THE CONTINUING LEGAL EDUCATION
SOCIETY OF BRITISH COLUMBIA
CLE BC

PERSONAL INJURY CONFERENCE 2017
PAPER 1.1

Update on Case Law

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UPDATE ON CASE LAW

I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference held in June 2016. 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. Coast Building Supplies Ltd. v. Superior Plus LP, 2016 BCSC 1867, Gropper J.

On a preliminary objection to the admissibility of evidence contained in an affidavit filed on an application for, *inter alia*, disclosure of documents, the court held that for an affidavit based on information and belief to be admissible, the source of the information must be identified and it is not enough to specify the source without naming the individual. The source is not entitled to remain anonymous. The court struck those paragraphs of the affidavit which did not disclose the source. Other portions of the affidavit were struck as containing argument.

The affidavit also attached a transcript of a pre-trial deposition of a witness in a separate but related action without the defendant's consent. The court rejected the plaintiff's argument that there is a distinction between answers obtained by examination for discovery and evidence obtained by deposition in the application of the implied undertaking of confidentiality rule.

B. Mirzai-Sheshjavani v. Ho, 2016 BCSC 1704, Master Baker

This case is a reminder that counsel must take care in the preparation of chambers material and not slavishly follow precedents.

In his reasons dismissing an application for a late IME, Master Baker expressed frustration over the number of applications by defence counsel seeking independent medical examinations very close to a trial date and often with short leave. The Master commented that a fair proportion of the short leave applications being heard on a daily basis relate to late IMEs which he thought might be the result of litigation being driven by adjusters and not by counsel who are not being given enough latitude to exercise their professional judgment. He was particularly critical of this application and the quality of the affidavit evidence which he described as "there is just absolutely no question that this is a cut-and-paste affidavit" since it was taken literally verbatim from the affidavit outlined in one of the other cases cited to him, including down to the punctuation.

C. Tournier v. Ruckle, 2017 BCSC 308, Master Muir/Widdowson v. Rockwell, 2017 BCSC 385, Kent J.

These two cases also address the impropriety of the "cut and paste" method of drafting affidavits.

In *Tournier*, on an application for an IME, Master Muir was provided with an affidavit lifted word for word from an affidavit from a different expert filed in the same litigation. She commented: "I note the concern, and I think it is a concern in many cases that experts are swearing affidavits to simply comply with some cookie cutter expectation of what will succeed rather the real issues in the particular case" (para. 18).

In *Widdowson* (outlined in further detail below), Mr. Justice Kent addressed affidavit evidence filed on a summary trial application from employees of the defendant pub in a commercial host liquor case.

At paragraphs 43 to 45, His Lordship found:

> [43] All three serving staff swore affidavits containing identical paragraphs on important substantive issues. For example, the three affidavits sworn by them contain the following identical paragraphs:
>
> - "Moreover, upon being hired by the Cambie, I reviewed, and agreed to abide by the Cambie's written policies and procedures

> for serving alcohol (the "Policies and Procedures"). In particular, the Cambie's written Policies and Procedures require all serving staff, including myself, to take care that patrons do not become intoxicated at the establishment. The Cambie's Policies and Procedures further require all serving staff to immediately stop serving an intoxicated patron and take steps to ensure that an intoxicated patron is provided with a safe means of transportation home ... "
>
> • "I would never serve a patron who was slurring her words, staggering, unable to count their money or exhibiting any other signs of intoxication."
>
> • "I did not observe any patrons exhibiting signs of intoxication on February 17, 2012 or serve alcohol to any patrons at the Cambie who were exhibiting signs of intoxication during my shift on February 17, 2012. Had I observed patrons exhibiting signs of intoxication, I would not have served them further alcohol, and I would have taken steps to ensure that the intoxicated patron had a safe ride home, by calling a cab if necessary."

[44] These paragraphs deserve little if any weight. They were drafted by a lawyer and purportedly adopted by the witnesses. They clearly do not represent the witnesses' own words. The content is "lawyer speak" not "ordinary person speak". And having observed these various witnesses being cross-examined, it is clear that if asked proper questions on direct examination, none of them would have given this evidence in the same words or syntax found in these paragraphs. These paragraphs are in effect testimony manufactured by counsel, and the use of such identical language in multiple affidavits from different witnesses is simply not an acceptable method of adducing evidence (let alone credible evidence) on a summary trial.

[45] Furthermore, the cross-examination of the employees revealed that some of the assertions in the affidavits are not true or, at least, did not represent the actual conduct of the employees on the day in question. For example, the waitress Kennedy stated that if she saw a person drunk in the bar she would "give them water and wait for them to leave on their own". The bartender Wyse stated that if four people in the space of two hours consumed eight beer, four double vodkas, and six shooters, this is something that would *not* attract his attention. He also stated what I consider to very likely be the reality of day-to-day practice in this establishment, namely, that intervention depends on how the patrons are behaving and would not likely occur if they do not act like they are drunk.

III. Commercial Host Liability

A. Widdowson v. Rockwell, 2017 BCSC 385, Kent J.

The parties sought a summary trial, by agreement, of a commercial host liquor liability claim. This case represents a departure from earlier cases that suggested ensuring that a drunken patron gets home safely was sufficient for a bar to satisfy its duty of care.

The plaintiff suffered serious injury as a pedestrian when he was hit by a truck being driven by the defendant, Rockwell, as the plaintiff was walking home along a sidewalk in Port Moody. Rockwell was severely intoxicated; he was "quite literally, falling down drunk" at the time of the accident. Rockwell and three co-workers had visited the defendant pub and consumed alcohol earlier in the day of the accident. The amount consumed was in issue in the summary trial application.

As outlined above, three of the employees of the pub swore affidavits that contained identical paragraphs on important substantive issues regarding the pub's policies on the service of alcohol and their evidence was rejected.

His Lordship noted the shortcomings in the evidence which included that it would have been preferable to have heard and observed Rockwell testify in person to assess his credibility. Instead, the court was limited to reading his discovery evidence, in whole, which was necessary and fair in light of the parties' insistence that the pub's liability be determined based on a summary trial. The court was prepared to accept some of Rockwell's evidence but not his evidence respecting the extent of his own alcohol consumption in light of the unchallenged BAC reading which was .334 (334 mg of alcohol in 100ml of blood) at the time of the Accident.

The evidence established that Rockwell had been drinking at the pub from about noon to 3:00 p.m. After he left the pub, he drove down Hastings Street towards Barnett Highway, stopped at a beer and wine store for his passenger, Sahanovitch, to purchase a six-pack of beer and a mickey of whiskey which Sahanovitch started to consume on the drive out to Rockwell's home in Port Moody. When they got to Rockwell's home, Sahanovitch called his mother to have her pick him up, as planned, but she could not and so Rockwell left to drive him to Coquitlam Center. They were at Rockwell's home for about 15 to 20 minutes during which the two testified that Rockwell had split the remains of some flavoured vodka, the only liquor in the house; it was about a "little shot glass" and not more than an ounce and a quarter or a half. The accident happened when Rockwell lost control of his truck after "gunning it" around a blind turn to get ahead of an approaching vehicle and mounted the sidewalk striking the plaintiff.

The court inferred from the BAC evidence that Rockwell consumed a significant amount of alcohol at the pub rather than the two and a half beer he testified to consuming. The court also found that the two must have spent about 30 minutes at Rockwell's home and that it was likely he consumed more alcohol at home than he claimed to in his evidence. It was not necessary to ascribe a precise amount to the consumption of alcohol; it was clear that Rockwell was significantly intoxicated when he left the pub and that he became even more severely intoxicated through the consumption of alcohol after he left the pub.

In addressing the pub's argument that the arrival at home is "complete defence"; that safe arrival home breaks the "chain of causation" and the pub has discharged its duty of care, Mr. Justice Kent held:

> [81] In my view, there is little logic to the bald proposition that a safe arrival home "breaks the chain of causation" or otherwise discharges the pub's duty of care. Ought it really matter whether the pub-induced intoxication triggers a fall while walking home as opposed to a fall once the drunken patron has successfully crossed the threshold into his house? Does it make any sense that liability can be imposed for alcohol-caused injury to third parties before arrival at home but not if same injury occurs after leaving the home a few minutes later?
>
> ...
>
> [83] In the present case it would be artificial in the extreme to say that Rockwell's intoxication, which was caused at least in part by the excessive consumption of alcohol at the pub, was not a cause of the subsequent accident simply because he spent a few minutes at home before again venturing onto the road. I have found as a fact that the pub's breach of duty led to Rockwell being substantially impaired when he first left the pub and got into his vehicle. That intoxication still existed at the time of the accident, albeit increased by subsequent alcohol consumption, and hence it was clearly part of the cause of the accident and of the resulting injuries sustained by the plaintiff. Applying the causation

> principles referred to above, that is sufficient to found liability on the part of the pub in this case.
>
> [84] I recognize the argument that because of Rockwell's attendance at home, the pub's breach of duty might no longer have been a "proximate cause" of the accident or:
>
> > . . . in other words, that the damage was not too remote from the factual cause. ... The remoteness inquiry assumes that but for the defendant's wrongful act, the plaintiff's loss would not have occurred, but places legal limits on the defendant's liability: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54.
>
> [85] It may well be that our Court of Appeal will determine, as a matter of general principle, that arriving safely home should limit (or eliminate) a pub's liability for damage thereafter caused to third parties by an intoxicated patron. Thus far at least, there is no authority to that effect that is binding upon me and I decline to make such a ruling in the circumstances of this particular case. In my view, delivery of the intoxicated patron into the hands of a sober and responsible person might arguably permit the elimination of otherwise indeterminable liability, but that did not occur here.

The pub was found to be liable and fault was allocated 75% to Rockwell and 25% to the pub.

IV. Contingency Fees

A. Hammerberg Lawyers LLP v. Ikeda, 2016 BCSC 621, Master Muir (as Registrar)

A client's failure to cooperate led to her solicitors withdrawing from her case. The client eventually settled her case and she brought an appointment for a review of the contingency fee agreement and the lawyer's accounts. The law firm unilaterally reduced the percentage fee charged. Despite the reduction, the client still argued that the maximum contingency fee should be reserved for the most severe cases. The court disagreed, stating that smaller claims could have a greater risk for lawyers, as it did in this case. The agreement clearly contemplated the contingency fee should be calculated on ultimate recovery and the client failed to recognize that the sole reason she obtained settlement was the foundation laid by the work of her solicitors. The Court found that it was a difficult case and the result was a good one. Further, the solicitors were seeking less than they were entitled to under the contingency fee agreement.

V. Costs and Disbursements

A. Gill v. Fowler, 2016 BCSC 1163, Master Baker

This was an assessment of costs following settlement of three separate fast track actions encompassing four separate motor vehicle accidents. The trials of the actions were to be heard at the same time. The plaintiff applied for fast track costs in each of the three actions. Master Baker held that by putting all matters together, certain preparations would have been avoided. On that basis, a small reduction was applied to the fixed costs for fast track trial preparation, the court finding that not every single fast track case will be awarded $6,500 in trial preparation where the matter settled. In the result, the plaintiff was awarded $20,000 inclusive of GST and PST.

B. Howell v. Witt, 2016 BCSC 913, Butler J.

The plaintiff sought costs at Scale C after a 14-day jury trial, arguing that the length of trial complexity of issues and hard fought nature of the case made it a case of more than ordinary difficulty. The trial judge disagreed and found that the case fell within the range of ordinary personal injury trials. Moreover, his lordship held that credibility was very important and the defence strategy to challenge the plaintiff's version of the accident and the extent and nature of his injuries was not unreasonable.

> In the adversarial process, the parties will often take contrary positions which will require issues to be seriously challenged and vigorously argued. When that occurs, it should not elevate the scale of costs except when one side is acting in an unreasonable manner. Vigorously defending a client or a client's interests is of fundamental importance to the integrity of the justice system and should not be curbed for fear of an increase in the scale of the costs award. (at para 23)

C. Kondor v. Shea, 2016 BCCA 15, per Lowry J.A. (Saunders and Fitch JJ.A. concurring)

The court considered the question of whether an order made by the trial judge with respect to the costs of two interlocutory applications heard by a master in the course of litigation of the action can be upheld. The plaintiff had successfully opposed two defence applications before trial. On the first application, the master did not make any provision for costs but the court of appeal noted that *Rule 14-1(12)(b)* applies in that case. On the second application, the master awarded the plaintiff costs in the cause. Following trial in which the plaintiff was successful, the trial judge made a costs order depriving the plaintiff of the costs of both application. The master did not refer the costs of the applications to the trial judge and orders of the master were not appealed. Therefore, the court of appeal found that there was for no place for the judge's intervention and the master's orders were restored.

D. Pinch (Guardian ad litem of) v. Morwood, 2016 BCSC 1907, Dillon J.

The plaintiff sought costs at Scale C following a liability trial in a medical negligence action which application was dismissed as the matters were found to fall within ordinary difficulty. Dillon J. also declined to award costs for two counsel, following *Thom v. Canada Safeway Limited*, 2015 BCSC 2026 where the court held the only authority in the *Rules* for additional costs is Scale C and Appendix B s. 2(5) which allows the 1.5 unit "uplift".

E. Weston v. Shaw, 2017 BCSC 40, Rogers J.

The parties agreed on quantum of $80,000 and proceeded to trial on liability. Each party argued that he or she was in the right and that the other was entirely at fault for the collision. In the end, the trial judge found each 50% at fault for the accident. The plaintiff sought to depart from the effect of s. 3 of the *Negligence Act* which would have limited his recovery to 50% of his costs and disbursements. However, the trial judge found that the circumstances of the case, including the reduction in the amount that the plaintiff would ultimately recover, did not warrant a departure from s. 3 apportionment.

Special Costs

A. Henry v. British Columbia (Attorney General), 2016 BCSC 1494, Hinkson CJSC

The plaintiff succeeded in his claims for damages arising from his wrongful conviction and incarceration against the Province of BC. The plaintiff was unsuccessful in his application for special costs. Although the court found many of the Province's defences to be weak and of little merit, and that the Province unreasonably failed to make admissions of fact, its conduct did not raise to the level of requiring the court's rebuke. Instead, the court awarded costs at Scale C and allowed the "uplift" that each unit allowed be 1.5 times the value that would otherwise apply under s. 2(5) of Appendix B. The court awarded full costs against the Province and did not apportion any of them against defendants with whom the plaintiff had settled before judgment.

B. Norris v. Burgess, 2016 BCSC 1451, Funt J.

The plaintiff was awarded $462,374 following a jury trial. The defendants had made a formal offer to settle before trial in the amount of $678,500 and applied for costs from the date of the offer to trial and special costs for the trial on account of the plaintiff's late disclosure of photographs and documents. The plaintiff, in turn, applied for special costs for the entire proceeding, equalling the amount of the contingency payable to her counsel. The plaintiff's application was based upon defence disclosure of video surveillance during the fourth week of trial and contrary to an order made at a trial management conference which required its listing.

The court declined to give effect to the defendants' formal offer, finding that the plaintiff's belief in the possibility of a significant loss of earning capacity award was reasonable. The court also found that the late disclosure of the video surveillance undermined the settlement process and weighed against giving effect to the offer. The plaintiff's conduct in failing to disclose photographs and documents earlier was found to be more of an oversight and did not amount to conduct worthy of rebuke. ICBC's late disclosure, however, attracted the court's rebuke. Funt J. held that ICBC showed a casual disregard for the court order and disrupted the plaintiff's ability to make her best case to the jury. His lordship awarded the full amount of the contingency fee payable to her counsel for the entirety of the case.

C. Smithies Holdings Inc. v. RCV Holdings Ltd., 2017 BCCA 177, per Goepel J.A. (Groberman and MacKenzie JJ.A. concurring)

The appeal concerned an award of special costs against the appellants for their pre-litigation conduct. In deciding the issue, Goepel J.A. undertook a compendious examination of the BC appellant and trial decisions on the issue as well as cases from other jurisdictions. The appellate authorities revealed that while it was typically held that special costs were reserved for misconduct during the course of the litigation, there was no definitive decision on the issue. There were *obiter* comments suggesting that pre-litigation conduct could be considered, but the Court of Appeal had never directly answered the question. The BC Supreme Court decisions revealed that the question of whether special costs could be awarded for pre-litigation conduct were not answered in a consistent way. The court held that while trial judges have a wide measure of discretion in fashioning costs awards, the discretion must be exercised judicially and in accordance with established principles. The purpose of special costs, unlike party and party costs, is not to indemnify but to deter and punish reprehensible conduct. The authorities made clear that these special costs are usually reserved for misconduct during the course of the litigation. The court

found no policy reasons to depart from this general rule and that judges must exercise their discretion in accordance with the principles of judicial comity, which call for judges to treat like cases alike.

There is already a remedy for pre-litigation conduct in the nature of various causes of action and punitive damages. Therefore, a "bright line" can and should be drawn so that judges will be able to exercise their discretion in like cases in a like manner. Pre-litigation conduct should not be considered in determining whether such an award is appropriate.

D. Tanious v. The Empire Life Insurance Company, 2017 BCSC 85, Brown J.

The plaintiff successfully sued for past disability benefits and a declaration that she was totally disabled. The court also awarded $15,000 in aggravated damages. The court awarded special costs against Empire Life, finding that the nature of disability insurance contracts warranted such a result. The coverage issue for a disability was found to be of a similar nature to that of coverage issues in third party proceedings cases where courts have awarded special costs in addition to the insurance benefits payable. In both situations, fulfilment of the intention of the insurance coverage is the driving consideration.

E. Williams v. Canales, 2016 BCSC 1811, Blok J.

The defendants successfully obtained judgment against Intact Insurance Company which declared that Intact was obliged to defend them in the underlying personal injury action. Intact was required to reimburse the defendant for defence costs already incurred. The defendant then sought special costs against Intact for the coverage action. Following Ontario jurisprudence, the court awarded special costs, finding that coverage cases were an additional exception to the usual rule that special costs will not be awarded in the absence of unusual circumstances.

