application materials and how important it is to ensure that all of the relevant evidence is contained in the supporting affidavits and the affidavits come from the appropriate deponents.

This was an application by a plaintiff for production of unredacted copies of two investigative reports listed by the defendant as privileged under Part 4 of his list of documents. The action arose out of a parking lot accident and liability was in issue. The defendant asserted litigation privilege over the reports.

The application was granted on the basis that the evidence failed to objectively establish to any certainty that the investigative reports were commissioned by the defendant for any other purpose than for basic investigation of the plaintiff's claim. There was no evidence from the earlier handling adjuster who had the file for the first 18 months. There was no evidence to indicate that the insurance adjusters had undertaken any type of earlier investigation to determine whether there was reasonable and objective basis upon which liability should be denied or to address the quantum. The adjuster who swore the affidavit (and who had conduct of the file shortly before litigation was commenced), failed to explain her position in the context of a standard form letter that she had sent out the day she commissioned the investigative reports (i.e., the letters said that liability had not yet been determined). The letter also appeared to contradict her evidence that she only handled litigated claims. Further during argument, counsel for the defendant made submissions regarding the nature of the investigation which was not addressed in the supporting material.

IX. Evidence

A. Adverse Inference

1. Miles v. Kumar, 2013 BCSC 1688, Bernard J.

The plaintiff's claim for damages was dismissed on the grounds that there was no negligence against the defendants. The accident happened when Ms. Kumar, alone in her vehicle, was driving eastbound on Grandview Highway approaching Slocan Street. The plaintiff, who was riding a bicycle in the same direction, moved into the defendant's lane of travel in preparation for a left turn onto Slocan and the collision occurred.

This case is interesting because the court refused to draw an adverse inference from the defendant's failure to testify at trial despite liability being in issue. Mr. Justice Bernard addressed the issue as follows:

> [66] The plaintiff has submitted that the Court should draw an inference adverse to the defendants because Ms. Kumar—"the only person who could have provided evidence as to her position, speed, attentiveness, driving experience, familiarity with the road, as to when she first saw Mr. Miles, and as to why she made no attempt to avoid a collision"—who had been scheduled to testify, did not do so, and without explanation. In support of his position, the plaintiff cites *Bronson v. Hewitt*, 2010 BCSC 169. In *Bronson*, the court drew an adverse inference against the defendants because one of the defendants did not testify. The court found this defence decision deprived the court of the best evidence of conversations critical to deciding the case.
>
> [67] The defendants submit that *Bronson* is distinguishable from the case at bar. In *Bronson*, a positive defence was advanced; one which required proof of content of critical conversations between the two defendants. The court observed that evaluating the defence advanced obliged the court to consider the credibility of both defendants, and the failure to call one defendant deprived the court of the best evidence of the conversations and the opportunity to assess credibility—a matter very much in issue.

[68] In the case at bar, the defendants note that a positive defence has not been advanced. Here, the defendants simply rely upon the onus the plaintiff bears to provide its case. The defendants' position is that the plaintiff has failed to prove the negligence alleged. In support, they cite *McIlvenna v. Viebigg*, 2012 BCSC 218. In reviewing the law on adverse inference, the court in *McIlvenna*, stated:

> [70] The law with respect to adverse inference in civil cases when witnesses are not called is summarized in *Halsbury's Law of Canada* [Civil Procedure II, 1st ted (Markham: LexisNexis 2008) at para 228; Evidence, 1st ed (Markham: LexisNexis 2010), at para. 14] under both *Civil Procedure* and *Evidence* headings, respectively, as follows:
>
> > It is highly unusual for a party not to testify in a civil trial. The court may draw an adverse inference from the fact that a party fails to testify; provided that it is reasonable in the circumstances to do so. In order for an adverse inference to be drawn, there must be a dispute as to those facts concerning which the party would be competent to testify. Furthermore, if the plaintiff has failed to establish a prima facie case against the defendant, no adverse inference will be drawn should the defendant not testify. Nor is a party required to testify to rebut allegations that are plainly absurd. More generally, an adverse inference will not be drawn where the effect of such an inference is to reverse the onus of proof.
> >
> > ...
> >
> > There is no obligation on any party to call any particular witnesses. However, the trier of fact may draw an adverse inference from a party's failure to call a witness whose testimony would be expected to assist the party's case.

[69] Having regard to the foregoing, I agree with the defendants that the effect of drawing an adverse inference against Ms. Kumar would be to reverse the onus of proof; moreover, Ms. Kumar was extensively cross-examined at her Examination for Discovery and the plaintiff chose to "read in" many of Ms. Kumar's answers as evidence in the plaintiff's case.

[70] I am satisfied that there is a critical distinction between the case at bar and that in *Bronson*. Here, the defendants have not advanced a positive defence and then elected not to testify in support of it. In such circumstances, the defendants are entitled to rest upon the plaintiff's failure to prove his case. Drawing an adverse inference against the defendants for failure to present a case with Ms. Kumar as a witness would undermine the fundamental legal premise that it is the party alleging the wrongdoing who bears the onus of proof.

B. Income Loss

1. Musgrove v. Elliot, 2013 BCSC 1707, Johnston J.

The plaintiff, a self-employed builder, recovered only a fraction of the damages he sought due to the lack of business records both before and after two accidents. There was little reliable evidence of what he had actually earned before the accident and he had not filed tax returns. His Lordship commented that evidence of actual earnings is usually the most reliable basis on which to assess

damages for income loss. His poor record keeping habits after the accidents left little for the court to base a confident estimate of what he paid others to help him.

> [73] Mr. Musgrove must accept responsibility for the consequences of his poor or non-existent records. One such consequence may be an award lower than it might have been had he kept proper records.

C. Use of Clinical Records

1. Kostecki v. Li, 2013 BCSC 2451, Schultes J.

Following the plaintiff's closing argument, Schultes J. asked counsel what use he could make of potential inconsistencies contained in a neurologist's records. Thereafter, the defendant then applied to reopen his case to prove that the plaintiff gave oral statements to a neurologist and a physiotherapist that the defendant argued were inconsistent with certain aspects of her direct evidence.

Defence counsel cross-examined the plaintiff on a letter from her neurologist to her family doctor. During cross-examination the plaintiff could not recall the conversation with the neurologist, was not sure why he would have written what he did, and would not necessarily agree that the neurologist had recoded her statements accurately.

Defence counsel also cross-examined the plaintiff with respect to a statement in a clinical note by a physiotherapist that she was feeling 85% better. The plaintiff qualified that statement and explained that she meant she was 85% following a flare-up of her symptoms, and not 85% better overall since the accident.

Defence counsel argued that the failure to call the neurologist and the physiotherapist to speak to their clinical records was an error or oversight of his own. He argued that it was a very narrow point on which he sought to call the witnesses and did not involve eliciting new expert or substantive evidence. Plaintiff's counsel opposed the application on the basis that: defence counsel was in possession of the records for a considerable period of time prior to trial, and plaintiff counsel's response to the proposed document agreement was that he reserved the right to dispute that the statements in the records were actually made; second, the proposed evidence is admissible only as to credibility and did not contain material facts as required by the rule governing reopening; and third, the records were admitted as business records and therefore it was questionable what the testimony of the makers of the documents could add.

Schultes J. permitted the defendant to reopen his case for the purpose of calling Dr. Beckman for the sole purpose of proving that the plaintiff made the statements he attributed to her in his letter.

The jurisdiction to reopen a case is inherent, and is not restricted to the need to prove a material fact as provided for under the Rules, either the current rule or its predecessor. The court reviewed *Vander Ende v. Vander Ende*, 2010 BCSC 597 at para. 84:

> The decision to permit or disallow reopening is a matter of judicial discretion. The discretion of the trial judge presiding over a civil trial to reopen the trial before judgment has been rendered is wide. The scope of the discretion is generally narrower where judgment has been issued, and the test becomes even more rigorous depending on whether the order has or has not been entered: *G.C.H. v. H.E.H.*, 2009 BCSC 4 (CanLII), 2009 BCSC 4; *Clayton v. British American Securities Ltd.* (1934), 49 B.C.R. 28 (C.A.); *Zhu v. Li*, [2007] B.C.J. No. 2150. While the ambit of the judicial discretion is acknowledged as being unfettered, it must be exercised cautiously so as to prevent an abuse of process: *Clayton; G.C.H.*; *K.F.P. v. D.J.P.*, [2004] B.C.J. No. 782. In considering whether to reopen,

> the court should turn its mind to the relevance of the proposed evidence, the effect, if any, of reopening on the orderly and expeditious conduct of the trial at large, and most fundamentally, whether the other party will be prejudiced if the reopening is permitted: *R. v. Hayward* (1993), 86 C.C.C.(3d) 193 (Ont. C.A.).

Clayton contains additional requirements: the power must be exercised sparingly, and the fundamental consideration is whether a miscarriage of justice will occur if the additional evidence is not admitted: *Steven v. Plachta*, 2006 BCCA 479.

The court reasoned that the failure to call the neurologist was a simple mistake by defence counsel. The purpose of reopening would be to put the defendant in the position he would have been if the error had not been made. It would confer no additional benefit and would allow the neurologist to vouch for the statements he recorded in his letter.

Since it was the defendant who was applying to reopen and the plaintiff had not called any reply evidence, the additional defence evidence could simply be considered as a continuation of the defendant's case and is less prejudicial than when a plaintiff seeks to reopen: *Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Company*, 2011 BCSC 1536 at para. 34. The court found that prejudice to the plaintiff was minimal or non-existent, the only thing she lost was the opportunity to take advantage of a slip up by opposing counsel. The court stated at para. 21: "... but my having to decide the critical issue of credibility with a piece of evidence that may be highly relevant to that assessment sitting on the sidelines only because of counsel error is indeed the stuff of which miscarriages of justice are made."

2. Lees v. Compton, 2013 BCSC 1015, Goepel J. (as he then was)

This case contains the following helpful comments about when clinical records can and cannot be used to undermine the credibility of a plaintiff:

> [71] In *Edmondson*, N. Smith J. pointed out certain concerns in relation to clinical records including the fact that they are usually not intended to be verbatim recording of everything that was said and the records may only be a brief summary or paraphrase. Those concerns are real and can, in many cases, diminish the importance of a specific clinical note.
>
> [72] The plaintiff submits that the physiotherapy records with respect to field hockey, running and studying are unreliable and inaccurate. In this regard, they refer to the evidence of the plaintiff, her parents, Ms. Weymark and Ms. Welch. They note that the defendant did not call any of the physiotherapists to confirm the accuracy of the records, or to confirm whether they were written contemporaneously or at the end of their shift after having seen a number of other clients.
>
> [73] In the course of the trial the plaintiff admitted that the physiotherapy notes were business records and admissible pursuant to s. 42 of the *Evidence Act*. By definition, that means that document was made in the usual and ordinary course of business and it was in the usual and ordinary course of the business to record in that document a statement of fact at the time it occurred or within a reasonable time thereafter. The notes record information that would be of importance to a physiotherapist in formulating an appropriate treatment plan. It is not the type of note which one would expect would be wrongfully recorded.
>
> [74] While I acknowledge the comments of N. Smith J. in *Edmonson* that clinical records must be viewed with caution, in this case there are eight separate notes that are in issue. With regard to each note, the plaintiff claims the physiotherapist is wrong and she never gave the information in question because the information sets out activities in which she did not participate and indeed could not participate because of her injuries.

> [75] On the evidence before me I cannot disregard the physiotherapist's notes. While it is possible that a clinical note may be in error it is highly improbable that there would be eight such errors. There is also little evidence that contradicts the notes. As noted earlier, other than Ms. Welch, the plaintiff did not call any of her contemporaries as witnesses and Ms. Welsh's evidence was limited to her experience on one filed hockey team.
>
> [76] I find the plaintiff made the statements to the physiotherapist that are recorded in the clinical notes. Those statements raise significant questions concerning the plaintiff's credibility. Her evidence must be viewed with great caution.

X. Examination for Discovery

A. Li v. Oneil, 2013 BCSC 1449, Master Muir

The third party ICBC applied to compel the plaintiff to attend a further examination for discovery. An examination for discovery was conducted by previous counsel for ICBC two years prior for a period of one hour and thirty five minutes. Nine requests were left on the record and the transcript ended without comment by counsel that the discovery was concluded. The transcript ended with a note by the court reporter "(Proceedings adjourned at 1:35 p.m.)"

Master Muir states that the application:

> despite being framed as an application for a further discovery, was in reality an application that the examination of the plaintiff continue, both in accordance with R. 7-2(22) and generally, based on production of new material such as the list of special damages, medical records and employment records [at para. 11].

The plaintiff; however, took the position that the third party was really seeking a second discovery and therefore relied upon *Sutherland v. Lucas*, 1996 CanLII 3393 for the proposition that the third party must demonstrate that the examinee failed to give the examiner the discovery to which he was entitled, and in the alternative, that the complexion of the case has materially changed, or that full and frank disclosure was not made at the first discovery.

Master Muir concluded that the examination for discovery was adjourned and therefore the third party was entitled to continue its discovery regarding "questions left on the record" and "that logically extends to questions based on documents requested at the discovery and subsequently produced." Since the discovery was not concluded, the heavy onus required by *Sutherland* was not invoked.

In *obiter*, Master Muir stated that if the application had been for a second discovery she would have allowed the application further to her review of the documents produced by the plaintiff subsequent to her discovery, which included records that were in existence prior to her discovery but were not produced at that time. She agreed with counsel that this constituted a failure to make full and frank disclosure as contemplated in *Sutherland*:

> I agree. In my view it does not behoove a party to fail to make complete document disclosure prior to an examination for discovery and then to take the position that the examination cannot be continued when proper disclosure is made [at para. 20].

