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# Insurance Defence: Practical Considerations and Preparation for Change January 28th, 2009

# RECENT DEVELOPMENTS IN PERSONAL INJURY CASE LAW AND DAMAGES

For the purposes of this paper, I have identified a "Top Ten" list of recent key personal injury cases and trends in damages awards of which those practicing in this area should be aware.

They are as follows (in no particular order of importance).

## I. FAILURE TO MITIGATE

As represented by the following cases, there is a recent judicial trend towards reduction of damages awarded to a Plaintiff for failure to follow recommended treatment. Some of the reductions are substantial.

A. *QIAO V. BUCKLEY*, 2008 BCSC 1782, SINCLAIR PROWSE J.

This Plaintiff suffered chronic pain and anxiety as a result of an Accident. Her GP and psychiatrist recommended that she engage in group psychotherapy sessions more than two years prior to the trial. She had not done so by the date of trial but testified that she intended to take the treatment in the future. Madam Justice Sinclair Prowse was satisfied that the evidence established treatment would be effective in addressing her anxiety disorder and in improving her chronic pain symptoms.

The Plaintiff testified that she had not taken the treatment for two reasons. Firstly, she was embarrassed do disclose the psychological symptoms in such a public manner because she would be seen as "useless". Her embarrassment was, in part, cultural as a result of her Chinese heritage. Secondly, she said that she could not afford it.

A court will excuse a Plaintiff's failure to mitigate only in circumstances where, as a result of reasons outside of their control, they are unable to comply with the duty to

mitigate. In this case, the Plaintiff's embarrassment was not a circumstance beyond her control; it made it more difficult for her to engage in the treatment, but not impossible.

The Plaintiff had failed to demonstrate that the costs precluded her taking the treatment. She had not shown any steps to demonstrate the financial difficulty such as mentioning it to her treating doctors or raising it with the Defendants (presumably meaning ICBC).

Her Ladyship reduced the quantum of damages by 30% as a result of the Plaintiff's failure to mitigate.

B. *ANTONIALI V. MASSEY*, 2008 BCSC 1085, PRESTON J.

The Plaintiff suffered soft tissue injuries to her neck and back which continued to cause complaints to the date of trial. She had only sought passive chiropractic treatment and had not participated in an active exercise program recommended by her doctors shortly after the accident and on other occasions since.

The finding of a failure to mitigate in this case was based on the opinions of the Plaintiff's own expert, a physiatrist, Dr. Stewart. The court found:

> [32] Dr. Stewart is a specialist in physical medicine and rehabilitation. I am satisfied that her evidence provides the safest guide to the likely efficacy of an exercise program. She expressed the opinion that even at the time of trial a program of stretching and conditioning would have been likely to improve her functioning. However, it was clear from her evidence and that of Drs. Cameron and Leung that this has been true for some time. Dr. Stewart commented that in the early stages of an injury individuals are usually so sore that they cannot engage in an exercise program. She has said that many people are not ready to perform active rehabilitation for as much as a year after the injury.
>
> [33] She observed that, in Ms. Antoniali's case, she assumed household and child care duties after the collision that reduced the time that she had to devote to both work and rehabilitation.

> [34] She agreed that injured persons improve most with active rehabilitation in the first two or three years after an injury.
>
> [35] I am satisfied that, had Ms. Antoniali engaged in an active rehabilitation program beginning one year after the collision, she would have significantly reduced the disability that she has experienced.

Judge Preston then reduced her award for past damages (including 50% of her non-pecuniary damages and past wage loss from one year after the accident to the date of trial) by 15% and her award for future income losses (including 50% of her non-pecuniary damages) by 50%. This reduced the total award from $135,677 to $87,027.

*Antoniali* has been applied in the context of mitigation arguments in two cases:

- *Ponipal v. McDonagh (Committee of)*, 2009 BCSC 461, in which the non-pecuniary award was reduced by 10% for failure to engage in a recommended exercise and conditioning program.

- *Job v. Van Blankers*, 2009 BCSC 230, is another case in which the non-pecuniary award was reduced by 10% because the Plaintiff failed to follow her family doctor's advice to attend for physiotherapy, chiropractic treatments and massage.

C. *PAPINEAU V. DORMAN*, 2008 BCSC 1443, BROWN J.

In this case, the Plaintiff suffered immediate neck pain following an accident and within a few weeks started to experience back pain. The Plaintiff did not seek medical treatment for about eight months after the accident. Causation was the predominate issue in the case.

