THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

PERSONAL INJURY CONFERENCE—2016
PAPER 1.1

Personal Injury Update on Case Law and Legislation

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PERSONAL INJURY UPDATE ON CASE LAW AND LEGISLATION

I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference held in June 2015. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Affidavits

A. LLS America LLC (Trustees of) v. Dill, 2015 BCSC 1467, Kent J.

At paragraph 31 of these reasons for judgment, Mr. Justice Kent addressed how the "modern rule" for cross-examination on affidavits is not as rigid as it used to be. His Lordship described how currently, as evidenced by the judgment of Mr. Justice Byers in *Greater Vancouver Water District v. SSBV Consultants Inc.*, 2014 BCSC 1148, conflict in the affidavit evidence is not the only basis for an order for cross-examination nor is it a requirement. The question is whether cross-examination may yield evidence that might be of assistance in determining an issue. For example, whether the evidence might be relevant to the issues proposed to be argued by the parties at the hearing of the application.

B. Simple Pursuits Inc v. 0842748 B.C. Ltd., 2015 BCCA 382, per Chiasson J.A. (Smith and Neilson JJ.A. concurring)

This appeal addressed, in the context of a summary trial application in a commercial case, the principle that a lawyer who appears as an advocate should not rely on his or her own affidavit. However, it is not a rigid rule and the court may permit a lawyer to use their own affidavit on an interlocutory application where the affidavit addresses uncontroverted matters and its use is justified as the best evidence available or it will facilitate an expeditious and economical resolution of an interlocutory issue.

III. Bankruptcy

A. 407 ETR Concession Company Limited v. Superintendent of Bankruptcy, 2015 SCC 52, per Gascon JJ., (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and WagnerJJ. concurring) (McLachlin C.J. and Côté J. dissenting)

This decision determined that Ontario's provincial legislation preventing the Registrar of Motor Vehicles from issuing a license as a result of debts that have been discharged by bankruptcy is inoperative to the extent it conflicts with the federal *Bankruptcy Insolvency Act*.

A driver failed to pay tolls associated with using a particular highway in Ontario. Section 22(4) of the provincial legislation provided that ETR, the company that enforced payment of the tolls, could inform the Registrar of Motor Vehicles that debts were unpaid, and on such notice, the Registrar must refuse to issue or renew the debtor's vehicle permit until the Registrar is advised that the debt has been paid.

The driver was subsequently discharged from bankruptcy and the toll debt was part of the discharge. ETR was notified of the driver's assignment, but it did not take part in the bankruptcy proceeding. Section 178(2) of the *Bankruptcy and Insolvency Act* ("*BIA*") provides that a discharge from bankruptcy releases a debtor from claims that are provable in bankruptcy; however, the motions judge concluded that the provincial legislation was not in conflict with the *BIA* and that he lacked the jurisdiction to order the Registrar to issue a driver's permit.

The driver subsequently resolved his issues with ETR; however, the Superintendant of Bankruptcy appealed on the basis that the provincial legislation conflicted with the *BIA*, frustrating the purposes of bankruptcy. The Court of Appeal considered two types of conflict: conflict on an operational basis, or frustrating the purpose of legislation. The Court of Appeal held that there was

no operational conflict, because the driver could choose not to request a vehicle permit, or ETR could choose not to notify the Registrar of the debt; but, the provincial legislation did frustrate one of the purposes of the *BIA*, which is to give discharged bankrupts a fresh start. The Court of Appeal ordered the vehicle permit to be issued and held that the provincial legislation was inoperative to the extent it conflicted with the federal *BIA*.

The Supreme Court considered whether the concurrent operation of both pieces of legislation results in a conflict. The majority held that there was an operational conflict:

> s.178(2) of the *BIA* prohibits the enforcement of provable claims after the bankrupt's discharge, while s.22(4) of the *407 Act* allow ETR to enforce its provable claim despite the discharge [at para 23].

And:

> ...while the provincial scheme has the effect of maintaining the debtor's liability beyond his or her discharge, the federal law expressly releases him or her from that same liability [at para 25].

The Supreme Court held that s.22(4) of the provincial regulation was constitutionally inoperative to the extent it is used to enforce a provable claim that has been discharged by bankruptcy.

IV. Conflict of Interest

A. Hanlan v. Wilson, 2016 BCSC 372, MacKenzie J.

The plaintiff was a passenger in a vehicle driven by his common law spouse, Wilson, when they were involved in an accident with an unidentified vehicle. The plaintiff and Wilson retained the same legal counsel to prosecute the claim and met with the lawyer on four occasions. They also went to the scene of the accident with the lawyer. That lawyer recommended that the plaintiff commence an action against both ICBC and Wilson and that Wilson would have to retain separate counsel. Wilson agreed that the lawyer could continue to act for her husband. ICBC retained counsel to represent Wilson in the defence of the claim against her and that counsel applied for an order enjoining the plaintiff's lawyer for continuing to act on the grounds that he was in a conflict of interest. The plaintiff's lawyer argued that Wilson had consented for him to act on behalf of her husband and so there was no conflict.

The application was granted. The test is whether a reasonably informed person would be satisfied that no use of confidential information would occur. The plaintiff's counsel had argued that because both parties had consulted counsel together and had been interviewed together that meant that the lawyer did not obtain confidential information from Wilson about the accident. The lawyer failed to discharge the heavy onus of establishing that no relevant information was imparted. The court found that any alleged consent by Wilson for the lawyer to continue to act for the plaintiff must give way to public interest in the administration in of justice as there was a legitimate appearance of impropriety. There was an allegation of contributory negligence being advanced against Wilson which meant a distinct possibility that the lawyer would have to cross-examine Wilson on the same matter in which he had once represented her.

V. Costs and Disbursements

A. Ekman v. Cook, 2015 BCSC 1863, G.C. Weatherill J.

Following a liability-only trial, the plaintiff was found to be 75% liable and the defendant 25% liable for the accident in issue. Quantum had been settled before trial. The plaintiff's injuries were serious and included a traumatic brain injury, facial fracture, pelvic fracture, injuries to his back, left hand, and left knee.

In determining whether the plaintiff should be awarded only 25% of his costs pursuant to s. 3(1) of the *Negligence Act*, Weatherill J. considered the seriousness of his injuries and the riskiness of the claim, given that the plaintiff had been ticketed for passing on the left and had no memory of the accident. The claim, however, was not without some merit.

The plaintiff had made two offers of liability splits of 50-50 and 40-60 in favour of the defendants. The defendant took the position throughout that the plaintiff was 100% liable and made no offers to settle. The plaintiff had no alternative but to proceed to trial.

In exercising his discretion under s. 3(1) of the *Negligence Act*, Weatherill J. considered the issue of proportionality. Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as practicable, conducting the proceeding in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.

The trial was conducted efficiently in three days and there was never an issue that the plaintiff was not contributorily negligent. He was prepared to accept 60% of liability but the defendants forced him to trial to demonstrate that he was less than 100% liable. The plaintiff succeeded. All of the trial costs were necessary to achieve this result in a liability-only trial. In the result, he was awarded 100% of his costs and disbursements.

B. Gonopolsky v. Hammerston, 2015 BCSC 2006, Brown J.

The plaintiff filed her action in Supreme Court but settled shortly before trial for the total sum of $22,500. The parties did not settle costs and applied for an order. The defendant argued that the amount should be limited to disbursements pursuant to Rule 14-1(10) as the amount recovered was within the Small Claims jurisdiction. The issue before the court was whether the plaintiff had sufficient reason to commence the matter in Supreme Court.

In his reasons, Brown J. confirmed that:

> [14] While an award of costs generally involves the exercise of discretion, the determination as to whether there were sufficient reasons to bring a proceeding in Supreme Court does not involve an exercise of discretion. This was explained in *Gradek* at para. 16:
>
> > [16] The words "sufficient reason" are not defined in the *Rules of Court*. In their ordinary and grammatical sense, they do not suggest a specific limitation in terms of application, although it is clear that "any reason" will not do. The reason has to be "sufficient", but there is nothing in the Rule to suggest that it has to be connected solely to the quantum of the claim. On the other hand, the words do not connote the exercise of a discretion, with its attendant deferential standard of review. That point was made by this Court in *Reimann v. Aziz*, 2007 BCCA 448, 72 B.C.L.R. (4th) 1, at para. 13:

> [13] At the outset, I observe that the application of Rule 57(10) does not involve an exercise of discretion. For a plaintiff who recovers a sum within the jurisdiction of the Small Claims Court to recover more than disbursements, the court must make a finding that there was sufficient reason for bringing the action in the Supreme Court.

In the case at bar, the defence argued that the action was barred by a *worker v. worker* defence and the operation of section 10 of the *Workers Compensation Act*. In addition, causation of any injury was disputed due to the minimal nature of the vehicle damage involved. Plaintiff's counsel had some evidence from the gp at the time the action was commenced that the plaintiff's soft tissue injuries were ongoing and chronic. She suffered from post traumatic symptoms and ongoing anxiety. She was unable to attend to all of her usual household duties and recreational pursuits. An MRI had been ordered to rule out a disc herniation.

While defence counsel pointed to clinical records of the gp which arguably showed that the plaintiff had recovered some months after the accident, the judge found that the notes were open to different interpretations and that it was more "grist for the mill" on cross-examination. Given the nature of the injuries (being soft tissue in nature, some caution was appropriate when considering prognosis) and their effect on homemaking and employment, she concluded that there was a substantial possibility of damages exceeding $25,000.

As for the WCAT issue, the defendant argued it was not complicated and could have been determined in Provincial Court. Remarkably, the defence argued that since the plaintiff was not yet legally eligible to work in Canada at the time of the accident, the WCAT issue was moot. However, the *worker v. worker* defence was never withdrawn and remained in play up to the date of settlement. This defence complicated the matter and underscored the necessity of having counsel and discovery on the issue. The plaintiff could not reasonably have been expected to know how that defence would play out.

In addition, the defendant's position that the impact's velocity was too low to cause an injury somewhat further complicated the case, would likely call for examinations for discovery, and at some juncture might entail an engineer's opinion. It is unlikely the defendant would invest capital in that line of defence for this case, but it was reasonable to say the plaintiff's burden on causation would be somewhat heavier than in a case where the force of the accident is not really in issue, which weigh in favour of a trial in the Supreme Court.

In summary, the court concluded that the defendants created the situation giving rise to the motion. Their pleadings raised a multitude of issues in their defence. Those issues raised complex questions of fact and law which made it unlikely that a layperson could address them competently."

As a final matter, Brown J. noted that the gap between the $25,000 threshold for small claims actions and the $22,500 settlement was not very wide, unlike the large gaps seen in some cases. A host of factors influence a settlement, but the amount settled here was "at least within shouting distance of $25,000." Although that somewhat suggests the initial decision to bring action in the Supreme Court was reasonably defensible, standing alone, that was not seen as sufficient reason.

The plaintiff was awarded her costs of the action and the application.

C. Mothe v. Silva et al., 2015 BCSC 1053, Ross J.

The plaintiff sought damages in excess of $400,000 for injuries arising from a motor vehicle accident, including a C6-7 disc herniation which issue was hotly contested. After a five-day trial, the plaintiff was awarded damages totaling $65,000 with awards made under each head of damages claimed.

The defendants applied to assess costs under Rule 14-1(f) and 15-1 (Fast Track costs) and to apportion costs and award two of the five trial days to the defence on account of the plaintiff's failure to prove the disc herniation.

Ross J. held that although the case was not conducted as subject to the Fast Track rules pursuant to Rule 15-1, costs must be awarded pursuant to that Rule because of the provisions of Rule 14-1(1)(f): see *Codling v. Sosnowsky*, 2013 BCSC 1220. She went on to find that there were special circumstances in the present case which warranted an award of additional costs; in particular the factual complexity of the issues which necessitated a five-day trial to address. Accordingly the award was $11,000 plus $3,000, representing two additional days at $1,500 per day for a total of $14,000.

The defendants applied for two days' costs in their favour, arguing that the cause of the plaintiff's C6-7 disc herniation constituted a discrete issue, which was decided in favour of the defendants.

In the result, Ross J. concluded that this was not an appropriate case to in which to apportion costs. First, from the perspective of the heads of damage, she found that this was not a case of divided success, but one in which the plaintiff recovered under every head of damage claimed. While the awards for non-pecuniary loss and loss of future earning capacity were considerably lower than the plaintiff's claim, the defendants cannot be said to have succeeded with respect to these claims.

She also found that the trial was efficiently conducted and finished within the time that had been set. In any event, it was necessary to address the role that the disc herniation played in relation to the plaintiff's condition and level of function no matter what the decision on causation of that condition. Thus it could not be said that the case was prolonged unnecessarily as a result of the time spent considering the causation issue. There were no witnesses called exclusively to testify about the C6 disc herniation.

D. Nixon v. Pickton, 2015 BCSC 1700 Macintosh J.

A jury awarded the plaintiff $45,000 in total damages in a case where she sought over $1 million. Her claims for future income loss and cost of future care were dismissed. In assessing whether she was "successful" as defined by Rule 14-1(9), Macintosh J. found that her dealings with Mr. Pickton were only a small event by comparison with the miseries she faced in many other parts of her troubled life. Causation for her claim was a difficult, and as it turned out, insurmountable task. Although she established liability and obtained a remedy, he found that she was not successful in any meaningful sense of that word.

Ultimately, however, Jenkins J. awarded the plaintiff her costs up to the date of a formal offer made by the defendant but no costs to the defendant.

He also reduced the invoice of a chartered accountant by one-half on the basis that counsel had asked the accountant to make numerous factual assumptions which were not supportable on the evidence.

E. Tambosso v. Holmes, 2015 BCSC 1502, Jenkins J.

The most significant issue during the 33-day trial was the plaintiff's credibility, including false reports to experts, her "almost constant efforts to avoid answering questions during cross-examination" and her conduct in attempting to intimidate a witness for the defence. She was found to have fabricated certain events involved in the accident. Her claims for PTSD and MTBI were dismissed. She claimed in excess of $2 million for her losses. She was awarded a total of $36,042.30 for non-pecuniary damages, past wage loss and special damages.

ICBC made a formal offer to settle of $250,000 which was not accepted.

Prior to trial, ICBC advanced the plaintiff $36,895 on the tort claim and was to be deducted from her judgment by agreement. ICBC sought to have the claim dismissed as the advances exceeded the judgment. ICBC would then be the "successful party" for the costs award.

Jenkins J. cited ample authorities for the proposition that the proper course when the amount of advances by the defendant exceeded the amount of the judgment, the action ought to be dismissed.

ICBC was awarded special costs against the plaintiff on account of her ongoing effort to deceive the court and intimidate a witness. The plaintiff's conduct included:

- Fabricating evidence about a triggering event that caused her PTSD, namely, that the defendant intentionally drove toward her after the collision and tried to run her over, such that she had to jump out of the way. Jenkins found that this did not occur. Her evidence was contradicted by an independent witness who said she did not exit her vehicle and by her passenger who said that she exited her vehicle but only took a few steps before returning (and before the Holmes vehicle came up the hill).
- Repeating her false version of events to several of the expert witnesses. The deception continued for several years up to and including the trial.
- Testifying that she could not drive which conflicted with video surveillance of her driving a car and her Facebook postings.
- Lying to her disability insurer.
- Lying to a business which paid her for work during a period which she also claimed to be disabled.
- Leaving a voicemail message for a defence witness to intimidate her from testifying.

F. Thom v. Canada Safeway Limited, 2015 BCSC 2026, Saunders J.

This case is another attempt to have a successful plaintiff denied a portion of his costs pursuant to Rule 14-1(15) on account of the trial time expended on discrete issues which the plaintiff lost. Saunders J. declined to do so in the context of a wrongful dismissal trial. Although the plaintiff did not prevail on all issues, the court found that the interests of justice did not require apportionment and there was enough overlap between issues which the evidence addressed such that the matter was not over litigated or unduly prolonged.

In addition, Saunders J. addressed the issue of the propriety of awarding the successful party the cost of two counsel. He held that to the extent that complexity of a case supports two counsel, that complexity may be recognized in an award of costs under Scale C. Other than that, the only other authority in the *Rules* for additional costs is Appendix B s. 2(4) which provides that the dollar value

for each until on the tariff may be set at 1.5 times the value that would otherwise apply, but only if after fixing the scale of costs the court finds that an award on the basic scale would, because of unusual circumstances, be grossly inadequate or unjust.

In this case, he made no such finding and made no award for the participation of second counsel.

G. Wormald v. Chiarot, 2015 BCSC 1671, Funt J.

At trial, the plaintiff claimed for physical and psychiatric injuries as a result of a motor vehicle accident. The total claim was approximately $250,000. Following a seven-day trial, she was awarded $5,100 for the scar, bruises, scrapes, and cuts she suffered. Funt J. held the plaintiff 40% contributorily negligent for several reasons: she knew that the defendant had a novice licence; she knew that the defendant had been drinking, contrary to her novice licence; the defendant had 9 passengers in the vehicle, contrary her novice licence; the vehicle had more occupants in it than it was designed to carry; over the course of the night in question, she had several opportunities to remove herself from the situation but did not do so; she sat in an area of the vehicle where she knew there were no seatbelts; and, the other occupants planned to throw eggs at people from the moving vehicle (with the reasonable expectation that the vehicle might be chased).

In this case, the court rejected the defence argument that costs should be apportioned, citing *Lee v. Jarvie*, 2013 BCCA 515. Funt J. reiterated that such awards should be confined to relatively rare cases:" : *Loft v. Nat*, 2014 BCCA 108 at para. 49. The evidence presented at trial intertwined with the heads of damage. The plaintiff recovered a sum of money and was the "successful party" (*C.P* v. *RBC Life Insurance Company*). In the circumstances, apportionment was not justified.

The court then considered the effect of two formal offers to settle made before trial: the first made 2 ½ weeks before trial for $20,000 plus taxable costs and disbursements to the date of the offer (and the defendants entitled to costs thereafter) and the second made on the Friday before trial for $40,000 plus taxable costs and disbursements to the date of the offer. The first offer contained a rationale for the amount of the offer, including references to the plaintiff's discovery evidence, medical evidence and evidence that the plaintiff missed no time from school or work.

The court held that the first offer to settle ought reasonably to have been accepted as it was made at a time before trial when all of the evidence to be called by the plaintiff was known to her and the defence had outlined the weaknesses in her case in the offer. The court held that one week was a reasonable time within which to consider the offer. She was awarded her costs up to that date and no costs thereafter. The defendants were awarded costs from one week following service of the first offer.

The court also declined to apportion her costs and limit recovery to 60% pursuant to the *Negligence Act*. Funt J. held that since the defendants' formal offers to settle allowed her full costs and disbursements to the date of the offers without qualification for the plaintiff's relative fault, he would exercise his discretion and allow her full costs and disbursements to one week following service of the first offer.

There was no argument that costs should be limited by Rule 14-1 to disbursements only, or assessed as Fast Track costs under Rule 14 and 15.

Disbursements

A. Brach v. Letwin, 2015 BCSC 2081, Williams J.

The defence sought an award of special costs against the plaintiff on account of the expert evidence of Mr. McNeil who was admonished by the trial judge at the conclusion of his evidence. The matter proceeded before a jury and, in considering costs, Williams J. remarked that he made clear to him that "the manner in which he had prepared his evidence and testified at trial was not acceptable". However, Williams J. found that plaintiff's counsel conduced himself in a proper manner and it was Mr. McNeil whose conduct had been found wanting. The disbursements relating to his involvement were disallowed but no special costs were awarded. Williams J. said:

> I expect that the cumulative effect of his appearances will have a salutary effect on the approach he brings to future forensic endeavors.

B. Carreiro et al. v. Smith, 2015 BCSC 2379, District Registrar Nielsen

The parties attended an assessment of costs following the settlement of an action at mediation. The cost of a narrative report by an educational consultant was disallowed. The court concluded that it was not an expert opinion but simply a narrative which summarized facts to be provided to a neuropsychologist and neuropsychiatrist for their opinions. The report did not require special knowledge or expertise and could have been done by plaintiff's counsel. It was not a true educational assessment. Although the work done by the educational consultant (including interviewing the plaintiff's mother and teachers) freed up the lawyer's time for other matters and, therefore, appropriate it was not necessary or proper in the context of Rule 14-1(5). It was an "extravagance".

Defence counsel had requested expert file contents from two of the plaintiff's experts pursuant to Rule 11-6(8).

Doctor #1 charged:

file processing charge	$125
copy charge	$272
colour copy charge	$ 4 (for 2 colour copies)
total	$401.00

Doctor #2 charged:

review and photocopying clinical records	$112
"additional fee" (500 pages x $1.00)	$500
courier charge	$ 19.28
GST	$ 30.60
total	$661.88

Registrar Nielson noted that these charges are not in keeping with the BCMA Guidelines which provide a rate of $1.60 for the first 10 pages and $.30 per page thereafter. Administrative Notice 5

provided a guideline of $.25 per page for photocopying. Departure from such guidelines is allowed where actual costs are demonstrated to be different; however, "the sky is not the limit".

In the result, Registrar Nielson held that unless there are circumstances which cause the cost of photocopying to exceed what would ordinarily be expected, the amount set by the BCMA Guidelines is appropriate and constitutes a "reasonable amount". He noted that he was not directed to any variables which might have impacted the cost of photocopying the files beyond the BCMA Guidelines. The courier charge was allowed provided that there is proof it was actually incurred and not merely notional. Since private medical information was being sent, it was appropriate that a courier protect its confidentiality.

C. Sturdy v. Dhadda, 2016 BCSC 505, District Registrar Nielsen

The plaintiff applied for production of the defence expert invoices in relation to fees for their IME assessment. The plaintiff argued that since the defendants were challenging the reasonableness of her experts' charges, the defendants ought to provide details of the costs they incurred for the same or similar experts. The matter had settled before trial.

Registrar Nielsen held that the information, while not determinative on an assessment, was relevant on the basis that Registrars often compare the charges of a particular expert within the same or similar specialty. Litigation privilege did not attach because the reports had been served on the plaintiff pursuant to Rule 11-6.

Security for Costs

A. Corden Holdings Ltd. v. The Lookout Emergency Aid Society, 2015 BCSC 2059, Gropper J.

The third party was added by court order and then sought security for costs from two of the defendants, The Lookout Emergency Aid Society and Darwin Construction. In response to the application, these defendants provided an affidavit from a claims specialist at Zurich Insurance Company, stating that: the defendants were covered by a third party liability insurance policy; costs were included in the coverage; and that there is no risk that Zurich would not be able to afford to pay a costs award if one were made in the proceedings.

