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PERSONAL INJURY CONFERENCE 2018
PAPER 1.1

Personal Injury Conference 2018 Update on Case Law

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PERSONAL INJURY CONFERENCE 2018 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 2017. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Costs and Disbursements

A. A.S. v. British Columbia (Director of Child, Family and Community Services), 2017 BCSC 1175, Fisher J.

Two petitions involved in this litigation challenged a decision made by the Director of Child, Family and Community Services to place a young child with Metis heritage with family in Ontario. Both petitions were struck as an abuse of process and the respondents sought special costs or party and party costs to be paid by the petitioners' counsel. The main issue under consideration involved the conduct of counsel in bringing multiple proceedings seeking the same relief and allegations of unprofessional conduct. Under the supervision of their counsel, the petitioners brought eight proceedings before all levels of court in which they sought the same relief on the same material facts. There were numerous examples of where the parallel proceedings were used to obfuscate and delay court process.

The court confirmed that an order for costs against counsel where costs are not sought against the party can be made under either *Rule 14-1(33)* or its inherent jurisdiction.

The court considered the issue of settlement privilege in its reasons. In this case, counsel for the petitioners issued a settlement offer "without prejudice except for costs". Fisher J. held that the reservation of the right to use this letter to claim costs "as deemed necessary by us" could not restrict its use to a future application for costs only by his clients. Settlement privilege belongs to both parties. Once a written communication is excepted as to costs, one party should not be able to dictate how or when the exception can be exercised for that purpose.

In addition, the court held that counsel's threats to expose his assertions of perjury on the part of Ministry employees in the settlement correspondence were egregious and raised an issue of public interest which outweighed public interest of encouraging settlement and protecting settlement privilege. The allegations were premised upon the existence of an alleged recording which was never produced by counsel. The evidence raised an inference that if such a recording existed, it was made surreptitiously and involved the child in issue. Such conduct amounted to a form of blackmail, which the court refused to countenance.

Fisher J. cautioned that counsel need to guard against identifying too closely with their clients in order to maintain the ability to provide effective, objective legal advice. Some of their actions rose to the level of reprehensible conduct and special costs were awarded. Since the two counsel played different roles, special costs were awarded on a several basis split 75%/25% between the two.

B. Bolin v. Lylick, 2018 BCCA 127, per Saunders J.A. (Harris and Fenlon JJ.A. concurring)

The plaintiff succeeded on an application brought six weeks before trial to adjourn the trial for the second time. The court declined to award the defendants their costs thrown away for their trial preparation.

The court allowed the appeal of the costs order, noting that the usual approach to costs in circumstances of a late adjournment is an award of costs thrown away. There must be some explanation for departing from the usual path.

C. Gibson v. Mihalcheon, 2018 BCSC 35, Master McDiarmid

This case provides a useful overview of the general principles to be applied to the assessment of units and disbursements. For tariff items:

- where there is a discretion on the range of units, the test is objective;
- the Registrar is to compare the case at bar with all other cases that come before the court and decide where it fits within the spectrum; and
- factors to be considered include whether the case was straightforward, the number of parties, the nature of the legal issues, experts, worth of the case and any other factor impacting on the case's difficulty.

D. Glover v. Leakey, 2017 BCSC 1287, Gropper J.

After the verdict in a jury trial was delivered, Gropper J. declared a mistrial and granted judgment to the plaintiff on the issue of liability. She so decided on the basis that the defendant's conduct in denying liability for the accident in the action at bar and admitting liability for the same accident but in a different action, was an abuse of process. The plaintiff then sought special costs against the defendant arising from that finding.

Gropper J. awarded special costs to the plaintiff, finding that the filing of inconsistent pleadings was conduct that could not be condoned by the court and was the type of conduct from which the court wants to disassociate itself. The repercussions of the abuse of process were wide spread and of significant expense to the plaintiff as the inconsistent pleadings were only discovered days before a jury trial was about to commence.

(An appeal was allowed on the issue of whether or not there was an abuse of process but the order for the mistrial was upheld. The matter has been remitted for a new trial: *Glover v. Leakey*, 2018 BCCA 56).

E. Ponder v. Dodds, 2017 BCSC 995, Steeves J.

The defence tried to prove fraud on the part of the plaintiff in an application brought post-settlement to deprive the plaintiff of her disbursements.

The plaintiff brought three actions for three motor vehicle accidents. ICBC invoked s. 75 of the *Insurance (Vehicle) Act* in respect of one of the accidents on the basis that the plaintiff willfully made a false statement. ICBC asserted that all claims in respect of that accident were invalid and forfeited. The defendants made a formal offer to settle all three actions for "$10,000 plus necessary and reasonable disbursements" to the date of the offer which was accepted by the plaintiff.

The defendants then applied to deprive the plaintiff of her disbursements on the basis that there was fraud underlying the claim, arguing that where there is fraud, a disbursement cannot be "reasonable". The court has equitable jurisdiction to award or not award costs. The court confirmed that fraud is a serious matter and requires cogent and admissible evidence, noting that the issues are "notoriously difficult to decide based on affidavit evidence". In the result, he found that it was not possible on the evidence before him to determine whether there was fraud or not. He dismissed the application and remitted the matter to an assessment before the Registrar.

F. Tisalona v. Easton, 2017 BCCA 272, per Hunter J.A. (Newbury and Savage JJ.A. concurring)

The plaintiff commenced two actions in respect of two accidents with liability admitted in each. The trials were heard at the same time for the assessment of damages. The plaintiff was awarded damages for the first accident. The trial judge concluded that the plaintiff had not sustained any injuries from the second accident and dismissed the claim. The plaintiff was awarded costs of both actions.

The plaintiff appealed her damages award and the defendants cross-appealed the award of costs on the bases that they had beat a formal offer to settle and that as an unsuccessful party, the plaintiff was not entitled to costs for the second action.

The court reviewed the historical foundation for the default costs rule that costs of a proceeding must be awarded to the successful party unless the court otherwise orders. The current rule has been interpreted to grant unqualified discretion to depart from the *prima facie* rule of costs to the successful party. One of the factors to consider is whether there are reasons connected to the case to depart from the usual order.

The only issue in the second action was whether it had aggravated or prolonged the effects of the first accident. The trial judge concluded that it had not, and that it had been reasonable to deal with the two together. Only one hour of trial time was devoted to evidence relating to the second accident and none of the expert reports addressed it to any extent. While acknowledging that it was unusual to award costs to an unsuccessful plaintiff, the Court of Appeal noted that the principal

considerations were the *de minimus* nature of the additional time required to deal with the second action and the trial judge's conclusion that it had been reasonable to join the claim to the more substantial one.

The trial judge was also in the best position to assess the reasonableness of the plaintiff's conduct at the time the defendants' formal offer was made and the cross-appeal on that issue was also dismissed.

Court Order Interest

A. Craig v. Howat, (unreported), October 15, 2017, Kelleher J.

The plaintiff brought an application for court order interest following the settlement of a claim, alleging that the approximate 30 day delay in paying costs, while costs were being negotiated was unreasonable. Mr. Justice Kelleher disagreed, finding that there was nothing unreasonable about the delay and dismissed the application with costs to the defendant.

Disbursements

A. Garayt v. Deneumoustier, 2018 BCSC 295, Registrar Cameron

Registrar Cameron clearly stated again that the Trust Administration Fee is a recoverable disbursement. He added:

> ...on numerous occasions on assessments that I have presided over I have advised counsel for the Insurance Corporation of British Columbia, who are retained to defend these motor vehicle related personal injury claims under our provincial automobile insurance program, that unless there is an issue as to whether or not the Plaintiff's counsel has received a deposit into trust in respect of resolution of the litigation, there is absolutely no justification to put the trust administration fee into issue.
>
> I have said to counsel, who come with instructions to oppose the TAF disbursement that those instructions are simply misguided and the matter ought not to be raised on an assessment unless there is an issue about the deposit being made.

He awarded the plaintiff an additional amount for costs for having to address this objection to the TAF and in recognition of the failure of ICBC to abide by the "very clear case law not to make TAF an issue unless there is a proper basis for doing so".

He also awarded the plaintiff her costs of an occupational therapist's report which was not served on the defendants during the litigation. The defendants argued that there was insufficient disclosure of all of the preparation and time spent by the OT in assessing the plaintiff and preparing the report. Litigation privilege was maintained over the report at the assessment. The affidavit of justification was from plaintiff's counsel but the reasons do not disclose the nature of the evidence used to justify the fees. The cost was allowed in full.

B. Lafond v. Mandair, 2017 BCSC 1081, Dley, J.

The plaintiff beat his offer to settle following trial and the defendants agreed that he was entitled to double costs. The plaintiff also sought double disbursements. The provision for double costs in *Rule 9-1(5)(b)* states that the award is for all or some of the steps taken in the proceeding after the

date of delivery of the offer. A step in the proceeding is a formal step that moves the action forward. Incurring a disbursement is not a formal step as contemplated by the *Supreme Court Civil Rules* and, therefore, double disbursements are not available.

C. Steinhauser v. Stinson, 2018 BCSC 596, Master McDiarmid (as Registrar)

The Trust Administration Fee was again disputed as a proper disbursement by the defence, and was again allowed. Master McDiarmid stated:

> For reasons which escape me, and which counsel for the defendants could not address without improperly disclosing instructions, the defendants have submitted that I should disallow the trust administration fee. (para. 21)

After noting the earlier affirming authority of *Christen v. McKenzie*, 2013 BCSC 1317, Master McDiarmid noted that the Fee funds insurance which in essence guarantees members of the public, including the defendants and their insurers, against misuse of trust funds and that:

> [i]f the defendants and their insurers were unable to rely on the sanctity of trust monies provided to members of the legal profession in this province, it would cost those defendants and their insurers substantially more than the relatively minor amount the plaintiffs' lawyers are required by the Law Society to pay for each file where trust funds are dealt with.

III. Credibility

A. Cyril v. George, 2018 BCSC 635, Weatherill G.C. J.

Through cross-examination on clinical records and discovery evidence, the plaintiff was shown to be less than forthright regarding her injuries and the extent of her ongoing symptoms. In addressing the absence of complaints in the clinical records the court said:

> [90] As this Court has previously noted, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. However, where, as here, a plaintiff's description of her symptoms is clearly inconsistent with her failure to seek medical attention and is consistent with improvement in her condition, the court is entitled to draw an adverse inference as to her credibility: *Edmondson v. Payer*, 2011 BCSC 118, at paras. 36–37.
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> ...
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> [92] The court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods of time beyond the normal or usual recovery: *Buttar v. Brennan*, 2012 BCSC 531, at para. 24; *Tai v. De Busscher*, 2007 BCCA 371, at para. 41. Generally, a plaintiff will not receive compensation in the absence of convincing evidence that her complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) at 399.
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> [93] I find that, if the plaintiff had been suffering the persistent and excruciating pain symptoms she described during her examination-in-chief, she would have mentioned something in that regard not only to her work superiors in that regard but also to her family doctor and there would not have been the gaping void of complaints in Dr. Kolkind's clinical records.

The court did not place much weight in the opinion of the plaintiff's medical experts because they were based almost entirely on her subjective complaints of significant ongoing pain, which were unreliable.

Mr. Justice Weatherill also addressed *Edmondson* and the proper use of clinical records in impeaching a plaintiff's credibility in *Chavez-Salinas v. Tower*, 2017 BCSC 2068 at paragraphs 173-193. The case also contains a helpful summary of the law relating to when an adverse inference may be drawn from the failure to call a treating physician.

B. Nagaria v. Dhaliwal, 2018 BCSC 569, Ball J.

In the course of a personal injury trial, plaintiff's counsel argued that where a defendant seeks to undermine or impugn a plaintiff's evidence, the defendant must put forward "convincing evidence of a deliberate falsehood". The court held that this assertion was wholly without merit and not a correct statement of the law as it unacceptably reduced the possible manners of impugning witness credibility and reliability to a single potential finding of "deliberate falsehood".

At paragraph 26, the court noted that *Julian v. Joyce*, 2016 BCSC 1417, at paras. 35-36, provides an accurate primer on the law relating to the credibility and reliability of a witness which involves an "assessment of the trustworthiness of a witness testimony based on the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides". Factors to be considered in assessing credibility include: the ability and opportunity to observe events, the firmness of a witness' memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence is consistent with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally.

Plaintiff's counsel also argued that a witness is more easily considered credible when the witness comes "from the same social or economic setting as the judge" and that the court might consider a witness less credible if the witness "hails from a different social group". Ball, J held that "[r]eference to the social or economic setting of a judge is of no relevance to the consideration of credibility or reliability of a witness" and that if the court were to give effect to plaintiff counsel's submissions, it would be a profound error of law and would impugn the impartiality of the court.

The plaintiff was a physician who gave evidence as an expert from time to time. His counsel argued that the court should take special care in making a credibility finding adverse to the plaintiff because of this fact and that he draws a portion of his income from that activity. The court, at paragraph 31 confirmed that the process for assessing credibility and reliability of a witness does not involve a consideration of the social status or occupation of the witness.

The plaintiff attended only one visit with another doctor, then diagnosed his own injuries and prescribed his own exercise regime, but failed to record any of his own symptoms, their occurrence, development, or resolution. The plaintiff relied on the expert report of Dr. Rickards but the court found a number of inconsistencies between the evidence of the plaintiff at trial and the history provided to Dr. Rickards. Ultimately, the court held that the plaintiff was not a reliable witness or a competent historian, and there was considerable exaggeration in his evidence.

IV. Damages

A. Isbister v. DeLong, 2017 BCCA 340, per Frankel J.A. (Tsyoe J.A. concurring and Smith J.A. dissenting)

The plaintiff was seeking a substantial increase of the damages awarded on appeal. With a majority judgment, the plaintiff's appeal was dismissed. Two points of interest: firstly, the Court of Appeal found that the trial judge did not err in allowing the expert reports served out of time. The trial judge exercised his broad discretion to admit the late reports and in doing so, he weighed the prejudice that the plaintiff might suffer against the benefit of having all the relevant expert evidence before the court. The trial judge found that in respect of the three expert reports that were served late, the plaintiff did not suffer prejudice within the meaning of *Rule 11-7(6)(b)* and that if the plaintiff had required more time to consider a late report, she could have sought an adjournment at the start of the trial. The Court of Appeal considered each expert report and found that the trial judge's decisions should not be interfered with in each of the circumstances.

Secondly, the plaintiff had also made an unsuccessful claim to recover interest on money that she had borrowed from her lawyer. The trial judge described the evidence of the loans as "scanty" and that interest on a loan to fund general living expenses is not recoverable as damages when the damages are not reasonably foreseeable and arise from the plaintiff's impecuniosity. The Court of Appeal found that there was no need to decide whether the plaintiff was entitled to recover, as special damages, interest on money she borrowed to cover living and other expenses, as she failed to establish a causal link between the need for the loan and the accident.

Smith J.A. in dissent would have remitted the claims for non-pecuniary damages, special damages, cost of future care, and loss of earning capacity to the trial court to be reassessed. Smiths J.A.'s proposed disposition turned on other issues, but she also noted disagreement with the trial judge's characterization of his discretion under *Rule 11-6* and *11-7*. She noted that the current rules are guided by different parameters which are outlined in *Healey v. Chung* 2015 BCCA 38.

B. Jacobs v. Basil, 2017 BCSC 1339, Abrioux J.

The plaintiff sued for damages from two motor vehicle accidents in 2011. The plaintiff was a young aboriginal man in his late teens at the time of the accidents and had faced a somewhat troubled and negative upbringing. The plaintiff only completed part of Grade 10 and had worked only sporadically as a dishwasher prior to the first accident. As a result of the first accident, he suffered chronic pain in his right leg, right hip and back, so severe that he could not stand or walk for more than a couple of hours. The plaintiff alleged that his life was permanently altered by the accidents, that he sustained changes to his emotional state, and that his injuries had a severe negative impact on his family relationships. The plaintiff had not made any attempts to pursue his education since the accidents and alleged that his injuries had significantly affected his career goals.

Plaintiff counsel argued that the court should consider "cultural bias" factors in its assessment of damages. In particular, at paragraph 162, the court states that "[h]is argument appeared to finally rest with the proposition that if the plaintiff's cultural background could be causally related to a specific head of damage then the court should take that into account in assessing those particular damages". The court accepted the opinion of the occupational therapist that the plaintiff's indigenous heritage likely means that the plaintiff will require assistance to access medical and other support services, but apart from that, the court did not consider the "cultural bias" argument to be appropriate in the assessment of damages.

C. Kirilenko v. Bowie, 2017 BCSC 2048, Saunders J.

The plaintiff was a passenger in a pickup truck driven by the defendant Ms. Bowie who made a left turn in front of an oncoming truck, leading to a collision with the pickup overturned at the side of the road. The plaintiff sustained multiple injuries including cranial cerebral injury, right hemopneumeothorax, pulmonary contusions, multiple rib fracture, liver laceration, and occipital condyle fracture. The brain injury and associated impairment in front lobe function were the chief difficulties that the plaintiff faced. The court assesses the plaintiff's pre-accident drug use, including cocaine addiction, as it was necessary to compare his pre and post accident condition to put the plaintiff back to his original condition.

The plaintiff agreed on cross-examination that things had begun to go downhill for him in 2009, approximately 3 years before the accident, when he started using cocaine every day. His income declined considerably and he had no reported income in the nine and a half months leading up to the accident. The plaintiff's evidence was that he stopped working to keep himself from having a lot of money, so he could try to quit the drug use. The court found that prior to the accident, the plaintiff's ability to function was severely impaired by cocaine abuse and that even if he accepted the plaintiff's testimony, he "…would see the decision to deprive oneself of means of earning a regular income as having been borne of desperation, indicating the severity of the plaintiff's addiction". However, Saunders J. stated that he found the plaintiff's explanation for not working to be contrived and that it was just as likely that the plaintiff's lack of regular employment in the months leading up to the accident indicated a lack of interest, or a lack of ability to motivate and organize himself due to his addiction.

The court found that the plaintiff's frontal lobe injury would have affected the plaintiff's impulse control and a number of medical experts testified that the plaintiff's brain injury put him at increased risk of relapse. The court found that while the plaintiff may have sought professional help for his cocaine addiction absent the accident, the timing of that eventuality was far from certain. Neither the plaintiff nor the defendants tendered any expert evidence from specialists in addiction medicine to address issues such as how difficult it is to overcome cocaine addiction, how responsive cocaine addiction is to treatment, the probabilities of relapse with and without professional treatment, and similar questions. The court took judicial notice that cocaine has the capacity to be highly addictive and with heavy users, such as the plaintiff, if they attempt on their own to abstain or if they choose to undergo professional treatment, they face a significant long-term and possibly life-long risk of relapse. The court held that the plaintiff's cocaine addiction represented negative contingencies that the court was obliged to account for in the assessment of quantum.

D. Mann v. Kathuria, 2017 BCSC 2229, Gerow J.

The plaintiff brought an application to amend the notice of civil claim to include a claim for compensation for the loss of appreciation in the value of his home. The plaintiff alleged that he was unable to work because of injuries sustained in the accident, and that he therefore had to sell his home because he could no longer afford his mortgage. The plaintiff sought to introduce evidence that, in the three years since selling his home, the property had increased in value by approximately $220,000.

The defendant opposed the application on the grounds that the loss of appreciation of the home was not recoverable as a head of damage. The defendant's opposition was based on principles of remoteness and foreseeability, and that the law does not compensate injured plaintiffs for consequences of their own impecuniosity.

In dismissing the application, Gerow J. agreed that case law has established that if a person's own impecuniosity is a cause of damage, then that damage is not recoverable. She noted the rationale

behind this proposition rests on foreseeability. Specifically, it is not reasonably foreseeable to a tortfeasor that they will injure an impecunious person, or that a car accident will lead to a chain of events culminating in impecuniosity and subsequent economic loss.

E. Moody v. Hejdanek, 2018 BCSC 380, Steeves J.

The plaintiff sought damages from injuries sustained in a motor vehicle accident. The accident was severe, but the plaintiff suffered relatively minor injuries. Following the accident, the plaintiff attended a walk-in clinic on two occasions, the first of which occurred nine days after the accident. He received minimal treatment, attending a total of four massage therapy appointments. He did not attend other medical assessment or treatment until he obtained expert evidence over four years later in preparation for trial. The plaintiff provided as an explanation for the lack of medical attention that he was a 'germaphobe' and that he asked questions of clients who are doctors and obtained advice from them.

The defendants argued that the plaintiff failed to mitigate his losses. Steeves J. concluded that although the plaintiff had not failed to mitigate, the absence of medical records prior to obtaining expert evidence nonetheless went to the issue of what weight should be attached to the plaintiff's expert reports. Steeves J. concluded in these circumstances that the absence of medical information meant there were minimal injuries caused by the accident.

The defence expert opined that the plaintiff likely suffered minor soft tissue injuries as a result of the accident, but that the plaintiff's injuries resolved within two months of the accident.

Ultimately, Steeves J. found that the plaintiff suffered soft tissue injuries and headaches because of the accident, and that he continued to suffer some ongoing discomfort. He awarded the plaintiff $55,000 for non-pecuniary damages, which took into account the lack of medical treatment and $50,000 for loss of future earning based on approximately one year of income.

F. Nguyen v. Bhatti, 2017 BCSC 1537, Fitzpatrick J.

The plaintiff alleged ongoing neck, back, and shoulder pain from a 2012 motor vehicle accident with ongoing sleep problems impacting his home life and his ability to work. The court found that the plaintiff was generally a credible witness but there were serious issues with the reliability of his evidence. As there was little objective evidence from medical professionals, it was necessary to carefully consider the plaintiff's subjective evidence as to the extent of his injuries.

