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2015 Update on Case Law

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2015 UPDATE ON CASE LAW

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

II. Apology Act

A. Vance v. Cartwright, 2014 BCCA 362, per Lowry J.A. (Tysoe and McKenzie JJ.A. concurring)

The Court of Appeal was asked to address the *Apology Act* for the first time. One of the grounds of appeal was that the trial judge had wrongly attached significance to an apology made by the plaintiff at the scene of the accident. The plaintiff, a motorcyclist, had said he was sorry and that the accident was all his fault at the scene and later that day paid $1,000 for the repair of the defendant's vehicle. The Court of Appeal declined to determine whether the plaintiff's utterance and conduct constituted an apology under the Act. Ultimately, the appeal was dismissed on the basis that the judge could not be said to have taken it into account in determining liability. Instead, the trial judge appeared to have discounted what the plaintiff said as being attributable to confusion following the accident.

III. Affidavits

A. Staaf v. ICBC, 2014 BCSC 1048, Burnyeat J.

In this case, three witnesses, two insurance adjusters and an emergency physician testified on behalf of the defence at trial. They had earlier sworn affidavits prepared by counsel for the defendants before plaintiff's counsel decided that it would be necessary for each of the affiants to appear in the trial. The affidavits attached documents being proffered as business records and each deposed that they swore the affidavit on the understanding that it would be used by the defendant without the necessity of being called as a witness at trial.

The question that arose was whether their evidence should attract lesser weight or should be disregarded in its entirety. In addressing the impropriety of having witnesses swear affidavits, Burnyeat J. said:

> [6] ... The consciences of witnesses at trial are fettered by committing them in advance to a story which is favourable to the client of the lawyer preparing the affidavit. To obtain a sworn affidavit or a statutory declaration not only influences the evidence that a witness may give under oath at a trial but also compromises accurate and truthful evidence at trial because a previous statement may compromise the interest of the witness who wishes to testify truthfully but the truth may be in conflict with the previously sworn statement. Before trial, the acceptable practice is to take statements from witnesses but not arrange for those witnesses to swear affidavits or to make statutory declarations.

If testimony is to be given by affidavit, an application should be made pursuant to Rule 12-5(59) and the affidavit must be served at least 28 days prior to the application being heard by the court. There had not been such an application in this case. Had there been an order granted pursuant to Rule 12-5(59), plaintiff's counsel could require that the witnesses be called for cross-examination pursuant to Rule 12-5(61). During the course of the trial, when it became apparent that the three affidavits had been sworn, Burnyeat J. urged counsel to make the appropriate applications pursuant to the Rules and granted the orders.

The judge was satisfied that the sworn testimony of the three witnesses were in no way compromised by the previously sworn affidavits because the affidavits only: attached records to be put before the court; were prepared on the assumption it would not be necessary for the affiant to

appear at trial; did not provide direct observations; and, did not concern controversial matters. No lesser weight was attached to their testimony.

IV. Bankruptcy

A. Re Kuta, 2014 BCSC 2252, Master Bouck

The registrar, hearing a bankruptcy matter, refused to find a personal injury settlement for loss of income to be part of the bankrupt's estate, despite precedent found in *Bell (Re)* (1996), 1996 CanLII 3016 (B.C.S.C.), as subsequent decisions had affected the validity of the judgment.

Bell (Re) had ruled that monies intended to compensate a bankrupt for "economic loss" were payable to the trustee as the award was a "capital asset." A subsequent case, *Conforti (Re)*, 2012 ONSC 199, had accepted that an award for loss of competitive advantage fell under the exclusion of s. 68 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and was not considered part of the plaintiff's "property" or "income."

Further, in *Perren v. Lalari*, 2010 BCCA 140, the Court of Appeal had determined that a future loss of income award is not necessarily determined by a loss of capital asset approach, but can also be assessed as a "real or substantial possibility" that a future event will lead to a loss of income. Master Bouck held that the importation of the "capital asset" concept into bankruptcy law, and consequently the *Bell (Re)* judgment, is no longer valid. Accordingly, the funds intended to compensate Mr. Kute for his future loss of income did not vest with the trustee.

Master Bouck further noted that "a manifestly unjust result would occur if the bankrupt was compelled to pay current creditors with monies intended to compensate the bankrupt for future circumstances."

V. Costs & Disbursements

A. Campbell v. Bouma, 2015 BCSC 817, Master McDiarmid

The defendant brought an application for particulars of past and future income loss with costs payable against the plaintiff's solicitor or the plaintiff payable forthwith. There was delay in some document production of employment records and income tax returns. The documents had been requested by plaintiff's counsel but not yet received. The defendant sought particulars to narrow the issues before discovery and quantify the claim. Plaintiff's counsel was unaware that defence counsel was planning a parental leave and did not understand there was any particular urgency to the usual document requests.

The application for particulars was dismissed and Master McDiarmid commented on the impropriety of the costs application, finding that except on rare occasions, it is not helpful or appropriate for a sophisticated litigant, represented by counsel, to make such an application in these circumstances. Seeking costs from plaintiff's counsel where there is no basis for such a costs order may have the effect of unnecessarily complicating what is already an adversarial process.

On the issue of seeking costs "forthwith," Master McDiarmid held that seeking costs payable forthwith from a young plaintiff in an action where liability was admitted was inappropriate. If the defendant were to be successful in the application and get costs in any event of the cause, she can set them off from the damages awarded to the plaintiff.

In the result, costs of the application were awarded to the plaintiff payable forthwith. Scale C was awarded because of the effort required to respond to the defendant's costs application against the lawyer personally.

B. Kovac v. Moscone, 2014 BCSC 259, Harvey J.

The plaintiff sought damages in the $1 million range at trial but was awarded $75,000 in non pecuniary damages with her claims for past wage loss, future care and earning capacity dismissed. The key issue at trial was causation. The defendants did not dispute that she had profound and disabling injuries and credibility was not a determining factor in the case. While the trial judge found that half of the trial days were consumed by evidence on issues upon which the plaintiff ultimately failed, he declined to apportion costs based on degrees of success. Instead, he limited her costs recovery to 11 of the 21 trial days.

C. Loft v. Nat, 2015 BCSC 198, Jenkins J.

The plaintiff was deprived of his costs in a personal injury action in which he claimed significant damages but was awarded a modest amount in non pecuniary, past wage loss and special damages. His claims of future income loss and future care were dismissed based on, *inter alia*, serious credibility and pre-existing mental health issues. The trial judge found that the plaintiff did not enjoy "substantial success" at trial and, on that basis, denied him costs.

The defendant had made two formal offers to settle and sought costs. However, it was a term of the offers that upon acceptance of either offer, the defendants and/or ICBC would be obliged to pay monies first to the Family Maintenance Enforcement Program, ICBC having been served with a Notice of Attachment. The trial judge held that neither offer was one that ought reasonably to have been accepted because ICBC was not indebted to the plaintiff upon acceptance of the offer and the amount of arrears was in dispute.

D. Saopaseuth v. Phavongkham, 2015 BCSC 45, Bernard J.

The plaintiff recovered damages of $44,920 following a seven day trial and sought to recover costs pursuant to Rule 14-1(1)(b). The defendant had filed a Form 61 Notice of Fast Track at the time of filings his Response to Civil Claim. On this bases, the defendants argued that the lump sum costs limits set out in Rule 15-1(15) applied.

Bernard J. held that the mere filing of a Form 61 does not automatically convert an action into a Fast Track action. One of the requirements of Rule 15-1(1) must still be met: (a) the claim is $100,000 or less; (b) the trial can be completed within 3 days; (c) the parties consent; or (d) the court so orders. In the circumstances of this case, Bernard J. found that none of the criteria were met and, therefore, the Filing of Form 61 did not convert the claim into a fast track action.

However, the quantum awarded was clearly captured within the legislative scheme for fast track costs. There were special circumstances that justified an increase from the $11,000 lump sum cap in that the trial was set for seven days, conducted efficiently and dealt with some relatively complex quantification issues. In the result, the plaintiff was awarded $17,000 representing an additional $1,500 for each of the extra four days.

Double costs were denied to the plaintiff although the trial award exceeded his offer to settle. Bernard J. held that the competing expert evidence made quantification difficult, the offer was not broken down into its constituent elements and the defendant had a legitimate defence to the

plaintiff's claim. He held that an award of double costs would unduly punish the defendant for mounting a meritorious defence.

VI. Costs of Two Counsel

A. Best v. Thomas, 2014 BCSC 2487, Duncan J.

In this case, defence counsel challenged the jurisdiction of the court to make such awards, arguing that there is no provision in the Rules that allow them. Duncan J. did not rule on the jurisdictional issue, finding that the facts of the case did not support such an award in any event.

B. Maras v. Seemore Entertainment Ltd., 2014 BCSC 1842, Abrioux J.

Defence counsel in this case agreed to the assessment of 1.5 times the applicable units for the preparation and attendance of counsel at a 43-day jury trial with significant liability and damages issues. The court rejected the plaintiff's position that double units were appropriate, finding that while the case profited at trial from the use of two counsel, the defendants should not be responsible for the costs for both counsel for preparation and trial attendance.

C. Wallman v. Doe, 2014 BCSC 968, G.C. Weatherill J. (appeal and cross appeal filed)

Costs of two counsel for preparation and attendance at a 29-day trial were allowed considering essentially all of the same factors that raised the matter beyond ordinary difficulty and justified Scale C units: complexity of the issues of liability and causation; 43 witnesses; 16 experts; 16 expert reports; several pre trial applications, including a jury strike application; and the matter was hard fought with little conceded. Weatherill J. held that a significant volume of documents and evidence had to be amassed, digested, and presented. The attendance of two counsel on behalf of the plaintiff allowed the trial to proceed smoothly and efficiently and it enabled counsel to provide the court with extensive and comprehensive summaries of the evidence and submissions immediately following the close of evidence. However, attendance at trial of second counsel was reduced to 70% as it was not necessary to have two counsel 100% of the time, particularly during lengthy video evidence.

VII. Special Costs

A. Gichuru v. Smith et al., 2014 BCCA 414, per Harris and Goepel JJ.A. (Strombereg-Stein J.A. concurring)

At the trial of this wrongful dismissal action, the trial judge dismissed the claim and awarded lump-sum special costs against the plaintiff on a summary basis and in the absence of any evidence, using the "rough and ready" approach employed in other cases of $6,000 per half day of evidence. On appeal, the court considered, *inter alia*, the power of a judge to assess special costs and the proper method for so doing.

The Court of Appeal rejected the use of the "rough and ready" approach to assessing special costs as such an approach was a "fixed fee" approach that did not conform to the requirements of Rule

14-1(3) to allow proper and necessary fees after considering all of the circumstances, including those enumerated in Rule 14-3(b).

A key finding by the court was that Rule 14-1(15) of the 2010 Supreme Court Civil Rules, expanded the role of the court and allows a judge who awards costs of a proceeding to fix the amount of costs, including disbursements. Previous cases invoking the court's inherent jurisdiction to fix the amount of costs pre-dated the introduction of this Rule. As 14-1(15) provides the authority to fix the amount of costs, resort to the court's inherent jurisdiction is no longer necessary.

In assessing the amount of special costs, only those fees that were proper or reasonably necessary to conduct the proceeding are to be awarded. The ultimate award of costs fixed by a judge must be consistent with the award that a registrar would make in similar circumstances. In addition, natural justice requires a certain level of procedural fairness which would typically provide an opportunity for a party to test the reasonableness of the fees. A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services.

As a final matter, the Court of Appeal stated that the decision to fix the quantum of costs under Rule 14-1(15) is a matter of discretion that should be sparingly exercised.

VIII. Disbursements

A. MacKenzie v. Rogalasky and Chandi v. Atwell, 2014 BCCA 446 per Harris J.A. (Smith and Bennett JJ.A. concurring) (leave to SCC refused 2015-05-14)

The Court of Appeal ruled that interest paid on disbursements is not recoverable as a disbursement in the action. The court considered that "disbursement" is not a defined term and must be interpreted in the context of the Rule 14-1(5) as a whole, guided by the purposes of a legal regime that permits the recovery of costs by successful litigants, and which also recognizes the broader legal context governing the recovery of interest.

There was no common law right to recover costs and disbursements and such recovery was introduced by legislative intervention. Pre-judgment interest was generally not recoverable on either costs or on special damages. The enactment of the *Court Order Interest Act* added pre-judgment interest to special damages at rates provided under the legislation. Pre-judgment interest was not similarly extended to disbursements. The legislation specifically prohibits awarding interest on costs, which in the court's view, includes disbursements. The court concluded that by this prohibition, the legislature determined that in respect of costs/disbursements, there is no pre-judgment loss in respect of which it is appropriate to compensate for the time value of money expended.

In the context of a costs rule, interest expenses do not arise from the nature of the allegations or the conduct of proceedings. They arise from unrelated causes including the financial circumstances of a party and, as such, they do not fall within the meaning of the word "disbursements." To be recoverable, a disbursement must arise directly from the exigencies of the proceeding and relate directly to the management and proof of allegations, facts and issues in litigation, not from other sources.

B. Reid v. Amell, 2014 BCSC 1613, Registrar Nielson

The cost of filing a Part 7 action was allowed as being necessary and an adjunct to the tort litigation. The court held that but for the defendant's actions, which caused the accident, the plaintiff would not have had to commence the Part 7 action to preserve her rights where the defendant plead s. 25 in the tort action.

C. Tomas v. Mackie et al., 2015 BCSC 364, Registrar Nielsen

The plaintiff accepted a formal offer to settle which provided that the plaintiff was entitled to her costs of the action at scale B and necessary and reasonable disbursements assessed in accordance with Rule 14-1. Registrar disallowed the expenses associated with filing a Part 7 action, finding that the Part 7 action was not extinguished by the accepted settlement offer. Additionally, the Part 7 was a separate proceeding in which legislative benefits are alleged to be owed to the plaintiff by ICBC. The dispute was more in the nature of contract than tort. It was not a claim involving the defendants in the tort action. Costs awards relate to the particular case and are made between the successful and unsuccessful parties. The defendants were not a party to the Part 7 action.

IX. Credibility

A. Facebook

1. Tambosso v. Holmes, 2015 BCSC 359, Jenkins J.

The major issue in the plaintiff's claim for damages arising out of a motor vehicle accident was her credibility. The plaintiff was injured in two motor vehicle accidents and she claimed she suffered from post traumatic stress disorder and major depression as a result. The plaintiff described her pre-accident life as vibrant, hard working, social, and happy. Following the accidents, she told her physicians and various experts that she was "housebound," stopped seeing her friends, and completely shut herself in.

In part, the court relied on voluminous Facebook records in concluding that the plaintiff was exaggerating and fabricating her symptoms and limitations. The trial judge approached the Facebook documents with caution, accepting that people are more inclined to post positive details of their lives. However, the Facebook posts were in sharp contrast to the plaintiff's evidence in chief and the history that she provided her to physicians.

Facebook posts and photographs indicated that the plaintiff rejoined activities and parties with her friends mere weeks after the accident, at a time when she told physicians that she was in a "bad place" and that the weeks after the accident "really sucked." Photographs depicted the plaintiff attending a stagette including drinking and tubing on a river, and a Halloween party that she attended in costume. The plaintiff's Facebook posts dropped off during the period that she was pregnant and in the midst of an abusive relationship. The trial judge noted there was no similar drop off in her Facebook usage in the months following the accident, at a time the plaintiff described as being very bad for her.