Having found no British Columbia authorities on point, Gropper J. relied on Ontario authorities which held that where a financially responsible insurer has given an assurance to pay costs, that commitment amounts to sufficient protection to defeat a motion for security of costs.

VI. Credibility

A. Koltai v. Wang, 2015 BCSC 1346, Armstrong J.

The trial judge was left with "grave reservations" about the reliability and credibility of the plaintiff's evidence at trial. These included, *inter alia*, contradictions between the plaintiff's physical presentation at trial to experts, and observations of his physical presentation on surveillance; contradictions between the plaintiff's evidence and his wife's evidence about the assistance his wife provided at work prior to the accident; contradictions in the plaintiff's evidence about how long he could walk following the accident; the explanation the plaintiff gave for his improved presentation

on surveillance video and the lack of any corroborative evidence; evidence that the plaintiff's overuse of various medications may actually cause the symptoms he claimed were accident related; and contradictions between the plaintiff's evidence about how much he could lift, and observations of the plaintiff lifting heavier items on surveillance.

Beginning at paragraph 209, the trial judge gives a thorough review of the law regarding the difficult task of assessing credibility. At paragraph 210 the trial judge stated:

> Credibility cannot be gauged solely by the test of whether the demeanour of a particular witness carried conviction of the truth. The challenge is to assess the reliable evidence given by each witness and weigh the inherent probabilities and improbabilities of their versions of the events. The test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at para 11.

The trial judge's review of the law also included reference to the recent case *Pacheco v. Antunovich*, 2015 BCCA 100, in which the court referred back to *Faryna*, including the following:

> The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

The plaintiff sought damages in the range of $800,000 to $1,067,000. Despite serious credibility and reliability concerns, the trial judge accepted that the plaintiff had been involved in an accident with significant forces that caused the plaintiff to suffer from psychological injuries as well as soft tissue injuries, chronic headaches, and chronic pain. In the result the trial judge awarded $375,562.98 for all heads of damage.

B. Pitcher v. Brown, 2015 BCSC 1415, Betton J.

The trial judge undertook a thorough review of the law regarding assessing credibility citing the recent judgment of the Court of Appeal in *Warner v. Cousins*, 2014 BCCA 29, the more lengthy discussion in *Bradshaw v. Stenner*, 2010 BCSC 1398, and *British Columbia (Public Guardian and Trustee) v. Zhang*, 2011 BCSC 1205 which itself canvasses various cases addressing how the trier of fact may assess what evidence is in "harmony with a preponderance of probabilities", and factors that may be taken into consideration in testing a witnesses evidence.

In *Pitcher*, the plaintiff gave her evidence with significant animosity during trial. She appeared to be selective about sharing evidence that she perceived would be unhelpful, but had a good memory and was articulate when she perceived the evidence would bolster her claim. In particular, despite her direct evidence and cross examination, the court was left with a poor understanding of the plaintiff's pre-accident work. Dr. O'Shaughnessy noted that the plaintiff was "extraordinarily vague" regarding her employment history. The plaintiff's trial evidence was contradicted by statements she made to the various experts with the result that the expert's opinions regarding her ability to work were not grounded in the evidence that was given at trial. As a result, the trial judge determined that the plaintiff failed to meet the burden of proof in respect of her claim for past wage loss.

VII. Damages

Causation

A. Andraws v. Anslow, 2016 BCCA 51, per Harris J.A. (Tysoe and Savage JJ.A. concurring)

The plaintiff appealed the judgment dismissing her claim following a low speed rear-end accident. The trial judge concluded that the plaintiff was not sufficiently reliable and had failed to establish on a balance of probabilities that she suffered injuries resulting from the accident.

The Court of Appeal agreed with the plaintiff that the reasons for judgment were inadequate and the appeal was allowed. The Court held that the reasons for judgment failed to address why the trial judge rejected the plaintiff's evidence, her husband's evidence, and the objective evidence of the plaintiff's doctor that he observed a muscle spasm eight days after the accident. In considering whether to accept the plaintiff's evidence, it was not sufficient that the trial judge concluded that the plaintiff exaggerated her evidence regarding the strength of the impact: "it does not necessarily follow that exaggerating the force of the collision meant that she was unreliable in respect of whether she had suffered some injury…" (at para 17).

B. Duda v. Sekhon, 2015 BCSC 2393, Ball J.

The plaintiff was involved in two motor vehicle accidents. Liability was admitted by all defendants. Defendants' counsel spent a great deal of time and effort arguing that the accidents did not cause significant motor vehicle damage, however, the trial judge, stated that the law was clear in rejecting the theory on low impact accidents and its correlation to lack of compensable injury in referring to *Lubick v. Mei and another*, 2008 BCSC 555. Ball J. stated, "it has been clearly established in Canadian law that minimal motor vehicle damage is not 'the yardstick by which to measure the extent of injuries suffered by the plaintiff.'"

C. Gabor v. Boilard, 2015 BCSC 1724, Ballance J.

The plaintiff suffered a mild traumatic brain injury as a result of an accident. At trial, she was able to establish that she would no longer be able to become a college art instructor and artist.

Ballance J. noted that the court will exercise caution in using temporal sequence of events (which often takes the form of comparing the plaintiff's pre- and post-Accident scenarios) as proof of causation, as referred by *Madill v. Sithivong*, 2012 BCCA 62 and *White v. Stonestreet*, 2006 BCSC 801. Ballance J. further noted that, "it does not follow that the judicial insistence of caution signifies judicial thinking that temporal reasoning is an illegitimate analysis or a branch of logic to be seldom invoked..."

This case slightly differs from *White v. Stonestreet*, 2006 BCSC 801, which states that the fact that symptoms arose after an accident and were absent before does not directly prove a casual connection to the accident.

D. McCullum v. White, 2016 BCSC 569, Voith J.

The plaintiff had a difficult upbringing which resulted in a troubled adulthood including drug use. At trial, the plaintiff testified that his illegal drug use and subsequent drug addiction were caused by his accident injuries because he was self medicating to manage his pain.

The trial judge did not accept the plaintiff's evidence on that point. First, there was no expert evidence on the issue of causation, which is not required, but is generally important particularly where the plaintiff had a history of drug use. Second, although the plaintiff testified that he used heroin for the first time in the week following the second accident to relieve his pain, there was other evidence to suggest that his back pain had improved before the second accident. Third, although the plaintiff testified that he used heroin and marijuana to address his pain, that was not true of his use of crystal meth. Fourth, the plaintiff admitted to selling drugs between the first accident and the second accident, which tended to establish that he was "already in an environment where dug use was prevalent" (at para 48).

E. Saadati v. Moorhead, 2015 BCCA 393, per Frankel J.A. (Saunders and Chiasson JJ.A. concurring)

The plaintiff was involved in five motor vehicle accidents by the time of trial. The trial concerned the second accident. The trial judge rejected the plaintiff's claim that he sustained a brain injury in the accident, but found him to be a "changed man" based on evidence of his family and friends. The plaintiff neither pleaded nor argued for damages based on a psychological injury.

The Court of Appeal allowed an appeal and set an aside an award of non-pecuniary damages from a "psychological injury" arising from the accident. Frankel J.A. determined that the trial judge should not have dealt with the issue on the basis of a legal theory not advanced by the plaintiff without giving the parties an opportunity to address the matter.

Frankel J.A. stated that the trial judge did not refer to any authorities dealing with the psychological or emotional effects of an accident being compensable nor did the plaintiff plead or argue the effects. As a result, Frankel J.A. determined that the plaintiff did not prove an entitlement to compensation arising out of the accident. He stated that the trial judge should have notified counsel following his determination that the plaintiff had failed to prove the case before him (namely, the brain injury sustained in the second accident) and stated that he would be prepared to consider a claim that had not been pleaded giving the plaintiff an opportunity to amend his pleading and if the amendment were allowed, it would give both parties the opportunity make further evidence and make further submissions.

Cost of Future Care

A. Sunner v. Rana, 2015 BCCA 406, per Chiasson J.A. (Saunders and Harris JJ.A. concurring)

The question of the proper award for cost of future care was remitted back to the trial judge. Further to *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351:

> The failure of the trial judge to perform an analysis of each item sought by the plaintiff with respect to whether there was "some evidentiary link between the physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health professional" was a legal error.

It was not possible to ascertain on what basis the trial judge arrived at the award for cost of future care and so the appeal of that award was successful.

B. Suthakar v. Humble, 2016 BCSC 155, Ballance J.

Following a motor vehicle accident, the plaintiff suffered ongoing symptoms in her neck, low back, and shoulder. She experienced exacerbation particularly after standing all day at work. There were opinions at trial that the plaintiff may need to retrain. At the time of the trial the plaintiff was treating her symptoms with Tylenol. Whether the plaintiff intended to accept the recommended treatment was a valid consideration; however, Ballance J. stated at paragraph 129:

> The court, therefore, should be cautious about reducing or eliminating altogether an award for the cost of future care simply on the basis that the injured plaintiff has not confirmed a willingness to participate in a medically justified course of care, or currently says that he or she will not follow the recommended treatment...fairness requires that the court be alive to the prospect that an injured person's disposition may change, or that he or she may not have had the means or ability to follow certain courses of treatment in the past.

In the result, the trial judge allowed the cost of Tylenol, active rehabilitation program, a gym pass, vocational assessment, and assistance from an ergonomic analyst and occupational therapist. In respect of each award, the trial judge identified the link to the evidence in support of the item.

Divisible Injury

A. Derksen v. Nicholson, 2015 BCSC 1268, Grauer J.

The plaintiff was involved in three motor vehicle accidents. The first two accidents were rear end accidents and liability was not seriously contested. The plaintiff was liable for the third accident. The first accident was the most significant and caused the plaintiff to most symptoms. The second and third accidents caused minor aggravations to the plaintiff's injuries from the first accident.

The plaintiff argued in submissions that his injuries were indivisible. In argument, the defendant agreed with this position. In assessing causation, the trial judge concluded that the since the third accident produced a "blip" of exacerbation, the effects of the third at fault accident were in fact, divisible. The trial judge found that the period of exacerbation following the third accident was about two weeks, and that exacerbation had "no effect on Mr. Derksen's income earning capacity, housekeeping capacity, future care needs, or residual symptoms" (at para 54).

Loss of Future Capacity to Earn Income

A. Fadai v. Cully, 2015 BCCA 505, per Fitch J.A. (Kirkpatrick and Frankel, JJ.A. concurring)

At trial, the plaintiff established that he suffered from the ongoing effects of a concussion, namely, difficulty regulating his behaviour and controlling his temper. The trial judge made awards for non-pecuniary damages, past wage loss, loss of income earning capacity, cost of future care, and special damages. The defendant appealed the order for $250,000 for loss of income earning capacity, arguing that it was wholly erroneous and that the reasons for judgment were insufficient to permit appellate review of the issue.

The Court of Appeal dismissed the appeal. Mr. Justice Fitch, writing for the Court, concluded the trial judge's findings were rooted in the evidence. The trial judge had a difficult task assessing loss of income earning capacity, given that the plaintiff immigrated to Canada at age 13, had to learn English, struggled in school, and was only 28 years old at the time of trial. The evidence was that prior to the accident, the plaintiff was excelling in sales roles. The trial judge accepted the evidence of the lay witnesses as to the plaintiff's difficulties with his temper following the accident, and the effect those difficulties had on his employment opportunities. The Court of Appeal concluded the trial judge's approach was "detailed, thoughtful and well-reasoned." In respect of the reasons for judgment, the Court of Appeal concluded that they were "more than sufficient to permit meaningful appellate review" and contained clear factual findings based on the evidence at trial.

B. Gillespie v. Yellow Cab, 2015 BCCA 450, per Harris J.A. (Newbury and Goepel JJ.A. concurring)

The defendant appealed the awards for past wage loss and loss of capacity to earn income on the basis that the plaintiff failed to lay the foundation for such findings to be properly assessed. The plaintiff operated his own flooring business in which he bid on jobs, purchased materials, and then arranged for sub-contractors to do installation.

The Court of Appeal noted that the evidentiary basis was thin; however, it was accepted that there was some evidence on which the trial judge could make his findings (at para 43):

> The evidence, in my view, establishes a foundation for discerning a correlation between those periods post-accident when Mr. Gillespie's injuries affected his capacity to work and the profitability of MG. The correlation is not perfect.

Having established a real and substantial possibility of a future loss, the trial judge went on to apply the capital asset approach. Taking the years 2010 and 2012 as a benchmark for the plaintiff's ability to earn income supported a claim in the range awarded by the trial judge. The evidence tended to establish that when the plaintiff was able to work at capacity his profits rose, and when he needed to rest as a result of his accident injuries, his profits decreased. The trial judge applied the correct legal principles and the awards for past wage loss and loss of capacity to earn income were not wholly unreasonable.

C. Grassick (Guardian ad litem of) v. Swansburg, 2015 BCSC 2355, Loo J.

The plaintiff was 16 years old when he was a pedestrian struck by a motor vehicle. Prior to the accident he was a highly motivated and energetic young man who excelled at sports and school. Prior to the accident he had spoken of his desire to become an engineer. Despite four previous concussions, the plaintiff was not experiencing any cognitive difficulties prior to the accident.

As a result of the accident the plaintiff suffered a moderate to severe concussion. His Glasgow Coma Scale was 8 out of 15 when he was assessed by ambulance attendants at the scene of the accident. He was placed in a medically induced coma for several days following the accident and in the aftermath he continued to experience deficits with his memory, processing speed, cognitive inefficiencies, and fatigue.

Based on the evidence at trial, including the plaintiff's evidence and the evidence of lay witnesses, the trial judge concluded that the plaintiff was an exceptional young man who was not content to be average in any respect. As a result, she found that but for the accident he would have begun his career as an engineer initially earning in the average range, but then moving into management roles in which his wages would have reached the 80th or 90th percentile for professional engineers.

The trial judge rejected arguments that the plaintiff was not likely to become an engineer and would have pursued a career as a mountain biker, his passion prior to the accident. Education was important to the plaintiff prior to the accident, and the uncontroverted evidence was that he had discussed a career in engineering with his father. Although the plaintiff continued to get excellent grades following the accident, and had successfully completed co-op terms as part of his engineering studies, the trial judge rejected the defendant's argument that this was a good prognosticator for his career trajectory. The trial judge noted that the plaintiff had given up all of his sporting and social activities to focus on his studies. He experienced difficulties and intense stress during co-op terms, particularly with verbal instructions and tasks that involved deadlines. He was able to provide examples of mistakes and difficulties during his co-op terms. His abilities had not been tested in circumstances where he was living independently, dealing with the increased burdens of the working world, or caring for others.

Considering all of the evidence, the trial judge found there was a real and substantial possibility that the plaintiff would have difficulty working as an engineer, and difficulty maintaining full time employment. Though his cognitive impairments were mild, the trial judge stated "they are potent for him." The plaintiff sought and was awarded $3,000,000.

D. Ostrikoff v. Oliveira, 2015 BCCA 351, per Saunders J.A. (Tysoe and Bennett JJ.A. concurring)

The defendant appealed the orders for past wage loss and future loss of earning capacity on the basis that the trial judge's findings were based on speculation rather than the evidence. The defendant argued in the alternative that the trial judge failed to provide adequate reasons to explain how he reached the figures in question.

The Court agreed that the trial judge's findings did not accord with the evidence at trial. With respect to past wage loss, the plaintiff is required to establish his loss on a balance of probabilities. The trial judge acknowledged that a projection of increased earnings was speculative, but made the award for past wage loss on the assumption that the plaintiff would have experienced a stream of increasing earnings. As a result the award for past wage loss was set aside.

The misapprehension of a stream of increasing earnings similarly infected the analysis of future loss of capacity to earn to income. Additionally, the trial judge did not adequately take into account both positive and negative contingencies. The award for future loss of earning capacity was set aside and both questions were referred back to the trial judge.

Loss of Use

A. Miller v. Brian Ross Motorsports Corp., 2015 BCSC 1381, Dardi J.

The plaintiff's Ferrari was damaged during a service appointment following which the plaintiff claimed for loss of use of his Ferrari. Difficulties arose as to where the Ferrari would be repaired and ultimately the court found that the period of wrongful detention was nine months.

The defendant acknowledged a wrongful detention; however, the parties disagreed as to how to calculate damages. Despite the fact that he did not rent a Ferrari as a replacement, the plaintiff suggested damages be calculated based on the monthly cost of a rental Ferrari: $9,381, rounded to $85,000 after taking into consideration positive and negative factors. The defendant countered that damages of $85,000 represented almost two thirds of the purchase price of the Ferrari and that $5,000 was more appropriate.

The court noted "the weight of authorities in British Columbia endorses a cautious approach to the assessment of damages for loss of use. The pleasure the plaintiff derived from his Ferrari and his involvement in a social scene of luxury car owners was balanced against considerations such as: the Ferrari was not the plaintiff's only vehicle; the Ferrari was not the plaintiff's usual mode of transportation; the plaintiff was away on holidays at times during the period of wrongful detention, the plaintiff did not drive the Ferrari when it was raining; and there was no evidence that the rental Ferrari had actually been rented at a rate of $9,381 per month. Considering all of the circumstances, the court awarded damages of $15,000.

Mitigation

A. Liu v. Bipinchandra, 2016 BCSC 283, Voith J.

This case is of interest as there was a 40% reduction for the plaintiff's failure to mitigate her damages by thoroughly disregarding treatment recommendations.

The plaintiff was 43 years old and had been trained and worked as a civil engineer for about 12 years and then worked for a real estate company. She immigrated to Canada with her husband and child and worked in intermittently for four years in various forms of physical and seasonal work. She had just started to work as a civil engineer when the accident happened. She suffered dizziness, blurred vision, neck, shoulder and low back pain and numbness in her left hand. She worked for six months after the accident. She was able to travel to China on several occasions. She walked regularly, exercised, swam and did some yoga. However, she failed to comply with the treatments recommended by her doctors instead choosing to rely on herbal medicines, meditation and prayer. She filled out 10 prescriptions for medications over seven years but took virtually none of the medicines on a sustained basis. She did almost no physiotherapy. She did not join a gym. She did not attend counselling in a meaningful way. She felt that the treatment recommendations were too expensive or were ineffective and she was too busy or had various other reasons for not participating.

In addressing whether the plaintiff's damages would have been reduced had she followed the recommended treatment, His Lordship observed that there was no direct medical evidence establishing that her soft-tissue injuries would have been abated or resolved and that Dr. Dost had opined that it was possible but not probable that some of the recommended treatments would assist in respect of her headaches. His Lordship found:

> [102] The legal question of whether a plaintiff would have been assisted by a procedure or course of treatment is to be determined on a subjective basis. Nevertheless, a defendant need not lead direct evidence that the particular plaintiff at issue would have benefitted from a specific treatment. The outcomes of many treatments, or therapies, or procedures are uncertain. A plaintiff who acts unreasonably in the face of the medical advice they are given cannot take refuge in that uncertainty.
>
> [103] Instead, it is open to a defendant to establish the second aspect or branch of the mitigation test indirectly. Thus, if most persons are assisted by a particular treatment the Court can, as a matter of inference, determine that it is probable that a particular plaintiff would have benefitted from that treatment.

Non Pecuniary

A. Mayer v. Umabao, 2016 BCSC 5065, Young J.

The plaintiff was 72 at the time of trial and was awarded $175,000 in non pecuniary damages for "very mild" traumatic brain injury, vestibular injury, somatoform disorder and soft tissue injuries to his neck, back, hips and thumbs. He was able to continue working at his business for three years following the accident but closed his shop on the eve of trial. This case illustrates that the key to a non pecuniary damages award is evidence that provides a true appreciation of the individual's loss. In this case, while the court found that the plaintiff and his wife over-idealized their life before the accident, she was impressed by his loss of the many joys, talents and opportunities he had before the accident. In particular, the plaintiff was a top amateur wine maker and BC wine judge. As a result of his injuries, he lost the ability to finesse his wines and adequately articulate wine qualities in order to judge them.

B. Picco v. British Columbia (Attorney General), 2015 BCSC 1904, Brown J.

The plaintiff had a prior history of drug abuse and use of narcotic analgesics for pain. Evidence was given at trial that the subject accident caused aggravation to his previous drug history. In addition to claiming $150,000 in non-pecuniary damages, the plaintiff claimed $30,000, for his heroin drug addiction, relying on *Fabretti v. Gill*, 2014 BCSC 899.

The court awarded the plaintiff $80,000 for non-pecuniary damages, augmented by $10,000 for his drug addiction following the accident. The trial award was reduced by 20% due to a failure to mitigate.

C. Sangra v. Lima, 2015 BCSC 2350, Walker J.

This case is another reminder that non pecuniary damages are not based on a tariff approach for the nature and severity of an injury. Non pecuniary damages are to provide solace and a substitute for lost amenities. The plaintiff was 85 years old at the time of trial and the victim of a horrific hit and run accident which occurred when he was standing at a bus shelter. Prior to the accident, the plaintiff was "an exceptionally healthy and active 83 year old married man" who embraced life in a dynamic way.

The accident left the plaintiff with serious, life-threatening and life altering injuries to nearly all areas of his body and required multiple urgent surgeries. He suffered a brain injury, skull fracture, facial fractures, cervical spine fractures, pelvic fractures, internal organ traumas, fractured ribs, inoperable rotator cuff tear, multiples severe lacerations and significant aggravation of wrist and knee arthritis. The defence proceeded primarily on the issues of life expectancy and the cost of future care.

Mr. Sangra was awarded non pecuniary damages of $315,000. The reasons for judgment reflect a compelling narrative of the life that he lost as a result of his injuries. The court relied on cases reflecting the "golden years" doctrine that as one advances in life, one's pleasures and activities particularly do become more limited, and any substantial impairment in that activity becomes all the more serious. His life expectancy was found to have been reduced by one year as a result of his injuries to 92.4 years.

Punitive Damages

A. Arsenovski v. Bodin, 2016 BCSC 359, Griffin J.

The plaintiff claimed against the Insurance Corporation of British Columbia ("ICBC"), the adjuster, and a Special Investigations Unit agent for malicious prosecution. Her claim arose as a result of a criminal charge that was instigated by ICBC's SIU agent who worked closely with the ICBC adjuster. On the first day of the criminal trial, the Crown stayed the charge.

The plaintiff, a recent immigrant to Canada, spoke almost no English at the time her husband was struck by a motor vehicle while they walked home holding hands after an English class. On the advice of friends the plaintiff attended ICBC to report the accident. She also retained counsel on the advice of her physician.

