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PERSONAL INJURY CONFERENCE—2010
PAPER 1.1

Update on Case Law and Legislation

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UPDATE ON CASE LAW AND LEGISLATION

I. Introduction

The case law briefs included in this paper were assembled from motor vehicle and related cases decided since the last CLE Personal Injury Conference held June 2009. The full text of most of the cases can be found on the BC Superior Court website at www.gov.bc.ca.

II. Appellate Review: Assessment of Credibility— Palpable and Overriding Errors

A. Mariano v. Campbell, 2010 BCCA 410, per Groberman JA (Lowry and Tysoe JJA concurring)

The defendant appealed a trial judge's award of damages in a motor vehicle action on the ground that the judge had made palpable and overriding errors in assessing the plaintiff's credibility.

The plaintiff was injured in a minor impact motor vehicle accident. The defendant's position at trial was that the plaintiff recovered within one month. The plaintiff's position was that she continued to have pain three years after the accident and that her injuries forced her to retrain in order to accommodate her continuing pain. The credibility of the plaintiff was a significant issue.

The trial judge found the plaintiff to be a "very credible witness." She concluded that the plaintiff's continuing pain was caused by the accident and that her decision to retrain was a result of her accident-related difficulties.

The plaintiff was cross-examined on a mortgage insurance application in which she had stated that the duration of her "neck pain due to car accident" was "1 month off from work." Approximately a year after the accident her doctor wrote a note to the insurer confirming that she had recovered from her injuries sustained in the accident and had no complications or sequelae of this accident. The trial judge intervened to bring to an end defence counsel's cross-examination of the plaintiff on the insurance application and the doctor's note. She failed to mention in her reasons the plaintiff's application to a college in which she answered in the negative questions about whether she had or continued to have various conditions that would affect her ability to work as a Licensed Practical Nurse. Her doctor completed a form confirming that the plaintiff was free from back problems and that she was capable of performing the work of an LPN.

The trial judge failed to appreciate that these prior statements by the plaintiff were admissible for the truth of their contents. The trial judge assumed that the statements were false, but did not adversely affect the plaintiff's credibility because she was forced by the defendant's negligence to lie in order to obtain insurance without exclusions.

The trial judge stated that neither of the plaintiff's expert witnesses was seriously challenged on cross-examination. This statement was not supported by the trial transcript, which disclosed serious challenges to the testimony of both doctors.

The Court of Appeal concluded that the trial judge did not deal with important contradictions in the evidence, and appeared to have misapprehended or ignored parts of the cross-examinations of the plaintiff's witnesses. The reasons for judgment, when compared to the trial transcript, did not suggest that the trial judge "seized the substance of the critical issues" as she was required to do by the Supreme Court of Canada decision of *R. v. R.E.M.*, 2008 SCC 51 when assessing a party's credibility. This was the kind of error that compelled the Court of Appeal to set aside the judge's order and to order a new trial.

III. Causation

A. B.P.B v. M.M.B., 2009 BCCA 365, per Chiasson JA (Smith JA concurring in part and Mackenzie JA dissenting)

In issue on this appeal was whether the trial judge had erred in apportioning damages among several consecutive tortfeasors whose actions combined to cause severe psychological injury to the plaintiff.

The plaintiff had been subjected to physical and emotional abuse by her father as a young child. At the age of 10, she was sexually abused by her uncle. She brought action against her uncle and settled for the sum of $30,000. She brought action against her father in tort and for breach of fiduciary duty. The trial judge concluded that while the sexual abuse caused significant psychological damage, without the devastating, prolonged physical and emotional abuse inflicted by her father, the sexual abuse would not have caused the plaintiff to be as psychologically impaired as she now was. She applied *Blackwater v. Plint*, 2005 SCC 58 to apportion 65% of the plaintiff's non-pecuniary damages and 85% of her pecuniary damages against the father.

Chiasson JA, with whom Smith JA concurred in separate reasons, concluded that the trial judge had misapplied the law relating to causation and multiple tortfeasors as established by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458 and *Blackwater*. He stated that in cases such as this where there are multiple causes of a plaintiff's injury, the core question is whether the injury is divisible. If it is, a plaintiff can recover from a defendant only damages attributable to the injury caused by the defendant. If the injury is indivisible, a plaintiff can recover 100% from the defendant of the damages attributable to the injury which is caused or contributed to by the defendant, subject to considerations of placing the plaintiff in her original position.

The trial judge failed to determine whether the plaintiff's injury was divisible or indivisible. Moreover, she misapplied *Blackwater*, which was a case where the plaintiff's original position had already been compromised by other causes when he was subjected to sexual and physical abuse by multiple tortfeasors. The Supreme Court of Canada concluded in *Blackwater* that the defendants were responsible for the indivisible injuries caused by them and subsequent tortfeasors, but that they were only required to return the plaintiff to his original position. In the case at bar, the plaintiff's original position was uncompromised before she was abused by her father. The trial judge ought to have made a finding that the father's abuse and the uncle's abuse caused an indivisible injury for which the father was 100% liable. Such a finding was available to her on the evidence. Chiasson JA reluctantly concurred with the conclusion by Smith JA in his concurring reasons that the amount of damages should be reduced by the $30,000 in damages the plaintiff had received from her uncle.

Mackenzie JA, in dissent, stated that he regarded the reasons in *Athey* as "a summary explanation of the principles of causation applicable to the relationship between tortious and non-tortious causes in an effort to clarify those principles and eliminate unnecessary confusion." He did not understand *Athey* as intending to disturb existing principles of causation and assessment of damages between separate non-concurrent torts, and in particular the approach to apportionment illustrated by *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C.C.A.). *Athey* approved "crumbling skull" cases which frequently combine the symptoms of an "original" symptomatic condition with injury caused by a tort to produce the entangled (one could say indivisible) condition that both *Athey* and *Blackwater* said must be apportioned. He pointed out that it was illogical to require apportionment between a symptomatic condition which is non-tortious and a tortious aggravation of that condition, if there is no apportionment if the original symptomatic condition involves a tortious cause. There is no reason why the subsequent tortfeasor's liability should be greater when the original condition was tortious than when it was non-tortious.

B. Bradley v. Groves, 2010 BCCA 361, per Huddart, Levine and Garson JJA

The majority reasons in *B.P.B v. M.M.B.* were further entrenched in this decision where the court, writing joint reasons, confirmed that indivisible injuries, whether occasioned by a combination of non-tortious and tortious causes or solely by tortious causes, result in joint liability for tortfeasors. The Court also confirmed that the approach to apportionment in *Long v. Thiessen* is no longer applicable to indivisible injuries and that *Long v. Thiessen* was necessarily overruled by the Supreme Court of Canada in *Athey*, *Blackwater* and other decisions.

The Court acknowledged that this represents an extension of pecuniary liability for consecutive or concurrent tortfeasors who contribute to an indivisible injury. However, the Supreme Court of Canada could not have been unmindful of this consequence. Moreover, apportionment legislation, such as the *Negligence Act* in BC, can potentially remedy injustice to defendants by letting them claim contribution and indemnity as against one another.

IV. Costs

A. Heppner v. Zia, 2009 BCSC 369, Cohen J.

The plaintiff was awarded $91,500 in damages reduced by 50% to reflect her apportionment of liability. The main issue at trial, in addition to liability, was whether the accident caused the plaintiff's herniated disc resulting in a permanent disability from her employment as a nurse's aide. The Court found that the plaintiff suffered soft injuries as a result of the accident and that she failed to prove causation with respect to her herniated disc and permanent disability. The Court awarded her no damages for her claims for loss of earning capacity and cost of future care.

At issue on this costs application were: (1) whether the court should assess costs under Rule 57(15) based on the fact that the defendants were wholly successful on the discrete causation issue; and (2) whether the court should exercise its discretion to depart from the normal costs apportionment set out in s. 3(1) of the *Negligence Act*.

Cohen J. agreed with the defendants that the issue of causation was a discrete issue upon which the plaintiff did not succeed and that she should be deprived of her costs relating to that issue. He disagreed with the defendant's assessment that the issue comprised five days of the 20 day trial, however, and directed the parties to agree on an estimate, failing which they may provide the court with written submissions.

With respect to the *Negligence Act* issue, Cohen J. could find no reason to depart from the usual Rule that the plaintiff's costs be reduced in proportion to her liability. Her award was substantially less than the amount of $349,000 she offered prior to trial and somewhat closer to the defendants' offer of $20,000. In addition, she did not achieve substantial success at trial that would be effectively defeated if costs were awarded pursuant to s. 3(1) of the *Negligence Act*. She was awarded 50 % of her costs.

B. Henri v. Seo, 2009 BCSC 845, Boyd J.

Boyd J. refused to depart from the fixed costs set out in Rule 66(29) where the trial lasted two days, but written submissions were required to avoid a third day of trial. She was not persuaded that the mere filing of written submissions amounted to special circumstances justifying extra costs.

She also refused to order special costs against the defendant on the basis that she and her insurer relied on the expert report of an orthopedic surgeon whose evidence had either been rejected or not relied upon in a number of previous cases. She questioned whether special costs were even available in Rule 66 actions, and then concluded:

> [10] ... How ICBC goes about defending motor vehicle actions, including which experts it retains and relies upon, is not a matter to be addressed in costs in an action between the plaintiff and the defendant here.

C. Mohamadi v. Tremblay, 2009 BCSC 1583, Truscott J.

In this decision, Truscott J. places the onus squarely on plaintiffs' counsel to investigate their clients' allegations of injury and loss prior to choosing the appropriate forum to start their clients' actions.

The plaintiff was awarded $10,000 in non-pecuniary damages and $490 in special damages. In issue on this application was whether the plaintiff showed sufficient reason for bringing his action in Supreme Court such as to entitle him to his costs of the action.

Truscott J., on the basis of two decisions upon which defence counsel relied, *Bagasbas v. Atwal*, 2009 BCSC 793 and *Akitt v. McColl*, 2002 BCSC 1086, concluded that "the onus to prove that at the beginning of the claim there is sufficient reason for bringing the proceeding in Supreme Court, as Rule 57(10) states, lies in practice to some great extent on plaintiff's counsel who is advising the plaintiff on the value of his claim and commencing the action."

In this case, plaintiff's counsel filed the writ and statement of claim ten months after the date of loss and prior to obtaining a medical report or his client's physician's pre- and post-accident clinical records. By the time a medical report was obtained, approximately two months later, it was clear that the doctor's opinion was that the plaintiff had recovered from his injuries.

The plaintiff had given a statement to ICBC about his monthly earnings that conflicted with his evidence at trial, which itself was unsupported by any documentary evidence or oral testimony. He alleged as well that as a result of the accidents, he suffered headaches, sexual dysfunction, a drop foot condition, blurry vision, memory and concentration problems and dizziness and blackouts, none of which were supported by the medical evidence at trial.

Truscott J. states:

> [60] Here, I am satisfied that if Dr. Fox's medical records pre-accident had been obtained and if his opinions and the opinions of Dr. Cameron had been obtained before the writ of summons was issued, with the plaintiff's credibility at issue with respect to the injuries he was alleging that were not supported by his doctors, with his false statement to ICBC, and with the contrary evidence of his employer, it could and should easily have been determined that the action should be commenced in Small Claims Court and not this Court.

D. Devji v. Nash, Vancouver Registry No. M072239, August 21, 2009, Dardi J.

The jury awarded the plaintiff $2,000 for non-pecuniary damages. The plaintiff brought an application under Rule 57(10) for an order for costs of the action. The defendant argued that the plaintiff did not have sufficient reason to bring the action in Supreme Court and was entitled therefore to disbursements only.

Dardi J. considered the following factors:

- This was not a complex case and there was no procedural advantage in choosing the Supreme Court over the Provincial Court: liability had been admitted in the Statement of Defence; there was no evidence that the plaintiff required documentary discovery; the plaintiff did not discover the defendant, file a notice requiring trial by jury or seek a Rule 18A disposition.
- The accident was minor.
- There was no medical opinion available at the time the action was started.

- The medical opinion that was subsequently obtained supported a Grade II soft tissue injury with no indication of income loss or loss of income earning disability.
- There were no medical records after approximately a year after the accident regarding the injuries.
- There was no opinion tendered at trial from the doctor/chiropractor to whom the plaintiff was referred for treatment by her general practitioner.

Dardi J. found that the plaintiff had not discharged the burden imposed upon her by Rule 57(10) to show sufficient reason for bringing her action in Supreme Court.

E. Erikson v. Asmussen, 2009 BCSC 951, Pearlman J.

A jury apportioned liability 23% against the plaintiff and 77% against the defendant. On this costs application, the plaintiff sought 100% of his costs on the basis that he was forced to trial, put to the expense of a jury trial at the election of the defendant and his modest financial resources were pitted against those of ICBC. Further, ICBC's general litigation policy should be a factor to take into account.