The trial judge concluded that the Facebook documents for the period after the accident reflected a person with an active social life who went through various life events, and it was "completely

inconsistent with the evidence of the plaintiff at trial and to the experts that she was a 'homebody' whose 'life sucked' and 'only had friends on the internet.'"

X. Damages

A. Barta v. Da Silva, 2014 BCSC 2113, Affleck J.

This case is of interest because it included a claim for a loss of capacity to trade securities on the plaintiff's own account and which caused him to lose capital he had accumulated and invested in the stock market as a consequence of a mild traumatic brain injury. The plaintiff alleged that he had lost in excess of $1,000,000 by the time of the trial and pursued future losses in excess of $850,000. He alleged a loss of capital in excess of $4,000,000.

It was his allegation that pre-accident, his trading had been careful and risk averse; whereas after the accident he engaged in reckless trading and made the unwise decision to purchase a house he could not afford.

The claim was rejected primarily due to evidence that the plaintiff had made significant gains in the stock market in the year immediately following the accident. The court noted that he had made unwise decisions to hold onto stock that had declined; similar errors in judgment which many people without concussions make. His substantial losses occurred following the market "crash" a year after the accident and were unrelated to his injuries.

B. Lo v. Matsumoto, 2015 BCCA 84, per Newbury J.A. (Willcock and Saunders JJ.A. concurring)

This appeal addressed the evidence necessary to justify an award for cost of future care. The trial judge had disallowed certain care items on the basis that the plaintiff had failed to testify about his intention to pursue every item. In allowing the appeal, Newbury J.A. noted that there was no hard and fast rule requiring a plaintiff to testify that he intends to use every item in the "wish list" of an occupational therapist to justify an award for cost of future care. Rather, a plaintiff must prove his case in terms of need and the likely utility of the item sought. Where items are not absolutely necessary, a plaintiff cannot assume the court will simply accept the recommendations of an occupation therapist or even the medical practitioner.

C. Mathroo v. Edge-Partington, 2015 BCSC 122, Schultes J.

The 84 year old plaintiff suffered an open fracture of his elbow when he was a pedestrian struck by a motor vehicle in a cross walk. The plaintiff had ongoing discomfort, was not able to walk as often or as far as he had before the accident, had difficulty in tending to garden, and had lost some social contact as a result of not being able to attend his former temple.

On the issue of non-pecuniary damages, plaintiff's counsel referred to the "golden years doctrine" referred to in *Fata v. Heinonen*, 2010 BCSC 385: that retirement years are special ones, and that an injury to an older person can wreak more hardship than it would to a younger person. In contrast, defence counsel referred to *Olesik v. Mackin*, [1987] B.C.J. No. 229 (S.C.), in support of the argument that a limited life expectancy of an older plaintiff justifies a lower award.

The trial judge noted that the applicability of *Olesik* had been questioned by other decisions of the Supreme Court, and that the golden years doctrine had only limited application in the present case.

He held that the two competing principles essentially cancelled one another out, so that advanced age should not be a factor either way. That view was supported by *Duifjuis v. Bloom*, 2013 BCSC 1180.

D. Future Income Loss

1. Kathuria v. Wildgrove, 2015 BCCA 186, per Willcock J.A. (Bauman C.J.B.C. and Chiasson J.A. concurring)

This case contains a good analytical framework for consideration of future loss of earning capacity claims based on delayed entry into the workforce and loss of future income.

The plaintiff was a medical student when he was injured in a motor vehicle accident in July 2009. He had had some difficulties in medical school having to repeat many classes. In August 2008, he moved to Illinois and enrolled in a preparatory course of study for the US medical licensing exams between September 2008 and April 2009. The reviews of his clinical work in Illinois were generally good. At trial he testified that, after writing the exam in April, he planned to return home to BC and take some time off until March 2010. He would work part-time at a non-medical job and then write the Step 1 examination in June 2010, followed by his clinical rotation. He would then write his Step 2 exams in January and May 2011. All going well, he would be qualified to begin his internship in June 2012.

However, he alleged that, as a result of the accident, he did not carry through with the Step 1 exam in June 2010. His injuries prevented him from starting to study until March 2010. He then changed his plan and elected to enrol in a review program (between September and November 2010), followed by further group study in 2011. Following that, in January 2012 he wrote the Step 1 exam, but did not obtain a passing grade.

By the trial in March 2013, he had completed 18 of the 72 weeks of the required clinical rotations. Thus there was still substantial work in front of him before he could begin an internship and, on the basis of his academic record, substantial uncertainty as to whether he would succeed. There was no evidence at trial about the pass rates for the examination take by the plaintiff or whether his failure was par for the course or predictive of the likelihood of passing examinations.

The plaintiff sought an award for loss of capacity to earn income because: (1) he had planned to start his internship in June 2012 but was likely to start it in June 2014; and (2) he would be restricted in his employment by the lingering effects of his injury.

The trial judge awarded him $210,000 for the delayed entry into the workforce. In arriving at the $210,000 the judge had relied upon economic evidence about the present value of the future wages the plaintiff could have expected to earn assuming commencement of residency in mid-2012 versus in mid-2013. In addition, the plaintiff was awarded a further $100,000 for the "real and substantial risk of future loss and down time from the practice of medicine."

The awards were appealed on the grounds that the award was inordinately high.

Willcock J.A. found that there was merit in the appeal because the trial judge had applied a wrong principle of law by leaving out of account a relevant factor in the assessment which was the real and substantial risk that the plaintiff would not qualify as a physician. He wrote:

> [19] Because the assessment of future or hypothetical past losses requires the trial judge to weigh possibilities as well as probabilities, it is an error to treat an injured person's anticipated career to be a certainty where there is evidence of considerable

> uncertainty with respect to the plaintiff's prospects. As this court noted in *Reilly*, account should be taken of the possibility a person might not realize his or her professional dreams.

The court reduced the award on the basis that the plaintiff could not establish anything more than a simple probability of success in qualifying as a US physician. The court discounted the award by 50% to account for the possibility the plaintiff will not qualify.

The court also set aside the $100,000 award for the diminished value of the capital asset. After quoting from the two recent BCCA authorities, *Perren v. Lalari* and *Steward v. Berezan*, Willcock J.A. found:

> [34] In my view, similarly, in the case at bar, it cannot be said there was evidence of another realistic alternative occupation that would be impaired by the plaintiff's accident-related injuries. As stated in *Steward*, an inability to perform an occupation that has not been established as a realistic alternative occupation is not proof of a future loss.
>
> [35] Further, there was no evidence of the injuries having any meaningful impact upon the plaintiff's ability to practice any particular branch or specialty of medicine. The trial judge had erred in making the award in the absence of evidence demonstrating a real and substantial possibility that the plaintiff would be limited in his profession in a manner likely to diminish his earning capacity.

E. Interest

1. Isbister v. Delong, 2014 BCSC 1947, Bowden, J. and Kaiser v. Williams, 2015 BCSC 646, Cullen J.

These two cases address the question of whether interest paid on living expenses and/or for treatment costs are recoverable as a special damage. In *Isbister*, the plaintiff claimed she had to take out loans of $170,000 to fund her living expenses since she was not able to work and the loans were also used to pay some of her health care costs. In dismissing the claim, Bowden J. said:

> [5] In my view, assuming that the interest is paid, the interest on a loan to fund general living expenses including treatment costs during the course of litigation is not recoverable as damages where, as here, it is not reasonably foreseeable and arises because of the impecuniosity of the plaintiff ...

The court also determined that the loans were not necessary as a result of the accident because she had received an amount which exceeded her loss of income to that point.

In *Kaiser*, the plaintiff's claim for interest on her MasterCard for debts which pre-dated the accident and were unconnected to the accident was disallowed because of remoteness.

F. Management Fee

1. Best v. Thomas, 2014 BCSC 2487, Duncan J.

A modest management fee was awarded for $25,000 where there was expert evidence from an economist that economic projections indicate that by 2019, government bond rates will be better than the 2% discount rate. The evidence was that an individual working with a banker who will charge transaction fees, or an investment planner who would be paid for a few hours of advice,

could set up a proper bond investment structure that would ensure against erosion from inflation and generate an income stream.

G. Medical Marijuana

1. Amini v. Mondragaon, 2014 BCSC 1590, Greyell J.

The trial judge awarded the plaintiff $6,500 in future care for topical marijuana ointment under the Medical Marijuana Program based on the recommendation from Dr. Hershler to treat ongoing neck and shoulder pain.

2. Mandra v. Lu, 2014 BCSC 2199, Duncan J.

The trial judge refused to award future care costs for medical marijuana cream recommended by Dr. Hershler, concluding that it "is a treatment in its very early experimental stage with minimal empirical evidence to suggest it will assist the plaintiff, if it is even permissible under Health Canada's medical marijuana exceptions."

The reasons for judgment note the evidence given by Dr. Hershler that he is aware of directives from the Canadian Medical Association and Health Canada about exercising restraint in prescribing medical marijuana. He views these directives to be aimed at smoked cannabis of a particular strain, not those he suggests as a cream or oral supplement. He agreed he is keen to use those types of applications of medical marijuana in the field to assist in the gathering of evidence about its efficacy and modality in pain management.

3. Torchia v. Siegrist, 2015 BCSC 57, Hyslop J.

The claim for medical marijuana was rejected by Hyslop J. on the ground that there was no evidentiary basis for making such an award. The plaintiff smoked marijuana recreationally before the accident occasionally. After the accident, he sought out marijuana to ease his back pain and consumed two joints a day. He then requested a prescription for medical marijuana from his gp to provide him with the equivalent of two joints per day which the gp provided. The gp made no reference to use of marijuana for pain in his expert report and testified that he was not an expert as it relates to the treatment of pain with marijuana. None of the other doctors who treated the plaintiff commented on the use of medical marijuana except the physiatrist who said that he had patients that report smoking marijuana to treat their pain. Hyslop J. held that this evidence could not be taken as a doctor's recommendation based on medical evidence that it is capable of treating pain. There was no evidence before the court "or any reference to any conclusive studies that suggest treating pain with marijuana."

Hyslop J. emphasized that an award for medical marijuana in another case does not automatically mean that it is medically necessary for another plaintiff. For example, in *Joinson v. Heran*, 2011 BCSC 727 medical marijuana was approved by Mr. Joinson's psychiatrist to use so that Mr. Joinson's use of morphine could be reduced. In *Joinson*, there was evidence before the court which led Brown J. to conclude:

> [418] I accept the medical literature is controversial and this subject remains generally controversial among experts and authorities. Medical use of marijuana has many supporters, professional and lay, particularly for use in cases of intractable pain such as cancer, but also detractors who raise legitimate grounds for challenging its safety and health benefits. Given the conflicting medical opinions,

scientific controversy and safety concerns, all the more reason for a judge requiring compliance with rules and regulations established for the legal purchase of medical marijuana.

H. Mitigation

1. Benson v. Day, 2014 BCSC 2224, Skolrood J.

The plaintiff suffered from chronic pain as well as psychological injuries as a result of a motor vehicle accident. The court agreed with the defendant's expert who characterized the plaintiff's treatment to the date of trial as "woefully inadequate." The plaintiff had attended six chiropractic appointments over the course of 18 months. He gave evidence that he did not recall being advised to do physiotherapy, and that he was unaware of recommendations provided by experts his lawyer referred him to. This evidence was not accepted. Despite the diagnosis of anxiety, he attended only one counselling appointment because he was too tired to attend at the end of the day.

The trial judge found that the plaintiff took virtually no personal responsibility for treatment. At trial, several doctors testified as to the benefit of early treatment. The trial judge determined that a reduction of 15% was appropriate in the circumstances, and further to *Zawadzki v. Calimso*, 2011 BCSC 45 and *Penner v. Silk*, 2009 BCSC 1682, he considered the applicability of the reduction under each head of damage separately. The reduction was applied to the plaintiff's non-pecuniary damages, past wage loss, and loss of future earning capacity, but not to the awards for cost of future care or special damages.

2. Rasmussen v. Blower, 2014 BCSC 1697, Funt J.

The plaintiff was off work for approximately three months following the accident. During that time, he was counselled to do physiotherapy and massage; however, he only attended one appointment of each. The plaintiff argued that he was not able to afford such treatments, that his initial visit had caused him pain, and that he was too busy to attend these treatments. The trial judge rejected these reasons noting that: while he was off work, he was available to attend treatment; perseverance is key to allowing medical treatments to work; and he had sufficient funds for treatment or could have applied for coverage through Part 7 benefits. Furthermore, the trial judge noted at paragraph 42: "he also consumed alcohol in quantity which, pragmatically viewed, probably reduced or nullified the effectiveness of the prescribed medications." The trial judge applied a reduction of 20% to the plaintiff's award as a result of his failure to mitigate.

I. Past Wage Loss

1. Saadati v. Moorhead, 2014 BCSC 1365, Funt J.

The plaintiff claimed non-pecuniary damages and past wage loss as a result of two motor vehicle accidents that occurred in 2005. The plaintiff claimed $6,000 per month for a period of 24 months over the course of which he claimed he could not drive due to his accident injuries. There was evidence in the form of traffic tickets that he had in fact driven during that time. The plaintiff received benefits from the Worker's Compensation Board in respect of the first accident that were paid in 2005 and 2006.

The plaintiff's pre-accident income was determined with reference to his income tax returns. He did not report any income for 2001, 2002 and 2003, and for 2004 he only reported $12,796 in taxable

capital gains. There was evidence that the plaintiff did not appear to be in financial difficulty during the years before the accidents; however, the court declined to impute income as it would be "tantamount to finding possibly gross negligence or tax evasion which is unwarranted, especially having regard to the fact that the plaintiff is not able to testify to explain matters and defend his reputation." The court referred to *Hoy v. Williams*, 2014 BCSC 234, regarding the test to determine whether to make an award for past income loss and held that the plaintiff had not provided sufficient evidence that by reason of his psychological injuries he was unable to earn income or that he would have earned income. The plaintiff's claim for past wage loss was dismissed.

J. Unintended Consequences of Trial

1. Bulpitt v. Muirhead, 2014 BCSC 678, G.C. Weatherill J.

The plaintiff was injured as a result of a motor vehicle accident. The plaintiff worked as a fire fighter and supplemented his income with other part time work on his days off. As a result of his accident injuries, the plaintiff was off work as a fire fighter for several months, and then returned to work on a graduated basis. Approximately eight months after the accident he was back to full time duties and remained at work full time until the time of the trial. The plaintiff's fire chief gave evidence at trial regarding progression to management roles in the New West Fire Department.

On the first business day after trial, the plaintiff received a letter from the fire chief raising concerns about the plaintiff's ability to perform the full range of job demands required by his position. The fire chief was concerned that medical evidence related to the plaintiff's ability to meet his job demands referred to at trial had not been provided to the fire department, and that the employer was not aware of the considerable claim the plaintiff was making in respect of the accident. The plaintiff was "held out of service" without pay until he demonstrated to his employer that he was fit for duty. Ultimately, the plaintiff proved that he was fit for duty; however, he lost three weeks' pay in the interim. That lost pay was the subject of a grievance brought by the plaintiff's union against his employer, the City of New Westminster (the "City").

The plaintiff was permitted to apply to reopen his case in respect of his suspension. He claimed that the lost wages were directly caused by the accident. The City refused to pay the plaintiff for his lost wages taking the view that the loss was occasioned because the plaintiff or his counsel acted unreasonably in failing to provide the medical reports to the employer in a timely way. The trial judge concluded that the issue was a matter between the plaintiff, his union, and the City. His suspension after trial on the basis of evidence he led at trial was not a reasonably foreseeable consequence of the accident. Therefore, there was no basis for permitting the plaintiff to reopen his case in respect of the suspension.