Further to the accident report, the special investigations unit at ICBC became involved and worked closely with the adjuster. Subsequently, the SIU agent recommended criminal charges in a Report to Crown Counsel ("RTCC") for fraud over $5,000 and making false statements in contravention of the *Insurance Vehicle Act*. The RTCC contained many inaccuracies. The trial judge found that the plaintiff never made a statement to ICBC that she was knocked down after her husband was struck by the motor vehicle. Furthermore, although the plaintiff's lawyer had discussions with the ICBC adjuster regarding Part 7 benefits for the plaintiff, the plaintiff never made a tort claim or indicated that she intended to do so. The trial judge found that it was "wholly inaccurate" to suggest the plaintiff was blatantly attempting to defraud ICBC. Despite the SIU agent claiming that he was unable to read the clinical records, the RTCC he drafted stated that the plaintiff had received three and a half hours of unnecessary medical treatment. The court found that the actions of the SIU agent and ICBC amounted to malicious prosecution.

Punitive damages were awarded as a result of the "marked departure from ordinary standards of decent behaviour" in order to punish the defendant. In all of the circumstances, the trial judge found that the conduct of the adjuster and the SIU agent was high handed, reprehensible and malicious. The trial judge also recognized that as a recent immigrant with very little English, and no understanding of how ICBC or the British Columbia court system operated, the plaintiff was particularly vulnerable. The trial judge ordered ICBC to pay $350,000 in punitive damages.

B. Industrial Alliance Insurance v. Brine, 2015 NSCA 104, per curiam Fichaud, Oland and Scanlan JJ.A., leave to appeal refused, 2016 Carswell NS 399

The Nova Scotia Court of Appeal reduced award for punitive damages in a claim regarding payment of disability benefits. In this case, National Life did not refuse to pay benefits; in fact, National Life overpaid benefits and sought recovery. However, in order to recover the overpayment, National Life simply stopped paying monthly benefits when they should have prorated the monthly payments.

The factors supporting a finding of bad faith and supporting an award of punitive damages included the following: at trial, the adjuster for National Life gave evidence that was at odds with the information in her file; the trial judge had "serious reservations" about her evidence and found that she attempted to paint a negative picture of the plaintiff; National Life improperly discontinued rehabilitation services; National Life disclosed a medical report late; and National Life failed to follow the ruling of the Tax Court regarding taxability of benefits. The trial judge awarded punitive damages of $500,000.

On reviewing the trial judge's decision, and other claims attracting awards of punitive damages, the Court of Appeal concluded that the original award was inordinate in the circumstances: "this case does not involve Whiten's level of crass opportunism or the quest for a windfall that is seen in some of the authorities" (at para 222). The Court of Appeal took notice of the fact that this was not National Life's first breach of its duty of good faith, and that a previous award of punitive damages had been ordered. The trial judge stated: "deterrence involves a meaningful gradient between successive transgressions" (at para 223). Considering the circumstances and the case law, the Court of Appeal substituted an award of $60,000 for punitive damages.

C. Zurich Life Insurance Company Limited v. Branco, 2015 SKCA 71, per Richards C.J.S. (Lane and Herauf JJ.A. concurring), leave to appeal refused 2016 Carswell Sask 243

In 2013, this case set the high-water mark for punitive damages. The trial judge ordered the two insurers to pay $4.5 million in punitive damages and $450,000 in aggravated damages as a result of their cruel and malicious treatment of the plaintiff.

The Court of Appeal considered the awards for punitive damages and mental distress made against the insurer AIG, originally $1.5 million dollars and $150,000, respectively. The Court of Appeal reviewed the evidence and concluded that the trial judge made several significant errors in assessing punitive damages, including the characterization of periods of time which the plaintiff was denied benefits and the issue of whether the rehabilitation facility in Lisbon was appropriate for the plaintiff. On an examination of the evidence, there were two periods during which AIG's decision to discontinue payments did not constitute a breach of good faith. Regarding the rehabilitation facility, the plaintiff's counsel wrote to AIG stating that he had located a more appropriate facility. AIG responded to the plaintiff's counsel and invited the plaintiff to identify a facility for rehabilitation treatment; however, the plaintiff failed to respond to AIG for some seven months or so. The award against AIG for punitive damages was decreased to $175,000. In respect of the award for mental distress, the Court considered the case law and reduced the award to $15,000 as against AIG.

With respect to the awards made against Zurich, originally $3 million for punitive damages and $300,000 for mental distress, the Court concluded that a decrease in both awards was appropriate. Although it was improper for Zurich to refuse to pay "own occupation" benefits to 2009, the Court accepted Zurich's argument that it was *not* bad faith to refuse to pay "any occupation" benefits until 2009. In fact, in 2003 the plaintiff agreed he could do other work so long as it did not involve standing or walking for long periods of time. The trial judge committed palpable and overriding errors when he found (1) that Zurich ought to have accepted the plaintiff's offer to settle further to advice from an independent assessor, since such advice was never given; and (2) that Zurich failed to disclose medical reports of Calgary physicians indicating the plaintiff was disabled, when in fact, that report was prepared for the plaintiff. Additionally, the court found that Zurich did not misconduct itself during the course of the litigation. As a result, there was a reasonable basis on which to decrease the awards of punitive damages and mental distress to $500,000 and $30,000, respectively.

Special Damages

A. Bricker v. Danyk, 2015 BCSC 2404, Skolrood J.

The plaintiff sought mileage charges for driving to and from her medical appointments as part of her special damages. The defendants argued that the plaintiff should not be able to claim mileage charges as those costs were offset by the savings realized by her not having to drive to work on a daily basis referring to the authority of *Bilinski v. Smith*. The issue was complicated in this case because the plaintiff had not travelled to her office on a daily basis and there was no evidence before the court about whether the dates for which she claimed mileage to travel to medical appointments coincided with days that she would have otherwise gone to her office. On that basis, a complete offset proposed by the defendant was not warranted however some offset was allowed.

VIII. Disability Insurance

A. Brugger v. IWA - Forest Industry Long Term Disability Plan (Trustees), 2015 BCSC 2363, Ball J.

The plaintiff was injured in a car accident and received disability benefits through his employment LTD benefits trust plan. The plan contained a term that if a disabled person received compensation from a third party or received a settlement, that person will be required to repay some or all of the LTD benefits. The plaintiff settled the tort claim for the sum of $197,773.36 being the remainder available under the policy limits carried by the defendant. The settlement was made on the express agreement that the plaintiff could pursue an UMP claim. The plaintiff took the position that because the LTD benefits were deductible from the UMP claim, there was no sum to be repaid to the disability plan and that the tort settlement contained no payment for wage loss. The plaintiff subsequently settled his UMP claim for the sum of $240,000. Thereafter, the benefits trust plan stopped paying disability benefits and Mr. Brugger sued. The benefits trust plan sought repayment of $40,383.25 being a portion of benefits paid to the plaintiff.

The plaintiff had to repay the portion of the LTD benefits sought by the defendant pursuant to a reimbursement agreement he had signed despite the fact that the plaintiff recovered less than 100% of his wage loss claim. A plaintiff is not required to be fully indemnified for his wage loss in order to trigger his reimbursement obligations. A subrogation analysis is not applicable because the plan was a benefit trust and not a contract of insurance. All that is required is that the plaintiff received "settlement" as defined in the LTD plan, in relation to the same disability for which he was receiving LTD benefits under the benefits trust plan. In calculating the amount to be recovered by the defendant, it was entitled to include the TTDs and the UMP policy amounts paid.

B. Garneau v. Industrial Alliance Insurance and Financial Services Inc., 2015 ONCA 234, per Lauwers J.A. (Hourigan and Pardu JJ.A. concurring), leave to appeal refused, October 15, 2015.

The plaintiff suffered from fibromyalgia and began receiving long-term disability benefits from the defendant in 1996. In 2002, the insured took medical retirement from her government job and began to receive superannuation benefits which the insurer was entitled to deduct from the LTD benefits pursuant to the terms of the policy. The insurer received notice from the government advising of the amount of superannuation benefits being paid to the insured, but the letter went to the wrong department. The insurance company continued to pay the full amount of the LTD

benefit without the proper deduction for the superannuation benefits or CPP benefits from June 2002 to September 2007, when the overpayment of approximately $114,000 was discovered. The insurer then began to offset the overpayment, initially reducing the LTD benefit amount to zero but then to 50% of the monthly benefit. The insured sued alleging bad faith and sought an order limiting the insurer to a 20% reduction in her LTD benefit payments pursuant to the *Wages Act*, R.S.O. 1960, c. W-1, s. 7.

The insurer brought on a summary judgement which was allowed and the action was dismissed.

The motion judge held that the insurer was entitled to use the self-help remedy of deducting LTD benefits to repay the overpayment and dismissed the allegations of bad faith. The court of appeal agreed that the policy contained a clause providing for the reduction of payable benefits and a common sense reading of the clause entitled the insurer to deduct the amount of benefits that had wrongly been received.

The court of appeal found that the motions judge was correct in finding that the overpayment was a debt and not wages and so the provisions of the *Wages Act* did not apply.

The court of appeal determined that the motions judge had not erred in failing to award aggravated, exemplary or punitive damages for the breach of good faith and had correctly concluded that the insurer did not owe the insured an "ad hoc fiduciary duty" in the circumstances. The court of appeal commented that the test for establishing an "ad hoc fiduciary duty" has been modified since *Frame v Smith*, [1987] 2 S.C.R. 99. The duty will only be found where the alleged fiduciary has provided an express or implied undertaking to act in the best interests of the other party.

C. Tanious v. Empire Life Insurance Co., 2016 BCSC 110, N. Brown J.

The plaintiff was diagnosed with multiple sclerosis ("MS") in February 2005. She alleged that her condition worsened until she was terminated in January 2012. She had been self-medicating with the use of crystal meth after the MS diagnosis and this led to erratic behavior and ultimately the termination of her employment. In December 2011, the plaintiff's GP determined that she could no longer work. She was terminated two weeks later and her claim for weekly benefits and then LTD benefits were rejected. The insurer maintained the denial on the basis that the disability was the result of drug use and not MS. The plaintiff commenced an action seeking a declaration that she was totally disabled and entitled benefits until age 65 and for aggravated damages.

The plaintiff succeeded on the grounds that she had only to prove that MS was the proximate cause of disability, not the more serious cause. There was objective evidence that the MS had a progressive effect on her brain and mental functioning since it was diagnosed. The plaintiff's performance reviews and her testimony showed that there was a gradual decline in functioning consistent with the medical evidence. Depression, anxiety and fatigue were all symptoms of MS and the plaintiff had been experiencing these symptoms consistently. The plaintiff had started to use drugs because she honestly believed that the drugs would improve her performance at work and had not started to use drugs as a way of thrill-seeking or self-gratification. She honestly believed that amphetamines would help her as some amphetamines were prescribed by doctors to assist with MS symptoms. The fact that the employee had worked for a brief period against doctor's advice did not disqualify her from benefits. She was clearly unable to perform at an expected level. She had not recovered since her termination to an extent where she could engage in employment in any suitable occupation.

The plaintiff was also awarded $15,000 in aggravated damages. The non-payment of the benefits for three and a half years contributed to her poverty after she lost her job and she suffered additional mental distress and a loss of a sense of personal dignity.

IX. Document Production

A. Buettner v. Gatto, 2015 BCSC 1374, Master Caldwell

The plaintiff brought an application for the production of the defendants' documents which were listed under multiple claims of privilege. No evidence or argument was presented in support of the claims of either solicitor-client or solicitor's brief privilege and therefore, Master Caldwell determined that those claims must fail and he was left to deal with the claim of litigation privilege.

In this case, a senior claims examiner stated that she was aware of an internal assessment of fault and expected the plaintiff would start a lawsuit on the basis that most of her file load consisted of mostly litigation files. Caldwell concluded that the examiner had no evidentiary basis to support her decision to deny liability, "...Her unsupported decision cannot be used as justification for her to conduct a proper investigation into the facts of this motor vehicle accident while cloaking that investigation in a claim of litigation privilege."

Caldwell outlined the reasonable prospect/dominate purpose test in noting that there must be an expectation or requirement that there is at least some evidence of *bona fides*, due diligence or accountability on the part of the party seeking to rely on the prospect of litigation, which was created by their own actions, to support their claim of litigation privilege. This requirement is particularly of concern where the same insurer (ICBC) provides coverage for both parties and owes a duty of an investigation and determination of facts before reaching a decision on issues such as fault or liability for an accident.

B. Dudley v. British Columbia et al., 2015 BCSC 1244, Macintosh J.

The plaintiff applied to obtain documents of the Chief Coroner concerning the death of her daughter for whom the action was brought. The court held that its powers under *Rule 7-1(18)* to order documents from a third party did not apply to the Chief Corner who is bound by sections 63 and 65 of the *Coroner's Act* not to disclose any information or record in respect of a deceased person or made, used or submitted in the course of an investigation, inquest or review. Section 65 expressly states that a person must not be asked a question or produce a document that would reveal confidential information or the subject matter of a review.

C. Easton v. Chen, 2015 BCSC 2288, Master Muir

The defendant brought an application for the production of documents from several earlier motor vehicle accidents involving the plaintiff which were all settled before trial. The defendant had already been provided with copies of most materials relating to the subject of the application (presumably by ICBC when he was retained) for which he claimed privileged.

The defendant argued that the implied undertaking of confidentiality did not apply to any document that could prove or disprove a material fact and therefore, the documents should be produced pursuant to Rule 7-1(11) of the *Supreme Court Civil Rules*. The defendant alleged the plaintiff's injuries sustained in the previous actions were similar to the ones pleaded in the subject accident. The plaintiff claimed that the injuries had resolved prior to the accident question and that

the injuries were significantly different. Plaintiff's counsel submitted that the injuries were overlapping, but divisible thus the documents sought were irrelevant and not producible.

Master Muir ordered the production of prior documents, the discovery transcripts and the experts' reports from the prior actions since they could be used to prove or disprove material facts in the subject action. She also concluded that there was sufficient foundation for their production under Rule 7-1(11) and it was in the interests to justice to relieve against the implied undertaking of confidentiality in disclosing the documents. Master Muir further ordered that the mediation documents be disclosed due to the issue of indivisibility and the potential for double compensation.

D. Gamble v. Brown, 2015 BCSC 1873, Master Taylor

The defendant brought an application for an order that the plaintiff sign an authorization for document production for the plaintiff's former solicitors' files relating to a previous motor vehicle accident. Alternatively, the defendant sought an order that the plaintiff amend her list of documents to include any or all documents in possession or control of the previous solicitors relating to the previous accident. The defendant argued that the production of documents was necessary to prevent the plaintiff from any chance of double recovery.

Plaintiff's counsel submitted that any settlement letters or mediation briefs prepared by the plaintiff's former solicitors were privileged. In addition, the plaintiff swore in her affidavit that her previous solicitor provided written confirmation setting out the terms of settlement of the previous accident and confirmed that the settlement did not include damages for loss of opportunity or past or future income loss.

Master Taylor concluded that the defendant had not shown that the public interest in preventing double recovery took precedence over the public interest in encouraging settlement such that he should order the production of documents from the plaintiff's previous solicitor.

Further, in response to whether or not the plaintiff should place any terms on the production and disclosure of documents that she provided to the defendant, Master Taylor noted that it was up to the trial judge to determine at the outset of the trial and in the absence of the jury, aside from the issue of the plaintiff maintaining her solicitor-client privilege with her former solicitor, which should be preserved in any event.

E. Gee v. Basra, 2015 BCSC 2495, Master Harper

The master dealt with a consent order for document production, the procedure of which she remarked on unfavourably. Rather than serve non-party record holders, the parties agreed that the order would require the plaintiff to sign various authorizations permitting the release of the records in Halliday form. Although the master made the order based on the consent of the parties, she considered that such applications should be brought in the conventional way, with notice to the records holders.

F. Hickey v. The Roman Catholic Archdiocese of Vancouver, 2015 BCSC 2314, Master Taylor

The defendant brought an application in seeking a number of orders including an order for the production of documents or an authorization allowing the defendant to obtain the documents. The plaintiff took the position that if certain reports and records were requested by the defendants, then it should be the defendants' obligation to pay for the documents obtained. In addition, the plaintiff

argued that he was entitled to a type of *Halliday* order which would allow counsel to review the records for privilege or privacy before providing the records to the defendants.

In practice, in some instances, defendants have agreed to reimburse plaintiffs for the costs of obtaining documents requested by defendants. However, according to Master Taylor, this is not a rule or requirement which can be relied upon and "it is only a practice that depends on the parties, the issues and the urgency with which the documents are sought." In Master Taylor's view, Rule 7-1 must be observed by all parties seeking or producing documents, and it is up to a party if they wish to reimburse the opposite party for the cost of obtaining documents (in other words, it is not a requirement). If reimbursement does not occur, the plaintiff is entitled to make a claim for costs when presenting their Bill of Costs.

G. Leach v. Jesson, 2016 BCSC 591, Thompson J.

This was an appeal from the dismissal by a master of the plaintiff's application for an order for production of redacted copies of the defendant's hospital and ambulance records relating to a rear end accident. Liability for the accident was not in issue. The plaintiff sought those portions of the records that related, *inter alia*, to the cause of the accident, the severity of the accident and the nature of the defendant's injuries including her ability to recall and observe events after it. The appeal was dismissed because:

> [20] It is true that the quantity of material sought by the plaintiff is likely to be small and if production were ordered the invasion of the defendant's privacy would be unlikely to be of a high order. On the other hand, the question of what the plaintiff did at the scene of the accident is an issue of slight importance. On balance, the master evidently concluded that ordering production would not be consistent with conducting this action in a way that is proportionate. The defendants have not demonstrated that the decision was clearly wrong.

H. Wawanesa Mutual Insurance Company v. Wade, 2015 NBCA 43, per Green J.A. (Deschenes and Bell JJ.A. concurring)

Following amendments to her statement of claim, which further particularized allegations of bad faith, the plaintiff sought an order compelling the insurer to provide information and documents in response to outstanding discovery questions. The plaintiff alleged the defendant retained the services of various professionals for the purpose of terminating her benefits. Details of the amounts paid to those parties were requested, as well as information regarding how many policy holders received benefits from the insurer who had policies like the plaintiff's, and the defendant's net worth and gross assets from the sale of policies like the plaintiff's.

The defendant attempted to resist the application on the basis that the information requested was not relevant and that the magnitude of documents requested was out of step with principles of proportionality. The court disagreed and further to its review of the plaintiff's amended statement of claim, concluded there was nothing inappropriate about the questions or requests for documents. The defendant's appeal was dismissed.

I. Wilder v. Munro, 2015 BCSC 1983, Master Bouck

The defendant sought production of all photographs and video depicting the plaintiff dancing, attending music festivals, socializing, and on vacation since the date of the accident. The defendant was able to retrieve over 100 photos from public social media platforms depicting the plaintiff in

various activities following the accident. The defendant was not able to identify the specific dates and times of the photographs or the videos they retrieved.

The master dismissed the application on the basis of proportionality. The claim was proceeding in fast track, and the defendant already had dozens of photographs, plus ten videos depicting the plaintiff after the accident. The plaintiff was employed with no limitations on her ability to do her job. Furthermore, the master was not convinced of the probative value of the photographs given that the plaintiff's discovery evidence was not that she stopped all socialization, but that her activities were curtailed, and she did not enjoy herself as much as usual. She was not asked specifically about the photographs and videos that were listed on the defendant's privileged list of documents at her examination for discovery.

X. Examination for Discovery

A. Elworthy v. Tillit, 2015 BCSC 1936, Master Bouck

This case involved one of two personal injury claims brought by the plaintiff. Liability, causation and the quantum of damages were contentious issues in both proceedings.

At a case planning conference, both the defendants had a notice to have their conferences conducted at the same time and they were largely in agreement on the procedural orders to be sought at the conference. Plaintiff's counsel circulated a consent order that would allow the two proceedings to be heard at the same time. One of the defendants refused to consent to the order unless the plaintiff agreed to a further order that all evidence, including that given at examinations for discovery in each action, be admissible in both actions. The plaintiff agreed that all admissible documents disclosed by her in each action could be used in both actions; however, she refused to give consent to the same relief with respect to the evidence given at discoveries. The plaintiff submitted that each of the defendants ought to agree to adopt each other discovery evidence.

The court concluded that the primary legal issue to be determined was whether the implied undertaking rule ought to be waived. The defendants relied on *Gill v. Gill*, 2013 BCSC 2365, in stating that the implied undertaking rule could be waived so that a transcript of the plaintiff's discovery in a Part 7 action could be used in a tort action and vice versa. Master Bouck differentiated the facts in *Gill* to the case at issue; however, she found that *Gill* should be followed due to the similar issues of causation and indivisible injuries. Master Bouck ordered that the discovery evidence be admissible in both actions and stated it would make sense to have both actions heard at the same time, subject to the direction of the trial judge.

B. Higginson v. Kish, 2015 BCSC 1066, Johnston J.

The plaintiff brought an application to compel a defendant to return to an examination for discovery to address three questions that the defendant was instructed by his counsel to not answer at the discovery which had already taken place.

In examining the questions, Johnston J. noted that one of the questions was not appropriate to ask a witness in inquiring if it would be more reasonable to approach highway speed before changing lanes. This question was determined to be a decision for a judge and it involved a matter of law.

The remaining two questions also involved the circumstances surrounding the accident - one of which asked about a possible explanation as to why the defendant did not see the plaintiff prior to

the accident, and another concerning the defendant's knowledge of the speed at which traffic was or might reasonably be expected to be travelling at the time of the accident. Both questions were deemed relevant if properly phrased. Further, Johnston J. stated that questions of relevance are important; however, questions of relevance are finally determined at trial, not discovery and the first and last question stated nothing about whether or not those answers or any of the evidence developed would be admissible at the trial.

C. Nordin v. Wong, 2015 BCSC 2356, Master Scarth

The action was initially litigated as a Fast Track action under Rule 15 and a two-hour discovery of the plaintiff took place. Defence counsel noted on the record that the discovery had concluded. The defence sought a second discovery just prior to trial on the basis that the plaintiff had since attempted and failed to return to work at the job which she held at the time of the discovery. She had also unsuccessfully attempted other employment.

Master Scarth denied the second discovery, noting that there is no continuation of the discovery as of right once a matter is removed from Fast Track. There were no conditions placed upon the removal of the action from Fast Track by defence counsel. The circumstances did not meet the heavy onus of establishing a material change in circumstances.

D. Schroeder v. Sweeney, (unreported) August 27, 2014, Kelowna Registry No. M91827, Schultes, J

Mr. Justice Schultes overturned the Master's decision which was quoted in our paper last year addressing the location of a discovery when counsel cannot agree. The Master had found that where parties cannot agree that the "default position" is for the party to be discovered at that party's counsel's office.

Mr. Justice Schultes started his analysis with comment that it is the duty and responsibility of counsel to cooperate in matters such as this and that the litigation process is dependent on a high degree of cooperation between counsel.

