Briefly!

Published by Law Courts Center and the Canadian Paralegal Institute APRIL 2015

3 Judicial Views: On Gender and Cultural Diversity Part 1

February 19th, 2015 serendipitously presented two momentous occasions that offered a glimpse into how much our society has embraced multiculturalism. It marked the start of the lunar year of the ram It was also the Amici Curiae lecture which featured three members of the Canadian judiciary speaking on gender and cultural diversity.

The Honourable Madam Justice Maryka Omatsu of the Ontario Court of Justice starts by articulating recent statistics brought to light in the Law Society of Upper Canada's report regarding racialized lawyers. The unfortunate consensus is that lawyers who are visible minorities face challenges that are not issues to their Caucasian counterparts. The report went even further to indicate that the discrimination of these racialized lawyers affects the reputation of the legal profession, access to justice, and the quality of service provided to clients.

Justice Omatsu notes that there have been far-reaching efforts to promote diversity in both gender and race. Indeed, for the past thirty years the number of women entering law has greatly increased, and the past decade has seen that women are starting to largely outnumber men in law school. With respect to Vancouver and Toronto, 17 – 18 per cent of lawyers are racializied.

"In-group Bias" is the term that illustrates how people favour other people who they perceive as similar to themselves. For the more than 50 per cent of law school graduates who are women, the factor of maternity leave and opting to staying at home and to raise their children often results in women lawyers changing their status and disrupting their careers. The reality is that while the country has become more progressive by offering longer maternity leaves and organizing funds to help women to take time off work for child-raising responsibilities, very few women are taking advantage of these recourses so that they do not fall behind their colleagues.

In BC, only 4.6 per cent of the population is identified as First Nations individuals. Of the lawyers practicing in British Columbia, only 1.5 per cent identify as First Nations (which equates to a total of 16 lawyers in the province). Justice Omatsu specifically pointed out these statistics because in a province that must acknowledge that the very lands we inhabit are unceded Coast Salish territories, we, as a community, need to nurture and foster the multiculturalism we have so proudly gained – we need to extend these attitudes without constraint.

Of further interest is that 43 per cent of racialized lawyers believe that the cultural barrier in some way hinders their entry and advancement. Of the non-racialized lawyers, only 3 per cent agree that race is a barrier to entry and advancement in the legal sector.

Are there proposals for change within the legal community? England and Wales have both signed diversity and inclusion charters that promote the integration of cultural diversity. In the United States, a study was done in 1995, a mere 20 years ago, that discovered that of all the lawyers in the country, only 1.6 per cent were either Hispanic or African American. At this shockingly low average, measures were implemented to attempt to raise this statistic. After over a decade, the percentage in 2015 rests at 1.9%. Canada has been called to action to make changes. Nevertheless, with racialized lawyers, Ontario tends to see an overwhelming amount of them opting for practicing as sole practitioners, mostly due to discrimination in joining larger firms.

Canadian General Counsel has 60 signatories to contract compliance, where they consider diversity in hiring and purchasing practices, encouraging Canadian law firms to follow suit. In Ontario, the security commission has started to

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April 9	**Trust Accounting 101 / 102**
April 11	**Uncontested Divorce Orders for TFWs**
April 16/17	**Civil Litigation 102**
May 12	**Lecture: Family Orders Do's & Don'ts**
June 2	**Lecture: Does culture colour our courts?**
	Personal Injury Spring 2015 Series
April 27	**Medico Legal Terminologies 101**
April 28	**MVA Active Rehabilitation Workshop: Understanding Soft Tissue Injuries**
April 29	**Managing MVA Files 103**
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The Philosophy Behind Costs

Costs – if you are a litigant, it is the little person that sits on your shoulder cautioning you of the risks of litigation.