The family doctor's clinical notes (no report was provided by the GP) showed that he had recommended the Plaintiff undergo physiotherapy and conditioning programs which the Plaintiff had failed to pursue. Madam Justice Brown concluded that she could draw an

adverse inference with respect to the GP's failure to testify in respect of the mitigation issue.

She applied a 20% reduction to the Plaintiff's non-pecuniary damages and past loss of income, but assessed his future losses differently "based on the assumption that he will choose to act reasonably and to mitigate his losses by following treatment recommendation, with corresponding benefit".

D. *MIDDLETON V. MORCKE*, 2007 BCSC 804, STROMBERG-STEIN, J.

As a result of two car accidents, the Plaintiff suffered soft tissue injuries and depression. The Plaintiff was found to have failed to mitigate both her psychological and physical injuries.

Her doctors had recommended a program of anti-depressants, biofeedback and group therapy which the Plaintiff failed to follow because, she said, she preferred to concentrate on physical, not psychological, complaints. However, she only pursued passive therapy for her physical injuries and did not follow the medical advice for an active exercise program.

Addressing the Plaintiff's failure to mitigate in respect of her psychological injuries, the court said:

> [49] I agree with the Defendants' comments that this is a case of a patient thinking that she knows better than her health practitioners. In cross-examination when asked why she did not pursue group therapy and biofeedback, the Plaintiff stated 'I didn't have time to do all that.' This response indicates that the Plaintiff's priority was not her recovery.

With respect to the physical injuries, the court said:

> [54] The Defendants submit that the Plaintiff has failed to pursue an adequate, active exercise program. Instead, she has unreasonably relied

> almost exclusively on passive therapy modalities, such as prolotherapy, acupuncture and physiotherapy. The evidence adduced demonstrates the value of exercise to aid quick recovery for the Plaintiff's type of injuries. In addition, exercise has a positive effect in alleviating the symptoms of depression. The medical evidence establishes there is an overlap between pain and depression; there is a connection between a person's mood and their perception of physical pain. For someone like the Plaintiff, an exercise program is a key part of her recovery, not a recreational activity that she may discontinue if she does not find it enjoyable. The evidence establishes that the Plaintiff put minimal effort, at best, into an exercise program.

Her general damages were reduced by 40% for her failure to mitigate.

E. *TAGGART V. YUAN ET AL*, JANUARY 11, 2008, VANCOUVER REGISTRY NO. M062358, SLADE J.

In this case there was a 30% reduction to the awards for non-pecuniary damages, loss of earning capacity and loss of housekeeping capacity for a failure to mitigate. The Plaintiff had initially followed her doctor's advice to engage in a number of treatments, but had failed in the years since to follow through with the advice to engage in an active exercise regime.

F. *RINDARO V. NICHOLSON*, 2009 BCSC 1018, MEIKLEM, J.

The court reduced the Plaintiff's damages by 25% because the Plaintiff had failed to reduce his weight, which would have decreased his chronic pain suffered as a result of a knee injury.

G. OTHER CASES

The following are other recent cases in which mitigation arguments were successful:

*Lidher v. Toews*, 2009 BCSC 1055
*Loik v. Hannah*, 2009 BCSC 1196

*Leung v. Foo et al*, 2009 BCSC 747

*Latuszek v. Bel-Air Taxi (1992) Limited*, 2009 BCSC 798

## II. IN-TRUST CLAIMS

There were two cases last year that represent a more conservative approach to in-trust claims.

A. *ELLIS v. STAR* 2008 BCCA 164, PER MACKENZIE JA (LEVINE AND LOWRY, JJA CONCURRING

The Court of Appeal overturned an in-trust award of $3,500 for yard maintenance that the Plaintiff's wife had to perform as a consequence of the Plaintiff's right hand injury. The wife had done all of the yard maintenance that the Plaintiff would have done in the year after the accident, 70 percent in the following year and 60 percent in subsequent years.

The court confirmed that in-trust claims should be confined to care provided to seriously inured Plaintiffs or to support services beyond those normally expected in a marital relationship to adjust for minimal debilitating injuries.

The court adopted the following quote from *Kreoker v. Jansen*, (1995), 4 B.C.L.R. (3d) 178 (CA):

> [29] There is much merit in the contention that the court ought to be cautious in approving what appears to be an addition to the heads of compensable injury lest it unleash a flood of excessive claims. But as the law has developed it would not be appropriate to deny to Plaintiffs in this province a common law remedy available to Plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a

> similar regime of reasonableness will develop in respect of the kind of claim at issue in this case.