Disbursements

A. Ali v. Fineblit, 2016 BCSC 566, District Registrar Nielson

The plaintiff's disbursement claim for a privately obtained MRI was disallowed on the basis that there was no evidence that any attempt was made to have the plaintiff examined in the public system or evidence of an actual wait time.

B. Carby v. Benoit, 2016 BCSC 1675, Master Bouck

Following the settlement of her claims for $750,000, the plaintiff's costs and disbursements were assessed. The plaintiff had consulted 19 experts and served 31 reports for trial purposes. The costs of the vast majority of the reports were allowed. Master Bouck disallowed:

- the fee of Dr. Kahn, an anaesthetist and pain management specialist for a private assessment. She found his assessment to be a private medical service and, as such, could have been claimed as an item of special damages. It was not a proper or necessary disbursement within the meaning of the *Rules.*
- the private MRI.

- the cost of an economist to consult with counsel on subrogation issues involving the plaintiff's employer and disability management program. This was found to be a luxury that ought not to be visited upon the defendants.

C. Haller v. Galey, 2016 BCSC 998, Master McDiarmid

On an assessment of the plaintiff's costs, Master McDiarmid disallowed a $2,000 administration fee mark up charged by IMA. An administration fee markup for providing the services to set up a medical examination and transcribe a report may be reasonable but administration for coordination of testimony, especially when it was known substantially in advance makes the fee charge unreasonable. The fact that the defendant's insurer also retained experts through the same organization and presumably paid the same administration fee, is not determinative of the issue.

Master McDiarmid disallowed the cost of a jury consultant, finding that it constituted trial preparation which is covered by tariff item 34 and also constituted a luxury.

D. Noori v. Pochman, 2016 BCSC 1329, District Registrar Nielsen

The plaintiff sought mediation costs as a disbursement following the settlement of the action. The plaintiff failed to attend the mediation after ICBC advised his lawyer that the handling adjuster had authority only to $15,000 and would not entertain settlement beyond that amount. Given the adjuster's position, plaintiff's counsel advised the plaintiff not to bother attending as it would have been a waste of time. The mediation costs were found to be necessary and proper costs when they were incurred and they were allowed in the circumstances.

E. Pacholski v. Doe et al., 2016 BCSC 1157, Registrar Cameron

The plaintiff sought recovery of the cost of a service provider who conduct a mock direct and cross-examination of the plaintiff before a mock jury. The claim was disallowed on the basis that the exercise is properly characterized as part of trial preparation and, as such, was not a disbursement that should be passed on to the defendant. Preparation for trial is compensated by tariff item 34.

F. Wynia v. Soviskov, 2017 BCSC 195, District Registrar Nielson

The cost of insurance coverage for after-the-event insurance is not a proper or necessary disbursement in the conduct of the proceeding. The coverage insures against the plaintiff's own disbursements and opponents' costs and disbursements, in a lost or abandoned case. As such, it was seen to relate to the direction, management or control of the litigation and did not arise from the exigencies of the proceeding.

VI. Credibility

A. Brennan v. Colindres, 2016 BCSC 1026, Baker J.

The defendants in this case admitted liability for the accident but denied that the plaintiff was in his vehicle when the accident happened. In her reasons for judgment, Baker J. found that the plaintiff was not a credible witness. The plaintiff was a poor historian, he provided different versions of the same events and there were instances when he failed to respond honestly and truthfully to questions

asked. The plaintiff's testimony was contradicted by other witnesses called on behalf of the defence as well as by witnesses called on behalf of the plaintiff.

The trial judge concluded that the plaintiff would have found his recreational and social activities less enjoyable after the accident but that within six months post-accident he returned to participating in activities to the same extent as he had prior to the accident. At paragraph 103 the trial judge stated:

> Since March 2012, Mr. Brennan has acquired a new hobby, which, judging by the numerous photographs he has posted on his Facebook page, provides him with considerable satisfaction. Mr. Brennan testified that he obtained a firearms permit and a friend purchased a handgun for him. He has posted numerous photographs of himself in various poses with this weapon.

In the result, the plaintiff was awarded $27,328 in damages.

B. Insurance Corporation of British Columbia v. Singh, 2017 BCSC 111, Duncan J.

This case involved an application by ICBC for an order that seven personal injury actions related to three separate motor vehicle collisions be tried together. The alleged injuries resulting from all three collisions were soft tissue or psychological injuries. ICBC also filed a Notice of Civil Claim against all parties alleging fraud. The question was whether these accidents were staged by the parties.

In oral reasons for judgment, Duncan J. was satisfied that a high degree of interconnectedness existed between the parties and that it would be in the interests of justice for the matters to be heard together. She stated at paragraph 38 that "If individual trials were held, inconsistent results could ensue." The judge reviewed factors to be considered when ordering actions to be heard together. She found that an order that the actions be heard together would result in a saving in pre-trial procedures. She also found that there would be a reduction in the number of days required for trial and that the parties would save time and expense as they could be excused from portions of the trial which did not relate to them. At paragraph 36 the judge also suggested the following:

> ...the actions could be heard in stages with the ICBC fraud action scheduled first as it might determine, in whole or in part, the viability of the individual tort actions. This, of course, would be dependent on the views of a judge at a case planning conference or a judicial management conference.

C. Lamb v. Fullerton, 2016 BCSC 1694, Warren J.

The plaintiff sought damages in relation to four accidents. Liability was in issue for three of the four accidents. At the time of each accident, the plaintiff was riding a motorcycle. Ten years before the first accident the plaintiff was struck by a motor vehicle while walking on a sidewalk. He testified that in the previous accident he had sustained a brain injury and other injuries that affected his mobility and memory. No medical evidence was led in relation to those injuries.

The trial judge had "grave concerns" about the credibility and reliability of the plaintiff's evidence. She concluded that the plaintiff's evidence was unreliable in the absence of corroborating independent evidence. The trial judge stated:

> Mr. Lamb unreasonably persisted in making claims that were inconsistent with either independent evidence or other aspects of his own evidence, and he made little, if any, attempt to explain the inconsistencies…. [para 10]

> …Mr. Lamb also baldly advanced claims, some of which were out of the ordinary and even outlandish, without corroborating evidence in circumstances where one would expect corroborating evidence to exist…. [para 14]
>
> …Some of Mr. Lamb's evidence was implausible. For example, he asserts that he continues to suffer from very serious conditions including significant pain, anger, and memory problems, in addition to the extraordinary, frequent, and debilitating vomiting and bowel incontinence, and yet he did not see his family doctor, Dr. Lawrence Yang, at all in the more than two years between September 3, 2013 and December 2, 2015. He then saw Dr. Yang on several occasions after December 2, 2015, in the roughly six weeks before the commencement of the trial. [para 17]

The judge also observed that although the plaintiff claimed he suffered from memory problems, some of his testimony was precise to an implausible degree. In the absence of medical evidence, she was not persuaded that his unusual behaviour was a result of a pre-existing brain injury. The plaintiff also acknowledged having been untruthful in other contexts. The judge arrived at the conclusion that some aspects of the plaintiff's testimony were fabricated. At paragraph 22 of her decision, Warren J. describes the peculiar demeanor of the plaintiff in court and notes that the plaintiff had even admitted to being under the influence of marijuana while testifying.

Warren J. dismissed the plaintiff's claim in relation to one of the accidents. The plaintiff was awarded non-pecuniary damages in the amount of $4,000 for the remaining three accidents and special damages in the amount of $500.

D. Siddall v. Bencherif, 2016 BCSC 1662, Weatherill J.

This action arose as a result of two separate motor vehicle collisions. Liability was admitted for the collisions and the court was to assess and apportion damages among the defendants. The judge did not find the plaintiff to be forthcoming. She was evasive, argumentative and adversarial during cross-examination. The judge also found that the poor quality of the plaintiff's memory was at odds with her obvious high level of intelligence. She was unable to recall significant portions of the clinical history she herself had provided to the experts. The experts providing their opinions had relied to a significant degree on what they were told by the plaintiff. As a result of the judge affording little weight to the plaintiff's evidence, the opinion evidence of the experts could not be of much assistance to the court.

At paragraph 182 the trial judge stated:

As is the case in most personal injury actions, the most important witness in the determination of causation is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.

At paragraphs 189 and 190 the trial judge stated:

The plaintiff's antics and demeanour during cross-examination, as well as her numerous and vehement attempts to convince the court of her ordeal, evoked the oft-quoted line from *Hamlet*: "the lady doth protest too much".

I find that, overall, the plaintiff was not a particularly credible or reliable witness regarding the effect that the Collisions had on her, which I find she exaggerated. Unfortunately, I am unable to give her evidence in that regard much weight.

The plaintiff sought $130,000 for non-pecuniary damages, $275,000 for the cost of future care, $50,000 for past loss of income earning capacity, and $250,000 for future loss of income-earning capacity. In the result, the trial judge awarded $60,000 for non-pecuniary damages and $6,500 for specials damages. The trial judge dismissed the claim for the cost future care and the claims for past and future income-earning capacity.

VII. Damages

Aggravated/Punitive

A. Marshall v. ICBC, 2016 BCSC 2369, Master Bouck

ICBC brought an application for bifurcation of the bad faith claim from the contract claim arising from ICBC's denial of coverage of the insured's vandalized vehicle. The application was pursued on the basis that defence of the bad faith claim may require waiver of solicitor-client privilege. In opposing the application, the insured provided an affidavit that the bad faith claim was confined to events alleged to have occurred prior to the litigation. Even if the insured was not so limiting their claim, ICBC had failed to provide any evidence to support its bald assertion that the defence of the bad faith claim required disclosure of solicitor-client privilege or that the denial was based on legal advice. ICBC had not listed any privileged documents that related to solicitor client communications on the bad faith issue. The court will not presume the possibility that waiver of solicitor-client privilege is necessary to properly defend a bad faith claim. The application was dismissed.

Causation

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

The trial judge dismissed the plaintiff's claim on the basis that she had not been injured in a collision which had involved only minor forces. On appeal, a new trial was ordered on the basis that the reasons for judgment were not adequate.

The trial judge had failed to provide some basis in his reasons for rejecting the plaintiff's evidence that she suffered injuries when there was some evidence in support. It was not clear whether the judge's adverse findings on the plaintiff's credibility were based solely on the plaintiff's overstatement of the severity of the collision. The plaintiff's evidence had been corroborated by her husband's observations and objective evidence from her GP that he had found muscle spasm and muscle tenderness. It was open for the trial judge to reject evidence of objective sign of injury, but it was incumbent upon him to explain why he had done so.

The court accepted that:

> [17] ... there is an inferential gap between finding that she had exaggerated the force of the collision and concluding, without considering any other evidence, that she was generally an unreliable witness or that the accident had not caused any injury. As the judge acknowledged, very minor impacts may cause injury. 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 the time and

> remained symptomatic. No doubt, unreliability about one thing can undermine reliability about everything, but the reasons do not disclose whether this was the judge's view. In my view, the failure in the reasons to offer at least some indication of why the judge concluded that exaggerating the force of the impact justified a wholesale rejection of the plaintiff's evidence, if that is what he did, reinforces the conclusion that the reasons for judgment are inadequate.

B. Dunbar v. Mendez, 2016 BCCA 211, per Harris J.A. (D. Smith and Goepel JJ.A concurring)

One of the issues on appeal was whether the trial judge erred in the assessment of past income loss by improperly applying the test for causation. The plaintiff was injured in a motor vehicle accident and later suffered a disc herniation when he exerted himself doing manual labour. The back injury caused an income loss but resolved before trial. Expert evidence at trial stated that the injuries sustained in the accident contributed to the disc herniation. On appeal, the court held that this was sufficient to satisfy the "but for" test. It rejected the defendant's/appellant's assertion that "if a plaintiff does not prove that the defendant's negligence was more than one of two or more independently sufficient causes", then causation is not established. The court found that this was not an accurate statement of the law. The trial judge's finding that the accident was a necessary cause was sufficient to satisfy the but for test.

C. Tan v. Mintzler and Miller, 2016 BCSC 1183, Groves J.

At trial, there was a debate concerning the type of injury that the plaintiff sustained. The Court held that the distinction between whether the plaintiff's psychological injuries and cognitive difficulties were caused by an MTBI or by the plaintiff's chronic pain and sleep disturbance was relevant only to the quantum of general damages and to the plaintiff's prognosis. It was accepted that the plaintiff suffered an MTBI during the accident and that she continued to suffer from chronic pain in her hand, face and jaw, along with depression, anxiety, mild PTSD. In preferring the plaintiff's neurologist expert, Groves J. stated that it was clear the plaintiff suffered either a mild or moderate traumatic brain injury. The Court placed more emphasis on the plaintiff's symptoms and it was satisfied that despite the dispute over diagnoses, the plaintiff's injuries had "a real and substantial impact on her quality of life."

Charter Damages

A. Henry v. British Columbia (Attorney General), 2016 BCSC 1038, Hinkson CJSC

At the trial for the plaintiff's claim for wrongful conviction and imprisonment, he was awarded damages in the amount of $7,500,000 for vindication and deterrence under section 24(1) of the Charter. This head of damage was analyzed and awarded as one amount under a non pecuniary damages analysis to compensate for his suffering and loss of amenities.

Cost of Future Care

A. Watkins v. Harder, 2016 BCSC 2078, Gaul J.

In this case, the plaintiff claimed for medications as part of her future care. The defendants did not challenge the costs but argued that the federal government under its health benefits program for Aboriginal persons would likely pay for these medications. It was the defendants' position that these costs should be deducted from any cost of future care award to avoid the plaintiff's double recovery. Neither party provided evidence with respect to the nature of the benefits to which the plaintiff was entitled as a result of her Aboriginal status and, therefore, the Court had no evidence regarding: her continued entitlement; the certainty of the benefits provided under the program; or her eligibility for benefits when an alternative source of funding, such as a tort award, was provided. As a result, the court declined to make a deduction as it could not be determined that the costs of treatments and medications in question would be provided under the government scheme. The court would also not presume that the plaintiff would make a fraudulent claim for publicly-funded health benefits if the amounts were awarded.

B. Wilhelmson v. Dumma, 2017 BCSC 616, Sharma J.

This case involved a catastrophic motor vehicle accident in which three people were killed, including the plaintiff's boyfriend. The plaintiff, 21 years old at the time of the accident, spent 39 days in hospital with four weeks in a medically induced coma. She subsequently underwent 10 surgeries and experts expressed significant doubt that she would ever be able to successfully complete a pregnancy through to term. The plaintiff claimed a specific award for surrogacy fees to allow her to have a biological child in the future. The defendant argued that these factors were valid considerations only in determining the amount of general damages as Canadian law prohibits payment for women to carry another woman's eggs and act as a surrogate. The plaintiff provided opinion evidence, quantifying the cost of a surrogate in the United States in the $50,000 to $100,000 range per pregnancy. In relying on this evidence, the Court awarded $100,000 for surrogacy fees for two pregnancies. Sharma J. recognized that the lost ability to carry a child had caused the plaintiff pain and suffering, however, she chose to award the plaintiff a separate award specifically addressing surrogacy fees. Sharma J. outlined her reasoning at para. 375, "…the fact that she is unable to carry a child leads to a distinct future cost to allow her to have a biological child - the cost of hiring a surrogate. I find this cost is medically necessary and reasonable. Its necessity arose directly from the accident; therefore the cost must be borne by the defendant."

Deductibility of Prior Settlement Amounts

A. Henry v. British Columbia (Attorney General), 2016 BCSC 2082, Hinkson CJSC

The plaintiff was awarded damages for compensation, special damages and breach of his charter rights in an amount of just over $8,000,000 for wrongful incarceration lasting 27 years. The plaintiff settled with a number of other defendants before trial for an undisclosed amount. The defendant Attorney General applied post-judgment to have the settlement amount deducted from the trial award. The court found that although the allegations against the settling defendants and non settling defendants were based upon different allegations of fault for different time periods, the relief sought was essentially the same: compensation for a wrongful conviction and 27 years of

imprisonment. On this basis the results alleged from the different causes of action were indivisible. The principle against double recovery required that those portions of the settlement funds which did not relate exclusively to costs must be deducted from the trial award.

Housekeeping Capacity

A. Liu v. Bains, 2016 BCCA 374, per Neilson J.A. (Bauman and Newbury JJ.A. concurring)

The defendant appealed the trial order awarding the plaintiff $35,000 for past loss of housekeeping capacity and $35,000 for loss of future housekeeping capacity. At trial, the plaintiff was found to be an industrious and hard-working mother and wife who came from a poor family and had little education before immigrating to Canada. She performed all of the household tasks in their 2,500 square foot home because she wanted her three children to focus on their education and obtain better employment than she had been able to do. There was a strong evidentiary basis for the trial judge's findings that her devotion and dedication to her domestic life, in additional to working full time, was extraordinary as she wanted her children to fulfill their full potentials. She remained unable to perform substantially all of these tasks at trial but for light chores.

On appeal, the court held that while the award represents the "high end of the usual range", the trial judge nevertheless applied the cautionary approach mandated by the case law. The trial judge used a conservative estimate of 12 hours per week at $11.15/hour as a guide and this was held to be an appropriate model to assist in the assessment of the damages. The trial award for the future loss was limited to five years although the plaintiff was expected to live into her eighties with no real hope of improvement in her chronic pain. This was held to be reasonable and justified on the evidence.

B. Shongu v. Jing, 2016 BCSC 901, Sewell J.

The plaintiff was 39 at the time of trial and a married father of three young daughters. He immigrated to Canada from the Democratic Republic of the Congo after fleeing the atrocities of civil war. He was diagnosed with post traumatic stress disorder as a result of his experiences but was treated, and went on to work, volunteer, assist other refugees and marry before the accident. As a result of chronic pain from his injuries sustained in the accident, his PTSD reoccurred at a severe level and he was rendered totally disabled. The trial judge found that he was now incapable of providing any real assistance to his wife in childcare or looking after the household. As part of his damages, he was awarded past loss of homemaking capacity of $30,000 and future homemaking capacity of $150,000. While the trial judge appears to have conflated this head of damage with the in trust claim advanced on behalf of the plaintiff's wife, he engaged in a similar analysis as the trial judge in *Liu v. Bains* which approach was upheld on appeal, as discussed above.