B. P (C.) v. RBC Life Insurance Co., 2013 BCSC 1434, Master Baker

This case involved a "difficult and, at times disputative or even fractious" two days of examination for discovery. There were frequent interruptions and interventions by counsel (there were interruptions on 116 of the 170 pages of the transcript although many were "benign"). The plaintiff sought an order, *inter alia*, for further discovery at the defence's cost.

The court reviewed the law regarding the largely "hands off" approach to discoveries except it the clearest of cases. The principle of wide-ranging questioning is in keeping with the newly stated object of proportionality. It is far more efficient for counsel for the examinee to raise objections to the admissibility of evidence at trial, rather than on discovery. Counsel should not raise objections which are "rigid limitations rigidly applied." Often objections lead to arguments between counsel which occupies a significant portion of the time.

The court raised the following concern for the direction that practice regarding discovery may be taking:

> [18] I worry that there is a trend to more oppositional examines for discovery and that more and more will, inevitably, result in applications such as this. While the court is always available to apply the Rules of Court and decide on procedural issues, the process for examinations for discovery never intended this level of supervision. I agree with N. Smith J. that the court should generally discourage a question by question approach that, essentially subsidizes counsel's fundamental duty to conduct an appropriate discovery, on the one hand, or to permit one (including its broad and wide ranging nature often), on the other.
>
> [19] Rule 7-2(1)(a) inevitably increases the responsibilities in that regard. With a seven-hour limitation, examining counsel is obviously required to be efficient, focused, and effective in conducting his or her examination. Opposing counsel, on the other hand, is obliged to restrict his or her objections to and not consume that valuable time with unnecessary objections or interventions. Quite the contrary: if one thinks strategically, why not allow one's opponent to use the examining time with irrelevant or non-productive questions? Tedious as they may seem, they would offer an excellent response to any application for increased examination time.
>
> [20] But that choice would be entirely left to the examinee's counsel. In the main, it is for him or her to avoid intruding on the examinee's time unless clearly justified.
>
> [21] There is a parallel obligation on the actual examinee; with the restriction on examination time comes a heightened reasonability to inform oneself in advance of the examination, so that the time can be used fruitfully and the discovery process serve its purpose. In this case Ms. Edizel had a particularly clear obligation in that regard. She was not the case manager or supervisor during the operative times of C.P.'s claim management; both of those individuals as I have said, have left RBC. It was therefore incumbent on Ms. Edizel to redouble her efforts to examine the file and its history and to inform herself as much as possible ... I am not satisfied that she met her obligation to inform herself as much as reasonably possible in advance of her examination. As a consequence, Rule 7-2(22) applies:
>
> > In order to comply with subrule (18) or (19), a person being examined for discovery may be required to inform himself or herself and the examination be adjourned for that purpose.
>
> [22] The combination, then, of the overly-frequent interventions, inappropriate objections, and an under-prepared witness requires that Ms. Edizel be further examined. I will not restrict that examination to outstanding requests. Moreover, her attendance for further examination in British Columbia will be at the expense of the defendant ...

XI. Experts

A. American Creek Resources Ltd. v. Teuton Resources Corp., 2013 BCSC 1042, Grauer J.

This case did not involve a personal injury claim but is of interest because it addresses the circumstances under when lay opinion evidence may be admissible.

His Lordship relied upon the following quote from *The Law of Evidence in Canada*:

> Courts now have greater freedom to receive lay witnesses' evidence if: 1. the witness has personal knowledge of the observed facts; 2. the witness is in a better position that the trier of fact to draw the inference; 3. the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and 4. the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with a reasonable facility describe the facts she or he is testifying about. But as such evidence approached the central issues that the courts must decide, one can still expect an insistence that the witness stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops.

Reference was also made to the Supreme Court of Canada ruling in *R. v. Graat*, which specifically addressed the ability of lay witnesses to give evidence regarding intoxication, age, speed, identity, or emotional state:

> This is because it may be difficult for the witness to narrate his factual observations individually. Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication, and it is yet more difficult for a witness to narrate separately the individual facts that justify the inference, in either the witness or the trier of fact, that someone was intoxicated to some particular extent. If the witness is to be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to particular degree ... Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

B. Farand v. Seidel, 2013 BCSC 323, Savage J.

The court found that the requirements in Rule 11-6(10) that a party give notice of the intended objections to expert reports at least 21 days before trial are mandatory. Mere inadvertence was not sufficient to relieve a party from a breach of this rule (at paras. 110-13).

C. Friebel v. Omelchenko, 2013 BCSC 948, Ker J.

The court ruled that asking an expert to review discovery transcripts was not, in and of itself, problematic. The problem (from the admissibility perspective) arises from the expert not setting out a concise statement of the facts and assumptions upon which the opinion is based. The trier of fact must be able to determine what facts form the basis for the opinion. The trier of fact must be

able to see clearly the basis for the opinion and determine whether counsel has succeeded in proving the underlying facts. The court noted that in some circumstances, it is beneficial to have the expert review transcripts of examinations for discovery. However, it must never be left to counsel and the court to guess as to which facts and assumptions the expert relied upon in reaching his or her opinion.

D. Healey v. Chung, 2014 BCSC 429, Ball J.

The defendant admitted liability for the pedestrian/vehicle accident but the nature of the accident was a prime focus for the determination of the injuries the plaintiff claimed he suffered in the accident. The defendant and one eye witness testified as to the nature of the accident in which the plaintiff was struck by the vehicle such that he pushed himself away from the car and landed approximately 10 feet away. However, an exaggerated version of the accident was given to the plaintiff's experts, including that he was thrown up to 40 feet and rendered unconscious. Such exaggerated and inconsistent accident descriptions were found throughout the clinical records and early reports, and incorporated into later expert reports as well. The inadmissible statements became the factual basis for the medical legal reports.

In such circumstances, Ball J. held that the weight to be given to the reports was significantly diminished—"perhaps to the level where they are almost worthless."

Ball J. also employed the "immutable laws of physics" to inform his analysis and reject the plaintiff's contention that he was thrown to a height of 15-20 feet and flew 30-40 feet after impact.

E. Jarmson v. Jaconsen, 2013 BCCA 285, per Hinkson J.A. (as he then was) (Frankel and Neilson JJ.A. concurring)

The Court of Appeal accepted the trial judge's rejection of the cost of future care opinion of Janice Landy which was not only a Cadillac, but a gold-plated one. Hinkson J.A. (as he then was) held that the trial judge properly assessed the need to establish the reasonableness of items claimed, and that his reference to the life care plan as "gold plated" (which was argued as a ground of appeal) was meant to address its unsuitability based upon: her reliance on fact, opinions and assumptions not in evidence; her costing in some instances displaying a "discomforting lack of care"; and the fact that the plan lacked the support of medical opinions other than her own.

F. Lower v. Stasiuk, 2013 BCCA 389, per Levine J.A. (Neilson and Groberman JJ. A. concurring)

This case underscores our court's reluctance to strip away the immunity provided to expert witnesses.

Expert immunity was recently overturned by the United Kingdom Supreme Court in *Jones v. Kaney*, [2011] UKSC 13, a case in which a psychologist who had assessed a plaintiff in the context of a car accident claim was sued. The lawsuit was dismissed at first instance but overturned on appeal on the basis that there was no justification to continue to hold experts witnesses immune for breach of duty in respect of their evidence on the basis of the longstanding immunity provided to experts.

Lower involved a family law proceeding in which custody was in issue. At trial, the judge was very critical of a psychiatrist, who had testified on behalf of the mother. The psychiatrist was described as an advocate and someone who was prepared to do or say whatever was necessary to assist his client even if it meant attempting to destroy the reputation of the father's expert. The father was successful at trial and then sought to join the psychiatrist as a third party for the purposes of

seeking special costs against him. The application was refused on the grounds that his conduct did not meet the test for adding a party for the purposes of special costs and that he was immune from civil liability as a witness.

The court of appeal upheld the decision on the basis that his conduct did not amount to the special circumstances required to add him as a party. However, Madam Justice Levine went on to address the question of witness immunity reviewing the law and finding that caution ought to be exercised in this jurisdiction before adopting the exception to witness immunity as has been done in the UK.

G. Mattice v. Kirby, 2014 BCSC 657, Jenkins J.

Mr. Justice Jenkins was highly critical of an expert witness showing a lack of willingness to be frank, open and honest with the court. The expert, Dr. Christian, an orthopaedic surgeon, conducted an IME of the plaintiff at the request of the defendant. The plaintiff testified that Dr. Christian's examination took a total of 20 minutes, 16 of which was for the interview and four minutes for the physical examination. Dr. Christian did not disagree that his assessment was very brief.

The court had the following to say about his evidence at trial:

> [75] During cross-examination, Dr. Christian was very argumentative and often arrogant. He stated that when asked previously by defence counsel whether he took notes of his meeting with Mr. Mattice, he advised that he did not take notes. At trial, Dr. Christian admitted to having taken "scribbles", which he said were illegible and which he destroyed after dictating his report on the day of the assessment. He said he had denied having taken notes as he had instead made "scribbles" and that no one had asked him if he had taken any "scribbles". Since Dr. Christian admitted on cross-examination to having used his "scribbles" to dictate his report, there is little doubt in my mind that his "scribbles" were what any doctor would consider "notes" and that Dr. Christian was well aware that his "scribbles" constituted what anyone else would consider to be "notes". His answers in this inquiry were most evasive and clearly showed a lack of willingness to be frank, open and honest with the court.
>
> [77] Dr. Christian's interview and physical examination of Mr. Mattice were without question incomplete. On cross-examination, Dr. Christian admitted that he had not asked Mr. Mattice questions regarding, among many other things: the severity of the accidents of 2008 and 2009; any symptoms in his hands such as pain and "pins and needles"; whether symptoms, if there were any, were improving; bruising on Mr. Mattice's elbow; the nature of his employment; the extent of the pain in his shoulder; and sleep problems. Dr. Christian also did not inquire about aspects of the accident that were relevant to the injuries claimed, such as Mr. Mattice's body position in the 2009 accident and how he was impacted in the accident. In written submissions, counsel for Mr. Mattice listed 18 areas of legitimate inquiry that that Dr. Christian could have pursued to provide a more informed and unbiased opinion; in my view, there were areas in addition to these 18 which Dr. Christian could have explored, but elected not to do so.
>
> [78] Dr. Christian repeated on several occasions that he was an orthopaedic surgeon and that his role was only to explore musculoskeletal, and not neurological, problems.

The court then set out portions of Dr. Christian's original opinions and conclusions and referenced an addendum he wrote after receiving an MRI:

> [81] In the addendum of Keith Christian dated June 8, 2013, Dr. Christian said in part:

> The report of the MRI of the right shoulder suggests a tendinosis or intrasubstance tear of the infraspinatus tendon. It also notes partial thickness incomplete tear of the articular surface of the infraspinatus tendon. It also suggests a subacrominal bursitis.
>
> It should be noted that these features described in the MRI study are common abnormalities found in asymptomatic adult individuals; the incident in the general population is extremely high, particularly in mid to later life age groups. I would say that the presence of these abnormalities noted on the MRI are of no significance and are completely incidental findings. From the mechanism of the injury and the symptoms reported by the claimant, there is nothing to suggest there is a causal connection between these radiological findings and the motor vehicle accident in question.
>
> Furthermore, the presences of these radiological findings would not likely be related to this gentleman's ongoing symptoms. The complaints that he reported to me are more likely on the basis of the whiplash-associated disorder that I have discussed in my report. I would say that the presence of these findings do not, in any way, render this individual more susceptible to the appreciation of ongoing symptoms of this disorder occasioned by the motor vehicle accident in question.

[82] In cross-examination Dr. Christian stated that there was no reason at the time for him to be having shoulder pain, that any fatigue being experienced by Mr. Mattice was "absolutely irrelevant", that there was no reason for Mr. Mattice not to improve, and that there was no reason for Mr. Mattice to have a problem with his shoulder. He stated that, generally, in his opinion, Mr. Mattice should have been over any injuries from the 2009 accident long before the visit to Dr. Christian.

[83] In conclusion on Dr. Christian's evidence and opinions, I have no hesitation in finding that his research was incomplete, that he was predisposed to a finding that Mr. Mattice's injuries were either exaggerated or did not exist, and that by limiting his opinions to musculoskeletal injuries, he was not qualified to opine on the injuries which Mr. Mattice claimed to have suffered in the 2009 accident. As a result, I find the opinions and evidence of Dr. Christina to be of little or no probative value …

H. Mezo v. Malcolm, 2013 BCSC 1793, Russell J.

Madam Justice Russell rejected expert opinion that soft tissue injuries heal within 12 to 16 weeks of an accident and so the plaintiff's lingering complaints of pain could not be related to the accident. In finding his report unhelpful, Her Ladyship said:

> [114] I found Dr. Bishop to be rigid in his point of view and unable to do other than say that if the plaintiff's pain continued long past the 12 to 16 month time limit for the healing of soft tissue injuries, the pain could not come from soft tissue injuries. In my view, this begs the question of why the plaintiff continues to suffer pain from activities which place stress on her spine. That her injuries are not objectively demonstrable does not mean she does not suffer pain.
>
> [115] Dr Bishop agreed in cross-examination that there can often be soft issue injuries in patents where the pain endures for more than 16 weeks but which are not objectively determinable.