In respect of the plaintiff's claim for loss of earning capacity and loss of opportunity, the defendant had served a demand for particulars, to which the plaintiff responded by providing particulars about the plaintiff's career as a firefighter, and not the other side businesses that he participated in or operated. At trial, the plaintiff led evidence of opportunity to earn income outside his job as a firefighter. The defendant objected. The trial judge agreed that the plaintiff should have provided more fulsome particulars in respect of the claim. However, on balance, the defendant conceded they were not prejudiced; the plaintiff's work and employment outside the fire department were canvassed by the defendant both at discovery and trial; and the defendant had an adequate opportunity to address that evidence.

XI. Document Production

A. Imperial Parking Canada Corporation v. Anderson, 2014 BCSC 989, Kent J. (in chambers)

In the face of extensive requests for document production, Kent J. commented regarding the importance of appropriately framing an application for documents, including reference to the correct rule the party is relying upon. It is unhelpful to simply refer *to Rule 7-1* without more as different tests apply to the different levels of document production.

Where a request is made under Rule 7-1(11), which requires that a written demand for additional documents must contain "reasonable specificity" as to the documents sought, an overly broad demand (i.e., all documents not yet produced) will be fatal to the claim (relying on *Lit v. Hare*, 2012 BCSC 1918).

B. Jermana v. Kananga, 2014 BCSC 1558, Master Taylor

The plaintiff alleged that she suffered a MTBI and resulting impulse control issues in relation to, *inter alia*, her spending and purchasing habits. In that context, Master Taylor ordered a plaintiff to produce copies of Visa credit card statements and any other credit cards she may have used from one year pre-accident to present, in an unredacted form. In deciding in favour of production of the documents, Master Taylor found that the defendant had made out a case sufficient to breach the plaintiff's privacy expectations. It was noteworthy that the plaintiff had not provided any evidence to suggest that the production of her credit card statements would disclose embarrassing or confidential information.

C. Pavan v. Guolo, 2014 BCSC 648, Master MacNaughton

The 80 year old defendant in a car accident claim was ordered to produce his gp's clinical records and his Pharmanet records for the two years preceding the accident. The plaintiff had established a sufficient basis for the order because there were references in his ophthalmologist's records (which had been produced) to medications which may affect his ability to drive.

D. Prothero v. Togeretz, 2015 BCSC 764, Master Caldwell

The plaintiff asserted privilege over a privately obtained MRI. The plaintiff's gp wrote to plaintiff's counsel asking for a private MRI to be arranged because there was a two year wait in the public system. The doctor stated the MRI was necessary for investigation and referral to a specialist for assessment, rehabilitation and management of the plaintiff's symptoms. Plaintiff's counsel asked ICBC to pay for the MRI but ICBC refused. After the MRI the plaintiff was referred by her gp to a neurologist, who reviewed the MRI and reported back to the gp. The neurologist subsequently prepared an expert report.

The MRI was listed as a privileged document. The defendant brought on an application for its production. Master Caldwell ordered its production on the grounds that it was clear the MRI had been requested as part of the gp's course of investigation and treatment of the plaintiff's injuries and had not come into existence for the purposes of litigation.

XII. Evidence

A. Pacheco v. Antunovich et al., 2015 BCCA 100, per Smith J.A. (Bauman and Harris JJ.A. concurring)

The plaintiff appellant successfully appealed the dismissal of her injury claim arising from a minor collision and a new trial was ordered.

The appellant was involved in a rear end collision involving minor damage to her vehicle and no damage to the respondent's vehicle. The trial judge found the collision speed was 2 km/hr. She continued to complain of persistent pain two years later at trial. The trial judge dismissed the claim, finding, *inter alia*, that there was no objective medical evidence to support her subjective complaints, her evidence was exaggerated and she exhibited exaggerated pain behavior during trial.

The Court of Appeal held that there was objective evidence to support the appellant's claim of injuries and persistent pain arising from the accident consisting of: initial findings of muscle spasm by the gps, "tenderness," "pain with extension" and last degrees of movement of the lumbar spine, radiating pain to the right gluteal area and pins and needle sensation in the right foot; mild disc bulge on the CT; and positive "stress tests" on the SI joint.

The court also found that the trial judge placed undue weight on the appellant's demeanor in the witness box in concluding that she grossly exaggerated her claim. The court held that the trial judge did not find any inconsistencies or contradictions in her evidence and he should have considered her evidence at trial with the evidence as a whole to make findings of fact.

B. Adverse Inference

1. Beggs v. Stone, 2014 BCSC 2120, Smith J.

The plaintiff had a variety of pre-accident conditions at the time of the motor vehicle accident in question. The defendant argued that an adverse inference be drawn on the basis that she did not call the family physician who treated her in the years before the accident and the year following the accident, or the psychologists who were treating the plaintiff after the accident in both Vancouver and Winnipeg (where she had lived for a time after the accident).

The trial judge declined to draw an adverse inference, placing particular importance on the fact that the clinical records of all the physicians who were not called at trial had been produced to defence counsel and provided to the various experts for review. The trial judge found that the plaintiff's pre-accident conditions were well documented and there was no suggestion that anything in the records was contradicted by the doctors who did testify.

2. Rogalsky v. Harrett, 2014 BCSC 1255, Verhoeven J.

Following a minor motor vehicle accident, the plaintiff claimed that she continued to suffer from injuries to her neck, upper back, and right shoulder more than four years after the accident. She called evidence from a psychiatrist and an occupational therapist retained for litigation but not from her family doctor. The court was aware of two expert reports commissioned from her gp as one was referred to in the OT's report and the plaintiff admitted to attending her gp before trial for the purpose of a medical legal report. The first report contained a favourable opinion regarding her

prognosis and was characterized by Verhoeven J. as "not favourable to her case." He did not accept her evidence that she was unaware of the contents of the second report prepared before trial.

In the result, Verhoeven J. made an adverse finding regarding the plaintiff's credibility on the basis that she "suppressed and downplayed" her gp's evidence.

3. Solberg v. Carriere, 2014 BCSC 1668, Johnston J.

In a liability trial, Johnston J. drew an adverse inference against the defendant in circumstances where the defence elected to call no evidence at the close of the plaintiff's case. The accident occurred when the trailer being towed by the defendant's vehicle ran over the plaintiff in a parking lot. The plaintiff was severely intoxicated at the time and interfering with the defendant's vehicle at the rear before he drove away. A key issue was whether the defendant looked in the plaintiff's direction before he set his vehicle in motion.

The defendant was present throughout the trial. The plaintiff stated that she did not call him as part of her case because she believed that he would testify as part of the defence case. The defendant then elected not to call any evidence. Johnston J. exercised his discretion in drawing an adverse inference from the defendant's failure to testify and found that he did not look to see if it was safe to move his vehicle, knowing that the intoxicated plaintiff was in the immediate area and acting foolishly. He apportioned liability 40% to the defendant.

XIII. Examination for Discovery

A. Dann-Mills v. Tessier, 2015 BCSC 386, Voith J.

This case addresses whether mental capacity is the only consideration in determining whether an infant can be examined for discovery.

An application was brought to compel a plaintiff who was almost eight years old to attend an examination for discovery regarding injuries he had sustained in a car accident when he was 17 months old. The infant plaintiff alleged he had suffered a serious traumatic brain injury in the Accident and was advancing a significant case. Plaintiff counsel confirmed, in writing, that it was not anticipated that the plaintiff would be called to testify at trial.

The applicant argued that it had a right to conduct an examination under the rules including of a mentally incompetent infant. The argument was that Rule 7-2(8) is conjunctive and entitles an adverse party to examine an infant party, his or her guardian or his or her litigation guardian and that the only potential exception to the "right" to discover, is found in Rule 7-2(9), which pertains to mentally incompetent persons including infants. The court rejected this argument. Rule 7-2(8), which pertains to infants opens with the words, "unless the court otherwise orders." These words recognize that there are exceptions to the general rule that a party to an action can be discovered. Similarly subrules under Rule 7-2, which deal with examinations for discovery as well as Rule 7-2(16), which deals with discovery of documents are also prefaced with the words, "unless the court otherwise orders." Accordingly, based on the language and the structure of the rules it is clear that there will be some cases that involve infant plaintiffs who are not mentally competent but where the court still considers it inappropriate to require that infant to attend a discovery. The court did not accept that the only circumstances which could prevent the examination of an infant plaintiff is if that infant was mentally incompetent.

His Lordship found that the circumstances in which a discovery of an infant plaintiff may not be appropriate will be many and can relate to the child's age, ability to understand the truth, ability to express himself or herself, attention span and the prospect of undue anxiety on the part of the child or potential harm to the child.

In this case, there were a number of factors which militated against any discovery of the plaintiff and which included medical evidence that provided significant support for the position that the child should not be examined. Further, there was little utility or value of the examination. The plaintiff's case would be established through the expert evidence and other witnesses at trial. Observations of the plaintiff's functionality in examination would assist only the lawyer who conducted examination not other counsel and such observation could be done by other means.

B. Henneberry v. Humber, 2014 BCSC 1133, Romilly J.

The defendant applied for further discovery on a fast track car accident case on the bases that the case was complicated, liability was in issue and the plaintiff had refused to make admissions which could have shortened the discovery. Romilly J. reviewed the transcript and determined that defence counsel spent far too much time pursuing unproductive trains of inquiry. Consequently, the two-hour limit passed by without counsel for the defendant being able to deal with all of the issues they wanted to canvass on discovery. The application was refused.

Romilly J. referred to the following passages from *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166:

> [12] The new Rules also impose limitations on oral examination for discovery, but does so through a different mechanism. Rule 7-2(2) now limits an examination for discovery to seven hours or to any longer period to which the person being examined consents. Although the test for relevance of a particular question or group of questions remains very broad, examining parties who ask too many questions about marginally relevant matters, who spend too much time pursuing unproductive trains of inquiry or who elicit too much evidence that will not be admissible at trial risk leaving themselves with insufficient time for obtaining more important evidence and admissions.
>
> [13] As Griffin J. said in *Kendall*, the time limit imposes a "self-policing incentive" on the party conducting the examination: at para 14. At the same time, the existence of the time limit creates a greater obligation on counsel for the party being examined to avoid unduly objecting or interfering in a way that wastes the time available. This interplay was described in *Kendall* at para. 18:
>
> > A largely "hands off" approach to examinations for discovery, except in the clearest of circumstances, is in accord with the object of the *Rules of Court*, particularly the newly stated object of proportionality, effective July 1, 2010. Allowing wide-ranging cross-examination on examination for discovery is far more cost-effective than a practice that encourages objections, which will undoubtedly result in subsequent chambers applications to require judges or masters to rule on the objections. It is far more efficient for counsel for the examinee to raise objections to the admissibility of evidence at trial, rather than on examination for discovery.

C. Schroeder v. Sweeney, 2014 BCSC 1843, Master McDiarmid

This case stands for the proposition that if counsel cannot agree on where a discovery should take place, the convenience of the party being examined should prevail and it should be held at that party's lawyer's office.

XIV. Experts

A. Amini v. Khania, 2014 BCSC 697, Burnyeat J.

The defendants sought to tender an orthopaedic surgeon's supplementary report. The expert's earlier report had outlined in detail what documents he had reviewed in preparing his report, but his supplementary opinion did not. It became apparent that defence counsel had provided the surgeon with additional documentation prior to the preparation of the supplementary report, but none of the additional documentation was noted in that report.

The defendant argued that it is not necessary for a supplementary report to include a list of every document relied upon by the expert providing the supplementary opinion, as Rule 11-6(7) contains some, but not all of the requirements listed under Rule 11-6(1). Specifically, Rule 11-6(7) states only that a supplementary report must:

(a) be identified as a supplementary report,

(b) be signed by the expert,

(c) include the certification required under Rule 11-2(2), and

(d) set out the change in the expert's opinion and the reason for it.

Burnyeat J. disagreed that this meant a supplementary report did not need to abide by the requirements of Rule 11-6(1), focusing on the purpose of Rule 11-6 to prevent ambush or surprise at trial. He ruled that "a supplementary expert report remains an expert report. It must comply with the rules set out in Rule 11-6(1)," including the requirements to list all documents examined and the facts and assumptions relied on.

B. Healey v. Chung, 2015 BCCA 38, per Saunders J.A. (Kirkpatrick and Smith JJ.A. concurring)

The defendant in this case sought to have several documents prepared by psychiatrists in the course of the plaintiff's treatment admitted as expert opinions. The trial judge ruled that the documents met the admissibility requirements of Rule 11-6. Plaintiff's counsel had been informed prior to trial that the defendant intended to rely on the reports, but had not objected as he was not of the view that they were expert reports within the meaning of Rule 11-6.

The BC Court of Appeal ruled that, despite being consultation reports of medical professionals, the documents in question were not expert reports as envisioned by Rule 11-2 and that no notice of objection was required under Rule 11-6(10) and (11):

> [22] The respondent contends that she gave notice to Mr. Healey of her intention to use the letters, that Dr. Kuo knew of the qualifications of the two doctors, and that other deficiencies were "minor". She says Mr. Healey was obliged to express his objections as required by R. 11-6(10) and (11).

> [23] Forthrightness between counsel is favoured and is to be expected in litigation. Yet I cannot say there was anything to which we have been referred that put the positive legal duty on Mr. Healey to object under those Rules for the reason that the consulting reports sent to Dr. Kuo and disclosed as part of her clinical records were simply not 'expert reports' as regulated by the Rules. While they may be professional opinions from one doctor to another in the course of treatment, the impugned documents do not comply with R. 11-2; I do not consider they carry the basic hallmark of an 'expert report', being an opinion intended by the author, at some point, to be presented for the assistance of the court. Significantly, they contain none of the information that is essential to qualification of the author as an expert, nor the information reviewed by the author by which the court may assess the cogency of the opinion.
>
> [24] As I do not consider that these clinical records can be considered to be 'expert reports' as that term is used in the Rules, entitled to the privileged treatment for receipt of hearsay evidence discussed by Mr. Justice Hutcheon, I conclude that R. 11-6(10) and (11) did not require a notice of objection.

C. Lawrence v. Parr, 2014 BCSC 2004, Tindale J.

Tindale J. excluded an otolaryngologist's opinion on several grounds but primarily noted a failure of the expert to list all documents relied on in the production of his report. The expert's evidence had been taken by video deposition before the trial. Tindale J. noted, in particular, that the expert had made several oblique references to the documents he was referring to and, when he did discuss a document he relied upon, made "vague, inaccurate or misleading references to that document." As a result, despite a lengthy cross-examination, the purpose of the report and the doctors' factual assumptions were not clear and the report and his evidence were found to be inadmissible.

D. Maras v. Seemore Entertainment, 2014 BCSC 1109, Abrioux J.

In this case, Abrioux J. criticized an expert's use of extensive appendices, particularly when used to summarize interviews, medical notes, or critiques of other expert reports. His Lordship noted that, when such appendices are not referred to in the facts and assumptions section of the report, it is "difficult to discern the opinion and separate it from the underlying facts and assumptions." He commented that the admissibility of appendices containing such summaries is dependent on how effectively they can assist the trier of fact:

> [28] In my view, it is neither relevant, necessary, nor of assistance to the trier of fact for experts to include a detailed summary of their interview with the plaintiff, of others, or comments on documents provided to them; unless, of course, there is a specific purpose for doing so which relates to the underlying facts and assumptions or the opinion itself.
>
> [29] ... Generally speaking, appendices to the report should be streamlined, and only include what is necessary for the formulation of the expert's opinion and/or the facts and assumptions upon which it is based.
>
> [30] An appendix containing summaries and comments ... is no more than a working paper which does not need to be included in the report itself.