Pearlman J. could find no unusual features in this case that would warrant a departure from s. 3(1) of the *Negligence Act*, which provides for a costs apportionment in relation to the respective liability of the parties. Although the defendant required the jury trial, the trial was conducted efficiently and the positions taken by defence counsel at trial were not unreasonable. The relative financial circumstances of the parties are not a factor to consider in the exercise of the court's discretion to depart from the general rule. There was no appropriate evidentiary record of ICBC's litigation policies, even if it were open to the court to consider such a factor under s. 3(1).

F. Nazmedeh v. Spraggs, 2010 BCCA 131, per Finch CJBC (Hall, Low, Lowry and Kirkpatrick JJA, concurring)

In issue on this appeal before a five member panel were:

1. What standard of conduct must be shown before the court may exercise its discretion under Rule 57(37) to order a lawyer personally to pay party and party costs.
2. Whether there was a satisfactory evidentiary basis for holding that the lawyer was responsible for the absence of a response to interrogatories and for the inadequate response to the demand for particulars.

The chambers judge below ordered the plaintiff to respond to interrogatories and to a demand for particulars and ordered her counsel to pay costs of the applications to the defendants personally on the basis that he had, under Rule 57(37), "caused costs to be wasted through delay, neglect or some other fault."

Plaintiff's counsel appealed the costs order on the ground that Rule 57(37) requires a finding that counsel's conduct was reprehensible before making such an order, relying on the Court of Appeal decision of *Kent v. Waldock*, 2000 BCCA 357. Counsel for the Law Society supported the appellant's position on the standard of conduct required for an order for costs against a lawyer personally and advanced a number of policy-based submissions for maintaining such a standard.

The Court dismissed the appeal. It examined the plain meaning of Rule 57(37) and the inherent jurisdiction of the courts to make orders for costs against solicitors. It concluded that on its plain meaning, and in accordance with its purpose and scheme, Rule 57(37) does not require proof of "reprehensible conduct" before the court may order a lawyer to indemnify his client or to pay personally costs wasted by his conduct. Finch CJBC stated that prior to the enactment of the Rules, the court had power to make orders against lawyers to pay costs personally under the court's inherent jurisdiction. Such orders were generally made only in cases of serious misconduct. The Rules,

particularly Rule 57(37) and its predecessor, have expanded the scope of conduct which might support costs orders against lawyers and in effect have lowered the threshold to include conduct that does not amount to serious misconduct.

The Court of Appeal decision of *Kent*, which required a finding of "reprehensible conduct" applies only in cases of orders against lawyers for special costs. It is not authority for requiring such a standard when making an order for party and party costs against a lawyer.

The policy concerns raised by the Law Society that interpreting Rule 57(37) so as to lower the standard of conduct would increase the risk of a conflict between the lawyer's duty to his client and his duties to the court and could spawn "satellite" litigation were allayed by the Court when it stated that the discretion to order costs against lawyers should be exercised with restraint and is to be used sparingly and only in rare or exceptional cases.

The Court also concluded that the chambers judge, by ordering the lawyer to pay costs personally with respect to only two of the five applications before her, was exercising her discretion with restraint and only with respect to the orders for particulars and interrogatories where the evidence on the record was sufficient for her to do so.

G. Narvaez v. Zhang, 2010 BCSC 78, Romilly J.

The assessment of the plaintiff's bill of costs occurred before a registrar over a three day period following settlement of the plaintiff's action. The plaintiff's case involved a premise that she intended to qualify as a nurse in Canada and emigrate to the US to join other family members from the Philippines. She suffered a significant brain injury in the accident.

The defendant took issue before the registrar with "duplicate" opinions obtained by the plaintiff from physiatrists, cost of care specialists, occupational therapists and others in both Canada and the US, and asserted that the specific charges by the various experts were grossly excessive even where there had not been duplication.

The registrar concluded that his role in assessing costs was limited to ascertaining that there was a "sufficient basis to incur the cost of a disbursement relating to a certain claim" and not to decide whether the claim would have been successful at trial. The plaintiff sought review of the registrar's decision on the basis that some disbursements were improperly reduced or disallowed.

In his reasons, Romilly J. addresses how disbursements should be dealt with on an assessment:

A reasonable amount is permissible if the disbursement is necessarily and properly incurred at the time the decision was made to incur it, with the onus of proof resting on the party presenting the bill for review.

"Reasonable restraint" must be exercised when engaging experts.

He also sets out the scope of review by judge of a registrar's decision: it is not a hearing *de novo*, no new evidence may be received, and a judge should not override a registrar except on a matter of principle. Various expenses reduced by the registrar were canvassed (including an MRI expense, which was denied because it was merely part of the standard practice of plaintiff's counsel to request one).

The plaintiff was unsuccessful on the application for review.

H. Hamo v. Khan, 2010 BCSC 205, Registrar Blok

Registrar Blok concluded that the cost of two reports from a medical expert with dual specialties was unreasonable and reduced the cost of the reports from a total of $69,543.75 to a total of $27,800.

Approximately six months after the accident, the plaintiff suffered "collapsing spells" that resembled epileptic seizures. Her treating neurologist concluded that her spells were not epileptic in nature, but rather "pseudo seizures." Her counsel retained Dr. Hurwitz, who has a unique dual specialty as a psychiatrist and a neurologist. He concluded that the plaintiff's spells were due to psychogenic epilepsy. He testified that he was uniquely qualified, because of his two specialties, not only to diagnose the plaintiff's condition as a neurologist, but also to provide an opinion, as a psychiatrist, to explain why such episodes occurred. Therefore, it would have been necessary to engage two specialists to undertake the same investigations he performed.

In reducing the cost of the two reports, Registrar Blok considered the following:

The amount of time spent by the expert in summarizing collateral medical information in each report (approximately 83 hours in total) was vastly excessive, given that a fair amount of the pertinent history had been summarized elsewhere.

The preparation of the first report took place over a period of approximately 11 months, resulting in the necessity to spend further time to review earlier notes.

Dr. Hurwitz's hourly rate of $500 exceeded the rates of other experts retained by the plaintiff and the defendant. While his dual specialty meant that he could probably charge more than other experts, his rate was 33% higher than that of Dr. Davis, a psychiatrist with a postgraduate specialty in both disciplines.

When Dr. Hurwitz was retained, the plaintiff had already commissioned reports from a neurologist and two psychiatrists whose reports cost $3,850 or less. Therefore plaintiff's counsel's argument that it was necessary to retain one expert with two specialties to avoid the wasteful alternative of hiring two experts fell "rather abruptly."

I. Farrokhamanesh v. Sahib, 2010 BCSC 497, District Registrar Sainty

In issue at this assessment, among other issues, were two MRI's (at a cost of $975 each plus interest) and the expert reports of a psychiatrist and a psychologist.

Defence counsel argued that the MRI's were "extravagant" and ordered as a result of "excessive caution or zeal," relying on two decisions of Registrar Blok: *Phelan v. Newcombe*, 2007 BCSC 714 and *Ward v. W.S. Leasing Ltd. et al.*, 2007 CarswellBC 1396. In disallowing the MRI's, District Registrar Sainty stated the following:

> [44] I am going to disallow the claim for reimbursement for the two MRI scans. I cannot accede to Mr. Fahey's argument that simply because he, as counsel, thought it was necessary to obtain MRI scans I ought not to question that decision unless I find it to be extravagant or overly zealous. In my view, and I am going to expand on what Registrar Blok held in *Ward v. W.S. Leasing Ltd.*, to be allowed as a necessary and proper disbursement, there must be some medical reason for ordering an MRI. It is not simply enough that counsel seeks some (potential) objective evidence of an injury. Nor is it enough that counsel wishes to ensure that there is no latent injury such that his client might sign the standard release required. There is always a risk in personal injury litigation that a new injury or an injury that has not yet been determined might be found following settlement. That is simply a risk of litigation and a risk of settlement.
>
> She also disallowed the report from the psychologist on the basis that it was not necessary to hire both a psychiatrist and a psychologist given that "their expertise clearly overlaps and each used similar methodology in assessing the plaintiff."

District Registrar Sainty confirmed as well that under Item 8, process for giving discovery and inspection of documents, the reference to units awarded for numbers of documents disclosed relates to the number of documents actually listed. It does not relate to the number of pages that make up the various documents listed on the list of documents.

J. Dhanoa v. Trenholme, 2009 BCSC 1787, Cole J.

The defendant appealed the order of a master awarding only partial costs of the action when granting a consent order dismissing the plaintiff's tort claim.

Examinations for discovery occurred four months before trial, limited to the issue of liability and the Work Safe issues. One month before trial, the worker-worker issue was resolved in favour of the defendant through a Workers' Compensation Appeal Tribunal ("WCAT") ruling. The master hearing the application for costs concluded that there had been steps taken in the action which "were unnecessary considering the primary objective was to obtain the WCAT ruling," and declined to award costs for items 1B, 7, 8, or 34 of the tariff.

The master's decision was found to be wrong it law, as its practical effect would be to create a stay of proceedings pending a decision from WCAT, irrespective of whether the parties seek one, and contrary to the law that the mere act of pleading a "section 10 defence" does not bar the litigation.

There was nothing discreditable in the defendant's choice to conduct an examination for discovery addressing the WCB issue. In the absence of misconduct by the defendant, he was entitled to his costs for all items requested subject to taxation.

K. Cathcart v. Olson, 2009 BCSC 618, District Registrar Sainty

This decision is important for the following reasons:

- It confirms that a registrar has jurisdiction to assess costs payable under Rule 66 where the informal settlement agreement provides for "costs to be assessed."
- *Bowen v. Martinec*, 2008 BCSC 104, is binding authority for the proposition that when a Rule 66 action is settled, the plaintiff is entitled to his share of the pre-trial portion of the fixed costs (now $6,500 under Rule 15-1, the fast track rule), based on the stage of litigation reached at the time of settlement.
- *Anderson v. Routbard*, 2007 BCCA 193, endorsed the presumption that the intent of Rule 66 is to avoid the necessity of an appearance before the registrar to assess costs. It also endorsed a "rough and ready" approach to assessing the proportion of the costs "cap" of $6,500 that is payable by establishing the stage of proceedings at the time of settlement.

In this case, the matter settled four months prior to trial after the commencement of the action, discovery of documents, some examinations for discovery, settlement negotiations and production of experts' reports. Registrar Sainty concluded that 85% of the work required to prepare for trial had been undertaken at the time of settlement and awarded the plaintiff costs of $2,890.

This decision will assist counsel when negotiating settlements and costs in Rule 15-1 actions by providing a practical "rough and ready" approach without having to resort to an assessment before the registrar.

V. Damages

A. Perren v. Lalari, 2010 BCCA 140, per Garson JA (Levine and Goberman JJA, concurring)

The Court of Appeal clarified the tests for awards for loss of future earning capacity and loss of capital asset.

At trial, the Court found that the plaintiff had ongoing limitations and was not competitively employable in occupations requiring heavy or repetitive work, but also found there was no real and substantial possibility of future pecuniary loss. The trial judge was unable to reconcile *Steward v.*

Berezan and similar cases with decisions such as *Pallos v. ICBC* which applied the "capital asset approach." The trial judge considered those lines of authority to be inconsistent and awarded $10,000 for loss of future earning capacity on a "capital asset" approach. The defendant appealed the award for loss of future earning capacity.

The Court of Appeal unanimously allowed the appeal. The Court confirmed that loss of earning capacity is a pecuniary head of damages and, as such, the plaintiff must prove a real and substantial possibility of future pecuniary loss. The Court confirmed that there are two approaches to loss of future earning capacity and that both are correct (para. 12). Where a plaintiff has an established work history, the loss is quantifiable in a measurable way and the "real possibility" test of future pecuniary losses can be applied directly.

Where there is a proven loss that is not measurable in a pecuniary way, such as with a young person with an uncertain career path, then the more abstract "capital asset" approach is more appropriate.

The Court of Appeal further confirmed that in considering possible future losses, on either approach, the court is to take into account all substantial possibilities and give them weight according to how likely they are to occur (paras. 15 and 30). In reviewing *Pallos*, the Court noted that the plaintiff in *Pallos* was disabled from his usual duties. The Court stated that *Pallos* is not authority for the proposition that a plaintiff is entitled to an award for loss of earning capacity absent any real possibility of a future loss (para. 21).

B. Bradley v. Bath, 2010 BCCA 10, per Tysoe JA (Donald and Newbury JJA, concurring)

The defendants appealed the trial judge's awards with respect to loss of future earning capacity and an in-trust claim.

The trial judge made an award for loss of future earning capacity representing the wages the plaintiff would have lost while retraining for a new career over a two year period. She also made a separate award for loss of future earning capacity for limitations that might affect the plaintiff's ability to earn income thereafter. The Court of Appeal criticized the trial judge's approach of making two separate awards for the same head of damages, but held that it was proper for her to consider the factors that led to both awards and that the aggregate amount was not unreasonable.

The in-trust claim was not specifically pleaded and was first raised in the plaintiff's closing submissions. The hourly rate came from the report of an occupational therapist in connection with a claim for future care costs, but no future care costs were awarded at trial. Mr. Justice Tysoe gave merit to the argument that this type of claim should be specifically pleaded, referring to *Star v. Ellis*, 2008 BCCA 164. However, he also found that there was no evidence to support a conclusion that there was any diminution of the plaintiff's ability to perform household chores. As a result, the in-trust award was set aside.