The court concluded that services provided by the wife were not sufficiently extensive to rise beyond those services normally to be expected in a marital relationship and the Plaintiff's physical disability was of minimal significance in terms of routine yard work.

B. *FRANKSON V. MYRE*, 2008 BCSC 795, SAVAGE J.

The 21 year old Plaintiff, a college student, suffered a number of injuries in an accident, the most serious being a back injury. He spent the first night in the emergency department because of a shortage of beds. He was released the next morning into the care of his mother, a registered nurse. He remained bedridden for the next two weeks and largely housebound for the following month. His mother provided nursing care including checking his pupils and abdomen, administering medication and feeding him.

The court reviewed the six relevant factors for making an in-trust claim for the care provided by his mother as set out in *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735, aff'd 2004 BCCA 124 and held:

> [55] In the circumstances here, even if services went beyond that which might be performed out of a sense of love, friendship or family duty, which in my opinion they did not, the Plaintiff's mother suffered no opportunity loss, that is, she did not suffer any economic loss as a result of caring for the Plaintiff since she was off work on medical leave and under full salary.

## III. LOSS OF EARNING CAPACITY

Judges appear to be scrutinizing claims under this head of damage by applying the substantial possibility test to reflect the relative likelihood of an actual pecuniary loss occurring.

A. *STEWARD V. BEREZAN*, 2007 BCCA 150, PER DONALD JA (NEWBURY AND CHAISSON JJA CONCURRING)

The Court of Appeal has, in *Steward*, clarified the approach originally set out in *Palmer v. Goodall* when assessing whether a Plaintiff has suffered a diminished earning capacity. A wealth of cases followed *Palmer v. Goodall* in which Plaintiffs who suffered less serious injuries but ones which resulted in a permanent partial impairment were awarded loss of earning capacity claims even where the Plaintiff was earning as much or greater than they would have been able to earn absent the accident.

*Steward* sets out that when assessing a diminished earning capacity claim, the court must conduct a two step enquiry: the court must first determine whether there is a "substantial possibility" of future income loss and, only if so, then embark on an assessment of the loss.

*Steward* involved a Plaintiff who sustained an injury in an accident that prevented him from engaging in physically strenuous work. He was 55 years old at trial, and had been employed as a real estate agent for twenty years (and was working, full-time, as a realtor at the time of the trial). His previous occupation had been as a carpenter; he testified that he had no intention of returning to carpentry. In awarding $50,000 for the impairment of his earning capacity, the trial judge said:

> [44] In my view, this was not a case where it would be appropriate to calculate potential loss of earnings for the Plaintiff in the future. It appears that the Plaintiff may earn as much in the future as he would have if not injured.
>
> [45] This does not mean, however, that the Plaintiff is not entitled to compensation for the impairment of his earning capacity in other occupations that may now be closed to him. It is impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life.

In allowing the appeal, Mr. Justice Donald said at paragraph 17:

> The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur; *Parypa* [paragraph] 65 .

His Lordship concluded:

> There being no other realistic alternative occupation that would be impaired by the Plaintiff's accident injuries, the claim for future loss must fail.

Some cases suggest that *Steward v. Berzeran* may have limited application (for example, *Sinnott v. Boggs*, 2007 BCCA 267, *Djukic v. Hahn*, 2007 BCCA 2003, *Stone v. Ellerman*, 2007 BCSC 969, *Star v. Ellis*, 2008 BCCA 164).

However, *Steward* has been applied in *Bedwell v. McGill*, 2008 BCCA 22, *Naidu v. Mann*, 2007 BCSC 1313, *Chang v. Feng*, 2008 BCSC 49, *Dimen v. Binning*, 2007 BCSC 1853 and *Bourdin v. Ridenour*, 2009 BCSC 1295.

B. *PERREN V. LALARI*, 2008 BCSC 1117, MACAULAY, J.

In this case, Mr. Justice Macaulay reviewed the authorities that are in conflict with *Steward* and invited the Court of Appeal to clarify. The defence took up the trial judge's invitation and an appeal was taken from Mr. Justice Macaulay's decision. Unfortunately, that appeal was recently dismissed as abandoned on an application by the Appellant for an extension of time to file (2009 BCCA 373). I understand an appeal has been filed in respect of that order.