Despite his negative comments concerning the length and utility of the reports, Abrioux J. allowed several experts an opportunity to amend their reports in order to make them admissible.

His Lordship also excluded a psychiatric opinion on the basis that the author had not seen the litigant and had merely reviewed medical and other records relying on *Dhaliwal v. Bassi*. A

psychiatric opinion requires some observation of the patient. He had also assumed the role of an advocate by purporting to make findings of fact.

E. Moore v. Getahun, 2015 ONCA 55, per Sharpe J.A. (Laskin and Simmons, JJ.A. concurring)

The Ontario Court of Appeal unanimously reversed Wilson J.'s trial decision in which she sharply criticized the long-standing practice of litigators communicating with their experts during the preparation of their reports. The trial court had found:

> The purpose of Rule 53.03 of the *Rules of Civil Procedure* is to ensure the independence and integrity of the expert witness. The expert's primary duty is to the court. In light of this change in the role of the expert witness under the new rule, I conclude that counsel's practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral.

(The Ontario Rules are similar to our Rules 11-2 and 11-6(1).)

The appeal saw six groups representing lawyers and experts granted intervenor status to make submissions in the appeal.

In addressing the question of whether it was appropriate for counsel to review draft expert reports, the court noted that the changes to the medical report in question were relatively minor editorial and stylistic modifications intended to improve the clarity of the report.

The Court of Appeal disagreed with the trial judge's statement that the amendment to Rule 53.03 introduced a "change in the role of expert witnesses." Instead, the amendments only codified and reinforced the basic common law principles summarized as:

(1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

In addressing the longstanding practice of consultation between counsel and expert, the court said:

> [62] I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.
>
> [63] Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the *Rules of Civil Procedure* and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's

> opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issue.
>
> [64] Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.
>
> [65] Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.

The case goes on to address whether previous drafts of an expert report must be disclosed and produced to the adverse party. It should be noted that the practice in Ontario is different from that in BC. In Ontario, the rule is that litigation privilege is maintained even when an expert is called to testify.

F. Redmond v. Krider, 2015 BCSC 178, Maisonville J.

In this case, Dr. Levin's report was admitted, but given no weight, due to suggestions of bias and Dr. Levin's own conduct within the courtroom.

Dr. Levin admitted on cross-examination that the percentage of his billings paid by ICBC were: 87% in 2012, 78% in 2011, and 60% in 2010. The court noted that these billing figures were not determinative of bias or the weight to be given to his evidence, but were "difficult to ignore."

Further, Dr. Levin was argumentative with the plaintiff's counsel, often requiring the court to direct him to answer, and was not giving evidence in response to simple questions. On cross-examination, he stated that his expertise did not extend to physical injuries, but then opined that the plaintiff's limitations were inconsistent with her injuries. He also derided the DSM-5 criteria, stating that if it were applied as a checklist, "everyone in the courtroom would have a number of psychiatric diagnoses." These actions, coupled with Dr. Levin's billing figures, were sufficient for his report to be given no weight.

G. Sirak v. Noonward, 2015 BCSC 274, Warren J.

In her analysis of the plaintiff's disability, Warren J. preferred the evidence of Gerard Kerr, occupational therapist, who conducted a functional capacity evaluation over the defence orthopaedic and neurology experts, both of whom opined that the plaintiff was not disabled. Warren J. commented that the the nature and extent of the defence examinations "paled in comparison" to the thoroughness of the work-capacity evaluation.

For example, Dr. Turnbull assessed the plaintiff's mobility by watching him walk down a hallway, and assessed his strength by trying to physically force the plaintiff out of a particular position. Warren J stated:

> Dr. Turnbull is a slight elderly man. Mr. Sirak is a large, powerfully built, middle-aged man. On the question of Mr. Sirak's mobility and strength, I prefer the evidence of Gerard Kerr, an occupational therapist, who conducted an extensive evaluation of Mr. Sirak's functional abilities

H. Smith v. Fremlin, 2014 BCCA 253, per Willcock J.A. (Newbury and Lowry JJ.A. concurring)

The defendants appealed the trial judge's awards for loss of capacity to earn income, both past and future wage loss. At the time of the accident, the plaintiff was in the latter part of her articles. Her plan at the time was to pursue a Master's degree in law and then begin practice in the areas of environmental, immigration, and family law.

The defendant argued that the trial judge erred in admitting into evidence an economist's report on the basis that: the report was based on hearsay evidence; and it was irrelevant because it spoke to an income earning capacity of a group to which the plaintiff did not belong. The court did not accede to either argument. First, it was appropriate for the economist to rely on published census data and data from Statistics Canada in coming to his opinions.

The defendant's second objection was directed at the fact that the plaintiff gave evidence that she intended to pursue her career in a "limited range" of occupations and, therefore, it was not appropriate for the court to rely on calculations based on statistics for all female lawyers in BC. The court confirmed that the generally accepted approach to assess claims of loss of income earning capacity is to set the parameters of the claim by referring to statistical evidence, and then consider positive and negative contingencies in adjusting the result.

I. Staaf v. ICBC, 2014 BCSC 1031, Burnyeat J.

Staaf, like *Lawrence v. Parr*, considered the admissibility of an expert report that did not clearly indicate all documents that the drafting expert had relied upon. In this case, it was in the context of a rebuttal report. However, Burnyeat J. admitted the report through the discretion permitted by Rule 11-7(1).

He noted that the plaintiff had withdrawn the initial objection to the report and there was some reference in the report to the documents. The expert had been presented for cross-examination and it had been "possible for counsel for the Plaintiff to fully explore the question of what documents and research had been referred to." Because the plaintiff had the opportunity to do so, Burnyeat J. found no inconvenience or disadvantage to the plaintiff in admitting the report. Burnyeat J. also noted that the report could be beneficial to the plaintiff.

J. Walker v. Doe, 2014 BCSC 830, Butler J.

The trial judge delivered a pre-trial ruling on a letter of objection served by plaintiff's counsel pursuant to Rule 11-6(10) in respect of three defence experts, which included the statement:

> We shall seek sanctions personally against [expert's name], including but not limited to Special Costs.

Butler J. struck the statement from each letter without prejudice to plaintiff's counsel to deliver a revised notice to seek special costs, setting out particulars underlying the claim for such sanctions. He found jurisdiction to strike the statement from the objection letters in Rule 9-5(1) which allows

the court to strike any part of a document on the ground that, *inter alia*, it is unnecessary or is otherwise an abuse of process.

Butler J. found that:

- It was unnecessary to "remind" the experts of their duty to the court in light of their certifications under R. 11-2.
- The only notice required under Rule 11-6(10) is any objection to the admissibility of the report. The notice is not intended to be a document which initiates or provides notice of a costs claim.
- The intended procedure invoked by notice under Rule 11-6(10) is that parties and the court could deal with objections prior to entry of the expert report as an exhibit at trial. The procedure eliminates any reason for claiming costs against an expert prior to trial.
- In stating an intention to seek costs and sanctions against an expert personally, counsel has misused the court's procedure to intimidate the experts or discourage them from giving evidence. As such, the statements were an abuse of process.

K. Westerhof v. Gee Estate, 2015 ONCA 206, per Simmons J.A. (Laskin and Sharpe JJ.A. concurring)

This case is noteworthy for the proposition that certain treating practitioners can provide opinion evidence about a party's medical condition without having to comply with the formalities of a traditional expert report under Ontario's Rule 53.03 which requires an expert to affirm their objectivity, describe their qualifications, explain the assumptions they have made and acknowledge the limits of their conclusions.

The trial judge in this case had refused to admit opinion evidence from the plaintiff's medical practitioners who treated the plaintiff but who failed to comply with the formal requirements for an expert report.

The issue on appeal was whether Rule 53.03 applied only to experts described in Rule 4.1.01 and Form 53 - experts "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding" (i.e., a litigation expert).

(The language in our Rule 11-2 provides "if an expert is appointed by one or more parties ...").

Simmons J. found that participation experts and non-party experts (i.e., not experts retained for the purposes of the litigation) may give opinion evidence without complying with Rule 53.03. Her reasons are as follows:

> [59] As I have said, I do not agree with the Divisional Court's conclusion that the type of evidence—whether fact or opinion—is the key factor in determining to whom rule 53.03 applies.
>
> [60] Instead, I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:
>
> —the opinion to be given is based on the witness's observation of or participating in the events at issue; and

—the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

[61] Such witnesses have sometimes been referred to as "fact witnesse" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness's evidence must relate solely to their *observations* of the underlying facts or whether they may give *opinion* evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".

[62] Similarly, I conclude that rule 53.03 does not apply to the opinion of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

[63] If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.

[64] As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The court could also require that the participant expert or non-party expert comply with rule 53.03 if the participant or non-party expert's opinion went beyond the scope of an opinion formed in the course of treatment or observation for purposes other than the litigation.

L. White v. Burgess, 2015 SCC 23, per Cromwell J. (McLachlin C.J.C. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring)

The Supreme Court of Canada addressed the basic standards for admissibility of expert opinions. The claim was a professional negligence action against the former auditors of the plaintiff shareholders' company. The defendant auditors brought a summary trial application seeking dismissal of the claim. The plaintiff retained a forensic accountant who provided an affidavit setting out her expert opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors succeeded on an application to strike the affidavit on the grounds that she was not an impartial expert. The expert was a partner in the same accounting firm, different city, that had carried out the initial audit which had identified the alleged problems with the defendant's work. The alleged bias was that since the action came down to a battle of the opinions between two accounting firms, the auditors' and the expert witness's, the expert's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, the expert could be personally liable. Thus she had a personal financial interest in the outcome and so should be disqualified from testifying. The motions judge struck out the affidavit in its entirety on the basis that an expert "must be, and be seen to be, independent and impartial" and this was one of those "clearest of cases where the reliability of the expert ... does not meet the threshold requirement for admissibility." The majority of the Court of Appeal concluded that the trial judge had erred and allowed the appeal.

The Supreme Court dismissed the appeal finding that the inquiry for determining the admissibility of expert opinion is divided into two steps. The first step establishes the threshold requirements of admissibility which are the four factors set out in *R v. Mohan* (relevance, necessity, absences of an

exclusionary rule and a properly qualified expert). If the expert evidence fails to meet these threshold requirements, the report should be excluded. The second step is the discretionary gatekeeping step. At this step, the judge must decide whether the expert opinion is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

Expert witnesses have a duty to the court to give fair, objective and non-partisan evidence and be aware of this duty and willing to carry it out. If they fail to meet this threshold requirement, their evidence should not be admitted. Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed as part of the enquiry as to whether the expert fits the "qualified expert" element of the *Mohan* test. However, once the threshold is met, any remaining concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence that the judge conducts to carry out his or her gatekeeping role.

The court described the process as follows:

> [45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to be to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "the admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).
>
> ...
>
> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair objective and non-partisan evidence. Anything less than clearly unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits or receiving the evidence.
>
> [50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's

> interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.
>
> [51] Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.
>
> ...
>
> [53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" elements of the *Mohan* framework. ... A proposed expert who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts.
>
> [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order the meet the admissibility threshold and thereafter continue to pay a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

M. Yang v. Engen, 2014 BCSC 1332, Davies J.

In another case involving Dr. Levin, Davies J. initially excluded two paragraphs of Dr. Levin's report on the basis that they improperly assessed the plaintiff's credibility and attacked plaintiff's counsel and another psychiatrist.

After hearing Dr. Levin's evidence at trial, Davies J. went further and said:

> [57] ... concluded that Dr. Levin's opinion presents a distorted recording of his interview with [the plaintiff] by failing to identify with preciseness the questions which he asked of her and by his interspersed editorializing as to what answers he would have expected, all of which constituted his assessment of her lack of credibility which he then used as the basis for diagnosis. That in turn resulted in a resort to advocacy on behalf of the defendant in relation to issues of causation and, in my view, demonstrated a personal investment in the litigation sufficient to constitute bias.
>
> [58] Those concerns were even more dramatically highlighted by a highly personalized, and, in my view, entirely unwarranted attack upon Dr. Lu's opinion and professionalism in Dr. Levin's rebuttal report delivered in response to Dr. Lu's critique of Dr. Levin's analysis.
>
> [59] In result, I have concluded that Dr. Levin's opinions suffer so greatly from overstepping the proper bounds of opinion evidence into the assessment of credibility (a function for the trier of fact), advocacy and bias, that they are inadmissible.

[60] I must also observe that even if I had concluded that some part or parts of his opinions could be determined to be admissible, I would in any event have been required to give such opinions little or no weight because of the many shortcomings to which I have adverted.

[61] That conclusion is also mandated because while Dr. Levin improperly questioned the veracity of many of Ms. Yang's responses to his questions and offered his versions of what responses he would have "expected," counsel for the defendants did not confront Ms. Yang with the alleged "inconsistencies" and "discrepancies" relied upon by Dr. Levin in rendering his opinions.

[62] What is left is simply an array of unfounded and untested allegations of dishonesty and exaggeration that do not accord with my own assessment of Ms. Yang as a witness.

XV. Insurance

A. Buhr v. Manulife Financial - Canadian Division, 2014 BCCA 404, per Willcock J.A. (Tysoe and Garson JJ.A. concurring)

This was an appeal from a summary trial application dismissing a claim for group life insurance benefits. The deceased had held two group life insurance policies. One policy was effective in 1982 and a second policy was effective in 1985 when the deceased retired. In 2005, the estate wrote to the company that succeeded the deceased's former employer seeking payment of the death benefit which was effective in 1985 and received payment of the proceeds. The estate took no further steps until January 2013 when documentation was found in the deceased's belongings that revealed the first policy and thereafter the estate commenced an action to recover the proceeds.

The defendant insurer brought a summary dismissal application seeking dismissal on the grounds that the deceased was no longer covered by the policy at the time of his death and on the basis that the action had not been commenced within the statutory limitation period. The matter was dismissed on the basis that the first policy had been replaced by the second policy. Based on that conclusion, the trial judge did not have to address the limitation period, but had it been necessary to do so he would have found the claim was statute barred.

In dismissing the appeal, the court only addressed the limitation defence. The appellant had argued that the trial judge had erred in finding the limitation period and during the period when she was unaware of the evidence necessary to pursue her claim to benefits under the first policy. The court found that the limitation period began to run from the date of death regardless of when the estate became aware of potential claims. The event on which insurance money becomes payable as contemplated in s. 65 of the former *Insurance Act*, is death. The statute designates a fixed event, unrelated to the plaintiff's knowledge of a cause of action, to start the limitation period. The discoverability rule does not operate to extend the prescribed period.

B. Lau v. Insurance Corporation of British Columbia, 2014 BCCA 442, per Frankel J.A. (Garson and Willcock JJ.A. concurring)

In brief oral reasons, the Court of Appeal upheld the trial decision of Verhoeven J. that Mr. Lau had misrepresented the identity of the principal operator of the vehicle in question and was not entitled to coverage and indemnity. The trial decision is summarized in CLEBC's 2013 Personal Injury Conference Case Law Update.