C. Gregory v. Penner, 2010 BCSC 22, Arnold-Bailey J.

The plaintiff was a 44 year-old single parent who was the driver of a vehicle that was rear-ended. She had received saline breast implants the year before the accident and alleged that her left implant ruptured as a result of the accident. Her airbag had not deployed. The collision had been at low speed and resulted in approximately $1,000 damage to the defendant's Volkswagen. The plaintiff claimed she was financially unable to have the deflated implant replaced, and had been unsuccessful in her application to obtain an advance (*Gregory v. Penner*, 2009 BCSC 1661).

She also suffered other soft tissue injuries as a result of the accident. Her pre-accident history included migraine headaches (which were alleged to have increased in frequency and severity), panic attacks and depression.

The plaintiff attempted to continue her work as a meat packer on light duties for a month after the accident, but then began receiving medical unemployment benefits and was eventually laid off. About a year after the accident, she began a nine- month training program to pursue her career goal of becoming a welder. In order to do so, she obtained a note from a doctor stating that she was fully recovered and able to return to work. (She returned to the doctor the next day to have the note reworded to specifically state that she was able to perform all of the duties of a welder, although no physical examination was done.) The plaintiff completed the training but found the welding work to be too difficult due to her ongoing physical complaints and quit her first job after three weeks. At trial she was considering taking courses to qualify to teach sports to children.

The Court held that causation of the breast implant injury was established by the evidence of a plastic surgeon of substantially reduced breast size after the accident, together with a lump diagnosed as necrotic fat due to trauma. However, the plaintiff was found to be prone to exaggerate the severity and duration of some of her symptoms and the extent to which they disabled her, particularly with respect to her migraine headaches. Separate non-pecuniary amounts were awarded for the breast implant injury ($65,000) and the soft tissue and headache injuries ($35,000).

No separate award was made for the plaintiff's emotional distress, as there was no evidence which suggested it came to the level of a recognizable psychiatric illness: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 and *Kotai v. Queen of the North (The)*, 2009 BCSC 1405.

In assessing future loss of earning capacity, the Court considered recent cases including *Rosvold v. Dunlop*, 2001 BCCA 1; *Steward v. Berezan*, 2007 BCCA 150; *Bedwell v. McGill*, 2008 BCCA 6; *Chang v. Feng*, 3002 BCSC 49; and *Job v. Van Blankers*, 2009 BCSC 230 and concluded:

> [179] Given this case law, I find that in order to succeed in her claim for loss of future income, the plaintiff must first prove a substantial possibility of a future event leading to an income loss. This possibility can be proven with reference to the four factors identified by Huddart J.A. in *Rosvold* [confirming the four factors set out in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353]. If the plaintiff proves that possibility, it is then open to the Court to value that loss based on either the capital asset approach or based on what the plaintiff would have earned but for her injuries.

Applying this approach, the court held that the evidence fell "significantly short of establishing that her injuries from the accident have resulted in a substantial possibility of a future event leading to an income loss," and declined to make any award under this head of damages.

D. Romanchych v. Vallianatos, 2010 BCCA 20, per Tysoe JA (Low and D. Smith JJA, concurring)

The defendant appealed an award of $80,000 for loss of future earning capacity. The plaintiff had sustained soft tissue injuries to her neck and shoulder with associated headaches. At the time of the accident, she was working part-time in a laboratory while completing a Bachelor of Science degree in Chemistry. She left her job because it aggravated her symptoms and caused significant pain, taking a position which did not utilize her educational training and paid slightly less than she would have earned if she stayed at the former job and was promoted to an analyst position.

The trial judge concluded that a real and substantial possibility of impairment of earning capacity had been proven, referring generally to various contingencies and possibilities. Tysoe JA ruled that the trial judge was not required to articulate all of the substantial possibilities and assign a specific weight to them. A factual error in the trial judge's reasons about the plaintiff's earnings at the time of trial was held to be minor and not overriding because it was referred to in the introductory portion of a statement and did not affect the main point being made or the outcome of the analysis.

E. Jezdic v. Danielisz, 2008 BCSC 1863, Sigurdson J.

This is a relatively rare case in which a Supreme Court judge dismissed the plaintiff's personal injury action arising from a low velocity impact accident.

The plaintiff was seated in the driver's seat of a vehicle parked in a parking lot. The defendant, while backing from his parking spot, struck the plaintiff's vehicle at an angle. The plaintiff testified she was thrown into the steering wheel and then thrown backwards. She claimed she suffered injuries to her neck and mid- and lower back which prevented her from working for two months and that, five years later, she still occasionally suffered backache.

Sigurdson J. conceded that there was no Rule or law of physics that a person cannot be injured in a low speed collision. However, the following factors led him to conclude that the plaintiff had not proved, on a balance of probabilities, that she was injured in the car accident:

- if the plaintiff was injured in the accident, her injuries persisted longer than one would normally expect, and the comments of McEachern CJ in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) were apposite;
- the plaintiff's evidence contained significant inconsistencies in the manner in which she described her symptoms at trial, to her doctor and on discovery;
- the medical evidence tendered by the plaintiff depended entirely on her subjective reporting to her doctors; and
- the defendant was a reliable witness whose description of the minor nature of the impact was accepted by the court.

VI. Damages—Infringement of Charter Rights

A. Vancouver (City) v. Ward, 2010 SCC 27, per McLachlin C.J. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)

The issues before the Supreme Court of Canada were when damages may be awarded under s. 24(1) of the *Charter of Rights*, and what the amount of such damages should be. The Court acknowledged that authority on this question was sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

A trial judge found that the respondent's rights were violated by the appellant and BC officials who detained him, strip searched his person and seized his car without cause. The respondent was awarded damages of $100 for the seizure of his car and $5,000 for the strip search. The trial judge rejected the government's argument that damages were an inappropriate remedy for *Charter* breaches absent bad faith, abuse of power or tortious conduct. The BC Court of Appeal upheld the damage awards.

Section 24(1) of the *Charter* provides as follows:

> Anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

McLachlin J concluded that s. 24(1) of the *Charter* was broad enough to include the remedy of damages for *Charter* breaches. Such damages are not private law damages but constitutional damages that the state must pay to compensate an individual for breaches of the individual's constitutional rights. Whether damages are appropriate and just in a particular case in which a *Charter* breach has been found depends on whether they fulfill one or more of the related functions of compensation, vindication of the right and/or deterrence of future breaches.

Once a claimant has established that damages are functionally justified, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. Such factors include the existence of other more appropriate remedies and concerns for good governance.

When assessing damages, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

Applying the law to the facts of this particular case, the court concluded that the respondent's constitutional right to be free from unreasonable search and seizure was violated in an egregious manner by the strip search, such that the compensatory function of damages was engaged. The award of damages was appropriate given the fact that the officers' action was not malicious, high-handed or oppressive and the appellant was not physically or psychologically injured.

The $100 award for the seizure of the appellant's car was not an appropriate remedy when a declaration under s. 24(1) that the vehicle seizure violated his constitutional right to be free from unreasonable search and seizure adequately served the need for vindication of right and deterrence of future improper car seizures.

VII. Defences

A. Notice—Local Government Act

1. Thauli v. Delta (Corporation), 2009 BCCA 455, per Rowles JA (Low and Levine JJA concurring)

The Court of Appeal has lowered the threshold for what constitutes "reasonable excuse" for failing to provide a municipality with notice of a claim for damages against it within two months from the date on which the damages were sustained under s. 286(3) of the *Local Government Act.*

Section 286 provides:

> (1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
>
> (2) In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action.
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
>
> (a) there was reasonable excuse, and
>
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

The plaintiff, who was a legal assistant employed by a law firm, was injured during a fitness class in a community centre operated by the defendant municipality. She sustained a fairly minor injury to her knee from which she was significantly recovered within five months. In conversations with the lawyers with whom she worked, she became aware of the six month limitation period for bringing an action against a municipality, but she was not aware of the notice provision under s. 286. She brought action against the municipality shortly before the six month limitation period expired. The chambers judge dismissed the municipality's application to dismiss the plaintiff's action because she failed to

provide the requisite notice in time, relying on the governing authority of *Teller v. Sunshine Coast* (1990), 67 D.L.R. (4th) 62 which confirmed that ignorance of the law was an appropriate factor to consider under the saving provision of s. 286.

The Court of Appeal dismissed the municipality's appeal. It rejected the municipality's contention that ignorance of the law alone cannot constitute reasonable excuse in the absence of other factors including the fact that the plaintiff's condition was not severe enough to have prevented her from seeking legal advice or giving notice in time. *Teller* did not posit a test to determine if there is reasonable excuse. Nor did it stand for the proposition that ignorance of the law could only be considered along with other factors including a "severe conditions" test. Rather it instructs that "all matters put forward as constituting either singly or together a reasonable excuse must be considered." The chambers judge considered the various circumstances before her and properly applied *Teller* to conclude that there had been reasonable excuse.

B. Mitigation

1. Latuszek v. Bel-Air Taxi (1992) Limited, 2009 BCSC 798, Satanove J.

The plaintiff suffered significant physical and psychological injuries as a result of a motor vehicle accident.

The Court found that he failed to take reasonable steps to minimize his damages:

> [85] There is a duty at law to take reasonable steps to minimize your loss, particularly where, as here, conservative treatments have been recommended. Because of the nature of the plaintiff's work, as a professional driver transporting fuel, he has limited his medication to Tylenol Extra Strength or Tylenol 8 Hour. Dr. Jaworski recommended exercises in the pool and gym and brisk walking. Mr. Latuszek says he swam once in a while, but he did not go to the gym or do brisk walking. Dr. Jaworski suggested that brisk walking may be contraindicated now that he knows that Mr. Latuszek has a torn medial meniscus. Mr. Latuszek does very little regular exercise of any kind, except once or twice a week. He did not try yoga, massage therapy, relaxation therapy or the medications as recommended by his psychiatrist. He has not taken holidays in the past two years to try the anti-depressant medication, yet he understands that such medication as well as exercise, may improve, if not cure, his symptoms. The plaintiff has not prioritized his recovery.

Powers J. reduced the plaintiff's non-pecuniary damages from $100,000 to $60,000 as a result.

2. Rindero v. Nicholson, 2009 BCSC 1018, and Meiklem J.

The plaintiff suffered a chronic knee injury as a result of a motor vehicle accident. At the time of trial, he weighed 265 pounds. The medical evidence supported the "elementary physical principle" that a reduction in weight would decrease his knee pain. His testimony at trial established that he had in the past been capable of losing a considerable amount of weight by changing his diet and lifestyle. The Court reduced his damages by 20%.

3. Salzmann (Guardian ad litem of) v. Bohmer, 2009 BCSC 1586, Melnick J.

The plaintiff suffered soft tissue injuries in a motor vehicle accident when she was 10 years old. At trial, she alleged she continued to suffer the effects of the accident 10 years later. Melnick J. concluded that she suffered a chronic regional myofascial pain syndrome which continued to affect her at trial.

However, he was also of the view that the plaintiff had failed to follow the advice of her physicians to engage in an appropriate and properly directed regime of exercise after the accident. He states:

> [21] Today, she still suffers from the injury she received in the accident. But the message from her own doctor is loud and clear: she can do something about it.
>
> [22] I have no evidence upon which I can estimate the cost of an exercise therapist or kinesiologist. Dr. Apel gave no indication of the length of time Ms. Salzmann should be supervised. However, the non-pecuniary damages I will award her will recognize that her road to the eventual abatement of her symptoms will probably require her to not just be self-motivated, but have the assistance of a professional for advice for a period of time to set her on the right track. That said, I note that no defendant should be required to pay for anyone's lack of interest in pursuing his or her own recovery. Ultimately we all bear a responsibility to do what we can to attain and maintain good health. In the legal realm, this constitutes mitigation, and a plaintiff bears a legal duty to mitigate.

He deducted 20% from her awards for non-pecuniary damages, loss of future earning capacity and special damages.

4. Robinson v. Anderson, 2009 BCSC 1450, Bernard J.

The plaintiff suffered soft tissue injuries to her neck, back, left shoulder and right knee in a motor vehicle accident, the effects of which she still suffered four years later. The Court found that her current symptoms were caused by the motor vehicle accident, but that she had failed to heed her physicians' advice to lose weight and undergo an exercise regime:

> [23] Notwithstanding the aforementioned causal link, the evidence strongly supports finding that: (a) the plaintiff's injuries are not permanent; (b) if the plaintiff takes reasonable steps to improve her fitness level, then significant, if not full, recovery is very likely; and (c) if the plaintiff does take those reasonable steps, then recovery is attainable within a relatively short time frame. In this regard, the medical opinions of both Dr. Hodgson and Dr. Werry (on May 6, 2009 and April 9, 2009 respectively) suggest that the plaintiff's present symptoms would decrease substantially through a reduction of her "habitus" (body size and shape), increased physical activity, and working through that which is sometimes described as "the pain of reactivation."