There are a number of appeals before the court that also raise this issue and undoubtedly we shall have further clarity from the Court of Appeal on this issue shortly.

C. *PENLAND V. LOFTING*, 2008 BSCS 507, MACKENZIE J.

This is another case to be aware of in which a future capacity claim was dismissed on the basis that there was not sufficient evidence to prove a substantial possibility that the Plaintiff's ability to earn future income was diminished. McKenzie, J. did not refer to *Steward.*

## IV. COST OF FUTURE CARE

The following is a recent case in which the court took a more conservative approach to a cost of future care award.

A. *TRAVIS V. KWON*, 2009 BCSC 63, JOHNSTON J.

Mr. Justice Johnston made the following comments regarding cost of future care claims:

> [109] Claims for damages for cost of future care have grown exponentially following the decision of the Supreme Court of Canada in the trilogy of decisions usually cited under Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.
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> [110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured Plaintiff could live as complete and independently a life as was reasonably attainable through an award of damages.
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> [111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.
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> ....
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> [114] Part of the housekeeping portion of these claims arises out of the fact that the Plaintiff's husband is not terribly helpful in that regard.

> While the Defendants cannot expect a family member to take on an unreasonable burden created by injuries to another member of the family, it is not reasonable to expect Defendants to pay to have someone perform services that can and should be reasonably be taken on by members of the family.

His Lordship disallowed the claim advanced for future housekeeping services on the grounds that the services were not medically necessary. However, the court made allowance for such claim as part of the non-pecuniary damages.

*Morrison v. Gauthier*, 2009 BCSC 1271, applied *Travis* to assess a loss of domestic capacity as part of the non-pecuniary claim and not a separate head of damage.

## V. PSYCHOLOGICAL INJURIES – NERVOUS SHOCK

The Supreme Court of Canada has clarified the law on what is and is not compensable in nervous shock claims.

A. *MUSTAPHA V. CULLIGAN OF CANADA LTD.*, 2008 SCC 27 PER McLACHLAN C.J. (BASTERACHE, BINNIE, LEBEL, DESCAMPS, FISH, ABELLA, CHARRON AND ROTHSTEIN J.J. CONCURRING)

The Plaintiff sought damages for grievous psychological injury he suffered after he saw some dead flies in a bottle of water delivered by the Defendant. He recovered damages at trial, which was overturned by the Ontario Court of Appeal on the basis that the standard for reasonable foreseeability was an objective one, based on the "person of normal fortitude and robustness" principle.

The Supreme Court unanimously dismissed the appeal. In doing so, Madam Justice McLachlan set out the elements for a successful action in negligence. The Plaintiff must demonstrate that:

1. the Defendant owed him a duty of care;

2. the Defendant's behavior breached the standard of care;
3. the Plaintiff sustained damages;
4. the damages were caused, in fact and in law, by the Defendant's breach

In this case, the Plaintiff was able to satisfy the first three elements.

In considering whether the Plaintiff suffered damages, McLachlan CJ made it clear that there is no real distinction between psychological and physical injury. However, psychological disturbance that rises to the level of compensable personal injury must be more than upset, disgust, anxiety, agitation or other mental states that fall short of injury. According to the Chief Justice, compensable psychological injury "must be serious and prolonged and rise above the ordinary annoyances, anxieties, and fears that people living in society routinely, if reluctantly, accept". The evidence in this case established that the Plaintiff developed a major depressive disorder with associated phobia and anxiety which were debilitating and had a significant impact on his life. He therefore established that he sustained damage.

However, the case failed on the fourth element. This element involved the concept of "reasonable foreseeability" viewed from the vantage of a Plaintiff of "ordinary fortitude". Reasonably foreseeable harm requires a degree of probability or a "real risk" i.e., "one which would occur to the mind of a reasonable man in the position of the Defendant and which he could not brush aside as far-fetched".

The medical evidence in this case established that the Plaintiff's reaction was "highly unusual" and "very individual" and, accordingly, his claim must fail.

B. *ARNOLD V. CARTWRIGHT*, 2007 BCSC 1602, BUTLER, J.

The Plaintiff witnessed a motor vehicle accident and involved in a high speed accident in which the two drivers were both killed. The Plaintiff was nearly involved in the accident, called 911, and spent about 90 minutes assisting the victims. Eleven months later he

suffered a panic attack and was subsequently diagnosed with PTSD and bipolar disorder which disabled him from working for two and half years. The lack of pre-existing relationship with the victim was not a bar to recovery of damages for nervous shock. The development of the PTSD was reasonably foreseeable and caused by the exposure to the accident.