The plaintiff relied on a report from his family physician which included notes of the plaintiff's visits and an impression indicating a diagnosis of soft tissue injury with chronic symptoms and appropriate treatment. The court held, at paragraph 81, that the "medical opinion is so brief and unilluminating so as to be of little assistance to this Court" and no weight was given to his opinion. The report from physiatrist Dr. Wee also had limitations, as there were references to knee and arm injuries that the plaintiff did not attribute to the accident and lack of review and consideration of the plaintiff's physiotherapist's records. In addition, Dr. Wee did not review the pre-accident clinical records which referred to prior neck and shoulder injuries so the court held that her opinion that the accident caused the plaintiff's neck and shoulder injuries, rather than aggravated them, was of little weight. The court held that the accident aggravated the plaintiff's pre-existing neck, back, and right shoulder injuries which had arose in a prior motor vehicle accident in 2009.

The plaintiff worked as "lead hand" electrician both before and after the accident. The company president Mr. Krause testified that the plaintiff's work before the accident was "first class" but after the accident there were work related issues. Mr. Krause testified that the plaintiff turned down a

foreman position due to ongoing symptoms and that he was not certain that the plaintiff was capable of performing a foreman's duties. Plaintiff's counsel argued that Mr. Krause's statement can be accepted as lay witness opinion relying on *Albert v. Politano*, (unreported), 2012 June 26, Vancouver (M104190), where a lay witness was permitted to opine on issues related to expected performance on a particular career path. The court stated that this matter should have been raised and addressed when such opinion evidence was being sought from Mr. Krause and not left to the end of the trial when all the evidence had been taken. In addition, the plaintiff and Mr. Krause both testified that Mr. Krause did not directly observe the plaintiff while he was working. The court found that Mr. Krause was not a witness who personally observed the plaintiff's ability and therefore had no facts from which he could draw logical conclusions on which to base any opinion. The court declined to admit Mr. Krause's evidence as lay opinion evidence and dismissed the plaintiff's claim for loss of future earning capacity.

Reasonable special damages were awarded, but the plaintiff's claim for parking at his counsel's office was not allowed.

G. Palangio v. Tso, 2017 BCSC 1573, Arnold-Bailey J.

The plaintiff was 51 at the time of trial and had been employed as a journeyman scaffolder at the time of the first of three accidents. He was left with permanent disabling chronic neck pain and headaches. Prior to the accidents, he had engaged in a variety of tasks outside of work, including building patios, constructing decks, doing roofing and roof repairs, performing exterior painting, and doing heavy landscaping work. He was awarded $12,500 for loss of handyman capacity as his ability to perform sustained heavy work had been diminished as a result of his injuries.

H. Warick v. Diwell, 2018 BCCA 53, per Fisher J.A. (Bauman C.J.B.C. and Fenlon J.A. concurring)

This appeal considered principles applicable to the cost of future care where publicly funded home care is in issue. The plaintiff was rendered a paraplegic in the accident with serious injuries to her intestine and bladder. One issue concerned her need to use a catheter to remove urine according to a regular time frame which was particularly difficult during the night. The trial judge held that the level of home support she received from Alberta Health Services ("AHS") did not approach what a person of ample means would find reasonable and awarded additional care, including six hours of overnight care per day. He increased the level of care according to different age scenarios and reduced this portion of the award by 60% to reflect the amount and quality of care that was likely to be provided at public expense.

On appeal, the court found that the trial judge did not fall into error by failing to consider the overall reasonableness and fairness of the award. He did not confound medically justified care needs with amenities. The court concluded that there may have been less costly ways to provide for the plaintiff's medically justified needs, but that did not constitute a failure to consider the overall fairness and reasonableness of the award.

The appellant also argued that the full amount of the services provided by AHS should have been deducted from the award and that his failure to do so amounted to a duplication of services. This ground was also unsuccessful as the court determined that he was assessing the value of additional care and he declined to apply any contingency to discount the value of the AHS services as they were likely to remain funded.

In addition, the court concluded that no contingency deduction was appropriate to take into account the uncertainty of predicting the future and the chance that the assumptions on which he

assessed this loss may turn out to be wrong. Fisher J.A. stated that a trial judge is not required to make adjustments for contingencies - whether positive of negative, citing *Krangle*. Whether or not such an adjustment is appropriate depends on the specific needs of the plaintiff.

The appellant also took issue with the amount of overnight care for turning and catheterizing, stating that the trial judge did not address whether there were less costly ways to address any problems associated with the failure to reposition or catheterize. On appeal, the court dismissed this ground, finding that when read as a whole, the reasons demonstrate that the trial judge was well aware of evidence of alternative solutions. While the award was "a generous one", it was medically justified.

The plaintiff cross-appealed on the issue of the 60% discount for increased AHS services after age 64. This was also rejected on appeal. There was no evidence that tort compensation would affect her eligibility or entitlement to receive AHS services.

I. Zwinge v. Neylan, 2017 BCSC 1861, Branch, J.

At issue in the assessment of damages was the proper consideration of the plaintiff's pre-existing substance use disorder. Psychiatrist Dr. Janke opined that it was "important for the plaintiff to attain and maintain a sober state as ongoing use of alcohol will contribute to generalized anxiety and depressive symptoms and will interfere with any psychological treatments or use of psychotropic medications". The court found that the defendants' concern about the plaintiff's alcohol use were legitimate as he had not yet maintained a "sober state" and that he would have had materially better prospects for recovery absent the pre-existing substance use disorder.

The court treated the issue as a negative contingency or as a relevant issue in assessing the plaintiff's baseline "original position". However, the court held, at paragraph 63, that the extent of the concern was moderated as the substance use disorder was under some level of control before the accident in that its effect on the quality of the plaintiff's work was marginal, he had obtained some treatment in 2013, and his drinking was somewhat moderated in the months leading up to the accident.

In assessing past loss of earning capacity, the court found, at paragraph 77, that the effect of the pre-existing alcohol abuse problems and other family issues were embedded in the pre-accident history. The court found that the plaintiff's average earnings in the five years before the accident was approximately $32,000 per year included these effects so no further reduction was needed, in terms of a negative contingency, in assessing the plaintiff's past loss of earning capacity.

Aggravated/Punitive

A. Godwin v. Desjardins Financial Security Investments Inc., 2018 BCSC 99, Saunders J.

The plaintiff was a paralegal who was disabled from psychiatric illness starting in 2011. After a series of denials, the insured was eventually approved to receive benefits during the "own occupation" period. At the request of the insurance company, the plaintiff underwent an IME in July 2013 with a psychiatrist, Dr. Levin. Dr. Levin opined that she had recovered and could return to her employment. The plaintiff was then advised that she would be denied benefits effective October 2013, when the definition of disabled changed to the "any occupation" criteria. She commenced the action on August 20, 2014 and just days before the trial commenced in March of 2016, the defendant elected to reinstate her benefits, with interest on the outstanding arrears. The trial proceeded on the issues of aggravated and punitive damages.

The judge found that punitive damages were appropriate as the insurer had not simply made an incorrect decision. The claims examiner repeatedly failed to analyze and to weigh the evidence; imported or applied tests for disability beyond those set out in the policy; and made findings not supported or inadequately supported by the evidence. It was apparent that the insurer had sought reasons to deny the initial claim, rather than fairly evaluating the claim. Even when the benefits were finally approved it was not clear why the insurer had made the decision at that point.

The insurer's conduct criticized by the court included:

- Not asking the same questions of the treating family doctor that were being asked of the insurer's internal medical consultant.
- Denying the claim based on the lack of "objective medical evidence" when the family doctor had stated that it might be another six months before the plaintiff could return to gainful employment, described her GAD-7 as 17 (indicating severe anxiety), and that she had started Cipralex but was continuing to have ongoing symptoms.
- Denying the claim because there was no consultation report from a psychiatrist when there was no evidence that an opinion from a psychiatrist was regarded as necessary to determine coverage.
- Denying the claim because the insured was unable to confirm that her condition was "severe enough to cause significant and prolonged psychiatric impairments" when the definition of total disability did not require a significant and prolonged psychiatric impairment.
- Denying the claim because the plaintiff's situation was "dominated by occupational and motivational factors" and not a psychiatric condition when there was no medical or factual foundation for such a conclusion and where there was evidence that she was motivated to return to the workforce.
- Not giving any weight to the consideration that it might be harmful for the plaintiff to have returned to work.
- Failing to address any of her concerns by way of follow up with the plaintiff's employer or medical practitioners.
- Failing to follow up with questions posed by the internal medical consultant regarding deficiencies in the information provided by a psychiatrist in support of the plaintiff's appeal for benefits.
- Failing to have any written record of an assessment having been conducted despite the plaintiff being told that her appeal was rejected after a careful assessment of her medical condition and how it affected her ability to work.
- Failing to consider the fact that the plaintiff had been approved for disability CPP and, instead, using it as a basis to press the insurer's subrogation interests.
- Failing to consider patent gaps in the IME report from Dr. Levin.
- Failing to investigate whether Dr. Levin had made a recording of the IME as alleged by the plaintiff and which would have brought to light that he had asked questions abruptly and interrupted the plaintiff as she had complained. The recording which was produced by the time of trial supported the plaintiff's complaints about the manner in which Dr. Levin examined her.

In October 2016, the plaintiff had undergone a psychiatric IME at the request of her counsel with Dr. Smith whose diagnosis and findings were consistent with the plaintiff's treating physicians and contrary to Dr. Levin's findings. Dr. Smith also challenged Dr. Levin's methodology. At this point, the insurer sought to have the plaintiff examined by another psychiatrist, Dr. Spivak, in part based on the revelations that Dr. Levin had been criticized by the court in a number of recent decisions.

The case is of particular interest regarding the allegation that the court should find that it was a breach of the duty of good faith for the defendant to continue to rely on Dr. Levin's opinion after it had notice of reasons for concern regarding Dr. Levin's IME. Mr. Justice Saunders found:

> [151] It is fair to say that any insurer or any litigant aware of these decisions would have good reason to think twice before retaining Dr. Levin to conduct an independent medical examination. But there is no evidence that Desjardins ought to have been aware of concerns about Dr. Levin's objectivity when his examination of Ms. Godwin was performed in 2013, and there is no evidence that the defendant was aware of these decisions criticizing Dr. Levin until late 2016. Further, these were all cases of motor vehicle injury damages assessment, and while it might be argued that a motor vehicle insurer ought to monitor how the reports of medical doctors it uses are received by the courts in motor vehicle accident litigation, I find no basis for the contention that a similar duty lies upon disability insurers, in respect of monitoring the courts' treatment of expert opinions rendered other than in the context of disability insurance, or in personal injury litigation generally. A prudent insurer, acting proactively, might take such steps. Not to do so is not a breach of the duty of good faith.
>
> [152] When Desjardins did become aware of negative judicial comment on Dr. Levin's opinions, it appropriately sought the plaintiff's consent to a further medical; and when that was not forthcoming, had Dr. Levin's methodology reviewed by Dr. Spivak. Apart from its initial wrongful acceptance of Dr. Levin's opinion in denying Ms. Godwin's claim, as described above, I do not find that Desjardins was wrong to have continued to rely on the opinion in the litigation.

The plaintiff also complained that the defendant had not disclosed that it did not intend to rely on Dr. Levin's opinion until after the trial was underway. The court found that decisions to call or not call witnesses are entirely a matter of counsel's discretion, subject to disclosure on the party's witness list. If the plaintiff viewed his evidence as critical to her case, she ought not to have left it to the defence counsel to produce him for cross-examination.

The court also rejected the plaintiff's argument that it was extortion to make a settlement offer to reinstate benefits in exchange for the extra-contractual claims being dismissed.

She was awarded $30,000 in punitive damages and $30,000 in aggravated damages.

B. Godwin v. Desjardins Financial Security Investments Inc., 2018 BCSC 690, Saunders J.

The plaintiff sought special costs both up to the date that the benefits were reinstated and of the trial itself on the basis of the case of *Tanious v. Empire Life Insurance Co*., 2017 BCSC 85 (which is under appeal). The plaintiff argued that the defendant and its counsel had demonstrated a "pattern of obfuscation" throughout the litigation which made legal representation necessary in order for the plaintiff to secure her full benefits. In *Tanious*, the plaintiff was awarded special costs against an insurer that was found not to have acted in bad faith, but on the grounds that special costs, as full indemnity, were necessary to ensure the successful plaintiff would obtain the full benefit of the contract of indemnity. Typically an order of special costs normally requires a finding of reprehensible conduct.

In this case, Mr. Justice Saunders expressed the view that a finding that special costs are necessary to fulfill the intentions of the parties to a contract of insurance where the insured be fully indemnified against loss, could only have a juridical basis in a finding of an implied contractual term to that effect. That finding would require an investigation into the actual intentions of the parties.

Mr. Justice Saunders did not have to engage in such an analysis, because unlike in *Tanious*, the defendant had been found to have acted in bad faith throughout the handling of the plaintiff's claims. He found the breach of the duty of good faith, central to an insurance contract, met the test for reprehensible conduct sufficient to award special costs. However, the Court of Appeal had recently determined in *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177, that there is no sound judicial policy argument to consider pre-litigation conduct in awarding special costs. Special costs are reserved for cases of reprehensible conduct in the course of litigation only. Although the case had been hard fought, no bad faith was found on the part of the defendant or its counsel in the conduct of the action.

After noting Mr. Justice Goepel's findings in *Smithies* that special costs may be unnecessary as a means of expressing the court's disapproval, where that function is better served by a damages award, Justice Saunders held:

> [24] While it is of course correct to say that the purpose of a special costs award is to deter and punish, the *effect* of a special costs award, by its very nature, is to provide a litigant with a greater degree of indemnity against its actual legal expenses. I infer from these quoted passages that in the view of the Court, the quantum of any punitive damages award intended to rebuke reprehensible conduct should account for the need to indemnify a litigant who succeeds in obtaining such damages, thus fulfilling the purpose of a special costs award. That is entirely logical. The disparity between actual legal costs, and those awarded under the current tariff as ordinary costs is so great – and the quantum of a punitive damages award may be so modest – that the cost of trial can serve as a disincentive to litigate punitive damages liability on its own. If the amount of its punitive damages exposure does not fully account for the assured's cost of litigating the punitive damages claim, an insurer at risk of a finding of bad faith may have little incentive to pay a claim at an early date, and may instead elect simply to test the assured's resolve by waiting until the eve of trial to pay the claim – as, in fact, the defendant did in the present case – trusting that the cost of proceeding to trial would lead the assured to abandon the punitive damages claim.
>
> [25] Had *Smithies Holdings* been drawn to my attention in closing submissions, I would have decided that a special costs award was precluded, but I then would have assessed the punitive damages in a higher amount. The full measure of the court's rebuke of Desjardins' conduct in the present case necessitates both the quantum of the punitive damages that have been awarded, and special costs throughout. I therefore award the plaintiff special costs of this action, throughout.

Whether special costs should be assessed without regard to her counsel having been retained on a contingency fee agreement, was left to be determined by the Registrar hearing the assessment.

This case is under appeal.

C. Howell v. Machi, 2017 BCSC 1806, MacNaughton, J.

This case represents the first time an award for punitive damages was made in a hit and run case. It is also of interest because it addresses what happens when a defendant files for bankruptcy before trial.

The defendant did not stop after striking the plaintiff as she jaywalked between traffic that had been stopped for a red light. Instead, he drove up the dedicated left turn lane, and rather than turning

left, turned right in front of two stopped lanes of cars, pulled over a moment and then sped off. The plaintiff suffered significant injuries.

The defendant's driver's licence was suspended at the time and had been suspended three previous times for driving while prohibited. At trial, he denied that he was driving at the time of the accident.

The defendant filed bankruptcy and so a stay of proceedings under the *Bankruptcy and Insolvency Act* had to be lifted as a preliminary matter. The court was satisfied that the plaintiff would be materially prejudiced if the stay were not lifted: the issue of fault had to be determined before she could obtain compensation from any insurance policies; the defendant had declared bankruptcy just weeks before the commencement of trial when the trial preparation was almost complete and after ICBC had been denied an adjournment application; and any delay might aggravate the plaintiff's psychological injuries and cause financial hardship. The court noted that it is the usual practice to lift stays in motor vehicle litigation.

The plaintiff was allowed to amend her pleadings to seek punitive damages at the commencement of trial.

In considering whether to award punitive damages, Madam Justice McNaughton referenced the following factors, as outlined in *Whiten v. Pilot Insurance* and adopted in *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277:

(a) punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff, and any advantage or profit gained by the defendant;

(b) punitive damages should take into account any other fines or penalties suffered by the defendant for the misconduct in question;

(c) punitive damages should generally only be awarded where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence, and denunciation;

(d) the purpose of punitive damages is to give the defendant her or his "just dessert", deter the defendant, and others, from similar misconduct, and to mark the community's collective condemnation about what has happened. Punitive damages are only awarded when compensatory damages are insufficient to accomplish these objectives;

(e) punitive damages are awarded in an amount that is no greater than necessary to accomplish their purposes and are generally moderate; and

(f) the court should assess whether the conduct of a defendant should be punished over and above the requirement to pay non-pecuniary, pecuniary, and aggravated damages.

Madam Justice MacNaughton was satisfied that the defendant's actions were worthy of denunciation and retribution beyond the compensatory awards. Although she concluded that his failure to stop after striking the plaintiff did not amount to further negligence, it was relevant to the analysis of punitive damages as was his repeated complete disregard for the suspension of his driver's licence. The plaintiff was awarded $100,000 in punitive damages.

D. Lau v. Royal Bank of Canada, 2017 BCCA 253, per Savage J.A. (Groberman and Garson JJ.A. concurring)

This was an appeal of an award of aggravated damages for mental distress made in a wrongful dismissal action. The award was based on the judge's impression of the "slow, quiet and monotone manner" in which the plaintiff testified. There was no evidence from family or friends about Mr. Lau's mental state nor any expert medical evidence. The bank argued, on appeal, that there must be evidence of a recognized psychological condition such as depression and evidence from a medical professional in support.

The court confirmed that the test for mental distress, in principle, is the same in tort and contract. Based on *Saadati v. Moorhead*, expert evidence of a recognized psychiatric illness is not required to show compensable mental injury.

However, the award was set aside because there was no evidentiary foundation for it. Aggravated damages cannot be solely based on the demeanor of the plaintiff at trial. There must be some testimony "demonstrating a serious and prolonged disruption that transcended ordinary emotional upset or distress". Mr. Lau had not provided the court with such evidence. He had testified that he felt "lost" and had a "horrible feeling" about the termination. It is not open to the court to award damages for the normal distress and bad feelings resulting from the loss of employment.

E. McCaffery v. Arguello, 2017 BCSC 1460, MacNaughton J.

In this case, Madam Justice MacNaughton awarded $30,000 for punitive damages as a consequence of a road rage incident. The parties had engaged in a dispute over who cut off whom at an on-ramp to the Second Narrows Bridge. They proceeded for four or five kilometres along Highway #1 exchanging insults and jockeying back and forth for position. The defendant then pulled in front of the plaintiff and slammed on his brakes causing the plaintiff to rear end him. A passenger in the defendant's vehicle and the plaintiff got out and engaged in a scuffle. At which point, the defendant joined in repeatedly striking the plaintiff with a baseball bat causing serious injury to his head and wrist. The defendant was convicted of assault causing bodily harm and assault with a weapon and received a six-month conditional sentence, including three months during which he was subject to a curfew, and one year of probation.

The plaintiff was awarded $819,016.40 in compensatory damages. The award included $242,081 for loss of housekeeping capacity based on evidence from the plaintiff regarding the tasks that he no longer was able to perform, his estimate that he participated in household activities for at least an hour a day before the incident and could only make little contribution since the incident. The amount awarded was based on expert evidence regarding the net present value of an hour a day at the hourly rate of a light duty cleaner ($22.25). The expert also referenced a Statistics Canada's survey that showed Canadian men averaged 2.2 hours of domestic work daily. The court commented that the plaintiff's estimate of one hour a day was conservative and so there was no deduction for consideration that as his children grew up and the plaintiff and his wife aged, their housekeeping demands would likely change.

The court noted the defendant's conviction and the significant compensatory damages but determined that punitive damages were necessary to make it clear to the public that such conduct departed so markedly from the ordinary standards of decent behaviour that it was worthy of further punishment. Although the defendant had expressed regret, he had also made submissions that consideration should be given to the fact he had paid legal fees to defend himself criminally and the impact of the incident on his family, which indicated to the court that he had not entirely understood the community's condemnation of his behaviour.

F. Nazerali v. Mitchell, 2018 BCCA 104, per Tysoe J.A. (Garson and Fenlon JJ.A. concurring)

In reducing an aggravated damages award in a defamation case, the Court of Appeal commented that aggravated damages should only exceed the amount awarded for general damages in extraordinary circumstances.

Causation

A. Gordon v. Ahn, 2017 BCCA 221, per Groberman J.A. (MacKenzie and Fitch JJ.A. concurring)

The plaintiff suffered physical injuries in a car accident and then depression from the pain and the drugs prescribed to treat the injuries. The trial judge found that the plaintiff's difficulties with her mother during high school rendered her a crumbling skull and reduced her awards by an unspecified amount. The judge also reduced the award by an unspecified amount for her failure to mitigate her damages. On appeal a new trial was ordered on the basis that the evidence did not support the judge's characterization of the plaintiff as a crumbling skull plaintiff and for his failure to explain how he had effected the reduction of damages.