The court preferred the evidence of the plaintiff's doctor as it was a more nuanced opinion and appeared to be supported by the plaintiff's account of the changes in her physical state as a result of the accident.

I. Moore v. Getahun, 2014 ONSC 237, Wilson J.

This Ontario case is of some interest as the Ontario court addressed the extent to which counsel should discuss draft reports with an expert. The court went so far as to say:

> [50] For reasons that I will more fully outline, the purpose of Rule 53.03 is to ensure the expert' witness and independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.
>
> [51] If after submitting the final expert report, counsel believes that there is need for clarification or amplification, any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel.
>
> [52] I do not accept he suggestion in the 2002 Nova Scotia decision, *Flinn v. McFarland*, 2002 NSSC 272, 211 N.S.R. (2d) 201 (N.S.S.C. [In Chambers]), that discussion with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.

J. Neyman v. Wouterse, 2013 BCSC 95, Walker J.

Walker J. refused to allow the defendant to tender a rebuttal report that had been delivered 27 days prior to trial. The court found that Rule 11-7(6) governed the circumstances in which an order can be made when the requirements of Part 11 have not been met. The court found that a failure to comply with Rule 11-6(4) (notice) is one of those requirements. The court then considered the three tests set out in Rule 11-7(6). Walker J. relied heavily on *Perry v. Vargas*, 2012 BCSC 1537 and concluded that either the trial should be adjourned with costs consequences or the report excluded.

K. Paller v. Regan, 2013 BCSC 1672, Fenlon J.

Madam Justice Fenlon rejected the medical opinion of the defendant's expert, Dr. Dommisse, on the issue of causation in part because he had not conducted an examination of the plaintiff and his opinion was largely anecdotal. Dr. Dommisse had also assumed that an impact speed of 5 kph based on the defendant's ICBC statement. However, at trial, the defendant conceded that he could not be precise about his speed: and he testified he had been accelerating and was travelling at a moderate speed. Accordingly, his opinion was based on a fact not proven at trial.

L. Sekihara v. Gill, 2013 BCSC 1387, Watchuk J.

In this case, a defence doctor's opinion was rejected because the doctor did not appear to have demonstrated "an open mind" in his examination of and conclusions regarding the plaintiff or to have taken into account her complete medical history.

The doctor had: only taken a cursory history from the plaintiff; made a number of editorial comments in the section of his opinion titled "medical records review" without identifying the comments as his own; left out salient facts which tended to support her complaints; if he was

unable to read handwriting left it out without stating that he had done so; and, was evasive in his oral testimony.

M. Smith v. Rautenberg, 2013 BCSC 1347, Master McDiarmid

This case addressed the position often taken by psychologists and neuropsychologists that their code of conduct only allows them to release their raw test data to a registered psychologist and not directly to a lawyer.

That was the position taken by the plaintiff's neuropsychologist following service of her expert opinion and in response to defendant's request for the underlying records. The court ordered production of the records on the grounds that the records were relevant and that there was nothing in the code of conduct to substantiate the apparent position of the College of Psychologists. Accordingly, there was no reason why the raw test data would be exempt from disclosure under the BC Supreme Court Rules.

N. Thibeault v. MacGregor, 2013 BCSC 808, G.C. Weatherill J.

The 101 page report of Dr. Vondette was ruled inadmissible at trial, having been found "prolix in the extreme" and improper for: being argumentative, simply regurgitating the plaintiff's complaints, opining on matters that had no relevance to the claim, overreaching into areas reserved for the trier of fact, and remarking on matters relating solely to credibility. Weatherill J. did, however, permit a two page summary of the medical opinion to be entered into evidence. Having done so, the oral testimony of Dr. Vondette was of little value to the court as he: returned to the prolix method of communication which tainted his report; was argumentative and condescending; and represented himself as a physician with "bountiful knowledge in other specialties" in which he has no formal training, including: psychiatry, psychology, gynecology, physiotherapy, family medicine, social work, and occupational therapy.

XII. Gambling—Self-Exclusion Clauses

A. Dennis v. Ontario Lottery and Gaming Corporation, 2013 ONCA 501, per Sharpe J.A. (Weiler and Rouleau JJ.A. concurring)

This case involved a class action suit in Ontario for individuals who had signed self-exclusion agreements with casinos, whereby the casino would make "best efforts" to exclude them from the premises. The self-exclusion process was entirely self-directed and required no determination from the casino. The plaintiff bringing the case had been able to return to the casino on a regular basis over a three year period.

The motion judge refused class action certification as all significant issues turned on whether those who signed the self-exclusion clauses were vulnerable, pathological problem gamblers. Class-action status was deemed not to be appropriate because it included all those who had signed the forms and liability could only be determined by a personal examination of each class member.

B. Ross v. British Columbia Lottery Corporation, 2014 BCSC 320, Truscott J.

The plaintiff alleged that she lost approximately $78,000 due to the failure of several casinos to enforce self-exclusion clauses. The action was brought for unjust enrichment, negligence, or breach

of fiduciary duty. The court found that a voluntary self-exclusion form is not a contract at law, but also that the defendants were not entitled to rely on the waiver and release portions of the form. The court denied the plaintiff's claim for unjust enrichment as to allow it would permit banned patrons to gamble with impunity.

In regards to negligence, the court found that none of the defendant casinos "owed the plaintiff a duty of care to guarantee or ensure that she would not be able to continue to gamble in any BC casino during her self-exclusion period of 2007-2010, nor any duty of care to indemnify her for her losses when no other gambler is owed this duty" (para. 532). However, the "defendants did owe the plaintiff a duty of care to put in place a voluntary self-exclusion program that required the casinos to exercise all due diligence to prevent and not knowingly permit any person who has been barred from the casino or barred from participating in casino games by BCLC, from entry or being present in the casino or participating in casino games" (para. 533). The court found this general duty of care stemmed from the casinos Operational Service Agreements with the BC Lottery Corporation. Based on evidence about standard casino activities and enforcement of self-exclusion clauses, the casinos were found to have met the duty of care by following the program designed by the BC Lottery Corporation.

Additionally, the court noted that the plaintiff's attempts to not be identified in the casinos caused her to be "the author of her own misfortune" (para. 573). The court was also receptive to the public policy argument that to allow a recovery would encourage all other gamblers to join the self-exclusion program to be able to reclaim their losses.

XIII. Health Care Costs Recovery Act

A. British Columbia (Attorney General) v. Beacon Community Services Society, 2013 BCCA 317, per Prowse J. (Lowry and D. Smith JJ. concurring)

The Province appealed the decision of a chambers judge who dismissed its claim against Beacon Community Services pursuant to the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 (the "Act"). At a summary trial the chambers judge dismissed the Province's claim on the basis that it was out of time.

The appeal was dismissed. The Province chose to attempt to recover health care costs associated with injuries suffered by Monych while he was under the care of an employee of Beacon by commencing its own action against Beacon. Pursuant to the Act, the Province was confined by the limitation period provided for in s. 8(5) of the Act. The Province failed to commence its claim within six months of the two year limitation date and none of the dates in s. 8(5)(b)(i)-(v) applied to the Province's action.

The Province argued on appeal that an alternate limitation date applied, being s. 8(5)(b)(i): six months after the minister received notice under s. 4, (ii): six months after the minister receives notice under s. 10, or (iii): six months after the minister is first provided with records under s. 11(2). Beacon argued that the chambers judge was correct, and further argued that s. 8(7) applied.

Section 8(7) states that s. 8(5)(b) does not apply if the limitation period referred to in subsection (5)(a) has expired before the date that subsection comes into force. The court was satisfied that the words in s. 8(7) "referred to" meant the two year limitation date which applies to the injured person. The Province's action was out of time.

B. British Columbia v. Tekavec, 2013 BCSC 2312, Bracken J.

The Province applied to strike the defendant's Response to Civil Claim and the defendant filed a cross application to strike the Province's Notice of Civil Claim.

Pursuant to s. 8 of the *Health Care Costs Recovery Act* (the "Act"), the Province elected to commence a claim against the defendant in an action for damages for personal injuries (the original claim was *Jack v. Tekavec*, 2010 BCSC 1773). Jack's claim arose from an incident in which he fell from a third floor apartment balcony when a railing gave way. The apartment building was owned by Tekavec doing business as Goldcrest Apartments.

Jack's health care costs totaled $68,061.46, therefore the Province sought to recover this amount from Tekavec. Further to the limitation provisions in the Act, the court determined that the Province had commenced its action within six months of receiving the beneficiaries notice.

The court considered whether the Province was bound by the finding in the original action that the Act had no application because the original action was commenced before the Act came into force. The Province was aware of the court's decision in the original action, yet the Province did not elect to appeal the decision, which it had the ability to do. As a result of the Province's failure to appeal, the defendant took the position that the Province was bound by the decision in the original action.

Since the two year limitation period for the underlying action had not expired, the Province was entitled to rely on the provisions of s. 8(5)(b).

The defendant submitted that since the Province was aware of the trial judge's decision in the original action as to the applicability of the Act, but did nothing to participate in the trial, and did nothing to challenge the decision. The Province relied on *Translink v. British Columbia*, 2013 BCSC 1602 for the proposition that where a defendant fails to give notice of a settlement to the Province, the Province has a claim against the defendant in debt. The court distinguished the present case from *Gosselin v. Sheppard*, 2010 BCSC 755, which the trial judge in the original action relied upon in concluding that the Act did not apply. Therefore, the Province had a right to maintain its action against the defendant and its Notice of Civil Claim was not struck.

Finally, the court considered whether the defendant was bound by the decision in the original action that the property owner was 100% responsible for Jack's injuries. Tekavec's appeal was dismissed and leave to appeal to the Supreme Court of Canada was denied. The court found that the issues of liability and contributory negligence were fully dealt with in the original action. However, the potential liability of two third parties had not been fully dealt with in the original action since the third parties named in the Province's action were not parties in the original action. As a result, the defendant's Response to Civil Claim was struck out, but the third party proceedings were permitted to proceed as between the defendant and the third parties.

C. Translink v. British Columbia, 2013 BCSC 1602, Gray J.

Translink appealed a decision of the Provincial Court which held that the Province was entitled to commence a claim against Translink after Translink failed to give notice of a settlement. The settlement was reached after the *Health Care Costs Recovery Act* ("*HCCRA*") came into force, but the plaintiff's claim for damages as a result of injuries was commenced before the Act came into force.

The court reviewed the principles of statutory interpretation: the words should be read in their entire context and in their grammatical and ordinary sense harmoniously with the objects of the Act and the intention of parliament; legislation does not intend to produce absurd results; the court should presume that the legislature did not intend a statue to have retroactive effect; and common law rights are held not to have been taken away or affected by a statute unless it is so expressed in clear language, and then only to the extent as may be necessary to give effect to the intention of the legislature.

Translink relied on *Gosselin v. Shepherd*, 2010 BCSC 755. In *Gosselin*, the plaintiff was injured and commenced her claim before the *HCCRA* came into effect. After the *HCCRA* came into effect, she applied to the court to amend her claim to include a claim for health care costs pursuant to s. 2 of the *HCCRA*. Justice Sewell dismissed her application on the basis that s. 2 did not apply to lawsuits that were commenced before the coming into force date of the *HCCRA*. The obligation to claim health care costs only arises pursuant to s. 3 of the *HCCRA* and s. 3 is not applicable to lawsuits that were commenced prior to the *HCCRA* coming into force.

The court reviewed the decision in *Gosselin* and found that it did not consider the applicability of s. 13 of the *HCCRA*, which requires a payor-settler to notify the Minister of a settlement, to lawsuits that were commenced before the *HCCRA* came into force. *Gosselin* did not address the effect of a settlement after the *HCCRA* came into force as a result of a lawsuit that was commenced before the *HCCRA* came into force.

The court held at para. 59:

> The clear words of ss. 13 and 24 of the *HCCRA* impose an obligation on Payor-Settlers to give notice to the Minister of settlements, and if the Payor-Settler fails to give the prescribed notice, the government has the right to recover [health care costs] as a debt from the Payor-Settler.

Translink's appeal was dismissed.

XIV. Indemnity

A. Felix v. ICBC, 2014 BCSC 166, Saunders J.

The plaintiff was driving her argumentative and inebriated boyfriend when he reached out and grabbed the wheel, causing the vehicle to leave the highway. The plaintiff's boyfriend had passed away as a result of the accident and the plaintiff had previously obtained a judgment against his estate. This action concerned whether ICBC was obligated to indemnify his estate.

The court ruled that ICBC was not so obligated due to the specific language of ss. 63, 66, and 66 of the *Insurance (Vehicle) Act*, which together provide an indemnity to anyone engaged in the use or operation of a vehicle or to a passenger engaged in the use of a vehicle causing injury to anyone not within the vehicle. Given the limitation on a passenger's liability in s. 66, the court did not find the passenger could be seen as using or operating the motor vehicle and thus no indemnity was owed.

Despite the result, the court was sympathetic to the plaintiff's public policy argument that not allowing recovery in similar cases would dissuade people from becoming designated drivers due to concerns they would not be indemnified for the actions of inebriated passengers.

XV. Insufficient Reasons for Judgment

A. Morgan v. Galbraith, 2013 BCCA 305, per Garson J. (Tysoe and Bennett JJ. concurring)

The defendant appealed the trial judge's assessment of damages for future loss of earning capacity at $700,000 as well as the awards for past loss of income and cost of future care. The plaintiff cross appealed with respect to the trial judge's finding that his damages were to be reduced by 30% for a failure to mitigate.

The plaintiff was 34 years of age at the time of trial, and following the same career path that he would have chosen regarding of the accident.