Indvisible Injury

A. Griffioen v. Arnold, 2017 BCSC 490, Bracken J.

The plaintiff brought an action against the defendants with respect to a motor vehicle accident. The plaintiff was subsequently involved in a second accident in which the plaintiff's husband was liable and the plaintiff missed the limitation date to sue him. It was acknowledged that the second accident likely aggravated the plaintiff's psychological condition and soft tissue injuries. Any

injuries from the second accident were indivisible from injuries received in the first accident and they could not be separated. Therefore, the Court held that the plaintiff knew her right to commence an action from the time of the accident and the defendants were aware of their right to commence a third party action against the husband upon discovering that they might be liable for some damages from the second accident. As a result, the Court determined that liability for the injuries would not be apportioned between the accidents.

In-Trust Claim

A. Hans v. Volvo Trucks North America Inc., 2016 BCSC 1155, Davies J.

The plaintiffs, a husband and wife, suffered significant injuries as a result of an accident which occurred when the husband plaintiff lost control of his tractor trailer truck after an electrical failure. The wife's injuries were relatively minor based on her recovery of her injuries and the fact that she had returned to work. Following the accident, her husband immediately developed psychological symptoms and he was later diagnosed with PTSD, which made it unsafe for him to return to work. He subsequently made multiple suicide attempts, which led to extended hospital stays along with requiring constant care by his wife and friend. The Court awarded the wife $15,000 in non-pecuniary damages for her injuries since they had mostly resolved at the time of trial and her husband was awarded $265,000 for pain and suffering and loss of enjoyment of life. He was awarded $165,000 for in-trust claims for compensation for his wife and family members who provided care and other services. He was also awarded a further $1,781,000 for future cost of care in accepting that the plaintiff husband would require near constant supervision until age 75 based on his history of suicide attempts and ongoing psychological issues.

Loss of Future Capacity to Earn Income

A. Dunbar v. Mendez, 2016 BCCA 211, per Harris J.A. (Smith and Goepel JJ.A. concurring)

The defendants appealed the trial award of future loss of earning capacity on the basis that it was inordinately high. On appeal, the court noted that the trial judge was not provided with evidence that would have informed her assessment. In particular, there was no economic or labour market statistics that would have assisted her in estimating the respondent's future stream of income as a steel fabricator, taking into account negative and positive contingencies, including the risk posted to his future earning capacity by his pre-existing hip problem. The judge was also not given any economic evidence to assist her in assessing his residual earning capacity. Without this information, she was placed in a difficult position in trying to compare his original position with his post-accident position. At para. 20-21 the court held:

> The utility of this kind of evidence to the assessment of damages has been recognized often by this Court because it reflects the fact that an award for loss of earning capacity, even when measured using the capital asset approach, is not simply at large [citations omitted]. Such aids provide helpful context to the application of the factors from *Brown*, by identifying in a general sense the magnitude of the plaintiff's loss: *Jurczak v. Mauro,* 2013 BCCA 507 at paras. 33-37.
>
> The assessment of future loss requires a court to estimate a pecuniary loss by weighing (even if not assigning specific numeric values to) possibilities and

> probabilities of future events and relating evidence and findings of fact to the quantification of the loss [citations omitted]. The usefulness of economic and statistical evidence does not turn an assessment into a calculation. It does, however provide a useful tool to assist in determining what is fair and reasonable in the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

A number of negative contingencies applied to the assessment in this case: the respondent's young family; the ability to continue with the "brutally long and physically demanding work weeks" of a steel fabricator, even without the accident; the cyclical nature of the work; and his pre-existing degenerative hip condition. The court a tested the reasonableness of the trial award against various percentages applied to these negative contingencies and translated those into an annual loss. In the result, the court found that the trial judge's assessment was inordinately high on the evidence. In the result, the court reduced the $400,000 award to $250,000.

B. Jamal v. Kemery-Higgins, 2017 BCSC 213, Morellato J.

Counsel for the plaintiff challenged the defendant's approach to the analysis of her future loss of earning capacity as their expert relied on female statistics, which counsel submitted were unreliable and discriminatory. The plaintiff cited authorities which found that the use of such statistics may incorporate gender bias into the assessment of damages along with inappropriate discriminating. The Court agreed with the plaintiff's position that it was not appropriate to use female statistics in this analysis.

C. Villing v. Husseini, 2016 BCCA 422, per Savage J.A. (Saunders and Bennett JJ.A. concurring)

This case involved a 17-year-old student injured in a motor vehicle accident. The plaintiff's claim at trial was that she continued to experience low back pain five years after the accident. The defendant appealed the trial judge's assessment of damages for non-pecuniary loss and for the loss of future income-earning capacity arguing that the awards were inordinately high. The trial judge had awarded $85,000 for non-pecuniary damages and $100,000 for loss of earning capacity.

Savage J.A. dismissed the appeals and found that, given the evidence at trial, the awards were not so inordinately high as to be wholly erroneous. At paragraph 37, the Court stated:

> ...given the chronicity of the complaints, the kind of treatment proposed, the impact of that treatment on income, and the prospect of repeated rhizotomy treatments, which generally offer only temporary relief, the judge's allowance for loss of future earning capacity was not outside the appropriate range for such an award.

Mitigation

A. Mojahedi v. Friesen, 2016 BCSC 1225, Steeves J.

The defendants argued that the plaintiff's damages should be reduced by 30% due to a failure to mitigate by beginning physiotherapy and an active exercise program well after they were recommended (by 8 and 21 months respectively) and for a pattern of misleading his physician and not following his advice by undertaking chiropractic care instead of swimming, not disclosing that he was taking his brother's Tylenol 3s, "exchanging" his Celexa prescription for marihuana and incorrectly advising that he had started physiotherapy in January 2012.

The court held that, although it may have been advisable for the plaintiff to begin physiotherapy and active rehab as soon as recommended, the plaintiff is only held to a standard of reasonableness and not perfection. A delay in treatment is not necessarily unreasonable. Further, the defendant had failed to prove that beginning physiotherapy or active exercise earlier would have reduced the plaintiff's symptoms. The fact that earlier treatment was "more likely" to be efficacious is insufficient. The defendant also had failed to show that the plaintiff's damages would have been reduced had his doctor been more fully informed of the plaintiff's situation. The court concluded that the plaintiff had not failed to mitigate his damages.

B. Mullens v. Toor, 2016 BCSC 1645, Verhoeven J.

This case contains a helpful summary of the principles relating to mitigation, but it is of particular interest because it addresses the duty to mitigate in the context of a plaintiff's failure to return to work. The plaintiff had suffered moderate soft tissue injuries which developed into chronic pain, anxiety and depression. She was convinced that she could not return to her work at a bank or ever work full-time again, but her belief was not supported by medical evidence. The plaintiff's recovery from her physical symptoms depended largely on her mood disorder and her prognosis was uncertain. The court found that she should have attempted to return to work when she was feeling better and had started anti-depressants. She had a supportive employer who was prepared to accommodate her. Had she made such an attempt, it was likely that she would have had some measure of success in pursuing her career path towards management. Further, a return to work would have benefited her mood disorder as her sense of identify and self-esteem were connected to her employment. At the time of trial, her former bank manager was enthusiastic about the plaintiff pursuing part-time work as a client advisor which would have been a good re-entry job. However, the plaintiff suddenly decided to abandon a career in banking and to retrain to become a counsellor by pursuing a masters degree. The court found that this was a peculiar decision and was inconsistent with her evidence that she could not return to banking. Her plan to take four years of study to enter a field that provided lower remuneration was uneconomic.

The plaintiff was also unreasonably resistant to accepting that her condition required treatment with anti-depressants and psychiatric intervention. Her reluctance to take medication during pregnancy and breastfeeding was understandable, but she demonstrated an overall pattern of resistance. She had not implemented repeated recommendations by her treating psychiatrist instead focusing on her physical complaints which might have been detrimental as it could serve to perpetuate her symptoms and legitimize her condition that she continued to believe she was disabled. Had she had better engagement with medical and psychiatric treatment she would have had increased chances of returning to work.

The plaintiff was not impaired in her rational decision making capacity in relation to her career and treatment and so it was found that she had failed to mitigate her damages.

Mr. Justice Verhoeven considered the issue of mitigation separately in respect of each head of damage: non-pecuniary damages were reduced by 50% (from $140,000 to $70,000); her net past loss of earning capacity was assessed as $99,800 (which was a reduction of 50%) and reflected a better than 50% chance that much of the loss claimed could have been avoided (she could have successfully returned to work about nine months after the accident or, again, after she weaned her child and could have resumed anti-depressants) and that the amount sought by the plaintiff may be too high based on an unwarranted certainty she would have been promoted which should be offset by other negative contingencies; future diminished capacity claim was also reduced by 50% (from $350,000 to $175,000) but an additional $35,000 awarded for future loss relating to loss of pension benefits; future cost of care award was reduced by 10% - her claim for further passive therapies was

disallowed as not medically justified or reasonable, there was uncertainty about her commitment to physical exercise, her claim for child care overlaps with her claim for future loss of earnings since she would incur that expense if she were working.

Pre-Existing Condition

A. Chow v. Goodman, 2016 BCSC 1486, Duncan J.

The case concerned the issue of causation in the context of a pre-existing condition. The defence argued that the two accidents in issue caused soft tissue injury but did not cause or contribute to the plaintiff's need to undergo a discectomy. They argued that the plaintiff's pre-existing disc condition would have become symptomatic without the accident, perhaps within a few years of the accident based on an expert opinion.

The plaintiff was in his early thirties at the time of the first accident and had pre-existing degenerative changes in his neck which were quiescent in the years leading up to the accident. The plaintiff's neurologists opined and the trial judge accepted that the first accident triggered symptoms and the need for surgical intervention much earlier than would otherwise have been the case. The trial judge found that the plaintiff would have remained asymptomatic from his disc condition for an indefinite period of time, likely into his fifties or sixties. Those findings regarding the plaintiff's "original position" and likelihood of later onset of symptoms even without the accidents were not discussed again in the context of assessing damages, however.

VIII. Document Production

A. 0731431 BC Ltd. v. Panorama Park View Homes Ltd., 2016 BCSC 1828, Brown J.

In a bankruptcy matter, the plaintiffs brought an application to compel the self-represented defendant, Sangha, to, *inter alia*, produce a list of documents. The trustee in bankruptcy had produced all of the documents to the plaintiffs. Mr. Justice Brown found that that production was sufficient to warrant the court to exercise its discretion pursuant to Rule 7-1(14) relieving Sangha of producing a list. However, it was not possible to effectively examine Sangha for discovery without a list of documents. A list was necessary because Mr. Sangha would answer questions by saying "I gave the document to the trustee" and without a list specifying the documents, counsel was not able to have Sangha identify which documents he says provided an answer to the question. Sangha was ordered to produce a list.

B. Dudley v. British Columbia, 2016 BCCA 328, per Fitch J.A. (Neilson and Garson JJ.A. concurring)

The underlying action involved a claim brought by a deceased woman's mother for negligent investigation by the RCMP of her daughter's murder. The Province and Canada appealed an order requiring production of portions of an investigative brief prepared by the RCMP in anticipation of the criminal prosecution of those alleged to be responsible for the murder. The court of appeal addressed the narrow issue of whether the common law claim of litigation privilege only protects against disclosure to an adversary in the litigation or whether it operates to exclude everyone, including third parties to the litigation.

Fitch J.A. held that the purposes underlying litigation privilege are not achieved merely by locking the litigation adversary out of a room. Rather, they are achieved through maintenance of a zone of privacy. Limiting the scope of the privilege to the litigation adversary risks eradicating the zone of privacy the privilege is designed to protect. The court also held that litigation privilege in the criminal law context is a more circumscribed form of privilege and does not extend to the fruits of the investigation that attract a *Stinchcombe* duty of disclosure. However, once the fruits of an investigation are disclosed under *Stinchcombe*, they do no become communal property that may be disseminated at the recipient's discretion or otherwise accessed by strangers to the criminal litigation. Such disclosure in a criminal case is given on an express undertaking that it not be further disclosed or used for a purpose unrelated to the making of full answer and defence.

C. Este v. Blackburn, 2016 BCCA 496, per Newbury J.A. (Stromberg-Stein and Goepel JJ.A. concurring)

The defendant Blackburn had been interviewed by the West Vancouver Police Department (the "WVPD") in the context of a criminal investigation related to the circumstances of a fire. Ms. Este, the plaintiff in two actions (a breach of trust property action and a defamation action), applied for an order that the WVPD make available a transcript of their interview with the defendant for use in the civil proceedings.

The master below had found that the contents of the police file would be relevant to the defamation proceedings commenced by Ms. Este and that the police file, including the transcript, was likely to prove or disprove material facts with respect to Ms. Este's claims. The contents of the police file were likely less relevant to the property action but Master Baker thought it artificial to differentiate between the actions given that both actions generally concerned the relationship between Ms. Este and the defendants. The master granted an *Antunes* order and directed the WVPD to determine which documents were privileged or prejudicial to the criminal proceeding involving the defendant Blackburn. The balance of the documents were to be provided to the plaintiff Este.

The defendant Blackburn sought and obtained leave to appeal the *Antunes* order of the master below in order to seek a *Halliday* order. By the time of the hearing, the police had diverted the criminal charges against the defendant to alternative measures. The restrictions on disclosure contemplated by the order under appeal were no longer necessary to protect the defendant's right to a fair criminal trial. The matter to be decided by the Court of Appeal was no longer whether the Master erred in granting an *Antunes* order, but whether the transcript of the WVPD interview with the defendant should now be produced in unredacted form or subject to the restrictions of a *Halliday* order to protect the defendant's privacy.

The Court of Appeal balanced the need to protect privacy interests in irrelevant material against the need to ensure adequate discovery as a facet of the administration of justice. Newbury J.A. was not persuaded that the defendant's privacy should be protected by a *Halliday* order. She noted that the "circumstances of this wide-ranging litigation bear no resemblance to the more clearly defined circumstances in which *Halliday* orders are usually granted." The appellant Blackburn was ordered to disclose the unredacted WVPD documents to the respondent Este. The reasons for judgment of the Court of Appeal referenced the approach of Lowry J. in *North American Trust Co. v. Mercer International Inc.*, 71 B.C.L.R. (3d) 72 (S.C.):

> Under the rules of this court, *a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of the document is producible if a part of it relates to a matter in question.* But where what is clearly not relevant is by its nature such that there is good reason why it should not be disclosed, a litigant may be excused from having to make disclosure

> that will in no way serve to resolve the issues. In controlling its process, *the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.* [At para. 13; emphasis added.]

D. Hickey v. Roman Catholic Archdiocese of Vancouver, 2016 BCSC 1044, Kelleher J. / Solomon v. McLean, 2016 BCSC 1765, Master Dick

These two cases address the question of who pays for the costs of obtaining records.

Mr. Justice Kelleher upheld Master Taylor's decision in *Hickey* (outlined in last year's paper), that, in the absence of agreement between counsel, the *Rules* do not require a defendant to reimburse a plaintiff for the costs of obtaining documents from third party treating physicians requested by the defendant. Mr. Justice Kelleher commented that the question of whether $100 should be paid now or submitted as part of the bill of costs was "something that should have been resolved between the parties and not the subject of long proceedings between the Master and this Court." In dismissing the appeal, Mr. Justice Kelleher said at paragraph 20 that:

> "I do not think that any distinction can be made between documents that the plaintiff has already obtained and documents that are within the plaintiff's power to obtain. In both cases the question was whether any charge can be demanded in addition to photocopying. The Master's decision was not wrong".

In *Solomon v. McLean*, the defendant argued that the decision in *Hickey* expanded the plaintiff's obligation to obtain and produce clinical records created by third parties as within the plaintiff's power to do so. Thus, the plaintiff should be obliged to request the documents and pay the cost of production and the defendant would then have the documents available for the cost of photocopying. The plaintiff had offered to obtain the records from third parties on the condition that the defendant would pay the costs of doing so, but the defendant refused and brought on the application to compel the plaintiff to obtain, list and produce the documents.

Master Dick found that *Hickey* was not determinative of the issue as it did not address a parties obligation to obtain third party records since the records were already in the possession of the plaintiff. Instead, based on the authorities of *Seller v. Grizzle* and *Kinsella v. Beattie*, clinical records created by hospital or physician are not within a plaintiff's power or control to provide until they are in the plaintiff's possession and a plaintiff has no obligation to obtain clinical records at his or her expense.

E. Hurley v. Baldo, 2016 BCSC 1605, Master McDiarmid

At the plaintiff's examination for discovery, the plaintiff was unable to recall the names of her treatment providers, the timing of treatments, or names of medications prescribed to her. Defence counsel requested those answers as well as documents, including her MSP and Pharmanet records at discovery, and followed up on these requests by letter. Following the discovery, plaintiff's counsel had reviewed the Pharmanet printouts and disclosed the names of medications taken since the accident. Plaintiff's counsel further advised that all clinical records of practitioners prescribing medications had been disclosed. Counsel also reviewed the MSP record and advised that it did not contain any additional "medical practitioners who treated the Plaintiff that could reasonably be thought to be related to the injuries claimed by her in this action." Plaintiff's counsel declined to provide the documents in the absence of any explanation that justified their disclosure as required by Rule 7-1(11).

On the defendant's application for production, Master McDiarmid noted that the defendant's demand failed to comply with the requirements of Rule 7-1(11) as it did not provide any reason why the additional documents should be disclosed. Defence counsel noted only that the plaintiff was unable to remember the names of treating physicians, the timing of treatment or the names of prescription drugs she took.

In these circumstances, Master McDiarmid noted that while the evidentiary threshold is relatively low, it was not met by reiterating discovery requests. It was open for defence counsel to conduct a further examination for discovery of issues arising from the answers given by plaintiff's counsel following the initial discovery and the application for the documents was dismissed.