XVI. Juries

A. Blaike v. Penafeil, 2014 BCSC 1470, Master Muir

This case reminds counsel that the right to a jury trial is relinquished if the jury fees are not paid when due. The defendants filed a jury notice in compliance with the Rules but did not pay the jury fees as required. The trial was adjourned by consent and the defendants purported to file a new jury notice (a nullity per *Hoare v. Firestone Inc.* (1989), 42 B.C.L.R. (2d) (C.A.)) and intended to pay the jury fees when they became due for the new trial date. However, Master Muir ruled that the defendants had voluntarily relinquished the right to a trial with a jury by failing to pay the jury fees for the first trial date. The adjournment of the trial did not carry with it a renewed right to pay the fees.

B. Maras v. Seemore Entertainment Ltd., 2014 BCSC 1050, Abrioux J.

This case concerned an unusual situation in which a juror asked to be discharged in a civil trial and a mistrial was sought. On the 40th day of trial, immediately prior to counsel making their closing submissions, the subject juror asked Abrioux J., "Can I be excused from rest of jury duty. I am in minority view. I do not get along with other jurors. My presence will make no difference in verdict." This communication was followed by another that suggested that the same juror had been threatened by the foreman. The defendants applied for a mistrial as a result.

Abrioux J. conducted an inquiry into the conduct of the jurors and concluded that no other jurors felt that the incident referred to by the initial juror had been threatening, and rather that the juror requesting discharge had been the only one who was rude and intimidating. He concluded that the juror's "allegations of threatening behavior by the foreman are an overreaction by him as to what occurred during deliberations." Consequently, he denied the application for a mistrial and gave the jury the 75% majority instruction contemplated in s. 22 of the *Jury Act*. The complaining juror was not discharged.

XVII. Lessors

A. Stroszyn v. Mitsui Sumitomo Insurance Company Limited, 2014 BCCA 431, per Saunders, Bennett, Willcock JJ.A.

The court ruled on two issues arising from insurance coverage provided to a vehicle Lessor, Honda Canada Finance ("Honda"). The lease agreement between Honda and the defendant stipulated that she would obtain third-party liability insurance to a limit of at least $1 million and that such insurance would cover Honda. Honda was the named insured under an excess insurance policy issued by Mitsui Sumitomo Insurance Company Limited ("Mitsui") to a limit of $9 million. The statutory limit on the amount for which the lessor is liable in damages is $1 million pursuant to s. 82.1 of the *Insurance (Vehicle) Act*.

At the settlement of the action where damages were agreed at $1.6 million, ICBC paid $1 million to Mr. Strosyzn. The issue was whether Honda was then liable to pay to him any amount in excess of the $1 million paid by ICBC or whether the payment by ICBC wholly discharged Honda from its vicarious liability.

The Court of Appeal overturned the lower court's decision on the issue and held that since Honda was an insured under the ICBC policy, its liability is reduced by payments made on its behalf by

ICBC. The ICBC payment was not a payment made on behalf of the defendant tortfeasor alone. In the result, Honda's limit of liability was fully discharged by the ICBC $1 million payment.

The second issue was whether the Mitsui excess policy extended additional coverage to the defendant owner and driver. The Mitsui policy was an "optional insurance contract" to which s. 61 of the *Insurance (Vehicle) Act* applied and was a contract of automobile insurance providing excess liability insurance coverage. Section 61 required such optional insurance contracts to extend coverage to *every* insured on the same terms and conditions as those described in the underlying certificate policy. The underlying certificate and policy issued to the defendant owner was extended to the defendant driver by virtue of s. 63(b) of the Insurance (Vehicle) Regulation.

The court held that the provisions of the *Insurance (Vehicle) Act* required Mitsui to afford coverage to the defendant owner and driver on the same terms and conditions as those in the ICBC certificate unless Mitsui expressly limited the coverage. Section 61(2) states that a limit on coverage is not binding on the insured unless the policy has printed on it in a prominent place in conspicuous lettering the words "This policy contains prohibitions relating to persons or classes of persons, exclusions of risks or limits of coverage that are not in the insurance it extends."

The Mitsui policy did not contain the mandatory language of exclusion. Accordingly, the court held that Mitsui was precluded from reducing or altering the underlying coverage by writing limiting terms into its policy. In the result, Mitsui was obliged to pay to the plaintiff the remainder of the settlement amount on behalf of the defendant driver.

XVIII. Negligence

A. Agar v. Webber, 2014 BCCA 297, per Smith J.A. (Levine and Garson JJ.A. concurring)

In this occupier's liability case, the defendant landowner had installed a 'T' shaped device to clean crabs on his dock. His neighbor, the plaintiff, had been given permission to use the device, but no instruction and no supervision when he began using it. The plaintiff cleaned his first two crabs successfully, but when cleaning his third crab, the plaintiff found the device somewhat stuck on his crab and exerted more force; the shell came off abruptly, causing him to lose his balance and cut his hand on the device. The trial judge had found the defendant liable under occupier's liability and noted that the sharpness of the underside of the device constituted an "unusual hazard."

On appeal, Smith J.A. found that the judge failed to properly consider all of the factors related to whether the device entailed an objectively unreasonable risk of harm, namely: whether there was a recognizable risk of injury, the gravity of the risk, the ease or difficulty with which the risk could be avoided, and the burden or cost of eliminating the risk. As such, the error was reviewable on a correctness standard. She then ruled that the object itself did not pose an unreasonable risk of harm, as evidenced by Dr. Agar himself first cleaning two crabs without incident, and that the harm to Dr. Agar was caused by him losing his balance.

B. Gallant v. Slootmeg, 2014 BCSC 1579, Joyce J.

A cyclist passing by the defendant's property was knocked from his bicycle by the defendant's dog and suffered injuries as a result. The dog had been restrained only by an electronic fence and had a history of running along the electronic fence barking at cyclists. The plaintiff's claim was based on scienter and negligence.

Joyce J. emphasized that under the doctrine of scienter it is not necessary for a plaintiff to show that a dog has actually caused the same harm in the past: "what is required is to show that the defendant knew or ought to have known that the dog had a propensity or manifested a trait to that kind of harm." The defendants admitted that the dog caused the injuries, but argued that the plaintiff had not shown the dog was of a vicious or dangerous nature.

The judge found the owners liable on the basis of scienter, as the defendants were aware of the aggression displayed by the dog towards cyclists, and negligence, as the defendants had failed to either test the fence or use alternate means of restraint.

C. Ormiston v. ICBC, 2014 BCCA 276, per Lowry J.A. (Stromberg-Stein J.A. concurring and Willcock J.A. dissenting)

The plaintiff was a 16 year old cyclist who was riding down a hill on a highway with loose gravel on the shoulder. An unidentified driver passed him, approached the bottom of the hill, and then stopped. The plaintiff slowed and then attempted to pass on the right hand shoulder. The driver pulled suddenly to the right and caused the cyclist to veer into the concrete barrier and fall into a rocky embankment.

At trial, the judge found both the cyclist and the driver partially liable.

On appeal, Lowry J.A. (Stomberg-Stein J.A. concurring) reversed the trial judgment and the action was dismissed. The majority found that despite having passed the cyclist a short while earlier, the driver had no reason to expect that a cyclist might attempt to pass him on the right and had no obligation to check his rear or side mirrors. Further, the *Motor Vehicle Act* provided for only three exceptions to the general bar against passing on the right as indicated in the *Motor Vehicle Act* and none applied in this case. The Court of Appeal found that a cyclist in this situation was bound by the same duties as a driver of a motor vehicle. As such, liability extended to the cyclist illegally passing on the right and the finding of liability on behalf of the driver was overturned.

In his dissenting opinion, Willcock J.A. noted that the trial judge's finding that the driver had "driven without reasonable consideration for others on the roadway" imported a finding that the cyclist was there to be seen and ought to have been observed. Moreover, he suggested that in some circumstances the *Motor Vehicle Act* held different duties for cyclists than drivers of motor vehicles. He interpreted s. 183((2) of the *Motor Vehicle Act* to mean that "a cyclist must drive as close as practicable to the right side of the highway and therefore on the shoulder where possible" (emphasis in original). From there, he interpreted s. 158(1) to stand for the proposition that a cyclist was permitted to pass on an unobstructed shoulder. As such, he would have ruled that the driver had the duty to watch for a cyclist passing on the right and the cyclist had a right to do so.

D. Ray v. Bates, 2015 BCCA 216, per Groberman J.A. (Goepel and Savage JJ.A. concurring)

Mr. Bates was involved in an accident on the way to Apex Mountain Ski Area, when he lost control of his vehicle as a result of snowy conditions and struck a bus driven by the plaintiff. While they were exchanging information, another vehicle driven by the defendant, Mr. Garrioch, also lost control and slid into the bus. No-one was injured. Shortly after the second accident, emergency responders attended the scene and an ambulance stopped but slid backwards into the ditch. The plaintiff arranged for a passerby to place triangular warning signs on the road to warn of approaching traffic and thereafter the traffic was able to pass safely in both directions.

The plaintiff, aware that the road conditions were deteriorating, left his bus with the intention of asking the ambulance crew to contact road maintenance to request that the area be salted or sanded. The plaintiff slipped and fell on the icy road and pursued a claim for his injuries.

On a summary trial application, the judge found that the defendants' negligence was not the proximate cause of the plaintiff's injuries and also dismissed the plaintiff's claim that he was entitled to recover damages on the basis that he was a "rescuer" because he did not "need" to do what he did. The plaintiff appealed the dismissal of his claim as a rescuer on the grounds that the judge had erred in applying a standard of necessity rather than reasonableness to the plaintiff's actions.

The appeal was dismissed:

> [22] In rescue cases, the law does not find the chain of causation to be broken by the rescuer's actions because they are considered to be foreseeable consequences of the peril created by the negligence. In order for a plaintiff to bring him or herself within the principles applicable to rescue cases, therefore, the plaintiff must demonstrate that his or her actions were motivated by a reasonable perception of a peril that was caused by the defendant's negligence.
>
> [23] In my opinion, the plaintiff fails to meet this requirement in two respects. First, the plaintiff could not reasonably have perceived a peril in the circumstances of this case. Everything was under control, and there was no reason to believe that road maintenance authorities had not been advised of the situation. This is what the judge meant when he said "Whatever else may be said of the plaintiff's decisions, it cannot be said that he needed to walk to the ambulance to summon road maintenance personnel when all of the emergency personnel described were already in attendance." He was not applying a standard of necessity in rescue cases, but rather was making a finding that there was no purpose to be served by the plaintiff walking on the road.
>
> [24] The plaintiff's claim to be a "rescuer" in this case must also fail because any peril that the plaintiff was attempting to alleviate was one that was unconnected with the accident. This was not a case (like *Bridge*) where the plaintiff was attempting to assist a victim of the accident, nor was it a case (like *Goodman)* where he was attempting to reduce the danger posed to other drivers by the detritus left by the accident. The plaintiff was attempting to contact road maintenance officials to deal with the slipperiness of the road. That problem was purely a product of weather conditions, and not of the accident.

E. Contributory Negligence

1. Davies v. Elston, 2014 BCSC 2435, Griffin J.

In this case, a motorist was found at fault for a road rage incident.

The plaintiff, age 77, and his adult son were riding side by side in a bike lane. The plaintiff's son made a comment about the defendant's parked vehicle's mirror encroaching into the designated bike lane as they road past. The defendant, who was nearby, overheard the comment and got in his truck to follow and confront them. When he caught up to them, he had his passenger roll down the window and he pulled up close to the cyclists and he and the cyclists exchanged words. After a brief exchange, probably less than 10 seconds, the defendant drove away and the plaintiff fell and injured himself.

This case was clearly a credibility battle with the defendant suggesting that his actions had nothing to do with causing the plaintiff to fall.

In finding liability against the defendant, Griffin J. determined:

> [167] As for whether Mr. Elston's conduct was negligent, I find that the defendant fell below the standard of care of a reasonable and prudent driver, in driving alongside the two cyclists and yelling at them, while so close to the bike lane that it made it intimidating, threatening and unsafe for the cyclists; and then in addition in pulling away quickly, without warning, with Mr. Davies so close by and with his hand on the truck.
>
> [168] It is obvious as a matter of common sense that such driving conduct was without reasonable care for the safety of the cyclists and was negligent.
>
> [169] No matter how aggravating a cyclist's behaviour might be, and I find there was nothing aggravating about the Davies' conduct, a driver of a motor vehicle can never be justified in deliberately using a motor vehicle to confront a cyclist who is riding a bike. Confrontation creates a serious risk of harm to the cyclist which is way out of proportion to anything the cyclist might have done. A driver of a motor vehicle is not entitled to impose a penalty of death or serious bodily harm on a cyclist just because the cyclist was rude or broke a traffic rule.
>
> [170] It has to be remembered that motor vehicles have four wheels, automatic brakes, seatbelts, and the driver is nicely encased in a heavy steel cage and that a person on a bicycle is not in a situation which is the least bit comparable, even if going the same speed as a vehicle. A cyclist cannot stop on a dime, is vulnerable to losing balance, and can be seriously injured or killed if he or she makes contact with a motor vehicle or falls at high speed.

The finding was 100% against the defendant. The court had been asked to find contributory negligence, *inter alia*, on the basis that riding side by side was contrary to the *Motor Vehicle Act*. Her Ladyship found that there was nothing in the Act that prohibited riding abreast in a bike lane and even if there was nothing about the two cyclists riding abreast that caused or contributed to the accident.

2. Glanville v. Moberg, 2014 BCSC 1336, Warren J.

See summary under Seat Belt Defence.

3. Telford v. Hogan, 2014 BCSC 1925, Fitzpatrick J.

This case is significant because contributory negligence was assessed at 35% against a plaintiff for having engaged in a day of drinking with the defendant driver and voluntarily riding with her knowing her to be impaired. The plaintiff was also found 25% at fault for the accident as a consequence of her touching the steering wheel.

The plaintiff and defendant and two other friends had taken a camping trip in the Okanagan on the August long weekend in the defendant's car. All four of the women consumed alcohol over the course of the weekend and three of them, excluding the driver, also consumed some marijuana. It was a weekend of partying. The accident occurred on the drive back to Vancouver on the Monday morning. After the women woke up, the defendant consumed a beer because there was no potable water. The three other women started to drink shortly after they woke up. They stopped at several spots along the way home, and they consumed drinks in travel mugs along the way. The defendant did not have her own container of alcohol on the drive but sipped from the container of others. The defendant testified that about 70% of what she consumed was from the plaintiff's container. The defendant testified that she did not drink to become impaired but just to be sociable. The three

passengers also consumed marijuana at the first of many stops along the way. They purchased and consumed other alcohol as well.

Similar to the passengers' attitude to the defendant drinking and driving throughout the entire weekend, the three passengers had no concerns about the defendant's ability to drive home. The passengers' recollection of events leading up to the accident was "clouded by their copious consumption of alcohol." The accident occurred when the defendant sped past ("flew by") another car to the right of that car. It then moved back into the right lane of the highway and almost immediately it suddenly veered sharply to the left and travelled across the median, flipped over and ended up upside down in the middle of the oncoming lane of gravel. The defendant testified that the plaintiff had jerked the wheel.

The plaintiff had little recollection of the weekend or of the accident. Her blood alcohol level was more than three times the legal limit. She would have been "grossly intoxicated." The defendant's blood alcohol level was more than twice the legal limit. She had a high tolerance to alcohol and that was observed by others at the scene of the accident.

Fitzpatrick J. identified that the relevant factors for consideration in addressing contributory negligence in these circumstances are:

(a) the plaintiff's knowledge of the defendant's consumption of alcohol and degree of impairment;

(b) the plaintiff's ability to observe and appreciate the defendant's ability to drive at the relative times, being when she got into the vehicle and immediately prior to the accident; and

(c) if, having appreciated the risk she was in, the plaintiff had an opportunity to remove herself from the vehicle.