The court of appeal found that the trial judge did make the necessary finding of fact with respect to a substantial possibility of a future loss. However, the court of appeal agreed with the appellant that the trial judge did not adequately address the quantification or assessment of the likelihood of the loss. Pursuant to *Perren v. Lalari*, 2010 BCCA 140, once the plaintiff has established a real and substantial possibility of a future loss, the judge must then assess the damages via the 'earnings approach' or the 'capital asset approach.' The question of the quantification of future loss of earnings was remitted to the trial judge.

The Court of Appeal also remitted the question of past wage loss to the trial judge on the basis that the trial judge's reason for the award was unclear since it was not possible to determine what findings of fact were made. Future cost of care was sufficiently explained and the court did not accede to this ground of appeal.

Lastly, the court considered the plaintiff's cross-appeal, that a deduction of 30% for failure to mitigate his damages was unreasonable. The mitigation argument focused on the plaintiff's decision to continue to play lacrosse despite medical advice that doing so would aggravate his condition. The court held that there was expert medical evidence on which the trial judge could properly rely to conclude that the plaintiff had failed to mitigate his damages and agreed that 30% was a reasonable reduction for failure to mitigate.

XVI. Juries

A. Catalano v. Ogloff, 2013 BCSC 2257, Master MacNaughton

The plaintiff was involved in two motor vehicle accidents. In the first action, the plaintiff filed a jury notice. After the plaintiff commenced the second action, the parties consented to an order that the actions be heard together. The defendant in the second action then filed a jury notice.

The defendant in the second action could not presume that the first action was proceeding to a jury trial. All parties to an action had to independently preserve their election of jury trial by serving their own jury notice. The defendant in the second action could not rely on the plaintiff's jury notice, as it was merely the first stage of election process and did not guarantee a jury trial. To ensure the right to a jury trial, the defendant in the second action should have made it a term of his consent to have the matters tried together or he could have delivered a jury notice and then applied to have the matters heard together with a jury.

The defendant was not at liberty to deliver a jury notice in the manner that he did and it was a nullity.

B. Appeals of Jury Awards

1. Paskall v. Scheithauer, 2014 BCCA 26, per Chiasson J. (Willcock J. concurring; concurring reasons by Saunders J.)

The plaintiff was injured while walking in a cross walk and claimed damages. The plaintiff suffered from cerebral palsy prior to the accident, and argued that as a result of the accident she suffered, most significantly, a fractured skull and brain injury. The plaintiff's sought a significant sum for damages including a claim for $2,000,000 for cost of future care.

The jury awarded the plaintiff $82,400 which included $35,000 for non-pecuniary damages and $36,000 for cost of future care. The plaintiff appealed on the basis that the trial judge erred by leaving the issue of contributory negligence with the jury; on the basis that the award for non-pecuniary damages was inordinately low; and on the basis that the award of damages was internally consistent.

The court held that the award of non-pecuniary damages was not inordinately low:

> [24] The injuries sustained by the appellant were significant, but there is no schedule for an award of non-pecuniary damages based on the nature of the injuries sustained. The function of damages in tort is to put the claimant into the position she would have been had the tort not occurred. Compensation for the trauma and pain of her injuries is required, but further compensation requires proof of ongoing adverse effects. It is apparent that the jury, in its award of non-pecuniary damages, did not accept that the appellant has serious, ongoing adverse effects.

The Court of Appeal found that it was open to the jury to make the award it did.

With respect to the issue of whether the award was internally consistent, the Court of Appeal noted that new trials have been ordered "when portions of a jury's award are inconsistent to the extent that it is not possible to ascertain on what basis the jury made its award" (at para. 52). The appellant argued that the awards for special damages and cost of future care were inconsistent. The award for special damages was not specified by the jury, but was assumed to be for a wheelchair and scooter which would help prevent the plaintiff from falling.

The court found that it was open to the jury to conclude both that the appellant did not sustain serious ongoing adverse effects from the accident, and also that the award for the wheelchair and scooter was appropriate. Since further falls and a subsequent head injury could result in more serious consequences to the plaintiff, the jury must have found that use of a wheelchair and scooter could protect the plaintiff from that contingency.

Finally, the court considered whether the trial judge erred by leaving the issue of contributory negligence with the jury. There was evidence from a witness that the plaintiff did not look right or left prior to entering the cross walk, and walked without looking for traffic. With reference to the charge to the jury, the court of appeal held that the trial judge did not err in leaving the issue of contributory negligence to the jury, and that there was evidence upon which the jury could rely in concluding that the plaintiff was contributorily negligent.

2. McBryde v. Womak, 2013 BCCA 260, per Hinkson J.A. (as he then was) (Ryan and MacKenzie JJ.A. concurring)

Two plaintiffs appealed from a jury's decision on the basis that their awards were unjust and so inadequate as to constitute a miscarriage of justice.

The appellant McBryde was involved in three motor vehicle accidents, the first was a rear end accident and the second two accidents occurred when his parked vehicle was struck while he sat inside it. The appellant Golestani was a passenger in McBryde's vehicle at the time of the first accident. The jury awarded McBryde a total of $9,000 in respect of the first accident, and nothing in respect of the second and third accidents. The jury awarded Golestani $17,500 in respect her accident injuries.

The appellants alleged the following issues:

> Issues on Appeal
>
> [31] Counsel for the appellants (not counsel at trial) raises three issues with respect to the conduct of counsel for the respondents at trial (not counsel in this court):
>
> a) that his cross-examination exceeded permissible limits;
>
> b) that he expressed personal opinions and/or gave evidence and misstated evidence in his closing submissions to the jury; and
>
> c) that he introduced irrelevant and prejudicial evidence from Ms. Womack.
>
> [32] Counsel for the appellants also alleges that the trial judge erred in her charge to the jury:
>
> a) by failing to instruct the jury with respect to the lack of a correlation between the magnitude of vehicle damage and the severity of injury;
>
> b) by misdirecting the jury with respect to the issue of causation;
>
> c) by misdirecting the jury with respect to the evidence of the Mr. McBryde's general practitioner concerning the mechanism of injury to Mr. McBryde's knee; and
>
> d) by misdirecting the jury with respect to the appellants' claims for diminished future earning capacity:
>
> i) by telling the jury that a future award was contingent upon the acceptance of the appellants' evidence; and
>
> ii) by failing to instruct the jury with regard to the factors discussed in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, and adopted by this Court in *Kwei v. Boisclair*, 60 B.C.L.R. (2d) 393.
>
> [33] Finally, the appellants contend that the verdict of the jury was against the weight of the evidence and was unjust.

The court noted that despite the criticisms of counsel's conduct at trial, trial counsel made no objections to that conduct. On appeal, counsel for the appellant took issue with the cross-examination of Golestini with respect to counsel having summarized medical records, her receipt of government financial assistance, and about her leaving her studies to pursue a business opportunity with McBryde. The court rejected these criticisms of counsel. The court held that Golestini put her earning capacity and her occupational goals in question and therefore the cross-examination was appropriate.

The appellants attacked several statements made by defence counsel during closing submissions. The Court of Appeal rejected the appellant's submissions with respect to each impugned statement made by trial counsel. Although the court agreed that statements by counsel such as "I thought" and "I found somewhat of interest" should be avoided, the court was unable to accept that the jury had been improperly influenced by these comments.

The appellants took issue with the evidence led from the defendant in the first accident regarding the force of the impact; in particular, her evidence that she was recovering from back surgery at the time of the accident and she did not suffer any injury. However, at trial no objection was taken to any of the complained about conduct or evidence. The Court of Appeal reviewed the law regarding the importance of making timely objections, and found that there were no exceptional circumstances in the present case that led the court to accede to the appeal on this basis.

Once again, with respect to appellant's argument about the charge to the jury, trial counsel took no objection to the charge. Furthermore, the trial judge provided both counsel with the proposed charge the night before it was to be provided to the jury, and neither counsel took the opportunity to fully consider the charge.

Lastly, the court of appeal held that it was open to the jury to conclude that McBryde's injuries were not exacerbated by the second or third accident and that finding may have negatively impacted his credibility. There was also evidence before the jury that McBryde had a tendency to exaggerate and that his complaints exceeded his objective deficits. On the whole, the court of appeal could not say that the jury's award was "wholly disproportionate or shockingly unreasonable."

The appeal was dismissed.

C. Jury Strike

1. Vander Maeden v. Condon, 2013 BCSC 1810, Gaul J.

This is another recent case in which a jury was struck as a result of improper statements made by plaintiff counsel during his final submissions to the jury. The case, and those referenced in it, are good reminders for what is properly done in front of a jury and what is not. This closing address hit almost every mistake counsel can make.

The closing address included comments which included making improper personalization of his submissions and in doing so impermissibly inserted and added his own credibility into the plaintiff's case. Plaintiff counsel advised the jury that it was the plaintiff that asked for the jury. He referred to his own personal views, knowledge and experiences including making statements such as:

> "From a plaintiff's point of view, from my point of view"—as the way I practice, we have to put the facts in front of you. We're not trying to hide the fact there was a second accident. We're not making more of the second accident than it actually is."
>
> "... and you have in Exhibit 4, I think Exhibit 4, this is the examination for discovery excerpts, Exhibit 4, and my friend handed these out and read them in as—as the start of his case. This is the start of the defence. And so I can—I can submit to you that in law school we're taught to start your case off with your strongest evidence and finish your case with strong evidence and put the average stuff in the middle, and so my submission to you is that this part of the strongest evidence of the defence case."
>
> "Personally and maybe we could—maybe it's—I'll make it my submission. In my submission, many of us could not tell you what we're doing or what we did in January 2008, who we contracted with, and what started in December 2008. I mean I would have not chance, I can tell you that ... It, in my submission, is impossible to say—for me to say or anyone to say what they were doing on February 2nd, 2007 and confirm that they talked about back pain to their doctor"

Plaintiff's counsel wrongly encouraged the jury to disregard legal arguments saying "I don't want you to get misled in some technical legal arguments."

He wrongly referred to the opinion of a medical doctor who had examined the plaintiff when that doctor did not testify at trial and when the opinion, although mentioned during the trial, was not adopted by any medical expert who had testified at trial.

He made improper comments on the conduct of the defence. For example, defence counsel had advised the court and plaintiff counsel, in the absence of the jury, that the first defence witness was not available until later in the proceedings and not wanting to delay maters, he would start the defendant's case by reading in portions of the plaintiff's discovery. As referenced above, plaintiff counsel told the jury that the examination for discovery must have been the defendant's strongest evidence given that it was introduced first, when he knew the true reason why the defendants were proceeding in this manner. Plaintiff counsel incorrectly implied to the jury that the defendants had, wrongly, only used portions of the plaintiff's discovery.

He made improper attempt to introduce a document in the course of his closing submissions. At the pre-charge conference, counsel were asked if they would be relying on any written argument or materials in their address to the jury. Contrary to his advice that he would not be, plaintiff counsel attempted to hand to the jury a summary of his submissions about what should be awarded for cost of future care. This forced defence counsel to have to object and, in light of the suggestion by plaintiff's counsel that there had been questionable tactics by the defence during the course of the trial, may have caused the jury to interpret the defendant's objection as yet another attempt to keep important information from them.

He inaccurately recited evidence to the jury and he told the jury about certain evidence he would have led from one of the experts who was not called to give evidence.

The reasons cite other examples of counsel errors.

2. Wallman v. Gill, 2013 BCCA 409, per D. Smith J.A. (Donald and Newberry JJ. concurring)

The defendant appealed the decision of a chambers judge granting the plaintiff's application to strike a civil jury notice.

The plaintiff claimed injuries as a result of a rear end motor vehicle accident that he alleged caused injuries including a mild traumatic brain injury which prevented him from continuing to work as an emergency room physician. At trial there would be 23 experts, including medical, employment, actuarial and engineering experts, and 31 civilian witnesses. Trial was set for seven weeks.

The chambers judge struck the jury on the basis that the scientific investigation required could not be conveniently undertaken by a jury. The decision to strike a jury is discretionary and should not be interfered with lightly. The test for appellate review of a discretionary order is whether the judge has "given weight to all relevant considerations," *Mining Watch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2.

The appellant did not allege palpable and overriding error with respect to the chambers judge's finding that the issues for trial would require a scientific investigation. It was a relevant consideration for the chambers judge to consider the trial length and the ability of the jury to retain evidence of a complex and intricate nature over a lengthy period. As the Court of Appeal referred

to *Wipfli v. Britten* (1981), 32 B.C.L.R. 343 with respect to the definition of the terms "convenience" as used in Rule 12-6(5)(i):

> What is required before it is convenient to have a scientific investigation made with a jury is the ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.

Appeal dismissed.

XVII. Lessors

A. Stroszyn v. Mitsui Sumitomo Insurance Company Limited, 2013 BCSC 1639, Bowden J.

The petitioner suffered injuries as a result of a collision with a vehicle that was leased through Honda Canada Finance. The owner's collision insurance policy with ICBC carried $1,000,000 of coverage. Honda Canada Finance was the named insured under a policy of excess insurance with limits of $9,000,000 (the "Mitsui Policy").

The petitioner resolved his tort claim with the defendants; the parties agreed that the petitioner's damages were $1,600,000. ICBC paid out the policy limits of $1,000,000. Thereafter, Honda Canada Finance refused to pay the further $600,000 to the petitioner taking the position that the Mitsui Policy only provided coverage to Honda Canada Finance, and that s. 82.1 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c.231 (the "Act") limited the liability of the lessor to $1,000,000 and further, the principles of joint liability dictated that payment by one jointly liable defendant, ICBC, discharged the liability of all other jointly liable parties.