F. Kopp v. White, 2016 BCSC 1953, Master McDiarmid

An application was brought by the defence for production of non-employment income (WorkSafeBC, EI, Ministry of Social Services), employment income (seven current and former employers, tax returns) and clinical records relating to claims arising from injuries sustained by the plaintiff in an October 31, 2012 accident. The application sought production of records going back five years, rather than the typical two years, because of the severity of the alleged injuries and the resulting alleged impact on her employment and ability to work in the future.

What was unusual about the application was that the plaintiff had not produced any list of documents and so ICBC had not been able to make a demand framed in the language of Rule 7-1(11).

The plaintiff did not file an affidavit addressing privacy concerns, but her counsel's legal assistant had filed an affidavit objecting to production of records on the basis that they had not been previously requested. The Master also noted that the legal assistant had set out the plaintiff's position in respect of requests (that the requests were premature). Had there been an application to strike that portion of the affidavit, it would have been allowed.

The Master agreed that some of the records being sought were premature but the argument would have had more force had the plaintiff complied with Rule 7-1(1).

In allowing most of ICBC's requests for pre-accident records, the Master reasoned:

> [58] As I have stated numerous times earlier in these reasons, this case is somewhat unique in that there is an absence of a list of documents from the plaintiff. Keeping in mind Rule 1-3 of the Civil Rules and in particular the proportionality, which, in my view, in this case tilts the scale toward increased disclosure, given the seriousness of the plaintiff's claims and keeping in mind privacy issues, I determine that the disclosure I order will provide documentation which is relevant to the issues in this litigation. Relevance, clearly, is the most important factor and ICBC has a right to investigate documents which are relevant or which reasonably may be relevant.

Production was ordered as follows: the employment, clinical records and tax returns from 2009 in a *Jones* format; the Pharmanet and MSP records from 2007 to the date of the accident in a *Halliday* format and from the accident onward in a *Jones* format; the WorkSafe records from 2007, EI records from 2009 the social assistance file from 2009 in a *Halliday* format. The plaintiff was also ordered to produce a list of special damages with supporting documentation and a list of documents.

Costs were awarded to the defendants in any event of the cause and at Scale C rather than the usual Scale B.

G. Li v. Wu, 2016 BCSC 1360, Master R. W. McDiarmid

In the context of a fast track action, the defendant sought disclosure of adjuster materials from a separate unrelated accident in which the plaintiff Ms. Li was a defendant. In reasons for judgment, Master McDiarmid found that the applicant did not discharge the onus of demonstrating compelling public interest reasons for ordering disclosure. There were no exceptional circumstances to justify that the implied undertaking of confidentiality should be set aside. At paragraph 28, the decision states:

> Evidence about the effect of the second accident on the injuries sustained by the plaintiff in this claim is relevant. However, the collision forces involved in the second accident are only marginally relevant, if relevant at all, in resolving issues in this action.

The Master dismissed the application as the probative value of the documents with respect to the issues in the case was minimal at best. Moreover, the applicant had not thought through the potential unintended consequences of ordering disclosure:

> As noted, there have been redactions from some of the documents for privilege and relevance. What the insurers for the parties do not seem to appreciate is that waiver of the implied undertaking would probably result in waiver of privilege, making the documents disclosable to the plaintiff in the second accident. [para. 23]

H. Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52 per Gascon JJ. (Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagener, Gascon, Côté and Brown JJ.)

This case involved an inquiry by the syndic of the Chambre de l'assurance de dommages into the conduct of a claims adjuster. The Chambre is a self-regulatory organization established by the *Act respecting the distribution of financial products and services*, CQLR, c. D-9.2 ("*ADFPS*") and it is responsible for overseeing the professional conduct of a number of representatives working in the insurance field.

The Chambre received information that an adjuster had made errors in file management. The adjuster had investigated a fire that had damaged the residence of a person insured by Aviva. The Chambre asked Aviva to send a complete copy of its claim file with respect to its insured. The Chambre based this request on s. 337 of the *ADFPS*. In response, Aviva produced a number of documents, but explained that it had withheld some documents on the basis that they were covered either by solicitor-client privilege or by litigation privilege. It was argued by the Chambre that s. 337 *ADFPS* was sufficient to lift the privilege, because it created an obligation to produce "any...document" concerning the activities of a representative whose professional conduct is being investigated. Aviva finally sent the Chambre the entire file regarding the insured person's claim, however, the Chambre nevertheless proceeded with the motion seeking a declaratory judgment.

The Superior Court concluded that litigation privilege cannot be abrogated absent an express provision. The Court of Appeal upheld the Superior Court's judgment and held that even though litigation privilege is distinguishable from solicitor-client privilege, it is, to the same extent, a fundamentally important principle that cannot be overridden without express language.

In the subsequent appeal, the central issue was whether Aviva could assert litigation privilege against the Chambre. To resolve this issue the Supreme Court of Canada had to determine whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal

language and, accordingly, whether s.337 *ADFPS* could be interpreted as establishing a valid abrogation of the privilege.

At paragraphs four and five, the Supreme Court of Canada stated:

> I would dismiss the appeal. Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.
>
> The requirements established in *Blood Tribe* apply to litigation privilege. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect. Because the section at issue provides only for the production of "any...document" without further precision, it does not have the effect of abrogating the privilege. It follows that Aviva was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.

I. Mackey v. British Columbia, 2016 BCSC 1877, Macintosh J.

The defendants sought production of the academic records of the plaintiff's siblings, arguing that their relevance derived from the plaintiff's contention that he was likely to succeed professionally, in part, because some of his siblings have done so. His own marks in school before the accident were unremarkable. The defendants hoped to find that the plaintiff's siblings had good marks, and thereby distinguish the plaintiff's probable career trajectory from theirs. Neither the custodian of the requested records, nor the siblings opposed the production of these records. The defendants argued that the plaintiff did not have standing on the application which position was rejected by the court. Macintosh J. held that a plaintiff "will nearly always have standing on any application for document production from any source". The application was allowed on the condition that the use of the documents would not disrupt the plaintiff's scheduling of witnesses for trial.

J. Plenert v. Melnik Estate, 2016 BCSC 403, Master Muir

This case involved a motor vehicle accident involving several vehicles and resulting in one death. The third party was responsible for the maintenance of the section of the highway involved and had liability insurance under which policy the insurer was required to defend the action and indemnify the third party for any claim payable. The liability insurer conducted investigations, resulting in adjuster's reports and witness statements. The third party asserted litigation privilege over these documents. The defendants challenged the privilege claimed and brought an application for their production. In dismissing the application and upholding the privilege, the court held that given the severity of the accident and the fact another adjuster was making inquiries about road conditions, litigation involving the third party was a reasonable prospect at the time that the claim was reported. There was no evidence that the documents were created for any purpose other than defending against the litigation.

IX. Examination for Discovery

A. Lindgren (Guardian ad litem of) v. Parks Canada Agency, 2016 BCCA 459 per Harris J.A. (Bennett and Fenlon JJ.A. concurring)

This action arose out of a motor vehicle accident which took place in Yoho National Park. The plaintiff alleged that Parks Canada was negligent in failing to ensure that the highway within the park was reasonably safe. Ms. Brenda DeMone, Associate Director for Parks Canada's Highway Service Centre, was the Parks Canada representative designated by the Deputy Attorney General for the examination for discovery to be conducted by the plaintiff. In chambers, the plaintiff applied for a substitute Parks Canada representative as the plaintiff wished to examine the snow plough operator instead.

Gray J. in chambers was satisfied that, as a representative of Parks Canada, Ms. DeMone was not "demonstrably unsatisfactory" and "incapable of being informed." The plaintiff appealed the chambers judge's dismissal of the application. The Court of Appeal outlined the issue before it in the following manner:

> The discrete question before us, on this appeal, is the test to be applied under s. 7 for the Court to designate a Crown representative for discovery other than the one designated by the Deputy Attorney General. I say this to emphasize that, provided a judge has applied the correct test, the decision whether to designate another representative involves an exercise of discretion in relation to an issue of case management. Subject to well settled law, we are required to defer to such an exercise of discretion and are not permitted to substitute our view for that of the judge on such questions as whether one representative can or cannot adequately inform him or herself on matters in issue in the case. [para. 8]

Harris J.A. dismissed the plaintiff's appeal and found that the chambers judge did not err in her analysis of s. 7 of the *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-604 or her application of the *Hubrisca* test. The test is summarized at paragraph 26 in the following manner: "The test, developed in the case law, is that a representative is demonstrably unsatisfactory if that person is not informed and is incapable of being informed."

X. Experts

A. Cambie Surgeries Corporation v. British Columbia (Medical Services Commission), 2016 BCSC 1822, Steeves J.

The Cambie Surgeries litigation involved constitutional questions about provincial health care. An issue arose regarding when the plaintiff could examine its own expert on a *Rule 11-6(4)* reply (or responding) report prepared by that expert. The plaintiffs sought to examine its expert on a reply report after the conclusion of the defendant's case. The plaintiffs also applied during their own case to call rebuttal evidence at the end of the evidence of the defendants' case. In his ruling, Steeves J. emphasized the difference in nature of a reply report and rebuttal evidence. He held that the plaintiff must call and exhaust their evidence, including reply reports, as part of their case. He stated:

> As a first comment, some precision in the language is required. The expert report at issue is a responding or reply report as described under R. 11-6(4). It is not an expert report under R. 11-6(3). Rebuttal refers to something else again: the introduction of evidence at the end of a trial, usually that could not have been anticipated before the trial…. [para. 3]

> …Overall I conclude that, while it is always open to a party to apply to apply to call rebuttal evidence, a responding expert under the *Rules* is quite a different part of a trial. In short, a responding expert report is not rebuttal evidence in the usual sense of being in response to unanticipated evidence. In my view, as with all anticipated evidence, the plaintiffs must call and exhaust their evidence. This is paraphrasing of the judgment in *Commercial Electronics v. Savics*, 2011 BCSC 162 (CanLII). The plaintiffs will examine their expert witnesses about their reports, including responding reports as part of their case. [para. 10]

B. Cambie Surgeries Corporation v. British Columbia (Attorney General), 2016 BCSC 1739, Steeves J.

An issue arose concerning the scope of examination in chief of experts. The question was whether an article or text cited in an expert report could be put to the expert in his evidence in chief and then entered as an exhibit. In his oral ruling, Steeves J. reviewed the leading text *Law of Evidence in Canada* by Sopinka, Lederman and Bryant on the use of authoritative literature. He noted that the plaintiffs sought to go "a step further" and have the articles cited by the expert report entered as evidence. At paragraph 11, Steeves J. provided the following procedural guidelines for counsel on this issue:

It follows that I do not agree that the plaintiffs can go as far as they would like to go and put in articles through their experts on examination in chief. I adopt the approach in the Sopinka text and add the following procedural requirements:

(1) An article or text cited by an expert in his or her report may be identified by the expert and then entered as an exhibit for identification. I emphasize that the article or text has to be cited, but the expert report does not have to specifically state that the expert is adopting the article or text.

(2) As part of the examination in chief of the expert he or she may be taken to specific parts of the article or text. These will be read into the record.

(3) The expert can use the excerpts to clarify terminology or ambiguities in his or her report or use the excerpts to make the report more understandable, and the expert can adopt the excerpts as his or her own. I acknowledge that, to be more understandable, different reports may require different applications of this approach.

(4) The article or text itself will remain an exhibit for identification and is not evidence.

(5) Any hearsay issues will be decided as set out in the *Mazur* judgment.

(6) The expert is not permitted to give a new opinion or adopt an opinion other than the one in his or her report.

(7) If it is not clear, the expert may be cross-examined on any part of his or her evidence.

C. Cambie Surgeries Corporation v. British Columbia (Attorney General), 2016 BCSC 1896, Steeves J.

Issues arose between the parties with respect to the scope of evidence given by doctors who are not certified as experts under the *Rules of Court*. The plaintiffs' evidence was to include evidence from

individual patients and the treating physicians of these individuals. The evidence was likened to the evidence from doctors in personal injury cases.

At paragraph 10 of his oral ruling on the testimony of physician witnesses, Steeves J. cited the following passages from *Seaman v. Crook*, 2003 BCSC 464:

> [14] The cases *Ares v. Venner, supra*; *Sandu and Brink*, *Olynyk v. Yeo, supra*; *Butler v. Latter*, [1994] B.C.J. No. 2358 (B.C.S.C.), *McTavish v. MacGillivray, supra*; *Coulter and Ball et al.*, 2002 BCSC 1740 (CanLII); and s. 42(2) which provides:
>
> > In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if...
>
> when taken together, stand for the following:
>
> > (1) That the observations by the doctor are facts and admissible as such without further proof thereof.
> >
> > (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof.
> >
> > (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth.
> >
> > (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth.
> >
> > (5) That the diagnoses made by a person to whom the doctor had referred the patient are admissible for the fact that they were made but not for their truth.
> >
> > (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.
>
> [15] Therefore any, and I emphasize the word "any", opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.
>
> [16] Without having met the requirements of Rule 40A, the oral testimony of the doctor interpreting his clinical records does not change the nature of the evidence contained in those clinical records. The clinical records remain evidence of the fact that he made those notes, made that diagnosis, and prescribed a certain treatment.
>
> [17] The opinions contained in the clinical records do not constitute independent stand-alone expert opinions. If they did, what would be the purpose of Rule 40A? It is the expert's opinion that the court is weighing. It is the expert's report that the court will accept or reject. It is not the opinion in the clinical records that the court is weighing.

With regard to the category of evidence from a doctor, not certified as an expert, on his or her experience with waitlists, Steeves J. stated:

> ...I can see no impediment to the admissibility of evidence from doctors about their observations of how waitlists operate. This is part of the everyday experience of important actors in the health care system and it can be of value to the court. I note this is not opinion evidence about whether waiting times are medically justified or not justified. Such opinion evidence must come from a certified expert. [para. 14]
>
> Another related category of evidence is also from a doctor, again not certified as an expert, who testifies about his or her observations as to a patient's situation while waiting for a medical procedure. These observations can be about a patient being in pain, having restricted movements, not being at work, being anxious and/or depressed and other matters. I conclude that these observations are also admissible. In my view the character of these observations are the same as observations that could be made by a non-doctor. [para. 15]
>
> …In any case I conclude that a doctor's observations about his patient while waiting for a medical procedure or prior to being put on a waitlist, however that list is defined, are analogous to the accepted forms of this type of evidence in other cases. This includes identification of handwriting, identification of persons, identification of things; apparent age; the bodily plight or condition of a person, including illness; the emotional state of a person, whether distressed, angry and depressed; and other categories (*Graat*, at para. 46). [para. 18]

With regard to evidence from a doctor, again not certified as an expert, who says a patient is experiencing a specific medical condition caused by waiting for a medical procedure, Steeves J. was clear that without certification as an expert, this evidence was not admissible. This was precisely the ultimate issue for the court to decide. Based on admissible evidence, it was for the court to conclude whether or not wait times had a significant impact on patient health and quality of life and whether or not delayed treatment negatively impacted the overall well-being of patients.

XI. Family Compensation Act Claim

A. Trotter-Brons (Guardian ad litem of) v. Corrigan, 2016 BCSC 1891, Hinkson CJSC

A claim was brought by the infant plaintiff whose parents were killed in a motor vehicle accident when he was just eight months old. He then became the subject of a custody dispute between his maternal grandparents and a second cousin. The grandparents adopted the plaintiff in the belief that it would prevent further custody claims and be in the plaintiff's best interests. The parties then proceeded by special case for a determination of the effect of the adoption on the *Family Compensation Act* claim.

Hinkson CJSC held that there was a convincing distinction between the consequences of marriage and the acquisition of a step parent, which limits the surviving child's FCA claim and adoption. The obligations of a step-parent were not seen a gratuitous because they arise out of a legal obligation that follows from the remarriage. An adoptive parent, however, undertakes the liability and responsibility for a child as a gratuitous act. He declined to follow the earlier case of *Manning (Guardian ad litem) v. British Columbia* which held that while the claims of the infant plaintiff were not extinguished upon her adoption, the benefits arising from her adoption had to be taken into account when assessing her pecuniary and non-pecuniary claims. The court held that the act of adopting the plaintiff did not reduce his damages for the loss of his biological parents.

B. S.L.B. v. M.A. Estate, 2016 BCSC 1193, Ball J.

The action was brought by the mother of a 12-year old girl who was killed in a motor vehicle accident. The plaintiff suffered from Lupus and sought damages for the loss of household services she claims would have been provided by her daughter. She alleged that her daughter intended to become a nurse and would have provided nursing services to her for the balance of her life expectancy. She advanced a claim for such damages in the $250,000 to $500,000 range. After reviewing the relevant authorities, including the reasons in *Cahoose* v. ICBC which held that an award in the $100,000 range for such cases is high and would be rare, he concluded that the daughter would have provided a certain amount of assistance to the plaintiff and awarded $42,000.

XII. Fast-Track

A. Zerkee v. Grelish, 2016 BCSC 750, Master MacNaughton

This case considered a late notice of fast track filed by the plaintiff. Both the plaintiff and defendant filed jury notices when the action was set for trial. The defendant paid the first instalment of the jury fees the day before the deadline. On the same day, the plaintiff filed a notice of fast track under Rule 15. Both of these steps were taken by each counsel without knowing of the other's step. Upon discovering the notice of fast track, the defendant advised that she disagreed with the suitability of the matter in fast track, had instructions to remove it from Rule 15-1, and had instructions to proceed with a jury trial.

The plaintiff applied to strike the defendant's jury notice and, in a cross-application, the defendant applied for an order removing the action from Rule 15-1. The matter was heard less than a month prior to trial.