An honoured guest at a recent Amici Curiae lecture, Master Leslie Muir explains that the traditional philosophy behind costs is two-fold: 1) to award the prevailing litigant for successfully defending an unfounded claim or pursuing a valid legal claim; and 2) to act as a deterrent against weak and frivolous actions. It matters not whether you are a self-represented litigant (SRL); the principle of costs applies equally to all litigants. This is the underlying rationale to keep in mind when courts are asked to veer away from this well-established principle.

Advance costs, then, can test a court's discretion to vary from the usual costs orders. They are funds that are awarded while the litigation is ongoing to allow disadvantaged litigants access to the court. In essence, it is an award that funds a party's ability to litigate further. While it is meant to balance the scales between parties, you can imagine the outcry that may come from an opposing party who would not receive this special treatment.

On the other hand, Master Muir points out that matrimonial litigation enshrines advance costs awards in the *Family Law Act*, S.B.C. 2011 c. 25, s.89. Indeed, where one spouse is the primary breadwinner and the other is not, an advanced distribution of family assets that would otherwise be dispensed anyways at the end of the litigation would only make sense in the fairness of justice.

Applied more broadly to public interest litigation, one of the driving forces behind advance costs awards in this type of action is whether the claim is meritorious. The more merit a claim has, the more likely the award of advance costs.

From the 2003 Supreme Court of Canada decision, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 to the recent decision, *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2015 BCSC 120, the criteria in granting advanced costs have gradually evolved. In the Douglas Lake decision, the court cited the following factors outlined in *Dish Network L.L.C. v. Rex*, 2011 BCSC 1105, reviewed on appeal, 2012 BCCA 161, at para 68:

a) the potential effect of the litigation is widespread and significant;

b) the outcome of the litigation would resolve continued legal uncertainty;

c) the outcome of the litigation may reduce the need for related litigation, and thereby reduce public and private costs;

d) the issue would not be resolved but for the litigation;

e) the litigation involves scrutiny of government actions;

f) determination of the issue is an urgent matter;

g) the applicant was forced into the litigation or had no choice but to resort to litigation to assert their rights; and

h) one party controls all of the funds that are at issue in the litigation (e.g. trust and matrimonial litigation).

In the *Douglas Lake* action, the court indicated that an applicant applying for advance costs must demonstrate their inability to fund the litigation and not simply prefer to seek their litigation funds elsewhere. If the applicant cannot afford all costs of the litigation, but neither are they impoverished, "the applicant must commit to making a contribution to the litigation". Relying of the Supreme Court of Canada case, *R. v. Caron*, 2011 SCC 5 at para 39, "[e]ven where these criteria are met there is no 'right' to a funding order". In other words, there is no guarantee to an advance costs award. Instead, it is left to the judge's discretion and inherent jurisdiction. In the judge's view, the *Douglas Lake* action did not present special circumstances as contemplated in *Dish Network*.

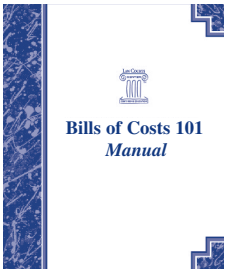
In general , advance costs awards are treated gingerly, granted rarely, and only in exceptional circumstances. While the courts try to streamline and facilitate access to justice, it can be a precarious balance between access to justice and a just result. Prolonged, unnecessary litigation that runs contrary to the principle of proportionality is not something to be encouraged. Comprehensive decisions, however, come from parties who can afford to thoroughly investigate and present their claims.

Master Muir observed that the law behind costs will develop slowly and advance costs awards will be limited to an exceptional few cases.

At the end of the litigation, if you want to get to the proverbial pot at the end of the day, consider the risks of proceeding with litigation and tread carefully. Bon appétit. !

Sharon Mah is a paralegal at Bull Housser Tupper, who covers the special topic of costs for Amici Curiae, whose paralegals prepare Bills of Costs for self-represented litigants.

The recording of this lecture may be ordered.



Bills of Costs 101 $ 225

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A Better Informed Patient: Has Its Time Come?