The case is of interest for these comments:

> [32] As the defendants concede, the phrase "crumbling skull" was inapt to describe the situation of the plaintiff. Although she had had emotional difficulties and some relationship problems with her mother as a teenager, she had not shown signs of developing major depression. No expert opinion suggested that deterioration of her mental condition (absent the accident) was probable, let alone inevitable.
>
> [33] The use of the phrase "crumbling skull" to describe a plaintiff's condition is, in any event, rarely helpful. As Major J. explained in *Athey v. Leonati*,[1996 Carswell BC 2295 (S.C.C.)], there are no special rules or analyses that apply to claims made by plaintiffs who, before becoming victims of a tort, are affected by conditions that may deteriorate in the future. Damages are always to be assessed by reference to the situation that the plaintiff would be in but for the wrongdoing. Describing a plaintiff as coming within the "crumbling skull doctrine" does not eliminate the need for a complete analysis of the pain and suffering caused by the accident.
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> [34] The judge found that there was "an inter-relationship between the pain that the plaintiff experienced from her physical injuries and her emotional or psychological problems". He also found that her psychological problems "worsened because of the accident". Even in cases where a plaintiff is suffering from serious chronic depression, an aggravation of the symptoms attributable to a tort is compensable: *Sangha v. Chen*, 2013 BCCA 267. In the present case, where the plaintiff's symptoms were fairly minor before the accident, but developed into major depression as a result of the accident, it is clear that damages ought to have been awarded.

Housekeeping Capacity

A. Kim v. Lin, 2018 BCCA 77, per Bauman C.J.B.C. (Lowry and Savage JJ.A. concurring)

The 27 year old plaintiff was found to have suffered, *inter alia,* fibromyalgia, chronic pain syndrome and somatic symptom disorder as a result of the motor vehicle accident in issue and she was rendered permanently unemployable as a result. Amongst her damages, she was awarded $418,000 for loss of housekeeping capacity (past $168,000 and future $250,000) which order the defendants appealed.

Prior to the accident, the plaintiff had primary responsibility for the household work and childcare. Her husband worked long hours at an accounting firm, was studying for his CGA designation and was seriously physically disabled in his left hand which prevented him from gripping or carrying with it. As a result of her injuries, the court found that she suffered a profound loss of capacity to perform household tasks and carry out childcare responsibilities. At one point, her husband quit his job because he was unable to cope with work, childcare and studying. They exhausted their financial resources and moved in with his mother. His mother, in turn, became overwhelmed with looking after the family. She sold her home to allow her son and his family to move and purchase their own home. The court found that it was messy, dirty and disorganized with meals of instant or frozen food provided by the plaintiff's mother in law.

The trial judge calculated the loss of capacity based on the number of daily hours required to replace the plaintiff's contribution at a rate of $15/hr. No award was made for daycare to avoid double compensation. In assessing the future loss, he assessed the cost to age 70 and reduced the amount for the possibilities that the plaintiff might improve and that as her children age, she would have done less in any event.

The appeal was dismissed. The court recognized that while previous cases called for a cautious or conservative approach to these assessments, there is no special test to be applied to housekeeping capacity that is distinct from damages assessments for other heads of loss. Awards under all heads must meet the test of reasonableness. There is no set range or cap on damages for a pecuniary award for loss of capacity. The amount will be determined on the duration and need for assistance based on the specific facts and evidence of the case. Similarly, the court rejected the contention that some global deduction should be applied to housekeeping capacity awards as a last step in the assessment process as that assertion was without legal foundation and counter to the prevailing authorities.

Income Loss

A. Grewal v. Naumann, 2017 BCCA 158, per Smith J.A. (Bauman C.J.B.C. concurring and Goepel J.A. dissenting) / Rousta v. MacKay, 2018 BCCA 29, per Savage J.A. (Bauman C.J.B.C. and Lowry J.A. concurring)

In these two cases, the Court of Appeal confirmed that the standard of proof for hypothetical events, past and future, is whether there is a real and substantial possibility.

Mr. Justice Savage addressed the test in *Rousta* as follows:

[16] In its analysis of the error below, the Court in *Grewal* said this:

> [43] The appellants submit that the trial judge erred and applied an incorrect lesser burden of proof in his analysis of Mr. Grewal's claim for loss of past income earning capacity. They rely on this Court's comments in *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 at paras. 15-16 and in *Osterkoff v. Oliveria*, 2015 BCCA 351 at para. 15. Both cases suggest that the plaintiff's task in respect of past loss of earning capacity is to prove that loss on a balance of probabilities as contrasted with the task in claiming future loss of earning capacity, which requires a plaintiff establish a real and substantial possibility of a future event occurring that could result in the plaintiff's loss of earning capacity.
>
> [44] With respect, I cannot agree. The appellants' submission conflates the way courts deal with alleged past events and the way courts deal with hypothetical events, past or future. This fundamental distinction was explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458:
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> > [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
> >
> > [28] By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle, supra*; *Malec v. J. C. Hutton Proprietary Ltd., supra*, Cooper-Stephenson, *supra*, at pp. 67 — 81.
> >
> > ...
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> [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's

> negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
>
> [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
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> > [29] ... What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
>
> [17] As can be seen from the above, the standard for the proof for hypothetical past events, like hypothetical future events, is the lesser "real and substantial possibility" threshold. This standard can be contrasted with the standard of proof for past events, which is on the ordinary civil balance of probabilities standard, and alleged events which do not rise to the "real and substantial possibility" standard because they constitute mere speculation.

B. Sharma v. Chan, 2017 BCSC 1651, Voith J.

The plaintiff was in high school at the time of the accident and was awarded past income loss based upon a past hypothetical analysis. The defence argued that no pre-judgment interest was payable because the award was not a pecuniary judgment for the purposes of the *Court Order Interest Act.* Voith J. disagreed and found that the past loss was still a pecuniary loss as it was an assessment of a loss of capacity to earn income. The court determined what the plaintiff would have earned but for the accident and held that it was a pecuniary award that attracted pre-judgment interest.

Indivisible Injury

A. Fleming v. McAllister, 2017 BCSC 521 and 2017 BCSC 753, Betton J.

The plaintiff was injured in three accidents with the second accident settling before trial with terms unknown to the court.

The court found: indivisible neck and mid-back injuries from the first and second accidents; divisible low back injury from the first accident; divisible temporary aggravation of the low back injury in the second accident; and a divisible injury to the knee in the third accident. Betton J. made a global finding on damages.

The defendants argued that damages for the indivisible injuries should be assessed globally, with the plaintiff recovering that amount less the settlement from the second accident. The plaintiff sought a global assessment of damages with an apportionment of a percentage to each accident. Betton J. rejected both positions and requested further submissions from the parties in light of his findings.

After further submissions, Betton J. apportioned damages within each head of damage to each injury. Applying *Ashcroft v. Dhaliwal,* 2008 BCCA 352, Betton J. found that the settlement amount from the second accident that is attributable to the indivisible injury will be deducted from the total award for the indivisible injury.

B. Lakatos v. Lakatos, 2017 BCSC 1990, Steeves J.

This plaintiff was involved in two serious motor vehicle accidents. The defendants admitted liability, but had separate counsel and differed on apportionment of fault between the two accidents for her injuries. The defendants also argued that the plaintiff was contributorily negligent for her injuries for failing to wear her seatbelt in the first accident.

The plaintiff was found to be 20% liable for her failure to wear her seatbelt and that reduction would be applied to the damages attributable to the first accident. However, despite the finding that the injuries from both accidents were indivisible, Steeves J. held that the plaintiff's contributory negligence would not apply to the assessment of damages for the second accident. He stated that the defendant in accident two must be taken to have accepted the plaintiff as she was at the time.

Once injuries from two or more accidents are found to be indivisible, then joint and several liability applies between the defendants. Apportionment of liability between the defendants is available under the *Negligence Act*, R.S.B.C. 1996, c. 333. However, if contributory negligence is also proven, the plaintiff no longer has the benefit of joint and several liability – at that point, the degree of fault is to be assessed and damages apportioned on the basis of fault.

In the case at bar, Steeves J. found that on the evidence, special damages, past loss of income, and future loss of income were divisible between the two accidents and could be calculated separately. The special damages and past income loss attributable to the first accident were both reduced by 20%. No future income loss was attributable to the first accident and was assessed against the second accident only.

A global assessment was made for each of non-pecuniary damages, future care and the in trust award. He then apportioned liability for these damages based on degree of fault. Steeves J. found the defendant in the second accident to be more blameworthy, because he crossed his lane of traffic and entered oncoming traffic; compared to the first accident, in which the defendant lost control in snowy conditions. He stated that he also "considered" the contributory negligence of the plaintiff. He apportioned liability for non-pecuniary damages, future care and in trust damages as 10% against the plaintiff; 30% against the first defendant; and 60% against the second defendant.

Loss of Future Capacity to Earn Income

A. Knapp v. O'Neill, 2017 YKCA 10, Savage J.A. (Smith and Fitch JJ.A. concurring)

The plaintiff successfully appealed the trial judge's award of future loss of earning capacity where the Court of Appeal found that the trial judge had misapprehended the evidence, given inadequate reasons and awarded an inordinately low amount for damages for loss of earning capacity.

Savage J.A. held that in appropriate circumstances, a court may consider its findings on past income loss to inform its analysis on future loss, as the numbers for the past loss are more grounded in fact. The trial judge had awarded $30,000 for two years of past loss income and $70,000 for future income loss. In this case, the Court of Appeal found it appropriate to replace the trial judge's finding, given that it had been 18 years since the accident. The Court of Appeal noted that, using the equation of the economist's expert report that was tendered at trial, the trial judge had only awarded $5,000 per year for future loss of income which was disproportionate to the past income loss award. The Court of Appeal found that it was appropriate to use the findings of past loss ($15,000/year) and carry it forward. The award for loss of earning capacity made by the Court of Appeal was $211,000.

When a court determines the capital asset approach is best suited to assess damages, the court should still ground its assessment as much as possible in factual and mathematical anchors.

Management Fees/Tax Gross-Up

A. Pestano v. Wong, 2017 BCSC 1666, Branch J.

The parties settled most heads of damage in this medical malpractice case but sought the court's determination of several issues in relation to management fees and tax gross-up awards. The case involved an infant who suffered a significant brain injury at three days of age, resulting in cerebral palsy, epilepsy, autism spectrum disorder and global developmental delay.

Among other issues, the court was asked to determine the appropriate level of investment management advice. After an extensive review of the body of law on the issue, Branch J. held that based upon the evidence before him from the plaintiff's parents and the proposed custodian of the funds, the plaintiff would require independent management assistance in order to pursue any investment returns. He rejected the defence argument that such additional management over and above the services of the trust company be limited to a review every five years. The sum in issue was in excess of $5 million and the court found that even small errors or gaps in the required investment results could yield significant shortfalls for the plaintiff. The plaintiff's life expectancy was 56 years from trial and, as such, even slight dips below the necessary level of return for short periods could yield outcomes falling far short of the settlement's intended results. In the result, Level 4 assistance was awarded to achieve the rate of return contemplated by the discount rate with no time limitation as to the duration of the assistance.

As to the amount of the fees, Branch J. held that it was not a relevant consideration that the real rate of return may exceed the assumed lower rate of return. He held that once the court concludes that investment management services are necessary to achieve the discount rate, the fact that it may be possible to earn surplus returns should not change the outcome.

In addition, the plaintiff applied for a novel award of a fee for the committee of the plaintiff to represent the work that would have to continue to be done by the parents after their usual parental responsibilities came to an end at the age of majority. This award was rejected by the court on the bases that: there is generally no compensation awarded to a committee of the person; where there is a private trust there is no requirement to have a committee appointed; and any award for the parents arising from their obligation to care for the plaintiff could and should have been advanced as an in trust claim within the underlying damages claim.

The court also rejected the plaintiff's claim for an additional amount to address the possibility that the PGT may need to assume the trustee and investment advisor roles in the future which would result in higher fees. In so finding, Branch J. held that there was insufficient evidence on the point.

On the issue of a tax gross-up, the court revisited the "life certain" versus "probability of survival" methods of calculation and noted that the probability of survival is now the accepted methodology. The experts expressly factor mortality tables into their calculations. The debate in this case focused on by what approach this should occur. The court endorsed the view that there should be a consistent basis employed in these calculations as it is a highly technical actuarial exercise. The court accepted the method presented by the plaintiff's expert which derived from a 2001 paper entitled *Grossing-Up for Income Tax*, by Brian Burnell, chair of the Actuarial Evidence Committee of the Canadian Society of Actuaries. The defence expert's approach was rejected as it created some

projections that did not extend to the entire projected life expectancy. It was also noted his approach was outside any of the methods proposed by Mr. Burnell.

Mental Injuries/Nervous Shock

A. Greenway-Brown v. Kyung, 2018 BCSC 287, Macintosh J.

The plaintiff sued for damages arising from five motor vehicle accidents that took place between 2014 and 2017. The court found that the defendants were not liable for MVA's 1 and 4. Liability was admitted for MVA's 2, 3, and 5, which all occurred in parking lots, but the court found that there was minimal damage to the plaintiff's vehicle, no objective evidence of injury, and that the plaintiff was highly susceptible to "catastrophizing" her condition.

Applying *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27, the court held that any injury the plaintiff suffered was not serious and prolonged and the events did not rise above the "ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept…Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage". The court found it "unbelievable" that the plaintiff suffered the same symptoms from each accident, and suffered them instantaneously or at least on the same day. The court also found that the plaintiff lacked credibility as she overstated her physical activities before the first of the five accidents and while she testified that she had led a normal and full life, the clinical records demonstrated that she suffered cycles of insomnia, was frequently and severely depressed, and had ongoing conflict at work.

The court held that the plaintiff had not established that the defendants' conduct was the cause of any damages and all five actions were dismissed.

B. Perzoff v. Pringle, 2017 BCSC 1448, Blok J.

This matter concerned an action for breach of a contract for purchase and sale of a home and torts of negligence and negligent misrepresentation. The plaintiffs' claim was made out in both contract and tort. The plaintiffs alleged a number of damages suffered, including general damages for mental distress and suffering.

With respect to breach of contract, Blok J. found that the plaintiffs did not establish that that the possibility of mental distress upon a breach of the contract was in the reasonable contemplation of the parties at the time the contract was formed. With respect to liability under tort law, Blok J. referenced *Saadati v. Moorhead*, 2017 SCC 28 in determining that the plaintiffs did not establish a mental injury above the ordinary annoyances, anxieties and fears. In other words, the plaintiffs' did not establish that they suffered the requisite degree of disturbance.

C. Ponsart v. Kong, 2017 BCSC 1126, Butler J.

The plaintiff was seeking damages for injuries suffered in multiple motor vehicle accidents. A significant area of disagreement was whether the plaintiff suffered depression and anxiety as a result of the accidents in issue. The defendants argued that the plaintiff's emotional condition was unrelated to the accidents, the plaintiff was anxious prior to the accidents and continued to be anxious afterward. Butler J. applied *Saadati v. Moorhead*, 2017 SCC 28 and found that the plaintiff had met the burden of proving serious and prolonged disturbance to her emotional well-being arising from the injuries in the accidents.

D. Saadati v. Moorhead, 2017 SCC 28, per Brown J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ. concurring)

The plaintiff was originally awarded damages for five motor vehicle accidents, including damages for mental injury caused by the second and third accidents. The British Columbia Court of Appeal allowed an appeal on the ground that the plaintiff had not demonstrated by expert evidence a medically recognized psychiatric or psychological condition. As well, the Court of Appeal noted that that the trial judge had erred by deciding a case on a basis neither pleaded nor argued by the plaintiff.

The Supreme Court of Canada allowed the appeal and restored the trial judge's award. The court found that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric injury. The claimant can establish on a balance of probability the occurrence of a mental injury. As well, it was found that although cases should not be decided on grounds not raised, in claims for negligently causing mental injury, it is generally sufficient that the pleadings allege some form of such injury. In this case, the statement of claim alleged various injuries caused by the accident, including: "such further and other injuries as may become apparent through medical reports and examinations, details of which shall be provided as they become known; and the effects of the said injuries upon the [p]laintiff include headaches, fatigue, dizziness, nausea and sleeplessness."

Mitigation

A. Downey v. O'Connor, 2017 BCSC 1459, Jenkins J.

To establish a failure to mitigate in a personal injury case, it is not sufficient for the defendant to show that an exercise program could have been of benefit. It must be proven on a balance of probabilities that the exercise program would have reduced the plaintiff's damages.

B. Gill v. Lai, 2018 BCSC 101, Funt J.

In order to establish a failure to mitigate, the defence must first show, on a balance of probabilities, that the plaintiff acted unreasonably. If that is established, then the determination as to the amount that the plaintiff's damages may be reduced will involve hypothetical possibilities, which the court will weigh according to relative likelihood.

In this case, the mitigation defence was dismissed as it was held the plaintiff acted reasonably in following the doctor's orders according to her abilities.

C. Lock v. Floreani, 2017 BCSC 1313, Russell J.

The plaintiff suffered injuries as a result of a motor vehicle accident. One of the issues to be determined was whether the plaintiff mitigated her loss of income damages. She was a unionized employee within the top third of seniority. She took a voluntary severance package, for reasons which she said included wanting to concentrate on her recovery and to be fair to other employees who had to perform work she was unable to do. She moved to Kelowna and was unable to find commensurate employment.

Russell J. found that the plaintiff could have stayed in her pre-accident position with accommodations, and that her decision to leave was primarily made for lifestyle reasons. This finding substantially reduced her loss of future capacity damages from a demand of $650,000, to an

awarded of $159,000 based on the overtime she would have lost due to her injuries had she remained in her pre-accident position.

D. Mullens v. Toor, 2017 BCCA 384, per Savage J.A. (Newbury and Frankel JJ.A. concurring)

The plaintiff appealed the trial award arguing that the judge's decision to reduce all heads of damages for failure to mitigate was in error when the failure to mitigate argument was only made in respect of past wage loss. The trial judge found that the plaintiff was unreasonably resistant to taking anti-depressant medication and did not see a psychiatrist as recommended. The court found, at paragraph 58, that the issue of mitigation was specifically pleaded and extensively explored at trial concerning; the appellant's failure to return to work; delay in taking medication; not seeking psychiatric treatment; not having consistent treatment; and the delay in obtaining recommended treatment being a negative factor in her prognosis. The court also found that the specific arguments made with respect to failure to mitigate past loss of income were logically connected to the other heads of damages claimed. The appeal was dismissed.

E. Nguyen v. Bhatti, 2017 BCSC 1537, Fitzpatrick J.

The plaintiff alleged ongoing daily neck, back, and shoulder pain five years post-accident as well as sleep disruption and impact to his home life and ability to work. Defence counsel sought a reduction of 15-20% for all heads of damages based on the plaintiff's failure to mitigate. The court found that the plaintiff's family physician and physiatrist told the plaintiff to get active and do daily stretching but instead, he did only minimal activities and pursued substantially passive treatment. The plaintiff substantially ignored the recommendations, and on a balance of probabilities, the court held he would have shown more and more rapid improvement in his condition had the exercise and stretching programs been undertaken. The court reduced the plaintiff's non-pecuniary damages by 10% for failure to mitigate.

F. Park v. Targonski, 2017 BCCA 134, per Goepel J.A. (Bauman C.J.B.C. concurring and Smith J.A. dissenting)

The plaintiff appealed the damages award for non-pecuniary damages, past wage loss, and loss of future earning capacity. The appeal was allowed in part and largely centered on whether the trial judge had been correct in finding that the plaintiff had failed to mitigate her damages. The trial judge found that the plaintiff had engaged in a number of recommended therapies, but had failed to engage in an active exercise program and did not attend a pain management program.

Writing in dissent, Smith J.A. found that the trial judge erred in finding a failure to mitigate. Smith J.A. reiterated that the onus is on the defence to show that the plaintiff unreasonably failed to follow the advice of her doctor and that if she had followed the advice, her damages would have been reduced. The defence failed to establish this and the trial judge had effectively reversed the burden of proof.

Bauman and Goepel JJ.A. agreed with Smith J.A. with respect to the trial judge's error in finding a failure to mitigate. Unanimously, the 20% deduction on non-pecuniary damages was set aside. However, the majority held that the mitigation findings did not affect the trial judge's decision on past and future wage loss and those awards were upheld. In dissent Smith J.A. would have increased the past wage loss award and remitted the future wage loss for further consideration.

Payment of Tax Debt from Damages

A. Paine Edmonds LLP (Re), 2017 BCSC 2275, Murray J.

The plaintiff was an undischarged bankrupt when he was involved in two accidents. He was awarded damages and the funds from the judgment were deposited into his counsel's trust account and used to pay legal fees, disbursements and directions to pay. The balance of the funds was sought by the CRA pursuant to a requirement to pay a tax debt owed by the plaintiff. On an interpleader application by plaintiff counsel, the CRA argued that since it was not a bankruptcy hearing, they were not constrained by the principle that personal injury awards for pain and suffering, cost of future care and future wage loss are not open to claim by a trustee in bankruptcy. The court rejected the argument and found that the CRA was only allowed to attach the award for past income loss.