The defendants asserted that the plaintiff was using a late fast track notice as a "backdoor way" of striking an otherwise valid jury notice. Counsel for the plaintiff agreed that she delivered the notice of fast track because she did not believe the matter should be tried by a jury. However, she reached that conclusion because as the case evolved through the litigation process, it became clear that the fast track rule should apply. Three major developments transpired since the matter was set down for trial which significantly narrowed the issues and complexity of the claim, *viz:* the defendant admitted liability; the defendant's medical legal report included an optimistic prognosis and disputed the need for any future care; and the plaintiff's expert characterized her ongoing symptoms as not being severe. As a result, it was the plaintiff's submission that the claim was narrowed from that initially advanced.

Both counsel agreed that the quantum of the plaintiff's damages did not exceed $100,000 and the court agreed with this assessment. The court stated that as a result of the action meeting at least one of the criteria set out in Rule 15-1, it was a matter for fast track. Master MacNaughton acknowledged that the court should guard against strategic use of fast track by parties to avoid a jury trial. However, *Rule 15* does not set a timeframe in which a notice must be delivered and in the court's view, "it is in accordance with the object of the Rules for counsel to assess and reassess their positions as to the suitability of a matter for fast track as it progresses." The court concluded that this was such a case. Further, the plaintiff had delivered her own jury notice and the court was persuaded that the plaintiff's decision to deliver a fast track notice was not a strategy to avoid a jury trial.

The late delivery of the fast track notice meant that the plaintiff should be responsible for the $1,500 jury fee for the first day of trial disbursement.

XIII. Independent Medical Examinations

A. Gill v. Wal-Mart Canada Corporation, 2016 BCSC 1176, Master Harper and 2017 BCSC 135, Funt J.

The plaintiff's claim was for damages for injuries sustained as a result of a slip and fall at a Wal-Mart store and for injuries sustained in a motor vehicle accident two weeks later. The defendant in the motor vehicle accident claim, applied for an order compelling Ms. Gill to attend an examination by Dr. Andrew Travlos and for an order compelling her to sign the physiatrist's consent form.

Ms. Gill was willing to attend the IME but refused to sign the consent form. Dr. Travlos said the College required him to obtain evidence of informed consent to the IME and that he would not conduct the IME unless the plaintiff signed his particular consent form.

Master Harper concluded that the plaintiff should not be compelled to sign the consent form required by Dr. Travlos. She found that the consent form contained clauses that were not reasonable. The application of the defendant Pandher was dismissed with costs to the plaintiff in any event of the cause.

Funt J. allowed the appeal and ordered the plaintiff to attend the IME and to sign the form of consent used by Dr. Travlos. The consent form was found to be reasonable. If the plaintiff decided not to sign the form, the IME would not be conducted and the defendant would be at liberty to bring an application to strike the plaintiff's claim.

B. Marques v. Stefanov, 2016 BCSC 2589, Dorgan J.

Relying on *Carta v. Browne*, 2012 BCSC 2219 and *Ng. v Eng*, [2014] B.C.J. No. 3498, the plaintiff sought to have the court impose, as a term of an order requiring the plaintiff to attend an IME, that the defendant be prohibited from conducting any surveillance of the plaintiff as he travels to and from the IME. The argument was rejected.

Madam Justice Dorgan observed that there did not appear to be any argument raised in either *Carta* or *Ng* regarding surveillance and that neither case had been subsequently followed and so the court was not bound by them. The imposition of a broad, all-encompassing restriction, such as sought, of an otherwise legal discovery tool should be avoided. Such restriction, if any, should be imposed by a court exercising discretion judicially, on evidence, which would lead the court to conclude that the restriction was necessary to achieve parity between the parties, and is therefore a reasonable restriction of an otherwise legal discovery tool.

See also *Mirzai-Sheshjavani v. Ho*, 2016 BCSC 1704, above, in which Master Baker was critical of the frequency with which the court is hearing applications for late IMEs.

C. Sahota v. Smithers, (unreported) July 19, 2016, Vancouver Registry No. S102767, Master Harper

The defendant applied for an order that the plaintiff, who had suffered serious injury in a motorcycle accident, attend an IME with an addiction medicine specialist, Dr. Farnan, at which he be required to provide samples of his blood, urine and hair. The plaintiff had attended several prior IMEs at the request of the defendant including one with Dr. O'Shaughnessy, a psychiatrist. The application was opposed on the basis that Dr. O'Shaughnessy had already opined or could have opined on the plaintiff's addiction issues.

The plaintiff had a significant history before and after the accident of substance use and abuse and had admitted to being dependent on narcotics, which he alleged was due to needing to manage his pain. The plaintiff's evidence regarding his drug and alcohol history had to be treated with caution.

Dr. O'Shaughnessy had seen the plaintiff to assess whether he had suffered any psychiatric damage or brain injury as a result of the accident. In his first report, he identified that the plaintiff had been taking opiates before the accident and recommended that a Pharmanet printout be obtained to clarify the plaintiff's pre-accident use of narcotics.

Dr. O'Shaughnessy provided a second report after reviewing the plaintiff's Pharmanet records and opined that the plaintiff was taking far higher doses of opiates than he had described to Dr. O'Shaughnessy or admitted to other doctors. This suggested that there may be greater difficulties with substance abuse than he acknowledged. There was evidence of increased tolerance and at least physiological addiction, but he could not comment on whether there was psychological addiction at that point. He recommended a referral to an addiction medicine specialist.

Master Harper ordered that the plaintiff attend the IME with Dr. Farnan because he was the specialist with the most complete qualifications to examine the plaintiff notwithstanding that Dr. O'Shaughnessy touched on the same areas. Further it was reasonable for the defence to obtain an opinion about whether the addiction itself was contributing to the plaintiff's difficulties as well as to opine on prognosis and his recommendations for treatment of the addiction.

Master Harper determined that based on the seriousness of the case, proportionality tipped the balance in favour of the defence being able to choose an expert with the highest and best qualifications. The plaintiff's addiction could possibly have a serious impact on the assessment of his injuries and therefore the assessment of damages.

The issue of causation was also important to determine and Dr. Farnan could opine on whether the physiological addiction, both before and after the accident, were impeding the plaintiff's recovery.

The claim involved a mixed medical picture, as addressed in *Stene v. Echols*, 2015 BCSC 1063, so the fact that Dr. O'Shaughnessy touched on the same subject matter as Dr. Farnan was not sufficient to defeat the application.

D. Sahota v. Smithers, (unreported) March 8, 2017, Vancouver Registry No. S102767, Grauer J.

Mr. Sahota subsequently attended the IME with Dr. Farnan but did not provide a urine sample.

On an application to, *inter alia*, strike the plaintiff's claim for failing to comply with a court order, Mr. Justice Grauer ordered that the plaintiff attend the offices of a drug testing lab to provide a urine sample on 18 hours notice from counsel for the defendant and which request must be made within six months from the date of the order.

E. Sarrafi v. Sun Life Assurance Co. of Canada, 2016 BCSC 1989, Master Harper

At a CPC in a claim for long term disability benefits, the plaintiff sought an order that the expert retained by the defendant insurance company be appointed as a joint expert pursuant to Rule 5-3. The insurance company had retained Dr. Panenka, who had specialty in both neurology and psychiatry, to conduct an IME in three months time.

The plaintiff proposed the following reasons for wanting Dr. Panenka to be appointed as a joint expert:

(1) Sun Life had the right to examine the plaintiff under the LTD policy and had a continuing obligation to act in good faith in investigating the plaintiff's claim. If the IME were undertaken pursuant to the policy, Sun Life would be required to produce a copy of the report to the plaintiff.

(2) Under the policy, Sun Life could explore and impose rehabilitation but had not done so and it would be helpful for the plaintiff to discuss with Dr. Panenka what thoughts he may have regarding rehabilitation and modified work prior to trial.

(3) Sun Life had pled a failure to mitigate and the plaintiff sought this as an opportunity to mitigate his losses.

Plaintiff's counsel argued that she was looking for a less adversarial process which is suitable for disability claims since the relationship might have to continue after the litigation was concluded. Sun Life argued that the IME was not pursuant to the policy but was for the purposes of litigation, the defence is restricted in the number of its experts, and Dr. Panenka would be its sole expert. It did not wish to be deprived of its right to retain the expert of its choice, provide its own instructions to the expert, use the expert for trial preparation in a confidential manner and have the right to choose not to request a report.

Master Harper determined that a joint expert was not appropriate and noted that these sorts of applications were rare; counsel were only able to locate one previous application for a joint expert. There was no evidence before the court about what issues the expert could help to resolve or the questions to be considered by the expert. If the parties were not able to agree on the issues, the trial date would be in jeopardy. If a joint expert were appointed, there would be questions as to whether either party could tender any other expert evidence on the same subject and the employee was likely wanting to tender evidence from his treating psychiatrist and other specialists.

F. Wee v. Fowler, 2017 BCSC 545, Harris J.

Following a request from the defence that the plaintiff attend an assessment by a physiatrist, the defendant brought a Notice of Application seeking an order that the plaintiff undergo the examination by Dr. Hirsch. By the time of the hearing, the plaintiff agreed to attend the examination and a consent order was made in court before Harris J. Despite the consent order, when the plaintiff attended at Dr. Hirsch's office, she refused sign the form of consent and Dr. Hirsch would not proceed in the absence of the signed consent form. The form of consent had been provided to plaintiff's counsel before the hearing.

The matter was brought before Harris J. again in a second application by the defendant to compel the plaintiff's attendance at an examination by Dr. Hirsch. Harris J. held that when the plaintiff consented to the first order for her attendance, she was required to obey that order and to do all things reasonably necessary to comply with the order, including signing forms necessary for the examination to take place. She held:

> I do not agree with the plaintiff that the defendant was required to have sought an order requiring the plaintiff to sign the consent form in the original notice of application. If the plaintiff took issue with the form of consent which had been provided by counsel for the defendant prior to the hearing before me, it behooved plaintiff's counsel to raise that matter with opposing counsel or in court at the time the matter was heard. I consider that the plaintiff's attending the examination in purported compliance with the order and then refusing to sign the consent form effectively undermines the integrity of the consent order and was inconsistent with the object of the Rules in providing for a just, speedy, and inexpensive determination of every proceeding on its merits. [para. 35]

Harris J. further rejected the plaintiff's demand that Dr. Hirsch accept a new form of authorization which "entitled" him to conduct and IME, rather than noting that the plaintiff "consented" to an IME. In the result, the court held that since the plaintiff already consented to an order requiring her to attend an IME by Dr. Hirsch, she is obliged to obey the order, including signing the consent form which was found to be reasonable.

G. Wohlleben v. Dernisky, 2016 BCSC 976, Master Harper

Plaintiff objected to attending an IME on the basis that her counsel had provided her with copies of cases in which the proposed doctor's evidence had been criticized by the court and so she could not "repose trust and confidence" in the doctor or offer him the level of cooperation necessary for the examination to reach a meaningful conclusion.

The Master concluded that the impetus behind the opposition came from her counsel and noted that the plaintiff had not been provided with copies of cases in which the doctor's evidence had been accepted. The Master noted that there was no evidence of any misconduct on the part of the doctor and that the case extracts only demonstrated that, in some trials, the judge preferred the evidence of other doctors.

The plaintiff's subjective views did not mean that there would be a reasonable apprehension that the examination would be fraught with peril if conducted by the proposed physician. It is not the law that the plaintiff gets to choose the expert to examine him or her. The plaintiff was ordered to attend the IME.

XIV. Insurance

A. Ocean Park Ford Sales Ltd. v. Insurance Corporation of British Columbia, 2016 BCCA 337, per Willcock J.A. (Goepel and Fenlon JJ.A. concurring)

This case concerned the interpretation of the substitute vehicle coverage provided by the *Insurance (Vehicle) Act* and Regulations s. 52 and whether a lessee is considered an "owner" under those provisions.

SCK Motor Company leased a BMW from Ocean Park and insured it with ICBC and CDI. Under the heading Registered Owner on the Owner's Certificate, Ocean Park was listed as "lessor" and SCK as "lessee. SCK returned the BMW to Ocean Park. It then sold a Mercedes to Ocean Park and leased it back. Later the same day, Ms. Evans, driving the Mercedes with the consent of SCK, was involved in an accident. SCK claimed coverage under s. 52 of the Regulations at it had acquired the Mercedes as a substitute vehicle for the BMW.

The court held that SCK was not entitled to coverage. The statutory scheme provided substitute vehicle coverage only to a person who has disposed of the ownership interest in a vehicle. The word owner in these provisions did not encompass lessees. The references to lessee or renter in the *Act* and Regulations demonstrated that the legislature intended to distinguish between owners and renters. The newly leased Mercedes was not acquired by an owner in substitution for the returned vehicle

B. Watkins v. Western Assurance Company, 2016 ONSC 2574, Braid J.

The plaintiff Timothy Watkins' mother Deborah Stuckless was a passenger in a vehicle involved in a car accident. Watkins was 15 years old at the time of the accident and he was not in the vehicle at

the time of the accident. Stuckless held a valid policy of automobile insurance with Western. Eight years after the accident, Watkins brought two actions against Western Assurance Company, his mother's insurer. One action was for accident benefits and the other action was a derivative action related to the plaintiff's loss of his mother's care. At paragraph 57, Braid J. summarized the position of the plaintiff with respect to the derivative action:

> Watkins pleads that Western negligently or maliciously denied benefits to the mother, and that this caused the mother's psychiatric illness, which in turn caused Watkins to lose his mother's care and guidance. Western could owe Watkins a duty of care not to cause harm, if their relationship was sufficiently proximate; if the harm was foreseeable; and if there are no residual policy reasons negating the duty of care: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 SCR 537.

Braid J. found that even though Watkins was unnamed, he was insured under the contract and he was entitled to recover in the same manner as if named as the insured. The judge found there was no genuine issue for trial in the action claiming accident benefits and extra-contractual benefits. The accident benefits claim was dismissed. However, the judge found it was not plain and obvious that the claim for damages arising out of Western's handling of the mother's accident benefits was certain to fail. The derivative claim was not dismissed and was allowed to proceed.

Subrogation

C. Sabean v. Portage La Prairie, 2017 SCC 7, per Karakatsanis J. (Machlachlin C.J. and Moldaver, Wagner, Gascon, Cote and Brown JJ. concurring)

In this Nova Scotia case, the plaintiff was injured in a motor vehicle accident and awarded damages. After the tortfeasor's insurer paid a portion of the judgment, there was a shortfall which the plaintiff claimed from his own insurer under the SEF 44 Endorsement (excess insurance coverage). The insurer sought to deduct the plaintiff's future Canada Pension Plan disability benefits. The trial judge found that CPP benefits were not benefits from a policy of insurance and would not be deducted from the amount payable. The Nova Scotia Court of Appeal disagreed, concluding that the CPP was a policy of insurance under the Endorsement.

The Supreme Court of Canada agreed with the trial judge, finding that future CPP disability benefits are not disability benefits from a "policy of insurance" within the meaning of the provision and are not deductible from the amounts payable by the insurer as the ordinary meaning of a "policy of insurance" refers to a private insurance policy purchased by the insurer. The SCC found that an average person applying for this additional insurance coverage would understand a "policy of insurance" to mean an optional, private insurance contract and not a mandatory, statutory scheme such as CPP.

Subrogation of Rights or Under Insurance

A. Brugger v. Trustees of the IWA - Forest Industry Long Term Disability Plan, 2016 BCCA 445 per Willcock J.A. (Saunders and Groberman JJ.A. concurring)

The court of appeal reversed the trial decision of this matter referenced in our paper last year.

The plaintiff was injured in an accident and received disability benefits from the defendant and in respect of which there was a subrogation agreement. He subsequently settled his claim against the

tortfeasor and on a summary trial application was ordered to repay $40,383.25 of the settlement funds to the Trustees pursuant to the subrogation agreement. The plaintiff appealed in respect of the portion of the $40,000 that related to Part 7 benefits that had been paid. The appeal was allowed. The chambers judge had erred when he ruled that Part 7 benefits were to be included as "compensation from... a person whose acts have caused or are alleged to have caused the Disability". Instead, Part 7 benefits are no fault, first party insurance benefits and are distinct from compensation awarded on the basis of fault or liability in tort. The judgment was reduced to $16,025.70.

B. Middleton v. Heerlein, 2016 BCCA 369 per Fenlon J.A. (Saunders and Savage JJ.A. concurring)

This was an appeal from the decision of Mr. Justice Johnston dismissing a summary judgment application by Progressive Max Insurance Company, a U.S. insurer, in the name of the plaintiffs, Washington State residents, who were injured in two separate accidents in British Columbia. Progressive alleged that it was entitled to a right of subrogation against the defendants for the medical expenses it paid to the plaintiffs. Progressive was asking the court to reconsider the same issue it had previously unsuccessfully litigated in *Matilda v. MacLeod*, 2000 BCCA 1, based on recent changes in the wording of s. 84 of the *Insurance Vehicle Act* arguing that it provided for a broader right of subrogation. The Court of Appeal disagreed. The trial judge was correct to conclude that s. 84 did not affect the existing interpretation of s. 83 and an extra provincial insurer has no express statutory right of subrogation.

XV. Limitation Periods

A. Anonson v. North Vancouver (City), 2017 BCCA 205, per Smith J.A. (Newbury and Wilcok JJ.A. concurring)

The master allowed the plaintiff to add the City as a defendant without prejudice to the City's right to plead late notice under former s. 736 of the *Local Government Act* ("*LGA*") (former s. 286). On appeal, the chambers judge set aside the master's order and granted the application to add the City without the condition, effectively eliminating the City's late notice defence.

The Court of Appeal allowed the City's appeal and reinstated the master's order. Like its predecessor s. 286 (and s. 755 of the earlier *Municipal Act*), s. 736 of the *LGA* was interpreted as substantially different from limitation period provisions. The Legislature chose to treat local government differently from other litigants by requiring that local government be given notice within a short period following an incident to allow the City of investigate the potential claim. Unlike the *Limitation Act,* s. 736 of the *LGA* is not akin to a lapse of time in which to bring an action. Therefore, the notice provisions are not captured by s. 4(1) of the *Limitation Act* when a party is added to an action because the trial or appeal court must first determine whether the saving provision applies. The City remained at liberty to plead late notice under s. 736 of the *LGA* after being added as a party.