The plaintiff, who had a PhD in Educational Psychology and was the District Director of a provincial program dealing with autism, claimed $75,000 for loss of future earning capacity on the basis that her injuries would affect her ability to attend professional conferences, present academic papers, networking with other professionals and qualifying for and accepting other positions in her field. Bernard J. found that her claim had to be significantly discounted because of her failure to undergo the treatment prescribed by her physicians in order to lose weight and become physically fit. He awarded her $10,000 for loss of earning capacity.

5. Harris v. Zabaras, 2010 BCSC 97, Schultes J.

The 34 year-old plaintiff suffered soft tissue injuries resulting in headaches and neck and left arm pain in a rear-end accident.

An early MRI did not reveal signs of a suspected possible brachial plexus injury, but the plaintiff failed to return to the referring neurologist after the MRI was done until almost three years later. He saw Dr. Travlos in the interim (on arrangement by his counsel) and was given suggestions regarding medication for his sleep disruption and for a structured rehabilitation program. The plaintiff did not follow the recommended program at that time, or when the same recommendations were made again almost two years later (four months before trial). Instead, he chose to see a massage therapist and limit his activities.

Non-pecuniary damages of $50,000 (including loss of home maintenance capacity) were reduced by 10% on the basis that the plaintiff's symptoms would have improved by at least that much if he had followed the advice given to him.

Although the plaintiff had a background as a residential care aide, he had been working in the auto sales business for five years before the accident and was a used car sales manager at the time of the accident. The plaintiff asserted that, but for his injuries, the effect of the economic downturn on his income in auto sales would have caused him to accept alternative heavy physical work as a "swamper." The "swamper" position had been offered to him on several occasions over a period of about 15 years, and would have yielded income similar to what the plaintiff had earned when the auto sales business was doing well.

Schultes J. held that there was no substantial possibility that the plaintiff's earning capacity as a capital asset has been diminished. His conclusion was due in part to the lack of realistic possibility that the plaintiff would abandon his stable employment in an occupation in which he had had so much success to pursue the "swamper" position as a stop-gap measure during the sales downturn.

6. Niloufari v. Coumont, 2009 BCCA 517, per Levine, JA (K. Smith and Garson JJA, concurring)

The plaintiff appealed on three grounds: reduction of non-pecuniary damages by 10 % for failure to mitigate, the trial judge's assessment of future loss of earning capacity, and reduction of special damages for physiotherapy expenses.

The reduction of non-pecuniary damages was based upon the plaintiff not having "done his best to mitigate his loss by exercising and seeking psychiatric and/or psychological advice and treatment." The plaintiff attended a four week rehabilitation program following the accident. He took physiotherapy, chiropractic treatment, massage and acupuncture on the recommendation of his doctor. He walked and stretched and performed exercises in a pool. His doctor recommended an active rehabilitation program two years after the accident under the supervision of a physiotherapist or kinesiologist, but there was no evidence that he was referred to any specific program that he failed to attend. He had seen a psychiatrist following the accident, but stopped due to disagreements about medication and concerns about the accuracy of the doctor's reports.

His family doctor recommended that he be reassessed by a psychiatrist even though his "depression symptoms seemed to be in remission." There was no evidence that a referral was made or that the plaintiff failed to follow the recommendation, or that his pain and suffering would have been reduced is he had seen another psychiatrist. For these reasons, the Court concluded that the trial judge had erred in reducing the non-pecuniary damages by 10%.

Special damages had been reduced by approximately $1,700 from the amount claimed by the plaintiff on the basis that part of the physiotherapy treatment was unhelpful and was followed less enthusiastically than it might have been. The treatment had been recommended by the plaintiff's physician, and the plaintiff reported that the treatment had relieved some of his pain. The Court held that there was nothing in the evidence which supported the reduction in special damages and set aside those parts of the trial judge's order.

The plaintiff's appeal of the award for loss of future earning capacity was dismissed.

VIII. Discovery

A. Day v. Hume, 2009 BCSC 587, Smith J.

In the first 50 minutes of a discovery, plaintiff's counsel made many objections to questions posed of his client and then following a break walked out, with his client, because he had learned that counsel for the other defendants would not agree to adopt the transcript from the examining defendant.

Counsel was not entitled to terminate the discovery. He was prepared to make his client available to continue the discovery and so it would not be just for the court to strike the plaintiff's claim.

The case is a good review of when counsel can intervene in the cross-examination of their client and how to make proper objections. It is appropriate for counsel to remind a client not to guess or speculate during the course of a discovery. Counsel should not suggest possible answers to questions. Counsel should not interfere with the cross-examination except where it is necessary to resolve ambiguity in a question or to prevent injustice. When objecting, counsel should state the basis for the objection but it is not proper to make unnecessary comments, suggestions or criticism.

B. MacEachern (Committee of) v. Rennie, 2009 BCSC 795, Ehrcke J.

Plaintiff counsel sought to read in certain discovery evidence from one of the defendants, Rennie. Rennie sought to have further answers and questions read in to provide context. Plaintiff's counsel agreed that the additional questions and answers could be read in but submitted that when additional evidence is read in under Rule 40(27)(d) it becomes evidence that can be used not only against the party who was examined, but also against all other defendants. That argument was rejected. The supplemental evidence was not direct evidence against any other defendant.

IX. Document Production

A. Stone v. Ellerman, 2009 BCCA 294, per Finch CJBC (Frankel JA concurring and Smith JA dissenting)

The plaintiff was awarded nearly $700,000 at trial for soft tissue injuries. While many issues were the subject of the appeal, the panel hearing the appeal focused only on the subject of the use by the plaintiff of a pain journal.

At trial, a previously undisclosed pain journal was used by the plaintiff to ostensibly refresh her memory. The plaintiff claimed privilege over the pain journal as it was created on the advice of counsel. The journal was not specifically listed under Part 3 of the plaintiff's list of documents, which had only generic descriptions of categories of privilege without identifying any specific documents. The trial judge exercised discretion under Rule 26(14) to allow the plaintiff to use the document. Much of the plaintiff's evidence took the form of endorsing the contents of the pain journal. The defence objected to the use of the document at trial, but the trial judge denied counsel the opportunity to obtain cases to argue the point. The majority held that there was significant prejudice to the defence in being denied an opportunity to make a full and reasoned objection to the late production of the document (paras. 38 and 44).

The majority decision of Chief Justice Finch (Frankel JA, concurring) held that the use of the undisclosed document, though privileged, resulted in a miscarriage of justice and ordered a new trial. The majority held that the generic descriptions of categories of privilege under Part 3 of the plaintiff's list of documents did not satisfy Rule 26(2.1). The Court reviewed many aspects of the case law regarding requirements for the listing of documents, the adequacy of descriptions, and distinctions in the amount of information to be used in the description depending on the nature of the privilege claimed.

The Court held that the generic descriptions of categories in Part 3 of the plaintiff's list of documents were deficient and that the pain journal was an undisclosed document for the purposes of Rule 26(14). The Court reviewed the cases addressing the factors for the court to consider in exercising discretion to allow a document to be used despite non-disclosure (paras. 30-36): prejudice to the other party, a reasonable explanation for the failure to disclose, whether excluding the document would prevent determination of the issue on the merits, and whether the ends of justice require that the document be admitted. A reasonable explanation for the failure to disclose is a central factor for consideration. The fact that a document may be subject to litigation privilege or lawyer's brief privilege is not a reasonable explanation for the failure to disclose it in accordance with Rule 26. Prejudice to the other party is not required in order to Rule documents inadmissible. The majority found that the trial judge failed to consider whether there was a reasonable explanation for the failure to disclose and did not give adequate consideration to prejudice to the defence.

One area of difference between the majority and the dissenting opinion of Smith JA was on the issue of prejudice. The majority held that there was prejudice for the failure to properly list the document even though the defence could not have compelled production of the document prior to trial (paras. 39 and 47). The majority further held that it was no answer to the failure to list the pain journal that it was not used for an improper purpose or that the defence chose to cross-examine on the document as it was irrelevant to the issues of non-compliance with the rule, whether there was prejudice to the defence, and whether the trial judge exercised discretion judicially (para. 40).

The dissenting reasons of Smith JA concluded that it was in the interests of justice to allow the plaintiff to refresh her memory and no miscarriage of justice resulted from exercising discretion to allow the plaintiff to use the undisclosed pain journal. He held that there was no prejudice to the defence in the failure to properly list it as the defence could not have compelled production of the pain journal because it was privileged (paras. 86-87, 108-10). He also held that the failure to allow the defence an opportunity to marshal law to argue the issue of non-disclosure was not an error as it was a routine evidentiary objection and the law was adequately addressed with reference to annotations in the *British Columbia Annual Practice*.

B. Gulamani v. Chandra, 2009 BCSC 1393, Arnold-Bailey J.

Subsequent to a successful Rule 30 application by the defendant to compel the plaintiff to submit to examinations by several physicians, the plaintiff applied under Rule 26 for production of the physicians' "examining notes or any other recording ... that record any history given to them by the plaintiff ... and any notes that record the doctor's observations or findings on physical examination together with copies of any test, questionnaires, or other documents completed by or on behalf of the plaintiff ..."

The defence objected to production of these documents on the basis that the proper mechanism for obtaining such documents was an application under Rule 30 and that neither Rule 26 nor Rule 27 were available to grant such relief. Further, the working papers of the doctors were privileged and part of the solicitor's brief until the doctor testifies in court. Lastly, the plaintiff had not identified any factual material that was not already set out adequately in the reports that had already been delivered.

Arnold-Bailey J. granted the order. The leading authorities, *Stainer v. Plaza*, 2001 BCCA 133 and *Traynor v. Degroot*, 2001 BCCA 556 clearly indicate that any notes, annotations, recordings, or working papers that reveal an examining doctor's confidential opinion or advice to counsel will, generally, be privileged. However, the cases also illustrate that notes or recordings that capture the factual history given by the plaintiff as well as raw test data are outside the scope of privilege and are subject to production. Furthermore, the jurisprudence collectively appears to suggest that the facts underlying an expert's report are presumptively relevant to an opposing party's case, since the report may not necessarily reveal facts that have been ignored or not relied upon: *Delgamuukw v. British Columbia* (1988), 32 B.C.L.R. (2d) 152 (S.C.).

Arnold-Bailey J. also concluded that the timing of the request for disclosure of such documents is not limited to Rule 30 applications or to the period after a report has been delivered in accordance with Rule 40A. She could find no cases, whether dealing with applications under Rules 26, 27 or 40A, and both before a report has been created or put into evidence, where the court has declined to order production of the expert's factual underpinnings.

Query whether this decision and the decisions upon which it relies will be affected by the new Supreme Court Civil Rules, especially with reference to the timing of the request for disclosure of experts' notes and records. Rule 11-6(8) states that, unless the court otherwise orders, if a party *serves* an expert report, the party upon request by a party of record must promptly serve any written statement of fact, any record of independent observations, any data and test results. While this Rule appears to be a codification of *Stainer*, it does appear to go further and authorize the disclosure of such material only in cases when a party intends to rely on the expert report at trial.

C. Tayelor v. Truong, Vancouver Registry No. M031966, November 10, 2009, Master Tokarek

Master Tokarek granted the defendant's application for production of photographs and video-recordings of the plaintiff's travels to Hawaii, the Dominican Republic, Palm Springs, Oregon, Las Vegas, Turks and Caicos, an Alaskan cruise, motor home destinations, and participation in a bachelorette party, bridal shower and wedding.

The master commented that this case was distinguishable from similar applications where courts order production of photographs depicting the plaintiff engaging in physical activities. In this case, the plaintiff alleged that as a result of her injuries she was mostly housebound and had a limited social life. Such allegations required more than photographs depicting physical activity. The plaintiff's concern about the extent of invasion into her privacy was one that could be raised when dealing with the admissibility of the photographs at trial.

D. Gorse v. Straker and Galipeau, 2010 BCSC 119, Macaulay J.

The defendants in this case were seeking production of various medical, educational and employment records. Entitlement to some of the records was in issue, but the primary issue considered by Macaulay J. was whether the various orders should be in "Halliday" or "Jones" form. This case provides a helpful general review of the law on this issue, affirming the following points:

- A Halliday order is not a "default" form of order for production of a record in which the subject of the record has a privacy interest.
- A Halliday order should be granted where there is evidence of a likelihood that a Jones order will result in the inappropriate production and disclosure of irrelevant or privileged documents.
- Through the Halliday process, as long as counsel fulfills his or her obligations to determine what is relevant and ensure that relevant documents are disclosed, there is no prejudice to the opposing party's discovery rights (other than the minimal associated delay of a two-step process), and the subject of the record is spared the potential for great harm or embarrassment which would arise from production of an irrelevant record.
- Relevance is determined by the subject matter of the document, regardless of privacy considerations.

The threshold for a Halliday order is low. The party seeking it must present evidence to demonstrate that the records may well include irrelevant, private documents or documents properly subject to litigation privilege. The party alleging the adverse impact should ordinarily swear the affidavit where

the documents at issue are claimed to be private and irrelevant, but this is not an absolute requirement as long as there is other admissible evidence on point. Where the objection relates to litigation privilege, the party's lawyer or paralegal can swear the affidavit setting out the fact of the communications giving rise to the claim without disclosing actual content.