Her Ladyship then does a careful review of the facts contained in many of the relevant authorities.

The plaintiff was found 35% at fault because: she had embarked on a drinking exercise or "hazardous enterprise" when both knew that the intoxication of the driver was inevitable; she knew the defendant had been drinking over the course of the day and the plaintiff had particular knowledge of the quantity since the defendant was drinking from her container; the plaintiff drank alcohol to the point of being severely intoxicated herself which confirms that she failed to take reasonable steps to ensure her ongoing ability to assess her safety over the course of the drive home.

4. Wormald v. Chiarot, 2015 BCSC 272, Funt J.

In this case, a plaintiff who was 15 years old at the time of the accident, was found to be 40% at fault for riding in an over-crowded, speeding vehicle driven by a novice driver. In finding contributory negligence, the court considered the plaintiff knew that:

(a) Ms. Chiarot had a novice licence;

(b) Ms. Chiarot had been drinking, contrary to her novice licence;

(c) Ms. Chiarot had more passengers in the vehicle than was allowed by her novice licence;

(d) the vehicle had more occupants in it than it was designed to carry;

(e) over the course of the night in question, she had several opportunities to remove herself from the situation but did not do so;

(f) she sat in an area of the vehicle where she knew there were no seatbelts; and

(g) the other occupants planned to throw eggs at people from the moving vehicle (with the reasonable expectation that the vehicle might be chased).

F. Foreseeability

1. Dhillon v. Jaffer, 2014 BCSC 83, Melnick J.

The plaintiff's wife and eldest son fraudulently sold his property, and the wife's solicitor paid the proceeds of sale to the wife. The plaintiff sued the solicitor for damages, as well as for mental distress he suffered during the period in which he lost his house. The trial judge found the solicitor negligent and allowed the plaintiff's claims.

The defendant solicitor appealed. On the issue of damages for mental distress, the only evidence was the plaintiff's testimony. The Court of Appeal noted that the trial judge was not referred to *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, which held that damages for mental distress as a result of a shock were not payable since the loss was not reasonably foreseeable. Relying on the reasoning in *Mustapha*, and considering that the mental distress was caused by the plaintiff's wife's fraudulent actions, more so than the solicitor's negligence, the Court of Appeal allowed the solicitor's appeal and reversed the order for damages for mental distress.

G. Public Transportation

1. Isaacs v. Coast Mountain Bus Company, 2014 BCSC 2212, Watchuk J.

The plaintiff was an 82 year old woman who injured herself exiting the bus. The bus had come to a stop some distance away from the curb. She stated that it was about 12 to 14 inches away and that she needed to jump to the sidewalk. After jumping, she fell. She did not ask for assistance prior to exiting the bus.

The bus driver testified he stopped six inches from the curb in accordance with Translink policy that drivers should stop six to ten inches from the curb. He testified that after leaving the bus the plaintiff landed on both feet, took a step and then fell as her knee buckled.

The court stated that, based on Translink's policy, if a driver stopped more than ten inches from the curb, there would be a *prima facie* case of negligence and it would be for the defendant to establish that the plaintiff's injuries occurred without negligence on their part or were due to a cause for which the defendant was not responsible. The plaintiff's evidence regarding how she had fallen was accepted. However, she was found 50% at fault for not holding onto the railing or requesting either assistance or that the driver move the bus closer to the curb.

2. Tchir v. South Coast British Columbia Transportation Authority, 2014 BCSC 1119, Davies J.

In another public transportation case, Davies J. found a bus driver negligent in the injury of a passenger after he had stopped abruptly to avoid hitting a car in front of him. That car had stopped unexpectedly at an intersection where no turn was allowed. The car had previously been driving erratically and had cut in front of the bus driver. Relying on the increased burden of public carriers as in *Day v. Toronto Transportation Authority*, 1940 CanLII 7 (S.C.C.), [1940] S.C.R. 433, Davies J.

noted that the driver could have and should have slowed down more after the other driver had cut in front of him, allowing himself more time to stop in the event of further erratic driving. Engineering testimony had indicated that the driver had sufficient room to do so. Further, he had not shouted a warning to his passengers to prepare for the abrupt stop.

H. Standard of Care

1. Fordham v. Dutton-Dunwich (Municipality), 2014 ONCA 891, per Laskin J.A. (Rouleau and Lauwers JJ.A. concurring)

The teenaged plaintiff ignored a stop sign at a rural intersection, entering the intersection at approximately 80 km/h. The road was a through road, but its alignment changed on the other side of the intersection; it was offset some distance to the right. There was no sign alerting motorists to the shift or offset in the road. The trial judge imposed liability equally against the plaintiff, who was speeding and ignored the stop sign, and the municipality which did not place a warning sign on the road.

The defendant municipality appealed. The court found that the trial judge had misapplied the test for assessing a municipality's statutory duty of repair, finding that the duty is limited to preventing or remedying conditions that create an unreasonable risk of harm for ordinary drivers exercising reasonable care: "A municipality has no duty to keep its roads safe for those who drive negligently" (at para. 7). There was evidence at trial that a driver who stopped at the stop sign in question would have been able to appreciate the offset in the through road and negotiate it easily. In fact, the plaintiff's experts agreed that even a driver who rolled through the stop sign, or entered the intersection at a speed of 50 km/h without stopping at the stop sign would have enough time to negotiate the offset in the road.

The trial judge fell into error because the offset in the road posed no risk at all to the reasonable driver. The court further held that the trial judge erred in finding that "ordinary rural drivers do not always stop at stop signs." First, the evidentiary basis was insufficient for such a finding; and second, in law, "no amount of general community compliance will render negligent conduct 'reasonable'" (per Iacobucci J. in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at 473). There is only one standard, and that is ordinary drivers exercising reasonable care. Finally, the court referred to the Ontario Traffic Manual and its statements in respect of checkerboard warning signs, noting that checkerboard signs "should" be placed in areas where there is a sharp change in road alignment, not that they "must" be placed. Moreover, guidelines in traffic manuals are simply guidelines; they do not created legally enforceable standards.

The plaintiff was solely at fault for the accident.

2. Maddex v. Sigouin, 2014 BCCA 213, per Lowry J.A. (Stromberg-Stein and Willcock JJ.A. concurring)

The plaintiff police officer was struck by the defendant when the defendant attempted to pass the police vehicle on the left in a lane dedicated to left turning vehicles. The police vehicle was attempting to execute a u-turn manoeuvre in order to pull over a vehicle that was speeding in the other direction. The Court of Appeal found that the trial judge applied the wrong standard of care in deciding that the parties were equally liable for the accident. Further to the Emergency Vehicle Driving Regulation the officer was not required to have his siren on while executing his u-turn as he was not yet in "pursuit" of the offending vehicle, per the definition of "pursuit" in the Regulation.

> Under s. 4(2), where a police officer operating an emergency vehicle for purposes other than a pursuit reasonably believes the risk to the public favours exercising s. 122(1) privileges, such privileges may be exercised by operating an emergency light without a siren under s. 4(2)(b) if the officer is engaged in the lawful execution of duty and reasonably believes it is safe to do so.

In reconsidering the question of liability with reference to the appropriate standard of care, that of a reasonable police officer responding to an emergency on very short notice, the officer was entitled to depart from the rules of the road set out in the *Motor Vehicle Act*. In the result, the Court of Appeal found that liability rested entirely with the defendant.

XIX. Offers to Settle

A. Barnes v. Lima, 2014 BCSC 1475, G.C. Weatherill J.

The plaintiff sought double costs where he made a formal offer the day before trial, open until 4:00 pm. The offer exceeded the damages award which award included no compensation for loss of earning capacity. Weatherill J. found that the defendant had a legitimate defence to the claims and, in particular, the significant claim for loss of capacity. The offer did not break the amount into its components and provided the defendant with no ability to assess how much of it was to compensate the plaintiff for the loss of capacity claim. In addition, there were live issues regarding credibility and the reliability of the complaints of ongoing soft tissue injury. Double costs were declined on the basis that parties should not be unduly deterred from bringing meritorious, but uncertain, defences because they fear a punishing costs order.

B. Bay v. Paskieka et al., 2015 BCSC 809, Butler J.

The defendant and third party sought double costs following the dismissal of the plaintiff's claim. The accident involved a minor collision in which the plaintiff rear-ended the defendant who had stopped for a fire truck. The defendant and third party served a $1.00 formal offer shortly after filing their Responses to Civil Claim. Butler J. held that the plaintiff ought to have been aware of the frailty of her case, if not from the start, then at least from the time of the examination for discovery of the defendant. The offer was one that ought reasonably to have been accepted given that she had neither legal nor factual support for her position. Had it not been for an inordinate delay of 3 1/2 years in bringing the application for costs, the defendant and third party would have been entitled to double costs.

C. Bideci v. Neuhold, 2014 BCSC 1212, Abrioux J.

The matter proceeded by fast track litigation where liability was apportioned 1/3 against the plaintiff and 2/3 against the defendants. The defendants delivered a formal offer which contained express language that it could only be withdrawn by written notice and was not revoked by a subsequent informal offer. After serving the formal offer, the defendants later served an informal offer with a limited time for acceptance. This offer was not accepted. The plaintiff ultimately recovered less than the defendants' formal offer. Since the formal offer had not been withdrawn in writing, it remained open for acceptance after the informal offer expired and could be given effect under Rule 9-1(5) and (6). The plaintiff was awarded 2/3 of his costs to the date of the formal offer and the defendants awarded 25% of their costs from the date of the offer.

D. C.P. v. RBC Life Insurance Company, 2015 BCCA 30, per Goepel J.A. (MacKenzie and Willock JJ.A. concurring)

On appeal, the court held that there is no jurisdiction to award a defendant double costs for beating an offer to settle in circumstances where the plaintiff recovers a judgment.

The plaintiff was insured under a disability policy and she began receiving benefits. There was a disruption in the payment of benefits when her benefits were terminated. Following the reinstatement of benefits, the plaintiff sued for aggravated and punitive damages for severe mental stress and bad faith. The plaintiff was awarded $10,000 in aggravated damages and the claim for punitive damages was dismissed. The defendant had made a formal offer of $50,000 and was awarded double costs from the date of the offer.

On appeal, the court held that it was not open to the trial judge to award double costs to the defendant and it was an error in principle to do so. Where a plaintiff has obtained a judgment, the plaintiff is subject to costs sanctions under Rule 9-1(6)(a) in that the successful plaintiff may be deprived of costs and under Rule 9-1(5)(d) may be ordered to pay the defendant's costs. The court held that to allow a defendant double costs would skew the procedure in favour of the defendant and unfairly penalize and pressure plaintiffs.

E. D.(J.) v. Chandra, 2014 BCSC 1272, Griffin J.

Comments made by a judge presiding at a judicial settlement conference will not be considered later in determining whether acceptance or rejection of an offer is reasonable.

F. Debou v. Besemer, 2015 BCSC 106, Cohen J.

Double costs were awarded to the plaintiff where examinations for discovery were complete, expert reports had been exchanged, a mediation had taken place and the defendant had made its own formal offer to settle. In these circumstances, there was ample opportunity to evaluate the available evidence and assess the strength of the plaintiff's claims, as well as their defence to his claims.

G. Griffith v. Larsen, 2014 BCSC 2005, Affleck J.

The plaintiff's award at trial exceeded her formal offer by $159 and she sought double costs. The trial judge had found the plaintiff to lack credibility and he held that her lack of candour with the court ought not to be rewarded with double costs. In addition, she advanced a claim far exceeding the final damages award based on the notion that she would undergo surgery for thoracic outlet syndrome (which was not accepted by the court).

H. Henry v. Bennett, 2014 BCSC 1963, Ballance J.

The defendant sought double costs from the date of her formal offer after the plaintiff's claim was dismissed. The first formal offer was reasonably refused by the plaintiff because it was low, did not include his costs and was made before any medical reports had been produced. The second formal offer was for a larger sum and provided for costs and disbursements. It was delivered six days before trial and was remained open for acceptance for three days.

Ballance J. concluded that the second formal offer ought reasonably to have been accepted in the circumstances where the plaintiff had given damaging discovery evidence. She found that the plaintiff should have appreciated the deep weakness of his claim and the risk of significant

apportionment against him or the outright dismissal. The defendant was awarded cost up to the date of the second offer and double costs thereafter.

I. Johnson v. Jamieson et al., 2015 BCSC 648, Brown J.

Where a plaintiff's claim is dismissed, double costs are available to the successful defendant.

J. Loft v. Nat, 2015 BCSC 198, Jenkins J.

See summary under Costs & Disbursements.

K. Miller v. Emil Anderson Maintenance Col. Ltd., 2014 BCSC 1399, Ballance J. (aff'd 2014 BCCA 198 on liability)

The court considered the effectiveness of a $1.00 formal offer made by the defendant in a contentious liability case where the action was dismissed at trial. The plaintiff proceeded on his hypothesis as to how the accident occurred but provided no expert evidence in engineering or accident reconstruction in support of his theory. Ballance J. found that the plaintiff was sincere in his belief as to how the accident happened and that it was not a frivolous claim. Although the plaintiff was aware of the risk that his evidence would not prevail, his refusal to accept the offer was not unreasonable. The offer provided nothing to him in relation to the claim itself and proffered little meaningful benefit to him.

L. Ostrikoff v. Oliveira, 2014 BCSC 842, Kent J.

The plaintiff was awarded double costs following the date of his formal offer to settle. Liability was admitted and the defence tendered "essentially no evidence at trial to rebut the plaintiff's case." The defence expert addressed mitigation issues. Kent J. found that the defendant's tactics to defend the case comprised putting the plaintiff to strict proof combined with cross-examination of the plaintiff's various witnesses. The uncontradicted expert evidence was that the plaintiff was not a suitable candidate for retraining from his previous highly skilled occupation.

The case was known to the defence well before the trial began and the plaintiff's offer ought reasonably to have been accepted. The defendant chose to proceed to trial "to see what might happen." Keeping in mind the purpose of the Rules to encourage reasonable settlement offers, double costs to the plaintiff were warranted.

M. Paskall v. Scheithauer, 2014 BCCA 26, per Chiasson J.A. (Saunders and Willcock JJ.A. concurring)

Following a jury verdict, the trial judge declined to give effect to the defendant's formal offer to settle on the basis that it was presented in an "evidentiary vacuum," that being the absence of any defence medical report. The Court of Appeal confirmed that the discretion to award costs is very broad but not unfettered. The phrase from *Hartshorne v. Hartshorne* "whether some rationale for the offer was provided" does not impose a requirement that a party must provide evidence to support the reasonableness of the offer as the trial judge suggested. Accordingly, it was an error of principle to impose an obligation on the defendant to provide evidence to the plaintiff on which she could evaluate the reasonableness of the offer.

In the context of this case, the plaintiff had experienced counsel who advised the court on a pre-trial adjournment application that their "assessment of damages had changed dramatically" indicating that an assessment *had* been made. Earlier reports in the hands of the plaintiff supported the defence view that the plaintiff had not sustained any serious injury. On appeal, the defendants were awarded costs from the date of their first offer, capped so that the amount did not exceed the plaintiff's costs awarded up to that date.

N. Paush v. Vancouver Coastal Health Authority, 2015 BCSC 231, Sharma J.

Following the dismissal of his action in negligence, the defendants sought double costs, having served a $5,000 formal offer to settle before trial. Sharma J. declined to award double costs, finding that the offer was purely tactical and akin to a nuisance offer. The defendants' offer was made one day after the plaintiff's offer of $73,000, implying that the defendant had not given serious consideration to the plaintiff's offer. Sharma J. also considered relevant that the defendants' brought a late objection during trial to the qualifications of the plaintiff's expert which were circumstances the plaintiff could not reasonably have anticipated.