B. Bell v. Wigmore, 2017 BCCA 82, per Groberman J.A. (Tysoe and Dickson JJ.A. concurring)

The plaintiff appealed a dismissal of his claim for medical malpractice on the basis that the limitation period had expired prior to the action being brought. The trial judge found that the

plaintiff would be able to prove negligence on the part of the defendant and that the negligence was causative of his damages. The plaintiff had known the identity of the defendant; that the performed procedure caused him injury; and that the procedure should not have been undertaken. The mere fact that the injuries proved to be more severe than initially believed would not serve to postpone the running of the limitation period. The Court of Appeal determined that the facts found by the trial judge were open to her on the evidence and that she applied the correct legal tests. The appeal was dismissed.

C. DeWolfe v. Jones, 2016 BCSC 2008, Gaul J.

The defendants sought to have the plaintiffs' actions dismissed by summary trial on the basis that the Notice of Civil Claim was filed nearly two years outside of the limitation period. The plaintiffs argued that the defendants were estopped from relying on a limitation defence as a result of an alleged statement by the ICBC adjuster which implied that there was no limitation period. The court found that the adjuster's statement did not amount to a representation that there was no limitation period and there was no positive duty on ICBC to bring the limitation issue to the plaintiffs' attention. The adjuster had made it clear that ICBC was willing to settle at any time although the plaintiffs and ICBC had not entered into settlement negotiations. No representations amounting to a promise not to rely upon the limitation period had been made to the plaintiffs, and they had not relied on any assurance to waive the limitation period in any event.

D. Mullett (Litigation Guardian of) v. Gentles, 2016 BCSC 802, Loo J.

The master granted an order allowing the plaintiff to add a new defendant with liberty for the new defendant to plead a limitation defence. The plaintiff successfully applied for an extension of time to appeal the master's decision. The court held that since the master's decision to preserve the limitation defence was vital to the final issues of the case, the standard of review was a rehearing. In allowing the appeal, the Court found that the master erred in law by allowing the new defendant to preserve its right to raise a limitation defence.

E. Trombley v. Pannu, 2016 BCCA 324, per Smith J.A. (Harris and Goepel JJ.A. concurring)

In a slip and fall incident, the plaintiff advised the defendants that he would be pursuing a claim, however, he did not file his Notice of Civil Claim until three weeks after the expiration of the limitation period. During the investigation, the insurance adjuster sent a letter marked "without prejudice", requesting the plaintiff's settlement demands in view of the impending the two-year limitation period. The trial judge found that the wording "without prejudice" reinforced that they were still in the "investigation and assessment" stage and did not allude to the admission of liability. The Court of Appeal concluded that the trial judge applied the correct test in finding that the communications between the adjuster and plaintiff did not demonstrate an admission of some liability. As such there was no confirmation of a cause of action.

See also Practice - Third Party Proceedings: *Leijenhorst v. Turner*, 2016 BCSC 1563, Master McDiarmid

XVI. Negligence

Causation

A. Benhaim v. St-Germain, 2016 SCC 48, per Wagner J. (McLachlin C.J. and Karakatsanis and Gascon JJ. concurring) dissenting reasons by Côté J. (Abella and Brown JJ. concurring)

A spouse and son of a patient who passed away from lung cancer brought an action for damages against the patient's physicians for medical negligence. The trial judge concluded that while the physicians were negligent in failing to properly diagnose the patient's cancer, the evidence did not establish on a balance of probabilities that their negligence caused the patient's death. The trial judge held that the patient's cancer was likely already in a late stage and was likely incurable when the diagnosis should have been made. As a result of the physician's negligence in failing to diagnose the cancer earlier, the issue of causation was difficult to prove because of the speculative nature of the post hoc analysis available on the issue of the stage of cancer. The court of appeal overturned the trial judge's decision, stating that she should have drawn an adverse inference against the physicians on causation because their negligence undermined the plaintiff's ability to establish causation.

The decision was appealed to the Supreme Court of Canada where the Court held that the trial judge had committed no error of law in her causation analysis, nor did she commit palpable and overriding error of fact. In applying Snell v. Farrell, the court held that triers of fact are permitted to draw an adverse inference of causation in medical negligence cases where the defendant's negligence undermines the plaintiff's ability to prove causation and where the plaintiff adduces at least some evidence of causation. However, the court is not required to draw such an inference in all such cases and the decision falls within the discretion of the trier of fact based on all of the evidence. It was open to the trial judge not to draw the adverse inference in this case.

B. Borgfjord v. Boizard, 2016 BCCA 317 (leave to SCC dismissed 2017 CanLII 5366 (SCC)), per Savage J.A. (Saunders and Smith D. JJ.A. concurring)

This appeal reviewed the law on causation in fact and causation in law and overturned the trial finding of negligence against a passing driver on the Coquihalla Highway who was found at trial " not to have driven as fast as reasonably possible" in overtaking slower traffic. Causation in fact is assessed using the "but for" test, showing on a balance of probabilities that but for the defendant's negligent act, the injury would not have occurred. Inherent in the phrase but for is the requirement that the defendant's negligence was necessary to bring about the injury. Scientific proof is not required and common sense inferences from the facts may suffice so long as the inferences are based upon proven facts. Causation in law requires proof that the defendant was a proximate cause of the loss, the damage was not too removed from the factual cause or the damage suffered was reasonably foreseeable. Overall, the inquiry for causation in law asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable. It is not necessary for the plaintiff to show that the precise injury or the full extent of the injury was reasonably foreseeable, only that the type or kind of injury was reasonably foreseeable.

In the result, the court of appeal found that the trial judge erred in asking whether the accident "may not have happened", rather than whether the accident "would" not have happened but for the appellant's breach of her duty of care. Despite setting out the correct test, the trial judge was found

to have ultimately applied the wrong legal test for factual causation and to have failed to make the findings of fact required to determine whether the accident would not have happened.

In addition, the trial judge erred in the analysis of legal causation in failing to consider whether the accident was a reasonably foreseeable consequence of the appellant's conduct. The risk created by her passing speed (which the trial judge found too slow) was that another driver may not see her or misjudge her speed and approach her too quickly. However, the approaching driver did see her. Instead of slowing down, he engaged in series of dangerous high speed manoeuvres where his view of traffic was blocked, resulting in the accident. This conduct was outside of the possibilities of the "general" kind of accidents that were reasonably foreseeable.

C. Haynes v. Haynes, 2017 BCCA 131, Newbury J.A. (Harris and Mackenzie JJ.A. concurring)

This case involved a father and son, the defendant and plaintiff respectively, who had set off in a truck towing a flat-deck trailer. The trailer went over an embankment and the plaintiff was injured. In ruling on liability, the trial judge held the defendant liable by reason of the speed of his vehicle and the defendant's violation of s. 7.07(3) of the *Motor Vehicle Act Regulations*.

The trial judge was found to have erred in law finding that a breach of the regulations constituted negligence. The Court of Appeal held that the trial judge also erred in fact in proceeding on the basis that the defendant did not testify that he had slowed his vehicle when it began to wobble and in failing to engage in a proper analysis of causation. The trial judge did not explain how the speed of the defendant's vehicle or how his failing to check his side mirrors caused or contributed to the mishap. The judge was also wrong for rejecting the defendant's explanation of how the accident may have happened without negligence on his part, in other words, in rejecting the possibility that the mishap may have been the result of a flat tire on the trailer.

If a prima facie case of negligence had been made out by the plaintiff, the Court of Appeal found that the explanation from the defendant would have discharged the onus that shifted to the defendant to offer an explanation consistent with no negligence on the part of the defendant. In her reasons for judgment, Newbury J.A. found that the defendant had provided uncontroverted, reasonable, and specific evidence which adequately neutralized any prima facie evidence of negligence. In contrast, the trial judge had found the defendant's explanation to be speculative. The Court of Appeal cited *Fontaine v. British Columbia (Official Administrator)* [1998] 1 S.C.R. 424 noting that the strength of the explanation required "will vary in accordance with the strength of the inference [of negligence] sought to be drawn by the plaintiff."

Contributory Negligence

A. Olson v. Farran, 2016 BCSC 1255, Pearlman J.

The plaintiff, a pedestrian struck in an unmarked cross walk, was found 25% contributorily negligent for failing to determine whether the defendant's oncoming vehicle presented a risk to her own safety. The court found that she was distracted by a cell phone conversation via an ear bud with her mother at the time.

B. Womald v. Chiarot, 2016 BCCA 415, per Donald J.A. (Goepel and Fitch JJ.A. concurring)

The plaintiff successfully appealed the decision of the trial judge which found her 40% contributorily negligent for the injuries she sustained whilst riding in the hatch area of a vehicle without a seatbelt. On appeal, the court affirmed that the conduct in question must be a proximate cause of the risk of accident in order to justify a finding of contributory negligence. Donald J.A. found that the trial judge concluded that the circumstances of the incident overall (riding with a novice driver; a driver who had consumed some alcohol; riding in the hatch where no seatbelt was available; more passengers than allowed by the driver's novice licence; more passengers than the vehicle was designed to carry; other passengers planned to throw eggs at people from the moving vehicle) were "fraught with the risk that there might be an accident of some kind" but that this conclusion was too vague a basis on which to find the plaintiff contributorily negligent. Donald J.A. held that:

> Life is full of risks, more so perhaps for young people, which society accepts by granting driver's licences to 16-year-old persons. Accepting a ride with friends in high spirits out on a lark is not an inherently and unacceptably dangerous activity. (at para 20)

Professional Negligence

A. Kitsul v. Slater Vecchio LLP, 2016 BCSC 1039, Voith J.

The plaintiff alleged that the defendant was negligent in its submissions to WCAT after it was determined that his injuries arose out of the course of his employment, partly due to an error in the facts surrounding the plaintiff's use of the vehicle at the time of the accident. Madam Justice Koenigsberg found that if a mistake or error in judgment was made, it did not amount to negligence and that the defendant law firm did not breach the standard of care of a reasonably competent and diligent lawyer. The plaintiff's action was dismissed.

Public Carriers

A. Benavides v. Insurance Corporation of British Columbia, 2017 BCCA 15, per Fenlon J. (Frankel and Mackenzie JJ.A. concurring)

The defendants appealed the trial judge's finding that a *prima facie* case of negligence is made out when a passenger is injured while riding on a public carrier. The Court of Appeal clarified the law, confirming that the mere fact that a passenger is injured while riding on a public carrier does not establish a *prima facie* case of negligence and that the plaintiff bears the burden of proving on a balance of probabilities that the defendant breached the standard of care owed to the plaintiff. Once the plaintiff establishes a *prima facie* case of negligence, then in practical terms the burden shifts to the defendant to answer the case against him and to show that he was not negligent.

B. Gardiner v MacDonald, 2016 ONCA 968, per Cronk, Juriansz and Roberts JJ.A.

The defendants argued that the trial judge erred by imposing an inappropriate, elevated standard of care applicable to the defendant bus driver. The Ontario Court of Appeal upheld the trial judge's

reasons that the requirement that the bus driver be held to the standard of care of a reasonably prudent driver in like circumstances did not preclude a finding that as a professional driver, he should be held to a higher standard. The Court of Appeal found that the trial judge was entitled to consider the defendant bus driver's status as an experienced bus driver as relevant to the determination of the applicable standard of care.

XVII. Occupiers Liability

A. Robinson v. 1390709 Alberta Ltd., 2017 BCCA 175, per Newbury J.A. (Smith and Willcock JJ.A. concurring)

The plaintiff was out for dinner with a friend and as she was leaving the restaurant slipped on "something slimy and thicker than liquid" but could not say precisely what. On a summary trial application, the restaurant was found 100% at fault. An appeal was undertaken arguing that the trial judge had erred both in resorting to "speculation" and in his interpretation of *Sinow v. Maple Ridge Square Shopping Centre Ltd.*, [1990] B.C.J. No. 743.

The appellant argued that since Ms. Robinson had been unable to identify what she had slipped on, the court could not determine whether the restaurant's conduct fell below the standard of care. Since the burden of proof remains on the plaintiff to prove that her fall was the result of the occupiers' failure to discharge its duty of care, it was insufficient for the trial judge to simply say she slipped on "something".

In dismissing the appeal, Madam Justice Newbury said, at paragraph 7:

> The trial judge in the case at bar distinguished *Van Slee*, however, observing that Ms. Robinson was able to state that the substance on the floor was "noticeably different than water and that it had the distinct consistency of a food item." He did not regard this as "speculation or theorizing" on the plaintiff's part and quoted the following passage from this court's decision in *Sinow v. Maple Ridge Square Shopping Centre Ltd*. [1990] B.C.J. No. 743:
>
> > ... It is not a particular type of debris that the occupier must concern himself with, rather it is debris generally which creates a risk of a slip and fall such as happened here that he must concern himself with. The trial judge found as a fact, and this is not challenged by the appellant, that the respondent slipped and fell on a leaf or leaves; or to put it another way she slipped and fell as a result of a form of debris on the floor in the common area that created a risk of harm [At para. 23].
>
> Gaul J. also noted that the colour and texture of the floor in the restaurant made it hard to see items that may have been dropped on it, and that from the vantage point of someone working behind the food preparation counter, it would have taken the extra effort of leaning over the counter to examine the entire floor.

Madam Justice Newbury held that the trial judge's reference to *Sinow* was not to the plaintiff's burden to prove causation but to the proof of a foreseeable risk with which an occupier must be concerned (i.e., that there was debris generally and the particular kind of debris was less important). The trial judge found that the plaintiff had established a prima facie case that the defendant had breached the duty of care owed under the *Occupier's Liability Act*. The trial judge concluded that the defendant did not have a reasonable cleaning program in place to ensure that the premises were clean and safe and that the policies or systems in place were not being properly followed or

implemented. The trial judge noted that the customer's observation that the substance was different from water and had the distinct consistency of food was not "speculation or theorization".

The appeal was dismissed.

XVIII. Offers to Settle

A. 469238 BC Ltd. (Lawrence Heights) v. Okanagan Aggregates Ltd. (Motoplex Speedway and Event Park), 2016 BCSC 1159, Rogers J.

The defendant made a mistake in the formal offer to settle by stating as a term that the plaintiff would consent to a registerable injunction instead of the defendant consenting to the injunction. While accepting that the reference was a misnomer, the offer, as it was written, was not one the plaintiffs could reasonably have accepted. His Lordship went on to say in *obiter* that "it is not for the court to go around correcting mistakes made in the crafting of formal offers to settle. That would amount to rectification of a contractual offer ahead of its acceptance by the offeree. Since there was no acceptance of the offer, there is nothing to which the remedy of rectification can be applied. In addition, the offer required acceptance by all plaintiffs so it was found not to be one that any individual plaintiff could have reasonably accepted.

B. Arsenovski v. Bodin, 2016 BCSC 649, Griffin J.

The plaintiff succeeded in a claim for malicious prosecution and was awarded legal fees incurred in defence of criminal charges; $30,000 for emotional distress and $350,000 in punitive damages. The plaintiff then applied for double costs on account a formal offer made in the mount of $78,000. The defendants made a nominal offer, intending to preserve their right to argue cost consequences if they were successful at trial. The court found that it would hardly seem fair that the defendants not also be held accountable for their decisions in refusing a reasonable offer from the plaintiff. The plaintiff was awarded double costs from the date of her offer.

C. Ben-Yosef v. Dasanjh, 2016 BCSC 1945, Bowden J.

The plaintiff was awarded $32,548.52 in his personal injury action. The defendants made a formal offer of $70,000 with four business days for the plaintiff to accept it before trial. Bowden J. found that the offer ought reasonably to have been accepted and deprived the plaintiff of his costs from the date of the offer. The defendants were awarded costs from the date of the offer to the end of trial.

D. Bergen v. Gaetz, 2016 BCSC 896, Greyell J.

Following an unsuccessful adjournment application, the defendants made a formal offer to settle for $600,000. The defendants filed an appeal from the order dismissing the adjournment application to be heard on the first day of trial. The morning of the appeal, the defendants withdrew the offer. The trial proceeded and the plaintiff was awarded $570,446. In awarding the plaintiff her full costs as the successful party, Greyell J. held that the offer was suddenly withdrawn before its stated expiry date and in the context of the adjournment appeal. It was unknown whether the trial would proceed. The court also held that it should not take into account informal exchanges between counsel, written or otherwise, to settle during the course of trial. Here, the defence made reference

to a post-it note plaintiff's counsel had passed to him with an offer that was significantly higher than what the plaintiff recovered at trial.

E. Hall-Smith v. Yamelst, 2016 BCSC 325 Dillon J.

The defendant's formal global offer to settle, which included settlement of claims from unrelated accidents, one of which was not the subject matter of any proceeding, was held to be a valid offer under *Rule 9-1.* However, the court declined to give it effect on the basis that the offer was made one month after the unrelated accident and only open for acceptance for about three months following that accident. The plaintiff could not have properly assessed any potential claim for the unrelated accident during the time that the offer was open.

F. Johal v. Radek, 2016 BCSC 1170, Voith J.

The plaintiff's formal offer made the morning of the first day on which the trial was to start (it was delayed to find an available judge) was found to be delivered in sufficient time that it could be properly evaluated. The offer was in the range of informal offers that were exchanged between the parties in the days leading up to trial. The plaintiff was awarded double fast track costs for the four days of trial that took place after the day the offer was made.

G. Manoharan v. Kaur, 2016 BCSC 1016, Affleck J.

The plaintiff recovered in excess of $900,000 following a 10-day trial. The plaintiff made a formal offer to settle for $425,000 open for acceptance for two business days before trial. In awarding double costs for the trial, Affleck J. held that the defendant had ample time to respond to the offer as the defendants had also presented a formal offer and both parties would be expected to be actively considering the likely damage award.

H. Mayer v. Umabao, 2016 BCSC 2355, Young J.

The plaintiff was awarded $446,120.16 at trial, a significant portion of which was a loss of earning capacity. The plaintiff made a formal offer of $247,599.80. The plaintiff was 69 at the time of trial and was found to have had unusual but nevertheless real plans for future earning opportunities. Given the contentious issues of causation and future loss, the defendants did not unreasonably refuse to accept the plaintiff's offer and the plaintiff's application for double costs was dismissed.