Following the decision of *Yeung (Guardian ad litem of) v. Au*, 2006 BCCA 217, aff'd at 2007 SCC 45, which interpreted s. 86 of the Act in such a way that corporate lessors were open to unlimited liability, the Act was amended to limit the liability of lessors to $1,000,000. The question for the court was whether the liability of the lessor was reduced by any amount paid by the lessee's insurer.

The petitioner pointed to similar legislation in Ontario that specifically provided the liability of the lessor was reduced by any amount paid by an insured other than the lessor. The petitioner argued that in the absence of such specific language, the lessor was liable to pay the further $600,000. In response, the lessor argued that specific language in the Act was not required because of the common law principles of joint liability.

The question then, was whether a lessor and a lessee are in the position of joint tortfeasors, and if so, whether the common law applies to reduce the amount owed by the lessor by any amount paid by the lessee's insurer. Pursuant to s. 86 of the *Motor Vehicle Act*, the lessee and lessor are joint tortfeasors. However, the court held that the lessor was not entitled to deduct payments made by ICBC of $1,000,000. There was no concern of double recovery if the petitioner recovered $1,000,000 from ICBC and the remaining $600,000 from Honda Canada Finance. The lessor's total liability was $600,000 which did not exceed the upper limit of liability of $1,000,000.

XVIII. Liability

A. McKenzie v. Mills, 2013 BCSC 1505, Dorgan J.

This case involved a single vehicle accident where the driver was given a 24-hour prohibition. Neither the plaintiff passenger nor the defendant driver remembered anything about the accident or why it occurred. The third party insurer argued that absent some evidence of the defendant's liability, the defendant could not be found liable.

The court discussed the doctrine of *res ipsa loquitur* and found it to allow inferences of negligence where circumstances clearly led to that deduction, but not to allow an inference where the circumstances left it equally likely that the defendant was at fault as not. However, the court ruled that in these circumstances, a vehicle being found in the middle of the road and a driver being given a 24-hour prohibition raised a *prima facie* case of negligence against the defendant and the defendant's lack of evidence failed to rebut that inference.

B. R v. Hutchinson, 2014 SCC 19, per McLachlin C.J. and Cromwell J. (Rothstein, Wagner, Abella, Moldaver, and Karakatsanis JJ. concurring)

In this case, the main issue was whether sabotaging a condom prior to sex by poking holes in it resulted in there being no "voluntary agreement by the complainant to engage in the sexual activity in question" under the sexual assault provision of s. 273.1(1) or whether the condom sabotage constituted fraud under s. 265(3)(c), with the result that no consent was obtained.

The court reviewed two dominant methods of determining whether sexual consent was given, that is, analyzing either 1) the act and all potential consequences deriving from it; or 2) the sexual activity in question, including how it is carried out and with whom. It concluded that an analysis of the specific activity consented to was appropriate and that a secondary analysis would determine if consent was vitiated by fraud.

The court determined that in this case consent had been given to the sexual activity, including the individual involved, but that this consent was vitiated by fraud. The criteria for fraud involves both deception and deprivation and the court further determined that depriving woman of the choice of whether or not to become pregnant or increasing the risk of pregnancy is equivalent to a serious risk of serious bodily harm and thus qualifies as deprivation for the purposes of s. 265(3)(c).

As *R v. Hutchinson* equates depriving a woman of the choice of whether or not to become pregnant or increasing the risk of pregnancy with serious bodily harm, it seems to allow for a tort for similar conduct.

C. Novel Claim

1. Kennedy v. Coe, 2014 BCSC 120, Fisher J.

The plaintiff in this case was the wife of a skier who died heli-skiing. She brought a novel claim in negligence against a fellow guest who voluntarily partnered with her husband as his "ski-buddy." The court, however, did not find the circumstances sufficient for the defendant to have assumed a duty of care, and found that even if a duty of care existed, the defendant had met the standard of care.

The circumstances of the case were as follows. The two ski-buddies had never previously met and never spoke. They merely confirmed they were partnered up with gestures. After the ski, the

defendant told the instructor he hadn't seen his partner. The deceased passed away despite a search beginning within minutes and being found within an hour.

The plaintiff argued that a duty of care arose from the defendant's voluntary undertaking to become Mr. Kennedy's ski-buddy (as per *Wiens v. Serene Lea Farms Ltd.*, 2001 BCCA 739 in which a defendant assumed a duty of care by offering to hold a ladder). Unlike that line of cases, Mr. Kennedy undertook a high risk sport, signed a waiver of liability, and was under the care of goods. The court also found that holding a duty of care existed could discourage people from becoming ski-buddies.

Despite finding that a duty of care did not exist in these particular circumstances, the court did suggest that a greater obligation might have existed in forested areas where ski-buddies were expected to check on each other with greater frequency.

D. Occupiers Liability Act

1. Dandell v. Thompson Rivers University, 2013 BCCA 490, per Lowry J.A. (Frankel and MacKenzie JJ.A. concurring)

The court dismissed an appeal on occupiers' liability, but found the judge erred in its analysis of willing assumption of risk under s. 3(3) of the *Occupiers Liability Act* by failing to consider whether the plaintiff had accepted both the physical risk and the legal risk of his actions. The court noted that because of the requirement that an individual assume the legal risk, this section would apply only rarely and that generally when an occupier is found to be at fault, the plaintiff's actions will be considered under principles of contributory negligence and attribution of fault rather than assumption of risk.

2. Paquette v. School District No. 36 (Surrey), 2014 BCSC 205, Sharma J.

The infant plaintiff was injured when he fell from his elementary school roof. The plaintiff acknowledged that he was partially liable for his injuries, but alleged that the school was partially liable as well.

The plaintiff was a 12 year old boy in grade seven at Peace Arch Elementary School. He and his friend gained access to the school roof via a nearby cherry tree. One of the branches of the cherry tree was approximately 12 inches from the school roof. The vice principal was alerted to someone being on the roof as a result of the noise and called out to the people on the roof. The children ran and attempted to get down from the roof but the plaintiff fell some 20 feet landing at the bottom of a cement stair well.

The evidence was that teachers, students, the principal and vice principal were aware of the problem of young people gaining access to the school roof from time to time. The principal of the school had made some efforts to block certain possible access points. On one occasion, he had witnessed a youth in a coniferous tree near the school and another youth on the school roof. He told them to get down and the youth on the roof jumped onto the tree and climbed down.

There were two issues for the court to decide: first, was it reasonable in all the circumstances for the defendant to allow the cherry tree to be in close proximity to the school roof; and second, did the vice principal's interaction with the boys when they were on the roof contribute to the plaintiff's injuries?

The court began by quoting *Bendzak v. Bohnet*, 2013 BCSC 435 for the following points:

- Section 3(1) of the *OLA* is a comprehensive code and common law negligence cases need not be considered in determining whether the duty of care has been met;
- An occupier is not held to a standard of perfection; an occupier is not an insurer against any possible risk of harm;
- The test is whether the defendant's actions were reasonable in all the circumstances;
- The general class or nature of the harm suffered in the circumstances must have been reasonably foreseeable, although the exact type of injury suffered need not have been foreseen

Although the defendant argued that there was no evidence that the cherry tree had been used in the past to access the school roof, the court found that this was not surprising since the defendant did not know how people got on to the roof most of the time. There was one incident where a person was seen using a tree as a mode of access to the roof. The principal conceded that a tree close to the school would tempt kids to climb onto the roof. The court also held that it was common sense that if a child can gain access to a roof, it is reasonably foreseeable that the child might fall off the roof and be badly injured.

Also, there was no evidence of "regular monitoring" on the part of the defendant in respect of potential access points to the roof. The evidence demonstrated that the defendant school took a "reactive and ad hoc" approach to preventing people from gaining access to the school roof. The defendant was unreasonable in permitting the cherry tree to grow so close to the school.

The defendant school's argument that most other incidents of people on the school roof occurred on weekends and by teenagers was rejected by the court. That argument did not address whether the defendant's actions in preventing access to the roof were reasonable.

The plaintiff's argument that an angry shout from the vice principal to "get off the roof" contributed to the plaintiff's injury was rejected. The court found that the children were worried about being caught on the roof and getting in trouble, and that they would have fled regardless of what a teacher said. The court apportioned fault 75% to the defendant school.

XIX. Mitigation

A. Glesby v. MacMillan, 2014 BCSC 334, Baird J.

In this case, the defence argued that the plaintiff had failed to mitigate her damages by not taking medical cannabis for pain management as recommended by one of her IME doctors. In rejecting the argument, the court accepted the plaintiff's evidence that she had reservations about the legality of the acquisition and use of it. She also testified that she was a committed life-long abstainer from narcotics and drugs of all sorts.

B. Maltese v. Pratap, 2014 BCSC 18, Kelleher J.

This case addressed what the judge described as a "textbook example of a failure to mitigate."

The plaintiff sustained soft tissue injuries in a car accident which continued to bother him to the time of trial and were expected to continue into the future. There was consensus among his treating

professionals that the plaintiff needed to undertake a program of physical rehabilitation and fitness with a kinesioloigst or personal trainer. Mr. Maltese chose to ignore the advice.

The court found that the first stage of the test in *Gregory* had been met in that the plaintiff, having all of the information at hand that he possessed at the time, ought reasonably to have undergone the recommended treatment. Mr. Maltese testified that he felt worse after physiotherapy and so had made a decision not to pursue an active rehabilitation. However, the medical evidence on the whole established that he would have experienced significant improvement in his symptoms had he followed his doctor's advice.

On such "a clear case," the court ordered a 30% reduction in his non-pecuniary damages, wage loss after his return to work and loss of future earning capacity.

Further, because it was unlikely that he would avail himself of these services in the future there was no award for cost of future care.

C. Sendher v. Wong, 2014 BCSC 140, Verhoeven J.

The plaintiff was found to have failed to mitigate her damages by failing to engage in any of the many activities her physicians recommended to exercise and be as active as possible. The trial judge found that the plaintiff resigned herself to her pain situation and believed that she was not going to improve. She remained inactive and relied on passive treatment. He found that her fear that exercise may cause problems and her explanation that she spends her non-work days recovering her energy unreasonable and reduced her non pecuniary damages by 20%.

D. Stull v. Cunningham, 2013 BCSC 1140, MacKenzie J.

The defendants unsuccessfully argued that the plaintiff failed to mitigate by failing to embark on an exercise program with a kinesiologist and utilize other pain management strategies as recommended by an occupational therapist who assessed him for the purposes of the litigation. The defendant argued that the plaintiff was assessed by this OT for the express purpose of assessment of his rehabilitation needs yet he did not follow them.

The plaintiff testified that he participated in a strenuous rehabilitation program with the Canadian Back Institute that resulted in him participating in a graduated return to work program which allowed him to return to work in a limited capacity. He also continued with a home exercise and weight loss program. While the trial judge found that a more stringent rehabilitation regime would probably have assisted the plaintiff, he did not find that the plaintiff acted unreasonably in the course of action he followed.

XX. Offers to Settle

A. Arsenvoski v. Bodin et al., 2014 BCSC 199, G.C. Weatherill J.

The defendants made a formal offer to settle pursuant to Rule 9-1 for payment of $10,000 plus disbursements. Later, and in response to an offer from the plaintiff, the defendants rejected the plaintiff's offer and extended a second offer to accept a consent dismissal order in exchange for a waiver of their costs. The second offer was not made pursuant to Rule 9-1. The plaintiff then purported to accept the defendant's first offer and applied to enforce the settlement agreement.

Weatherill J. held that the first offer had been revoked by the second offer and was therefore no longer open for acceptance. He concluded that in the absence of language in Rule 9-1 regarding how and when a formal settlement offer is withdrawn (unlike the former Rule 37), the common law applies. A settlement offer, formal or informal, is revoked upon the communication of a new settlement offer, formal or informal. There can only be one offer outstanding at a time.

B. Brewster v. Li, 2014 BCSC 463, Voith J.

After a series of negotiations, the defendant made a formal offer to settle four days before the commencement of the trial which offer exceeded the final judgment. The formal offer was extended to the plaintiff 45 minutes after it had made lower formal offer and without any explanation as to the rationale for the increase. Voith J. found that the circumstances of the defendant's offers had the prospect to confuse and be more difficult to deal with. The plaintiff argued that she did not have sufficient time to consider the offer presented and she was emotionally fragile on the eve of trial. In the end, Voith J. ordered that the plaintiff be deprived her costs and disbursements after the first day of trial with no costs to the defendant.

C. Currie v. Taylor, 2013 BCSC 1071, Armstrong J.

On a trial concerning liability, the plaintiff was found 75% at fault for the motor vehicle accident and the defendant 25%. The defendants had made a formal offer to settle the plaintiff's liability claim on the basis that the plaintiff was 59% liable and the defendant 41% liable. The plaintiff suffered extremely serious injuries in the accident.

On a consideration of s. 3(1) of the *Negligence Act*, Armstrong J. held that the plaintiff was entitled to 25% of his costs. He then considered the effect of the formal offer. The most significant issue was the disparity in financial circumstances of the parties. The plaintiff was destitute and survived off his ICBC disability benefit. He lived in a derelict residence. The defendants, however, were supported by an insurer and had little risk in the action. In the result, the plaintiff was awarded costs (at 25%) to the date of trial with each party to bear their own costs thereafter.