Non-Pecuniary

A. Cheema v. Khan, 2017 BCSC 974, Hinkson C.J.S.C.

In determining the appropriate quantum of non-pecuniary damages to be awarded to a plaintiff who suffered a soft tissue injury but had pre-existing disabling rheumatoid arthritis and major depressive disorder, the Chief Justice said:

> [114] I am not persuaded that the injuries suffered by the plaintiffs in most of these cases are comparable to the injuries sustained by this plaintiff, but accept the principle expressed by Madam Justice Sinclair Prowse in *Agar* at para. 229, that to "rob a disabled person of what little she has left is a monstrous injury, for that little she has is, for her, the whole of her life. Not only is it an enormous physical injury but the emotional damage is, to most people, well nigh incomprehensible."
>
> [115] The reasoning in that case was recently applied by Mr. Justice Grist in *Ramchuk*, where he held:
>
> > [47] ... courts have recognized that the loss of function for a disabled individual can have a magnified effect. In *Morgan* [2012 BCSC 1237], Voith J. commented on the effect of injuries on an individual already suffering from a number of chronic conditions: chronic pain and respiratory failure. These conditions were aggravated in severity and frequency of onset as a result of injury in that case.
> >
> > [48] Still further, I find that Mr. Morgan has been transformed from a generally positive, outgoing and confident person into one who is reclusive, who suffers from consistent depression of significant severity, and who is without energy. I also consider that it is noteworthy that notwithstanding the significant challenges of various kinds that Mr. Morgan has faced since childhood, he has always persevered and by virtue of his determination improved his state. Since the Accident that is no longer true.
> >
> > ...
> >
> > [40] In *Agar v. Morgan*, 2003 BCSC 630, Madam Justice Sinclair Prowse addressed the question of how the non-pecuniary loss of an already disabled individual whose circumstances and enjoyment of life are still further curtailed should be measured....

Workers Compensation Act S. 257

A. Singh v. Soper, 2017 BCCA 335, per Tysoe J.A. (Frankel and Dickson JJ.A. concurring)

This is an appeal from a $40,000 award to the respondent for business-related losses from a motor vehicle accident. On the basis of s. 257 of the *Workers Compensation Act*, the respondent was only permitted to maintain an action for business-related losses that did not relate to personal injuries. The award of $40,000 was for the plaintiff's loss of deposit on a leased truck, when the lease was cancelled shortly after the accident.

The Court of Appeal overturned the trial judge's decision on two alternate bases. Firstly, the court found that if the plaintiff had cancelled the lease, the loss of the deposit was not recoverable by virtue of s. 257 of the *Act* because it was related to the respondent's personal injuries. Secondly, the court found that if the plaintiff had only requested for insurance to be cancelled and the Leasing Company terminated the lease without the legal right, then it is not a reasonably foreseeable consequence of the accident and the trial judge committed an overriding and palpable error.

V. Document Production

A. Forstved v. Kokabi, 2018 BCSC 111, Kent J.

The defendants brought three applications for production of documents on the eve of trial, seeking numerous categories of documents related to the plaintiff's past commercial transactions. The defendants argued that the documents would test the plaintiff's assertion that his business competency was compromised and that his ability to perform various executive functions was impaired. The plaintiff argued that the claim for production was made far too late in the game, the requests were overbroad and the material was of dubious probative value.

The court noted that the documents demanded were not the subject matter of requests at the plaintiff's continued examination for discovery that took place 60 days before trial. The defendants waited until the eve of trial before conducting following up discoveries and undertaking trial preparation work that could have and should have been done many months before.

Other than documents which were requested at the examination for discovery to which no objection was made and which had not yet been produced, the court declined to make the order sought, primarily because the application was brought far too late.

At paragraph 13, the court indicated that it was not impugning the integrity or professionalism of any of the counsel involved in the case, but emphasizing the court's "…expectation in general terms that counsel will perform their duties respecting discovery with utmost probity and rigour".

B. Iser v. Canada (Attorney General), 2017 BCCA 393, per Groberman J.A. (Stromberg-Stein and Willcock JJ.A. concurring)

The underlying action surrounds the plaintiff, a prison inmate, suffering injuries from an assault in a prison by other inmates. The plaintiff sued federal authorities in occupier's liability and negligence. There are three orders under appeal, all which concern the scope of informer privilege and public interest immunity. Groberman J.A. held that confidential informer privilege applies in civil proceedings without alteration and that the two preconditions for confidential informer privilege are i) the informer must have provided information to an investigating authority and ii) the

informer must have provided the information under an express or implied guarantee of protection and confidentiality.

C. JA Brink Investment v. BCR Properties Ltd., 2017 BCSC 1545, Church J.

The plaintiff sought various documents from eight non-parties. Issues in the action concerned what was disclosed about the environmental condition of the premises by the defendant and what was known by the plaintiffs about the environmental condition of the property at the time they leased the property. Defence counsel had consented to the application and only one of the non-parties, North Party Appraisals, opposed the relief sought which was for all documents relating to the two appraisals they prepared and the documents relating to the premises.

North Country Appraisals took the position that: they had a professional relationship with the defendant; any documents in its possession and control relating to the environmental condition of the premises were provided to North Country Appraisals by the defendant; and accordingly the documents would therefore be in the defendant's possession and control. North Country Appraisals argued that the plaintiffs must demonstrate that the documents sought are not in the possession of the defendant and that they have exhausted their remedies for further and better disclosure from the defendant under the provisions of *Rule 7-1(11)-(13)* before resorting to an application for production under *Rule 7-1(18)*.

The court held at paragraph 27 that to require the request for production of documents from North Country Appraisals to come directly from the defendant would be contrary to the objective of the *Supreme Court Civil Rules*, namely to secure the just, speedy and inexpensive determination of every proceeding on its merits, and would be contrary to the principle of proportionality. The court found that the fact that the documents are also in possession of a party to a proceeding is a factor to take into account and the court should generally avoid a duplicative order for production from a non-party. However, the court did not accept that the plaintiffs must exhaust their other discovery methods prior to bringing their application and there was evidence that the defendant was no longer in possession of the documents sought.

D. Kondratyeva v. Shazi, 2017 BCSC 2294, Master McDiarmid

The defendant sought, *inter alia*, an order under *Rule 7-1(11)* that the plaintiff produce certain pre-accident MSP, PharmaNet and PharmaCare records. Master McDiarmid was persuaded of the evidentiary basis for the order but based on the *Solomon* case, because the records were created by a hospital or physician, there is nothing that requires the plaintiff to obtain copies simply for disclosure and production.

E. Mather v. MacDonald, 2017 BCCA 323, per Dickson J.A. (Tysoe and Frankel JJ.A. concurring)

The plaintiff appealed an award of damages for injuries he suffered in two motor vehicle accidents, primarily on the basis that a miscarriage of justice resulted at trial due to over-disclosure of his social assistance file. Shortly before trial, an order had been issued for the plaintiff to sign an authorization for release of his social assistance file from 2008 forward. Mistakenly, however, counsel for the defendants provided and the plaintiff signed an authorization to release his entire social assistance file. The error resulted in an over-disclosure of approximately 109 pages and the entire social assistance file was admitted into evidence. The error was not discovered until after the trial judge made a negative credibility finding.

Dickson J.A. phrased the applicable test as: "would a reasonable observer, in the circumstances, fully informed of what took place, be apprehensive that Mr. Justice Punnett's decision-making process was fundamentally unfair or that the plaintiff was denied an opportunity to participate in the proceeding and present his case?"

Dickson J.A. observed that the records in question were clearly relevant and admissible, and would likely have been disclosed in the ordinary course, if not done so by inadvertence. In the circumstances, it was found that there was no risk that a miscarriage of justice arose from the over-disclosure.

F. McMahon v. Harper, 2017 BCSC 2328, Gray J.

This decision addressed cross applications concerning issues which originated from the plaintiff's delayed production of 16 pages of employment records. Counsel for the plaintiff received 52 pages of employment documents from the plaintiff's employer. On the plaintiff's first list of documents, the employment file was listed as complete and comprised of 34 pages. Prior to the plaintiff's examination for discovery, an amended list of documents was drafted and provided to defence counsel. The amended list showed the employment file as complete, but now showed the file contained 52 pages. Due to a mistake by defence counsel's office, the employment file was marked as a 'duplicate' and the additional 16 pages did not come to the attention of defence counsel until after the plaintiff's examination for discovery. Plaintiff's counsel advised that the 16 pages were inadvertently separated out and that they were disclosed as soon as the error was realized by counsel. The defence maintained that the plaintiff, or someone employed at the office of plaintiff's counsel, deliberately removed the 16 pages from the original disclosure in an effort to conceal them.

Gray J. addressed a number of issues raised by the applications, noting that she was troubled by the defence's assertion that there was intentional concealment of documents. Gray J. found that there was no evidence that the plaintiff either deliberately or by wilful indifference hid relevant documents. As such, Gray J. declined to order that the plaintiff swear an affidavit verifying the second list of documents. For similar reasons, Gray J. set aside the subpoena against the plaintiff's counsel. The basis for the subpoena was to collect evidence in support of a spoliation argument. Gray J. noted that in theory, a spoliation argument could be made; however, there was no evidence in support and a subpoena should not be issued "to fish" for material evidence.

The plaintiff argued that the conduct of the defence amounted to an abuse of process and sought various remedies. Firstly, the defence served a notice to admit which included a request to admit wrongful conduct on behalf of plaintiff's counsel. Gray J. found the notice to admit to be distasteful, but held it did not reach an abuse of process. Secondly, the plaintiff argued that the issuance of a subpoena to counsel for the plaintiff was an abuse of process. Gray J. agreed, noting that the subpoena was issued six months after the plaintiff provided their second list of documents, and that defendant could not demonstrate that plaintiff's counsel had any material evidence. As well, it was manifestly unfair to the plaintiff because it disrupted his relationship with his lawyer and led to an adjournment of the trial. Thirdly, the plaintiff argued that the decision of defence counsel to make a settlement offer on a reduced basis because of plaintiff's counsel's perceived deceitfulness was an abuse of process. Gray J. stated that "[i]t would bring the administration of justice into disrepute for a party to suggest that an offer would differ based not on the merits of the claim, but instead on which lawyers were representing the party and how they have conducted the claim." The settlement offer was not an official offer under the *Supreme Court Civil Rules*. Gray J. held that it was not necessary to determine whether the court's jurisdiction to control abuse of process can extend to out-of-court processes, as she had already determined that the subpoena was an abuse of process.

Gray J. dismissed the plaintiff's application to remove defence counsel as counsel of record as she found that any harm suffered by the plaintiff could be remedied by costs. Special costs were awarded to the plaintiff for the applications. It was further held that the plaintiff could recover, on a special costs basis, any costs thrown away arising from the issuance of the subpoena, including costs for instructing a new lawyer for trial and these applications.

G. Schreier v. Loblaws, 2017 BCSC 1793, Master Muir

The defendant brought an application in a personal injury action seeking production of the plaintiff's Medical Services Plan ("MSP") history report, PharmaNet printout, and massage records. The defendant had refused to prepay for the massage treatment records.

The defendant alleged the plaintiff had pre-existing injuries and that the existence of such injuries was a sufficient basis for production of MSP and PharmaNet records. The plaintiff took the position that it was a fishing expedition and that there was no suggestion that the plaintiff had a plethora of treaters or that that the plaintiff had treatment that had gone undisclosed. Master Muir denied the defendant's application on the basis that the defendant had not made out a case for such a broad request as complete MSP and PharmaNet records.

This case revisits the issue of the obligation to pay for clinical records. In this application, the defendants applied for production of documents from the plaintiff herself for various clinical records, arguing that they were in her control. As such, she had an obligation to obtain and list them at her expense. The plaintiff agreed to obtain the records on the condition that the defendant pay the cost of so doing. Master Muir followed the reasoning in *Solomon v. McLean* that there is nothing in the *Rules* which requires a plaintiff to obtain copies of medical records simply for the purpose of disclosure and production to the opposite party. The documents were in the plaintiff's power to obtain but no order would be made for the plaintiff to produce them without payment by the defendant for their production.

H. Shannon v. Harrison, 2017 BCSC 2272, Master McDiarmid

This application included a consent request by both parties for Master McDiarmid to determine whether unredacted clinical records should be disclosed by the plaintiff to the defendant. Master McDiarmid reviewed the three redactions in issue and confirmed that the redactions were regarding third party information and unconnected to the litigation.

I. Sinnett v. Loewen, 2018 BCSC 416, Master Bouck

The defendant produced a screenshot taken from ICBC's records of his insurance coverage at the time of the accident. The plaintiff applied for production of an unredacted copy of the original or replacement certificate of insurance issued by ICBC or any other insurer in effect at the time of the accident. The order was made. Pursuant to *Rule 7-1(3)* a party must produce the actual document detailing the insurance and any other type of document that discloses insurance coverage under which an insurer might be liable to satisfy a judgment or to indemnify or reimburse a defendant for any money paid in satisfaction of a judgment (including any UMP coverage available to the plaintiff). This disclosure allows the parties to be in a more informed position to reach settlement.

J. Wright v. Becker, 2018 BCSC 451, Master McDiarmid

The plaintiff brought an action in negligence against, amongst others, the Ministry of Children and Family Development (HMTQBC) for negligence in allegedly placing her in the care of her abusive

father. She claimed damages for physical and psychological injuries. The plaintiff had sought services from the Kamloops Sexual Assault Counselling Centre as a result of the alleged assaults. HMTQBC applied for disclosure of those records. The plaintiff took no position on the application.

KSACC opposed the application based upon the confidential nature of the documents sought and provided detailed and extensive evidence that KSACC maintains records in relation to its client interactions to assist in providing support to clients, and that KSACC does not make notes for the purposes of providing a "record" of what occurred. KSACC notes contain highly personal and sensitive information and are not a verbatim transcript of statements made in the course of an appointment and may be misleading if read or interpreted outside of the support relationship. The evidence provided explanations as to the vulnerability of its clients and the impact that disclosure would have on providing the type of supportive care survivors of assault require. KSACC had the plaintiff sign an acknowledgement that the file notes belonged exclusively to KSACC and would not be disclosed to any third parties, nor would KSACC get involved in court proceedings in any capacity.

Master McDiarmid held that KSACC could not "contract out" of the disclosure requirements of the *Supreme Court Civil Rules* and that if disclosure parameters were met, disclosure would be ordered. However, after quoting extensively from *A.M. v. Ryan*, Master McDiarmid dismissed the bulk of the application, finding:

> In this case, records are maintained in relation to KSACC's interactions with clients. They consist of notes which assist KSACC counsellors in providing support to the clients. They are not notes for the purpose of providing a record of what occurred. They are notes which are made in the course of appointments and are to be interpreted in the context of the support relationship. They are made for the purposes of the KSACC and its staff.
>
> It is common sense to recognize that in order for an effective counselling relationship to exist, there needs to be trust between the client and the counsellor. One can readily imagine notes made by the counsellor to assist in the counselling which, if disclosed to the client, might adversely affect that trust relationship. [paras. 39-40].

He concluded that the documents were of questionable relevance and ordered only disclosure of the dates the plaintiff attended for counselling.

VI. Examination for Discovery

A. Coast Building Supplies Ltd. v. Superior Plus LP, 2017 BCSC 812, Gropper J.

This commercial case addresses, *inter alia*, the general rules for the proper conduct of counsel at discovery including appropriate objections.

The plaintiff alleged that the conduct of the defendant's representative and its counsel warranted the plaintiff's entitlement to conduct a second examination of a different representative. The complaint was that the representative was not able to answer several questions and that defence counsel interjected and "sidetracked the discovery" and that his objections effectively signalled to the witness that the information sought could hurt the defendant's position.

Madam Justice Gropper quoted from *Nwachukwu v. Ferreira*, 2011 BCSC 1755, outlining how the new rules impose a greater obligation on counsel to avoid unduly objecting or interfering in a way that wastes time and that there should be a hands-off approach to discoveries. Objections should be

made in only the clearest of circumstances. If objection is to be made, counsel should state the reasons for the objection and not make comments, suggestions or criticism.

Objections on the basis of "relevance" must be approached from the perspective that counsel are entitled to a broad discretion to frame appropriate questions. It is for the witness to say if a question is confusing, not for counsel to object. Difficulty in answering does not exclude a whole area of questioning and there is no basis to object on the ground that it will "open the floodgates". Counsel are entitled to ask repetitive questions, so long as they are not intimidating the witness and "asked and answered" is not an appropriate objection. Inadequate foundation is not an appropriate objection as there is no requirement for the examiner to lay a foundation for a question. Even objections to "compounded questions" should also be used sparingly.

In this case the plaintiff referred to specific examples from the discovery but failed to ask the court to address the propriety of the objections on a question by question basis. This meant that the court could not reach a determination whether the objections or the questions were reasonable and so the application for a second discovery was dismissed.

B. Henni v. Food Network Canada Inc., 2018 BCSC 276, Master Muir

This was an application, in a breach of copyright claim, by the plaintiffs for an order that appointments taken out by the defendants for discovery of each of the plaintiffs be struck and that the defendants be limited to examination of only one of the plaintiffs as a representative. The application was dismissed. *Rule 7-2(1)* provides that each party of record must make themselves available for discovery and there is no discretion under the rule other than to lengthen or shorten the examination of each of the parties.

C. HSBC Bank Canada v. Singh, 2017 BCSC 1893, Affleck J.

This commercial case provides a thorough review of the law addressing the consequence of one party reading into evidence at trial questions and answers from an adverse party's examination for discovery when the answers were exculpatory.

In this case, the defendant, relied on *Welsh Enterprises Ltd. v. M. Milligan & Associates Ltd.*, 2005 BCSC 1095 for the proposition that the exculpatory answers supported the defence and the plaintiff, having made them part of its case, was bound by them and so the case must fail.

Mr. Justice Affleck did not agree that *Welsh Enterprises* was the governing authority in the context of the case and referred to a number of decisions which held that there is no general rule of law that if a plaintiff reads in exculpatory discovery evidence of the defendant, the plaintiff is bound by the evidence.

His Lordship distinguished *Welsh Enterprises* because in that case there was no evidence at trial that contradicted the discovery evidence that was read in. The ratio of *Welsh Enterprises* was applicable in a trial where two competing versions of important facts "cancel one another out", but that approach did not apply in the matter before Mr. Justice Affleck because the factual and legal situations were distinguishable:

> [136] The matter before me alleges deceit, which, by its nature, may make it impossible for a plaintiff to present direct evidence of the defendant's knowledge and motives and thus the court is often invited to infer from the evidence as a whole that there was an intention on the part of the defendant to deceive, or at least a reckless indifference as to whether representations were true or false.

Accordingly, the plaintiff was not bound by the answers and instead the court weighed the excerpts from the transcripts along with the other evidence adduced at trial.

VII. Experts

A. Bye v. Newman, 2016 BCSC 2671, Choi J.

This application occurred in an action for damages from personal injuries sustained in an accident where an ATV and a dirt bike collided. Liability was contentious. The defendant sought to have an expert qualified as an accident reconstructionist and argued that any issues to impartiality or bias should go to the weight of the expert's evidence. The plaintiff opposed the qualification of the defendant's expert. On cross examination the expert admitted to changing assumptions to try and make the defendant's version of events plausible.

Choi J. held that the expert did more than simply accept one version of events as more probable. The expert made factual assumptions that could not be proved based on the physical evidence; he favoured the position of the defendant. It was found, therefore, that the expert's report was unreliable. The expert report was held to be inadmissible and the expert was not qualified to give opinion evidence in this case.

B. Cole v. Lau, 2017 BCSC 2613, Verhoeven J.

Mr. Justice Verhoeven made the following comments regarding the use of "boilerplate" objection letters:

> [11] Defence counsel provided an objection letter on July 11, 2017. The defence letter in that respect delivered in accordance with Rule 11-6(10) lists 21 objections to the report of Ms. Baptiste. I think it is fair to say that the objections are entirely of a generic variety. There are no specifics. And the objections encompass virtually everything that could be said to exclude the report of an expert. The initial objection letter, therefore, is not useful and does not comply with the spirit and intent of the rule. The rule requires meaningful information and the rule requires meaningful compliance in accordance with its intent, which is to, if possible, resolve issues of admissibility prior to trial and to avoid, if at all possible, the lengthy interruption and inconvenience and inefficiency that has been experienced, for example, in this case. So the kind of generic one could say boilerplate response that was delivered was not useful and did not comply with the rule.

C. Gaebel v. Lipka, 2017 BCCA 432, per Goepel J.A. (Groberman and Stromberg-Stein JJ.A. concurring)

This appeal is of interest for the following comments made by the court in response to the trial judge's remarks that expert witnesses should avoid becoming treating physicians otherwise their evidence would be assigned less weight.

On appeal, the court stated:

> [43] With respect, there is no rule of law or practice that a treating physician cannot testify as an expert. To the extent the trial judge suggests that such a practice may be problematical, I am of the view that she erred. *MacEachern v. Rennie*, 2009 BCSC 939 does not stand for that proposition. It concerns the propriety of an opposing party approaching a treating physician to obtain evidence. The weight to be given to the evidence of any physician, whether they

> be the treating physician or an independent expert, will depend on the circumstances of the particular case. In many cases, the treating physician will in fact be in the best position to opine on the injuries that a party has suffered.

D. Hilton v. Brink, 2017 BCSC 1492, Abrioux J.

At trial, the plaintiff argued that a supplementary report from the defendant's orthopaedic expert was not admissible pursuant to *Rule 11-6(6)* because the expert changed his opinion on information he was aware of, or ought to have been aware of, at the time he prepared his initial report. The plaintiff also argued that the expert did not discharge his duty to the court to provide expert evidence in an objective and non-partisan way and the report was replete with improper evidence. Defence counsel argued that based on medical records received after the expert prepared his initial report, the expert was obliged to prepare the supplemental report since the additional documents, which included un-redacted copies of records previously made available to the defence, had materially changed some of the opinions expressed in the initial report.