I. Viewcrest Estates Ltd. v. Alfonso, 2016 BCSC 2368, Rogers J.

The defendants' formal offer to settle was made to "settle all claims in this action on payment to the Plaintiffs of $17,500". The plaintiffs accepted the offer but argued that they were entitled to costs in addition to the monetary amount of the offer. The plaintiffs' claim in the notice of civil claim included a claim for costs. Rogers J. turned to the ordinary and usual meaning of the word "claims" in the context of civil litigation where claims are things one party wants from another. By accepting the formal offer, the plaintiffs agreed to compromise all of their claims, including costs. It was held to be contrary to the terms of the contract – and unfair as well – to allow the plaintiffs to recover their claims for costs out of the proceeds of the settlement contract and recover additional costs under the Tariff too.

XIX. Part 7 Benefits

A. Powell v. ICBC, 2016 BCSC 1432, Dillon J.

The plaintiff was employed full-time as a secretary/bookkeeper and injured in a motor vehicle accident on October 25, 2010. She was deemed totally disabled from work for four weeks after the accident (the "initial period of disability"). However, she deposed that she took vacation pay for this period as she would not be paid sick leave by her employer. She then returned to work part-time on November 22, 2010 and continued to work part-time thereafter until August 2, 2013 when she stopped due to totally disability she claimed was caused by her accident injuries. She remained disabled at the time of the application for summary judgment (the "current period of total disability").

The Court held that the plaintiff had established a loss during the initial period of disability and that part of the claim was allowed. With respect to the current period of total disability, the plaintiff claimed entitlement to disability commencing on August 3, 2013 (about 144 weeks after the accident). Both parties agreed that s. 86 of the *Insurance (Vehicle) Regulation*, BC Reg 447/83 applied which allows for TTD benefits when an accident disability goes beyond the 104 week mark. The defendant argued that in order for the plaintiff to receive benefits under s. 86 the plaintiff must establish that TTD benefits were being paid to her by ICBC at the 104 week mark and that at the 104 week mark, the plaintiff was totally disabled as a result of injury sustained in the accident.

Dillon J. allowed the claim, relying on *Symons v. ICBC*, 2016 BCCA 207. In that case, The Court of Appeal held that the benefits could be revived where the original injury later caused disability under s. 86 - even when the total disability occurs after the 104 week period. Bennett J.A. further noted that this interpretation was consistent with the context and object of the *Act* in providing no-fault benefits for persons injured in motor vehicle accidents.

The Court stated that the facts in *Symons* directly applied to this case. If it was accepted that the plaintiff was totally disabled as a result of injuries sustained in the accident, *Symons* supported her position that it was not necessary that she be actually receiving benefits or that her disability had been ongoing at the 104 week mark. The issue then became whether or not the plaintiff could prove that she was totally disabled as a result of the injuries sustained in the accident.

Although the plaintiff returned to part-time work after the initial period of disability and did not apply for TTD benefits within or at 104-week mark, medical evidence established that she was totally disabled as result of injuries sustained in accident, so it was not necessary that she was actually receiving benefits or that her disability was ongoing at 104-week mark.

XX. Practice

Abuse of Process

A. Glover v. Leakey, 2016 BCSC 1624, Gropper J.

The plaintiff was a backseat passenger in a vehicle driven by her husband, the defendant, when it struck a snow plow. Another passenger, Penny Yeomans, had brought a separate action. Liability had been admitted in the Yeomans action and, ultimately, that action was settled before the Glover trial. The relevant pleading in the Yeomans action was:

> The accident particularized in paragraph 10 of the Notice of Civil Claim occurred as a result of the negligence of the Defendant, Kenneth Roger Leakey, while driving a motor vehicle owned by the Defendants, Glover and Leakey.

Ms. Glover's claim proceeded before a jury and both damages and liability were in issue. During the trial, plaintiff's counsel discovered the pleading in the Yeomans action and raised an argument that the defendant's denial of liability was an abuse of process based on inconsistent pleadings between this action and that brought by Ms. Yeomans. After the issue was argued, it was decided to let the jury reach its verdict and, depending on the outcome, the judge could render her decision on the application. However, there was a misunderstanding as between counsel in respect of how the matter would proceed before the jury and whether the jury's verdict would be entered as a judgment of the court. That misunderstanding prejudiced the plaintiff as her counsel declined to cross-examine the defendant on the inconsistent pleadings thinking that the agreement was that the judgment would not be entered regardless of the outcome pending Madam Justice Gropper's decision on the abuse of process.

The jury resolved the issue of liability in the defendant's favour. After the verdict, the defendant sought to have the judgment entered and took the position that the trial judge did not have jurisdiction and was *functus* to rule on the abuse of process application. The plaintiff applied for a mistrial on the issue of liability. The application was granted on the basis that there had not been a fair trial as a consequence of the counsels' misunderstanding regarding the agreement between counsel. The result in the trial would have been different if the application had been determined before the jury rendered its verdict.

Madam Justice Gropper granted judgment on the liability issue in favour of the plaintiff. She held that the inconsistent pleadings were an abuse of process for the following reasons:

> [69] Before this action was filed the defendant admitted liability for the subject accident in the Yeomans Action. He obtained the benefit of settlement with that defendant. It cannot be open to him to re-litigate something that he already conceded in the Yeomans Action. That offends the principle of judicial economy, unnecessarily expending the resources of the justice system and in this particular instance it is more egregious as the case called upon the wisdom of the community in the form of jurors. It is also contrary to the principle of finality to permit something that has been admitted to be re-litigated.
>
> [70] Consistency is also compromised. A position that Mr. Leakey is on one hand negligent but on the other not negligent cannot be anything but irreconcilable and inconsistent. The only distinction in the pleadings is that in the Yeomans Action the defendant asserted that Ms. Yeomans failed to properly adjust and securely fasten her seatbelt. That does not alter the bare fact of the defendant's negligence.
>
> [71] It is not relevant that Ms. Glover was a co-owner of the vehicle. The defendant has not explained how that distinction makes a difference. The same conduct of the defendant was involved in both the Yeomans and the Glover actions. To take different positions is inconsistent and provides unpredictability in the law.
>
> [72] I am also of the view that the administration of justice is compromised by the defendant's conflicting positions that it was his fault and then it was not his fault. Neither position was advanced in the alternative. As Levine J.A. stated in *Pepper's Produce*: "these proceedings cannot, as a matter of protecting the integrity of the court's process, stand together."
>
> ...

> [93] The defendant claims that to find these pleadings as inconsistent and an abuse of process will discourage admissions, contrary to public policy. I find that there is much larger public policy at stake. It is an abuse of process to allow a defendant to admit liability in respect of one passenger and deny liability in respect of the other where there are no facts to distinguish the two. Requiring a party, even ICBC, to file consistent pleadings is not onerous and, with respect, is a principled way to proceed. The pleading of inconsistent positions in this case cannot be condoned.

Admissions

A. Abdi v. Wong, 2016 BCSC 1659, Master Baker

The defendant applied to withdraw admissions of liability made regarding a motor vehicle accident. Master Taylor considered all the circumstances surrounding the admission concluding that it was not made inadvertently, hastily, or without knowledge of the facts, that it would prejudice the plaintiff if the admission was withdrawn and that the fact is one of mixed fact and law. At paragraph 8, Master Taylor concludes that while there may be a triable issue regarding liability he doubted it very much, finding that a judge would not have any difficulty in ascertaining how the accident occurred and that the defendant was liable. The defendant's application to withdraw the liability admission was dismissed.

B. Nagra v. Cruz, 2016 BCSC 2469, Master Harper and 2017 BCSC 347, Abrioux J.

Master Harper granted the application of the defendant motor vehicle owner to withdraw an admission that the defendant driver had his consent to drive the vehicle. The Court found that the admission was "deliberate" in the sense that ICBC has sole control over instructing defence counsel but as the actual defendant did not instruct defence counsel, it was his position that the admission of consent was a mistake and should not have been made. Master Harper found that there was a triable issue; the matters should be determined on their merits; there was no unreasonable delay in applying to withdraw the admission; and as the trial was three months away, there was time for further discovery. Master Harper held that any prejudice to the plaintiff could be offset by an order for costs and disbursements. The plaintiff appealed Master Harper's decision (see *Nagra v Cruz*, 2017 BCSC 347) but the Honourable Mr. Justice Abrioux held that Master Harper was not clearly wrong and that if the matter was reheard he would have reached the same conclusion.

Breach of Privacy

A. Duncan v. Lessing, 2016 BCSC 1386, Griffin J.

The plaintiff brought a claim against the defendant, a lawyer who represented the plaintiff's former wife in family proceedings. The plaintiff claimed that the defendant lawyer breached his privacy in the course of serving application material and through the conveyance of information about the plaintiff in casual conversation with another lawyer. The first breach involved the defendant's process server unintentionally serving an unsealed notice of application and affidavit on several companies not parties to the litigation. The second breach involved a conversation whereby the other party was able to deduce the identity of the plaintiff from the information divulged.

The Court found no merit to the argument that the lawyers' decision on what to include in the application could be found a breach of privacy claim by the plaintiff. The lawyer's purpose for serving the document was in furtherance of the family action. The defendant's actions were undertaken in order to further his client's interests thus served to shield the defendant from civil liability. Ethics, professionalism and good practice dictated that lawyers consider the privacy of litigants and not unnecessarily reveal private information or to embarrass the other party. The Court stated that an advocate must be free to serve their clients fearlessly, and not be deterred by the threat of lawsuits by the opposite party who is unhappy with the way the litigation is conducted.

The Court accepted that absolute privilege was a defence to the first alleged breach of privacy as there was no evidence that the application documents were served for any reason other than the lawyers' pursuit of their client's interests. The plaintiff also failed to prove that the casual conversation that the defendant had with another lawyer during a break in an examination for discovery in another case revealed private information or was a wilful violation of privacy within the meaning of the *Privacy Act*.

Communication by Email

A. Great Wall Construction Ltd. v. Lulu Island Winery Ltd., 2016 BCCA 227, per Lowry J.A. (Saunders and Harris JJ.A. concurring)

The issue in this case was whether the withdrawal of a settlement offer communicated only by email which the recipient did not see precluded the offer from later being accepted. The chambers judge had found it was:

> [30] ... Just as the plaintiff and defendant had implicitly agreed to exchange communications via facsimile in Trans-Pacific Trading v. Rayonier Canada Ltd. (1998), 48 B.C.L.R. (3d) 296, the parties here agreed to the use of email as a form of communication for communications not requiring formal service. Once delivered to the email inbox of counsel for the plaintiff, counsel for the defendant had the legitimate expectation that the email would be read. It is no different than if the defendant had sent a letter via post or delivery to the plaintiff's address and it was left unopened or misplaced in the plaintiff's office. While prudence, and perhaps courtesy, might have warranted some follow-up given there was no acknowledgment or response to the "new offer", such was not required.

The court of appeal agreed with the chambers judge's conclusions and dismissed the appeal.

CPCs/TMCs

A. Carleton v. North Island Brewing Corporation, 2017 BCSC 173, Smith J.

Mr. Justice Smith dismissed a consent application for a desk order to allow the parties to file late trial briefs after the matter had been removed from the trial list pursuant to Rule 12-2(3.3).

Where a matter has been struck from the trial list it cannot be restored simply by the late filing of trial briefs. Counsel may not opt out of the requirements under the TMC Rules. There must be a proper application to restore the trial to the list, which application should show a reasonable excuse for the failure to file trial briefs and that there would be some serious prejudice identified arising from the trial not proceeding. Only if the trial is restored to the trial list, does the question of the

late filing of trial briefs become relevant. Any application to extend the time for filing of a trial brief must be accompanied by a reasonable explanation for the failure to file trial briefs and proposing a date by which they would be filed.

B. Kirk v. Nanaimo Literacy Association, 2016 BCSC 2359, Smith J.

The parties applied by desk order to dispense, by consent, with a TMC that was scheduled for December 20, 2016. The application was rejected based on "uninformative" trial briefs. The intent of Rule 12-2(3.6) is to only dispense with a TMC when the court is satisfied that the matter is ready to proceed to trial and not merely because the parties agree to do so.

This decision recites a number of failings in the "pro forma" trial briefs including: the parties stated an expectation that the trial would be completed within the scheduled time but the total time estimates exceeded the scheduled trial by almost two days; there was no indication that counsel had fully considered all of the matters that would be addressed on a TMC, including that the plaintiff's brief stated that further witnesses may be called to address any outstanding documentary hearsay concerns which the parties are unable to resolve prior to trial; under admissions, the plaintiff merely stated that the law of B.C. applied and the defendant stated the facts to be admitted would be determined prior to trial; and, none of the important relevant cases were listed under the heading of "Authorities". Accordingly, the trial briefs did not give the court confidence that all of the issues had been addressed or that all potentially useful discussions had taken place.

Evidence—Admissions

A. Chand v. Martin, 2017 BCSC 660, Russell J.

At issue was whether the plaintiff's guilty plea to a charge under s. 144 of the of the *Motor Vehicle Act*, and payment of a $1,500 fine constituted proof that he was driving erratically or without due care and attention for the purposes of the tort claim. Madam Justice Russell applied the reasoning in *Toronto (City) v. CUPE Local 79*, 2003 SCC 63 and, in particular, that:

> [53] The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. ***There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail.*** An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

In this case, the plaintiff had no memory of the collision and so could not have robustly defended the charges under the *Motor Vehicle Act*. Further, the fine was quite minor and the stakes in the subsequent tort claim much higher so his plea was not surprising. Accordingly, the court found that the guilty plea did not constitute proof that the defendant was driving without due care and attention and thus was not determinative of liability in the tort claim.

Evidence—Adverse Inference

A. Mohamud v. Yu, 2016 BCSC 1138, Fisher J.

At trial, the plaintiff proffered very little objective evidence of continuing injuries from relatively minor accidents. The court found significant inconsistencies between what the plaintiff reported to her physician, her experts and in her evidence at trial. He concluded that he could not rely on the plaintiff's evidence regarding what injuries were caused by the accident, the extent of her ongoing symptoms, and the effect of a subsequent fall, unless her evidence was consistent with what she reported to her doctor at the time. The plaintiff did not call evidence from her gp. In these circumstances, the court drew an adverse inference from the plaintiff's failure to call her family doctor to give evidence, at least as a treating physician if not also as an expert witness. Damages were assessed accordingly in a range lower than that claimed at trial.

B. Tayner v. Brard, 2016 BCSC 1738, Armstrong J.

The plaintiff claimed injuries to as a result of two motor vehicle accidents. Prior to the accident, he had a history of scoliosis and associated intermittent back pain. At trial, he claimed a back injury as a result of the accidents and the trial judge found him to be a poor medical historian. The defendants argued that an adverse inference should be drawn against the plaintiff for his failure to call evidence from his treating family doctors whom he saw before and after the accidents. The records of the gp who treated the plaintiff before the accident indicated that he reported back pain in the month before the first accident. Given the importance of the plaintiff's pre-existing scoliosis diagnosis and the plaintiff's poor recall of his condition, the court drew an adverse inference from the plaintiff's failure to call opinion evidence from this physician.

The court declined to draw an adverse inference regarding the plaintiff's failure to call the gp he saw after the accident, however. In the two years following the accidents, there were no notations of any reports of back pain in the doctor's records. The gp had prepared a report but it was not introduced at trial. In these circumstances where the defence had the records and the gp's report, it was open to the defendant to call the physician as part of their case.

Litigation Guardian

A. Gengenbacher v. Smith, 2016 BCSC 1164, Johnston J.

This case is of interest for the following comments regarding the appointments of litigation guardians:

> [14] In my view, the Rules with respect to conducting litigation through a litigation guardian clearly leave any assessment of capacity to counsel; the court does not inquire into capacity, nor does the court rule on capacity. It is enough that a lawyer, as an officer of the court, certify that a person is "a mentally incompetent person" in the words of Rule 20-2(8).
>
> [15] If this were a fresh action, no order would be required. Sub-rule (2) provides that no action may be by or against a person under legal disability except by his or her litigation guardian. "Person under legal disability" is a necessarily broader term than "mentally incompetent person" so as to permit infants to engage in litigation while minors. In *E. (E.M.) v. W. (D.A.)*, 2003 BCSC 1878 (B.C.S.C.), the court held at para. 16 that persons under legal disability for the

> purposes of Rule 20-2 were infants or mentally incompetent persons, based on a reading of the Rule as a whole. I note that sub-rule (12) contemplates a litigant who attains majority during the litigation, and who is "then under no legal disability" of assuming conduct of their litigation on filing an affidavit.
>
> [16] Sub-rule (10) contemplates court involvement in this question only if a litigant becomes a mentally incompetent person while a party to a proceeding, in which case the court must appoint a litigation guardian if no committee has been appointed or the litigant has not nominated a representative under the *Representation Agreement Act*, R.S.B.C. 1996, c. 405. *E. (E.M.) v. W. (D.A.)*, does not require an inquiry into mental capacity in every case, as in there it was an opposing party seeking appointment of a litigation guardian for a self-represented litigant, with neither a lawyer's certificate nor consent of a proposed litigation guardian. In my view, the court can accept the certificate of one of its officers, even in the midst of an action, without having to go behind that certificate or requiring evidence to support it. Otherwise, a represented party might be exposed to collateral proceedings or inquiries, additional expense of expert opinions on mental capacity, or, in a worst case, investigation or examination by opposing counsel into capacity in the middle of proceedings.