D. Dennis v. Fothergill, 2014 BCSC 452, Bruce J.

The defendant's formal offer to settle exceeded the trial award by a substantial amount and the defendant sought double costs. The offer was made seven days before the start of trial but not communicated to the plaintiff until the day before its expiry. The plaintiff's case was heavily dependent upon her credibility as the medical diagnosis and their consequences were based almost entirely on her subjective assessment of pain and the history she reported. The trial judge found "glaring contradictions" in the plaintiff's evidence and concluded that she blatantly lied to the medical experts about her history. In such circumstances, the plaintiff would be expected to be cognizant of the risks of going to trial. The offer was one that ought to have been accepted.

However, the plaintiff was in dire financial circumstances and on the brink of bankruptcy. The plaintiff was entitled to her costs and disbursements up to the delivery of the offer and the defendant awarded costs and disbursements thereafter.

E. Desharnais v. Parkhurst, 2014 BCSC 758, Saunders J.

In a damages trial, a jury awarded the plaintiff damages in the amount of $30,100. Before trial, the defendants made formal offers of $50,000 and a second of $75,000. The plaintiff sought damages in

the $1 million range. Saunders J. held that the offers, viewed objectively, did not extend a genuine attempt at compromise. They were more reflective of what the defendants reasonably hoped to achieve if all or substantially all, of the issues were resolved in their favour. On that basis neither ought reasonably to have been accepted by the plaintiff.

Further, he found that the offers were not so substantial that the defendants ought to be entitled to indemnification against their own costs. The plaintiff's position was not lacking in merit or frivolous and, as the successful party, the plaintiff is entitled to costs. In the end, however, Saunders J. held that he could not ignore the fact that the settlement offers exceeded the judgment and the defendants were forced to incur the expense of a trial which they were willing to avoid by paying a "not insubstantial sum." In these circumstances, it would be unfair to require the defendants to indemnify the plaintiff for the cost of advancing an "overvalued" case to trial. The plaintiff was awarded his costs up to the date of delivery of the second offer and the parties to bear their own costs thereafter.

F. Gu v. Friesen, 2014 BCSC 210, Schultes J.

The Third Parties made a formal offer to settle to accept a discontinuance against both individuals named as Third Parties. The offer was open for acceptance for seven days. The defendants did not accept the offer but did discontinue against one of the Third Parties before trial. At the close of evidence, the defendants abandoned the claim against the remaining Third Party.

The Third Parties sought special costs or, in the alternative, double costs. Schultes J. declined to award special costs, finding the inclusion of the Third Parties was not unreasonable or frivolous. He also declined to award double costs. The difficulty with the offer was that it required the defendants to discontinue against a third party against whom they believed they had a viable case in order to avoid the potential of double costs with respect to another party against whom they were going to discontinue anyway. The Third Parties were awarded their ordinary party and party costs.

G. Gulbrandsen v. Mohr, 2013 BCSC 959, Affleck J.

The defendants were awarded double costs from the date of their offer to settle where the plaintiff was found to be an untruthful witness and unreliable.

H. Jackson v. Yusishen, 2014 BCSC 406, Betton J.

A litigant who receives an offer to settle must carry out a risk assessment, including the exposure to cost consequences and actual potential recovery. The plaintiff must assess the issues and evidence in the case and consider the prospects that they will do better than what is offered and measure them against the risks that they will do worse.

In this case, a jury awarded the plaintiff $5,000 arising from a minor collision. The key issue at trial was causation of rib fractures which were diagnosed six months after the accident. The recovery was complicated and involved several surgeries. The defendant offered $100,000 before trial. The plaintiff demanded the $2 million policy limits.

The defendant argued that the aggressive tactics of plaintiff's counsel in demanding the policy limits and attempting to intimidate counsel with potential exposure to a negligence claim should attract cost consequences. Betton J. would not say generally that the court should, in the absence of finding anything improper in the conduct of counsel, engage in critiquing those strategies or measuring their negotiating strategies against the court's view of their effectiveness as a stand-alone

factor in a determination as to costs. He did find that the position of the plaintiff was aggressive, making no allowance for losing on the causation issue. As a result, some cost consequence was warranted. The plaintiff was awarded costs to the date of the offer with each party bearing their own costs thereafter.

I. Ladret v. Stephens, 2013 BCSC 2278, Greyell J.

Withdrawal of a 9-1 formal offer can be oral or written. The question is whether such revocation is clearly and unequivocally given.

J. Vapheas v. Madden, 2014 BCSC 407, Adair J.

The trial proceeded on liability for a motor vehicle accident, resulting in an apportionment of liability of 75% against the plaintiff and 25% against the defendants. The defendants made a formal offer for a 51/49 division of liability in the plaintiff's favour.

Adair J. noted that but for the offer to settle, the defendants would not be entitled to any costs at all, based on *Flatley v. Denike* (1997), 32 B.C.L.R. (3d) 97 (C.A.). In *Flately*, the court held that where a defendant suffers no damage or loss, but liability is divided, the defendant must pay the plaintiff the same proportion of the plaintiff's costs as the defendant is liable but the plaintiff is not liable to pay any portion of the defendant's costs. Adair J. held that this law made the defendant's formal offer less attractive and made it more reasonable for the plaintiff to proceed to trial.

In addition, because the damages issues remained to be determined, Adair J. concluded that awarding the defendants 100% of their costs and depriving the plaintiff of all of her costs from the date of the offer would unfairly penalize the plaintiff. Adair J. awarded the plaintiff 25% of her costs through to the conclusion of the liability trial and awarded the defendants 75% of their costs from the date of the offer to the conclusion of the liability trial to be set off against each other.

K. Wafler v. Trinh, 2014 BCCA 95, per Kirkpatrick J.A. (Frankel and Goepel JJ.A. concurring)

The defendant appealed the costs order of the trial judge where the jury award was less than the defendant's formal offer. The trial judge awarded the plaintiff his costs, including disbursements up to the date of the first offer with each party to bear their own costs and disbursements after that date. On appeal, the defence abandoned his claim for double costs but sought his ordinary costs. The court noted that the defence admitted that:

> the purpose of the appeal on costs was to reverse what he described as a trend in the trial court wherein plaintiffs who succeed in "beating" an offer to settle are routinely awarded double costs but defendants who have made an offer to settle that was rejected but well within the claim value are deprived an order of costs. The defendant says this is unjust. In other words, the defendant submits there should be significant consequences to plaintiffs who fail to accept a reasonable offer. (at para. 59)

The court declined to interfere with the costs award of the trial judge, citing the permissive wording in Rules 9-1(5) and (6) and the preservation of the historically discretionary nature of costs awarded. In depriving the plaintiff of the costs and disbursements associated with the preparation and attendance of a 10-day trial, the cost order imposed enough of a penalty on the plaintiff for refusing to accept a reasonable offer.

L. Wattar v. Lu, 2013 BCSC 1080, Smith J.

The plaintiff was held 50% liable for the accident and awarded an amount less than the defendant's offer to settle after a three day trial. In determining costs, the court first determined that in the absence of an offer to settle, the plaintiff would have been entitled to half of her costs in the amount of $5,500. From that sum, the court reduced her costs by $2,250 (three trial days at $1,500 divided by two) as a consequence of her refusal to accept the defendant's offer. The defendant was not awarded any costs.

M. Wepryk v. Juraschka, 2013 BCSC 804, Ehrcke J.

The plaintiff was awarded "slightly less" than the defendant's formal office amount after deductions for Part 7 benefits were made (approximately $140 less). Ehrcke J. declined to penalize the plaintiff in costs for failing to accept the offer. In the circumstances, there was uncertainty regarding the amount to be deducted on account of Part 7 benefits. If nothing had been deducted, the damages award would have just exceeded the amount offered by the defendants. The plaintiff was awarded costs and disbursements in their entirety.

N. Wettlaufer v. Air Transat AT Inc., 2014 BCSC 607, Funt J.

The defendant was awarded double costs from the first day of trial after beating its formal offer which had been open for acceptance until the last business day before trial. The defendant's offer was for a sum inclusive of costs and disbursements. Funt J. concluded that the greater discretion provided by the 2010 Supreme Court Civil Rules allows the court to avoid a "formulaic approach" characterized by the former rules. In this case, the all inclusive offer was one which the plaintiff ought to have accepted. Funt J. reasoned that since 73% of the claim was for loss of future earning capacity and 10% was for future care (both issues upon which the plaintiff did not succeed), the plaintiff should have known that if her testimony were to be found unreliable, her claim under these heads would be particularly vulnerable.

The offer in this case was open for acceptance for two days, expiring on the last business day before trial. It more than doubled an earlier offer made by the defendants. Liability had been admitted. Since the action was a determination of damages based on the plaintiff's testimony, the key aspects of the case were within the plaintiff's knowledge.

O. Wilson v. Honda Canada Financial Inc., 2013 BCSC 1342, Fitzpatrick J.

A party is not required to "guess" about the probable outcome of the trial when assessing an offer to settle. He or she is required to fairly and objectively assess the evidence intended to be adduced at trial and make a reasoned decision about the relative merits of the claim or defence, having in mind a certain amount of litigation risk. The party receiving the offer must critically review the merits of the claim in relation to the amount offered. The defendant's offer in this case fairly assessed the claims about which there was no dispute and added further amounts for the litigation risk that the more contentious claims would go against the defendants. The plaintiff recovered less than the offer at trial and was awarded costs and disbursements from 5 days after the offer was sent and the defendants recovered costs and disbursements thereafter.

XXI. Part 7 Benefits

A. Fedyk v. ICBC, 2013 BCSC 1466, Brown J.

The plaintiff had claimed Part 7 benefits for her injuries from a motor vehicle accident, including those from Thoracic Outlet Syndrome ("TOS"), even though many of her symptoms from TOS had not arisen until well outside the 20 day deadline of s. 80(1). The court ruled that the combination of her soft tissue injuries within 20 days of the accident qualified her as disabled within the deadline.

Additionally, the plaintiff had been denied massage and physiotherapy benefits as ICBC had determined she was not disabled. The massage treatments were not shown to be curative, but were determined to assist the plaintiff by relieving pain and making it easier for her to be active and effectively engaged. The court ruled that the massage treatments were covered despite not contributing towards her long-term cure as they allowed her to more effectively work and engage in an active life (paras. 128-31).

B. Wage Loss Benefits

1. Cai v. Insurance Corporation of British Columbia, 2013 BCSC 2213, Bruce J.

The plaintiff brought on a summary judgment application to determine the issue of his entitlement to wage loss benefits pursuant to Part 7 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 and s. 86 of the Insurance (Vehicle) Regulation, BC Reg. 447/83. ICBC opposed the application and argued that the case was inappropriate for summary judgment.

At the time of the motor vehicle accident, the plaintiff was working full time as a security guard at a casino, 40 hours per week; and part time as a business liaison officer, 30 hours per week. Immediately after the accident the plaintiff saw his family doctor in respect of low back pain and pin prick pain in his left thigh. The plaintiff had not returned to his job at the casino by the date of the summary trial. He had returned to his part time job, a sedentary position, but at reduced hours.

Following the accident, ICBC paid the plaintiff one week of wage loss benefits pursuant to s. 80 of the Regulation. Thereafter, the plaintiff was in receipt of employment insurance for 16 weeks and disability benefits available through his employment at the casino for two years. The plaintiff's disability insurer terminated benefits on the basis that he was not totally disabled as evidenced by his ability to continue working in a limited way with his part time job. The plaintiff's application for Canada Pension Plan disability benefits was denied. The plaintiff then requested that ICBC reinstate his wage loss benefits; ICBC refused.

ICBC obtained an expert report from Dr. Grypma in which Dr. Grypma concluded that there were no objective findings to support ongoing disability and that the plaintiff's perceived disability was disproportionate to the physical findings. Although the plaintiff had notice of Dr. Grypma's report prior to the summary trial, the expert report was excluded and could not be used by ICBC as they had not provided sufficient notice to the plaintiff that they intended to rely on Dr. Grypma's opinion as an expert medical opinion.

ICBC applied to abridge the time limits for service of Dr. Grypma's expert report, and the plaintiff opposed the application on the basis that it was prejudiced by the lack of notice. Citing *Pushee v. Roland*, 2003 BCSC 149, the court noted that although the notice provisions in Rule 40(A) are not

incorporated with the notice provisions under Rule 18A, it is incumbent on the court to require reasonable notice of expert opinions to be relied upon at summary trial. Additionally the court found that Dr. Grypma's report was based on an incomplete medical history.

ICBC attempted to rely upon reports reviewed by the plaintiff's experts on the basis that hearsay is admissible in expert reports. That argument was rejected and the court noted that hearsay is only admissible to identify the underlying basis for the opinion; furthermore, those opinions did not comply with the rules for expert opinions. As a result, the only expert medical evidence before the court were three reports served by the plaintiff, two authored by his family doctor, Dr. Leong, and one report authored by Dr. Sahjpaul, a neurosurgeon.

Given the exclusion of Dr. Grypma's expert report, ICBC's argument that the matter was not appropriate for summary trial on the basis that there was conflicting medical evidence, that the matter was complex, and because the plaintiff's credibility was in dispute was rejected. There was no conflict in the medical evidence and no evidence with respect to the plaintiff's credibility because Dr. Grypma's expert report was not admitted. The fact that the issues may have been complicated did not render the summary trial process inappropriate.