C. *THOMPSON V. ATTORNEY GENERAL*, 2008 BCSC 582, ALLAN J.

The issue before Allan J. on this special case application was:

> Can [the Plaintiff] maintain an action against any of the Defendants to recover compensation for psychiatric injuries she suffered as a consequence of the deaths of Sherry Heron and Anna Adams?

The Plaintiff, for the purpose of the special case, was the sister and daughter of two women who were shot to death by the Plaintiff's sister's husband at Mission Hospital. After a three-day manhunt, the brother-in-law committed suicide. Prior to the killings, the Plaintiff's sister had disclosed the husband's violent behavior towards her to the RCMP but no charges were laid. After the shooting and while the brother-in-law was still at large, the Plaintiff feared for her and her family's safety and sought police protection. She was not at the hospital at the time of the shooting, nor did the Plaintiff see the bodies of her mother and sister. She was diagnosed as suffering from a number of psychiatric injuries, including PTSD and Major Depression and remained disabled from working.

Allan J. concluded that she was bound by the governing law with respect to psychiatric injury (or nervous shock) set out in *Rhodes Estate v. Canadian National Railway* (1999), 50 B.C.L.R (2d) 273 (C.A.) and *Devji v. Burnaby,* 1999 BCCA 599. In both cases, the Court of Appeal limited the recovery for psychiatric injury to circumstances involving locational proximity: the injured person witnessed the traumatic event or its aftermath. Despite the unique facts in this case – the Plaintiff warning the hospital and police and fearing for her safety after the shootings – she could not establish the degree of locational

proximity required by the leading cases. These unique circumstances went to the issue of reasonable foreseeability, not to locational proximity.

In dismissing the case, Allan J. said:

> [32] Ms. Thompson sought to protect her sister from the terrible event that actually transpired. In my opinion, it was reasonably foreseeable that if the Defendants failed to meet the requisite standard of care, that Ms. Thompson would suffer a psychiatric injury. However, I am bound by the law in B.C. that reasonable foreseeability is not enough. The Plaintiff's claim is barred by the policy based control mechanism that limits recovery for psychiatric illness. In B.C., there are no decisions where a Plaintiff has succeeded in recovering damages for psychiatric illness unless he or she witnessed the event or its immediate aftermath.

## VI. PSYCHOLOGICAL INJURIES - CAUSATION

I have referenced the following case as it contains a thorough analysis and review of the law with respect to causation for psychological injuries where the Plaintiff was pre-disposed to psychological disorders.

A. *THIESSEN V. KOVER,* 2008 BCSC 1445, CHAMBERLIST J.

The Plaintiff sought substantial damages for psychological injuries allegedly suffered in a car accident. She suffered from a pre-existing histrionic personality which she claimed made her a thin skull Plaintiff and that the accident triggered her ongoing physical and emotional symptoms such that her entire life had changed and she was now unable to cope with life.

There were significant issues of credibility, and ultimately, the judge chose to rely upon the defence lay witnesses who knew the Plaintiff before and after the accident and testified as to all of the stressors in her life. He also preferred the opinion of the psychiatrist called by the defence whose opinions were described as "enlightened", over the opinions of the Plaintiff's experts which were given little weight.

The court concluded:

> [142] Looking at the totality of the evidence regarding the ongoing psychological conditions of Ms. Thiessen, I repeat again that the burden or onus of proof is on the Plaintiff to show that but for the negligence of the Defendant Kover the psychiatric or psychological conditions now experienced by the Plaintiff would not have occurred.
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> [143] For the reasons set out I have concluded that Ms. Thiessen has not met this onus. Given her history of pre-existing psychiatric illnesses and the numerous stressors of the Plaintiff that have been experienced by her prior to the accident and subsequent to the accident, I have concluded the burden has not been met by the Plaintiff. I accept the evidence of Dr. Zoffman that it is, in all probability, that her psychiatric or psychological conditions would have evolved from the other stressors in her life other than stress related to the motor vehicle accident.

The Plaintiff was awarded damages of $14,624.

## VII. CAUSATION - INDIVISIBLE INJURY

Causation continues to be the subject of much judicial ink and far too broad a topic to be addressed in this paper. However, I want to highlight two cases of considerable importance from the defence perspective which address the principle of "indivisible injury".