A bare assertion of privacy or confidentiality in the absence of any evidence is an insufficient basis for a Halliday order (*Grewal v. Hospedales*, 2003 BCSC 1624). Likewise, an affidavit raising a mere possibility that records contain privileged or irrelevant, private information is insufficient.

E. Lledo v. Bolam, 2010 BCSC 28, Master Caldwell

The plaintiff in a motor vehicle action was the principal shareholder, CEO and operating mind between two closely held companies. He alleged that he had lost salary income due to his inability to perform his regular services for the companies, and that the profitability of the companies had been compromised with resulting reduction of dividend income and decreased participation in the overall profits.

The plaintiff's response to the defendant's application for production of various documents raised three main objections: the material was allegedly so extensive that 180 days was required for production, certain materials were alleged not to exist or not to be available to the plaintiff, and it was feared that production of the records related to employees of the company would breach or offend their privacy interests.

Master Caldwell ordered production of the material within 21 days in light of an upcoming trial date and the fact that the request had been outstanding for a year. He ordered the plaintiff or an authorized representative of the company to provide an affidavit detailing efforts to obtain the material which did exist and verifying the requested material that did not exist. Lastly, he addressed the privacy concerns by ordering that all information which could lead to the identification of an individual employee (such as name or SIN number) be redacted and that each individual employee be assigned a specific and unique number so that their income could be charted over time without actually identifying the employee.

F. Dykeman v. Porohowski, 2010 BCCA 36, per Newbury JA (Prowse and Lowry JJA, concurring)

The plaintiff successfully appealed a jury award for damages on two grounds:

1. The trial judge had erred in refusing to put to the jury the plaintiff's "in trust" claim.
2. The trial judge had erred in allowing defence counsel to cross-examine the plaintiff on various Internet postings by the plaintiff which the plaintiff says had not been disclosed to her counsel prior to trial in accordance with Rule 26.

A new trial was ordered.

The Court of Appeal disagreed with the trial judge's reference to "grievous" injury being the threshold test of whether an "in trust" claim should be put to the jury.

Rather, questions regarding the nature of the services (whether the services were part of the usual "give and take" between family members or "above and beyond" that level) and whether the services were necessitated by the plaintiff's injuries were thought to be appropriate for determination by the jury. If answered affirmatively by the jury, the amount of compensation must be commensurate with the loss.

The issue of document disclosure related to documents listed in Part 3 of the defendant's list of documents and described as follows:

- diskette containing an index to the plaintiff's web site;

- copy of bundle of printouts of articles regarding the plaintiff's horse business;
- copy of various pictures printed out from the internet regarding horse riding;
- copy of bundle of printouts of articles regarding advertising of the Freedom Fields Farm.

The list of documents was provided to plaintiff's counsel only a few days before trial. They consisted of over 8,000 items written by the plaintiff. Plaintiff's counsel objected to the "ambush" of his client during cross-examination arising from the claim of solicitor's brief privilege over the documents. The trial judge ruled that "... discovery is met by the listing. As a separate step, there is production, and if a copy was required, that would have been obtained by request." The trial judge did not read Rule 26(14) in conjunction with Rule 40(13). He permitted a half hour adjournment for the plaintiff and her counsel to review the documents. A book of 124 pages of documents was marked for identification only. Cross-examination of the plaintiff proceeded on 30 of the "postings."

The Court applied cases including *Stone v. Ellerman*, 2009 BCCA 294. It concluded that the documents had not been adequately listed for the purposes of Rule 26 because the descriptions were not sufficient to allow the validity of the claim of privilege to be assessed. The factors set out in *Stone* relevant to whether the trial judge should properly exercise his discretion to allow cross-examination under Rule 26(14) were considered: whether there was prejudice to the party being cross-examined, whether there was reasonable explanation for the failure to disclose, whether exclusion of the document would prevent determination of the issue on its merits, and whether the ends of justice required that the document be admitted in the circumstances of the case. The Court allowed the appeal on this issue because it could not be said with certainty that the plaintiff had not been prejudiced.

G. Stead v. Brown, 2010 BCSC 312, Hinkson J.

Hinkson J. concluded that *Lewis v. Frye*, 2007 BCSC 89, in which Hood J. held that the court has the power to order a party to sign authorizations for the production of records in the possession of third parties, was wrongly decided. Hood J. failed to consider the BCCA decision of *Peel Financial Holdings Ltd. v. Western Delta Lands*, 2003 BCCA 180 in which Finch CJBC concluded that a court has no power to compel a party to consent to an action. Unfortunately, this decision precludes a very practical and cost-effective approach to obtaining documents in the possession of third parties.

H. Desjardins v. Huser, 2010 BCSC 977, Joyce J.

In this application heard prior to July 1, 2010, Joyce J. held that he was bound by *Stead v. Brown*, 2010 BCSC 312 to conclude that a party cannot be compelled to execute authorizations allowing the other party to obtain documents in the possession of non-parties. However, he noted that Rule 7-1(14) of the new Supreme Court Civil Rules enables the court to order that a party serve an amended list of documents that contains all documents in a party's "possession, power or control, relating to any or all matters in issue in the action." Rule 7-1(16) enables a party to obtain copies of all listed documents. He invited counsel to apply once the new rules were in effect for an order compelling the plaintiff to list and produce documents in the possession of third parties who were outside of BC.

X. Evidence

A. Meghji v. Lee, 2009 BCSC 1542, Johnston J.

The defendants objected to the qualifications of the plaintiff's expert, a neuropsychologist, to the extent that they precluded him from giving an opinion that the plaintiff suffered an injury to her brain

and the cause of such injury. The plaintiff argued that the statutory and regulatory framework dealing with the provision of medical and related health services had changed significantly since this issue was last before the court in the 1994 decision of Clancy J. in *Knight v. Fletcher*, [1994] B.C.J. No. 279.

Johnston J. reviewed the statutory and regulatory framework governing psychologists in BC. He found that the *Health Professions Act* and the Psychologists Regulation did not go any further than to allow testing, assessment and diagnosis of behavioural, emotional or mental disorders. The distinction drawn by Clancy J. in *Knight* remained appropriate, and that is that the plaintiff's neuropsychologist was qualified to give his opinion on the cognitive and behavioural sequelae of brain injuries and the relative likelihood of such sequelae being the consequence of a traumatic brain injury, but his qualifications did not permit him to diagnose physical injury and its cause.

B. Moore v. Brown, Nov. 6, 2008, Victoria Registry No. 062931, Macaulay J.

At issue was the admissibility of portions of a report by an economist, Robert Wickson, in relation to the plaintiff's claim for diminished earning capacity. Defence counsel successfully argued that portions of the report set out calculations based on assumed future scenarios that were unlikely to be established on the evidence. Macaulay J. affirmed the decision of former Chief Justice McEachern in *Mazur v. Moody* (1987), 14 B.C.L.R. (2d) 240 at 244:

> [14] I find nothing to criticize in the second actuarial report which merely sets out the present value of an income stream over a future period of time based upon current actuarial principles. I rather think that is about all any actuary can properly say in these cases. Expert witnesses should not be constructing fanciful scenarios based upon what they understand the evidence might be for the purpose of expressing opinions on the financial consequences of such scenarios.

The offending portions of the report were redacted.

XI. Implied Undertaking Rule

A. Chonn v. DCFS Canada Corp., 2009 BCSC 1474, Voith J.

This is the first decision since *Juman v. Doucette*, [2008] 1 S.C.R. 157 to consider the implied undertaking of confidentiality in an ICBC motor vehicle action in which the plaintiff had previous, but now resolved, motor vehicle actions. The following points may be gleaned from *Chonn*:

- Defence counsel's listing of implied undertaking documents from the prior actions in Part 1 of the current defendant's list of documents was a use of such documents which required the consent of the plaintiff or leave of the court.
- A party is, however, both required and entitled to list these documents in Part 3 (now Part 4) of any list of documents generated prior to the granting of consent or court order.
- The plaintiff in the Current Action was not bound by an undertaking to withhold from the defendants materials that she herself produced in the previous action: *Wilson v. McCoy*, 2006 BCSC 1011.
- The documents cannot be used for internal strategic review in subsequent litigation, or for the purposes of drafting pleadings. Nor can they be sent to counsel for the purposes of obtaining an opinion in new litigation.
- The implied undertaking not only binds the defendants in the previous actions, it binds the defendants in the Current Action and ICBC as well.

- In most cases where ICBC or its counsel is aware, through the pleadings or their direct involvement in earlier litigation, of relevant documents or other pretrial discovery from that litigation, they need only contact plaintiff's counsel to obtain his or her concurrence to the use of the materials in question. Overwhelmingly that concurrence should be forthcoming.

B. Joubarne v. Sandes, 2009 BCSC 1413, Williams J.

The defendants appealed a master's order denying their application for production of a medical report and discovery transcript arising from an unrelated wrongful dismissal action brought and settled by the plaintiff prior to bringing her motor vehicle action. The master, applying *Juman v. Doucette*, 2008 SCC 8, concluded that the medical report was subject to litigation privilege and that there was no evidence that such privilege had been waived. He further ruled that the pursuit by the defendants of these documents was a fishing expedition.

On appeal, Williams J. found that the master's analysis was in error. He first applied the *Peruvian Guano* test for relevancy to the two documents and concluded that the documents were relevant to the present action, in which she advanced claims for loss of earnings and loss of capacity, in that the wrongful dismissal action encompassed issues including employment history, fitness and performance as well as health issues.

Having found that the documents were relevant to the present action, Williams J. applied the reasoning in *Juman* to conclude that he had discretion to relieve against the implied undertaking Rule "where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues." (*Juman*, per Binnie J. at para. 35). He ordered that the documents be produced.

C. Bodnar v. The Cash Store Inc., 2010 BCSC 660, Griffin J.

The issue on this application was whether the implied undertaking of confidentiality over information, produced by an opposite party in civil litigation ends when the party receiving the information attaches it to an affidavit filed in court on an interim application. Evidence contained in affidavit form and filed in support of an interim application becomes part of the court record which is available to the public in accordance with the "open court" principle.

Griffin J. acknowledged this issue was not specifically addressed by the Supreme Court of Canada in *Juman v. Doucette*, 2008 SCC 8 which spoke only of the open court principle as it relates to documents tendered as evidence at trial.

She therefore embarked on a balancing of the "open court" principle with a party's right to privacy and concluded that the implied undertaking continues to apply to information produced by the opposing party and filed by the receiving party in court on an interim application. The open court principle is not affected by this conclusion because the documents are still available to the general public, although in practice, according to Griffin J., most members of the public are simply uninterested in looking at evidence filed in interim applications.

Requiring leave for relief from the implied undertaking to use such materials serves as a barrier to mischief or abuse of process by a party to the litigation. For example, it would prevent a litigant from filing lengthy affidavits which attach otherwise confidential information of the opposing party, and then widely circulating the materials outside the proceeding to cause the opposing party harm.

Griffin J. did note that the fact that the materials had been filed in court for a legitimate reason and have become part of the court record is a factor to be considered by the court when asked to relieve a party from the implied undertaking. As well, the implied undertaking ends with respect to documents produced by a party when that information is filed in court by the producing party.

XII. Insurance Issues

A. Co-operators Life Insurance Co. v. Gibbens, 2009 SCC 59, per Binnie JJ. (McLachlin C.J., LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.)

The Supreme Court of Canada revisited the definition of "accident" in this decision involving a disability policy that provided coverage for losses sustained "as a direct result of a Critical Disease or resulting directly and independently of all other causes from bodily Injuries occasioned solely through external, violent and accidental means, without negligence" on the insured's part.

The insured had unprotected sex and contracted genital herpes which in turn caused transverse myelitis, a rare complication of herpes that resulted in total paralysis from his mid-abdomen down. The insured's policy provided coverage for a specific list of diseases that did not include transverse myelitis. The issue before the trial judge was whether the insured's disease was caused by accidental means. The trial judge concluded that his condition fit within the policy and awarded him compensation. The BC Court of Appeal upheld the trial judge's decision on the basis that the insured's loss was accidental in that it accorded with the traditional judicial definition of "accident" as being unintended or unexpected.

The Supreme Court of Canada reversed both lower decisions, finding that the policy excluded bodily injury from processes that occur naturally within the body in the ordinary course of events and, as well, from diseases that are transmitted in the ordinary way without any associated mishap or trauma except the spread (or inception) of the disease itself. To hold otherwise would "stretch the boundaries of an accident policy beyond the snapping point and convert it into a comprehensive insurance policy for infectious diseases contrary to the expressed intent of the parties and their reasonable expectations" [Binnie J. at para. 65].

Binnie J. stated:

> [2] Accident insurance is not comprehensive health insurance. Mr. Gibbens contracted a sexually transmitted disease in the ordinary way through sexual intercourse. In most cases genital herpes is a minor irritant (if indeed there are any symptoms at all). I agree with the courts in British Columbia that Mr. Gibbens' paralysis was tragic and unexpected but I do not agree with them that it was caused by "external, violent and accidental means" within the meaning of the insurance policy. I would therefore allow the appeal.