His Lordship found that in the normal course, the party conducting the examination for discovery has the authority, subject to ultimate review by the court, to set the time and place of that examination. As long as there is compliance with the radius in subrule (11) subrule (13) for service of the appointment and payment of witness fees, there is a requirement on a party to comply.

The defendant was awarded costs in any event of the cause because plaintiff's counsel was unreasonable in his position.

XI. Experts

A. Birkich v. Cantafio, 2015 BCSC 2293, Betton J.

The plaintiff retained Dr. Apel to conduct an independent medical examination and subsequently ordered and served a copy of Dr. Apel's written report. During her examination of the plaintiff, Dr. Apel made a digital recording of her findings on examination. The digital recording was not maintained following the medical examination and was therefore not able to be produced to the defendant pursuant to the Rules.

The evidence before the trial judge was that the digital recording was nearly word for word repeated in the portion of her report titled "Physical Examination" (subject to minor editing for grammar and punctuation). The trial judge confirmed in the strongest terms that it is unacceptable for experts to fail to keep copies of all documents, including digital documents. Further, the trial judge suggested that instructions to that effect ought to be a part of every instruction letter to an expert.

B. Conseil scolaire francophone de la Columbie-Britannique v. British Columbia (Education), 2015 BCSC 1555, Russell J.

After it closed its case, subject to some small exceptions, the plaintiff sought to have a report admitted into evidence as a rebuttal report during cross examination of a defence witness. The report did not address an issue on which the defendant carried the burden of proof, nor was it responsive to an issue raised by the defendant during its case. The plaintiff argued the report ought to be admissible because it was dated after the plaintiff's case was closed, and there was no way for the plaintiff to reasonably anticipate it. That is not the test for admissibility of rebuttal reports. A consideration of whether a particular piece of evidence was available is a relevant question on an application to reopen a party's case, but the plaintiff confirmed they were not applying to reopen their case. The report was not admissible.

C. Hendry v. Ellis, 2015 BCSC 1186, Jenkins J.

The trial judge accepted the evidence of the plaintiff's doctor and found the evidence of the defence expert, Dr. Bishop, was not helpful. Dr. Bishop's evidence in *Hendry* was inconsistent with his evidence regarding medical principles at a previous trial, and Dr. Bishop failed to set out alternate theories in his written report. For example, "at trial he agreed the absence of an objective basis for pain does not invalidate pain but he did not say so in his report" (at para 27).

D. Pinch v. Hofstee, 2015 BCSC 1887, Burnyeat J.

In order to meet the requirement of Rule 11-6(1)(c), the actual instructions provided to the expert must be appended to the report that is tendered into evidence. It is not sufficient for the expert to paraphrase instructions or to repeat some but not all of the instructions.

E. Pitcher v. Brown, 2015 BCSC 1019, Betton J.

The plaintiff's expert had destroyed a portion of her notes and testing data as was required in the jurisdiction of South Dakota where she taught and practiced. The defence argued for a remedy to exclude the report under the doctrine of spoliation as well as *Rule 11-6*. However, Betton J. held that *Rule 11-6* provided full remedy for the situation such that resort to a consideration of spoliation was not required. One of the issues for the defence was that its own expert had been unable to fully scrutinize the opposing expert opinion without all of the information. Betton J. admitted the report despite the non compliance with *Rule 11-6* but ruled that the defence expert could be in attendance in court (virtually or otherwise) during the direct and cross-examination of the plaintiff expert and then consult with defence counsel. He would then permit the defence expert to provide new opinion evidence.

F. Preston v. Kontzamaniis, 2015 BCSC 2219, Parrett J.

The trial judge accepted the opinion of the plaintiff's expert, Dr. Hirsch, over the evidence of the defence expert, Dr. Hawk. Dr. Hawk expressed the opinion that the plaintiff had "largely recovered" from the soft tissue injuries he sustained. However, despite the fact that Dr. Hawk was requested by the plaintiff to attend trial for the purpose of cross examination, he was not produced at trial. Although Dr. Hawk's report was admitted into evidence, in the circumstances, the trial judge gave the report little weight.

G. Zhibawi v. Anslow, 2015 BCSC 1824, Williams J.

The plaintiff alleged she was injured as a result of a rear end accident. The trial judge accepted the defendant's evidence that he was travelling at about 3 km/h at the time of impact. The plaintiff Zhibawi was a passenger at the time of the accident. The driver's claim (*Andraws v. Anslow*) for personal injuries resulting from the accident was dismissed on the basis that Andraws failed to prove her claim.

In the *Zhibawi* action, the defendant submitted that the judge's determination should be "informed" by the result of in Andraws claim. Mr. Justice Williams declined to do so, holding that each claim proceeded to its own trial and was required to be adjudicated on its own merits.

The trial judge was critical of the plaintiff's expert evidence consisting of two medical reports by a family doctor, Dr. Zayonc, who admitted that he was never the plaintiff's treating physician. The trial judge noted that the majority of the independent medical exams performed by the expert were for other clients of the plaintiff's counsel. The trial judge considered it significant that the expert had never seen the plaintiff prior to the accident, and did not see her for 18 months following the accident. The expert did not have access to all of the clinical records; based his opinion substantially on subjective complaints; was plainly wrong about the period of total disability; and on cross examination, he agreed that he could not say conclusively that the plaintiff suffered a concussion, despite diagnosing a concussion in his written report. The trial judge attached very little weight to the expert's opinions.

XII. Freedom Of Religion

A. Mouvement Laique Quebecois c. Saguenay (Ville), 2015 SCC 16, per Gascon JJ. (McLachlin C.J., LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring) (Abella JJ. concurring in part)

The plaintiff, an atheist, attended public meetings of the municipal counsel of the city of Saguenay at which the mayor opened each meeting with a prayer and made the sign of the cross. One of the counsel's chamber rooms housed a Sacred Heart and another room housed a crucifix. The plaintiff asked the mayor to stop his practice of starting meetings with a prayer; the mayor refused. The counsel then passed a by-law regulating the recitation of prayer at the official openings of meeting. The plaintiff took the matter to the *Commission des droits de la personne et des droits de la jeunesse* ("Commission") and then to the Human Rights Tribunal seeking to have the by-law set aside on the basis that it infringed on his rights to freedom of conscience and religion pursuant to the Quebec Charter, and to have the by-law declared a breach of the state's duty of neutrality. The Tribunal declared the by-law invalid and awarded $30,000 to the plaintiff for compensatory and punitive damages.

The city was successful on appeal. The Court of Appeal held that the prayer expressed universal values and could not be identified with any particular religion. Incredibly, the Court of Appeal found that the Sacred Heart and crucifix were simply art, and were "devoid of religious connotation." The Supreme Court allowed the appeal. It was reasonable for the Tribunal to find that the City's opening prayer was a religious practice that excluded non-believers. This interfered with the plaintiff's right to freedom of conscience and religion. The state's duty of religious neutrality arises out of the concept that the state must not interfere with the public's beliefs. The state must instead remain neutral in respect of all beliefs, including non-belief. The award of damages was reasonable.

XIII. Independent Medical Examinations

A. Andjelic v. Quiambao, oral reasons for judgment, Vancouver Registry, 12 Feb, 2016, Master Muir

The defendant applied for an order compelling the plaintiff to attend a functional capacity evaluation ("FCE"). The plaintiff resisted the application on the basis that the plaintiff was unfit to participate in an FCE as a result of his condition, ankylosing spondylitis. The plaintiff also argued that the FCE was a second IME since the plaintiff had previously attended upon an orthopedic surgeon pursuant to Part 7 of the *Regulation*, and a psychiatrist at the request of the defendant. Additionally, the plaintiff agreed through his counsel to attend a defence assessment with a vocational expert, and he indicated through his counsel that he would not serve an FCE report.

The assessment with the orthopedic surgeon took place over three years prior to the application, and the master accepted the plaintiff's condition was totally different to what it had been. The master accepted the defendant's evidence that the FCE would inform the vocational assessment rather than duplicate or attempt to bolster the vocational assessment. The master also accepted the defendant's evidence that the occupational therapist proposed by the defendant had safely conducted many FCE's on clients with the same condition as the plaintiff, and that his practice was to work within the client's limitations. In terms of proportionality, the opinions expressed by the plaintiff's experts indicated that he was likely permanently disabled and would never return to work. The claim was a significant one. The order was granted.

B. Dzumhur v. Davoody, 2015 BCSC 1656, Master Muir

The defendant applied for an order compelling the plaintiff to attend an independent medical examination after the deadline for service of expert reports. Early in the litigation, the plaintiff served a physiatrist's in which the expert opined that if the plaintiff responded to the treatment, he should fully recover. Shortly before the deadline for service of expert reports, the plaintiff served an updated report which indicated he had not responded to the treatment as well as was hoped, and he would likely continue to suffer from his injuries. The defendant claimed to be taken by surprise after receiving the updated report.

Relying on *Luedecke v. Hillman*, 2010 BCSC 1538, defence counsel submitted as evidence: (1) his email to the proposed expert asking the expert to confirm whether he needed the plaintiff to attend in person for an IME and his reasons for requiring in person attendance; and (2) the expert's responding letter confirming the same.

The master concluded the defendant's evidence did not satisfy the requirements of *Luedecke*. Counsel's letter to the expert did not make it clear that the opinion sought would be limited to

opinions responding to the plaintiff's reports. Further, the master was not satisfied that the defendant could be said to have been taken "completely by surprise" by the opinions expressed in the updated report. At the time of the first report, the possibility existed that the plaintiff may not respond as well as anticipated to the treatment plan, the master concluded that the defendant must be taken to have accepted that risk without obtaining its own IME.

C. Falbo v. Ryan, 2015 BCSC 2452, Master Harper

The defendant applied for an order compelling the plaintiff to attend an IME for a functional capacity evaluation after the plaintiff served two FCE reports. The 84 day deadline for exchange of reports had passed. Although the defendant submitted evidence from the occupational therapist attempting to justify the need for an in person IME, the master was not convinced. The master referred to *Timar v. Barson*, 2015 BCSC 340, agreeing with Mr. Justice Smith who said that IMEs for responsive reports should be rare. The master did not accept that the defendant could reasonably have been surprised by the subject matter of the two reports, and in any event, the master was not convinced that an in person IME was necessary for a responding report.

D. Gawlick v. Lim, 2016 BCSC 526, Master Muir

Master Muir ordered a second IME with a physiatrist, Dr. Waseem, after the plaintiff had attended an IME with an orthopedic surgeon, Dr. McPherson, in June 2013. The plaintiff had also undergone a functional capacity evaluation and a vocational assessment. After seeing Dr. McPherson, the plaintiff was diagnosed with thoracic outlet syndrome. The plaintiff argued that the second IME should not be allowed as it was simply an attempt to bolster the opinion of Dr. McPherson and there may not be enough time for the plaintiff to respond. Master Muir acknowledged that the "hurdle is high" particularly where there is some overlap in the expertise of the IME physicians. She ordered the IME because the objective was to ensure reasonable equality between the parties and although it is not to match expert for expert, the IME was necessary to ensure both parties are fairly able to advance their case at trial.

In making the order, Master Muir stated:

> [24] I am satisfied by Dr. Waseem's evidence that the diagnosis of thoracic outlet syndrome is a potentially significant new development. That is a factor of significance in the authorities. This is a new development that obviously could not have been addressed by Dr. McPherson in his report. Although the chronic pain was perhaps evident at the time of Dr. McPherson's examination, he did not comment on it and it appears that Dr. Waseem has considerably more expertise in this area. Dr. Waseem's evidence satisfies me that his examination would break new ground in this regard as well.
>
> ...
>
> [26] Given the distinctions between the investigations to be conducted by Dr. Waseem and what has been done by Dr. McPherson, although, yes, there is some overlap, I am satisfied that the new independent medical examination is warranted in all the circumstances and the order is granted.

The case underscores the importance of supporting the application with thoughtful affidavit evidence. Master Muir quoted extensively from the affidavit of Dr. Waseem which addressed the differences between his practice and that of Dr. McPherson.

E. Gee v. Basra, 2015 BCSC 2495, Master Harper

The defendant sought an order compelling he plaintiff to attend an independent medical examination with a neurologist. The plaintiff resisted the application on the basis that it was a second IME, and the issue of headaches sought to be addressed by the neurologist had been fully dealt with by the orthopaedic surgeon.

Although the instruction letter to the orthopaedic surgeon sought his opinion as to the plaintiff's orthopaedic injuries, it also asked whether the plaintiff had been rendered disabled, in whole or in part, as a result of "any injuries sustained". The orthopaedic surgeon offered opinions as to the cause and treatment for the plaintiff's headaches and in particular, although he commented that the opinion of a neurologist would be "of value", he did not indicate that the subject was outside of his area of expertise. In the circumstances, the application was dismissed.

F. Monahan v. Yang, 2015 BCSC 999, Tindale J.

The defendant sought an order compelling the plaintiff to attend a second independent medical examination with an orthopaedic surgeon. The defendant's first IME was with a Dr. Moll, a neurologist. The defendant's application was dismissed on the basis that Dr. Moll had already provided opinions regarding diagnosis, prognosis, and causation with respect to all of the plaintiff's neurological complaints, and her musculoskeletal complaints. A second IME by an orthopaedic surgeon would only serve to bolster Dr. Moll's report.

G. Nieman v. Joyal, 2015 BCSC 1980, Master MacDiarmid

The defendant sought an order compelling the plaintiff to attend an independent medical examination. At the hearing, the plaintiff agreed to attend, and the issue before the master was the appropriate level of compensation for mileage to the appointment.

The defendant relied upon Schedule 3 of the tariff which sets the rate at 30 cents per kilometer for conduct money for examination of a witness. The defendant argued that the independent medical examination was "an examination" pursuant to Schedule 3.

The master reviewed various cases, including cases in which plaintiffs were awarded 50 cents per kilometre for travel to their own appointments. The master considered that Rule 7-6 permits the court to make an order regarding expenses associated with independent medical examinations, and that specific reference was not made to Schedule 3 of the tariff. The master held that there was no difference between the reasonable expenses of a plaintiff attending on his own doctor and the plaintiff attending an independent medical examination. Compensation was ordered at 50 cents per kilometre.

H. Norris v. Burgess, 2015 BCSC 2200, Funt J.

The plaintiff attended a psychiatric IME at the request of the defence. The defendant chose not to obtain a medical report from the psychiatrist and advised the court that the psychiatrist would not be called to give any evidence. The defence provided a copy of the psychiatrist's notes relating to the IME.

In the course of the jury trial, Mr. Justice Funt was asked to rule on whether the plaintiff could testify that she had attended the IME and about the surrounding circumstances. The plaintiff argued that this evidence was relevant to show, among other matters, that she had not exaggerated her

injuries as the defence was arguing. Further, that the factual basis of the IME was relevant in order to argue an adverse inference in closing submissions if the evidence at trial warranted such an argument.

The judge ruled in the plaintiff's favour saying:

> [16] Civil Litigation is adversarial and litigant-driven. Where one party asks that the other party attend an interview or examination with a third person (whether or not that person is an expert) and the other party so attends, the requesting party should not be surprised that the interview or examination may be relevant with evidentiary consequences, including the possibility of an adverse inference. An unwanted but foreseeable consequence does not give rise to unfair prejudice.

I. Resendes v. Ganovicheff, oral reasons for judgment, 2015/11/05, Master Keighley

The defendant applied for an order compelling the plaintiff to attend an IME with an orthopedic surgeon. The plaintiff resisted the application on the basis that he had previously attended a part 7 IME with a different orthopedic surgeon about three years prior. The plaintiff also argued that if a further IME was warranted, then it should be with the original orthopedic surgeon.

The focus of the part 7 IME was primarily the plaintiff's left knee; however, a "new" issue had arisen with respect to the plaintiff's right shoulder which could not have been properly addressed at the first examination. In addition, there were new issues that arose following surgeries on the left knee that occurred after the initial examination. In the circumstances, the order was granted.

J. Stene v. Echols, 2015 BCSC 1063, Holmes J.

The plaintiff alleged soft tissue injuries to her neck and back and neurological injuries causing her to develop thoracic outlet syndrome. The plaintiff attended an IME with a neurologist, Dr. Dost, at the request of the defence in October 2013 (without a court order but which was made clear by plaintiff's counsel was to be considered a first IME for the purposes of *Rule 7-6*). The defence sought a further IME with a physiatrist, which application was initially denied as being premature since the plaintiff had not served any expert reports. The defence renewed the application after receipt of eight expert reports. The application was again denied by a master and then allowed on appeal before Madam Justice Holmes for the following reasons:

> [16] Ms. Stene submits that Mr. Echols failed and fails now to meet the necessary threshold for a further IME because nothing about her accident-related injuries or her circumstances has changed in a material way since Dr. Dost's IME. She submits that her injuries had crystallized by the time of that examination, and that Dr. Dost's report addressed them and indeed joined issue with one or more of Ms. Stene's own experts by disagreeing with the diagnosis of thoracic outlet syndrome. Ms. Stene submits that any further IME would be about exactly the same "matter" as has been addressed through the first IME, namely her injuries.
>
> [17] In my view, where, as here, the injuries in question are multi-faceted, creating a "mixed picture", the "matter" in issue is more nuanced than this submission assumes. The matter is not simply the fact of the injuries. It also encompasses their medical characterization. This is particularly so in circumstances where, as here, causation is in issue, and where Ms. Stene claims in respect of two separate accidents. Ms. Stene's claim against Mr. Echols, which relates to a motor vehicle accident in July 2010, is to be tried at the same time as her claim against a different defendant in respect of an accident in February 2012.

> [18] In my view Ms. Stene's own expert reports, asserting as they do a mixed picture of injuries including injuries which are clearly outside Dr. Dost's field of expertise, provide the necessary basis for a further IME. Without an IME by a physiatrist, Mr. Echols will be without evidence concerning an important aspect of Ms. Stene's injuries.
>
> [19] This is not a case where a further IME can add nothing to the first. The conclusions in many of the authorities on which Ms. Stene relies therefore do not assist. See, for example, *Hamilton*, at para. 22; *Christopherson v. Krahn*, 2002 BCSC 1356 at para. 14; and *Koulechov v. Dunstan*, 2015 BCSC 393 at para. 6.

K. Stoker v. Osei-Appiah, 2015 BCSC 2312, Pearlman J.

The defence applied to have the plaintiff undergo a functional capacity evaluation and vocational assessment. In the action, the plaintiff claimed damages for multiple injuries including injuries to his face, neck, shoulder and low back, headaches and depression. He also claimed to be disabled from his position as an IT installer and repairer. At the time of the application, he had not worked in over three and a half years. The plaintiff testified on discovery that he could not return to any work in any capacity.

Prior to this application, the defence had the plaintiff assessed by a psychiatrist and orthopaedic surgeon. Neither of their reports was before the court on the application. However, the evidence revealed that each was asked to provide opinions on whether and to what extent the plaintiff was restricted or disabled regarding employment or activities of daily living.
The plaintiff's employer had a functional capacity evaluation conducted which revealed significant limitations and impairments. The court held that since the defence had been in possession of that report at an early stage, it was suitably put on notice that the plaintiff's functional capacity, both at home and in the workplace, was in issue. Pearlman J. held that the defendant chose to have an examination conducted by an orthopedic surgeon at a time when she knew the plaintiff's functional capacity was in issue.

In the end, Pearlman J. found that the defendant had not shown that some question or matter that could not been dealt with in the earlier examination now exists that would warrant the functional capacity examination sought.

However, the vocational assessment was allowed as it was not a matter that could have been dealt with in the earlier examinations. Taking into account the significant amounts involved in the plaintiff's claims for past and future loss of earning capacity and the importance of the issues raised by those claims to both parties, Pearlman J. was persuaded that in the circumstances of this case, the further examination of the plaintiff by the defence vocational consultant was necessary to ensure reasonable equality between the parties in trial preparation.

L. Thandi v. Higuchi, 2015 BCSC 2366, Master Harper

The defence unsuccessfully applied for an IME with Dr. Dost, neurologist, where injuries claimed were soft tissue in nature with headaches. The plaintiff had previously been assessed at the request of the defence by Dr. Loomer, an orthopaedic surgeon. No report was produced from that assessment and was not before the court. The plaintiff had also agreed to attend a functional capacity assessment for the defence.

Master Harper found that the evidentiary burden to establish that a neurological IME was necessary to put the parties on equal footing had not been met. The major impediment to the

defendant's application was the absence of Dr. Loomer's report. Without it, the court could not assess whether the medical issues that involve neurological complaints were addressed by Dr. Loomer, could have been addressed by Dr. Loomer, or whether Dr. Loomer declined to opine on any neurological complaints because it was outside his area of expertise.

XIV. Insurance

A. Felix v. Insurance Corporation of British Columbia, 2015 BCCA 394, per Bennett J.A. (Saunders and Stromberg-Stein JJ.A. concurring)

This case determined that a passenger in a vehicle is an insured under the *Insurance (Motor Vehicle) Act Regulations* [now the *Insurance (Vehicle) Act].* The Court examined the statutory interpretation of who constitutes a "user" and what constitutes "use" of a motor vehicle the former sections 63 and 64 of the *Insurance (Motor Vehicle) Act Revised Regulations.*

Ms. Felix was driving her vehicle with her intoxicated and belligerent boyfriend when he grabbed the steering wheel, causing the car to crash. She was seriously injured and her boyfriend was killed. She successfully sued his estate, ICBC taking no part in the defence. She then sued ICBC for indemnity under section 64.

At trial, the judge held that "use" in sections 63 and 64 was broad enough to cover the passive use of a vehicle by a passenger as a means of conveyance. He also found that not finding "use" in these circumstances would have a chilling effect on the "designated driver, the person who remains sober and drives the drunks, reducing accidents caused by drinking and driving". In addition, the causation test was met because the passenger's negligent conduct was directly related to use "use" of the motor vehicle as a passenger.

However, the trial judge held that his finding on "use" was incompatible with section 66 which extends indemnification to passenger in a vehicle who causes injury or death to a person not occupying a vehicle. He concluded that his interpretation would render s. 66 redundant and therefore in conflict with accepted terms of statutory interpretation. In the result, he concluded that the passenger did not "use" the vehicle within the meaning of s. 64 and dismissed the action.