The court held that while the report was not admissible in its entirety, particularly the comments on the plaintiff's credibility, that portion of the report did not taint the report as a whole to the extent that it was inadmissible without redaction, and that this was not one of the rare circumstances where the report should be ruled inadmissible. The court was not satisfied that the plaintiff established a realistic concern that the expert was unable or unwilling to comply with his duty to the court, which was acknowledged in both reports.

Defence counsel acknowledged that he instructed the supplementary report to be served as soon as it was received without having the benefit of reviewing it himself due to the very tight time constraints with the rapidly approaching trial. Abrioux, J. confirmed that counsel has a duty to assist expert witnesses in preparing a report which would satisfy the criteria for admissibility and found that there was different wording the expert could have used to explain the change in his conclusions based on the new records provided to him without giving what amounted to an opinion on credibility, which is clearly the role of the trier of fact.

The court found that both parties shared blame: the plaintiff for not having obtained, in a timely way, documents from prior health care professionals, particularly the two years or so prior to the accident; and the defendant for not proceeding with a chambers application well before a month before the trial date.

The court found that if it ruled the expert's supplementary report inadmissible, then the defence would only be able to rely on the initial report and the trier of fact would be misled as to the expert's actual opinion based on the additional documentation received after the initial report was prepared. However, the court found that if it admitted the report into evidence, in whole or in part, the plaintiff would not have the opportunity to properly address the opinions in the supplementary report, which was only received two weeks before trial. In addition, the court considered that the plaintiff may want to obtain a report from an expert in the same field as the defence expert. While the parties wanted the trial to proceed, the judge saw no other alternative than to declare a mistrial. The supplementary report was not admitted into evidence but the defence was granted leave, to obtain a second supplementary report which should address the deficiencies in the current report.

E. Jalava v. Webster, 2017 BCCA 378, per Newbury J.A. (Frankel and Savage, JJ.A. concurring)

The unrepresented plaintiff sued for damages from an assault from a night manager at a restaurant. At trial, the defendant did not appear and the plaintiff's claim against the defendant and his

employer were allowed with damages and costs to be assessed. The plaintiff attempted to have his damages assessed and he was told by several judges that in order to advance his "claim" he needed to have it properly organized with medical evidence. At a final appearance he was told that again, and the judge dismissed the "claim" because there was no material before the court on which a quantification of damages could be based.

The plaintiff retained counsel to appeal the dismissal and Newbury, J.A. confirmed that while a medical-legal report is helpful and that without one it is difficult to assess damages, there is no legal rule to the effect that in order to have damages for personal injury assessed, a plaintiff must adduce a medical-legal report into evidence. The plaintiff told the court that he suffered a broken clavicle and a "banged up knee" as a result of the assault but had no details of the injuries or the financial consequences he had suffered. The court held that the chambers judge should not have dismissed the plaintiff's "claim" on its own motion and without prior notice to the plaintiff, and as the plaintiff had already obtained judgment against the defendants, it was not possible to dismiss the "claim". The court awarded the plaintiff a nominal sum for damages.

F. J.P. v. British Columbia (Children and Family Development), 2017 BCCA 308, per Smith J.A. (Bauman C.J.B.C. and Fitch J.A. concurring)

This appeal involved, *inter alia*, a civil proceeding by the mother against the Director of the Ministry of Children and Family Development and the Province for breach of duties in child protection matters relating to her children. The issue of the trial judge's treatment of the expert evidence was significant on appeal [paras. 221 - 262; 372 - 399]. In summary, the court held that the judge's approach to admitting expert evidence was seriously flawed by his failure to fulfill the gatekeeper role in determining threshold admissibility and failed to properly consider the effect of non-compliance with the *Rules*, leaving deficiencies or prejudice to be considered in terms of the weight of the opinion. Smith J.A. stated that the difficulty with admitting opinion evidence that has not properly been vetted for threshold admissibility is that it may have insufficient probative value and cause significant prejudice by distorting the fact-finding process.

The trial judge was highly critical of the Ministry's expert on social work practice and suggested, without finding, that she might have engaged in improper conduct in changing her opinion at the request of counsel and deliberately withholding information that she had an assistant help with document summaries. He recited a particularly unflattering and unprofessional characterization of her as a witness and expert. Smith J.A. reviewed the transcript of the expert's evidence and found no evidence to support his characterization of her evidence or the egregious conduct implied by his comments. She held that his complete disparagement of her professional reputation, scathing finding with respect to her integrity, impartiality and credibility was "disturbing to say the least." He was found to have "clearly ignored" the scope of her retainer, misapprehended and mischaracterized aspects of her evidence and made "unreasonable findings" with respect to her impartiality and professionalism that were not supported by the evidence.

G. See also Luckett v. Chahal, 2017 BCSC 1031, Abrioux J. under Practice/Jury

This case discusses *Rule 11-6* requirements for the introduction of medical illustrations.

H. Nagra v. Stapleton, 2017 BCSC 2225, Cole J.

The plaintiff sought damages for injuries including neck pain, upper back pain, shoulder pain, and headaches from a June 2014 motor vehicle accident. The plaintiff was in a prior accident in 2012 but reported that leading up to the 2014 accident he did not have any symptoms. Defence expert Dr.

Laidlow opined that the plaintiff's neck movement had restricted range of motion, but was of the opinion that the physical symptoms were at the same level or consistent with the plaintiff's physical symptoms from his 2012 accident. The court had difficulty with Dr. Laidlow's evidence as "he seemed to be more of an advocate, he was argumentative, and based his report, in part at least, on the fact that because there was no record of neck pain prior to his examination of the plaintiff, that the neck pain had been resolved to the state it was prior to the motor vehicle accident". Dr. Laidlow admitted that he found no clinical records in the six months before the accident where the plaintiff reported ongoing neck pain or headaches but relied on a report by Dr. Novak, who indicated that the plaintiff was suffering from chronic neck pain "likely since 2012". The court preferred the evidence of plaintiff's experts Drs. Watson and Waseem over Dr. Laidlow.

I. Truax v. Hryb, 2017 BCSC 1052, Dley J.

The defendant brought an application for summary judgment, seeking a declaration that the plaintiff was liable for the collision. As part of their case, the defendant argued that an adverse inference should be drawn against the plaintiff for failing to call expert engineering evidence. Dley J. held that there is no need to call expert evidence when common sense prevails, and opined that parties to litigation are often too quick to secure expert testimony when it is not required. Ultimately, the defendant was held to be solely liable for the accident.

J. Young v. Insurance Corp of British Columbia, 2017 BCSC 2306, Grauer J.

In this personal injury action, the plaintiff on application was successful in having the defence engineering report ruled inadmissible. Grauer J. applied the principles expressed by the Supreme Court of Canada in *R. v. Mohan* to conclude that notwithstanding the expert's extensive background in accident reconstruction, the expert did not provide bases for his opinions. As a result, the report was excluded, and Grauer J. advised further that the report would have been excluded by him in his discretionary role as gatekeeper. A substantial amount of time had passed since the accident and the expert report was based on no data and little information.

VIII. Independent Medical Examinations

A. Baxter v. Shelton, 2017 BCSC 953, Master Keighley

The defence applied to have the plaintiff attend an IME with a vocational psychologist. The plaintiff had already been examined by a defence psychiatrist but no report had been requested following the examination. In dismissing the application, Master Keighley said:

> [17] It is difficult in circumstances where a report of an expert with an overlapping expertise has not been produced to make a determination as to whether that subsequent examination is required for the purpose of levelling the playing field or addressing some issue which could not have been raised at the time of the original examination. The onus is on the defendant to establish those issues. I am not satisfied on this application that the defendant has done so.

B. Kenny v. Bateman, 2017 BCSC 900, Blok J.

This appeal from a master's order directing that the plaintiff attend a neuropsychological assessment provides a comprehensive discussion and analysis of the law relating to *Rule 7-6(2)* applications.

Mr. Justice Blok also had to address the preliminary question of whether to the appeal was moot as the plaintiff had already attended the examination as ordered. This same issue was addressed *Wright v. Sun Life Assurance Co. of Canada*, 2014 BCCA 309. As in *Wright*, his Lordship found that this appeal was not moot because the appellant also sought consequential relief in the form of terms that the neuropsychologist's report be deemed inadmissible for the purpose of trial and that he be prevented from conducting any further examination or report concerning the plaintiff. In the result, the appeal was dismissed and the order of the master upheld.

C. Johal v. Singh, 2017 BCSC 2431, Master Vos

The defendant sought to have the plaintiff attend a functional capacity examination after having had IMEs with a neurosurgeon and psychiatrist. The plaintiff had not served any expert reports other than from a GP and it was not known if he had or would be attending a functional capacity examination. The application was allowed, in part, because the plaintiff was only 39-years-old so his loss of future earning capacity could apply for a long period of time and therefore be significant, and one of the main issues at trial.

D. Shannon v. Harrison, 2017 BCSC 2272, Master McDiarmid

The defendant applied to compel the plaintiff to attend an IME with a psychiatrist. The notice of civil claim pleaded, *inter alia*, sleep disturbances and psychological injury. The plaintiff had attended at her GP's office with complaints of anxiety before and after the subject accident and there were references to her having an "anxiety disorder", chronic anxiety for most of her life, "stress" and depression in her clinical records. The defendant argued that the psychiatric IME was necessary because the plaintiff's pre-existing psychological condition affected her school work and could impact on her income loss, past and future. The plaintiff's position was that her mental condition was not in issue; she has pre-existing anxiety and the potential exacerbation, if any, was being treated by a general practitioner and not a psychiatrist. Plaintiff's counsel did not anticipate having psychiatric or neuropsychological assessments done.

The consideration of proportionality, the lack of a "psychiatric injury" and the fact that the anxiety was being treated by her general practitioner led the master to deny the application, with liberty to reapply should any psychiatric issues be raised by any of the plaintiff's expert reports.

E. Tani v. Baker, 2017 BCSC 1684, Master Muir

The defendant sought an order that the plaintiff attend an appointment with a radiologist and undergo X-rays based on their IME doctor opining that he requires updated X-rays to conduct a useful IME. He did not say why, nor that he had reviewed the other medical records relating to the plaintiff, and he did not make specific reference to it being necessary for this plaintiff.

The plaintiff objected to further X-rays based on health concerns as she had already undergone a number of X-rays and it was common ground between the parties that there is some danger to cumulative X-ray examinations. The plaintiff was intending to go to trial without updated X-rays and on the basis of expert reports produced without such imaging, so there was no basis on which the defendant should have the benefit of this "intrusive testing" and the application was dismissed with costs.

The master commented that, although counsel had been unable to point her to a specific case on X-rays, such an order may be made where a proper basis for the order was presented.

F. Van Veelen v. Central Saanich (District), 2017 BCSC 1825, Master Bouck

Master Bouck had previously ordered the plaintiff, who alleged a brain injury, attend IMEs with Dr. Janke, a psychiatrist and Ms. Piercy, an occupational therapist, but dismissed a request for the plaintiff to attend a neuropsychological examination (2017 BCSC 1040). The application regarding the neuropsychological application had failed because there was insufficient evidence that the assessment was "necessary".

This was a renewed application to compel the plaintiff to attend the neuropsychological assessment and for a further order that she attend and complete the functional capacity examination with the OT. The plaintiff had been unable or unwilling to cooperate in the FCE.

On this application, the defendant had evidence from Dr. Janke that supported the necessity of a neuropsychological examination. Dr. Janke explained any psychiatric opinion would be limited without the benefit of the neuropsychological testing. Such testing was needed to disentangle her pre-existing condition from the effects of a traumatic brain injury. Further, Ms. Piercy also explained why this testing was necessary for her to complete the FCE.

The plaintiff's opposition was based on her evidence that her physical and mental health were detrimentally impacted by having to participate in the two previous assessments. She also deposed to the difficulties of travelling outside of Victoria to attend the assessments (the neuropsychologist was in Vancouver). Her treating medical personnel said that it was preferable that the assessments take place in Victoria but did not rule out her attending elsewhere.

The master was now convinced that the neuropsychological assessment was necessary to bring reasonable equity between the parties for trial. The plaintiff was also ordered to complete the FCE. The master declined to order that the plaintiff pay any late cancellation penalty if she failed to attend the assessments as ordered.

G. Wang v. Wang, 2017 BCSC 1981, Master Dick

The defendant brought an application pursuant to *Supreme Court Civil Rule 7-6(1)* for an order that the plaintiff attend a neurologist for an independent medical examination. The plaintiff was seeking damages for alleged injuries sustained in a motor vehicle accident including, ongoing numbness, headaches, fatigue, and dizziness. The plaintiff had already consented to seeing an orthopaedic surgeon and a neuropsychologist for independent examinations arranged by the defendant.

Master Dick denied the defence application and held that the defendant is not entitled to pursue every potential medical possibility to address the plaintiff complaints. The neuropsychologist had the potential of sufficiently addressing the plaintiff's subjective complaints. Master Dick noted, however, that if the plaintiff chose to rely on a neurologist report, then the defendant was entitled to obtain a neurologist report without further order.

IME - Terms

A. Moquin v. Fitt, 2017 BCSC 1204, Thompson J.

This is the latest case in a series of competing authorities addressing whether a defendant should be prohibited from carrying out surveillance of a plaintiff as a term of a court ordered IME. Mr. Justice Thompson preferred the reasoning in the *Carta* line of cases which found that surveillance in the courthouse or on the way to or from a court-ordered appointment was inappropriate. A

defendant should not be allowed to take advantage of an opportunity created by a court order to engage in surveillance, because the defendant might be seen to be acting in close concert with the court. Further, surveillance around IMEs has nothing to do with "levelling the playing field". Mr. Justice Thompson also rejected the defence's proposal to undertake not to inform the private investigator of the date of the appointment so that any if surveillance occurred it would be coincidental which the defence argued would mitigate the concern expressed in *Carta*.

B. Namsechi v. Muir, (unreported), January 8, 2018, Vancouver Registry No. M151620, Master Harper

Master Harper ordered the plaintiff to attend two IMEs (with an orthopedic surgeon and a neurologist) after the 84 day deadline. There had been two aborted attempts at IMEs. One was with a physiatrist who terminated the examination alleging that the plaintiff was not cooperative, which the plaintiff disputed. The second had been scheduled with the same neurologist, but the plaintiff left after waiting for 35 minutes when the parties had agreed that the appointment would start within 30 minutes of the scheduled time.

In ordering the IMEs, the Master was asked to make a number of conditions by the plaintiff. She refused to impose the following terms:

- the "30-minute rule" as previously agreed. It led to avoidable difficulties.
- any consent orders, any questionnaires, consents or forms be provided to plaintiff counsel at least one day in advance. There is case law that deals with consents and it was not practical to address when one of the IMEs was the next day.
- the history be recorded in a legible form because it was patronizing to the doctor and could be dealt with as and when the notes were produced.
- the examiner retain all drafts, notes, papers etc. as it insults the doctor's professionalism.
- there be no photographs, audio or video recordings since there was no evidence that either of the doctors would do so.
- the examiner is available to attend trial. It is the responsibility of counsel to make arrangements that the doctor is available to attend trial.

Master Harper did order that, regardless of whether a report is produced, the notes of the history taken, observations, tests conducted and findings were to be delivered to plaintiff's counsel within 45 days of the examination. She also ordered that there be no surveillance of the plaintiff on the day of the examination nor any invasive tests or imaging of the plaintiff.

C. Van Veelen v. Central Saanich (District), 2017 BCSC 1040, Master Bouck

In this application, Master Bouck was asked by the plaintiff to impose the following conditions on her attendance at two IMEs:

(a) that the assessment commence within 15 minutes of the scheduled appointment time;

(b) that the assessment be limited in duration to one hour;

(c) that the plaintiff be entitled to make an audio recording of the assessment;

(d) that the expert only ask questions within that expert's claimed area of expertise;

(e) that the expert not conduct any invasive tests;

(f) that the expert not require the plaintiff to complete any forms, diagrams or questionnaires; and

(g) that the plaintiff be accompanied by a chaperone.

The defendant agreed to condition a. but no others.

Master Bouck found that there was little evidence from the plaintiff to support imposing any of the sought-after conditions. An order allowing the plaintiff to record the IME should only be made in rare circumstances and only where there is cogent evidence in support. The other conditions sought by the plaintiff would frustrate the examiners' abilities to conduct proper assessments.

IX. Insurance

A. Schoenhalz v. Insurance Corporation of British Columbia, 2017 BCCA 289, per Newbury J.A. (Saunders and Tysoe JJ.A. concurring)

This appeal concerned the interpretation of s. 91 of the *Insurance (Vehicle) Act* which bars an injured person from recovering from an uninsured driver pursuant to s. 20 of the *Insurance (Vehicle) Act* when they knew or ought to have known that the vehicle was being driven without the consent of the owner. The trial judge found that the driver was liable in negligence to the plaintiff who was a passenger in the vehicle, and that the vehicle had been taken without the owner's consent. The trial judge determined that the appropriate test to determine if s. 91 applied was both objective and subjective, and that ICBC had not shown that the plaintiff subjectively knew that the driver did not have consent of the owner. The trial judge considered the young age of the plaintiff (17-years-old), determining it was reasonable for the youth to believe that the driver had acquired the consent of the owner. Although the trial judge noted that it would not have been reasonable if the plaintiff had been an adult.

In allowing the appeal, the court determined that the trial judge applied the wrong test and had erred as matter of law. The correct test is an objective test of what a reasonable person, taking into consideration the plaintiff's age and experience, ought to have known. Applying this test to the case at bar, the Court of Appeal held that the Plaintiff ought to have known that the driver did not have consent of the vehicle's owner to operate the vehicle.

X. Negligence

A. Akintoye v. White, 2017 BCSC 1094, Fleming J.

The plaintiff sued for damages, alleging that he suffered significant physical and psychological injuries as a result of assault, battery, false imprisonment, and negligence on the part of the police officers. The defendants conceded that the officers subjected the plaintiff to unwanted force but argued that their conduct was reasonable, that they acted on reasonable grounds in using force, and that they did not use unnecessary force.

The plaintiff was stopped by two police officers as he walked along a sidewalk after the police mistakenly identified him as someone who was subject to an arrest warrant for fraud-related charges. The plaintiff was argumentative, and refused to comply with the officers' direction that he remain in place while his identification was checked. He began yelling at one female police officer

while she remained seated, then subsequently put his hands in his pockets and refused to remove them, giving rise to concerns for the officers' safety. The plaintiff subsequently resisted arrest and kicked at the officers.

The court found that given the similarities between the plaintiff and the suspect, the police had valid grounds to detain the plaintiff for investigative purposes and the decision to detain him was reasonable and reasonably necessary. The court found that although the plaintiff was likely experiencing some psychotic symptoms prior to and at the time of the incident, his conduct gave rise to concerns for the officers' safety. The court held that in light of the nature of the plaintiff's conduct after being detained, the importance of police duties to investigate and to protect life and safety, as well as the particulars of the investigation, namely confirming and executing an arrest warrant, the officers' actions were reasonable, reasonably necessary, and that the force used was justified.

The court also held that the claim against the City of Vancouver must fail as there was no expert evidence regarding the requisite standard of care. Section 21 of the *Police Act* bars an action for damages against a police officer unless he or she is guilty of dishonesty, gross negligence, or malicious or wilful misconduct, the plaintiff's claim failed as his pleadings did not make those assertions and there was no evidence led or findings of fact that would support them. The plaintiff's action was dismissed.

B. Provost v. Bolton, 2017 BCSC 1608, Kelleher J.

This case involved a liability trial in three plaintiff actions arising from an accident caused by a defendant who stole a vehicle from a car dealership. The dealership was not fenced in and a number of marginalized individuals frequented the area. The employee had left the vehicle outside of a detail bay with the keys in the ignition, the engine running, and the doors unlocked. The car remained in this state for approximately 40 minutes before a thief got in the vehicle and drove away.

The car dealership and its employee were held to be 15% liable in each action. Kelleher J. held that the theft and resultant damage and injury were foreseeable, and that the dealership and its employees owed a duty of care for other users of the road and the police. There were no issues with remoteness to void liability on behalf of the dealership and no intervening act was shown to have broken the chain of causation.

C. Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19, per Karakatsanis J. (McLachlin C.J. and Abella, Moldaver, Wagner, Cote and Rowe JJ. concurring and Gascon and Brown JJ. dissenting).

This was an appeal of a finding of liability against a garage for having left an unlocked car in their unsecured commercial garage lot with the keys in the ashtray. The vehicle was stolen by the defendant, J, and his friend, C, who were both minors, after an evening of drinking and smoking marijuana. They were out walking around looking for things to steal from unlocked cars when C opened this car and found the keys. J did not have a driver's licence and had never driven a car on the road. C decided to steal the car and told J to get in. C then drove out of the garage and onto the highway where the car crashed and J suffered a catastrophic brain injury. At trial, the garage was found 37% liable, C was found 23% liable, C's mother was found 30% liable and J was found 10% liable. The Ontario Court of Appeal upheld the trial judge's finding that the garage owed a duty of care to J and dismissed the appeal.