### A. *HUTCHINGS V. DOW*, 2007 BCCA 148, PROWSE J.A. (LOW AND KIRKPATRICK J.J.A. CONCURRING).

The Plaintiff suffered injuries in a car accident and three months later was injured in an assault. Each incident caused discrete injuries but the Plaintiff also suffered from a serious and ongoing depression that was caused by both the accident and the assault. The trial judge found that the depression was an indivisible injury which was contributed to in a material way by both the accident and the assault, with the result that the tortfeasors in both cases were jointly and severally liable for the entirety of damages flowing from that

injury. The decision was upheld on appeal as it was not possible to determine Hutchings' original position with respect to his depression in the absence of the Accident.

Leave to appeal to the Supreme Court of Canada was dismissed: [2007] S.C.C.A. No. 244.

B. *ASHCROFT V. DHALIWAL*, 2008 BCCA 352, PER HUDDART J.A. (KIRKPATRICK AND TYSOE J.J.A. CONCURRING).

The Plaintiff was injured in two accidents a year apart. She had retuned to work but was still suffering from the injuries sustained in the first accident when the second accident occurred. She then became permanently disabled. The trial judge found the injuries from the two accidents were indivisible – the second accident had realized a vulnerability created by the first accident.

The Plaintiff had settled her claim in respect of the second accident prior to trial. The trial judge deducted the settlement amount from the total award on the basis that it complied with the rule against double recovery espoused by the Supreme Court of Canada in *Ratych v. Bloomer*, [1990] 1. S.C.R. 940.

The Court of Appeal confirmed the trial decision and further clarified that the principle remains the same whether the torts are concurrent or consecutive.

Leave to appeal to the Supreme Court of Canada was dismissed: [2008] S.C.C.A. No. 488

**VIII. CAUSATION - TEMPORAL CONNECTION**

The following case contains a thoughtful analysis of the "but for" and "material contribution" tests as well as a rejection of the temporal connection test for causation.

A. *FARRANT V. LATKIN*, 2008 BCSC 234, SLADE J.

The plaintiff had a history of back problems from 1976 as a result of degenerative disc disease which required surgery in 1977 following which he was off work. He was off work again in 1996 and 1997. However, he had no visits to his doctor with complaints of back pain from 1998 to the date of a low speed rear end accident on March 27, 2004. The sought medical attention three days after the accident and was off work for six weeks. A month later he visited his doctor and reported that he was feeling better and looked as if he was well on the road to recovery. By November 2004 his condition deteriorated and by April 2006 he was in constant pain and disabled from working.

The case contains an interesting discussion about the quality of the medical evidence. The Plaintiff's experts were in disagreement regarding the mechanism of causation and one of the Plaintiff's experts put forward what the defence doctor called an "unfamiliar" theory of causation. The Plaintiff argued that the conflict in the medical evidence made it impossible to prove the case on the "but for" test recently revisited in the Supreme Court of Canada case, *Resurfice v. Hanke*, 2007 SCC 7 and so had to resort to the "material contribution" test. The court said that the Plaintiff could not rely on the lower standard merely because his medical experts were in disagreement with each other and with the defence expert.

Ultimately the court found that the Plaintiff had failed to show pain symptoms with 2004 onset would not have developed but for the accident.

Mr. Justice Slade quotes from Ehrcke J. in *White v. Stonestreet*, 2006 BCSC 801:

> The inference from a temporal sequence to a causal connection … is not always reliable. In fact, this form of reasoning so often results in false conclusions that logicians have given it a Latin name. It is sometime referred to as the fallacy of *post hoc ergo propter hoc:* "after this therefore because of this."

> In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternative, and more accurate, explanation of the true cause?

*Farrant* has been distinguished in *Randhawa v. Hwang*, 2008 BCSC 435 (Fenlon J.) on the basis that there was medical evidence that offered an explanation for the delay in he onset of a disc herniation a year after the accident.

## IX. PRODUCTION OF ELECTRONIC DOCUMENTS

Computers and social networking sites can be fruitful ground for gathering information helpful to the defence of a claim and the courts are increasingly being asked to grant Orders for the production of documents from social networking sites and access to computer hard drives.