B. Laxdal v. Robbins, 2009 BCSC 1074, Gerow J.

The plaintiff was off work for approximately six weeks in a calendar year. She was awarded $3,306 for gross past wage loss. Gerow J. refused to reduce the plaintiff's gross wage loss by the tax that would be payable on that amount (in accordance with ss. 95 and 98 of the *Insurance (Vehicle) Act*) as if the past wage loss was "stacked" upon the remainder of the plaintiff's earnings for that year. Instead, Gerow J. applied *Hudniuk v. Warkentin*, 2003 BCSC 62, as if the gross past wage loss was the only income earned in that period.

In *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, the Court of Appeal dealt with a different issue (the assessment of tax on past wages lost over multiple periods). However, the Court commented that the net income provisions in the *Act* must be interpreted in such a manner so as not to depart from the fundamental principle that a plaintiff is entitled to a damage award that reflects, as accurately as possible, his or her exact pecuniary loss. This comment applies equally to large losses suffered over multiple years and smaller losses suffered during one discrete period.

The "stacking" issue was not dealt with by the Court of Appeal in *Lines*. Gerow J. reasoned that *Hudniuk* and the authorities following it continued to support the conclusion that where the gross award is at or below the amount exempt from taxation, there would be no tax payable so that the net past wage loss would be the same as gross past wage loss.

C. Morris v. Morris, 2009 BCSC 1567, Cole J.

The issue before the court was whether the defendant, Enterprise Rent-A-Car, was vicariously liable for the defendant driver's negligence on the basis that the driver of the rental vehicle acquired possession of the vehicle with the consent, either express or implied, of Enterprise pursuant to s. 86(1) of the *Motor Vehicle Act*.

The Court found that the renter declined to include an additional driver on the rental form and signed the form, which clearly set out that, except as required by law, additional drivers were not permitted without the owner's written approval. The renter subsequently allowed her son to drive the vehicle which was involved in an accident in which the plaintiff was injured.

Cole J. set out the purpose of s. 86 of the *Motor Vehicle Act* as being remedial legislation that imposes a heavy duty on owners of vehicles to control who operates their vehicles in order to protect innocent third parties. The American authorities (followed in Alberta) have developed the notion of "constructive consent" which prevents owners of vehicles such as rental car companies from evading responsibility by expressly limiting the use of the vehicle. The business of leasing cars for profit includes the risk of liability for injury caused by unauthorized as well as authorized drivers.

However, Cole J., after an analysis of BC authorities, concluded that the "trend in our jurisdiction tends to be more restrictive than the broad policy approach that is taken in some United States jurisdictions and in some degrees by the Alberta Courts." The test for implied consent in BC is whether the owner would have consented in the circumstances. In the case before him, he found that Enterprise did not give express consent to the driver and would not have consented to the vehicle being driven by the unauthorized driver.

It is interesting to note that Cole J. refused to follow the recent decision of *McEvoy v. McEachnie*, 2008 BCSC 1496, in which the Court found that where an owner willingly hands over possession of his vehicle to a second party who willingly gives possession to a third party, implied consent on the part of the owner is established, even where the owner has expressly forbidden the operation of the vehicle by anyone else. Cole J. found that the court in *McEvoy* failed to follow binding authority. *McEvoy* is under appeal.

D. Ayres v. Doe, 2009 BCCA 552, per Saunders JA (Tysoe and Bennett JJA, concurring)

The Court of Appeal has confirmed that s. 106 of the Insurance (Vehicle) Regulation was the regulation in force when the action was resolved by judgment such that ICBC was not entitled to deduct the workers' compensation benefits received by the plaintiff.

The plaintiff was involved in an accident, during the course of her employment, with an unidentified motorist on May 8, 2003. At the time of the accident, s. 106 of the Insurance (Motor Vehicle) Regulation allowed ICBC to deduct from her award of damages the WCB benefits she had received. Section 106 was amended effective June 1, 2007 to preclude ICBC from deducting WCB benefits when the Workers' Compensation Board has elected to pursue its right of subrogation under the *Workers' Compensation Act.* The trial took place and judgment was rendered after June 1, 2007.

ICBC argued that its right to deduct WCB benefits vested when the plaintiff's cause of action arose. The trial judge concluded that its "right" to deduct the benefits did not accrue until its obligation to pay the plaintiff arose. Under s. 24 (of both the old and new legislation), that obligation did not arise

until a judgment sufficient to trigger a deduction was entered and the appeal period had expired. The Court of Appeal agreed with this analysis and dismissed the appeal. The amended s. 106 of the Insurance (Vehicle) Regulation will apply therefore to any action which is settled or where judgment is rendered after June 1, 2007, regardless of the date of the accident.

XIII. Juries

Two decisions deal with the right of the party who filed a jury notice to unilaterally proceed without a jury at different stages of the action:

A. Chapelski v. Bhatt, 2009 BCSC 1260, Hinkson J.

On the second day of a jury trial, defence counsel advised he had been instructed to continue the trial without the jury. Plaintiff's counsel objected. Hinkson J. reviewed the authorities dealing with Rule 39(26), none of which were directly on point with respect to the right of a party who has elected trial by judge and jury to re-elect trial by judge alone once the jury had been empanelled. The authorities suggested, however, that a party can voluntarily opt out of a jury trial at least until the jury fees were paid.

Hinkson J. concluded that, absent misconduct on the part of a party, a witness or a juror where the opposing party does not consent to continuing the trial without a jury, it is not open to the party who has filed a Notice Requiring Trial by Jury to opt out of a jury once the jury has been empanelled. Once empanelled, a civil jury is the trier of facts and cannot be supplanted at the instance of one party.

He did not decide if a jury could be discharged, absent misconduct, once a jury trial has begun even with the consent of all parties.

B. Iskum v. Badali, 2009 BCSC 1669, Griffin J.

Griffin J. filled the time gap left by *Chapelski* by ruling that once a party has fulfilled the two steps required by Rule 39(26)—filing the jury notice and paying the fees—the only method available to a party to set aside the election of trial by jury is pursuant to Rule 39(27) on the basis that the trial is unsuitable for trial by jury. Otherwise, the party who filed the jury notice and paid the fees is bound by its election and the requirement to pay the remainder of the jury fees.

Griffin J. commented that the Rules as a whole recognize that it is not efficient to conduct civil trials by ambush. Trials are more efficient and settlement is more likely if the parties have advance notice (in this case, at least 30 days) of not just the case they have to meet, but the mode of trial.

C. Williams v. Sadler, Victoria Registry No. 06-4927, Oct. 19, 2009, Bracken J.

Approximately one month before a jury trial was scheduled to begin, the plaintiff applied pursuant to Rule 39(27) to strike the jury notice. The plaintiff argued that in light of the fact that approximately 30 witnesses, including ten expert witnesses, were expected to be called during a trial that was scheduled to last 20 days, both tests for striking a jury notice were met. The issues were complex in that the plaintiff was alleging a mild traumatic brain injury and the evidence would include numerous psychological testing results and conflicting expert opinion. There were also issues with respect to contributory negligence, apportionment of damages between the two accidents and mitigation.

Bracken J. dismissed the application. The plaintiff relied on authorities in which the issues were much more complex than the case before him. The defendant referred to several decisions in which cases of similar or greater complexity were determined to be appropriate for a jury. He stated that the authorities were clear that a jury notice should not be routinely struck out and that a jury is generally

considered capable of understanding and applying evidence of experts and dealing with legal issues. The material set out in the plaintiff's Chambers Brief did not satisfy him that the case was of such intricate or complex nature as to make it inappropriate to be heard by a jury.

D. Knauf v. Chao, 2009 BCCA 605, per Huddart JA (Frankel and Tysoe JJA, concurring)

A jury made an aggregate award of $500,957 for damages arising from two accidents, including non-pecuniary damages of $235,000. The defendants sought a new trial on the basis that:

1. portions of an expert's report offended the prohibition against oath-helping and should not have been admitted into evidence,
2. counsel for the plaintiff made improper statements during his opening and closing addresses, and
3. there were errors in the charge to the jury (taken from the "abbreviated instructions" in chapter 1A of *CIVJI*) on future loss of earning capacity.

Alternatively, they sought a reduction of the awards for non-pecuniary damages, loss of past earning capacity and loss of future earning capacity. The Court of Appeal allowed the appeal to the extent of reducing non-pecuniary from $235,000 to $135,000.

The Court summarized the general Rule that "a new trial will not be ordered where no objection is taken to impropriety or error in the course of a trial unless there has been a substantial wrong or miscarriage of justice." At issue were portions of a functional capacity report by Paul Pakulak addressing validity testing and evidence from the examination in chief of Mr. Pakulak regarding his findings from the validity testing. No objection was taken at trial on either of these issues and Madam Justice Huddart concluded that, if that were the end of the matter, she would not be prepared to reach the conclusion that the jury made improper use of the expert's evidence.

However, plaintiff's counsel had commented in his closing:

> ... and that's what those tests were designed to do to show if what she told Mr. Pakulak, if what she told her doctor, what she told you was real and legitimate.

It was conceded on appeal that this comment was improper insofar as it told the jury they could use the evidence for the improper purpose of oath-helping. Defence counsel did not request the judge to include a limiting instruction in his charge to the jury, nor did the judge do so. A new trial was not required because the impropriety did not lead to a substantial wrong or miscarriage of justice. The plaintiff's credibility was not challenged at trial so the jury had no reason to disbelieve her or be influenced by the oath-helping.

Madam Justice Huddart found deficiency in the trial judge's charge to the jury on future loss of earning capacity, and stated:

> [33] In my opinion, judges should be very cautious in using CIVJI's Abbreviated Instructions. The length of the trial does not necessarily correlate to the complexity of the issues raised in the trial. Even in short trials, judges should review CIVJI's non-abbreviated instructions to ensure their inapplicability before relying entirely on the Abbreviated Instructions.

However, the lack of objection by counsel to the deficiency of the judge's charge "is a powerful circumstance militating against treating the defect as grounds for setting aside the verdict": *Rendall v. Ewert* (1989), 60 D.L.R. (4th) 513, 38 B.C.L.R. (2d) 1 at 10 (C.A.). The jury award was generous but not a miscarriage of justice as there was evidence upon which a properly instructed jury could reasonably and judicially have reached that decision.

Some of the comments by plaintiff's counsel in his closing argument were improper. (These go beyond the one example set out above, and counsel who conduct jury trials would be well served to review paras. 39-43 of the decision in particular.) The effect of the comments was found to be manifested in a disproportionate award of non-pecuniary damages which constituted a substantial wrong.

There is a helpful analysis of whether the interests of justice require a new trial. After taking into account various factors and *Moskaleva v. Laurie*, 2008 BCSC 1117, Madam Justice Huddart substituted $135,000 for the non-pecuniary damage award notwithstanding her view that the original award of $235,000 was more than three times what she would have considered appropriate.

XIV. Liability

A. Bradley v. Bath, 2010 BCCA 10, per Tysoe JA (Donald and Newbury JJA, concurring)

The defendants were found wholly liable for the accident at trial.

On appeal, liability was reapportioned 50% to the plaintiff and 50% to the defendant.

The collision involved a vehicle exiting a gas station and the plaintiff bicyclist. The plaintiff approached from the defendant's right, riding on the sidewalk, and emerged from behind a fence. The trial judge found the defendant wholly liable on the basis that the driver had failed to stop before crossing the sidewalk (*Motor Vehicle Act*, s. 176 (1)), and that there was no causal link between the plaintiff's breach of s. 183(2)(a) (prohibition from riding on the sidewalk) and the accident because he could just have easily have been a pedestrian. The plaintiff had conceded that he did not make eye contact with the driver before the impact and did not know the direction that the driver was looking.

While the prerequisite to apportionment under the *Negligence Act* is that the damage or loss has been caused by the fault of one or more people, "the apportionment must be done on the basis of the degree to which each person was at fault, not the basis to which each person's fault caused the damage." The Court of Appeal concluded that the trial judge erred in asking whether the plaintiff could have been struck by the defendant's vehicle if he were a pedestrian rather than a bicyclist, and thus concluding that the plaintiff's breach of s. 183(2)(a) was not causally connected to the accident. The correct inquiry was whether the plaintiff had failed to take reasonable care for his own safety and, if so, whether that failure was one of the causes of the accident.

B. Shular v. Seneca Enterprises Ltd., 2009 BCSC 1755, Kloegman J.

The defendants were the owners and operators of a motor home that broke down in a remote location without cell phone service outside of Fort St. John. The vehicle was in an unsafe position at the side of the road when the plaintiff and his friends came along. Without being asked, but without being told not to, the plaintiff and his friends pushed the vehicle across the road to a gravel pullout. The plaintiff voluntarily crawled underneath and attempted to repair the vehicle, and was injured when it rolled back at least 10 feet while he was underneath.