The only issue was whether the garage owed a duty of care to J. In allowing the appeal, Justice Karakatsanis wrote:

> [2] In my view, this case is easily resolved based on a straightforward application of existing tort law principles. This requires analytical rigour and a proper evidentiary basis. The plaintiff did not provide sufficient evidence to support the establishment of a duty of care in these circumstances. While the risk of theft was reasonably foreseeable, the evidence did not establish that it was foreseeable that someone could be injured by the stolen vehicle. Here, there was no evidence to support the inference that the stolen vehicle might be operated in an unsafe manner, causing injury. When considering the security of the automobiles stored at the garage, there was no reason upon this record for someone in the position of the defendant garage owner to foresee the risk of injury. I would allow the appeal. A business will only owe a duty to someone who is injured following the theft of a vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable
>
> ...
>
> [66] Under tort law, liability is only imposed when a defendant breaches a duty of care. The *Anns/Cooper* test ensures that a duty of care will only be recognized when it is fair and just to do so. As such, it is necessary to approach each step in the test with analytical rigour. While common sense can play a useful role in assessing reasonable foreseeability, it is not enough, on its own, to ground the recognition of a new duty of care in this case. Aside from evidence that could establish a risk of theft in general, there was nothing else to connect the risk of theft of the car to the risk of someone being physically injured. For example, Rankin's Garage had been in operation for many years and no evidence was presented to suggest that there was ever a risk of theft by minors at any point in its history.
>
> [67] This is not to say that a duty of care will never exist when a car is stolen from a commercial establishment and involved in an accident. Another plaintiff may establish that circumstances were such that the business ought to have foreseen the risk of personal injury. However, on this record, I conclude that the courts below erred in holding that Rankin's Garage owed a duty of care to the plaintiff.

The dissenting Justices determined that the relationship between the garage and J fell within a category of relationships in which a duty of care had been previously found to exist. The court was not required to undertake a full analysis to establish a novel duty of care; here C's act foreseeably caused physical harm to J.

The reasonable foreseeability inquiry is objective and must be undertaken from the standpoint of the reasonable person. Whether the defendant actually foresaw the risk which ultimately manifested in injury is not determinative. It is a low threshold and is usually quite easily overcome. Both the trial and appellate judges found that it was reasonably foreseeable that someone such as J could suffer injury as a result of the garage's negligence in its failure to lock and secure vehicles. The majority concedes that the risk of theft was reasonably foreseeable but would have required additional evidence that theft would have occurred at the hands of a minor to find that the physical injury to J was foreseeable. Regardless, the trial judge's findings satisfied that burden. Minors are no less likely to steal a car. In order to establish a duty of care, J was not required to show that the characteristics of this particular thief or the way in which the injury occurred were foreseeable. Imposition of a duty of care was conditioned in this case only upon J showing that a physical injury to him was reasonably foreseeable under any circumstances flowing from the garage's negligence.

Contributory Negligence

A. Biggar v. Enns, 2017 BCSC 2290, Sharma J.

Two friends were riding their motorcycles in California when the defendant rider gazed out into the canyon, failed to negotiate a turn, lost control of his motorcycle, and went into the oncoming lane. After doing so, the defendant failed to look right as he was re-entering the lane and put his bike in a dangerous position. As the plaintiff came around the curve, he was suddenly confronted with the defendant on his bike ahead of him in a perpendicular position to the direction of traffic. If the plaintiff continued straight he would have struck the defendant, and he could not swerve left because he did not know if there was oncoming traffic, so he braked hard, lost control of his bike, and slid into the oncoming lane, suffering injuries in the fall.

The defendant admitted liability but argued that the plaintiff was contributorily negligent on the basis that he was likely speeding, not traveling at a safe distance behind him, and should have slowed down once the plaintiff lost sight of the defendant around the corner.

The court reviewed case law regarding the general principle that liability is attributed to the tailing vehicle when there has been an accident between two vehicles travelling one in front of the other. However, the court found, at paragraphs 47 to 51, that the plaintiff was riding in a safe and prudent manner, had acted appropriately in the face of an unexpected hazard and the "agony of the moment", and his decision to brake hard, which caused his bike to fall and slide, was a reasonable course of action rather than impacting the defendant.

B. Suran v. Auluck, 2017 BCSC 471, Burke J.

Two motorists were allegedly street racing and one of them, Mr. Auluck, subsequently fled the police, lost control of the Chrysler 300, rear-ended another vehicle, rolled over, went down a steep embankment. His passenger Mr. Suran was killed. The deceased's wife sued the drivers of both vehicles involved in the street race on the basis that the street race and the accident were all part of a joint venture in which both drivers participated. The driver of the other vehicle, Mr. Marwaha argued that he had stopped due to being arrested, had withdrawn from the street race, and was not liable for the subsequent accident.

At paragraph 193, the court held that while Mr. Marwaha may have stopped, the accident occurred within minutes of Mr. Marwaha's arrest, and the causal connection had not been severed. At paragraph 195 the court states that the two drivers were engaged in a common (unlawful) course of action that ultimately precipitated the catastrophic accident and death of Mr. Suran. It was reasonably foreseeable that participation in the street race at high speed on a busy street would attract police attention and action, and that Mr. Auluck would flee the police. The court found that there was sufficient proximity and foreseeability for Mr. Marwaha to be found partially liable (10%) as a joint tortfeasor.

Contributory Negligence - Seat Belt Defence

A. Ackermann v. Pandher, 2017 BCSC 880, Schultes J.

The court did not accept that the plaintiff's failure to wear a seatbelt because he was recovering from bladder surgery was a valid reason. He had regularly worn the seatbelt on shorter car rides and had not been told by a doctor to not wear a seatbelt. However, the defendant failed to demonstrate that his injuries would have been lessened had the plaintiff been wearing a seatbelt.

B. Parlby v. Starr, 2017 BCSC 2353, Fleming J.

This case addressed whether as part of a "seat belt defence", a defendant must prove that there was a functioning seat belt available at the time of the accident.

The plaintiff argued that to prove contributory negligence required proof of: a. there was a seat belt in good working order available for use; b. it was unreasonable in the circumstances for the plaintiff not to use the seat belt, and, c. use of the seat belt would have avoided or reduced the injuries sustained by the plaintiff.

Madam Justice Fleming determined that, based on *Harrison v. Brown*, [1987] 1 W.W.R. 212, it is a two, not three, part test and that there is no requirement to provide the second element identified by the plaintiff. She then addressed the uncertainty regarding the "functionality requirement". The Court of Appeal had held in *Hill v. Winslow*, [1987] B.C.J. No. 285, that a defendant was not required to lead direct that the seat belt was operational. Her ladyship quoted from *Hill*:

> The evidentiary burden, in any case, will depend on the pleadings and on the evidence generally but, in my opinion, whatever may have been the situation before the wearing of seatbelts was made mandatory in this province, the situation now is that there is no more general requirement on the defendant to show that the seatbelts were operational than there is to show that the brakes or any other mechanical part was operational. In a particular case such an evidentiary burden may arise, but such an evidentiary burden is not a general rule. [Emphasis added.]

Madam Justice Fleming referenced the subsequent cases noting that they were somewhat inconsistent and quoted as follows from Justice Finch's comments in *Harrison* that:

> An issue is raised by the plaintiff as to whether the passenger's seat belt was in good working order. The defendant's mother said she had worn the seat belt for the passenger's seat within the few weeks preceding the accident, that it had fitted and buckled up properly and seemed to be all right. She did not test it in any way. No one inspected the condition of the seat belt following the accident. The evidence in my view falls short of showing that the belt was in proper working order. In my view, that, in itself, is fatal to the success of the seat belt defence in this case. [Emphasis added.]

Her ladyship concluded that a defendant must prove on the balance of probabilities that wearing a seat belt would have prevented or minimized the injuries. In some circumstances, a defendant will also bear the burden to prove that the seat belt was functioning. The "reality is, however, the evidence must support the inference the seat belt in question was functioning at the time of the accident".

Cyclists

A. Ilett v. Buckley, 2017 BCCA 257, per Lowry J.A. (Bauman C.J.B.C. and Garson J.A. concurring)

The southbound defendant driver was turning left at an intersection and the northbound plaintiff cyclist was riding on the shoulder passing slow moving vehicles. As the defendant driver made her left turn, a large vehicle precluded the parties from seeing each other and a collision occurred. At trial, the judge found the plaintiff not liable, despite finding that he breached section 158 of the *Motor Vehicle Act (*the "*Act*"*)*.

On appeal, at paragraph 24, the court states that it is "difficult to see on what basis the judge found in effect, by virtue of s.174, Ms. Buckley had a duty to yield to Mr. Illett such that he effectively had the right of way when under s. 158 of the *Act* he was not permitted to pass the large vehicle on the

right and enter the intersection as he did. It cannot be that one applicable section of the *Act* is to be taken as a factor in establishing the standard of care but another section that would apply in the circumstances is not".

At paragraph 29, the court indicates that the plaintiff had a legal duty to exercise due care and attention while riding his bicycle and to have reasonable consideration for others using the highway. The court found that as the plaintiff breached s. 158 of the *Act*, and sped into the intersection without stopping or slowing down, he did not discharge his duty to ride with care and attention for others on the highway and the trial judge's conclusion that the cyclist had not failed to take reasonable care for his own safety constituted an error in law. On appeal, liability was apportioned equally between the parties.

B. McGavin v. Talbot, 2017 BCSC 2194, Masahura J.

The plaintiff cyclist merged from the end of a bicycle lane onto the roadway when the defendant driver of a pick-up truck overtook him. The plaintiff alleged that the defendant's truck struck the handlebars of his bicycle, causing him to fall and suffer injuries. The defendant disputed that his truck struck the plaintiff's bicycle. The court found that the plaintiff was ahead of the defendant's truck when the bike lane ended and was in the dominant position on the roadway, and that the defendant passed the plaintiff when there was not a safe distance to do so. The defendant was found liable on the basis that:

(a) a cyclist has the same rights and duties of a driver of a vehicle pursuant to s.183(1) of the *Motor Vehicle Act* , R.S.B.C. 1996, s. 318;

(b) a driver of a vehicle overtaking another vehicle must pass to the left of the other vehicle at a safe distance and must not return to the right side of the highway until safely clear of the overtaken vehicle pursuant to s. 157(1); and

(c) a driver of a vehicle must drive with due care and attention and must have reasonable consideration for other drivers pursuant to s. 144.

C. Perilli v. Marlow, 2018 BCSC 495, Dley J.

This was an action brought by a jogger who was trying to pass three young girls riding their bikes but struck the rear tire of one of the bikes when the cyclist moved her bike to the right. The action was against the ten-year old cyclist, Ms. Marlow, and her grandparents on the basis that they had not properly instructed her in the safe operation of a bicycle. The three girls were riding abreast; two on the sidewalk and Ms. Marlow was on the road. They were riding in a direction that faced traffic as they felt it was safer to ride on the only side of the road that had a sidewalk. The plaintiff had been running on the sidewalk in the same direction, faster than the girls and intended to pass them. There was no room to pass the two bikes on the sidewalk and so he decided to go around Ms. Marlow on the road. As he was manoeuvring around her, she moved into his path and his foot hit her back wheel.

The court rejected the plaintiff's argument that Ms. Marlow was in breach of s. 183(2)(a) of the *Motor Vehicle Act*, which prohibited her riding on the sidewalk; she was riding on the road. The plaintiff's argued that she was prohibited by s. 183(2)(d) from riding abreast of another person on the roadway. The court noted that they did create an obstruction but this argument was rejected on the basis that there was no other person on the roadway, her friends were on the sidewalk. The court also rejected the assertion that s. 187(17) of the *Act* required that she used hand signals when she moved towards the curb and then back again. She was not making any turn, but simply

repositioning herself on the road. She had breached her statutory duty under s. 183(2)(c) that required her to ride as near as practicable to the right side of the road. However, that was not a breach that contributed to the accident in a way that should attract liability.

The evidence was that Ms. Marlow had looked over her shoulder and saw the plaintiff coming from behind and thought that he was going to pass. He had not announced his intention to do so. She moved closer to the curb to give him room even though there were no vehicles approaching. She looked back a second time and concluded that he was not going to pass because he had slowed and fallen back. She then moved into her original place on the road at which point the accident occurred. The court accepted that she had not made a sudden or dangerous manoeuvre and that she was not required to continually look behind her; whereas the plaintiff was able to see everything in front of him. Although her actions were not perfect, her action of looking behind only twice was not inconsistent with what a similarly aged young girl would have reasonably done in the circumstances. The court acknowledged that Ms. Marlow was part of a group that blocked the sidewalk, but that this was no different than if two people were pushing their strollers or walking the their dogs with a cyclist alongside. The claim was dismissed.

Vicarious Liability

A. Jacobs v. Basil, 2017 BCSC 1339, Abrioux J.

The plaintiff was involved in two motor vehicle accidents in 2011. In the first accident, the plaintiff was the rear seat passenger in a Ford Explorer driven by James Basil and owned by Joshua Basil. Joshua Basil denied that James Basil was the driver but if the court found that he was the driver, then Joshua denied that he was in possession of and operating the Explorer with his consent.

Joshua owned the Ford Explorer but kept it at his mother's house where James frequently stayed. Joshua owned and drove another vehicle regularly. The court held that there was some evidence that Joshua had given implied consent to James based on the frequency of times James was observed to have driven the vehicle, the fact that James had access to the keys left with their mother, and Joshua having not directly confronted his brother regarding the issue of consent. However, the court found that there was evidence supporting the conclusion that Joshua did not provide implied consent which included his knowledge of his brother's driving record and the fact that the brothers did not have a good relationship. The court was not satisfied that James's statement to Joshua that "he flipped his truck in Yahk" suggests that the Explorer was de facto James' vehicle and not Joshua's. The court held that the plaintiff had not established that if James had asked Joshua if he could drive the Explorer, as a matter of course, Joshua would have said "yes". The court found that Joshua Basil was not vicariously liable for James Basil's actions.

Waivers

A. Cooper v. Blackwell, 2017 BCSC 1991, Kent J.

The plaintiff commenced a *Family Compensation Act* claim alleging that the defendants were liable for the death of her husband after he was shot by one of the guides during a grizzly bear hunting trip. The defendants denied liability on the basis that the liability release agreement signed by the deceased was a complete defence to the claim.

The deceased had signed the liability release agreement in respect of a former unsuccessful grizzly bear hunt that took place in September 2013 and the accident took place at a subsequent hunt in 2014 which the defendants had offered free of charge as the deceased was a good customer. The defendants did not get the deceased to sign another liability release agreement, considering the hunt to be a continuation of the former unsuccessful hunt such that another release was not necessary.

The court held that the liability release agreement did not apply to the 2014 hunting accident and was not a defence to the claim because the wording of the liability release agreement favor a conclusion that it was contemplated and intended by both parties to apply only to the September 2013 hunting excursion. The court held that the 2014 grizzly hunt was a separate and distinct excursion not in any way contemplated by the parties at the time the 2013 liability release agreement was executed by the deceased.

The defendants also argued that the deceased was well aware of the terms of the liability release agreement having acknowledged and signed it on three prior occasions, and that an identical release should be implied in 2014 based on prior "course of dealing". The court held at paras. 39-41 that: three separate transactions were not sufficient to qualify as a "course of dealing"; express notice and clarity of language is essential; waiver requires an unequivocal and conscious intention to abandon rights; and there was no evidence of any such intention on the deceased's part in 2014.

B. Jamieson v. Whistler Mountain Resort Limited Partnership, 2017 BCSC 1001, Sharma J.

The plaintiff was injured while mountain bike riding at a park owned and operated by the defendant. He sued for injuries, claiming that Whistler failed to warn him of the risks involved in mountain bike riding in Whistler's bike park. He also alleged that Whistler engaged in deceptive and/or unconscionable acts and practices, by failing to disclose documents providing information about the rate and severity of injuries at the bike park (the "study"), which both vitiate the waiver of liability he signed and violate consumer protection legislation. Whistler applied for summary judgment seeking to enforce the release agreement and a dismissal of the plaintiff's action.

The plaintiff argued that the release was invalid because it failed to alert patrons to a known mechanism of injury, possible injuries, and the frequency of injuries, but the court held that where a plaintiff signs a contract containing an exclusion of liability clause, identification of specific risks is not generally required.

The court stated that prior case law makes it clear that the characteristics of the plaintiff are relevant to determining if an exclusion of liability is enforceable. In this case the plaintiff: was highly educated; had signed many documents including clauses for the exclusion of liability in the past; had involvement in the bike park as a first responder, having performed spinal precautions on injured riders himself; and had considerable experience with ski racing, heli-skiing and many years of downhill skiing, all of which involved signing documents including clauses of exclusions of liability.

At paragraph 125, the court held that the release was "…comprehensive, clear and blunt and could not see how any adult with basic reading skills could reasonably believe he or she retained the right to sue Whistler if they were injured using the park, even if Whistler was negligent", noting that key words in the release indicate that the waiver is for "all liability for any loss…injury… that [the signatory] may suffer… as a result of …participating in mountain biking, due to any cause whatsoever, including negligence, …breach of any statutory or other duty of care".

The court found that the plaintiff knew and understood the impact of signing the release and that the release was valid and enforceable. The court also found that while the study does provide insight into the rate of injuries in the bike park, it was not specific to injuries incurred in a bike park

and the study itself stated one of its limitations was that it did not have data about the number of riders in the bike park. The court held that it would be unreasonable to draw any firm conclusions from the study and found that Whistler had met the burden of proving that their actions were not unconscionable.

XI. Occupiers Liability

A. Binette v. Salmon Arm (City), 2018 BCCA 150, per Harris J.A. (Saunders and Fenlon JJ.A. concurring)

The Court of Appeal dismissed an appeal brought by the city of Salmon Arm in respect of a slip and fall which occurred on a city sidewalk. The plaintiff had tripped over a piece of metal protruding from the sidewalk. The City had been alerted to a broken sign near the site months before the plaintiff was injured. Employees had searched the area for the base but could not find it because there was snow on the ground and no further search was undertaken. The plaintiff was granted judgment on a summary trial basis.

The defendant appealed arguing that the judge: found certain facts based on speculation; had misapprehended the City's policies; and failed to consider causation. The appeal was dismissed. The trial judge had accepted that the City had used its best efforts at the time and that those efforts were reasonable in the circumstances, but found that the City had a duty to continue to use its best efforts to locate the base of the sign once the snow was gone, when it ought to have known that it would cause a hazard. It was open to the trial judge to infer that the damage to the base of the sign had occurred when it was disconnected from the sign, in the absence of any other plausible explanation. In respect of causation, once the location of the base had been identified, the sign would have been reinstalled in very short order and the trip and fall would not have occurred.

B. Harrison v. Loblaws Inc., (Real Canadian Superstore), 2018 BCSC 575, Basran J.

The plaintiff recovered more than $750,000 for a head injury suffered in this slip and fall case. She slipped on a large pool of liquid laundry detergent near the boundary between the grocery and the front end of the store. After sliding in the liquid she fell forward, struck her left eyebrow on a display, and then fell backwards hitting her head and temporarily knocking herself out.

The precise location was a significant issue at trial because the store kept separate sweep logs for each area of the store and the only sweep log that was produced at trial was for the front end area. The store employees could not testify as to the boundaries between the areas and a key witness, the employee who performed the sweep of the front end area, was not called to give evidence.

The court found that the defendant's maintenance and inspection polices were reasonable but held the defendant liable because there was insufficient evidence to establish that the policies were being followed on the day in question. The manager had also failed to adhere to the store's practice regarding customer incidents; he did almost none of the things required. Specifically he failed to: properly fill out the store's accident incident report; obtain a copy of the relevant sweep log as it appeared at the time of the accident; have the employee who did the work verify the copy of the relevant sweep log; maintain a copy of the department staff schedule for the day; take photographs of the accident scene; make a drawing of the accident scene; and take detailed statements from all staff before they leave the store.

The store manager indicated that he may not have been aware of the requirements of the policy and that this may have been a "training issue".

The court did not accept the proposition that the pool of laundry detergent could only have been there for a few minutes, because otherwise it would have been noticed and cleaned up earlier. Justice Basran described this logic as circular.

The plaintiff had established a *prima facie* breach of the statute. Superstore had a reasonable inspection and maintenance system in place by virtue of the sweep log procedure and maintenance of the logs for various departments but there was insufficient evidence adduced at trial to find that the defendant adhered to their system of inspection and maintenance at the time of the plaintiff's injury.

XII. Offers to Settle

A. Granja v. Jozef, 2017 BCSC 1087, Devlin J.

This case confirms that an offer must comply with the requirements of *Rule 9-1(1)(c)* in order to attract cost consequences.

The plaintiff applied for double costs on the basis that he twice offered to settle the case for less than the amount awarded at trial. The plaintiff was injured when the intoxicated defendant intentionally drove his car into the plaintiff's parked vehicle. A physical assault then ensued. ICBC defended the matter as Third Party.

The first offer did not comply with the requirements of *Rule 9-1(1)(c)(iii)* as it did not reserve the right to bring the offer to the attention of the court and was therefore not a valid offer under *Rule 9-1*. The second offer contained the wording but was not served on the defendant who had filed a Response to Civil Claim but had not served it on the plaintiff. Plaintiff's counsel's office had been made aware that the Response had been filed. The defendant was a party of record and the plaintiff was required to serve the offer on him in order to make an offer to settle within the meaning of *Rule 9-1(1)(c)*. This requirement is unaffected by the defendant's position with respect to liability or the involvement of ICBC in the litigation.

B. Hanson v. Sharma, 2017 BCSC 2310, Dley J.

This case deals with formal and informal offers to settle co-existing on a parallel track.