A. *BISHOP V. MINICIELLO*, 2009 BCSC 358, MELNICK J.

Defence was successful in obtaining an Order for production of the Plaintiff's hard drive for the sole purpose of retrieving metadata showing the Plaintiff's pattern of log-ins and log-outs of his Facebook accounts. The case contains an excellent review of the jurisprudence on productions of computer hard drives to date.

B. *LEDUC v. ROMAN*, 2009 O.J. No. 681, (Ont. S.C.) BROWN J.

This case stands for the proposition that a Defendant will be entitled to an Order for production of all of the information on a Facebook site (i.e., including all of the "private information") if relevant to a personal injury action. Judge Brown in granting an appeal

from a Master's refusal for production said:

> [29] Where a party makes extensive postings of personal information in his publicly-accessible Facebook profile, few production issues arise. Any relevant public postings by a party are producible....
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> [30] Where, in addition to a publicly-accessible profile, a party maintains a private Facebook profile viewable only by the party's "friends", I agree with Rady J. that it is reasonable to infer from the presence of content on the party's public profile that similar content likely exists on the private profile. A court then can order the production of relevant postings on the private profile.
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> [31] Where, as in the present case, a party maintains only a private Facebook profile and his public page posts nothing other than information about the user's identify, I also agree with Rady J. that a court can infer from the social networking purpose of Facebook, and the applications it offers to users such as the posting of photographs, that users intend to take advantage of Facebook's applications to make personal information available to others. From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of "friends" with whom they can share information about themselves, and on which "friends" can post information about the user.
>
> [32] A party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action. Master Dash characterized the Defendant's request for content from Mr. Leduc's private profile as "a fishing expedition", and he was not prepared to grant production merely by proving the existence of the Plaintiff's Facebook page. With respect, I do not regard the Defendant's request as a fishing expedition. Mr. Leduc exercised control over a social networking and information site to which he allowed designated "friends" access it is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

(see also *Wice v. Dominion of Canada General Insurance Co.*, [2009] O.J. No. 2946 (Ont. S.C.))

C. *BAGASBAS V. ATWAL*, 2009 BCSC 512, SATANOVE, J.

Photographs from the Plaintiff's Facebook page were used to discredit her allegations that her injuries interfered with her physical activities.

See also *Cikojevic v. Timm*, 2008 BCSC 74 and for a similar result in Ontario, see *Kourtesis v. Joris*, [2007] O.J. No. 2677 (Ont. S.C.)

D. *ROESKE V. GRADY*, 2006 BCSC 1975, SLADE J.

An application for order compelling production of the Plaintiff's laptop was dismissed predominantly on the basis that the application was brought late in the day. The Judge acknowledged that in some cases the whole of the information contained on a computer hard drive may be relevant.

E. *VELTHEER V. PRACHNAU*, 2007 BCSC 511, SINCLAIR PROWSE J.

The Plaintiff was ordered to review his electronic aids including Blackberry, Palm Pilot and computers and make a list of all relevant documentation stored in the devices, including the documents that may have been deleted by the Plaintiff, but still exist on the devices' hard drive.

## X. PRODUCTION OF POLICE RECORDS

Traditionally, the police have refused to produce documents collected in the course of their investigations until after criminal proceedings have been concluded. The following case now allows a party to obtain a desk order requiring the police to produce certain records prior to the conclusion of the criminal proceedings.

A. *WONG V. ATUNES*, 2009 BCCA 1200 KIRKPATRICK J.A. (HALL AND BAUMAN, J.J.A. CONCURRING)

The Defendant was charged with criminal negligence causing death as a result of a car accident in which the Plaintiff's son was killed. Certain documents were disclosed to the Defendant by Crown Counsel as part of the criminal proceedings pursuant to a *Stinchcombe* application. Those documents included witness statements and the results of DNA testing that had been gathered in the course of the police investigation. The Plaintiff brought a civil proceeding in which the Defendant did not disclose the police documents on his list of documents despite admitting that they were in his possession. On application by the Plaintiff, the court ordered that the police produce copies of all of the documents which had been disclosed to the Defendant in the criminal proceedings.

The Attorney General appealed the procedure for the disclosure and the Court of Appeal agreed that it was best for the application to proceed by way of desk order (the form of which is produced in the reasons). The desk order allows the police to examine the documents and determine whether certain documents should not be produced for reasons of privilege or which would be against the public interest (i.e., it could prejudice the conduct of criminal prosecution which had not yet been concluded, harm an ongoing investigation, reveal the identify of a confidential source or sensitive police investigation techniques, or harm international relations or national defence).