Litigation Privilege/Implied Undertaking

A. Unifund Assurance Company v. Churchill, 2016 NLCA 73, Welsh J.A. (Green C.J.N.L. and Barry J.A. concurring)

John Churchill was injured in a motor vehicle accident. He brought an action against the driver of the other vehicle for damages and a separate action against his own insurer, Unifund Assurance Company, for wage-indemnity benefits. Unifund sought discovery of medical reports obtained by the defendants in the tort action and used that province's rules on interrogatories to inquire whether an IME had taken place, when and with whom. Unifund applied unsuccessfully to obtain answers to the interrogatories and the medical reports. The appeal addressed the issue of whether litigation privilege and the implied undertaking rule precluded disclosure in the wage benefits action.

Welsh J.A. held that the applications judge erred in applying the implied undertaking rule and in concluding that the reports sought could not be disclosed because their use was confined to litigation involving the driver of the other vehicle. The purpose of litigation privilege is to aid in the adversarial process, not to impede the discovery of relevant facts which could not be otherwise obtained with due diligence. The court noted at paragraph 23:

> Further, in the circumstances, Mr. Churchill could not claim litigation privilege for a medical report that was requested by the insurer for the driver of the other vehicle. That action has been completed. As discussed in *Blank*, litigation privilege, if it exists, terminates when the litigation that gave rise to the privilege is ended. That principle would apply here because the action between Mr. Churchill and the driver of the other vehicle has been concluded. Even assuming that litigation privilege could have been claimed for medical reports requested by the other driver's insurer, that privilege is spent.

The Newfoundland rules with respect to IMEs and medical reports differs significantly from those in BC in that they require a party requesting an IME to promptly serve the other party with a copy of any written report the examiner may make. In addition, a party requesting an IME is entitled to receive from the party being examined, any previous report made by any medical practitioner relating to any relevant conditions of the party. In that way, if Unifund requested an IME in its own action, it would be entitled to a copy of the prior IME reports from the tort action. In the

result, the court held that the implied undertaking rule did not prevent disclosure of the reports. Further, the court found that:

> In this case, it is difficult to see how the implied undertaking rule is engaged. A medical report, being factual in nature, would be neutral insofar as encouraging the provision of complete and candid discovery, one of the rationales for the rule. Further, the proposition stated by Binnie J. that "whatever is disclosed in the discovery room stays in the discovery room" loses its impact and relevance when considered in the context of the factual nature of medical reports and the operation of rules 31 and 34.

Notice to Admit

A. Ceperkovic v. MacDonald, 2016 BCSC 939, Dillon J.

The Honourable Madam Justice Dillon found that the plaintiff bus driver would not have had to lead any evidence and would not have had to cross-examine other parties or witnesses if the defendants had not unreasonably denied facts set out in a Notice to Admit. At paragraphs 43-44, the decision states that while cost consequences of an unreasonable failure to admit are usually confined to the costs of proving the truth of facts or the authenticity of documents, Rule 7-7(4) of the *Supreme Court Civil Rules* provides the Court with discretion to penalize a party by awarding additional costs or depriving a party of costs "*...as the court considers appropriate*". Madam Justice Dillon exercised her discretion to award double costs against two of the defendants for trial preparation, attendance at trial, and written argument.

Parties

A. MacDonald v Cunniff et al, 2016 BCSC 559, Sharma J.

The defendant sought to plead negligence against a non-party company for the purpose of having the trial judge apportion a degree of fault to that non-party at trial, but not to add the company as a party to the action. The defendant argued that it was proper to add the allegations of the non-party's negligence if it intended to argue that its liability should be several rather than joint as against the plaintiff's alleged contributory negligence and the non-party. The Honourable Madam Justice Sharma found that the defendant's reasoning was sound and allowed the amendment sought.

Third Party Proceedings

A. Leijenhorst v. Turner, 2016 BCSC 1563, Master McDiarmid

The defendants brought an application to issue third party proceedings pursuant to Rule 3-5 two years and nine months after a motor vehicle accident and about a year and a half after the response to civil claim had been filed.

Rule 3-5(4) allows a party to file a third party notice, without leave within 42 days after being served with the notice of civil claim and, thereafter, only with leave of the court. The response to civil claim alleged that the accident was caused solely by the plaintiff and denied any negligence on the part of the defendants and the third party notice sought to allege, for the first time, that the

Corporation of the Township of Langley ("Langley") was negligent as a result of the placement of its stop sign and its failure to clear obstructions to allow the stop sign to be seen.

The plaintiff had not sought to add Langley as a defendant. Master McDiarmid noted that the plaintiff had not given notice pursuant to s. 286 of the *Local Government Act* within the requisite 60-day period and that the two year limitation for the plaintiff to bring a claim against Langley had passed, although there could be a slight possibility that a court might allow Langley to be joined as a defendant. However, the same defence under the *Limitation Act* would not be faced by the defendants in commencing independent proceedings for contribution and indemnity against Langley because less than two years had elapsed since the defendants were served with the notice of civil claim. Whether the provisions of the *Local Government Act* would defeat the claim was an open question.

The issue whether Langley could be liable was separate from the issue of liability between the plaintiff and the defendants. Master McDiarmid refused leave on the basis that: there would be no time saving and no efficient use of judicial resources; the crux of the third party claim was not significantly related to the claim against the defendants; the claims involved different legal and evidentiary issues; nothing prevented the defendants from bringing separate action for contribution and indemnity; proceedings between the defendants and third party would be relatively concise and damages would have already been established; there had been a lengthy delay between the time the defendants considered bringing the third party proceedings after writing a letter providing notice of its claim to Langley and bringing the notice of application; there was no explanation for the delay; and, there would be significant and insurmountable prejudice to the plaintiff in that the trial would be extended and likely delayed. The balance of convenience lay with the trial proceeding as scheduled and based on the pleadings as they stood.

See also Workers' Compensation: *Sandhu v Vuong*, 2016 BCSC 1490, Master Baker

Video Deposition

A. Brown v. Mitchell, (unreported), July 13, 2016, New Westminster No. M158056, Master Keighley

The plaintiff applied to have the evidence of her employer be by video deposition taken in advance of the trial since he was going to be in Egypt during the trial. The application was dismissed after a review of the authorities that support the proposition that it is always preferable that evidence be taken live by video conference rather than by deposition.

The employer was an important and significant witness; he would give evidence with respect to a key component of the plaintiff's claim, namely her ability to perform the usual requirements of her employment. If the examination took place in isolation from the trial, the defence would not have the opportunity to cross-examine the witness with respect to the evidence elicited during the trial. Master Keighley noted that Cairo had facilities to allow the employer's evidence to be taken by video conferencing and that he was not making any orders in that respect since he was not asked to rule on the appropriateness of video conferencing.

XXI. UMP

A. MacPherson v. White, 2016 BCSC 1151, Pearlman J.

The plaintiff claimed damages arising from a motor vehicle accident. The liability insurer of the vehicle operated by the plaintiff applied to be added as a defendant with full rights of participation as a party on contested issues of liability and damages as it had received notice that the plaintiff intended to make a claim under its policy in the event that the defendant's insurance and assets were not sufficient to satisfy any judgment the plaintiff might obtain. The Honourable Mr. Justice Pearlman found that the applicant insurer met the test in Rule 6-2(7)(c) of the *Supreme Court Civil Rules* as it had demonstrated that there existed a real issue between it and the plaintiff connected with the relief claimed and the issues of liability and quantum raised between the plaintiff and the defendant. The Court also found that it was just and convenient to add the insurer as a defendant in order to avoid a multiplicity of proceedings and to ensure the effective adjudication of all maters in dispute without the delay, inconvenience and expense of a second trial and the risk of inconsistent or contradictory verdicts.

B. BL v. The Insurance Corporation of British Columbia (Arbitration decision June 29, 2016), Mark Tweedy, Arbitrator

BL was involved in a motor vehicle accident in Washington. The defendant's US insurer offered to settle BL's claim for the policy limits and BL notified ICBC that he was seeking its consent to accept the offer pursuant to s. 148 of the *Under Insured Motorist Protection Regulations of the Insurance (Motor Vehicle) Act* (the "Regulations"). ICBC did not consent to the settlement and BL commenced an arbitration seeking under insured motorist benefits (UMP) from ICBC. ICBC took the position that the claimant had not established that the defendant motorist was underinsured as per section 148.1. The Arbitrator held that the evidence was not conclusive as to whether there was a liability issue in the Washington action. The Arbitrator held that the claimant was not entitled to UMP compensation and that ICBC was prejudiced by the settlement because it was deprived of the possibility that damages would have been assessed at an amount within the tortfeasor's limits.

In supplementary reasons dated July 5, 2016, the Arbitrator clarified that the tribunal could not determine if the Washington State tortfeasor was an "underinsured motorist" as used in the Regulations and that determination could only be made if there was a judgment in excess of policy limits and an inability of the tortfeasor to pay the judgment, or if ICBC makes that admission. The Arbitrator also clarified that costs to ICBC would not make up the prejudice resulting from the fact that the action did not proceed to judgment in Washington State, which might have resulted in a judgment for less than the tortfeasor's policy limits, thus eliminating an UMP claim. The Arbitrator also held that requiring ICBC's consent to accept a tender of policy limits interferes with the statutorily mandated scheme.

XXII. Workers' Compensation

A. Sandhu v Vuong, 2016 BCSC 1490, Master Baker

The defendants applied for leave to bring third party proceedings in a motor vehicle accident action in which liability was denied. The plaintiff moved to Manitoba and was involved in a subsequent accident. The defendants position was that the combination of s.4(2) of the *Negligence Act* and the Court of Appeal's reasons in *Bradley v Groves,* 2010 BCCA 361 *('Bradley")* required that the third

parties in Manitoba be joined or the defendants would risk being held liable for the totality of the plaintiff's damage, whether due to the BC accident or the Manitoba accident because some of the injuries are indivisible. BC maintains a tort-based legal regime for recovery whereas Manitoba maintains a no-fault regime and statutorily bars all claims other than those made within the provisions of the applicable legislation. The Court dismissed the defendants' application finding that the Manitoba legislation works to bar any tort claim by the plaintiff in Manitoba so the plaintiff could not successfully claim relief in BC for the accident in Manitoba. Master Baker found that as the plaintiff cannot claim in tort against the potential third parties either in Manitoba or BC, the defendants cannot join the same parties as third parties.

However, Master Baker held that the nature of indivisibility may be qualified and made divisible by the action of law when one claim is statute barred. Otherwise, if *Athey* and *Bradley* are applied strictly, the result would almost always be that the defendants are liable for all indivisible injuries prior or subsequent to the accident with no right of subrogation respecting prior or subsequent defendants. Master Baker concluded that when two jurisdictions' legal regimes collide, an exception to the indivisibility established by *Athey* and *Bradley* may arise. Master Baker also discussed the case of *Pinch v Hofstee*, 2015 BCSC 1888 where the Honourable Mr. Justice Burnyeat held that notwithstanding that indivisible injuries have been aggravated by a second, statute-barred event, the court may proceed to assess damages solely attributable to the first event. This case has applicability to whether a plaintiff can recover damages for indivisible injury if one defendant's negligence is statute barred by a WorkSafe BC defence.

XXIII. Legislation

Supreme Court

A. Administrative Notice AN-13

Effective January 1, 2017, the trial record in both civil and family proceedings must also include the trial briefs. In addition to the trial briefs, pursuant to Rules 12-3(1) and (2) the trial record must also include the pleadings, particulars served under a demand, any demands for particulars, any order relating to the conduct of the trial, and any document the registrar directs be included in the trial record.

B. Practice Direction PD-54 – Standard Directions for Appeals from Decisions of Masters, Registrars or Special Referees

Effective May 1, 2017, the Practice Direction states that appeals from orders or decisions must be brought within 14 days by filing the appropriate form. Within 7 days of filing the Notice of Appeal, the Notice of Appeal and a Statement of Argument must be served. A respondent wishing to oppose the appeal must file a Notice of Interest. A copy of this Notice of Interest and a Statement of Argument must be served within 14 days of service of the Notice of Appeal.

If the appeal is taken from an order or decision in which oral evidence is taken, a transcript of the reasons for judgment or decision and the transcript of oral evidence, but not including submissions, must be ordered within 14 days of the judgment or decision being issued.

The Practice Direction also deals with scheduling of the appeal hearing, the requirements of the appeal record and the time frame for filing the appeal record.

Date and time of hearing of Appeal

7. If the hearing of an appeal will require more than 2 hours, the date and time of the hearing must be fixed by Supreme Court Scheduling. If the hearing of the appeal will require less than 2 hours, it may be set on the chambers list on a date not before the expiry of the time for delivery of the respondent's Notice of Interest and Statement of Argument.

8. The appellant must provide to the registry where the hearing of the appeal is to take place, no earlier than 9 a.m. and no later than 4 p.m. on the business day that is one full business day before the date set for the hearing, an appeal record as follows:

a. the appeal record must be in a ring binder or in some other form of secure binding

b. the appeal record must contain

i. a title page

ii. an index

iii. a copy of the Notice of Appeal

iv. a copy of the order of the master or decision of the registrar or special referee

v. a copy of the written reasons for judgment of the master, or reasons for decision of the registrar or special referee, or if the reasons were given orally, a transcript of the reasons

vi. a copy of the Notice of Application and Application Response, and for registrars' appeals, a copy of the Appointment

vii. copies of any affidavits that were before the master, registrar or special referee which will be relied upon on the appeal

viii. a transcript of any oral evidence heard by the master, registrar or special referee to be relied upon on the appeal

ix. the appellant's Statement of Argument in Schedule A not to exceed 10 pages

x. the respondent's Statement of Argument in Schedule B not to exceed 10 pages

C. Chambers Assize List in Vancouver

The weeks available for booking long chambers applications on the chambers assize list are posted on the Scheduling section of the Court's website. The March 20, 2017 Notice states there is no guarantee that every matter scheduled during the one week time frame will be heard. Applications set for this one week block of time are sorted in order of importance. Counsel must be available to proceed on short notice during the assize week.

Applications which meet all of the following criteria are eligible to be placed on the chambers assize list:

(1) the application will take between 2 hours and 2 days to be heard;

(2) all counsel and self-represented parties consent to the application being placed on the assize list;

(3) everyone is available to proceed on at least 3 of the 5 days of the assize week; and

(4) the application arises in a civil proceeding and does not involve family law or judicial reviews.

Application records for matters set on the assize list must be provided to Supreme Court Scheduling, (counter 204 in the registry) no later than 4 p.m. on the Thursday before the assize week, and must be served as required by the Rules of Court. However, if the Friday before the assize week is a statutory holiday, the application record must be filed no later than 4 p.m. on the Wednesday before the assize week.

Civil Resolution Tribunal

The Civil Resolution Tribunal ("CRT") is a dispute resolution body established in 2012 by British Columbia's *Civil Resolution Tribunal Act. The Act was amended on May 14, 2015 and changes provide people with small claims and strata disputes with collaborative dispute resolution tools while preserving adjudication as a last resort. Examples of* services designed to encourage early resolution of disputes are online information, online dispute resolution services and telephone facilitation. If formal adjudication is required, the tribunal will actively case manage the dispute.

Starting on June 1, 2017, with just a few exceptions, civil claims of up to $5000 will no longer be dealt with in the Provincial Court through the Small Claims Court process. Instead, these claims will generally be resolved by the new online CRT. This monetary limit of the CRT will increase in future.

The CRT will have the authority to resolve matters such as small claims disputes for debt or damages, recovery of personal property or opposing claims to personal property, and specific performance of an agreement relating to personal property or services.

The CRT will not have authority to deal with claims against the government, a constitutional question requiring notice under section 8 of the *Constitutional Question Act*, questions of whether there is a conflict between the *Human Rights Code* and another law, a claim excluded from the authority of the CRT by regulations (no such exclusions exist at the present time) and claims for libel, slander or malicious prosecution.

Under section 11 of the *Civil Resolution Tribunal Act, the CRT can also refuse to deal with a claim if the issues raised in the claim are too complex or if it is otherwise impractical for its process.*

The CRT's **online** tribunal will offer dispute resolution services. These services can be accessed from home or any location with access to the internet. The services provided envision three phases:

(1) The initial negotiation phase will take place through online communication with the other party in an attempt to settle the dispute.

(2) The facilitation phase will involve trained CRT staff assisting with settlement efforts if initial negotiations do not succeed.

(3) The adjudication phase will come into play if the dispute remains unresolved. At this stage of the process a tribunal member may make a decision that can be enforced like a court order in Provincial Court, unless a notice of objection is filed.

Provincial Court (Small Claims)

Effective June 1, 2017, the upper limit of civil cases heard in the Provincial Court was increased to $35,000 (from $25,000). Small Claims Rule 8(7) was amended and now states:

> A claimant who filed a notice of claim before June 1, 2017 may change that notice of claim to increase the amount of the claim to an amount that is more than $25,000 and not more than $35,000, not including interest and expenses, whether or not the claimant had, in that notice of claim, abandoned part of the claim in accordance with Rule 1(5).

If a claim for an amount between $25,000 and $35,000 has already been filed in the Supreme Court of British Columbia, the case will proceed unless one of the parties applies to transfer the matter to Provincial Court.

Small Claims Rule 8(8) was also amended to allow a defendant who filed a reply containing a counterclaim before June 1, 2017 to increase the amount of the counterclaim up to $35,000.

Effective June 1, 2017, simplified trials at the Richmond and Robson Square courthouses will include cases of up to $10,000 (the previous monetary limit was $5,000). In order to increase the amount of a claim, the notice of claim or reply with a counterclaim must comply with the requirements of Small Claims Rule 8(2) on changes to the pleadings and must attach to the amended document a separate page giving detailed reasons for the change. Both the Richmond and Robson Square courthouses do not use simplified trials for personal injury claims and the Robson Square courthouse does not use simplified trials for financial debt claims.

The Provincial Court will continue to deal with all cases of up to $5,000 filed before June 1, 2017. After June 1, 2017, the Provincial court will continue to deal with cases of up to $5,000 where:

- the Civil Resolution Tribunal does not have the authority to deal with the subject matter of the claim;
- a judge orders that a matter proceeds in the Provincial Court instead of the CRT;
- where one of the parties files a notice of objection to a CRT decision; and
- where no objection to a CRT order is filed and a party asks to have the order enforced in the Provincial Court.