I have been following the blog of a lawyer who has been sharing his ordeal as he goes through chemotherapy and how hospitalists seem to be hard-wired with scripted questions and solutions. Given their case load, patients have become abstractions. Except sometimes there are patients like him who have an exceptional case of pancreatic cancer, and trying to fit a square peg in a round hole will not work. The lawyer has chronicled his exasperation but has become more determined to continue asking very critical questions and not necessarily accepting of the prognosis or recommended treatment plan that had been given to him.

This reminded me of *The Healing Power of Your Own Records*, a New York Times article published last March 31 2015 which concluded that there are many benefits to having access to your own records. Some of these benefits include being able to have a more constructive dialogue with your doctor and having just plain peace of mind.

Having become more educated about health and wellness has helped make our meetings with our physicians who have a limited amount of time to see us (*three questions only please*) more effective. With the help of technology, we can research before seeing our doctor, record our conversation and write them back for further questions.

As to be expected, health service providers have expressed alarm in giving out patient information to their patient. They are concerned that notes taken out of context may lead to dangerous conclusions. And the more complex the medical issue at hand, the higher the risk. Some have suggested that knowing that their patient will end up getting their notes might lead practitioners to think twice about how they write and what to include in their clinical records.

The NYT article wrote about Mr. Keating who collected his own information, which included the video of his ten-hour surgery, dozens of medical images, genetic sequencing data and 300 pages of clinical documents.

The blogging lawyer sees the advances in technology as empowering, an opportunity to re-calibrate the physician-patient relationship, with the patient having a stronger say in his own affairs. In his case, his conversations with the specialists have been jarring, in his weakened state but with a very lucid mind, he still manages to tell them what he thinks. He has refused to sign forms to block prescribed treatments just to get the attention of his doctors.

Twenty years ago, not feeling well, but not wanting to avoid the insufferable wait in his office, I faxed my doctor to ask for a prescription. He faxed me back a drawing of his stethoscope and he asked me to self-diagnose. Scribbled below was … *or you can come in to see me*.

These days, with the help of modern technology, the public has begun to make better use of their information to manage their personal health care. Information is readily exchanged between practitioners and patients. Radiology reports can be stored in a hand held digital device of your choice. There are apps that medical offices use to remind patients to take their pills.

Tap. Tap. Tap. Click. Click. Now, the process is a lot less paper intensive. Gone are the indecipherable scribbles. Incomprehensible bumps, missing vowels and misspellings are a rarity.

Nowadays, when I see my GP, who continues to stress me out each time I see her because she is in a rush to attend to me and get to her next appointment, I can still ask her my three questions. But my questions are *better* questions.

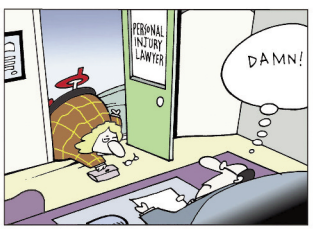
Knowing my own health history has allowed me to question her plan to prescribe a medicine by asking her to look back at a certain test result done years ago. It felt good to have her smile and apologize. A touch of humanity that I have not seen in a long time.

So think about your clients. Think about yourself and your family. Should patients have access to their personal health records? When is too much information dangerous? And what legal implications will this new relationship have?

I invite you to engage our instructors and your colleagues on this very topic at our upcoming Personal Injury Spring Series from April 27 to May 2 2015. !

Dom Bautista, who designed the PI series, still keeps an open mind about doctor visits; he still abhors the long wait times.