On appeal, the court held that the legislation must be considered in the context of the legislative scheme to "provide a universal, compulsory insurance program... and access to compensation for those who suffer losses" from motor vehicle accidents. Citing *Amos v. ICBC,* [1995] 3 S.C.R. 405, *Stevenson v. Reliance Petroleum Ltd.,* [1956] S.C.R. 936, *Citadel General Assurance Co. v. Vylingam,* 2007 SCC 46 and *Lumbermens Mutual Casulaty Co. v. Herbison,* 2007 SCC 47, the court concluded that the concept of "use" when it refers to use of a motor vehicle is broadly defined and that being a passenger in a motor vehicle is an "ordinary and well-known" use of a vehicle. A passenger in a motor vehicle "uses" the motor vehicle when he or she is being transported from A to B.
The court similarly agreed with the trial judge that here was a clear unbroken chain of causation from the passenger's negligent act to Ms. Felix's injuries.

Finally, the court clarified that s. 66 does not preclude a finding of coverage in this case. Section 66 was enacted before the 2001 amendment adding "use" to the definition of "insured". The addition of "use" is clearly to add broader covered in order to address a situation not covered by s. 66, including coverage for a person who is an occupant of the vehicle.

B. Venkataya v. Insurance Corporation of British Columbia, 2015 BCSC 1583, Voith J.

The Insurance Corporation of British Columbia was unsuccessful in establishing that the plaintiff had breached the conditions of his policy of insurance by (1) consuming a traditional Fijian drink called Kava; and (2) providing a wilfully false statement indicating that he had not consumed any drugs or alcohol in the 12 hours prior to the Accident. The defendant's position was not supported by the evidence, but rather, was based on mere suspicions.

The officer who attended the scene reported that the plaintiff had difficulty standing and walking, was unable to speak clearly or understand what was being said to him, he also vomited profusely at the scene of the accident and again at the police station. The evidence was that the plaintiff had consumed one small bowl of Kava, and that such a portion would not result in the effects the plaintiff was experiencing.

The defendant attempted to establish that Kava was an intoxicating substance by relying on the evidence of a police officer who had observed others drinking Kava, but he admitted he had never consumed Kava himself. His evidence was found to be "fragile and unreliable." The defendant also called an expert witness, Dr. McNeill, a pharmacologist. The weight given to Dr. McNeill's report was affected by the fact that many of the assumptions and facts he relied upon were not placed into evidence. Further, he relied upon various internet articles, including Wikipedia, regarding the drink itself. The evidence did not establish that Kava was an intoxicating substance, and the trial judge did not consider that the plaintiff had made a wilfully false statement to the defendant.

XV. Juries

A. Gill v. Mijatovic et al., 2016 BCSC 239, Davies J.

The decision provides a convenient summary of the law surrounding an application to extend the time for filing a jury notice. The defendants on this application were unsuccessful in their attempt for a late jury notice. The defence had attempted to rely on a jury notice filed out of time. When the plaintiff's counsel immediately advised that the jury notice was a nullity, defence counsel responded tersely that they did not agree to withdraw it. The defence did not then apply to extend the time for filing but went on to pay the jury fees before trial. The 14-month delay in failing to apply for an extension of time after being advised that the notice was a nullity was unexplained and fatal to the application.

B. Harder v. Poettcker, 2015 BCSC 2180, Sigurdson, J.

A jury rendered a verdict following deliberations, awarding the plaintiff nothing in non pecuniary damages, special damages of $1,600, $3,500 for past loss of housekeeping and nothing for future care. The trial judge found that this was an inconsistent award pursuant to *Balla v. ICBC*, 2001 BCCA 62. Sigurdson J. ordered a retrial based on the evidence already presented before him, including a retrial on liability.

C. Rados v. Pannu et al., 2015 BCCA 459, per Harris J.A. (Bennett and Fenlon JJ.A. concurring)

This was an appeal of an order refusing to strike a jury notice where a personal injury matter involved a traumatic brain injury; vestibular injury; various musculoligamentous and other physical injuries; and a major depressive disorder. The plaintiff anticipated calling 19 expert witnesses, four

treatment providers and 14 lay witnesses. The plaintiff served 31 medical-legal reports and two economic reports. The defendants had seven medical-legal reports for a trial total of 40 expert reports, totalling 700 pages. The trial was anticipated to take eight weeks.
The chambers judge concluded that the issue was "close to the line" but also that plaintiff's counsel had overstated the nature and complexity of the inquiries arising from the evidence. The chambers judge found that it will be a "hard" case for a jury which will have to make difficult decisions. However, it was not so intricate or complex so as to exceed the jury's capacity to arrive at a just and proper determination of the case.

The decision was upheld on appeal. Harris J.A. emphasized that the onus is on the applicant to displace the presumptive right to a jury and that decisions on this point attract considerable deference from the appellate court. In addition, while other similar cases assist in assessing whether discretion has been exercised judicially, the analysis does not begin and end with adding up the number of experts, medical issues, reports, pages or the length of trial. They are factors but not determinative. Here, the judge delved deeply into an analysis of the factual circumstances and exercised his discretion based on this assessment of those circumstances. In that regard, the court rejected the plaintiff's argument that the decision set the bar too high and much higher than had previously been the case in this province.

XVI. Master's Jurisdiction

A. Badreldin v. Swatridge, 2015 BCSC 1161, McEwan J.

Mr. Justice McEwan overturned this case reviewed in our paper last year.

Master Harper had ordered the plaintiff to pay $25,000 as a sanction for having failed to fully comply, in a timely way, with a consent order for production of documents and information relating to the plaintiff's claim for economic loss and special damages. The order was made because Master Harper felt that a dismissal of a portion of, or the whole of, the plaintiff's claim as sought by the defendant was too draconian but an order for costs was an insufficient sanction.

The order was overturned because the Master lacked the jurisdiction to make the order. *Rule 27-7(2)(e)* is limited to facilitating determinations on the merits and sanctions encroaching on merits undermine that objective. In linking the sanction to the estimated value of the claim and in saying that it would apply as an offset against the judgment, the Master altered the balance between the litigants which is not the purpose of interlocutory proceedings. There was no other rule authorizing sanctions beyond costs. There is no notion that distance between costs and dismissal represents a "gap". As put by Mr. Justice McEwan:

> [22] The sanction of dismissal hovers over non-compliant behaviour until it must be imposed in the interests of justice. Short of that, adjustments between the parties are addressed as collateral matters of costs, not as matters touching the merits.

XVII. Negligence

A. Borgjford v. Thue, 2015 BCSC 1917, Rodgers J.

The plaintiffs were passengers injured in a motor vehicle accident between three vehicles travelling the same direction on the Coquihalla Highway in circumstances where various vehicles were attempting to overtake tractor trailer units.

At the scene of the accident, Larson Hill, there were three lanes for southbound traffic. The speed limit was 110 km/h. Just prior to the accident, the following arrangement of vehicles were on Larson Hill: an Arrow tractor trailer unit with two trailers was in the right most lane travelling at approximately 25 km/h; a tractor with a single trailer was travelling in the middle lane at approximately 70 km/h; the defendant Boizard was driving a truck with a camper at approximately 80-85 km/h in left most lane; and the witness Mrs. Parry who was driving a Hyundai Santa Fe which began in the middle lane and then moved to the left most lane to follow Mrs. Boizard who was passing the single tractor trailer unit.

The plaintiffs were passengers in a Suburban driven by 18 year old Mr. Thue. When she was in the left most lane behind the Boizard truck and camper, Mrs. Parry observed the Suburban behind her in the left most lane gaining on her quickly. She decided to move back into the middle lane to allow the Suburban to pass the tractor trailer in the middle lane. The Suburban passed Mrs. Parry on her left, but then cut in front of her rapidly and moved to the right most lane. The Suburban was attempting to pass the tractor trailer in the right most lane when the Suburban struck the rear of the Arrow tractor trailer unit. The plaintiffs were ejected from the Suburban.

There was no question that Mr. Thue was negligent and liable for the accident. The question at issue was whether Mrs. Boizard was also partially at fault for the accident.

Mrs. Boizard gave evidence that she typically drove the truck and camper at about 90 km/h for safety reasons. It takes longer to stop because it is heavy, and the height of the camper makes it susceptible to winds. She knew that the truck and camper was capable of going up Larson Hill faster than 80-85 km/h and she acknowledged that other vehicles often passed their camper at higher rates of speed.

The plaintiffs and the defendant Thue argued that Mrs. Boizard was negligent in two ways: first, she impeded traffic by moving into the left most lane to pass the tractor trailer unit at a relatively low speed; and second, she should not have moved into the left most lane or stayed in the left most lane because she knew or ought to have known that the Thue vehicle was approaching quickly behind her.

The trial judge found that the standard of care required a reasonable and prudent driver to overtake the tractor trailer in the middle lane as quickly as reasonably possible. In choosing to drive at a lower rate of speed, she blocked the left most lane for longer than was reasonably necessary. The trial judge found that Mrs. Boizard's negligence was a cause of the accident because in order for the accident to happen the way it did, it was necessary for Mrs. Boizard to be blocking the left most lane. She was not negligent for having moved into the left most lane; the trial judge found as a fact that the Suburban was not yet in her view at the time she made her lane change. The parties agreed to leave the determination of relative fault for a later date. The possibility for contributory negligence on the part of the plaintiffs was not considered in this trial and therefore the trial judge could not apportion fault.

B. Paur v. Providence Health Care et al., 2015 BCSC 1695 Griffin J.

This action arose out of the plaintiff's emergency admission into St. Paul's Hospital during which he suffered a brain injury when he attempted suicide by hanging in a bathroom. The plaintiff was certified under the *Mental Health Act* by the ER physician for suicidal thoughts. He was intoxicated and the treatment plan was to hold him overnight while he sobered up. His suicide risk could then be assessed. He was kept in an area of the ER where patients could be closely watched by nurses. When two nurses were on duty and the third was on a break, he went into the bathroom and hung himself by his hospital gown. Some minutes later, one of the nurses investigated and discovered that the door was locked. The nurses struggled unlock the door and then discovered the plaintiff unconscious.

Despite finding St. Paul's Hospital negligent, the trial judge extended the following comment:

> As for the nurses, it cannot be forgotten that but for their intervention, Mr. Paur might be dead. It had to be extremely upsetting to them to have this incident occur. Their profession, and chosen place of work, the ER at SPH with a high mix of distressed mentally ill patients, is extremely challenging. Nurses in such a setting deserve admiration for the services they give to people in need.

However, Griffen J. held that the standard of care was not met by St. Paul's on the following bases:

(a) as part of its patient mix, SPH had a large number of suicidal, intoxicated patients treated in the ER who were certified and held involuntarily, many of them held in the Comox Unit;

(b) SPH knew or ought to have known of the real risk that a suicidal, intoxicated certified patient might attempt suicide by hanging in the hospital;

(c) SPH knew or ought to have known that the bathroom in the Comox Unit was unsafe for such a patient as the bathroom had not been made ligature-proof;

(d) SPH knew or ought to have known that the risk to a patient who attempts hanging is a very grave risk, as serious irreversible brain damage can be done to the patient quickly, within the range of five minutes, and the hanging can be fatal beyond ten minutes; and

(e) SPH had no policies or protocols for nursing staff in place to ensure that such patients were not permitted to be unmonitored in an unsafe locked bathroom for a period of time approaching five minutes or more.

C. S.H. v. A.M., 2015 BCSC 2400, Burke J.

The parties requested a hearing on a point of law pursuant to Rule 9-4 on the issue of whether a defendant could be held liable for a motor vehicle accident caused when he was in a severe psychotic state.

In order to succeed on a defence of no negligence, the defendant was required to provide that, as a result of mental illness, he had no capacity to understand or appreciate the duty of care at the relevant time or had no meaningful control over his actions. The plaintiff conceded this point based on the police and expert psychiatric evidence. The plaintiff's focus on the application was whether the onset of the incapacity to control his actions was foreseeable and whether reasonable steps could have been taken to prevent it: *Fiala v. Cechmanek*, 2001 ABCA 160; *Hagg v. Bohnet* (1962) 33 D.L.R. (2d) 378 (BCCA).

The nub of the dispute was whether the nature of the defendant's paranoid schizophrenia was such that when he began to experience signs of psychosis, he had the capacity to discern they were signs of this mental illness and thereby had a foreseeable duty to prevent the onset of the psychotic

episode. There was conflicting evidence on this issue. In order to reach a determination on this issue, Bruke J. found that she would have to weigh the evidence and make factual findings, an exercise which is impermissible under *Rule 9-4*. In the end, the application was dismissed with the issue to be determined at trial.

D. Thompson v. Corp. of the District of Saanich, 2015 BCSC 1750, Baird J.

The plaintiff was enrolled in a summer camp at which children had free time to play outside in a playground throughout the day. During free time on the playground, the plaintiff, age 11, joined other children in a game called "grounders". During the game she tripped and fell from a higher platform to a lower platform of a piece of playground equipment, striking her head. The game was chosen by the children and not organized by the District. The plaintiff had played grounders the day before the accident and on many occasions previously.

The District owed the plaintiff a duty of care not to expose her to an unreasonable risk of foreseeable harm. Grounders is a game of tag played on a piece of playground equipment. The child who is "it" is on the ground attempting to tag children who are on the playground equipment. If the child who is "it" climbs on to the equipment, the child must close her eyes; if a child who is trying to avoid being tagged steps onto the ground, the children yell "grounders" and that child becomes "it." There was a District employee supervising the playground at the time of the incident. The evidence was that he joined in on the game for a time prior to the accident.

The plaintiff alleged that the game was inherently dangerous and the District employees should not have permitted it to be played, or in the alternative, the game should not have been played on the particular playground equipment in question. The District argued that grounders had been played for years in Saanich playgrounds and was not unreasonably risky. The District pointed to their excellent safety record and social evidence discussing the benefits to children of physical activity and risk-taking within reasonable limits.

The trial proceeded on a summary basis and the court dismissed the plaintiff's claim. The trial judge found that while grounders and other games like it involving chasing, running, jumping, and tagging involve some risk, it was not an unreasonable risk considering the plaintiff's age and experience. The supervision provided was suitable. The District's obligation was not to remove every possible risk of harm, but to prevent unreasonable risk of harm.

Agony of Collision

A. Ackley v. Audette, 2015 BCSC 1272, Skolrood J.

In this case, the agony of the moment argument was rejected.

The plaintiff, a 19-year old, was drunk and hanging around a Subway restaurant. He made derogatory remarks about the defendant's appearance who was on his way into the restaurant. Words were exchanged between the two inside and outside of the restaurant and the plaintiff followed the defendant out of the restaurant and to his car appearing to want to fight. The defendant ended up running over the plaintiff. The defendant testified that he had not intentionally struck the plaintiff but was just trying to get away from him.

In rejecting the agony of the moment argument his Lordship said:

> [135] In my view, these cases are distinguishable. In the present case, while Mr. Audette was no doubt frightened and intimidated by Mr. Ackley, by the time Mr. Audette was in his car with the door closed, any imminent threat had subsided. Moreover, while I accept his evidence that he was intending to leave the scene and escape Mr. Ackley, the evidence did not establish that proceeding as he did was the only course of action open to him. Mr. Audette did testify that the exit from the parking lot was in the direction that he intended to drive, but there was no evidence establishing that there was no other available route to that exit. For example, there was no evidence that Mr. Audette was blocked from backing up his vehicle further and thus avoiding the need to drive through the parking stall and around Mr. Ackley in order to exit. Based on the evidence, there was no emergency compelling him to act quickly or drive towards that exit.

B. Graham v. Carson, 2015 BCCA 310, per Savage J.A. (Donald and Newbury concurring).

A cyclist was injured when he had to brake and steer to the right to avoid traffic that suddenly stopped as a consequence of another vehicle driven by the defendant, Carson, pulling into traffic too quickly and without using her signal throwing two other drivers into "disarray". The cyclist, in attempting to steer around the suddenly stopped vehicles, struck his elbow on the mirror of a parked car and fell to the ground. The trial judge found that the cyclist "had a matter of seconds to decide what to do" and that in the emergency situation, could not be expected to have exercised his judgment perfectly. Liability rested solely with Carson.

The defendant appealed arguing, *inter alia*, that the plaintiff was contributorily negligent in passing to the right, contrary to s. 158 of the *Motor Vehicle Act*. That argument was rejected because the evidence established that the plaintiff's steering to the right was not an attempt to pass but was an evasive movement.

The appellant argued that the "agony of the moment cases" are restricted to instances where the motor vehicles are operated at highway speeds. The court of appeal disagreed. The principle that a court does not judge with the benefit of hindsight or expect perfection in decision making in emergent circumstances applies equally to the operation of vehicles and bicycles at lesser speeds on busy city streets.

Contributory Negligence

A. MacKay v. Julley, 2015 BCSC 1114, Kent J.

The plaintiff lived with his wife in a rental property owned by the defendant. On the evening in question, the intoxicated defendant drove to the plaintiff's residence with a metal pipe for the purpose of assaulting the plaintiff. The defendant attempted to strike the plaintiff by swinging the pipe through a window, and then the defendant proceeded to the back of the residence. The plaintiff exited the residence unarmed and approached the defendant. The defendant struck the plaintiff with the metal pipe. Following the incident, the defendant was convicted of (1) assault using a weapon; (2) assault causing bodily harm; and (3) uttering a threat to cause death or bodily harm.

The trial judge concluded that the criminal conviction conclusively established the facts necessary to prove the elements of civil assault and battery. However, the trial judge held that the issue of contributory negligence was open to be considered. The trial judge concluded that the plaintiff ought not have left his home when the defendant was outside with a weapon, as doing so presented

an unreasonable risk of harm. The plaintiff's disregard for his personal safety did not approach the level of fault of the defendant; the plaintiff's fault was assessed at 15%.

B. Robinson v. Bud's Bar, 2015 BCSC 1767, Sigurdson J.

Liability and damages were at issue following a drunken confrontation which left the plaintiff badly injured. At the start of the trial the action was dismissed by consent against the bar. The defendant brothers were walking home shortly after 2 am following a bachelor party. The groom-to-be was intoxicated, but not wildly so. His brother was sober. As part of the celebrations, the groom to be was dressed in women's clothing and he was wearing a ball and chain around one ankle. The plaintiff had been at the same bar as the defendant, and was also intoxicated and walking home with friends.

The plaintiff ran to catch up with the defendant brothers and stood in front of the groom-to-be. He was a smaller man than the groom. The plaintiff insulted the defendant making disparaging comments about his clothing and his plans to marry. The groom's brother walked away, thinking the groom would follow him. The groom asked the plaintiff to leave him alone but the plaintiff continued to invade the defendant's personal space and insult him. The plaintiff's friends called for him to leave with them, and he did not. The groom pushed the plaintiff and the plaintiff fell back, hitting his head. The trial judge found that the push was "sudden and somewhat forceful."

The trial judge found that groom, a larger man than the plaintiff, "abruptly and carelessly" pushed the plaintiff resulting in the plaintiff falling. He found that the groom did not use reasonable care in the manner that he moved the plaintiff, and therefore was liable in negligence. The defence of self defence was not applicable as the trial judge found there was no threat of harm to the groom.

The plaintiff was guilty of provoking the groom, and was contributorily negligent. His persistent teasing using foul language, invading the groom's personal space, and refusal to move despite requests from the groom and from the plaintiff's own friends were ignored. He was intoxicated. He had an opportunity to leave the situation before the push happened. The plaintiff's damages were reduced by 30%.

XVIII. Offers to Settle

A. British Columbia v. Salt Spring Ventures et al., 2015 BCCA 343, per Bennett J.A. (Smith and Groberman JJ.A. concurring)

This case illustrates the discretionary nature of a costs award and the deference shown by the Court of Appeal to a trial judge's exercise of that discretion. The case involved an action by the Province against the defendants for diversion of water and resulting damages, and was dismissed.

The defendants made an offer to settle on terms that: the Province discontinue the action by way of a consent dismissal; costs on Scale B be awarded to the defendants; and that the defendant discontinue some third party notices in some related actions.

Considering the factors of Rule 9-1(6), the trial judge found:

(a) Salt Spring Ventures' offer was not one that ought reasonably to have been accepted by the plaintiffs since it represented no real compromise. Rather, Salt Spring Ventures was offering to settle on the basis of what they would achieve if they were fully successful;

(b) terms of the offer reflected the result at trial, which favoured Salt Spring Ventures.

(c) 9-1(6)(c) was a neutral factor as nothing suggested that the Province used a superior financial position in an oppressive or unfair way.

(d) regarding 9-1(6)(d), there were no other case-specific factors.

On the basis that the terms of the offer reflected the result at trial, the defendants were awarded a single set of costs with double costs for ten days of trial. On appeal, the Province argued that the award of double costs was inconsistent with the finding that the offer was not one that ought reasonably to have been accepted.

In her reasons, Bennett J.A. emphasized that the factors enumerated in 9-1(6) are independent factors which may be considered in silo. The weight to be given to any one of the factors is within the discretion of the trial judge who, having heard the evidence and argument, is in the best position to determine the appropriate costs consequences. Here, the trial judge did not award double costs from the date of the offer but only for the ten day trial and the court concluded that there was no error in her so doing.

B. Grieve v. Bennett et al., 2015 BCSC 899, Steeves J.

The parties argued costs following a jury trial in which the plaintiff was awarded $140,300. The defendant had made a formal offer to settle in the amount of $196,390 before trial.

The plaintiff argued that awarding costs to the defendants from the date of their offer would thwart the clear intention of the jury because it would reduce the amount available to the plaintiff by approximately $80,000 (consisting of $54,000 costs to the defendant and depriving the plaintiff of costs for the same period). Steeves J. held, however, that the jury does not and cannot have a role in determining costs. Their role is to assess damages. Costs were awarded to the defendants from the date of the offer onward.

C. Gupta v. Doe et al., 2015 BCSC 1688, Jenkins J.

The plaintiff was awarded $43,299.62 in damages for three accidents following a nine day trial. The defendants made three formal offers before trial, starting at $90,000 and ending at $164,000. Liability had been admitted early for two of the accidents. ICBC has alleged fraud for the remaining accident but then admitted liability shortly before trial. The plaintiff's credibility was a key issue at trial and she was found to have withheld evidence regarding her claims for significant income loss.

Jenkins J. held that the first formal offer of the defence ought reasonably to have been accepted and that her concealment of evidence most likely led the defence to increase its offers. She was therefore awarded full costs for all three actions up to the date of the first offer.

However, the court looked unfavourably on the unproved and abandoned allegation of fraud in respect of the hit and run accident. He held that such allegations should never be made without serious consideration by ICBC of its ability to provide the allegations. Although liability was admitted shortly before trial, the evidence revealed that the allegation should not have been made in the first instance. As a result, ICBC's cost entitlement was reduced to 75% of one set of costs after the first formal offer.

D. Kostinuk v. Fellowes, 2015 BCSC 2327, Brown J.

The plaintiff was awarded double costs after a six day trial. She made an offer three days before trial in an amount approximately $17,000 less that the judgment. In concluding that the offer was one that ought reasonably to have been accepted, Brown J. held that the defence was conducted by the insurer who was well able to assess the risks of proceeding to trial. The insurer did so knowing that it could be exposed to an award of double costs should Mr. Kostinuk succeed.