O. Saopaseuth v. Phavongkham, 2015 BCSC 45, Bernard J.

See summary under Costs and Disbursements.

P. Smith v. Neil, 2015 BCSC 572, Harvey J.

The plaintiff recovered $85,529 at trial with the claims for past wage loss, loss of future earning capacity, and costs of future care dismissed. The plaintiff made a formal offer to settle. However, Harvey J. found that the offer provided no analysis of the claims regarding what concessions she was making on the various heads of damages. There were legitimate issues over the claims for past wage loss and all future economic claims such that there should have been a breakdown within the offer as to its constituent elements, allowing the defendant to analyze what, if anything, was being proposed for the contentious claims.

The court also noted that the plaintiff's formal offer sought costs in accordance with Appendix B, rather that the fixed sums under Rule 15-1(15); that difference rendered the offer in excess of her trial recovery. Harvey J. went on to find that even if the formal offer referred to Rule 15-1 costs, double costs would still be declined on the basis that the difference between the offer and damages award was too nominal at less than 1%.

Q. Vander Maeden v. Condon, 2014 BCSC 677, Gaul J.

The plaintiff brought two actions for respective accidents which were ordered to be heard at the same time. He recovered damages in the first action but not in the second. The defendants made a global formal offer for both actions in an amount that exceeded the trial judgment. In evaluating the offer in respect of the first action, Gaul J. held that it ought reasonably to have been accepted. He was awarded his costs to the date of the offer. Gaul J. declined to award the defendants their costs thereafter as he found that that would be unduly punitive and severely detract from the compensation to which he was entitled from the first action.

Since the second action was dismissed, the defendant was entitled to his costs as the successful party. In addition, the offer in relation to the second action was one that ought reasonably to have

been accepted, given the questionable merit to the injury claim. However, no additional costs consequences were imposed.

XX. Part 7 Benefits

A. Kozhikhov v. Insurance Corp. of British Columbia, 2014 BCSC 1476, Smith J.

This was a summary judgment application brought by an insured for medical benefits pursuant to Part 7. ICBC took the position that the plaintiff's injuries were caused directly or indirectly by a pre-existing condition.

The court reviewed the law relating to the intent of Part 7 which is to allow "summary and relatively quick and inexpensive access" to benefits without putting the plaintiff to the same test for proving injury as is required in a tort claim.

Section 96(f) of the Regulations provides that ICBC is not liable to pay benefits under Part 7 in respect of an injury ... which "is caused, directly or indirectly" by sickness or disease, unless the sickness or disease was contracted as a direct result of an accident for which benefits are provided under this Part.

In this case, ICBC relied upon a report from a physician, Dr. Fisher, dated December 8, 2010. The subject accident had taken place on June 29, 2006.

Smith J. found that if ICBC is to reject a claim for specific benefits under s. 96(f), it must do so on the basis of evidence obtained prior to the expiry of the 60 day deadline imposed under s. 101 of the Regulations which requires ICBC to pay benefits within 60 days after it receives a proof of claim. ICBC cannot use evidence obtained long after the fact to justify a failure to comply with s. 101.

There were also invoices that were submitted to ICBC after the date of Dr. Fisher's report. In considering whether the exclusion from liability under s. 96(f) applied, his Lordship confirmed that the appropriate test to be used is the "but for" test of causation recognized in *Wafler v. Insurance Corp. of British Columbia* and *Cai v. Insurance Corp. of British Columbia* and not just whether the insured suffered a pre-existing condition. Those two cases addressed wage loss benefits.

Smith J. identified the issue in respect of medical benefits to be: It is whether "but for" a pre-existing sickness or disease, the specific treatments for which the plaintiff claims would be unnecessary.

B. MacDonald v. ICBC, 2014 BCSC 2155, Fitzpatrick J.

This case is important both for its ruling on the appropriateness of a summary trial where there is disputed, but untested, medical evidence and its interpretation of s. 88(1) of the Insurance (Vehicle) Regulations.

The medical issues of the plaintiff were complex, particularly with regard to causation, and ICBC submitted that this made a summary trial inappropriate. The plaintiff had extensive pre-existing conditions, but ICBC had not presented any evidence that those conditions contributed to the plaintiff's present condition. The court accepted the proposition that there may have been inconsistencies and uncertainties in Ms. MacDonald's medical evidence but was unwilling to accept the existence of those inconsistencies as fact, absent a cross-examination or examination for discovery exposing them. Despite the fact that the evidence proffered by the plaintiff had not

been tested, the court found a summary trial to be appropriate as there was no "real conflict" in the evidence.

Fitzpatrick J. further considered whether payment for two programs, a residential addiction program and multi-disciplinary pain management program, was required by s. 88(1) of the Insurance (Vehicle) Regulations. Fitzpatrick J. opted for a more restrictive interpretation of the clause, "driven by the specific enumerated services that are described in s. 88(1)." The judge went on to note that, "services provided by others do not become "medical services" simply because a medical doctor directs them or oversees or supervises them."

Fitzpatrick J. did express concern about this interpretation from a public policy perspective but found that "in the absence of clear guidance in the Regulation" the clause could not be read to include services, such as multi-disciplinary programs, that are not specifically enumerated.

C. Symons v. Insurance Corporation of British Columbia, 2014 BCSC 1883, Baird J.

This case addresses the revival of Part 7 benefits after the expiry of the 104 week period.

Following an April 2008 accident, the plaintiff received total temporary disability benefits under Part 7 (s. 80) until May 2008 when she returned to work due to financial pressures. Her back pain continued and eventually rendered her disabled from working again in 2012 when she applied for a revival of her Part 7 benefits under s. 86 which provides for TTD benefits when the accident related disability continues beyond the 104 week period. ICBC declined to revive her benefits on the basis that its obligation to pay TTDs ended when the plaintiff was able to return to work in early May 2008 and, accordingly, her benefits could not be revived or reinstated outside the 104 week period.

Baird J. considered the interpretation of s. 86 in the context of the purpose of the statutory scheme of no fault benefits which benefits are meant to temper the negative financial consequences—in particular, the loss of employment or homemaking ability—that flow from such injuries. Part 7 benefits are also intended to promote rehabilitation and foster efforts to return to work. In *Brewer v. ICBC* and *Halbauer v. ICBC*, the court previously determined that a claimant who met the initial requirements for TTDs under s. 80 had a right of revival of benefits if they became disabled again within the 104-week period. In *Symonds*, Baird J. held that an absurdity would result if a claimant's rights were extinguished for attempting a return to work within the 104 week period but became disabled again outside of the 104-week period. There was no reason in principle to provide a right of revival in the first scenario but not the latter. In the result, Baird J. held that an insured person is eligible to apply for the revival of TTDs under s. 86 so long as (a) they have previously established eligibility and received TTDs under s. 80; (b) they can demonstrate that they are totally disabled as defined in s. 80; and (c) they can show that the total disability is due to injury sustained in the original accident.

XXI. Practice and Procedure

A. Badreldin v. Swatridge, 2015 BCSC 450, Master Harper

In this motor vehicle accident claim, the plaintiff was ordered to pay $25,000 to the defendant as a result of his persistent pattern of non-compliance with court orders for the production of documents relating to, *inter alia*, his economic loss and special damages.

B. Brooks v. Abbey Adelaide Holdings Inc., 2014 BCSC 2075, Master Young

This case addressed whether a party to an action has any standing in a hearing of an application by another party to examine a witness prior to trial pursuant to Rule 7-5. The new Rule now specifically refers to Rule 8-1, which is the interlocutory procedural rule and makes it clear that it governs the procedure for pre-trial examinations of witnesses.

Master Young found that this change in the rules now granted a party some limited standing on an application by another party under Rule 7-5. That standing is limited to making submissions on procedural issues such as the scope and duration of the examination as it relates to relevance and proportionality. They do not have standing to object to the witness being questioned.

C. Gaebel v. Lipka, 2015 BCSC 351, Master Muir

The plaintiff was injured in an accident in Powell River where the parties and some of the lay witnesses resided. The trial was scheduled to take place in Vancouver, where most of the expert witnesses practiced. The defendant sought a change of venue to Powell River. The application was denied on the basis that the costs of having the experts travel to Powell River would be considerably greater than that of the lay witnesses.

D. Harris v. Leikin Group, 2014 ONCA 479, per Sharpe J.A. (Hoy and Rensburg JJ.A. concurring)

This case supports a judge's use of creativity to conserve judicial resources and to use evidence from a summary judgment at trial.

In a breach of fiduciary duty claim, the matter had first been set for summary judgment, but the judge found that there were issues of credibility that would require *viva voce* evidence. At trial, the judge opted to use much of the affidavit evidence from the summary judgment proceeding and supplement it with *viva voce* evidence for matters where credibility was at issue.

On appeal, the court wrote with approval about the trial judge's decision to hold a 'hybrid' trial. Specifically, the court noted that in his reasons for summary judgment, the trial judge had identified parties from whom he needed to hear *viva voce* evidence and on what issues he wanted counsel to focus, and had thus set the groundwork for the hybrid trial.

E. Miley v. Abulaban, 2014 BCSC 1471, Hyslop J.

The plaintiff applied to adduce fresh evidence after a personal injury trial concluded but before a decision was rendered. In the course of the trial, the plaintiff testified that he lied on his resume about receiving a Bachelor of Arts degree from the University of Victoria. He revealed this lie to his supervisor later the same day that he gave evidence. His supervisor testified the next day and acknowledged that the plaintiff reported that he had embellished his resume.

Following the end of the trial, the employer terminated the plaintiff for cause. The plaintiff sought to have the fact of his termination admitted on the issue of his earning capacity. Since the event had not occurred until after the trial had ended, it was obviously not discoverable during the trial. The evidence was credible, relevant and admitted into evidence.

F. Case Planning Conferences/Trial Management Conferences

1. Darel v. Samy, 2014 BCSC 904, Master Bouck

The plaintiff sought a partial transcript of a CPC "for the intended purpose of bringing the 'conduct' of the defendants 'to light'." The release of the transcript was denied, based on the reasons articulated in *Parti v. Pokorny*: (1) the transcript was not required to resolve a dispute about the terms of the case plan order; (2) there was no precedential value in any of the terms of the order; (3) the court does not issue reasons for judgment at the request of a party; and (4) the comments of the presider are not rulings or reasons.

2. Sabbagh v. Li (14 January 2015), Vancouver Registry M126933, Hinkson C.J.

This decision highlights the importance of properly identifying witnesses on witness lists. Plaintiff counsel had advised the Master presiding over the TMC that the plaintiff's witness list was not complete. The master ordered, *inter alia*, that the plaintiff deliver will say statements of all of the witness by January 8, 2015. At trial, objection was made by defence counsel in respect of four witnesses intended to be called by the plaintiff and who were not named on the witness list Two of the witnesses were allowed to testify on the basis that the defendant had some notice of them and would not be seriously prejudiced. The other two were not allowed to testify (even though counsel had earlier advised of his intention to call them by telephone).

3. Stewart v. Robinson, 2014 BCSC 959, Master Bouck

Unnecessary case planning conferences can attract costs. The defence set down a CPC over the objection of plaintiff's counsel who felt the parties were capably managing the litigation. The defence also sought an order prohibited by law (an order that required the plaintiff to list the areas of expertise of all of the experts each party intended to call at trial contrary to *Dhugha v. Ukardi*, 2014 BCSC 387). The defendant's case plan proposal addressed dates for the exchange of further lists of documents and for completion of discovery; all of which was proceeding without controversy.

In ordering costs against the defendant, fixed at $750, Master Bouck commented:

> 42. Except for proceedings under Rule 15-1, a CPC is not mandatory at any point in a proceeding. Such a conference may be ordered by the court, but that was not the case here. While litigants should have unrestricted access to the courts, there ought to be some reasonable purpose for the CPC before the resources of the parties and the court are engaged.

G. Document Disclosure

1. Gichuru v. British Columbia (Information and Privacy Commissioner), 2014 BCCA 259, per Garson J.A. (Donald and Frankel JJ.A. concurring)

This case addressed the adequacy of the description provided by a defendant in its List of Documents and the evidence on the application to assert a claim of litigation privilege over certain documents. The distinction between solicitor-client privilege and litigation privilege was again reviewed, citing *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, *Keefer Laundry Ltd. v. Pellerin Milnor Corp et al.*, 2006 BCSC 1180, and *Stone v. Ellerman*, 2009 BCCA 294.

The court noted that the affiant for the defendant to explain the privilege claim was not a lawyer and not directly involved in the litigation; yet purported to state opinions about the dominant purpose of the documents. The court was doubtful that the affiant had the necessary qualifications to give such opinions.

Garson J.A. held that it is impossible to express a general test that would describe the level of detail in an affidavit or document list necessary to establish a claim to litigation privilege. However, to the extent that a description can be provided without jeopardizing the confidentiality of the privilege, it ought to be. If doing so could jeopardize the privilege, then the judge may be required to examine the document. Garson J.A. stated that she would expect a claim of privilege to usually be supported by: (1) a description of the litigation; (2) the dates of the litigation; (3) a description of the party to whom the correspondence is written to or received from or at least a description of the role of the party (such as medical expert, potential witness, client); (4) a description of an enclosure where relevant; and (5) some particulars as to the purpose of the document.

H. Independent Medical Examinations

1. Garford v. Findlow, 2014 BCSC 2404, Master Bouck

The plaintiff suffered injury in two separate car accidents and had consented to defence medical examinations by a neurologist, orthopedic surgeon and a dentist. The defendant brought an application to compel the plaintiff to attend an examination with a psychiatrist, which was opposed by the plaintiff on the grounds that she did not intend to lead opinion evidence on her mental condition. The plaintiff pled that the accidents led to depression and anxiety and the medical records suggested that mental health issues were at play. The defendant was entitled to the examination to put the parties on an equal footing in terms of addressing diagnosis and causation of plaintiff's mental health condition. The defendant did not have to show that a referral to a psychiatrist had been recommended by any of the treating practitioners to be entitled to a psychiatric examination.

2. Shea v. Melnyk, 2014 BCSC 1655, Gaul J.

The defendant was successful in obtaining an order compelling the plaintiff to attend a second medical examination with a psychiatrist, the first examination having been conducted by neurologist. The notice of civil claim did not contain a plea for a psychiatric injury, but the plaintiff did claim loss of income earning capacity.

The evidence showed that the plaintiff had applied to be designated as a person with a disability under the *Employment and Assistance for Persons With Disabilities Act*, and the documents in support of that application included a letter from the plaintiff's doctor indicating that she suffered from major depressive disorder and generalized anxiety disorder which prohibited her ability to seek gainful employment. Furthermore, the plaintiff's expert, an anesthesiologist and expert in pain management, concluded that the plaintiff suffered from a long standing history of anxiety and depression and that the recent motor vehicle accident had exacerbated her symptoms.

The judge held that the plaintiff's mental and emotional condition would likely be an issue at trial given the nature of her claims and ordered the plaintiff to attend the psychiatric IME.

3. Wright v. Sun Life, 2014 BCCA 309, per Goepel J.A. (Bennett and Harris JJ.A. concurring)

This case stands for the proposition that an appeal of an IME order is not moot, even after the examination takes place.