ICBC's arguments regarding the merits of the application were rejected. First, pursuant to s. 86 of the Regulation, ICBC argued that only an insured who is "currently" receiving benefits is entitled to apply for continuation of benefits pursuant to s. 80. The court held that such a literal reading of the act would lead to an anomalous result and was contrary to the spirit and intent of the legislation. Furthermore, s. 81-83 of the Regulation do not deny coverage to an insured if they are in receipt of other benefits, the benefits are simply deductible, therefore it would be inconsistent to deny coverage to an insured under s. 86 because they were not currently receiving benefits under s. 80 due to the existence of other benefits.

Second, ICBC argued that the plaintiff had not met the onus of proof under s. 86(1), that the plaintiff failed to adduce evidence of the duties he could not perform due to his injures and that there was a conflict in the medical evidence about whether he continued to be totally disabled. ICBC pointed to the fact that the plaintiff continued to work part time as evidence that he was not totally disabled. The court reviewed the meaning of the phrase "totally disabled" with reference to *Halbauer v. Insurance Corporation of British Columbia*, 2002 BCCA 5.

The court found there was sufficient evidence from the plaintiff, Dr. Leong and Dr. Sahjpaul to raise a *prima face* case for entitlement to benefits under s. 86, which triggered a reverse onus on ICBC to rebut the plaintiff's claim and establish that the plaintiff could perform the duties of his pre-accident employment. Both experts agreed that the plaintiff was unable to perform the duties of his pre-accident employment as a result of his disc herniation caused by the accident. Standing was a substantial requirement of the plaintiff's job as a security guard.

The court further rejected ICBC's argument that the fact the plaintiff continued to work part time was indicative of the plaintiff's ability to return to his pre-accident work. The plaintiff was only working eight hours a week at his part time job instead of the 30 hours a week he worked before the accident. The fact that the plaintiff continued to earn some income did not disentitle him to benefits under s. 86.

Third, ICBC argued that the plaintiff was not entitled to wage loss benefits pursuant to s. 86(1) because at least some portion of the cause of his low back injury was a "disease or illness" within the meaning of s. 96(f) of the Regulation. With reference to *Wafler v. Insurance Corporation of British Columbia*, 2008 BCSC 1387 at para. 12, the court noted that not every contributing pre-existing disease is caught by s. 96(f):

> Although the plaintiff's *reductio ad absurdum* argument assumes facts not established by the evidence in this case, (the only evidence in this case on the prevalence of degenerative spinal disease is Dr. Hirsch's opinion to the effect that degenerative spinal conditions observable on radiographs are not rare in the general population and they are commonly asymptomatic), there is some force to the argument that the approach applied in *Mawji*, taken to its logical extreme, would deny coverage to any claimant with a pre-existing condition of sickness or disease that contributed in any way whatsoever, no matter how minor the contribution, to a continuing injurious condition following a motor vehicle accident. I agree that such an extreme interpretation would defeat the clear insuring intent set out in s. 80 (1) of the Regulation to provide wage-loss benefits to insured persons who are totally disabled as a result of injuries sustained in motor vehicle accidents.

The court went on to say that the pre-existing disease must itself satisfy the "but for" test for causation before it can satisfy the exclusion clause in s. 96(f). While the plaintiff had a pre-existing injury to his L4-5, the accident caused a disc herniation at L4-5 that was new and there was "little evidence to support a conclusion that the pre-existing degenerative disc disease was a contributing factor." Therefore, the court found that the evidence did not support a finding that "but for" the pre-existing condition the plaintiff would not have been rendered totally disabled from his employment.

The plaintiff was entitled to wage loss benefits from the time of the last payment made by his private insurer.

XXII. Practice and Procedure

A. Dupre v. Patterson, 2013 BCSC 1561, Adair J.

Madam Justice Adair took the opportunity on this summary trial application to comment on counsel's failure to comply with the Rules and provide a proper notice of application. The notice of application contained about three pages, double spaced under "Factual Basis" and the "Legal Basis" section said in its entirety:

(1) Rule 9-7

(2) Rule 14-1(2)—costs

(3) *Motor Vehicle Act*, R.S.B.C. 1996, s. 318m, Part 3m, s. 183(2)(3)

It lacked even a brief statement to the effect of "The court should dismiss the action because" and then setting out the reason or reasons why, in the defendant's submission that should be the result.

Madam Justice Adair addressed the deficiencies as follows:

> [47] In *Zecher v. Josh*, 2011 BCSC 311, Master Bouck was faced with a similar situation, where the Legal Basis section in particular of the notice of application was wholly inadequate. Master Bouck described what was required in order to comply with the *Rules* and said:
>
> > [29] The defendants' application for production of wage loss particulars and a calculation of any wage loss claim was dismissed due to the inadequacy of the material and argument presented. Both the factual and legal basis for the application are wanting.
> >
> > [30] Form 32 of the SCCR [*Supreme Court Civil Rules*] lends itself to providing both the opposing party and the court with full

> disclosure of the argument to be made in chambers. Parties should put in as much thought to the necessary content of that Form as is done when preparing the supporting affidavits. When a party is represented, responsibility for that content lies with counsel.
>
> [31] No doubt *the Lieutenant Governor-in-Council* intended Part 3 of Form 32 to contain more than a cursory listing of the *Rules* that might support the particular application. For example, common law authorities can and should be included as well as a brief legal analysis. Such an analysis is particularly helpful given that parties are not able to present a separate written argument in civil chambers unless the application is scheduled to take two hours or more of court time.
>
> [32] In my experience and observation, a comprehensive legal analysis can easily be included in a 10-page notice of application. As well, Rule 8-1(4) allows the parties to include a list of authorities in the application record.
>
> [33] By providing an effective analysis of the legal basis for (or against) making the order, the parties may well be able to resolve the application without attending court.
>
> [34] As an aside, I should note that the sparse content of this particular notice of application is unfortunately not unique; many such inadequate notices have been presented in chambers.

[48] I agree with and adopt Master Bouck's comments concerning what a notice of application must contain. The same will apply with respect to an application response (Form 33), and the notice of application and application response under the *Supreme Court Family Rules* (Forms F31 and F32).

[49] In Fraser, Horn and Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. loose-leaf (Markham: LexisNexis, 2007) one of the leading texts on practice and procedure, the authors say this concerning the "Legal Basis" section of a notice of application, at p. 32-3 [notes omitted]:

> The notice must set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the order sought should be granted (Rule 8-1(4)(c)). If appropriate, applicable cases may be cited. The argument to be made in chambers should be fully disclosed and should contain more than a cursory listing of the rules that might support the particular application.

[50] The requirements under the current *Rules* represent a fundamental change from the practice under the former *Rules of Court*. Under the former *Rules*, Rule 44(3) and Form 55 (the form of notice of motion) only required a bare statement of the Rule or enactment relied upon. An outline (see Form 125 and former Rule 51A (12)), outlining the legal arguments to be made, was then delivered later in the exchange of motion materials and prior to the hearing. That is not the practice under the current *Rules*.

[51] If a notice of application does not contain the information now required under the *Rules*, the party filing it has failed to give proper notice—to the opposing party and to the court—of the nature of the application. However, all too frequently, counsel in both civil and family cases are signing and filing inadequate notices of application and application responses. The notice of application filed in this case was not at all unique. However, such documents do not comply with the *Rules*.

> [52] In contrast to the bare-bones notice of application filed on behalf of Ms. Patterson, the application response was comprehensive and, in the page limit allowed under the *Rules*, set out both a detailed summary of the facts and an analysis of the legal basis on which the plaintiff said the court should find the defendant liable. It represents the standard expected by the court.
>
> [53] In this case, the inadequacy of the notice of application was compounded by defendant's counsel tendering a 14-page written submission at the hearing. Since the hearing was estimated and set for 90 minutes, this was in breach of Rule 8-1(16).
>
> [54] Rarely will a judge or master refuse to receive a written argument from counsel, provided it is not being used to "sandbag" or take the opposition by surprise. However, tendering a written argument at the hearing is neither an alternative to, nor a substitute for, setting out the "Legal Basis" in a notice of application or an application response in accordance with what the *Rules* and the case law require.
>
> [55] When counsel come to court with inadequate materials, which fail to comply with the *Rules*, judges and masters are placed in a very difficult position. What often happens is that, to avoid the inconvenience and expense of an adjournment, matters proceed despite the inadequate materials, and judges and masters do the best they can in the circumstances. But inadequate motion materials, which fail to comply with the *Rules*, are incompatible with the efficient and timely disposition of applications.
>
> [56] If counsel are coming to court with inadequate material that clearly fails to comply with the *Rules*, and counting on being heard, they are misguided. Judges and masters are entitled to expect that counsel will prepare application materials (including affidavits) that comply with the *Rules*, and do no less than this. Counsel who come to court with application materials that do not comply risk having their applications at least adjourned, with potential cost consequences, until proper materials are filed

This case is also of interest because it applied s. 2 of the *Apology Act* to exclude an apology made by the plaintiff at the scene of the accident. Her Ladyship also commented that roadside admissions are often unreliable since people tend to be shaken and disorganized after an accident.

B. Brar v. Abbotsford (City), 2013 BCSC 1694, G.C. Weatherill J.

This was an application to join a party to a motor vehicle claim outside of the limitation period. This case is notable because more often than not, these applications succeed and this one did not.

The accident occurred on December 4, 2007 when the plaintiff was driving his wife's vehicle and lost control in slushy conditions, crossing the center line and then colliding with a garbage truck. The plaintiff commenced an action on April 22, 2008 against the driver and owner of a garbage truck in negligence and the City of Abbotsford for failure to maintain the roads. The plaintiff did not name his wife as a party. On September 4, 2012 he applied to add her as a party alleging that she failed to maintain the vehicle in roadworthy condition and had failed to replace worn tires and to warn him of the state of the tires.

There had been a significant delay in bringing on the application as the evidence established that as early as December 2008, counsel had contemplated adding Ms. Brar as a defendant. The court also found that the plaintiff had failed to adequately explain the delay as there was unexplained discrepancies in the evidence supporting the application. His Lordship commented that where there has been significant delay in applying to add a party, there is an obligation on the applicant to "clearly and in a detailed and straight forward manner, explain the delay. Vague and inconsistent

attempts at justification are insufficient." Lastly, there was evidence of prejudice arising from the delay in that relevant documents regarding the maintenance of the vehicle were no longer available and Ms. Brar could no longer recall specific details regarding the maintenance of the vehicle.

The application was dismissed.

C. Gillespie v. Pompeo, 2013 BCSC 843, Baird J.

Mr. Justice Baird allowed an appeal from a Master's decision to dismiss an adjournment of a trial sought by the defendant on the grounds that that an appeal was outstanding in respect of his criminal conviction relating to the subject matter of the civil litigation.

The plaintiff sought damages for assault and battery from a member of the RCMP as a result of the defendant officer having shot him. The defendant was convicted of the criminal charge of aggravated assault. He appealed the conviction. There was no dispute in the criminal matter as to whether the defendant willfully shot the plaintiff; the defence was that he had been justified in using such force in the circumstances. The issue in the civil matter would be identical.

The adjournment was ordered because:

> [19] As things stand, the defendant has been criminally convicted of aggravated assault. There can be no assumption at this stage that a civil trial will yield a different or more accurate result. If the conviction is upheld it will be the end of the matter for the purposes of liability, and a civil trial conducted in the interval will have been a colossal waste of judicial resources and the time, money and effort of the parties and witnesses alike. Finally, dual proceedings on the same issues and facts give rise to the spectre of inconsistent verdicts, an eventuality to be avoided in the interests of maintaining the credibility of the judicial process.

D. Gounder v. Nguyen, 2013 BCCA 251, per Harris J.A (Finch, C.J. B.C. and Chiasson J.A., concurring)

This appeal addressed the test to be applied where one party seeks to withdraw an admission of liability that results from the agreement between the parties to an action involving a car accident.

The facts were that initially instructions were given to defence counsel to deny liability but to canvass the possibility of obtaining discontinuance against one defendant, Mr. Stewart, in exchange for an admission of liability by another defendant, Ms. Nguyen. However, after defence counsel had reviewed the file she determined that there was evidence of potential negligence against the plaintiff and her instructions then changed. Defence counsel subsequently, forgetting the change in her instructions, offered to make the admission of liability originally contemplated. Plaintiff counsel accepted the proposal. The admission was made in the amended pleading and a notice of discontinuance was filed against Mr. Stewart. Following a failed mediation many months later, the error was realized and steps were taken to withdraw the admission.

The defendant argued that the application should be considered as an application to withdraw an admission under the Rules of Court whereas the plaintiff argued that that the defendant was seeking the court's assistance to withdraw from an enforceable contract and should be estopped from doing so.

The chambers judge analyzed the matter on the basis of Rule 7-7(5) finding that it applied even if the admission arose from an agreement. The agreement in issue in this case did not purport to attempt to oust application of the Rules and, in particular, the rule governing withdrawal of an

admission made in a pleading. The court of appeal found the chambers judge had adopted the correct test.

Allowing a withdrawal of an admission is a discretionary matter and deference was owed unless the chambers judge erred in principle. No such error was shown. The chambers judge found there to be a triable issue because of the conflict in the evidence about the facts of the accident that should be resolved at trial. She accepted that the admission had been made inadvertently. She balanced any prejudice rising from the proposed withdrawal of the admission and she addressed the extent to which prejudice could be compensated by costs. There was no basis upon which to interfere with the exercise of the chambers judge's discretion.

Accordingly, the appeal was dismissed.

E. McCluskey v. Desilets, 2013 BCSC 1147, Steeves J.

The defendant in this car accident case had been criminally charged with dangerous driving causing death and dangerous driving causing bodily harm. He was acquitted on all charges and one of the findings made at the criminal trial was that there were insufficient factors on speed that would elevate the case to the level of a criminal offence (i.e., to establish beyond a reasonable doubt that his driving was objectively dangerous). The criminal trial judge also concluded that his driving was not a marked departure from the standard of care that a reasonable person would observe in the circumstances.