E. Loft v. Nat, 2015 BCCA 418, per Smith J.A. (Wilcox and Savage JJ.A. concurring)

This is the second Court of Appeal decision on costs in this case. The underlying action involved a personal injury claim in which the plaintiff sought damages of $3 million. The trial judge awarded the plaintiff $62,900 in total damages and granted costs of the action to the defendants. The plaintiff appealed both the damages and costs awards. This Court dismissed the appeal on damages but allowed the appeal on costs, remitting the matter back to the trial judge for a further determination.

At the rehearing which was summarized in the 2015 CLE Case Law Update, the trial judge found that the defendants' offers to settle ought not reasonably to have been accepted by the plaintiff because of his personal circumstances. They included the timing of the offers and his involuntary hospitalization under the *Mental Health Act*. The judge also found that the offer was uncertain for its inclusion of a term that ICBC first pay arrears for support the plaintiff owed under the *Family Maintenance Enforcement Act*. The judge concluded that neither party was substantially successful and ordered that both parties bear their own costs.

The plaintiff then appealed that costs decision. The defendant conceded and the court held that the plaintiff was the "successful party" in the litigation in that he was the recipient of an award of damages.

The defendant raised the issue of apportionment for the first time on appeal, which was not considered by the Court.

On the offers to settle, the court of appeal clarified that the defendant's offer was not uncertain for including a term that notified the plaintiff of FMEP's Notice of Attachment on ICBC as it simply notified the plaintiff of the effect of the existing legislative provisions that authorized the attachment. The FMEA is also "social legislation" for which a purposive construction must be given to its provisions in order to achieve its objectives. The legislative provisions effectively made ICBC a "debtor" to the plaintiff. In the result, however, the defendants conceded that the offer ought not reasonably to have been accepted by the plaintiff due to the personal circumstances at the time.

F. Warren v. Morgan, 2015 BCSC 1168, Russell J.

Two motor vehicle actions were heard at the same time for trial. The actions involved motor vehicle accidents which occurred two days apart. The action was dismissed against the defendant in the first action on the issue of causation. The vehicle contact was described as no more than a tap that caused no damage to either vehicle. Neither the plaintiff's car nor her body moved as a result of the impact. Liability was admitted but it was successfully argued that the accident did not cause any injury.

The defendants jointly made a formal offer to the plaintiff to settle the two actions for $120,000 two months before trial. They made an additional formal offer in the amount of $200,000 five days before trial. The plaintiff sought damages in the $1.3 to $2.4 million range.

At trial, the first action was dismissed on the issue of causation. Judgment was granted in favour of the plaintiff in the second action in the amount of $55,923.43.

The plaintiff applied for a Bullock Order under Rule 14-1(18) that the costs in relation to the first action be borne by the defendant in the second action. Following *Gill v. Lindstrom,* 2002 BCCA 632, Russell J. declined to make the order. In *Gill*, the court held that the successful plaintiff in one action could not recover from the unsuccessful defendant in that action the costs the plaintiff was required to pay to a defendant in a separate action where the unsuccessful defendant did nothing to cause the successful defendant to be brought into the litigation.

The trial judge found that the defendants' offers were genuine attempts at compromise based on the defendants' assessment of the likely outcome at trial and the expense they would incur if the cases proceeded to trial.

The plaintiff relied on a number of experts at trial that provided support for her position that she suffered from chronic pain, cognitive dysfunction and psychological injuries. A number of these reports were ultimately ruled inadmissible at trial. However, the trial judge agreed that it was the quality and not the quantity of evidence that should be considered when assessing the reasonableness of an offer. The weaknesses in the plaintiff's case, based on her self-reports, should have been apparent to the plaintiff by the time the offers were made.

On the issue of financial circumstances, the plaintiff proceeded with her case in a manner that did not indicate any financial disadvantage, having relied at one point on 23 experts.

The plaintiff was awarded costs up to the date of the defendants' second formal offer and costs to the defendants thereafter. The first defendant was awarded her costs for the action in their entirety as the successful party.

G. White v. Wang, 2015 BCSC 1080, Fleming J.

The plaintiff sought double costs following a seven-day trial in which she was awarded damages in the amount of $129,998.49. She made a formal offer to settle for $105,000 three days before trial which was not seen by defence counsel until the Saturday before the Monday start. The defendants argued that it was an offer that ought not reasonably to have been accepted because it was delivered too close to trial and did not provide an explanation or rationale for the reduction in the plaintiff's earlier offer. The plaintiff's initial offer was a comprehensive settlement proposal which specified the amounts proposed for each head of damage, reviewed the injuries, symptoms, treatments and the medical evidence regarding causation and prognosis. This initial proposal included a detailed analysis of the facts and the relevant case law.

The trial judge found that, at the time the plaintiff's final offer was delivered, all of the pre-trial fact finding had been completed for some time. All of the medical evidence had been properly exchanged and was in hand. The parties had attended a trial management conference where the issues were canvassed. Posed for trial, they were in as good a position as they would ever be to assess the relative strengths and weaknesses of the case. She agreed that ICBC, on behalf of the defendants, has considerable experience in litigating and settling claims, and is therefore well-poised to consider an offer quickly in light of that experience.

On the issue of financial circumstances, Fleming J. found that the plaintiff was a modest income earner, single parent and employed in a position with no job security. She testified over several days at the trial and was distressed about the time required to be absent from work. Proceeding to

trial rather than settling posed an immediate financial risk for the plaintiff that was not borne by the defendants. The plaintiff was awarded double costs from the first day of trial.

H. Zhao v. Yu, 2015 BCSC 2342, Baker J.

The plaintiff was awarded $91,700 following a six day trial but was unsuccessful in proving a mild traumatic brain injury as a result of the accident. The defendant made a formal offer to settle before trial in the amount of $93,500.

Baker J. awarded full costs to the plaintiff, finding that it was not unreasonable for the plaintiff to have pursued the MTBI claim or believe there was some prospect of its success. The expert witnesses differed about the injuries and the plaintiff's prognosis, including his capacity to earn income in the future.

Baker J. was persuaded by the plaintiff's submission that even a slightly higher award for special non pecuniary damages would have resulted in an award that exceeded the offer; however, costs were assessed as fast-track costs.

XIX. Part 7 Benefits

A. Kozhikhov v. ICBC, 2015 BCCA 515, per MacKenzie, J.A. (Saunders and Smith, JJ.A. concurring)

This appeal addressed a case canvassed in our paper last year and, in particular, the summary trial judge's interpretation of s. 101 of the *Insurance (Motor Vehicle) Regulation*. The trial judge had found that if ICBC is to rely on s. 96(f) (the exclusion relating to a claim for an injury caused by a pre-existing condition), it must do so on the evidence obtained before the expiry of the 60-day deadline for paying benefits (s. 101 provides that benefits are to be paid within 60 days from receipt of the proof of claim).

Ultimately, the court of appeal dismissed the appeal but did address the trial judge's interpretation of s. 101 finding that he had erred, although the error had no effect on the outcome. The trial judge had properly applied the burden of proof and reference to a relaxed standard described in the nature of Part 7 benefits, rather than a shift of the proof on the balance of probabilities. However, he had read too much into s. 101 when he interpreted it as limiting the evidence that ICBC could lead to only that evidence which existed before the expiry of the 60-day deadline. ICBC is entitled to lead evidence at a Part 7 trial which was obtained after the statutory payment date.

The court confirmed that the "but for" test for causation is the correct test to be applied in a claim for Part 7 benefits and that the material contribution test proposed by the insurer was only to be applied in special circumstances. The "but for" test applies even though the *Regulation* excluded entitlement to benefits in respect of injuries "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 were provided under the *Regulation*. The court upheld the trial judge's reasoning that the insurer was required to establish the treatment was unnecessary "but for" the pre-existing sickness or disease.

B. Middleton v. Heerlein, 2015 BCSC 1236, Johnston J.

The plaintiffs were US residents injured in a motor vehicle accident in British Columbia. They received over $100,000 of medical and rehabilitation benefits from their insurer, Progressive Max

Insurance Company ("Progressive") which Progressive was required to pay as a consequence of filing a power of attorney and undertaking. Progressive subsequently brought an action in the name of the plaintiffs and sought summary judgment for the amounts that Progressive paid for the plaintiffs' medical, wages loss and homemaker benefits.

The application was dismissed. Progressive is not entitled to bring a subrogated claim for benefits. There is no express statutory provision allowing for a subrogated claim as previously determined by *Matilda v. MacLeod*, 2000 BCCA 1. Progressive had argued that *Matilda* was no longer good law because of the change in the wording from the former s. 26 of the *Insurance (Motor Vehicle) Act* to the present s. 84 of the *Insurance (Vehicle) Act*. His Lordship found that the change in the language did not allow for a subrogated claim.

C. Park v. Targonski, 2015 BCSC 1531, Fitch J.

This case is of interest because the court considered if the case of *MacDonald v. ICBC*, 2014 BCSC 2155 had cast doubt on whether a pain clinic fell within the ambit of s. 88(1) of the *Regulations*.

The plaintiff recovered a judgment which included $8,500 for the cost of future treatment at a pain clinic. The defendant brought on an application to reduce the judgment by those amounts which would be payable under Part 7 in the future pursuant to s. 83 of the *Insurance (Vehicle) Act*. Mr. Justice Fitch found:

> [44] In the case at bar, there are no addiction concerns analogous to the situation in *MacDonald*. In this respect, *MacDonald* is factually distinguishable from this case. The narrow issue before me is whether a pain clinic that is focussed on "necessary physical therapy" is a mandatory benefit as contemplated by s. 88(1).
>
> [45] The mere fact that psychological and/or cognitive obstacles to optimal physical rehabilitation are likely to arise in the administration of what amounts, at its core, to a physical rehabilitation program does not negate the fact that the program is designed to achieve "necessary physical therapy." The law must take cognizance of our growing awareness of the intersection between physical and mental therapy. Indeed, it is difficult to envision aggressive implementation of the sort of active rehabilitation Back in Motion has in mind without necessarily engaging psychological and/or cognitive issues, particularly for an individual in the plaintiff's situation. Looking at the issue this way, it is unnecessary and unrealistic to hold that a physical therapy program that incidentally engages psychological and/or cognitive issues ought not to be characterized as a s.88(1) benefit in circumstances where the language of the provision does not dictate this result. Further, it is undesirable for courts to embark upon the impossible task of deciding which discrete components of a holistic pain program constitute s. 88(1) benefits because they are purely given to physical therapy, and which components fall outside the scope of s. 88(1) because they engage psychological issues that stand as barriers to the successful implementation of an active rehabilitation program. Such an approach is not only artificial, it is one that would breed uncertainty and spawn further litigation in an area already beset by what the Court of Appeal in *Raguin* charitably described as "jurisprudential inconsistencies".
>
> [46] As is evident from the foregoing, I favour the result reached on this point in *Klonarakis*. In the result, I am of the view that a pain clinic focused on "necessary physical therapy" is a mandatory benefit; one that shall be paid by ICBC even in circumstances where it is anticipated that psychological issues may arise in the implementation of the program.
>
> [47] As noted in *Ayles v. Talastasi*, 2000 BCCA 87 at para. 32:

> As a claim covered by s. 88(1) I.C.B.C. is obliged to pay the benefits. It is not a matter of discretion under s. 88(2) where entitlement depends "on the opinion of the corporation's medical adviser". The risk in deducting too much from the tort award for discretionary benefits is that I.C.B.C. may ultimately refuse to pay on items which although found to be compensable in the tort claim were deducted on the assumption that they would be paid as a no fault benefit. In that instance the claimant is out of pocket for the expense and I.C.B.C. enjoys a windfall. But here the class of future expense is obligatory, not discretionary, and so the plaintiff does not stand to lose anything by the deduction. It is only in circumstances where the classification of the future cost is unclear or an issue arises whether the item is covered by Part 7 at all, that some caution is required.
>
> [48] As I am satisfied in this case that the pain clinic is a mandatory benefit and that ICBC is obliged to reimburse the plaintiff for all reasonable expenses associated with her attendance at the clinic, there is no uncertainty as to whether this benefit will be paid.

D. Symons v. Insurance Corporation of British Columbia, 2016 BCCA 207, per Bennett J.A. (Newbury and Fenlon JJ.A. concurring)

This case addressed the revival of Part 7 benefits after the expiry of the 104 week period. Following an accident, the plaintiff received total temporary benefits under Part 7 (s.80) for a couple of months until she returned to work due to financial pressures. Her back pain continued and eventually rendered her disabled from working again, four years after the accident. At that point, she applied for the revival of 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 early and accordingly, her benefits could not be revived or reinstated outside the 104 week period.

At trial, the court determined that the plaintiff was be eligible for the benefits. The Court of Appeal dismissed ICBC's appeal, noting that benefits could be revived where the original injury later causes total disability under s. 86 – even when the total disability occurs after the 104 week period. Bennett J.A. further noted that this interpretation is consistent with the context and object of the *Act* in providing no-fault benefits for persons injured in motor vehicle accidents.

XX. Practice

A. Alexis v. Duncan, 2015 BCCA 135, per Goepel J.A. (Bauman C.J.A and Lowry J.A. concurring)

The court of appeal held that a party may not be added to a proceeding pursuant to Rule 6-1(1)(a) which allows an amendment without leave of the court at any time prior to service of the notice of trial. Rule 6-1(1) specifically states that it is subject to Rule 6-2(7) which speaks to adding, removing, or substituting parties. Therefore, Rule 6-1(1) is limited to amending pleadings and Rule 6-2(7) governs all circumstances in which parties may be joined to a proceeding. The amended notice of civil claim which did not comply with Rule 6-2(7) was an irregularity, and the proper remedy was to set aside the amended notice of civil claim.

B. Han v. Park, 2015 BCCA 324, per Stromberg-Stein J.A. (Saunders and Bennett JJ.A. concurring)

This appeal arose out of a jury trial at which the trial judge admitted the defendant's book of documents on consent, without providing any instructions to the jury about how they could use the documents. The book was admitted on the first day of trial and contained 322 pages including clinical records and other material that portrayed the plaintiff as difficult, manipulative and stubborn. For example, some of the clinical records contained a letter from the College of Physicians and Surgeons concerning a complaint made by the plaintiff against some of the doctors as well as the plaintiff's letter of complaint, a letter from ICBC addressed to the plaintiff's lawyer indicating that ICBC would no longer pay for any treatments based on the doctor's finding that she could work and that they would request a jury trial once the writ was issued. The wage loss records contained a letter setting out workplace expectations and anticipated disciplinary action, a letter respecting expectations and monitoring of her workplace performance, a letter of reprimand, notes of a meeting between management and the union at which the plaintiff had attended but refused to participate without a lawyer, a letter of suspension, a decision of the BC Labour Relations Board dismissing a complaint by the plaintiff that her union violated its duty of fair representation, and a review and reconsideration decision of the BC Labour Relations Board dismissing her application. The documents also contained letters from the plaintiff to the ICBC Fairness Commissioner and a decision of the BC Human Rights Tribunal dismissing her allegations of discrimination based on physical and mental disabilities in respect of her tenancy.

Although the parties had apparently agreed to the admission of the documents, the trial judge is always a gatekeeper and should not have admitted the highly prejudicial documents, which resulted in a substantial wrong or miscarriage of justice. The court endorsed the principle enunciated in *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 that medical records should not be entered en masse quoting from *Samuel* as follows:

> [39] The preferable approach is obvious. Clinical records should not be admitted into evidence, by consent or otherwise, unless counsel identify the specific purpose for the particular portions of the records. Furthermore, it would be preferable to introduce discrete portions of the records when they become relevant so that their admissibility can be ruled on at that time, when the jury will better appreciate the purpose of those portions in the context of the case and will have the assistance of a contemporaneous limiting instruction. In no event should a "book" of documents be simply handed up to the court and admitted as a whole.

Madam Justice Stromberg-Stein added that the comments from *Samuel* are not restricted to medical records.

The appeal was allowed because some of the documents were irrelevant, inflammatory or prejudicial and shifted the jury's focus to the plaintiff's negative character traits rather than the main issues in the trial.

The trial judge also erred in admitting transcribed portions of the plaintiff's examination for discovery used in cross-examination. There was significant risk that the jury would give greater weight to the transcribed evidence than to the plaintiff's answers in response.

C. Johal v. Radek, 2016 BCSC 232, Master Muir

The defendant applied for an order that the evidence of his expert be done by deposition before trial. The evidence before the court on the application was less than satisfactory. There was no evidence from the expert with the timing and details of his trip to South America. Instead, the

defendant relied on an affidavit from a paralegal containing triple hearsay of the doctor's absence. The plaintiff opposed the application with evidence that video conferencing would be available from Colombia. Master Muir dismissed the application for the deposition, finding that there was nothing before her to indicate that the expert could not appear at trial by video conferencing. She also awarded the plaintiff $1,000 in lump sum costs for the application which had been brought on short notice and kept counsel in chambers for an entire day.

D. Velgji v. Sangha et al., 2015 BCSC 2459, Master Harper

The defence applied to adjourn the trial when a conflict of interest arose, requiring the appointment of additional defence counsel. The delay in the appointment of new counsel was not adequately explained in the application. The adjournment was granted on the condition that the defence pay to the plaintiff an advance of $125,000, finding that there was not much risk that damages awarded at trial would be less.

E. Wall v. Kexiong, 2015 BCSC 1174, Master Muir

The defendant sought an adjournment of the trial on the basis that the plaintiff's injuries from her fourth motor vehicle accident were indivisible from those she suffered in the first three accidents. The master accepted that multiple actions arising from sequential accidents with indivisible injuries are commonly tried together. However, this was outweighed by the fact that the plaintiff had not yet commenced an action in respect of the fourth accident, and there would be great prejudice to the plaintiff if the trial were adjourned.

Evidence—Brown v. Dunn

A. R v. Abdulle, 2016 ABCA 5, per curiam Costigan, Martin and Wakeling, JJ.A.

We have included this case as a recent reminder about the importance of the rule in *Brown v. Dunn* which is summarized in this criminal appeal as:

> [11] The rule in *Browne v Dunn* requires counsel to put a matter to a witness if counsel intends to present contradictory evidence on that matter through a later witness: *Werkman* at para 7. Where the rule is breached, the trial judge may take the failure into account in assessing credibility: *Werkman* at para 9. The failure to cross-examine must relate to matters of substance. Where the evidence is of little significance in the overall context of the case, the failure to cross-examine should have no effect on the assessment of credibility: *R v Paris* (2000), 2000 CanLII 17031 (ON CA), 138 OAC 287 at para 23. Absent an error of law or a misapprehension of the evidence, a trial judge's assessment of credibility is, however, entitled to deference.
>
> [12] The appellant advances two errors by the trial judge in the application of the rule in *Browne v Dunn*. First, he says the trial judge erred in applying the rule to insignificant or minor details. The trial judge found that the failure to cross-examine with respect to alcohol was a detail not warranting a strict *Browne v Dunn* application, yet he said he would use it in assessing credibility. Similarly, the trial judge said he would not strictly consider the failure to cross-examine with respect to marijuana from a *Browne v Dunn* perspective, yet he did consider it from a credibility perspective.
>
> [13] While a trial judge's characterization of a matter as significant or insignificant is entitled to deference, here the trial judge appears to have concluded

> that the matters were details not warranting a "strict" application of the rule yet he nevertheless applied the remedy for breach of the rule in assessing credibility. In our view, the trial judge erred in this approach. We do not understand what the trial judge meant by his reference to a "strict" application of the rule. The rule is either engaged or it is not engaged. If it is engaged, in the sense that there is a failure to cross-examine on a matter of sufficient substance, then a remedy is available. On the other hand, if the matter is minor or of insufficient significance, the rule is not engaged and no remedy is necessary.

Evidence—Order of Plaintiff's Testimony

A. Rutter v. Adams et al., 2016 BCSC 554, Watchuk J.

At paragraph 215 Madam Justice Watchuk made the following observations regarding the order in which a plaintiff ought to testify:

> [215] Generally, and particularly in personal injury cases, it is preferable that the plaintiff testify first. Not only is the plaintiff's evidence important on its own, it is the framework or foundation for assessing the evidence of each witness that the plaintiff may call. A trial is much more than simply creating a record. It is the best opportunity for the trial judge to absorb the evidence and begin the analysis of the evidence. The orderly calling of the witnesses is crucial to the ability to consider and analyze. Sequence matters. It is very difficult to understand the evidence as a whole if the plaintiff's testimony is preceded by or interrupted by an expert or other witness.

Interrogatories

A. Jack v. Kendrick, 2015 BCSC 1872, Skolrood J.

The defendants in a car accident claim brought an application to compel the plaintiff to answer interrogatories directed to determine when and if the plaintiff and various treating physicians had received medical reports from other physicians. The purpose of the interrogatories was to explore whether the plaintiff had taken steps to address the treatment recommended in the reports (i.e., whether he had failed to mitigate his damages).

The plaintiff was ordered to answer those interrogatories directed to his personal knowledge (i.e., whether he personally had received and reviewed the reports). He was not compelled to answer questions which were outside his personal knowledge such as whether certain reports were given to various physicians or what information a doctor had when preparing his or her report. Those were issues more properly canvassed on cross-examination of the doctors.

Summary Trial

A. Pyrrha Design Inc. v. Plum, 2016 ABCA 12, per curiam Berger and Schutz, JJ.A. (McDonald, J.A. dissenting)

In this case, the appellants set down a summary trial application in respect of a settlement agreement in a commercial matter. The respondent did not formally cross-apply for summary dismissal, but did request that relief in their written brief. The appellant's summary judgment application was dismissed by the chambers judge who also concluded that the court could determine the entire

matter on a summary basis and dismissed the action. It was the most efficient and proportionate way to proceed and that it was fair and just to proceed on the existing record.

The appeal was dismissed and the case is of interest for the following comments made by the court in encouraging the use of summary trial applications:

> [10] ... the chambers judge properly adhered to the urging of the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 to the effect that courts are obliged to resolve legal disputes in the most cost-effective and timely method available, provided the process selected ensures fairness between the parties. Here, the chambers judge is to be commended, not criticized, for pursuing a cost-effective, timely **final** resolution to this litigation which was fair and just to the parties, as it simply serves no one's interest to permit continuation of protracted and costly litigation when it can be properly disposed of summarily and entirely.
>
> [11] This Court has expressly advocated a modern approach, involving the broad interpretation of summary judgment rules, in order to comply with the Supreme Court's recognition in ***Hryniak*** at para 2 that "a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system": ***Windsor*** at para 13. The motions court must determine "whether the issue of law can fairly be decided on the record before the court": ***Tottrup v Clearwater (Municipal District No 99)***, 2006 ABCA 380 (CanLII) at para 11, 401 AR 88.