In dismissing an appeal of a master's order for the attendance at a second IME, Bennett J.A. considered the defence's argument that the appeal should be quashed as moot since the examination had already taken place. She noted that certain items sought by the appeal, namely, seeking to have the expert report and copies of his notes and medical records destroyed, gave life to the appeal. As such, "if this court concludes that the IME order should not have been made it will be necessary to determine what relief, if any, is available to Dr. Wright and that relief could arguably include some prohibition or restriction on the use of Dr. Connell's report."

Ultimately, the appeal was dismissed as the chambers judge had made no appealable error.

I. Interpreters

1. Kim v. Khaw, 2014 BCSC 2221, Sharma J.

This case addressed the question of whether the use of an interpreter is relevant to the assessment of credibility. The plaintiff had testified through an interpreter but had served as a translator at various points in his life, including on a paid and volunteer basis, had taught school in English for seven years in Korea, worked in English in Canada and had passed courses at SFU and Douglas College. He also demonstrated, during the trial, that he had no difficulties reading documents in English when put to him on cross-examination.

The court outlined the difficulty in hearing evidence through an interpreter particularly in assessing credibility. Ultimately, the judge found it was reasonable in this case for the plaintiff to have testified through an interpreter since he was having to give evidence about his mental status thereby revealing personal and emotional matters and it was understandable that he would chose to do so in his native tongue. The use of an interpreter on its own is irrelevant to the issue of credibility. There must be some evidence or a reasonable inference that can be drawn from the evidence that the witnesses' use of the interpreter was not necessary for them to fairly participate in the trial but a deliberate intent to gain some advantage.

The court was not critical of the defendant for having raised the issue but noted that if counsel intend to raise such an issue, there should be have been an application to oppose the use of an interpreter allowing the court to make the appropriate inquiry into his linguistic understanding of English.

It was open to counsel to argue that the use of an interpreter when not absolutely necessary lengthened the trial and should reflect in a costs award.

2. Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd., 2014 BCSC 1710, Walker J.

The plaintiff brought on an application to compel the defendant to give evidence in English at a discovery to be conducted in Hong Kong.

The court reviewed a party's *Charter* right to understand the language of the proceeding flowing from the principles of natural justice which must be balanced with the need to avoid the use of an interpreter to gain an unfair advantage in the litigation to over-come cross examination. Where a

party tenders *prima facie* evidence of his need for an interpreter he has met the burden. The question then becomes whether the party challenging the need for an interpreter can show that the request is inappropriate.

In dismissing the application, the court said:

> [22] There are issues of credibility at play in this case. If Mr. Wong resided in Vancouver then I would have had the matter dealt with in two stages. The inquiry in *Roy* would be pursued. Mr. Wong would first be cross-examined about his proficiency in English and his linguistic understanding of facts and issues involved in this action. If the plaintiff determined that Mr. Wong's request was for an inappropriate purpose, they could return to Court to seek appropriate relief. But Mr. Wong resides in Hong Kong. Any bifurcated examination would result in an additional trip and additional and significant expense.
>
> [23] As I see it, allowing Mr. Wong to give his evidence at his examination for discovery in Cantonese through an interpreter, but at the same time allowing counsel for the plaintiff to cross-examine him on his proficiency in the English language, will allow the plaintiffs the opportunity to meet their burden for trial. The plaintiffs should be allowed to apply for the relief they sought on this application for trial. Thus, allowing their counsel to cross-examine Mr. Wong on his proficiency in English language and his linguistic understanding (in English) of the facts and issues in this case will also inform the inquiry that is spoken of in *Roy*.

J. Particulars

1. Campbell v. Bouma, 2015 BCSC 817, Master McDiarmid

The defendant unsuccessfully applied for particulars for past and future wage loss. The parties had removed the matter from fast track by consent and had not yet set a trial date. The defendant submitted that he was seeking to narrow the issues and quantify the claim prior to examinations for discovery.

Master McDiarmid quoted from *Hryniak v. Mauldin*, 2014 SCC 7, noting that the Supreme Court of Canada endorsed the notion that if the process used to adjudicate civil disputes is disproportionate to the nature of the dispute, then it will not achieve a fair and just result. In applying proportionality principles, Master McDiarmid held that it made little sense to require a plaintiff to be continuously updating past wage loss and special damages claimed. Those claims should be disclosed as they are known to enable an efficient examination for discovery but do not require formal particularization, such that they become part of the pleadings, until close to the trial date.

In circumstances where the defendant had detailed employment records for a particular period (although not up to date) and significant medical disclosure, particulars are premature. Updated employment records had been requested by plaintiff's counsel from the employer but not yet received.

K. Privilege

1. Raj v. Khosravi, 2015 BCCA 49, per Smith J.A. (Tysoe and Bennett JJ.A. concurring)

ICBC admitted liability in respect of a motor vehicle accident in which the defendant's vehicle struck the plaintiff's cab. The plaintiff met with the adjuster approximately two weeks after the

accident. Further to that meeting, the adjuster considered that the plaintiff had made inconsistent statements and statements that were inconsistent with his physical demeanor. On that basis, the adjuster commissioned a surveillance report and asserted privilege over the report after an action was commenced. The plaintiff's application for production was dismissed by the master, but the master's decision was overturned by the chambers judge.

The Court of Appeal allowed the appeal finding that the master had applied the correct legal test (set out in *Hamalainen*) and that there was an evidentiary basis for her findings that the report was commissioned when litigation was in reasonable prospect and for the dominant purpose of litigation. The master accepted the adjuster's affidavit evidence that he believed litigation would be necessary to resolve the plaintiff's claim because he did not accept the plaintiff's statements about the extent of his injuries, the incompatibility between the plaintiff's claim he was fearful of driving with his occupation as a taxi driver, the limited physical damages to the vehicle, and his physical demeanor during the meeting.

The Court of Appeal considered that the chambers judge erred in characterizing the meeting between the plaintiff and the adjuster as part of the "information gathering process" thereby foreclosing the possibility that litigation was in reasonable prospect. The court held at para. 18:

> ... litigation may be 'in reasonable prospect' at any point along the continuum between the information-gathering and litigation stages of an inquiry if an evidentiary basis is established that a party has more than just suspicions about the legitimacy of litigation occurring. The two stages are not mutually exclusive ...

Furthermore, the master accepted the adjuster's evidence that the dominant purpose of the surveillance report was to assist in the defence of the tort claim, and this was supported by the fact that the plaintiff had yet to confirm that he did not have WCB coverage, meaning a Part 7 claim was not yet a reality. The Court of Appeal reinstated the decision of the master.

2. Smith v. Air Canada, 2014 BCSC 1648, Gropper J. (in chambers)

The defendant Air Canada appealed the decision of Master Baker who ordered production of an incident report over which it claimed privilege. Gropper J. held that the master applied the correct test, the principles of which are taken from *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254 and *Stevanovic v. Petrovic*, 2007 BCSC 1392.

The focus was on the first part of the test; whether litigation was reasonably contemplated at the time the incident report was prepared. Air Canada filed two affidavits, testifying that employees are trained that litigation is always a reasonable prospect further to incidents on board, and that incident reports are created to be provided to the claims department. One affiant considered alternative reasons for preparing the report, and discarded them. Despite this evidence, Master Baker did not accept that litigation was reasonably contemplated at the time the report was created given the proximity of the creation of the report to the incident itself.

The trier of fact must assess whether the assertion that the document was prepared in contemplation of litigation is reasonable; he or she is not bound to rely an affiant's assertion to determine whether privilege attaches. Since the master held that it was not reasonable to conclude that litigation was a reasonable prospect at the time the report was created, there was no need to consider the dominant purpose test.

L. Surveillance Tapes

1. Sabbagh v. Li (12 January 2015), Vancouver Registry M126933, Hinkson C.J.

The Chief Justice declined an application by plaintiff's counsel for production of surveillance logs and notes made by private investigators. The plaintiff did not take issue with respect to the admissibility of the surveillance evidence. His Lordship found that he was bound by the decision of *Adamson v. Charity*, 2007 BCSC 671, which found that the provision of the PI's surveillance logs and notes was not a requirement for the admissibility of the video evidence.

M. Withdrawal of Admissions

1. Finch v. Anderson, 2014 BCSC 2008, Master Muir

The plaintiff's vehicle was stopped in a bus lane when it was rear ended by a bus. Investigations conducted by the bus company found fault with the bus driver, and on this basis, liability was admitted. However, after the examinations for discovery of both the plaintiff and the defendant bus driver, the defendants applied to withdraw the admission of liability. The discovery evidence revealed compelling evidence that differed from the plaintiff's original statement in material ways, including: inconsistencies in whether her hazard lights were on; the location of the collision; and whether the plaintiff's car was disabled at the roadside before the accident or she was engaged in other activity.

In applying *Sidhu v. Hothi*, 2014 BCCA 510, Master Muir held that whether the plaintiff was negligent was a triable issue, and the admission had been made without full knowledge of the facts from the plaintiff's discovery evidence. There was no delay as the application was made within one month of the plaintiff's discovery and only 18 months after the accident. Finally, any prejudice to the plaintiff was not significant as her counsel had spoken to three of the four witnesses to the accident in advance of the application. The defendant was permitted to withdraw its admission of liability in the circumstances.

2. Sidhu v. Hothi, 2014 BCCA 510, per Newbury J.A. (Lowry and Tysoe JJ.A. concurring)

The defendants sought an order permitting them to withdraw certain admissions made in their response to civil claim. The accident occurred in July 2008 when the defendant was making a left turn and struck a jeep. The plaintiffs' alleged they were the driver and passenger of the jeep. The defendant admitted liability, and admitted that the plaintiffs were the driver and passenger of the jeep.

In February 2012, a year after the response was filed, an ICBC adjuster spoke to a witness who stated that the driver of the jeep was a male and that he did not see any passenger. The witness stated that the jeep left the scene of the accident and that he and another motorist followed the jeep and located it parked in a driveway two blocks away. Immediately after receiving this information, the defendant cancelled its participation in a scheduled mediation and advised plaintiff's counsel they intended to seek to amend their pleading to withdraw the admission that the plaintiffs were the driver and passenger in the jeep. Despite this, the defendant took no steps to amend their pleading or withdraw the admission until May 2013.

At the hearing before the Master in May 2013, defendant did not provide an explanation for the lengthy delay in bringing the application. The application was dismissed on the basis the defendant failed to "meet virtually all of the tests laid out in the *Hamilton v. Ahmed* ... decision." The defendant appealed to a Supreme Court judge in chambers who allowed the appeal further to a rehearing. The chambers judge disagreed with many of the master's findings, and considered that the prejudice to the defendants outweighed the prejudice to the plaintiffs.

The Court of Appeal confirmed the decision of the chambers judge. The Court of Appeal reiterated that the factors set out in *Hamilton* are to be considered, but they are not conditions which must be met. The Court of Appeal held that the chambers judge correctly weighed the factors, and in particular, the possibility that the plaintiffs may not have been in the jeep at the time of the accident, and were perpetrating a fraud on the court, was a "possibility that would be very difficult to countenance."

XXII. Seatbelt Defence

A. Glanville v. Moberg, 2014 BCSC 1336, Warren J.

The plaintiff Glanville's vehicle was struck by a drunk driver, Moberg, who entered the intersection on a red light as the plaintiff made her left turn. The plaintiff Grant was Moberg's passenger. The court found that Moberg, who admitted to being "absolutely drunk" at the time of the accident, was entirely at fault for the accident, and then went on to consider whether Grant was contributorily negligent for accepting a ride with a drunk driver and for failing to wear his seatbelt properly. At the time of the accident, Grant wore a lap and shoulder style seatbelt, however, he removed the chest portion of the seatbelt and put it behind him because it bothered his neck.

The court found that Grant was 30% contributorily negligent for accepting a ride with an obviously impaired driver. The fact of Grant's own alcohol impairment did not provide a basis for finding that he was anything but a voluntary passenger in Moberg's vehicle.

With respect to the seatbelt defence, Grant's most significant injuries were to his face and hip. The court referred to *Noyes v. Stoffregen*, [1995] B.C.J. No. 73 (S.C.) for the proposition that in some cases common sense is sufficient to draw an inference that an injury would have been lessened or prevented had a seatbelt been worn, particularly where there is evidence of damage to the portion of the car that the injured person's body likely would have struck. However, in this case, there was no such evidence. It was possible Grant sustained the injuries to his face from the side of the car which a properly worn seatbelt may not have prevented.

B. Gleizer v. Insurance Corporation of British Columbia, 2014 BCSC 1037, Harris J.

The plaintiff taxi driver claimed he suffered injuries to the neck, shoulders, and back, a concussion, headaches, depression and anxiety as a result of a motor vehicle accident. The plaintiff was not wearing his seatbelt at the time of the accident and the defendant asked the trial judge to apply a common sense approach to find that the plaintiff's injuries would have been lessened or prevented had he worn a seatbelt, with reference to *Lakhani (Guardian ad litem of) v. Samson*, [1982] B.C.J. No. 397. The trial judge noted that in *Lakhani,* the evidence was clear that the use of a seatbelt would have prevented some of the plaintiff's injury. In this case, the physicians who gave evidence were not asked about the effect of not wearing a seatbelt on the plaintiff's injuries, and the court

noted that the plaintiff had just picked up passenger. The trial judge was not able to conclude that the plaintiff's injuries would have been lessened or prevented had he worn his seatbelt.

XXIII. WCB Claims

A. Singh et al. v. Sopper et al., 2014 BCCA 243, per Saunders, Frankel, Goepel JJ.A.

The defendants in this motor vehicle action applied for and obtained a certificate under s. 257 of the *Workers Compensation Act* which precludes an action for personal injury under s. 10 of the Act. The defendants then applied for an order dismissing the plaintiff's action. The judge found that the plaintiff was precluded by the certificate from claiming damages arising from personal injuries sustained in the accident. However, she found that the plaintiff was not statue barred from maintaining an action for his business-related losses as his election for compensation did not cover those losses.

The decision was upheld on appeal on the basis that the ongoing claim was not one for damages deriving from personal injury. The order was clarified to reflect that the plaintiff was not barred from maintaining an action for his business-related losses that do not relate to personal injuries (e.g., vehicle damage).

XXIV. Legislation

A. Health Care Costs Recovery Regulation

Section 7 of the Health Care Costs Recovery Regulation was amended effective February 13, 2015 with respect to the notices prescribed for the purposes of ss. 4, 10, 12 and 13 of the *Health Care Costs Recovery Act*. The purpose of the amendment was to clarify the information required by the Ministry to manage its obligations as defined by the Act. Now the form required pursuant to s. 13, the notice of proposed terms of settlement must include the proposed total amount of the settlement, the amount for health care costs, the consent dismissal order and releases.

B. Supreme Court Civil Rules

Rule 5-1(5) was amended effective July 1, 2014 so that instead of the plaintiff having to serve their case plan proposal first (regardless of whether the defendant called the CPC), now it is the party calling the CPC that must provide their case plan proposal within 14 days of issuing the notice of the CPC.

XXV. Practice Directions

A. British Columbia Supreme Court, Practice Direction, PD-44

A practice direction issued on January 5, 2015 requires counsel to provide the court clerk with an appearance list which includes the names of the parties, non-parties and counsel appearing on the matter, whether in person, by phone or by video and applies to any hearing brought, inter alia,

pursuant to the *Class Proceedings Act*, a hearing at which there are three or more parties appearing, six or more counsel appearing or which involves two or more separate proceedings.

The party initiating the proceeding has the obligation to prepare the appearance list and must be provided to the clerk at the commencement of the hearing.

The list must set out the name of each party and his or her counsel and in the same order as listed in the style of proceeding. The list should be type-written where possible.