At the civil trial, the defendant submitted that the issue had been determined in his favour by the previous criminal proceeding and, accordingly, he could not be found liable for the accident or for the plaintiff's injuries.

The judge held:

> [155] The approach of previous decisions on this issue have focused on issue estoppel (*Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at para. 63; citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.) at para 25). With regards to issue estoppel there are three preconditions: the same question has been decided in the previous proceeding, the previous decision was final and the parties in both proceedings are the same. In the subject case, the parties are not the same as the criminal proceeding and the issue of criminal negligence causing death and dangerous driving causing bodily harm are not the same issues as the civil liability of the defendant here. On this basis issue estoppel has no application.
>
> [156] With regards to abuse of process, such an abuse has been found where an arbitrator was asked to re-litigate whether an employee was guilty of a criminal sexual assault. A previous criminal court had convicted the employee. The arbitrator found that the employee had not committed the sexual assault and the courts set this decision aside (*Toronto (City) v. C.U.P.E., Local 79* (2001), 55 O.R. (3d) 541, 149 O.A.C. 213 (Ont.CA)).
>
> [157] In the subject case, again the defendant was acquitted of criminal charges with regards to the same incident that gave rise to this civil action. However, the cause of action in the latter is based in negligence not in the *Criminal Code*. I am not re-litigating whether the defendant committed a criminal offence, as was apparently the case in *Toronto (City)*.
>
> [158] I find that it is not an abuse of process for the plaintiff to seek damages against the defendant when the defendant had previously been acquitted of criminal charges.

F. Case Planning Conferences

1. Dhugha v. Ukardi, 2014 BCSC 387, Smith J.

At a Case Planning Conference held 15 months before trial and before the examination for discovery of the plaintiff, defence counsel sought an order that the plaintiff immediately disclose the areas of expertise of any experts whose evidence would be tendered at trail and an order limiting the expert evidence at trial to those areas of expertise. Plaintiff's counsel had informally advised defence counsel of the expertise likely to be involved but opposed a formal limitation by court order.

Smith J. held that it would be impractical and unfair to restrict a party's ability to prepare and present his case at such an early state. He also endorsed the litigation privilege that attaches to counsel's assessment of the case and identification of experts. In addition, Rule 5-3(1)(k) sets out a number of specific orders that may be made regarding experts but does not include an order disclosing an expert's identity or the area of his or her expertise before the report is served, much less an order barring any additional experts or areas of expertise. The general provision in Rule 5-3(1)(v) does not override basic and clearly established common law rights.

Furthermore, the power of the court to fix an alternate date for service of an expert report under Rule 5-3(1)(k)(iv) will be exercised in special circumstances on case-specific facts and will not be engaged lightly or routinely.

In this context, Rule 11-1(2) cannot be used at a CPC to force a party to identify specific medical experts or areas of medical expertise or to limit the party's case at trial to those experts.

The defence also sought an order for production of clinical records, employment records and income tax returns pursuant to Rule 5-3(1)(f). Smith J. held that as a matter of general practice, it is not particularly helpful for parties at a CPC to produce a long list of documents or categories of documents and simply seek an order that they be produced. The CPC process does not operate independently of the general rules for discovery of documents in Rule7-1. In the case at bar, Smith J. refused the order as it was apparent that the disclosure process was well underway and there appeared to be full cooperation of counsel.

G. Independent Medical Examinations

1. Jackson v. Yusishen, 2013 BCSC 1522, Barrow J.

This matter involved an application for an IME with a functional capacity expert within the 84 day time-limit for expert reports under SCCR 11-6(3). The application was denied because the legal assistant's affidavit that the application relied on did not specifically indicate why a physical examination rather than a rebuttal report was necessary.

2. Rathgeber v. Freeman, 2013 BCSC 2117, Master Keighley

The court considered an application for an additional IME by a doctor who had performed a Part 7 IME four years earlier. The court found that the original IME was of sufficient scope to be more properly tailored to a tort claim rather than a Part 7 action. While the court noted that the nature of the plaintiff's alleged injuries had changed dramatically, there was nothing in the application evidence to show why an examination was required to address the change in circumstances. As such, the application was denied.

H. Trial Management Conferences

1. Tran v. Cordero, 2013 BCSC 2048, Savage J.

Savage J. ruled at a trial management conference that Rule 12-2(9) confers jurisdiction on a TMC judge to order a pre-trial determination of whether an expert is biased and the report ruled inadmissible on that basis. In that case, Savage J. held that the defence objection to the family physician's report was of such a fundamental nature to the ability of the trial to proceed fairly that it must be raised and determined prior to trial.

XXIII. Seatbelt Defence

A. Schoenhalz v. Reeves, 2013 BCSC 1196, Hyslop J.

The plaintiff was a front seat passenger in a single vehicle rollover accident that occurred when she was 17 years old. The plaintiff was suffered serious injuries including fractured vertebrae, injuries to her teeth, a fractured pelvis, and third degree burns.

Neither the plaintiff nor her best friend, Reeves, who was 15 years old at the time of the accident, had a driver's license. The car belonged to Reeves' boyfriend's best friend and his mother. The plaintiff argued that Reeves was 100% liable, and the defendant's argued the defence of *volenti non fit injuria*, or in the alternative that Reeves' boyfriend was liable for sending the girls driving when he knew that neither of them had a driver's license or the experience to drive the vehicle. The defendants argued that the plaintiff was contributorily negligent.

The trial judge found that Reeves negligence caused the accident. Reeves took her eyes off the road in order to focus on a problem with the CD player and when she looked back at the road, there was a curve which she could not negotiate. The vehicle went into a ditch and rolled several times. The defendant's argument regarding the defence of *volenti* was not accepted. In order to establish *volenti*, the defendant needed to prove that there was a scheme to get Reeves to drive over her protestations such that Reeves was intimidated into driving with the plaintiff as a passenger. No fault was attributed to Reeves' boyfriend who gave Reeves and the plaintiff the keys to the car.

The defendants argued that Reeves' liability should be reduced to reflect the fact that the plaintiff failed to wear her seatbelt. In order to succeed, the defendants had to establish that the plaintiff failed to wear a seatbelt, which was not contested, that a seatbelt was available and in good working order, and that the plaintiff's injuries would have been prevented or lessened had she worn a seatbelt.

The owner of the vehicle gave evidence that the vehicle had seatbelts which were in good working order. With respect to the evidence required to establish that the plaintiff's injuries would have been prevented or lessened had she worn a seatbelt, the court said that the evidence "must not be of a general nature and it must be proved that the specific injuries would have been lessened as a result of wearing a seatbelt." In this case, the plaintiff was ejected from the car and it landed on top of her. The plaintiff's significant third degree burns were caused by the exhaust pipe as the plaintiff lay trapped under the vehicle. Nevertheless, the court could not say that all the plaintiff's other injuries were caused by being ejected from the vehicle. In the result, the trial judge found that the plaintiff was negligent and responsible for her own injuries in the amount of 20%.

XXIV. Summary Judgment

A. Burton v. Coady, 2013 NSCA 95, per Saunders J.A. (Oland, Hamilton and Fichaud, JJ.A. concurring; Beveridge J.A. dissenting)

In this case involving a 16 year old plaintiff who injured himself while using a sample Burton board, the court lamented the extensive record and proceedings resulting in the appeal of a six day summary judgment trial and upheld the original decision to deny summary judgment. The judge provided a lengthy break down of the law on summary judgment, noting that:

> The number of undisputed facts is not relevant to summary judgment; rather, the question is whether there are unresolved issues of material fact.
>
> The applicant for summary judgment has the onus of showing that there are no unresolved issues of material fact. Only if there are no such issues, are the relative merits of each party's case considered and it determined if there is a reasonable chance of success at trial
>
> The judge broke the summary judgment determination into a two-stage analysis, which it broke down into twelve points as follows:
>
> 1. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.
>
> 2. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.
>
> 3. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".
>
> 4. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.
>
> 5. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.
>
> 6. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.
>
> 7. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a

prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

8. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.

9. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.

10. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

11. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

B. Hryniak v. Mauldin, 2014 SCC 7, per Karakatsanis J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring)

In an appeal over a summary judgment decision, the Supreme Court of Canada identified the need for a culture shift in how summary judgment is used in order to improve access to justice. The Court of Appeal had ruled that summary judgment was appropriate in cases driven by documents with few witnesses, but was inappropriate in cases "requiring multiple findings, based on evidence from a number of witnesses, and involving an extensive record" (para. 17). The court noted that if used inappropriately summary judgments can work against their purpose and slow down the legal process.

The court also analyzed summary judgment in the context of new fact-finding powers of judgment under ORCP Rule 20. It determined that the new fact-finding powers were presumptively available, but they are only to be used after the judge has determined if there are any genuine issues requiring trial. If there are no genuine issues requiring trial, the court may then use its new fact finding powers so long as they do not violate the interest of justice.

As the new fact-finding powers affected findings of fact, the court also addressed the standard of review for summary judgment. Specifically, the court found that absent an error of law, review of summary judgment would involve mixed fact and law and subject it to a deferential standard of review, rather than correctness.

C. NJ v. Aitken Estate, 2014 BCSC 419, Ehrcke J.

Despite the emphasis about a culture change surrounding summary judgment in *Hyrniak*, the court in *NJ v. Aitken Estate*, 2014 BCSC 419, has indicated "In my view, Hyrniak v. Mauldin does not change the law regarding summary trials in British Columbia, and does not render the jurisprudence from our Court of Appeal obsolete." (para. 33)

XXV. Underinsured Motorist Protection

A. Clark v. Bullock, 2013 BCSC 1644, Betton J.

The plaintiff and ICBC, as third party, brought a joint application for a declaration allowing ICBC to make payments to the plaintiff from his underinsured motorist protection coverage ("UMP") to pay amount that the plaintiff was entitled to with adjustments as agreed by the parties.

The plaintiff was one of several individuals injured in a car accident, some of whom were seriously injured. The plaintiff, age 67, had obtained a $550,000 judgment against the responsible parties (the Bullocks) who carried $5,000,000 in coverage. It was a real and legitimate concern that the $5,000,000 would not be sufficient to cover all of the potential claims arising from the accident. The law required that claims would be paid out under the Bullock policy on a pro-rata basis after all claims would be quantified.

The plaintiff had entitlement to UMP in the amount of $2,000,000.

The legislation provided that ICBC is only obligated to make payments under UMP once other sources of recovery for any claims have been exhausted. This posed a problem for the plaintiff since he had to wait for payment of his pro-rata entitlement to the $5,000,000 and it may be many more years before the other claims would be resolved. One alternative was for ICBC to pay the $5,000,000 into court. That would resolve some issues for ICBC but not for the plaintiff. Attempts were made to reach an agreement with all of those who had claims arising from the accident to allow recovery by the plaintiff of the $550,000 but no agreement could be reached. All of the interested parties were served with the application but none attended.

ICBC was willing to waive its entitlement to insist on all steps being taken before permitting the plaintiff to access UMP if it had a declaration from the court that would protect it against potential for having to pay out more than the amount of the Bullock policy. ICBC had determined that there was no other source of recovery for the plaintiff (i.e., ICBC recognized that he would access the UMP coverage).

Mr. Justice Betton granted the order saying that the interpretation of the statutes and the application of the law should not be blind to practical solutions when the parties, fully cognizant of their rights and entitlement, present such a proposal. The judge was satisfied that the agreement did not prejudice or adversely affect the rights of the other parties, all of whom had been served with notice of the application and had chosen to not participate.

XXVI. Waivers

A. Morgan v. Sun Peaks, 2013 BCSC 1686, Griffin J.

The plaintiff skier was injured after she fell while boarding a lift and was then hit by the oncoming chair. The lift operator was found to have failed to push the stop button in time. The plaintiff attempted to rely on an exception in the waiver/release for the mechanical breakdown of ski lifts. The court denied that argument as there was no evidence of any mechanical issue with the lift and ruled the waiver voided liability.

B. Niedermeyer v. Charlton, 2014 BCCA 165, per Garson J.A. (Bennet J.A. concurring; Hinkson J.A., (as he then was) dissenting)

In this case, the appellant was injured in a bus accident while returning from a zip line experience operated by Ziptrek Ecotours Incorporated and for which he had signed a "Release of Liability, Waiver of Claims Assumption of Risk and Indemnity Agreement." The trial court held that the Agreement was a complete defence to the appellant's claim and dismissed.

On appeal, the BC Court of Appeal held that, as BC has a statutory scheme of compulsory universal insurance coverage for motor vehicle accidents, it is contrary to public policy to permit owners or operators of motor vehicles to contract out of liability for damages for personal injuries suffered in motor vehicle accidents. Justice Garson ruled that, while the statutory "scheme does not explicitly prohibit or permit an owner or driver and passenger from entering into a contract to exclude liability," it is still contrary to the scheme and purposes of its enactment, as evidenced by the language of comprehensiveness and universality in the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (para. 81). She also held that the social benefits conferred by the legislation make it analogous to human rights legislation.

Hinkson J.A. (as he then was) dissented from the majority and noted that the only cases in which parties have not been allowed to contract out of statutory rights where no prohibition against contracting out exists are cases of discrimination or other human rights violations. As the provisions for compulsory universal coverage within the Act did not explicitly bar individuals from contracting out of coverage, Hinkson would have dismissed the appeal.