The majority found that the appellant's complaint was of form over substance. The appellant had not been, in fact, prejudiced by the respondent's failure to file and serve a formal notice of application. The appellant had conceded on the appeal that it "had put its best foot forward". The court accepted that in some cases prejudice could be caused to the opposite party.

Mr. Justice McDonald dissented finding that there were questions of procedural fairness. He found that *Hryniak* and the Alberta Rule 1.2(1) (which sets out that the purpose of the Rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost efficient way) did not give the parties *carte blanche* to disregard the requirement to cross apply for summary dismissal. The need for a proportionate approach should not come at the expense of procedural fairness and fundamental adherence to the Rules of Court. At the very least, counsel should have advised by correspondence that he was also seeking summary dismissal of the entire claim.

XXI. Privacy Act/Invasion of Privacy

A. Ari v. Insurance Corporation of British Columbia, 2015 BCCA 468, per Garson J.A. (Lowry and Groberman JJ.A. concurring)

The plaintiff commenced a proposed class action lawsuit against ICBC in respect of breaches of the *Privacy Act* by an employee. *The Privacy Act* creates a statutory cause of action for breach of privacy; there is no common law cause of action for breach of privacy in British Columbia.

On an application by the defendant to strike portions of the claim, the plaintiff was permitted to proceed with the claim against ICBC on the theory that ICBC was vicariously liable for the breach of statute allegedly committed by one of its employees. Applying the two step approach set out in *Bazley v. Curry*, [1999] 2 S.C.R. 534, the chambers judge determined that the claim in vicarious liability was not bound to fail. The Court of Appeal agreed and held that the question could not be

answered on a pleadings motion, but required evidence and the appellant ought to have the opportunity to develop and argue the claim.

B. Jane Doe 464533 v. XXX, 2016 ONSC 541, Stinson J.

In what seems to be the first case in Canada of its kind, the plaintiff was awarded damages further to a claim against her ex-boyfriend who posted an intimate video of the plaintiff to a pornography website without her consent.

The plaintiff and defendant dated during high school and despite ending their relationship following high school, they stayed in romantic contact throughout the summer and fall of 2011. In the fall of 2011 they were both 18 years old. In September 2011 the plaintiff was living in another city and remained in contact with the defendant via internet, texting, and telephone. They continued to see each other when she visited home.

The defendant pressured the plaintiff over the course of several months to send him an intimate video. He assured her that he was the only one who would see it. The plaintiff relented and sent an intimate video to the defendant. She subsequently learned the defendant had posted the video to a pornography website. She learned that the defendant had shown the video to mutual friends from high school, and that friends in her social circle were aware of the video. The evidence was that the defendant posted the video on the same day he received it. The video was apparently removed from the website after three weeks, however, there was no way to know how many times it was viewed, or whether anyone had downloaded it or shared it further. The plaintiff suffered emotional upset, stress, and depression as a result.

The court addressed various theories of liability: breach of confidence; intentional infliction of mental distress; and invasion of privacy, and found the facts met the criteria required to find liability in each category. In respect of breach of confidence the court was satisfied that the information had the necessary quality of confidence, it was imparted in circumstances importing an obligation of confidence, and the posting of the video to a website was an unauthorized use of the information to the detriment of the plaintiff. The tort of intentional infliction of mental distress was made out as the conduct was flagrant and outrageous; calculated to produce harm; and resulted in a visible injury to the plaintiff.

Finally, the court relied on *Jones v. Tsige*, 2012 ONCA 32 in which the Ontario Court of Appeal recognized a tort for invasion of privacy. The category of "invasion of privacy" that was most relevant to the plaintiff's claim was "public disclosure of embarrassing private facts about the plaintiff" which requires the plaintiff establish that the defendant gave publicity concerning the private life of the plaintiff where the matter publicized was (1) highly offensive to a reasonable person; and (2) not of legitimate concern to the public. The judge had no difficulty finding that the criteria were met.

In considering damages the judge considered case law in respect of physical sexual assaults, accepting counsel's argument that although the plaintiff's case did not involve a physical violation; she was left with many of the same serious emotional and psychological consequences. The plaintiff was awarded $50,000 in non-pecuniary damages, $25,000 in aggravated damages, and $25,000 in punitive damages.

C. T.K.L. v. T.M.P., 2016 BCSC 789, Thompson J.

The plaintiff's stepfather surreptitiously observed and video-taped her on four occasions while she was undressed in the bathroom, in the shower and in her bedroom. He captured images of her completely naked, shaving her pubic hair and, on one occasion, masturbating in the shower. The defendant zoomed in and out for close ups of her nipples and of her face. The plaintiff was 20 and 21 years old at the time. On one occasion, her father yanked her towels off after she left the shower.

The plaintiff discovered the videos on the defendant's camera. The matter was reported to the police. The plaintiff sued for sexual assault and battery and relied on the *Privacy Act*, the doctrine of fiduciary duty and the law of intentional tort.

Justice Thompson found that the assault and battery allegations were not proven. The court had no difficulty in finding that the spying and recording of the plaintiff constituted a *Privacy Act* tort as well as a breach of fiduciary duty.

In finding the breaches the court commented:

> [20] By spying on and video-recording the plaintiff as described above, the defendant committed disturbing violations of the plaintiff's personal privacy. Subsection 1(1) of the *Privacy Act* provides that it is a tort for a person, wilfully and without a claim of right, to violate the privacy of another. Little analysis is necessary on the facts of this case to reach the conclusion that the defendant has committed this statutory tort. The defendant acted wilfully. The plaintiff was entitled to the highest degree of privacy when showering with the bathroom door closed, and changing her clothes in her bedroom with the door closed. The nature and occasions of the defendant's conduct make it apparent that his actions violated the plaintiff's privacy. The defendant's liability for the statutory tort is beyond question.
>
> [21] I agree with the plaintiff's submission that the voyeurism and video-recording by her stepfather was a breach of fiduciary duty. There are two Supreme Court of Canada cases that are particularly relevant to this analysis: *K.M. v. H.M.*, [1992] 3 S.C.R. 6; and *K.L.B. v. British Columbia*, 2003 SCC 51.
>
> [22] In *K.M. v. H.M.*, the plaintiff sued her father for the damages she suffered as a result of his incestuous acts. The majority judgment establishes several principles that are applicable in the case at bar, and no members of the Court took issue with what Mr. Justice La Forest wrote about the fiduciary duty owed by the defendant to his daughter. The relationship between parent and child is fiduciary in nature (p. 61). The sexual assault of one's child is a grievous and heinous breach of the obligations arising from that relationship (pp. 61-62). The inherent purpose of the family relationship imposes obligations on a parent to act in his or her child's best interests (p. 65). The fiduciary obligations are shaped by the demands of the situation (p. 66).
>
> [23] In *K.L.B. v. British Columbia*, the plaintiffs suffered abuse in foster homes. At paras. 48-49 of her majority judgment, Chief Justice McLachlin spoke of the content of the parental fiduciary duty. The unique focus of this fiduciary duty is the relationship of trust and loyalty. A breach of this duty is a breach of trust, an act of disloyalty that displays the preference of the parent's own interests at the expense of the child's interests. The parent who uses a child for sexual gratification or who exercises undue influence over their child in economic matters puts his own interest first, abuses the trust, and is disloyal.
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> [24] There is no doubt that the law extends the fiduciary duty to a step-parent. In *S.Y. v. F.G.C.* (1996), 26 B.C.L.R. (3d) 155 (C.A.), the plaintiff had suffered sexual abuse at the hands of her stepfather. In his reasons for the Court, Macfarlane J.A. made the points that a stepfather has a relationship of trust with a

> stepchild (paras. 38 and 57) and that the issue of breach of fiduciary duty could have been left to the jury (para. 84). In *R.D. v. G.S.*, 2011 BCSC 1118, Madam Justice L. Smith held that the defendant stepfather breached his fiduciary duty to his stepdaughter by sexual touching and by keeping photos of her mixed in with child pornography in a place where he knew she might find them.
>
> [25] The case at bar differs from the *S.Y. v. F.G.C.* and *R.D. v. G.S.* cases in two ways: in each of those cases there was sexual touching, and in each the stepdaughter was a minor. In my opinion, these different features do not assist the defendant. The stepfather's fiduciary obligations might not be as onerous to a stepchild that is no longer an infant in the eyes of the law, but where, as here, the defendant has taken advantage of the proximity and trust created by the stepfather/stepchild relationship, he has surely committed a breach of fiduciary duty. The defendant put his own selfish motivations of sexual gratification and feeling able to punish the plaintiff ahead of the plaintiff's dignity and other important privacy interests. This was disloyal in the extreme and a breach of the relationship of trust between family members that the law imposes in circumstances such as existed in this case. I conclude that the defendant cannot escape liability for a breach of fiduciary duty by the fact that the plaintiff, who was still living at home and dependent upon him, reached the age of majority before he committed his grievously disloyal acts.

The plaintiff was awarded non-pecuniary damages of $85,000 which included a measure of compensation for the aggravated circumstances. She also recovered claims for past loss of earning capacity, special damages and cost of future care.

XXII. Self-Represented Litigants

A. 0927613 B.C. Ltd. v. 0941187 B.C. Ltd., 2015 BCCA 457, per Smith J.A., (Willcock and Savage JJ. A. concurring)

This appeal concerned the principles of nature justice to arbitrations involving self-represented litigants.

The arbitration related to a commercial matter. One of the parties was self-represented by the time of the hearing and chose not to attend. The arbitrator determined the dispute in favour of the respondent. The arbitration award was set aside by the chambers judge on the grounds of arbitral error based on a finding that the natural justice in arbitrations had to include special considerations for self-represented parties and that the arbitrator had failed to meet the duties and obligations of natural justice and procedural fairness. The respondent appealed and the appeal was allowed. It was found that the chambers judge had failed to correctly understand what had transpired before the arbitrator, which led to incorrect findings. The arbitrator had given the petitioner every opportunity to present its case on the merits and to respond to respondent's evidence and submissions but chose not to do so. The arbitrator did not have a special obligation to self-represented party beyond natural justice requirements owed to any party. There was no breach of natural justice obligations or duties of procedural fairness when the petitioner was given every opportunity to participate in the process but chose not to do so.

The decision is of interest for the following comments:

> [64] There are no special rules of procedure for a self-represented party in an arbitration proceeding beyond the basic procedural requirements for any arbitration: an impartial arbitrator, procedural fairness of notice, and a fair or reasonable opportunity to make submissions and to respond to the other side's

> case. As this Court noted in *Burnaby (City) v. Oh*, 2011 BCCA 222 at para. 36, self-represented litigants do not have "some kind of special status" that allows them to ignore rules of procedure. In *Murphy v. Wynne*, 2012 BCCA 113 at para. 16, Madam Justice Neilson, relying on comments of Mr. Justice Chiasson in *Stark v. Vancouver School District No. 39*, 2012 BCCA 41 (in Chambers) and *Shebib v. Victoria (City)*, 2012 BCCA 42 (in Chambers), observed that "[w]hile it is important unrepresented litigants have a full opportunity to avail themselves of our court processes, all litigants must keep within the bounds of those processes." These comments in my view apply equally to an arbitration forum that has been chosen by the parties for the resolution of their dispute.
>
> [65] In the context of a court proceeding, the Canadian Judicial Council in its *Statement of Principles on Self-Represented Litigants and Accused Persons*, (Ottawa: Canadian Judicial Council, 2006) mandates fairness so as to ensure "equality according to law" in the sense of giving every litigant a fair opportunity to present their case. It also, however, imposes an obligation on self-represented parties to be respectful and familiarize themselves with the relevant practices and procedures of the court process. These principles, in my view, apply equally to the arbitration process. While some latitude is to be given to self-represented parties who may not understand or be unfamiliar with the arbitration process, an arbitrator, like a judge, is not required to ensure that a self-represented party participate in a proceeding if that party chooses not to do so. In short, an arbitrator does not have any special obligations to a self-represented party beyond the natural justice requirements owed to any party. The overarching test is fairness.

B. Walker v. Manufacturers Life Insurance Co., 2015 BCCA 473, per Newbury J.A. (Harris and Goepel JJ. A. concurring)

This appeal arose out of an underlying claim for disability benefits being brought by a self-represented plaintiff who was a lawyer. The plaintiff's claim had been dismissed as a result of her failing to comply with the terms of a court order made by a judge who had judicial management of the action and after the plaintiff had failed to attend three judicial management conferences. Two months later, the plaintiff sought to set aside the order dismissing her claim on the basis, *inter alia*, that she was a "person under disability" within the meaning of the *Supreme Court Civil Rules* because she had been designated a "person with disabilities" by an adjudicator acting under the *Employment and Assistance for Persons with Disabilities Act*.

The plaintiff had consistently failed to respond to various emails and requests from opposing counsel and court staff and later offered explanations that the court found inadequate and, in some cases, completely inappropriate. During the course of the hearing to set aside the dismissal order, the plaintiff raised an argument that she was under a legal disability but submitted that she did not require the appointment of a litigation guardian and was capable of managing her litigation. She also described to the court that she had the disabilities a brain injured person had and described forgetfulness, being clumsy and suffering fatigue. The judicial management judge was faced with a dilemma having been told that she sought protection under *Rule 20-2* and his own concern that it was clear she was not able to manage the ligation and so ordered the plaintiff obtain a letter from her doctor or psychiatrist addressing whether she was capable or incapable of managing the litigation. His Lordship also stayed all further applications until such letter had been provided.

The plaintiff appealed arguing that the judge had no jurisdiction to make an order requiring her to produce the medical letter.

The court of appeal held that where a question arises as to whether a plaintiff is a person under disability for the purposes of *Supreme Court Rule 20-2*, a chambers judge has the jurisdiction to require the litigant to provide a report from a qualified medical professional on the issue.

The court confirmed that *Rule 20-2* is a "complete code" and that it does not permit persons under legal disability to bring or defend proceedings in Supreme Court except through a litigation guardian.

XXIII. Settlement—Mary Carter Agreements

A. Northwest Waste Solutions Inc. v. Accili, 2016 BCSC 115, Affleck J.

This case is of importance to all litigants as it addresses the obligation of counsel to immediately disclose an agreement reached in multi-party litigation where a plaintiff has agreed to cap or limit a defendant's liability, but the defendant remains a party to the action while the plaintiff focuses their efforts on the other defendants (i.e., a Mary Carter-type agreement). The obligation to disclose arrangements of this nature is because the agreement "changes the landscape of the litigation" and may jeopardize a fair trial.

Failure to disclose such an arrangement could amount to an abuse of process and a striking of the plaintiff's claim.

XXIV. Unidentifed Drivers

A. Havens v. Insurance Corporation of British Columbia, 2016 BCSC 36, Myers J.

In this liability-only trial, Mr. Havens alleged that he lost control of his motorcycle as a result of a collision with an unidentified motorist. As a result of the accident, Mr. Havens lost consciousness and suffered a brain injury. At the hospital his Glasgow Comma Scale was 7 out of 15.

Mr. Havens acknowledged that his memory of the accident did not return until sometime after the accident. He testified that following his release from the hospital, approximately 4 months after the accident, he sat on his motorcycle and tried to recreate in his mind how the accident happened. He said when he sat on his motorcycle his memories started to "click into place."

He recalled that: a red pick-up truck approached him from behind in the lane to his left; he was struck in the head; he attempted to keep control of his motorcycle; he raised his left hand to his helmet; he saw the red truck immediately in front of him accelerating away, emitting a cloud of black smoke; he tried to focus on getting his bike around the corner; and his next memory was of being in the hospital. Mr. Havens also said that he recalled seeing the red pick-up with lumber protruding out of the back earlier while he was still on the highway.

Dr. O'Shaughnessy prepared a report for the defendant regarding the validity of the plaintiff's "recovered memory". He opined that such a recovered memory was not possible on the bases that: (1) a blow to the head sufficient to cause unconsciousness causes unconsciousness immediately. Therefore, if the blow to the head was caused by the lumber protruding from the red truck, it would be impossible for Mr. Havens to recall details following the impact, such as raising his left hand to his head and the red truck accelerating away from him leaving a cloud of black smoke; and (2) given Mr. Havens GCS of 7, it would have been impossible for him to have laid down long term memory due to the disruption of brain function necessary to achieve this.

Although Dr. O'Shaughnessy's opinion was sufficient for the court to find that the plaintiff's evidence was not reliable, the trial judge also considered whether the plaintiff's evidence about how the accident occurred was corroborated by that of other witnesses. It was not. The plaintiff's claim was dismissed.

B. Li v. Insurance Corporation of British Columbia, 2015 BCSC 1010, Armstrong J.

The plaintiff was struck from behind in a motor vehicle accident by an unidentified vehicle. ICBC rejected the claim and took the position that the plaintiff failed to take reasonable steps available to her in order to ascertain the identity of the driver and/or owner of the vehicle that struck her as required by s. 24(5) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*"). ICBC argued that s. 24(5) barred the Court from granting judgment in the plaintiff's favour.

The issues before Armstrong J. included a determination if the plaintiff took all reasonable steps to identify the motorist and if it was concluded that she did not then the court had been asked to consider ICBC's conduct including its failure to advise the plaintiff of the requirements under s.24(5) of the *Act* and in doing so, ICBC waived its right to rely on or is stopped from relying on ss. (5) as a defence. The court held that the plaintiff did not take all reasonable steps to identify the other motorist and rejected her argument that ICBC had a duty to tell their insured customers of their obligation to identify the other motorist. In other words, ICBC is under no legal duty nor does the statutory requirement imply that they must notify their insured customers of their obligations.

C. Link v. ICBC, 2015 BCCA 509, per Lowry J.A. (Tysoe and Garson, JJ. A. concurring)

The court of appeal upheld a trial judge`s finding of negligence against an unidentified driver of an SUV who moved from the slow lane into the fast lane on a four lane highway to overtake the plaintiff who was driving at about 40 to 60 kilometres an hour. The highway was covered in snow that was falling heavily. The unidentified driver immediately cut back in front of the plaintiff causing a `rooster tail of snow` onto the plaintiff`s windshield. The plaintiff instinctively tapped his brakes and lost control of his vehicle which crashed into the safety devices of cables and posts.

ICBC argued on appeal that it was not open to the trial judge to conclude that the SUV was travelling at an excessive rate of speed or that the accident would not have happened if the SUV had been travelling more slowly. The plaintiff had testified, on discovery, that his windshield wipers did not work very well.

Mr. Justice Lowry found that there was no error made by the trial judge as it was clearly open to him to find that the speed of the SUV was excessive in the circumstances and that any driver would know, through common sense, that the greater speed of a car the greater amount of snow it may throw up while changing lanes. It could not be said that if the SUV had been proceeding more slowly and had not cut in front of the plaintiff as it had, that the windshield would have been completely obscured as it was. The speed of the SUV was excessive for the conditions because of the effect its speed had.

Practice - Severing s. 24 Issues

A. Fitger v. John Doe, 2015 BCSC 1855, Meiklem J.

On a summary trial application, Mr. Justice Meiklem refused to sever liability from quantum as sought by the plaintiff but ruled that ICBC's statutory defence under s. 24(2) of the *Insurance (Vehicle) Act* was severable pursuant to the BCCA authority of *Hecker v. Thomson*. He determined that the plaintiff had complied with the written notice requirement by virtue of there being a written notation taken by ICBC of the oral report of the accident caused by an unidentified driver.

Although His Lordship found that it would be appropriate to sever the s. 24(5) issue, he felt there were too many factual questions relating to the accident that were not addressed in the application material and so decided that the question could not be addressed on a summary trial basis. Thus, the issue of the reasonableness of the plaintiff's efforts under s. 24(5) had to be left to the jury to address, but the issue before the jury would be limited to whether the plaintiff's actions on the date of the accident were reasonable.

The plaintiff also argued that ICBC should be estopped from relying on s. 24(5) by virtue of its conduct because the plaintiff had relied on ICBC's guidance. Although His Lordship did not apply the doctrine of estoppel, he was very critical of ICBC's practices commenting:

> [10] Ignorance of the provisions of s. 24(5) is not an uncommon phenomenon. I do not know whether ICBC has a policy of deliberately not informing claimants such as Mr. Fitger of their s. 24(5) obligations, but there certainly does appear to be a practice of not advising claimants of their obligations, despite comments from the court about the unfairness that is apparent when lay people place reliance on claims being processed as if valid, and are then belatedly faced with the invocation of s. 24(5) if settlement is not reached: *Springer v. Kee*, 2012 BCSC 1210 at paras. 82-93 and *Li v. John Doe 1*, 2015 BCSC 1010 at paras. 105-116.
>
> ...
>
> [12] In the case at bar, the plaintiff's argument would hypothetically be viable if the issue was the sufficiency of the plaintiff's efforts to identify the unidentified driver subsequent to his initial dealings with ICBC, but obviously nothing said or done or left unsaid by any employee of ICBC after notification of the accident could have affected the plaintiff's efforts in the immediate aftermath of the accident, which is the only remaining period in issue.
>
> [13] The plaintiff's evidence is that no one at ICBC told him that what he "had done was not enough". That is not a sound basis for him to infer that they felt he had done enough. There is no evidence of any actual promise or assurance made by ICBC that it accepted that he had previously made every reasonable effort to ascertain the identity of the other driver. Such a communication might arguably be a basis for estoppel if a reversal of position was found to be unconscionable, but in my view that finding would be unlikely in the absence of some detrimental action taken by the plaintiff in reliance, or some unfair advantage gained by ICBC.
>
> ...
>
> [16] While the doctrine of estoppel can, as a general proposition, be applied in respect of interfering with statutory rights, s. 24(5) of the *Act* is as much about creating an obligation on the courts to enforce an obligation on a class of claimants in the cause of preventing fraudulent claims as it is about providing a defence to ICBC.

> [17] In my view, ICBC's failure to inform the plaintiff of his s. 24(5) obligation was ill-advised from a public interest perspective. To continue to process his claim without comment on his accident-day inaction and then surprise him by pleading and pursuing a s. 24(5) defence was unfair from the plaintiff's perspective. These facts do not, in the circumstances of this case, amount to conduct warranting the application of the doctrine of estoppel to the limited remaining issue in regard to s. 24(5).

B. Lapointe v. ICBC, 2016 BCSC 195, Myers J.

In this case, Mr. Justice Myers came to the opposite conclusion regarding the appropriateness to sever a s. 24(5) issue as that of Mr. Justice Meiklem.