There were different versions of what happened and whether one of the defendants was in the vehicle when it began to move. However, the Court held that the defendants owed a duty of care to the plaintiff to ensure that the motor home was secured while the plaintiff worked under it, and had breached that duty. The plaintiff was contributorily negligent in "assuming" that the emergency brake was on and that the vehicle was in neutral. Liability was apportioned 25% to the plaintiff and 75% to the defendants.

XV. Nervous Shock

A. Piper v. Mitsubishi Heavy Industries Ltd., 2009 BCSC 1363, Pitfield J.

The issue in this Rule 18A application was the appropriate test to be applied to establish a claim for nervous shock.

The plaintiff's husband was killed in an airplane crash. The plaintiff was informed shortly thereafter of her husband's death. During the next few days, she watched television news stories of the crash, which depicted the crash site including the wrecked aircraft. She alleged that as a result of the news coverage, she suffered psychological injuries.

The issue before Pitfield J. was whether the leading BC authorities dealing with the test for establishing nervous shock should be considered with care and perhaps revisited in light of the subsequent Supreme Court of Canada decision in *Cooper v. Hobart*, [2000] 3 S.C.R. 537.

In *Devji v. Burnaby (District)* (1999), 70 B.C.L.R. (3d) 42 (C.A.), McEachern CJBC recognized that there was confusion in the law regarding the relationship between foreseeability and proximity in nervous shock claims. One view was that nervous shock was not compensable unless it was reasonably foreseeable. Another view was that, assuming reasonable foreseeability, controlling mechanisms, such as temporal, relational or locational proximity could preclude recovery. A third view was that proximity should inform reasonable foreseeability such that if there is insufficient proximity, there was no foreseeability. He concluded that he could fall back on the conventional approach that, assuming reasonable foreseeability, the tests to be applied are whether there is a sufficiently close relationship between the plaintiff and defendant to establish a duty of care, and if so, whether any public policy negates such duty.

In *Cooper v. Hobart*, [2000] 3 S.C.R. 537, the Supreme Court of Canada articulated a two-stage analysis. The first step was to determine whether the harm occasioned by the defendant's action was reasonably foreseeable and, if so, whether there was sufficient proximity or relationship between the plaintiff and defendant to warrant a recognition of a duty of care. The second stage was to assess whether there was any public policy concern to avoid the imposition of a duty of care, notwithstanding that both reasonable foreseeability and the duty of care had been established.

Pitfield J. concluded that he was bound by the BC authorities on the issue until such time as any apparent conflict was resolved. He found, however, that the facts before him did not establish a claim for nervous shock whichever test was applied.

It was not reasonably foreseeable that the plaintiff, on being informed of her husband's death, would suffer psychological harm. Nor was it reasonably foreseeable that the plaintiff would view news coverage of the crash site, resulting in nervous shock. The news coverage, over which the defendants had no control, was removed in time and place from the accident, and the requisite degree of proximity was lacking. On the other hand, there was no reason why the court could not employ locational or temporal proximity as factors in assessing whether it was reasonably foreseeable that someone who did not see the accident nor attend the scene would claim to have suffered nervous shock in the days after the accident by viewing pictures of the site.

B. Kotai v. Queen of the North (Ship), 2009 BCSC 1405, Joyce J.

A class action was brought by the passengers of a ferry that capsized, the majority of whom advanced claims based upon a "psychological injury" caused by their experiences in relation to the sinking. The issue before Joyce J. at trial was whether the claimants must prove that they suffered a recognizable psychiatric illness in order to recover damages.

After embarking upon an analysis of the law in several Canadian jurisdictions, Joyce J. was satisfied that despite attempts to lower the barrier, in BC a plaintiff who asserts a claim for damages for psychological injuries in a "nervous shock" case has to meet the threshold test of establishing a recognizable psychiatric illness: *Graham v. MacMillan*, 2003 BCCA 90. That test was not made less stringent by the Supreme Court of Canada decision of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, in which McLachlin C.J. stated at para. 9:

> I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and 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.

In *Mustapha*, there was no question that the plaintiff had suffered a psychiatric illness. The Court was concerned with the issue of the reasonable foreseeability of the illness. If McLachlin C.J. had intended to change the law with regard to the long-standing "psychiatric illness" test, she would have addressed the issue more directly, would have expressly rejected that test and would have provided reasons for doing so.

The requirement that the plaintiff must prove that he or she suffered a recognizable psychiatric illness introduces a degree of objectivity and certainty to the law through expert medical evidence and serves as a control mechanism to maintain a fair balance between plaintiffs and defendants.

XVI. Offers to Settle

There have been several recent Rule 37B (now Rule 9-1) decisions dealing with a variety of issues including the following:

A. Timing of Offer

In *Parwani v. Sekhon*, 2010 BCSC 540, an offer of $10,000 and 50% of disbursements delivered by the defendant on the Friday before the trial was scheduled to begin was a reasonable offer when the plaintiff was found to be 75% at fault and was awarded $25,000 in non-pecuniary damages, subject to apportionment.

However, the offer was delivered too late and therefore was not an embodiment of the conduct the Rule is intended to promote which, according to the Court of Appeal in *Mackenzie v. Brooks*, 1999 BCCA 623 is to reward a party who makes an early and reasonable settlement offer.

In *Oh v. Usher*, 2010 BCSC 122, an action in professional negligence and breach of conduct, an offer made by one of the defendants on the eve of trial was one that the plaintiff ought to have accepted given that she had no admissible evidence with which to prove her damages.

B. Successive Offers

In *Payne v. Lore*, 2010 BCSC 1313, the defendant delivered an offer containing a choice of two amounts: $250,000 (new money) if accepted within four days or $225,000 (new money) if accepted after four days but before trial. The plaintiff recovered at trial a net judgment that was $5,000 lower than the first amount offered. Wedge J. followed *ICBC v. Patko*, 2009 BCSC 578 to hold that an offer that has been revoked and replaced with another one may still be considered under Rule 37B if it was an offer that ought reasonably to have been considered while it remained open. She concluded that the timing of the offer, the time it was left open for consideration, the small difference between the offer and the judgment and the fact that the plaintiff had reason to believe she would recover damages for loss of future earning capacity and therefore recover more in damages, militated against giving any effect to the defendant's offer to settle.

C. Nominal Offers

In *Oh v. Usher*, an action in professional negligence and breach of conduct, an offer by one defendant for $1.00 without costs and disbursements, was according to the court, made relatively early in the proceedings, made no concessions to the plaintiff and ultimately provided little incentive for the plaintiff to settle. Even where the plaintiff's action was dismissed at trial following a non-suit application, the offer was not one that ought to have been accepted by the plaintiff.

In *Cambridge Plumbing Systems Ltd. v. Owners, Strata Plan VR 1632*, 2010 BCSC 459, a tendering dispute, the defendant delivered a Rule 37 offer for $1,000. Dorgan J. concluded that, in light of the range of damages being claimed by the plaintiff of $400,000 to $500,000, which range was not unreasonable, it was reasonable for the plaintiff to have rejected it. Rule 37B was enacted to prevent offers made for tactical reasons to force parties to consider unrealistic offers based on costs considerations only.

The defendant delivered a "walk away offer" which it subsequently revoked in *Burdett (Guardian ad litem) v. Mohamed*, 2010 BCSC 310. At trial, liability was found solely against the defendant's co-defendant and the action against him was dismissed. Boyd J. concluded that the "walk away" offer was one that ought to have been accepted by the plaintiff while it was open for acceptance. The plaintiff's insistence in keeping the non-liable defendant in the action was motivated by an awareness that the liable defendant's insurance would be insufficient to cover her damages. Of note, Boyd J. resiled from her earlier decision in *Radke v. Parry*, 2008 BCSC 1397 that the fact that there is a well funded insurer driving the defence is a factor to be taken into account under Rule 37B(6)(c).

Where an action against the defendant was unsuccessful but not frivolous and where the injury suffered was significant, it was not unreasonable for the plaintiff to refuse a "walk-away offer and pursue his claim. The offer provided no genuine incentive: *McIntyre v. Pitt Meadows Secondary School*, 2010 BCSC 852.

In *Riley v. Riley*, an estate action, the defendant offered to waive her costs in exchange for a consent dismissal order. The action was dismissed. The plaintiff argued that the offer was not a true offer to settle as it was simply "an invitation to the plaintiff to abandon the litigation." Greyell J. awarded the defendant double costs seven days from the date the offer was made. He stated:

> [16] An offer by a party to waive or forgo costs if the other party abandons pursuit of its claim is an appropriate offer to settle pursuant to Rule 37B. There are many claims commenced in this Court which are ultimately dismissed or which are subject to dismissal. To accept the plaintiff's argument would take away a valuable settlement tool from the parties and be contrary to the intent of Rule 37B.

D. Conduct of Party

In *Lakhani v. Elliott*, 2010 BCSC 281, the plaintiff delivered a Rule 37B offer to settle for $95,000. She recovered $105,038.93 in damages after trial. However, Voith J. declined to award double costs because of the plaintiff's conduct at trial which was worthy of censure and disentitled her to an award of double costs. He found that she sought to mislead the court and to significantly exaggerate the claim being advanced.

The defendant had not acted unreasonably in rejecting the plaintiff's offer when expert reports, which would have fully illuminated the risks the defendant was facing, were not served by the plaintiff until the last moment. It is incumbent on a party expecting an order for double costs to show timely disclosure of documents and reports that would have significantly affected the other party's assessment of whether the offer ought reasonably to be accepted: *Demarzo v. Michaud*, 2010 BCSC 1123.

E. Validity of Rule 37 and Rule 37B Offers

There continue to be conflicting decisions with respect to the validity of Rule 37 offers (delivered prior to July 1, 2008) which were not compliant with Rule 37 at the time they were made.

In *Burdett (Guardian ad litem) v. Mohamed*, the Court found that a "walk away" offer, purporting to have been made under Rule 37 but which did not strictly comply with Rule 37, was nevertheless a valid offer within the meaning of Rule 37B(1)(a).

However, in a subsequent family law action, *P.F. v. P.T.*, 2010 BCSC 600, Slade J. followed a consistent line of recently decided cases that have held "that a proposal concerning costs that does not fit within the definition of an "offer to settle" as defined in Rule 37B does not trigger the costs options set out in Rule 37B(5).

Whether a Rule 37B offer complies with the wording prescribed by Rule 37B(1)(c)(iii) has come under scrutiny and has resulted in conflicting decisions:

In *Mazur v. Berg*, 2010 BCSC 109, Adair J. found that an offer containing the following sentence:

> However, I will be bringing to the Court's attention in seeking double or increased costs that an offer to settle was made, upon the enclosed terms, and [sic] consideration by the Court pursuant to the new Rule 37B.

did not comply with the provisions of Rule 37B(1)(c) so as to qualify as an offer to settle under Rule 37B.

Conversely, in *Stanger v. Dehen*, 2010 BCSC 484, an offer to settle delivered after July 1, 2008 which was in the old form 64 under Rule 37, constituted an "offer to settle" under Rule 37B. Rice J. concluded that it would have been clear to the defendant that the plaintiff was nevertheless reserving the right to bring the offer to the attention of the court for consideration in relation to costs.

However, in *Roach v. Dutra*, 2010 BCCA 264, the Court of Appeal concluded that a Rule 37B offer that does not comply strictly with the wording required by Rule 37B (1)(c)(iii) is still valid provided it is substantially compliant with that subRule such that no reasonable person could be misled as to the intent of the offer or the fact that it was an offer within the meaning of Rule 37B.

In *Eigard v. Muench*, 2010 BCSC 878, the Court found that an offer to settle delivered after July 1, 2008 which was in the old form 64 under Rule 37, did not constitute an "offer to settle" under Rule 37B and did not meet the criteria set out in *Roach v. Dutra*.

F. Financial Circumstances of the Parties

In *Smith v. Tedford*, 2010 BCCA 302, the Court of Appeal stated that precluding from consideration the fact that a defendant has insurance coverage is very artificial. When ICBC assumes the defence, the financial ability to defend is much greater than the financial duty to prosecute, and that is of no small importance to consider whether and to what extent the financial circumstances of the parties, relative to each other, bear on the award of costs.

XVII. Practice

A. MacEachern v. Rennie, 2009 BCSC 939, Ehrcke J.

This decision, at least for now, maintains the principle set out in *Swirski v. Hachey* (1995), 16 B.C.L.R. (3d) 281 (S.C.) that, as long as the plaintiff's treating physician consents, the defendant may interview the physician in the absence of plaintiff's counsel and the treating physician does not thereby breach doctor-client confidentiality.

Prior to trial, defence counsel advised plaintiff's counsel that he intended to interview the physician who had treated the plaintiff for substance abuse. Plaintiff's counsel advised the physician that the plaintiff did not consent to the interview in her counsel's absence. Despite this, the physician, having obtained legal advice, consented to the interview by defence counsel in the absence of plaintiff's counsel.

During trial, a *voir dire* was held to determine the admissibility of the doctor's opinions with respect to his treatment of the plaintiff for substance abuse. One of the objections raised by the plaintiff was that the doctor should be precluded from giving expert opinion evidence because he had breached his duty of confidentiality to his patient by consenting to an interview by the defendants in the absence of counsel for the plaintiff.