The plaintiff made a formal offer followed by an informal offer. The defendant rejected the informal offer. It was then no longer capable of being accepted. The defendant then purported to accept the informal offer. Within minutes, the defendant then accepted the formal offer. After that acceptance, the plaintiff revoked the formal offer. The court held that the revocation was too late as it had already been accepted. The plaintiff argued that a term should be implied into the offer that it must be paid within a reasonable time. The court declined and held that if the offer to settle was to be predicated upon payment within a specific timeframe, it was incumbent on the offeror to make that clear.

The court also clarified that it is not fatal to the communication of a formal offer if it is not made to the formal address for delivery of the receiving party. If the parties had implicitly agreed to email as an accepted form of written communication, then the communications regarding offers to settle can be made using that method. As long as the party has actual notice of the offer, the method of delivery is not restricted to the address for delivery.

A formal offer to settle is open for acceptance until judgment even if a counter-offer has been made.

C. Lafond v. Mandair, 2017 BCSC 1081, Dley J.

The plaintiff applied for double costs and disbursements following the trial in which he was awarded more than his formal offer to settle. The defence agreed that he was entitled to double costs for tariff items incurred as of seven days following the formal offer but disputed double disbursements. After referring to the decisions of *Moore v. Kyba* and *Gonzales v. Voskakis*, Dley J. followed *Moore* in concluding that double disbursements are not available as the absence of any reference to disbursements in subsection (b) precluded an award for double disbursements.

Double costs may be awarded for some or all steps taken after delivery of the offer. A step in the proceeding is a formal step that moves the action forward. Incurring a disbursement is not a formal step as contemplated by the *Supreme Court Civil Rules*.

D. Layes v. Stevens, 2107 BCSC 2011, Hyslop J.

The defendant offered to settle the action for an amount greater than the trial award and sought costs. The offer was made just over two weeks before trial when all expert reports and rebuttals had been exchanged. The key issue at trial was whether the plaintiff suffered an MTBI. The plaintiff's experts who had diagnosed her with MTBI did not state why and their responses to the defence expert similarly did not state their reasons for holding certain opinions. There were factual errors on which some of her experts based their opinions which were not corrected. The plaintiff misrepresented her termination from her employment. She should have assessed the weaknesses in her case and have accepted the offer.

The formal offer was higher by about 25% more than the amount awarded by the court and the court was not critical of the offer because it did not break the amounts down into heads of damage. In the result, the court awarded the plaintiff costs up to the date of the offer and the defendant two-thirds of his costs and disbursements thereafter.

E. Park v. Donnelly, 2018 BCSC 219, Voith J.

This case concerned the ICBC standard form of wording for a formal offer to settle with a modification. The defendant offered a sum of $430,000 and included the words "old money" to define the Settlement Payment. The defendant also included the clauses (a) after taking into account Part 7 benefits paid or payable...and (b) after taking into account any advances paid to date (along with the standard (c) and (d) clauses).

On an application after trial to enforce the formal offer, the defendant argued that the Settlement Payment was not a net offer but rather a sum from which certain sums must be deducted. The plaintiff argued that the offer was ambiguous in that it was unclear what, if any, deductions were to be made.

The court declined to give effect to the offer under *Rule 9-1*, finding that it was unclear and ambiguous. The defendant took a view of the offer which differed from the finding in *Anderson v. Routbard,* 2007 BCCA 193. In *Anderson*, ICBC argued that the Settlement Payment in its standard wording offer to settle was a net amount from which no further deductions would be made. In *Park*, the defendant urged for various limited deductions but there was disagreement and confusion as to what payments were payable under Part 7. In this sense, the offer was unclear.

The court was also critical of the use of the phrase "old money" as it did not have any defined meaning and was not developed in any legal authority. Voith J. held:

> I accept that the expressions "old money" and "new money" are frequently used by persons who are involved in motor vehicle or personal injury litigation and

> who act for either plaintiffs or for the Insurance Corporation. Such colloquialisms, however, have the potential to give rise to certain risks. Their meanings will be opaque to many individuals, including many lawyers, who do not do such work. This will also be true for many members of the court. There is, as I have said, no place to turn to determine what these words mean on an objective basis. (para. 37)
>
> ...
>
> An offer to settle should be clear and unambiguous. It should use plain language. It should avoid colloquialisms or idioms that are understood only by a limited audience. (para. 55)

F. Sharma v. Chan, 2017 BCSC 1651, Voith J.

The plaintiff sought double costs following trial in which liability and whether the plaintiff suffered an MTBI were key issues. While the court found that the defence should have known that their position on liability was weak and inconsistent with objective evidence, the court found that the plaintiff's offer to settle was not one that ought reasonably to have been accepted because of the frailties in the plaintiff's expert medical evidence. In the end, Voith J. said that the plaintiff succeeded in establishing an MTBI because of conceding evidence the defence expert gave during his cross-examination. The reasonableness of the conduct of a party who declines to accept an offer must be assessed with reference to the evidence and information known to the parties in advance of trial. The evidence given by Dr. Dost in his cross-examination could not have reasonably been anticipated by the defendants in advance of trial.

XIII. Practice

A. Danton v. Stevens, (unreported), June 28, 2017, New Westminster Registry No. M166013, Master Tokarek

The plaintiff was involved in an accident in 2012 and, just three months before her scheduled trial in 2017, applied to adjourn the trial in order to undergo neck surgery, as her physician advised that the surgery would likely relieve her symptoms. The plaintiff had seen a specialist in 2013 but chose not to undergo surgery that time but was later persuaded by her family physician to go back and see the specialist again after an MRI, at which time she accepted the specialist's opinion and elected to have the surgery.

Master Tokarek noted that according to the defence expert, the plaintiff had a longstanding pre-existing condition and it had already been five years since the accident. Master Tokarek held, at paragraph 6, that "… there was nothing to suggest even speculatively or hypothetically that undergoing the surgery would in any way assist the court in determining whether the surgery was necessary as a consequence of the accident". Master Tokarek held that it was not in the best interests of the litigation to adjourn the trial, as that would result in a two-year delay.

B. Ferguson v. Dippenaar, 2018 BCSC 434, Bowden J.

In a medical malpractice decision, plaintiff counsel was aware of other potential doctor defendants but delayed seeking to add them as defendants until after the examinations for discovery and well after the limitation period had expired. At chambers, the plaintiff's application was granted and the defendants appealed the decision. The Judge held that there was clearly an issue between the plaintiff and the proposed defendants that relates to the relief claimed and the subject matter of the

proceedings as the parties sought to be added were involved in the plaintiff's medical treatment. In determining whether it was just and convenient to add the proposed defendants, the court considered factors including: the extent of the delay between the expiry of the limitation period and the date the application is brought; the reasons and explanation for the delay; any prejudice arising from the delay; and the degree of connection between the existing action and the new parties and claims that were being contemplated.

Although the limitation period had expired 39 months previously, Bowden, J. agreed with the master that as the medical evidence and records had not been destroyed the only prejudice to the proposed defendants was the loss of a possible limitation defence.

In dismissing the appeal, Justice Bowden stated, at paragraph 31, that the "potential prejudice to the plaintiff of losing the opportunity to ask a court to consider his claim against the appellants, which is potentially significant, is much greater than the prejudice to the appellants from losing "…a windfall opportunity to avoid the issue altogether. Their respective situations may be precisely balanced in purely financial terms, but not … as a matter of justice. A right to seek justice cannot fairly be equated with a right to cut short the search without an answer", citing *Molodvan v. Republic Western Insurance Company*, 2011 BCCA 418 at para. 35.

C. Jacques v. Muir, 2017 BCCA 344, per Bauman C.J.B.C. (Hunter and Fisher JJ.A. concurring)

This case confirms that the Court of Appeal has no jurisdiction to hear an appeal from an order made by the Supreme Court in respect of an appeal from a small claims action pursuant to s. 13 of the *Small Claims Act*.

D. Mydonick v. ICBC, 2017 BCSC 1897, Master McDiarmid

The defendant Insurance Corporation of British Columbia (ICBC) applied to dismiss the plaintiff's claim for want of prosecution. The action was commenced in 2008 in which the plaintiff alleged that his Hummer was stolen and ICBC denied that a theft occurred. An examination for discovery was conducted of the plaintiff on May 20, 2010 then no further steps were taken until plaintiff counsel filed a notice of intention to proceed on August 1, 2012 and a second notice of intention to proceed on January 29, 2014. At paragraphs 29-30, Master McDiarmid confirms that notices of intention to proceed are not steps in the proceeding, so he found that the last step in the litigation was the examination for discovery in 2010, seven years prior.

Master McDiarmid noted that when the dismissal application first came on three months prior he had granted the plaintiff's request to adjourn the application to provide response materials. The plaintiff conceded that the delay had been inordinate, the draconian remedy of dismissal for want of prosecution should not be granted. The plaintiff deposed that the delay was in part due to him working away from the city where he and his counsel lived and estate issues surrounding the previous death of his father but Master McDiarmid was not satisfied that the brief explanation was sufficient in part because there was other documentation indicating that the estate issues had been concluded in 2011.

Master McDiarmid found that the defendant had established inordinate and inexcusable delay which the plaintiff had not rebutted. He also found that there was prejudice to the defendant arising from failure of a key witness to recall events and loss of relevant documentary evidence that had been destroyed due to the lengthy passage of time. The defendant's application to dismiss the claim with costs was granted.

E. Roberts v. Hamilton, 2018 BCPC 24, Skilnick J.

This case is noteworthy for the remarks from the bench in response to comments from junior counsel from Vancouver made with "increasing frequency" to judges sitting in Abbotsford. Junior counsel from Vancouver had been complaining to the court about having to travel from Vancouver to Abbotsford for court appearances. In answer, Skilnick J. took the opportunity to clarify what he thought might be misconceptions that exist within the City of Vancouver about Abbotsford:

Abbotsford is a city location within the Province of British Columbia, coincidentally the same province that Vancouver is located in. It is not in a foreign country and one may access Abbotsford by motor vehicle without having to clear Customs, ride a ferry or proceed through any sort of checkpoints. No one is asked to present their "papers" when entering this city. Persons visiting Abbotsford from Vancouver do not require a passport or any type of inoculation or shots before coming here. According to Google Maps, the distance from the Vancouver Provincial Court to the Court House in Abbotsford is 67.5 kilometers. While this trip cannot be compared to a leisurely Sunday drive, patient drivers make this trek each day with most of the sanity intact afterward. For many years now Abbotsford has had electricity and indoor plumbing. Its drinking water is not only safe, but has even won international awards. Abbotsford is generous community and often ranks first in the nation in charitable donations per capita. This community has many other virtues that are best left to the local Chamber of Commerce to extol.

In the case at bar, defence counsel had argued that the drive out to Abbotsford supported his client's argument that the claim was an abuse of process and should be struck. Skilnick J. rejected this contention and concluded by reminding parties that Abbotsford is home to a large number of very able and competent lawyers and law firms if they wished to consider the option of retaining local counsel as an alternative.

Admissions

A. Chand v. Southern Railway of British Columbia, 2018 BCCA 41, per Fenlon J.A. (Newbury and Dickson JJ.A. concurring)

This is an appeal of a case that was included in our paper last year for the proposition that a guilty plea to a charge under s. 144 of the *Motor Vehicle Act* does not necessarily constitute proof of negligence.

The trial judge had found that Mr. Chand was not contributorily negligent for a collision between his van and a train at a railway crossing. Mr. Chand had no memory of the accident and had plead guilty to driving without due care and attention under s. 144 of the *Motor Vehicle Act*. The trial judge found that his guilty plea did not prove he breached the requisite standard of care. His lack of memory prevented him from offering a full and robust defence to the charges, the fine was quite minor and with the stakes of the subsequent proceedings, it was not surprising that he chose to enter a guilty plea. Eye witness testimony indicated that he was not speeding or driving erratically before the accident. The railway's appeal was dismissed.

B. Glover v. Leakey, 2018 BCCA 56, per Willcock J.A. (Tysoe and Hunter JJ.A. concurring)

The defendant appealed the order of the trial judge striking out his denial of liability as an abuse of process and declaring a mistrial. The abuse of process finding arose from the late discovery that the defendant had admitted liability in another action involving a different passenger.

The court held that the formal admission in the other action was only effective to bind the defendant in that case, noting that *Rule 7-7(2)* explicitly states that "unless the court otherwise orders, the truth of a fact...in a notice to admit is deemed to be admitted for the purposes of the action only". Formal admissions are only binding for the purposes of the particular case in which they are made and apply only to the trial which is in progress or imminent. The other action settled and did not proceed to trial. In the circumstances, there was no relitigation of the liability issue and the principle upholding the finality of judgements was not undermined. The trial judge was held to have fallen into error in finding that the defendant had abused the process of the court simply by denying his negligence in the action at bar after admitting liability and settling the other action.

The order declaring a mistrial was upheld, however, and the matter remitted to a new trial.

C. Nagra v. Cruz, 2017 BCSC 347, Abrioux J.

Liability was admitted on behalf of the defendants (owner Ludwig and driver Cruz) and a letter was sent from defence counsel to Ludwig with the response to civil claim admitting liability. The letter enclosing the response also indicated that the litigation process was slow, so Ludwig may not hear from counsel for lengthy periods. Two and a half years later defence counsel sent a letter to Ludwig advising that the plaintiff's claim may exceed his policy limits and a subsequent letter was sent advising of the trial date.

Ludwig then called ICBC and advised that he had not provided Cruz with consent to drive his vehicle, despite Cruz testifying at his examination for discovery that he did have his consent. Separate counsel was appointed and at chambers, the master allowed Ludwig to withdraw his admission of liability and to file an amended response to civil claim to reflect his plea of no consent. The defendant owner was out of the country at the time of the accident, was not aware of the accident until after he returned, and found that although the admission was deliberate in the sense that it was made by defence counsel on instruction from ICBC, it was inadvertent or a mistake from Ludwig's perspective. The master found that Ludwig, being an immigrant with limited education, did not appreciate that he might be vicariously liable for Cruz's negligence and that he did not deliberately ignore correspondence from defence counsel. The plaintiff, supported by the defendant driver, appealed the chambers decision.

Abrioux J. held that the master was not clearly wrong. There was a triable issue pertaining to the defendant owner's alleged consent and if the admission was not withdrawn, then he would be vicariously liable for the defendant driver's admitted negligence and may well face personal exposure for an amount well in excess of $1 million third party policy limits. Abrioux J. held that the master reviewed the relevant factors and provided a reasonable basis for her conclusion, particularly taking into account that the response admitting liability was filed without any direct contact between ICBC or its former counsel and Ludwig. The appeal was dismissed.

Breach of Privacy

A. Duncan v. Lessing, 2018 BCCA 9, per Hunter J.A. (Bauman C.J.B.C. and Fisher J.A. concurring)

This is the appeal of the decision reviewed in our paper last year. The claim was for damages under the *Privacy Act* alleging, *inter alia*, that the defendant lawyer violated the plaintiff's privacy when, in the course of bringing a pre-trial application to compel production of records from corporations related to the parties, documents with the appellant's private information attached to an affidavit

were served, by mistake, on another company that had nothing to do with the litigation. The action was dismissed on the grounds that the *Privacy Act* claim was barred by the absolute privilege that attaches to the conduct of civil litigation. The case was notable because the trial judge had commented that good practice required lawyers to consider the privacy of litigants and not unnecessarily reveal private information when serving applications.

The appeal was dismissed.

Browne v. Dunn Rule

A. North America Construction (1993) Ltd. v. Yukon Energy Corporation, 2018 YKCA 6, per MacKenzie, J.A. (Frankel and Fisher JJ.A. concurring)

Yukon Energy Corporation (YEC) contracted with the plaintiff (NAC) to refurbish a generating station in the Yukon. Disputes arose during construction and NAC sued seeking additional compensation for work it performed under the contract. YEC counterclaimed for the costs of remedying deficiencies. The trial judge granted judgment in NAC's favour and allowed YEC's counterclaim but at a lower amount estimated by NAC's witnesses. YEC appealed on various grounds including that the judge had incorrectly involved the rule in *Browne v. Dunn* to its disadvantage. Counsel for NAC made no complaint about any breach of the rule regarding witness testimony or closing submissions but the trial judge raised the rule on his own. The court held, at paragraph 57, that the trial judge erred by invoking the rule in *Browne v. Dunn* when it was not engaged and that the error of law tainted his reasoning on all three of the claims appealed. The court includes, at paragraph 15 to 24, a review of the rule in *Browne v. Dunn* as follows:

> [15] The Supreme Court of Canada summarized the rule in *Browne v. Dunn* in *R. v. Lyttle*, 2004 SCC 5:
>
> > [64] … The rule in *Browne v. Dunn* requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell, at pp. 70-71:
> >
> > […] My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.
> >
> > [65] The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. ...
>
> [16] In *R. v. Quansah*, 2015 ONCA 237 at para. 77, Justice Watt neatly summarized the fairness considerations animating the confrontation principle:

i. Fairness to the witness whose credibility is attacked:

> The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter*, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70-71.

ii. Fairness to the party whose witness is impeached:

> The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

> Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

[17] The purpose of the rule in *Browne v. Dunn* is to protect trial fairness: *R. v. Podolski*, 2018 BCCA 96 at para. 145.

[18] While often referred to as a "rule", its legal application will depend on the circumstances of the case. As the Court in *Quansah* observed at para. 89, "the rule in *Browne v. Dunn* is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss".

[19] The jurisprudence reflects that where trial fairness is unaffected by lack of cross-examination, a cross-examiner's failure to confront a witness will not violate the rule in *Browne v. Dunn*.

[20] This may be the case where it is clear or apparent, on considering all the circumstances, which may include the pleadings and questions put to the witness in examination for discovery, that the witness or opposite party had clear, ample and effective notice of the cross-examiner's position or theory of the case. Therefore, where the other party, the witness, and the court are not caught by surprise because they are aware of the central issues of the litigation, the rule in *Browne v. Dunn* is not engaged: see *Liedtke-Thompson v. Gignac*, 2014 YKCA 2 at paras. 42-43; *R. v. Drydgen*, 2013 BCCA 253 at para. 18; *Trillium Motor World Ltd. v. Cassels Brock& Blackwell LLP*, 2017 ONCA 544 at para. 317; *R. v. Paris* (2000), 150 C.C.C. (3d) 162 (Ont. C.A.) at para. 23; *R. v. Poole*, 2015 BCCA 464 at para. 39.

[21] Where the rule is engaged, a trial judge enjoys broad discretion in determining the appropriate remedy, and "there 'is no fixed consequence' for an infringement of the rule": *Poole* at paras. 43-44.

[22] In *Quansah* at para. 117, the Court listed the following factors that may inform the appropriate remedy:

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;

- the availability of the impugned witness for recall; and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

> [23] A trial judge may diminish the weight of the contradictory evidence: *Drydgen* at para. 26. Other remedies include recalling the witness and, in the jury context, giving a specific instruction to the jury about the failure to comply with the rule as a factor to consider in assessing credibility: *Quansah* at para. 119.
>
> [24] However, as discussed below, it may be impossible to disregard a reference to *Browne v. Dunn* when a trial judge has erred in concluding that the rule was engaged and the trial reasons show the judge gave the rule some significance that worked to the appellant's disadvantage: *Drydgen* at para. 27.

B. R. v. Podolski, 2018 BCCA 96, per Saunders, Smith and Fenlon JJ.A.

The appellants are three of five men convicted by a jury on various counts of murder and manslaughter. The appellants advanced 16 grounds of appeal addressing issues of trial fairness, the admissibility of evidence and the correctness and adequacy of the jury instructions. The appeals were dismissed but the decision has significantly expanded the scope of the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), which, requires a party who intends to impeach a witness to provide the witness with an opportunity to explain the point on which their evidence is to be challenged later in the trial (referred to more generally as "the confrontation principle").

Defence counsel argued that the rule in *Browne v. Dunn* only applies when the defence calls contradictory evidence that was not put to a Crown witness, and because none of the accused led evidence, the rule cannot be engaged. The Court of Appeal held that the rule requires counsel to confront a witness even if the intention is to argue in closing submissions that their evidence should not be accepted. At paragraphs 160 to 161, the Court of Appeal states:

> [160] In *Drydgen* at para. 13, this Court referred with approval to a passage from Sopinka, Lederman, and Bryant's *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) s. 16.180 (now s. 16.199), which states "[t]he rule applies not only to contradictory evidence, <u>but to closing argument as well</u>" (emphasis added). Similarly in S. Casey Hill, David M. Tanovich & Louis P. Strezos, eds., *McWilliams' Canadian Criminal Evidence*, 5th ed., looseleaf (Toronto: Canada Law Book, 2017 release no. 5) vol. 2 at para. 21:30.60.10, the authors describe the confrontation principle this way:
>
> > A party who intends to challenge the credibility of a witness, whether by calling contradictory evidence or simply as part of closing submissions to the fact finder, should generally provide the witness with an opportunity to address or explain the point upon which credibility is attacked. Simply put, the witness should be confronted in cross-examination with any material point on which his or her credibility is to be challenged. A failure to do so may detract from the strength of the party's case or entitle the party who called the witness to a remedy. This, in a nutshell, encapsulates the nature and impact of the so-called rule in *Browne v. Dunn* as it operates today.
> >
> > [Underline emphasis added.]
>
> [161] Two other examples suffice. In *R. McCarroll*, 2008 ONCA 715, the Crown called no evidence to contradict a defence witness, and did not challenge that witness in cross-examination, but in closing argument suggested the jury should not believe the witness. The Ontario Court of Appeal held the rule in

Browne v. Dunn applied. In *R. v. Quansah*, 2015 ONCA 237, leave to appeal ref'd [2016] SCCA No. 203, Justice Watt speaking for the Court stated:

> [79] Failure to cross-examine a witness at all or on a specific issue tends to support an inference that the opposing party accepts the witness's evidence in its entirety or at least on the specific point. Such implied acceptance disentitles the opposing party to challenge it later or, in a closing speech, to invite the jury to disbelieve it: *R. v. Hart* (1932), 23 Cr. App. R. 202 (Ct. Crim. App.), at pp. 206-207; *R. v. Fenlon* (1980), 71 Cr. App. R. 307 (C.A.), at pp. 313-314.
>
> [Emphasis added.]