This is an appeal from a master's summary judgment determination that the plaintiff had made reasonable efforts to identify the unidentified driver and owner and so had complied with s. 24(5) of the *Insurance (Vehicle) Act*. The master refused the summary trial application with respect to the issue of liability.

Mr. Justice Myers reversed the master's order based on a court of appeal decision, *Century Services Inc. v. LeRoy*, handed down the day before the master's decision and which was not argued before the master. *Century Services* held that Rule 9-6 could not be used to make a decision on a defence when the decision would not result in judgment on the case as a whole or a discrete portion of the claim.

The plaintiff argued that that the master's decision was determinative in the sense that it decided ICBC's liability to pay the future judgment which might be rendered against the unidentified driver or owner. Mr. Justice Myers found that a decision on s. 24(5) of the *Act* alone was not determinative of the case and could not result in a judgement but was only a decision on an issue. The plaintiff's argument artificially separated the cause of action against an unknown driver or owner from the claim against ICBC. His Lordship also pointed out that there is a continuing obligation to attempt to locate the unidentified driver or owner and if facts subsequently came to light that made the driver or owner ascertainable, they must be substituted as a defendant for ICBC. The *Act* only contemplated a single judgment and, in those circumstances, it would make the substitution for ICBC impossible as the matter was *res judicata*.

XXV. Worker v. Worker Defence and Indivisible Injury

A. Kallstrom v. Yip, 2016 BCSC 829, Kent J.

Mr. Justice Kent declined to apply *Pinch v. Hofstee* in this case commenting that finding in *Pinch* was "highly debatable":

> [371] I do not agree that any reduction in damages is required. There are several reasons for this.
>
> [372] First, this is not a defence that has been formally pleaded in any of the actions. The facts relating to, and the legal basis for, such a technical and unique defence are required to be pleaded and this has not been done.
>
> [373] In any event, *Pinch* neither applies to nor governs the present claim. It was the subject matter of an appeal and cross-appeal, but the case was settled and thus no definitive ruling on this interesting (and highly debatable) point of law has yet been made by the Court of Appeal. It must be noted that other decisions of

> this Court have treated a subsequent workplace accident aggravating a pre-existing injury as a situation of indivisible injury for which the defendant in the first accident remains 100% liable: see *e.g.*, *Kaleta v. MacDougall*, 2011 BCSC 1259.
>
> [374] Further, I do not agree that the employer's conduct is properly labelled as tortious in this case. It is not necessarily a tort for an employer to be difficult and demanding. Similarly, the distraught actions of a mother witnessing a near-death incident involving her child may also not amount to an actionable tort, particularly where the result is mental distress without accompanying physical injury. *Pinch* involved negligence on the part of the *Workers Compensation Act*-immunized worker. Further, *Kaleta* involved an on-the-job injury while lifting heavy product, *i.e.* no third-party negligence.
>
> [375] In the result, I hold that the "WCB defence" does not apply and no reduction in damages is required on that account.

B. Pinch v. Hofstee, 2015 BCSC 1888, Burnyeat J.

The plaintiff was injured in two car accidents. He suffered chronic pain as a result of the first accident that occurred in 2010 but returned to work almost two years later. He then injured many of the same areas in a second accident in 2013. The second accident occurred when both the plaintiff and the "at fault" driver were on the job and so the claim proceeded through the Workers Compensation Board. In the tort trial arising from the 2010 accident, the plaintiff asserted that the damages from the second accident could be claimed as part of the damages sought against the defendant, Hofstee, because those damages were indivisible from the damages caused in the first accident.

The court found the injuries were indivisible but held the general rule that a plaintiff could seek full compensation for indivisible injuries from a single tortfeasor did not apply. Section 10(1) of the *Workers Compensation Act* clearly precluded the plaintiff from seeking damages arising from indivisible injuries:

> [54] Section 10(1) of the *Act* makes it clear that the provision of the *Act* are "... in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any cause of action...." [emphasis added]. Therefore, s. 10(1) refers not only to "rights of action" but "any right... founded on a breach of duty of care or any other cause of action..." I am satisfied that the "right` to claim for recovery for indivisible damages is a right that is precluded by s. 10(1) of the *Act*, being a right which is separate and distinct from a right to commence an action. In this regard, s. 10(1) provides not only that the provision of the Part of the *Act* is in lieu of "any right and rights of action..." founded on the breach of duty of care that Mr. Pinch may have against an employee or an employer but also that "no action in respect of it lies" and that "any right ... founded in a breach of duty of care" is precluded. I am satisfied that this precludes any right that Mr. Pinch may have which is founded on a breach of duty of care by Mr. Hofstee.

His Lordship also made the following observations:

> [60] I conclude that the Legislature has made it clear that the principles set out in *Bradley*, *supra*, do not apply where there is a statutory bar to recovery of what may be found to be indivisible damages. Section 10(1) of the *Act* is but one example of the inability to recover indivisible damages arising out of a separate breach of duty of care. A further example might be illustrated by a situation whereby proceedings relating to a first tortious act were not commenced within the limitation period and a second tortious act occurred. In those circumstances, I cannot conclude that damages would be available where an action was not commenced relating to the first act, a subsequent act caused injuries which were

> found to be indivisible from the first act, and a claim was advanced against the second tortfeasor for damages for the injuries caused both by the first and the second tortious acts. Just as a claim for damages for a second tortious act could not "give life" to recovery of damages for a first act where a limitation period had expired so also s. 10(1) of the *Act* has taken away "any rights of action" available to Mr. Pinch and any recoverable "damages, contributions or indemnity" that might have been available to Mr. Pinch as a result of MVA #2.

The plaintiff's damages arising from the first accident were dealt with as if the second accident did not occur. His Lordship also assessed separately the damages attributable to the second accident MVA, which he found was necessary by the language of s. 10(7) of the *Act* which requires a determination of the portion of the loss or damages caused by the negligence of Mr. Hofstee.

XXVI. Vicarious Liability

A. Fernandes v. Araujo, 2015 ONCA 571, per Sharpe J.A. (MacFarland, Rouleau, Lauwers and Pardu JJ.A. concurring)

The Ontario court of appeal addressed an interesting case of whether vicarious liability should be imposed against an owner of a vehicle for the negligence of a person who had acquired the vehicle with the owner's consent.

The plaintiff was seriously injured while riding on an all-terrain vehicle ("ATV") owned by the defendant, Carlos Almeida, and driven by the defendant, Eliana Araujo. Almeida was fixing fences on his farm with the help of some of his friends, including Araujo. Almeida told Araujo that she could drive the ATV while on his farm but did not expressly forbid her from leaving the farm although he later said if she had asked he would have told her that she could not leave the property with the ATV. Almeida's cousin, Jean Paul, did tell her not to leave the farm.

Later that day, without asking permission to use the ATV, Araujo rolled the ATV with Fernandes as a passenger when they were returning back to Almeida's farm after visiting a neighbour. Allstate insurance brought two summary judgment applications. One was to address whether Allstate was liable to provide insurance coverage when the owner did not give his consent for Araujo and Fernandes to drive it. The second was to dismiss Araujo's third party claim because she was operating the ATV without the owner's consent and was operating it contrary to the licence she had at the time.

Allstate's first application was dismissed and was granted in the third party action.

In the main action, the judge relied upon an Ontario court of appeal decision, *Finlayson v. GMAC Leasco Ltd.* wherein the court determined that liability under s. 192(2) of the *Highway Traffic Act* is based on possession, not operation, of a vehicle. In *Finlayson*, it was stated that if an owner gives possession of a vehicle to another, and the owner expressly prohibits that person from operating the vehicle, the owner is nonetheless vicariously liable for the negligent operation of that vehicle. The judge had to reconcile *Finlayson* with another court of appeal decision in *Newman v. Terdik*. In *Newman*, the vehicle owner had given his permission to allow an employee to travel down a laneway between two farms, but was expressly forbidden to drive it on the highway. The worker hit and injured Newman when he was driving on the highway. The court of appeal held that the worker did not have possession of the vehicle with consent; therefore, Terdik was not vicariously liable. The court of appeal commented that possession is a fluid concept; it can change from rightful to wrongful possession or to possession with or without consent.

The trial judge found that *Newman* was distinguishable because Almeida did not expressly impose any restrictions on Araujo's operation of the vehicle. He gave her possession. The fact that Almeida's cousin expressly forbid her from leaving the property could not be attributed to Almeida. The judge also commented that *Newman* may be wrongly decided as it had not followed *Thompson v. Bourchier*. Thus, the judge found that Araujo had given Almeida possession and so consented.

In respect of the third party action, the judge found that Araujo was not licenced to drive the ATV since she did not have a valid licence. Section 32(1) of the *Highway Traffic Act* states that no person shall operate a vehicle on a highway unless they have a valid licence and Statutory Condition 4.1 states that an insured shall not operate, drive or permit another person to operate or drive a vehicle unless they are authorized by law to do so.

Allstate appealed the motion for summary judgment. No appeal was taken in respect of the dismissal of the third party claim.

The appeal was heard by a panel of five judges because the court was asked to overturn *Newman*.

The court confirmed that the language and the purpose of s. 192(2) of the Highway Traffic Act is inconsistent with the test being a subjective one:

> [25] ... It cannot be the case that if the person in possession subjectively believes that he or she has the owner's consent, that alone is sufficient [sic] determine the liability of the owner. That would allow anyone with actual possession of the vehicle to fix the owner with liability even where the owner had not consented to that person having possession of the vehicle. The focus of the language and the purpose of the provision are on the actions of the owner who is charged with the responsibility of exercising appropriate caution when giving another person possession of the vehicle.

Allstate argued that *Newman* was different than the decisions affirmed in *Finlayson*. It argued that the language of s. 192(2) of the *Highway Traffic Act* referred to the negligent operation of a vehicle on a highway, where the owner does not consent to use on the highway, the consent required by the section is absent. The court of appeal disagreed, holding that the reference in s. 192(2) to operation on a highway just means that the owner's vicarious liability will be trigged only where the place of the negligence and injury is on a highway. The court found it difficult to see why the result should be different where the owner imposes a prohibition on operation on the highway (i.e., *Newman*) than in a case where the owner imposes a prohibition on any operation at all (*Finlayson*). There is nothing in the language of the section to justify that different.

The court of appeal determined that:

> [44] In my view, *Newman* was wrongly decided. It is inconsistent with the reasoning and principle expressed in the long line of cases commencing with *Thompson* that if the owner has consented to possession, the owner will be vicariously liable even if there is a breach of a condition imposed by the owner relating to the use or operation of the vehicle.

XXVII. Legislation

Supreme Court Civil Rule Changes

A. Rule 20-5 Persons Who Do Not Have to Pay Fees

Rule 20-5 applies to those individuals who the court determines cannot afford court fees and was amended and effective July 1, 2015. The wording of the criteria for someone who is unable to pay their court fees was amended from an individual "otherwise impoverished" to someone who "cannot, without undue hardship" afford to pay the fees.

B. Rule 12-2 Trial Management Conferences

Effective July 1, 2016, *Rule* changes will affect procedures relating to Trial Management Conferences and Trial Briefs under revisions to *Rule 12-2.*

(1) Timing of Trial Briefs

12-2(3) Plaintiff must file and serve trial brief at least 28 days before the TMC unless otherwise ordered

12-2(3.1) Other parties to file and serve trial brief at least 21 days before the TMC unless otherwise ordered

(2) New Form 41 Trial Brief Highlights:

- declaration of whether the party expects the trial to complete within the scheduled time or if not, the time required and counsel's availability;
- identification of the issue a witness will speak to and whether the direct evidence could conveniently be given by affidavit;
- identification of the expert witness' expertise;
- identification of objections to an expert's report;
- whether counsel have discussed or agreed to a common book of documents or a document agreement;
- admissions the filing party will be making at trial;
- nature of order or direction the filing party will apply for at the TMC and time estimate for the application;
- disclosure of whether settlement discussions or mediation have taken place and whether the filing party will ask the court at the TMC to assist in the parties' efforts to settle.

(3) Consequences of Failure to Comply

12-2(3.2) failure to comply with (3) or (3.1) may result in costs ordered against the offending party by the TMC judge.

12-2(3.3) A trial **must** be removed from the trial list if no trial brief has been filed under (3) or (3.1) unless otherwise ordered.

(4) Parties may agree to dispense with TMC

12-2(3.4) Parties of record may, no later than 14 days before the date set for a TMC, apply under Rule 8-3(1) for an order by consent dispensing with the need for a TMC.

12-2(3.5) An application under (3.4) must include a copy of each filed trial brief and a trial certificate in form 42 from every party of record (in addition to materials required under 8-3(1).

12-2(3.6) A judge or master may grant an order under (3.4) if satisfied that the matter is ready to proceed to trial and can be completed within the time reserved for it.

(5) An Application under 12-2(6) respecting the manner in which a person is to attend a TMC or exempting a person from attending a TMC can no longer be made without notice.

C. Costs for Fast Track/Changes to Appendix B - Repealed

The amendments to the Civil Rules with respect to costs for fast track actions and changes to the civil tariff, Appendix B, party and party costs scheduled to come into effect July 1, 2016 were repealed by BC Reg. 87/2016 on March 31, 2016.

D. Form 22 (List of Documents) and 23 (Appointment to Examine for Discovery)

The forms were amended to include an implied undertaking to the court in stating that the "documents produced are not to be used by the other party(ies) except for the purposes of litigation..."

Practice Directions

A. Practice Direction PD-49 Applications by Requisition 5-1(3), 5-2(3)(a), 5-2(3)(b), 12-2(4) and 23-5(4)

A new form of Requisition Form 17 is now available allowing certain applications and no longer requiring a separate letter:

(a) an application to shorten the service period applicable to a notice of case planning conference pursuant to Supreme Court Civil Rule 5-1(3);

(b) an application exempting a person from attending a case planning conference pursuant to Supreme Court Civil Rule 5-2(3)(a);

(c) an application respecting the method of attendance at a case planning conference pursuant to Supreme Court Civil Rule 5-2(3)(b);

(d) an application for an order respecting the manner in which a person is to attend a trial management conference or exempting or exempting a person from attending a trial management conference pursuant to Supreme Court Civil Rule 12-2(4);

(e) an application for directions that an application be heard by way of telephone, video conference or other communication medium and the manner in which the application is to be conducted pursuant to Supreme Court Civil Rule 23-5(4)

The position of the other party(ies) must be set out in the Requisition.

B. Practice Direction PD-50 Master's Jurisdiction

This Practice Direction took effect on May 15, 2016 and replaced *PD-42 - Masters' Jurisdiction* (March 25, 2013).

Part A of the Practice Direction set out matters in respect of which a master is not to exercise jurisdiction:

(a) to grant relief where the power to do so is conferred expressly on a judge by a statute or rule;
(b) to dispose of an appeal, or an application in the nature of an appeal, on the merits;
(c) to pronounce judgment by consent where any party in a proceedings is under a legal disability;
(d) to grant court approval of a settlement, compromise, payment or acceptance of money into court on behalf of a person under a legal disability, or court approval of a sale of assets of a person under a legal disability, with the exception of approval of infant settlements not greater than $50,000 provided for under s. 40(7) of the Infants Act;
(e) in any matter relating to criminal proceedings or the liberty of the subject other than uncontested petitions under the Patients Property Act;
(f) to make an order holding any person or entity in contempt;
(g) to grant injunctive relief, other than as identified under paragraph 6 of this direction;
(h) to make an order under the Judicial Review Procedure Act or for a prerogative writ;
(i) to grant a stay of proceedings where there is an arbitration;
(j) to make a declaration under the Survivorship and Presumption of Death Act;
(k) to remove a suspension from the practice of a profession; and
(l) to set aside, vary or amend an order of a judge, other than:

    (i) to abridge or extend a time prescribed by an order where the original order was one that a master would have had the jurisdiction to make; or

    (ii) to vary the interim orders identified under paragraph 2 of this direction.

PART B of the Practice Direction provides Guidelines for the assistance of the profession and the public but are not intended to be exhaustive:

(a) orders by consent;
(b) orders under Supreme Court Civil Rule 22-7 and Supreme Court Family Rule 21-5;
(c) orders for summary judgment under Rule 9-6 where there is no triable issue;
(d) orders striking out pleadings under Rule 9-5(1) provided there is no determination of a question of law relating to issues in the action;
(e) orders granting judgment in default;
(f) orders under Rule 21-7(5) where no matter is contested or where there is no triable issue; and
(g) uncontested final orders in respect of the Administration of Estates under Part 25 of the Supreme Court Civil Rules

Court of Appeal

A. Court of Appeal New Practice Note - Use of Multi Media in Appeal Books

Effective May 13, 2016, electronic media accompanying an appeal book must meet the following requirements:

(1) Only CDs or DVDs may be used. The exhibits on the disc(s) must be only multimedia that cannot be legibly reproduced in paper (such as video and audio). Other media that can be legibly reproduced on paper, such as documents, photographs, and diagrams, must always be clearly printed or copied, in colour if necessary (see further instructions in Form 12).

(2) Where possible, only one disc should be filed per set of paper appeal books or joint appeal books. The index to the appeal books must list any accompanying CD(s) or DVD(s). At the page in the appeal book where the multimedia item would be located there must be a photocopy of the clearly labelled CD or DVD that contains the item.

(3) Files on CD(s) or DVD(s) must be named with the Court of Appeal file number, book, exhibit number(s), and a short description: e.g. "CA12345 - Appellant's Appeal Book - Exhibit 12 - video of interview with appellant.avi".

(4) On filing, any CDs or DVDs accompanying a set of paper appeal books must be contained in jewel cases. Both the jewel case(s) and disc(s) must be labeled with the file number, name of the book, exhibit number(s), and disc number: e.g. "CA12345 - Appellant's Appeal Book - Exhibits 2, 3, 12, 28 - DVD 1 of 2". Use only water-based markers and do not apply adhesive labels to any discs. If materials are filed in violation of this practice directive, the Registrar may cancel the filing of the appeal book or require that it be corrected.

Court of Appeal—Double Siding

Effective on 29 January 2016, a number of amendments were made to the Court's civil rules and forms requiring that all books filed be prepared double-sided, except for the factums. This change will reduce the amount of paper required and decrease the physical size of many of the Court's books. The change affects Rules 40(4), 54(4), Form 9, Form 12, Form 13, and Form 21

XXVIII. Motor Vehicle Act

A. Motor Vehicle Act, R.S.B.C. 1996, c. 318

1. Driving in the Left Lane Amendment (Reg. 116/2015):

Section 15 of the *Act* is amended effective June 12, 2015, in prohibiting driving in the left lane when the speed limit is 80km/h or higher and the traffic is moving at more than 50km/h, unless you are:

- overtaking and passing another vehicle.
- moving left to allow traffic to merge.
- preparing for a left hand turn.
- moving left to pass an official vehicle displaying a flashing light.

There are a number of additional exceptions to this section including instances where it is unsafe to drive on the right, if traffic congestion cause travel speed to below 50km/hour, in HOV lanes or where there is little traffic. In violating this section, the BC Ministry of Transportation can issue fines for $167 along with an additional three driver penalty points.

2. Distracted Driving Amendments (B.C. Reg. 26/58):

Regulations relating to distracted drivers are to be amended effective June 1, 2016. Distracted driving includes using an electronic device while driving; emailing or texting while driving; using an electronic device while driving in violation of a driver's licence restriction; or emailing or texting while driving in violation of a driver's licence restriction (B.C. Reg. 107/2016).

The new rules subject distracted drivers to the following:

- Each offence will include the base fine of $368 – up from $167 – and will add four penalty points to a person's driving record.
- First-time offenders will face a minimum $543 in financial penalties.
- Repeat offenders, upon a second offence within 12 months, will pay the $368 fine plus $520, for a total of $888 in financial penalties, which escalate further for any additional offence.

In addition to these amendments, "distracted driving" is being elevated to the threshold for "high risk" driving offences. In doing so, the changes include:

- Making repeat offenders subject to having their driving records automatically reviewed which could lead to a 3 to 12 month driving prohibition.
- Graduated Licensing Program (GLP) drivers face intervention after a first driving offence with a possible prohibition of up to six months.
- Longer prohibitions for repeat offences. The superintendent of motor vehicles also has discretion to prohibit drivers based on referrals from ICBC or police.

Further, under the *Offence Act*, **R.S.B.C. 1996, c. 338**, the Violation Ticket Administration and Fines Regulation (B.C. Reg. 89/97) is amended to increase fines and penalties for distracted driving violations and those driving contrary to a driver's licence restriction or failing to display "L" or "N" in violating a driver's licence restriction.

B. Motor Vehicle Amendment Act, 2015, S.B.C. 2015, c. 13

1. Sections 1, 3, 6, 9, 20, 25, 35 and 44 of the *Motor Vehicle Amendment Act*, 2015, S.B.C. 2015, c. 13 were amended effective February 3, 2016 (B.C. Reg. 12/2016).

These amendments relate to mandatory driver programs:

- Section 1 repeals provisions and adds a new provision, permitting the superintendent to order a person to take a discretionary driver course or program when the person is also subject to a mandatory driver program.
- Section 3 creates mandatory driver programs.

- Section 6 permits the superintendent to prohibit a person from driving or have the person's driver's licence, if that person does not complete a mandatory driver program.
- Section 9 removes the requirement that a person must give prior notice to ICBC of that person applies for court review of a driving prohibition of more than 3 years.
- Section 20 permits regulations to be made, including regarding mandatory driver programs, remedial programs and ignition interlock programs.
- Sections 25 and 35 repeal provisions replaced by the new mandatory driver programs added by Bill 15.
- Section 44 is a transition provision regarding the mandatory driver programs added by Bill 15.

2. Sections 21, 32, 46, 48, and 57 of Bill 15 were amended effective April 1, 2016 (B.C. Reg. 12/2016).

- Sections 21 and 32 make amendments regarding the burden of proof in a driving prohibition review.
- Sections 46 and 48 are transitional provisions regarding review of driving prohibitions.
- Section 57 is a consequential amendment to the *Motor Vehicle Amendment Act, 2010*.
- Under the *Motor Vehicle Act*, the Motor Vehicle Act Regulations (B.C. Reg. 26/58) are amended to repeal and replace Division 46 (Remedial And Ignition Interlock Programs), including to:
    - Require drivers, who are convicted of specified alcohol and/or drug driving offences, to complete the Responsible Driver Program (RDP), which focuses on education and counseling and/or the Ignition Interlock Program (IIP), where a device is installed in the vehicle to prevent drivers from driving if they have consumed alcohol; and
    - Require drivers, who are required to complete the RDP and/or IIP program, to pay:
        - $880 for the RDP; and
        - $150 for the IIP (all effective February 3, 2016, B.C. Reg. 12/2016).