The plaintiff urged the court to reconsider *Swirski*, which has as its key premise that the commencement of an action for damages for injury is a waiver of doctor-patient confidentiality for medical matters relevant to matters raised in the action. Plaintiff's counsel contended that *Swirski* should be overruled because it was not being following in other provinces and subsequent cases[1] show that the basis upon which *Swirski* was decided was no longer sound.

Ehrcke J. concluded he need not reconsider *Swirski* as the issue before him was not whether the defendants could interview the treating physician, but whether, having interviewed him, they could tender his opinion evidence. The facts before Ehrcke J. were that the plaintiff had not availed herself of the protection afforded to her by *Swirski* (i.e., by insisting that the clinical records used by the defendant to interview the physician were edited for relevance). Nor did she apply to the court to obtain an order barring or restricting the interview. He concluded that there was no impropriety in the meeting between the doctor and counsel for the defendants.

He comments, however, as follows:

> [28] If *Swirski* is to be reconsidered, the appropriate context would be on a pre-trial application where the issue is the same or analogous to the issue decided in that case.

B. Smith v. Wirachowsky, 2009 BCSC 1434, Halfyard J.

The Court ruled on the admissibility of clinical records that plaintiff's counsel sought to introduce into evidence by having them read by the physiotherapist and general practitioner who had recorded the plaintiff's complaints in the records. It was common ground that the records qualified as "business records" within s. 42 of the *Evidence Act*. Plaintiff's counsel submitted that the records were admissible to show the complaints that were made by the plaintiff to her health care givers but were not admissible for their truth.

Defence counsel argued that the statements made by the plaintiff as recorded in clinical records were not admissible as part of the plaintiff's case, unless those statements formed the factual underpinning of an expert's opinion. Such statements offended the rules against hearsay and prior consistent statements.

After reviewing the authorities and the rules of evidence, Halfyard J. concluded that the statements of the plaintiff to her physicians and therapists were not relevant to any issue in the trial that could have made them admissible at the instance of the plaintiff.

He provided a summary of the instances in which a plaintiff's statements to her physician can be relevant and admissible:

- in cross-examination of the plaintiff, to prove that the plaintiff made a previous statement (which is alleged to constitute a previous inconsistent statement or a damaging admission);

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1 Including *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157.

- in re-examination of the plaintiff, to rebut the suggestion (by defence counsel) of recent fabrication or failure to complain;
- in cross-examination of a doctor who examined or treated the plaintiff, to prove that the plaintiff made a previous statement (which is alleged to constitute a previous inconsistent statement or damaging admission), where the plaintiff denied or did not admit making the statement;
- where a doctor's or therapist's particular recommendation for the plaintiff's treatment is challenged, and the plaintiff's statement is relevant to explain why that treatment was prescribed or administered; and
- in cross-examination of a medical expert witness called by either party, where it is alleged that the expert relied on a particular statement made by the plaintiff to him or her; or where it is alleged that the expert disregarded or failed to consider a particular statement made by the plaintiff.

C. Shariatmadari v. Ahmadi, 2009 BCSC 1571, Fenlon J.

During the course of a jury trial, the court made two rulings: (1) the defence of *volenti non fit injuria* could not be put to the jury and (2) evidence of the plaintiff's alcohol consumption was admissible on the basis that it was relevant to the defence of contributory negligence.

The plaintiff and defendant had dinner and drinks together at the defendant's apartment. The plaintiff's evidence was that she and the defendant had consumed the same number of drinks. She later drove the defendant to meet his employer. After the meeting, the plaintiff allowed the defendant to drive. He lost control of the vehicle and was killed in the accident. The plaintiff suffered serious injuries.

The defence wished to lead evidence that would show that the plaintiff and defendant engaged in excessive drinking and driving several nights a week for some time prior to the accident. Defence counsel argued that such evidence would support a finding by the jury of a tacit agreement between the parties to assume the risk that might arise in relation to such driving. Fenlon J. concluded, based on the Court of Appeal decision in *Joe v. Paradis*, 2008 BCCA 57, that such evidence did not support a finding that the parties had, either implicitly or explicitly, reached an agreement, supportable by basic contract principles, to waive their legal rights to sue for injuries. As such evidence was necessary to establish the defence of *volens*, the Court ruled that the defence would not be put to the jury.

The Court did, however, allow into evidence the plaintiff's blood alcohol concentration. The Court held that evidence of the plaintiff's state of intoxication was relevant to the defence of contributory negligence. The plaintiff's blood alcohol level suggested that she and the driver had consumed more alcohol than she had admitted to and, if such was accepted by the jury, was evidence that supported her awareness of the defendant's consumption of enough alcohol to cause him to be impaired.

D. Forstved v. Penner, 2009 BCSC 1625, Masuhara J.

The defence objected to the admissibility of a report prepared by Russell McNeil, a registered occupational therapist, which relied almost entirely on findings resulting from the use of a functional assessment biomechanical system ("FAB") developed by Mr. McNeil. FAB is comprised of wireless inertial sensors attached to the subject's body and software that translates signals from the sensors into measurements of the movements of the subject's body on a real-time basis.

At the end of a *voir dire* during which Mr. McNeil was examined, the Court found that FAB did not meet the threshold reliability test for novel scientific evidence due to the following factors:

- The system has not been tested except by its developer; it is not yet ready to be marketed commercially to other users.
- Mr. McNeil, being an occupational therapist, was not able to speak to the technology involved in the hardware and software components of FAB.
- The system has not been subjected to peer review.
- There are no published standards for the techniques used by FAB nor is there any known rate of error.
- Mr. McNeil is the only occupational therapist in BC who uses motion capture software, which goes to the issue of whether it is generally accepted in the scientific community.
- Mr. McNeil is the inventor and marketer of FAB. His testimony, according to the court, "revealed a lack of appreciation regarding the role of a court expert and the need for open and candid disclosure of a financial interest in the very tools that he refers to in validating or verifying the reliability of the information supporting his opinions."

Masuhara J. ruled that the report, in its present form, was inadmissible.

E. Deventer v. Woods, 2009 BCSC 1546, Fenlon J.

During the course of a jury trial, Fenlon J. made two evidentiary rulings regarding the admissibility of photographs depicting minor vehicle damage as well as evidence of the plaintiff's financial circumstances, including life insurance and mortgage information.

Fenlon J. ruled that the vehicle damage photographs were relevant and admissible on the common sense basis that the greater the force with which two vehicles collide, the more likely it is that occupants of those vehicles will be injured. Any prejudice resulting from the jury's viewing of the photographs could be adequately addressed by instructing the jury to put the photos into the context of the evidence as a whole and that little or no damage to vehicles does not mean that the plaintiff could not have been injured.

The plaintiff's financial circumstances, including the fact that she had received life insurance proceeds as a result of her husband's death, although not relevant to the issue of whether she had suffered a loss of a capital asset, was relevant to the issue of whether the plaintiff's financial independence would have negatively affected such a loss.

XVIII. Third Party Proceedings

A. The Owners, Strata Plan LMS 1751 v. Scott Management Ltd., 1020 BCCA 192, per Neilson JA (Saunders and Groberman JJA concurring)

The Court of Appeal has laid to rest any lingering confusion over the ability of a tortfeasor to issue third party notices for contribution and indemnity under the *Negligence Act* against other tortfeasors whose liability to the plaintiff has been extinguished, either by expiry of the limitation period or by settlement.

In this "leaky condo" action, the Court struck the third party notices issued by the defendant builders against numerous contractors and sub-contractors on the basis that the expiry of the limitation period governing the plaintiff's claims against the third parties barred the defendants' claim for contribution against them. The chambers judge relied on a line of cases that held that concurrent liability of the defendants and the third parties to the plaintiff was a precondition to obtaining contribution under the *Negligence Act*. The expiry of the limitation period governing the plaintiff's claim against the third

parties precluded such concurrent liability and rendered the third parties immune from the defendant's claim for contribution. This line of cases appeared irreconcilable with a second line of cases, including, *Tucker v. Asleson* (1991), 86 D.L.R. (4th) 73(S.C.) aff'd in part (1993), 102 D.L.R. (4th) 518, which held that actions or events occurring after a tort, such as a settlement with one of the tortfeasors or the failure of the plaintiff to bring an action against a tortfeasor before the limitation period expired, did not preclude a defendant from claiming contribution or indemnity against those tortfeasors.

The Court of Appeal concluded that these lines of cases could be reconciled by a close examination of the temporal aspect of concurrent tortfeasors' liability to the plaintiff. For example, where a tortfeasor's liability to a plaintiff is extinguished prior to a tort occurring (either through contract or a statutory bar such as a worker-worker bar), a concurrent tortfeasor cannot advance a claim for contribution against the immune party after the tort. But where one tortfeasor's liability is extinguished after the tort, either through settlement or expiry of a limitation period, a concurrent tortfeasor can nevertheless advance a claim for contribution against that party.

According to the Court, the defendant's claim was properly governed by the principles established in *Asleson* and that "[t]here is no principled reason why the post-tort conduct of the plaintiff in failing to join the respondents as defendants before the limitation period expired against them should interfere with the defendants' right of contribution."

XIX. Unidentified Motorist

A. Greenwood v. ICBC, April 20, 2009, Vancouver Registry No. M081726, Brenner CJ.

ICBC applied for an order dismissing the plaintiff's action on the basis that he failed to comply with s. 24(2) of the *Insurance (Motor Vehicle) Act* by giving written notice to ICBC as soon as reasonably practicable and in any event within six months of the accident.

The plaintiff alleged he was struck as a pedestrian by an unidentified motorist. He did not provide notice to ICBC until he made a telephone call 22 months after the accident. Chief Justice Brenner agreed with defence counsel that the provisions of s. 24, creating as they do a right that does not exist at common law, must be strictly applied. The legislative purpose of the limitation period contained in s. 24(2) is to place ICBC in a position to investigate the circumstances of the unidentified motorist and to reasonably defend itself against the claim. He dismissed the action.

Chief Justice Brenner noted that the plaintiff failed to attend two examinations for discovery for which he gave no lawful excuse. Although he did not need to decide the case on this point, the Chief Justice commented that such could likely also provide a basis for dismissing the plaintiff's claim.

B. Hannah v. John Doe, 2010 BCCA 141, per Rowles JA (Kirkpatrick and Neilson JJA concurring)

The plaintiff was injured when a passenger in van that drove up beside her reached out and grabbed her purse strap and as the van accelerated away caused her to fall and be dragged until her purse ripped. The driver and passenger were never apprehended.

ICBC brought an application under Rule 18A to have the plaintiff's action dismissed on the ground that her claim did not fall within s. 24 of the *Insurance (Vehicle) Act* (the unidentified motorist provision) because, firstly, s. 24 was not intended to provide coverage for intentional or criminal acts committed by unidentified drivers while operating vehicles, and secondly, the injuries suffered by the plaintiff did not arise out of the use or operation of an automobile as required by s. 24.

The chambers judge dismissed the application.

The Court of Appeal dismissed ICBC's appeal. Section 24 requires that an injured person establish a cause of action against an unidentified motorist in order to bring action against ICBC as nominal defendant. The term "cause of action" is broad enough to include both intentional and negligent acts. It is clear from the language that that if the driver of an unidentified vehicle were proven to have intentionally driven his vehicle into collision with the plaintiff's vehicle, the plaintiff could bring a claim under s. 24: *Chan v. ICBC* (1996), 16 B.C.L.R. (3d) 96.

The plaintiff's injuries did arise out of the use or operation of a motor vehicle. On the facts of the case, it was reasonable to infer that the driver and passenger were engaged in a joint enterprise of robbery, using the vehicle to effect their purpose. The chambers judge, applying the reasoning in the Supreme Court of Canada decision in *Citadel General Assurance Co. v. Vytlingham*, 2007 SCC 46, concluded that the vehicle was being used as a vehicle, notwithstanding that it was used in the commission of the offence of robbery or the civil tort of assault. There was a causal link between the plaintiff's injury and the use or operation of the vehicle in that it was the combination of the passenger's grabbing the plaintiff's purse and the driver's acceleration of the vehicle that caused the plaintiff to fall and be dragged by the vehicle. According to the Court of Appeal, the chambers judge did not err in dismissing ICBC's application for there was a continuous chain of causation between the use of the vehicle on the one hand and the injuries sustained by the plaintiff on the other.

XX. Legislation

A. Motor Vehicle Amendment Act, 2009 (Bill 15)

Amends s. 25 of the *Motor Vehicle Act*, by adding a ban of the use of handheld electronic devices while driving.

B. Motor Vehicle Amendment Act, 2010 (Bill 14)

Adds ss. 215.41 and 250 to the *Motor Vehicle Act*, to provide for an automatic roadside driving prohibition when a person is operating a motor vehicle with a blood alcohol concentration equal to or greater than .05 and increases the fines for impaired driving.

Section 230 of the *Motor Vehicle Act* is amended to require health care professionals to report to the Superintendent any medical conditions that make it dangerous for their patient to drive and any patient that continues to drive after being warned of the danger.