[162] In summary, on this point, the rule in *Browne v. Dunn* can be engaged when a challenge to a witness' evidence arises in argument.

Fast Track

A. De Jesus v. John Doe, 2017 BCSC 2285, Russell J.

Madam Justice Russell upheld Master Baker's ruling to leave a matter in fast track that was set for seven days.

The plaintiff had commenced two separate actions under fast track in respect of two separate motor vehicle accidents. The actions were to be heard together. The parties agreed the trial would take seven days, in total, and that damages were less than $100,000. The defendant brought an application to have the matters removed from fast track. In upholding the Master's decision, Madam Justice Russell confirmed that the rule is aggregate; the two actions meant the fast track rule provided for six days of trial. Her Ladyship also confirmed Master Baker's reasoning that costs and the time for discovery are also aggregate. There is no limit to the number of cases that can be heard together under the fast track rule. The suitability requires a careful consideration of the facts and the exercise of discretion by the court when considering the workability of hearing more than one fast track case together, taking into account the object of the rules.

Jury

A. Donaldson v. Dorworth, 2017 BCCA 236, per Hunter J.A. (Groberman and Bennett JJ.A. concurring)

The plaintiff appealed a decision of a chambers judge who had refused the plaintiff's application to strike the jury notice. The Court of Appeal denied the appeal noting that the decision to strike a jury notice is discretionary and engages important issues of trial management. The chambers judge considered the appropriate factors and his judgment was entitled to deference.

B. Froese v. Wilson, 2017 BCSC 2042, Smith J.

The plaintiff unsuccessfully applied to dismiss the defendants' jury notice in an action which there were 13 experts for the plaintiff and six for the defence. The case is of interest because of some of the novel arguments advanced by the plaintiff.

The plaintiff argued that the jury notice should be struck because a jury may take a harsher view of the plaintiff's conduct than would a judge in assessing liability. The possibility that a jury verdict

may reflect community attitudes that differ from those of judges is one of the frequent justifications for retaining the jury system. Justice Smith also rejected the plaintiff's argument that, since the outcome of trial may determine the course of the plaintiff's life, subjecting him to the uncertainties inherent in a jury trial is inconsistent with the object of a just determination on the merits set out in *Rule 1-3*.

C. Luckett v. Chahal, 2017 BCSC 1031, Abrioux J.

The plaintiff sought to introduce medical illustrations representing the plaintiff's injuries and the surgical interventions in a jury trial at which the central issue was the causal relationship between the plaintiff's spinal surgeries and injuries sustained in four accidents. The defendants objected to the admissibility.

Mr. Justice Abrioux found that the illustrations constituted expert opinion evidence and were not demonstrative models or aids of anatomy. None of the requirements under *Rule 11-6(1)* had been met including identifying the expert, the facts and assumptions on which the opinion was based, complying with the time requirements for service and properly setting out the documents upon which the opinion was based. The defendants had requested the identity, qualifications, instructions to and file contents of the illustrator and none had been provided. Nor would the illustrator be produced for cross examination.

The plaintiff's expert could not incorporate the illustrations into his opinion at such a late date, without the requirements of *Rule 11-6(1)* being followed.

Further, the illustrations had been drawn to maximize the plaintiff's pain and suffering and to evoke sympathy for the plaintiff and shock the jury. They were not unbiased aids designed to assist the trier of fact to understand relevant anatomy and medical procedure.

The illustrations were excluded.

Litigation Guardian

A. Robinson (Litigation guardian) v. Bud's Bar Inc., 2017 BCSC 1385, Sigurdson J.

The plaintiff, through his mother as litigation guardian, sued two brothers for assault. The claim was dismissed against one of the brothers, who then sought costs from the infant plaintiff rather than from the mother. The defendant had not demonstrated any special circumstances to justify the general rule that it is the litigation guardian who is primarily liable to pay costs. One exception to this rule, which was not applicable to this case, is where the court has ordered that costs be paid against the estate of a party under disability.

Litigation Privilege/Implied Undertaking

A. Branconnier (Re), 2017 BCSC 1896, Voith J. / The Resolution and Collection Corporation v. Nishiyama, 2017 BCSC 2085, Voith J.

Both cases confirm that the implied undertaking of confidentiality applies to evidence and documents obtained at an examination in aid of execution.

Pleadings

A. Rezai v. Uddin, 2017 BCSC 1746, Master Wilson

The plaintiff applied to amend her notice of civil claim to plead similar fact evidence in the form of specific details of the defendant's driving record for speeding and other driving offences.

The application was dismissed. The proposed amendment was either evidence and, therefore, improper to include in the pleading or was intended to suggest the defendant was generally a bad driver and more likely to have caused an accident, in which case was frivolous. Evidence of prior speeding does not lead to an inference that the defendant was speeding at the time of the accident. To allow parties to routinely plead allegations regarding driving records would extensively prolong discovery and may cause trials to be longer, yet it would be seldom that such evidence would be relevant or admissible.

B. Roberts v. Pearson, 2018 BCSC 504, Master Wilson

The defence brought an application to amend their response to civil claim in a personal injury action arising from a motor vehicle accident. The amendment was sought to plead that both the plaintiff and the defendant driver were working within the scope of their employment at the time of the accident. The application was brought approximately four years after the date of the accident, and two years after the response to civil claim had been filed.

Master Wilson noted the low threshold to permit an amendment of pleadings, and that the possible s. 10 defence under the *Workers Compensation Act* had only recently come to the attention of the defence counsel. However, he also accepted the plaintiff's position regarding prejudice to the plaintiff, given that time limits to apply for benefits under the *Workers Compensation Act* had passed. Master Wilson followed *Brzozowski v. Greyhound Canada Trans Corp.,* [1998] B.C.J. No. 2440 and made the order to amend the response to civil claim, conditional upon the defendant's insurer providing an undertaking to pay the plaintiff the equivalent of benefits he would have received under the *Workers Compensation Act* had he applied in time.

Provincial Court (Small Claims)

A. Seeley v. ICBC, 2018 BCPC 59, Frame Prov. J.

This case is an example of when a small claims judge will expand the application of *Rule 16* beyond the specific matters set out in *Rule 16(6)* to grant a production/disclosure order before the trial but not at the settlement conference.

The action was for $25,000 for the damage sustained by her vehicle in a single car accident. When the plaintiff reported the accident to ICBC, she gave two different versions of how the accident happened. The version she was standing by was that she was texting at the time of the accident. ICBC's theory was that she was impaired and so they denied coverage. ICBC brought a pre-trial application, *inter alia*, against Telus for her cell phone records and for an order that she be required to answer questions about her weight and meals on the day of the accident. The information was required to instruct a blood analyst expert.

The plaintiff opposed the application saying that the defendant was attempting to conduct an examination for discovery or to serve interrogatories, thus expanding the complexity of the small claims proceedings beyond that contemplated by the *Small Claims Act*.

The judge allowed the application because to do otherwise would result in an adjournment part-way through the trial since there was no way to elicit the information other than to cross-examine the plaintiff at trial. Once the questions were asked at trial, an adjournment would be required in order for the expert to consider the evidence. That process would not be just, speedy, inexpensive or simple.

Reasons for Judgment

A. MacGougan v. Barraclough, 2017 BCCA 321, per Savage J.A. (in Chambers)

The applicant sought to have reasons for judgment removed or portions redacted from the court website because, he alleged, they were inaccurate and damaging to his reputation. The application was dismissed. Amending or redacting reasons would offend the principle of finality and there was no basis upon which the court could justify departing from the open court principle. The time to make such an application is before the order disposing of the appeal was entered.

Short Notice

A. O'Callaghan v. Hengsbach, 2017 BCSC 2182, Master Baker

Master Baker denied an application by the defendant for short leave to bring an application to compel the plaintiff to attend a psychiatric IME after the 84 day deadline for expert reports had passed. Master Baker was critical about how often short leave applications were being brought in motor vehicle claims and made the following comments:

> [17] Such applications should be restricted to emergent circumstances and should not reward inefficiency, inattention to a particular case, or a lack of oversight. To abridge the time limits imposed by the *Supreme Court Civil Rules* is, presumably, to prejudice the other party who is, naturally, entitled to rely on timelines imposed by the *Rules* and to expect the opposing party to do likewise.
>
> [18] In the absence of guiding authorities, I suggest the following considerations, non-exclusive, should guide the parties and the court in considering short leave applications:
>
> a) The application, of course, is to be made by Requisition, usually without affidavits, and may be made before a Registrar, Master, or Judge.
>
> b) While undue formality in the application is discouraged, the application should be made in court, on the record (even if by video or telephone) and not online as an e-filed application.
>
> c) Applicant's counsel should notify the opposing counsel or party of an intention to apply for short leave so that counsel can appear. At the very least applicant's counsel should canvass with his or her friend their availability on the proposed chambers date and whether he or she is opposed to the short leave.
>
> d) The applicant should be prepared to give a full accounting of the facts, circumstances, context, and chronology leading to the application for short leave, all of which should

> establish that the applicant has been affected or surprised by events or developments not reasonably foreseeable.
>
> e) If opposing counsel is not present should, as in the case of without notice applications, be prepared to give both favourable and unfavourable details.
>
> f) If any important or pivotal fact or element is disputed by opposing counsel the applicant should be prepared to offer affidavit evidence on the point and, as always, counsel should not speak to his or her own affidavit if the matter is contested.
>
> g) Busy schedules for the applicant counsel will usually not be sufficient reason for short leave; in that case counsel should arrange for a colleague or agent to speak to the chambers application on the usual notice required by the rules.
>
> [19] Ultimately, taking these points into consideration, the court will balance the prejudice both to the other party by potentially disrupting their schedules and trial preparations as well as service to other clients and to the applicant by virtue of reasonably unforeseen facts, circumstances, or developments that have inhibited the applicant's preparation in the normal chronology that the rules contemplate and mandate.

The application was denied because this was not a case that justified any surprise to the defence; there were multiple indications that the plaintiff was advancing a claim for psychiatric injuries and that the alleged damages were significant and long lasting.

Summary Trial

A. Brissette v. Cactus Club Cabaret Ltd., 2017 BCCA 200, per Tysoe J.A. (Bauman C.J.B.C. and Savage J.A. concurring)

In a defamation action, the Court of Appeal again confirmed the broad scope of summary trials under *Rule 9-7* and made the following comments about proportionality:

> [26] The two prerequisites under the previous Rule 18A continue under the current Rule 9-7. The court must be able to find the facts necessary to decide the issues of fact or law and the court must be of the opinion that it would not be unjust to decide the issues. Proportionality will primarily be of importance in considering the factors relevant to the issue of whether it would be unjust to decide the matter on a summary trial application, but there may be occasions when proportionality is relevant to the issue of whether the court is able to find the facts necessary to decide the issues of fact or law (for example, the court could in an appropriate case order cross-examination on key affidavits under Rule 9-7(12) rather than dismissing the summary trial application on the basis that a conventional trial is needed).

B. Salo v. ICBC, 2017 BCSC 1418, MacKenzie J.

The plaintiff suffered significant injuries in an accident when he was riding his bike and rendered unconscious. He had no recollection of the accident. He commenced an action under the unidentified driver provisions of the *Insurance (Vehicle) Act*. A witness had seen the bike and the Plaintiff "mid-air", but could not say that the plaintiff had been involved in a collision although he was near an SUV that was turning right. The SUV drove off normally.

The parties both sought a resolution of liability by way of summary trail and the court noted that even where experienced counsel agree on severance, the court must make its own determination and that severance should only be allowed in "rare cases". Justice MacKenzie determined that it was appropriate because the plaintiff had no memory of the incident and so his credibility of the event was not in issue and, most significantly, if the court did not find the SUV driver was negligent, it would obviate the need for the entire additional conventional trial.

The plaintiff was not able to demonstrate, on the balance of probabilities, fault on the part of the unidentified driver; the onus remained on the plaintiff even when the defendant brings the summary trial application. Where the evidence is circumstantial, inferences of negligence cannot be drawn unless there are positive proven facts from which such inferences can be made. Here both counsel suggested possible scenarios, but in the absence of evidence about the movement of the SUV prior to the collision, it would be pure speculation to infer negligence. The claim was dismissed.

XIV. Workplace Harassment

A. British Columbia Human Rights Tribunal v. Schrenk, 2017 SCC 62, per Rowe J. (Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring), (concurring reasons Abella J.), (dissenting reasons McLachlin C. J. (Cote and Brown JJ. concurring))

The Supreme Court of Canada upheld the BC Human Rights Tribunal's jurisdiction over complaints arising from conduct of co-workers or colleagues with different employers. The key issue is the determination of whether there is a sufficient nexus with the complainant's employment context. Factors informing this analysis include, but are not limited to: (1) whether the respondent was integral to the complainant's workplace; (2) whether the impugned conduct occurred in the complainant's workplace and (3) whether the complainant's work performance or work environment was negatively affected.

In her dissent, McLachlin C.J. held that the workplace discrimination prohibition in the *Human Rights Code* applies only to employer-employee or similar relationships. Complaints falling outside of these parameters which amount to private acts of discrimination between individuals in a general sense are not covered by the *Code.*

XV. Legislation

A. Amendments in Bill 20 - 2018 Insurance (Vehicle) Amendment Act, 2018 and Bill 22 - 2018 Civil Resolution Tribunal Amendment Act, 2018 received Royal Assent on May 17, 2018.

Highlights of Bill 20 - 2018 *Insurance (Vehicle) Amendment Act, 2018* include:

- Bill 20 s. 31 transitional provisions which make amendments to sections 83, 84 and 94(1)(d) applicable to accidents occurring after May 17, 2018.

- Bill 20 s. 26 (d) adds s. (83)(5.1) regarding deductibility: In estimating, under subsection (5), an amount of benefits that has not been ascertained, the court may not consider the likelihood that the benefits will be paid or provided.

- Bill 20 s. 32 - transition provisions which make amendments made by regulation to limit the corporation's liability for benefits retroactive to accidents occurring on or after January 1, 2018. (The anticipated increase in Accident Benefits from $150,000 to $300,000).
- factors upon which premiums may be based (Bill 20 s. 10 amending s. 34);
- changes effective April 1, 2019 including:
    - limiting claims for health care losses and mandating that the value of the deferred health case loss be made on the date of the estimate (Bill 20 s. 25 adding s. 82.2).
    - Part 7 Minor Injuries (Bill 20 s. 29 adding definitions and interpretation rules for Part 7). The amendments provide that the amount that can be recovered as damages for non-pecuniary loss must be calculated or determined in accordance with the regulations and requires the amount to be reduced in proportion to a claimant's contributory negligence, if any. The amendments authorize the Lieutenant Governor in Council to make regulations for the purposes of Part 7, added to the *Act* by Bill 20.

- "minor injury" is defined as:

(a) a physical or mental injury, whether or not chronic, that does not result in a serious impairment or a permanent serious disfigurement; and

(b) is one of the following

(i) an abrasion, a contusion, a laceration, a sprain or a strain;

(ii) a pain syndrome;

(iii) a psychological or psychiatric condition;

(iv) a prescribed injury or an injury in a prescribed type or class of injury.

- "serious impairment" and "permanent serious disfigurement" are defined terms (s. 101)

- s. 101(2) deems injuries as "minor injuries" if a claimant fails to seeks a diagnosis or comply with treatment without reasonable excuse. Section 101(3) establishes a reverse onus on the claimant to show that a serious impairment or permanent serious disfigurement would have occurred even if a diagnosis had been sought or treatment complied with.

- s. 103 limits the amount recoverable for non pecuniary damages for a minor injury, to be set by regulation.

Highlights of Bill 22 - 2018 *Civil Resolution Tribunal Amendment Act, 2018* include:

- Addition of jurisdiction to adjudicate motor vehicle claims for which it now has "exclusive jurisdiction" (Bill 22 ss. 2 & 4 adding ss. 1(1)(b) and 2.1).
- Defining the standard of judicial review for matters of which the tribunal is considered to have "specialized expertise" (Bill 22 s. 25 adding Part 5.1; and Bill 22 s. 32 adding Part 10, including s. 116 which states that a decision made in a claim in respect of which the tribunal has specialized expertise is "final").
- Bill 22 s. 32 Adding Part 10 which includes the addition of Division 7 Accident Claims, giving the CRT jurisdiction over (s. 133(1)):
    (a) the determination of entitlement to benefits paid or payable under the *Insurance (Vehicle) Act;*

(b) the determination of whether an injury is a minor injury for the purposes of the *Insurance (Vehicle) Act;*

(c) liability and damages, if the amount, excluding interest and any expenses referred to under section 49 [order for payment of expenses] is less than or equal to the tribunal limit.

- Division 7 s. 133(2) states that the CRT has exclusive jurisdiction in respect of (a) and (b) above and that is considered to have specialized expertise in respect of claims described in (c).

B. Administrative Notice 14 (AN-14) Cover Page Requirements

This administrative notice sets out new requirements for cover pages for all briefs, records or written submissions filed in the Registry. The external cover page must set out:

(a) the style of proceedings, court file number, and registry;

(b) a brief description of the nature of the material, for example "Rule 7-1(13) Application for Production of Documents" or "Written Submissions of the Plaintiff";

(c) contact information for counsel or the parties, including addresses for delivery, telephone numbers, and fax numbers or email addresses, which may be used by the registry for contact purposes (such as scheduling issues);

(d) the time, date and place of the hearing to which the material relates;

(e) the name of the party or counsel filing or providing the material;

(f) where the material is provided for a hearing, the time estimate for the hearing;

(g) for written submissions that have been requested or directed by a judge following a hearing, the name of the judge presiding at the hearing.

C. Policy on Use of Electronic Devices in Courtrooms Effective Date: September 17, 2012 (amended March 2, 2018)

Prohibitions on the Use of Electronic Devices

(2) Except as permitted under this policy, the use of electronic devices in courtrooms to transmit and receive text is prohibited.

(3) In addition, an electronic device may not be used in a courtroom:

(a) in a manner that interferes with the court sound system or other technology;

(b) in a manner that interferes with courtroom decorum, is inconsistent with the court functions, or otherwise impedes the administration of justice;

(c) in a manner that generates sound or requires speaking into the device;

(d) to take photographs or record video images except as permitted in this policy;

(e) to audio record or digitally transcribe the proceedings except as permitted by this policy.

Permitted Use of Electronic Devices in the Court of Appeal

(4) In a courtroom of the Court of Appeal, any person may use an electronic device to transmit or receive text in a discreet manner that does not interfere with the proceedings.

Permitted Use of Electronic Devices in the Supreme Court and the Provincial Court

(5) In courtrooms of the Supreme Court and of the Provincial Court

(a) accredited media; and

(b) lawyers who are members of the Law Society of British Columbia, may use electronic devices to transmit and receive text in a discreet manner that does not interfere with the proceedings.

Permitted Audio Recording by Accredited Media in All Courts

(6) In courtrooms of the Court of Appeal, the Supreme Court and the Provincial Court, accredited media may use electronic devices to audio record a proceeding for the sole purpose of verifying their notes and for no other purpose subject to the following restrictions:

(a) electronic recording devices may only be used when a proceeding is in session;

(b) electronic recording devices must be turned off when a proceeding is adjourned;

(c) electronic recording devices must not be left unattended in the courtroom at any time; and

(d) any audio recording must be destroyed once verification of notes is complete.

Permitted Use of Electronic Devices During Ceremonies Held at the Court of Appeal, Supreme Court and Provincial Court

(8) During ceremonies, family members and friends may take photographs or record video images and/or audio for their personal use, provided they do so in a way that does not interfere with others' enjoyment of the ceremony and is consistent with upholding the dignity and decorum of the Court. Such photographs, video images, and audio recordings may not be posted on social media, nor used for publication or broadcast.

(9) Accredited media wishing to take photographs or record video images and/or audio during ceremonies to publish or broadcast immediately or at a later date must apply to the Chief Justice or Chief Judge of the respective court for authorization to do so.

(10) The use of large cameras or other equipment that would obstruct lines of sight for members of the public is not permitted. Page 3 of 3 Discretion of Judicial Officers

(11) Nothing in this policy affects the authority of the presiding judicial officer(s) to determine what, if any, use can be made of electronic devices in a courtroom. Publication Bans, Sealing Orders, Restrictions on Publication

(12) Nothing in this policy alters the effect of a publication ban, sealing order or other restriction imposed by statute or the court, limiting the publication of information.

(13) Anyone using an electronic device to transmit information from a courtroom has the responsibility to identify and comply with any publication bans, sealing orders, or other restrictions that have been imposed either by statute or by court order.

Penalties

(14) A person using an electronic device in a manner prohibited by this policy may be subject to one or more of the following sanctions:

(a) a direction to turn off the electronic device;

(b) a direction to leave the courtroom;

(c) |a direction to forfeit the media accreditation card to the sheriff;

(d) citation, and prosecution for contempt of court;

(e) prosecution for any violation of a publication ban, sealing order, or other restriction on publication;

(f) a direction to remove photographs, video images, or audio recordings from social media; or

(g) any other direction or order of the court.