Personal Injury Spring 2015 Series



Six courses in six days

- ❑ **April 27** — **Medico Legal Terminologies 101**
- ❑ **April 28** — **MVA Active Rehabilitation Workshop: Understanding Soft Tissue Injuries**
- ❑ **April 29** — **Managing MVA Files 103**
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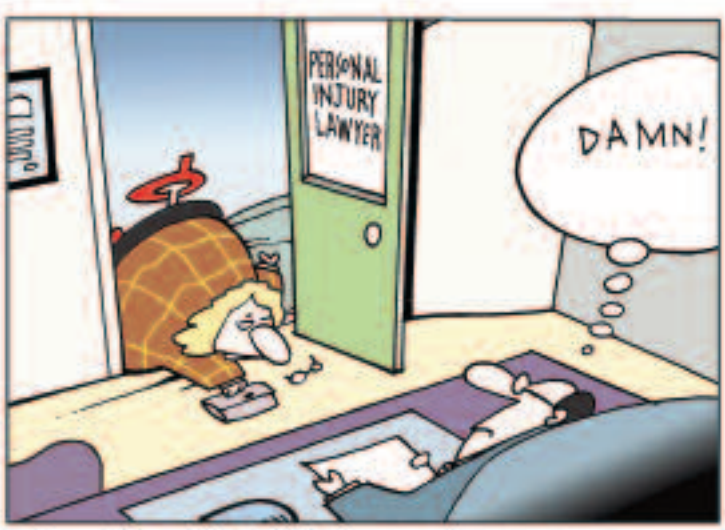
PERSONAL INJURY SPRING 2015 SERIES

APRIL 27 TO MAY 2, 2015

Additional inormation is set out on the next page



SIX COURSES IN SIX DAYS

SELECT FROM 1 TO 6

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PERSONAL INJURY SPRING 2015 SERIES

APRIL 27 TO MAY 2, 2015

April 27
Monday

Medico Legal Terminologies 101 9AM to 5PM $548.80

How To Read And Understand Medical Terminologies: Medical terminology is like a puzzle: medical terms can be taken apart and / or built up – roots, combining forms, suffixes and prefixes. Learn how to read medical records, the commonly used terms and abbreviations. You will get to learn how medical words are built. Then you will survey the following areas: basic organization of the body, the musculoskeletal system (bones and soft tissues)and the nervous system

April 28
Tuesday

MVA Active Rehabilitation: Understanding Soft Tissue Injuries 9AM to 3PM $262.50

At the end of the day, you should be able to:

1. learn about principles of active rehabilitation as it applies to soft-tissue injuries;
2. identify what the musculoskeletal areas that should be the focus of assessments;
3. using normative values understand what the appropriate amount of rehabilitation exercises should be;
4. identify what makes for an effective initial assessment report; and
5. develop best practices to mitigate injuries or to maximize rehabilitation costs.

April 29
Tuesday

Managing MVA Files 103 9AM to 5PM $548.80

An Introduction to the Preparation of an Effective File Binder: Master the mechanics of preparing your file binder; regardless of whether you are acting for the plaintiff or defense. Learn to take advantage of the Rules of Court of the Supreme Court of BC. Gain practical experience by preparing an actual case binder.

April 30
Wednesday

Heads of Damage 101 9AM to 5PM $548.80

Learning outcomes:

1) understand concept of common law and stare decisis
2) understand the concept and function of damages
3) identify, understand and explain different heads of damage
4) analyze fact patterns and assess applicable heads of damage
5) identify, understand and explain factors which may affect quantum of damages

May 1
Friday

Clinical Records Studies 101 9AM to 5PM $548.80

How to read the most common medical records in BC:

The success of any personal injury litigation depends on the gathering and analysis of information. One of the most efficient ways of reducing hundred or thousands of pages of medical information into a concise report is by streamlining the information into a chronology You will learn how to collect the records that you need and how to overcome the many challenges associated with this task. With your records on hand, you will learn how to read each one. You will also have opportunities to discuss Glasgow Coma scores, SOAP, medications and lab tests.

May 2
Saturday

Case Planning Seminar 201 9 to 11 AM $111.00

Learning Outcomes:

1. What criteria to look for when first retained that will affect the conduct of the case;
2. How to recognize elements ((ie novel issues, high value cases) that may develop in your case and how to ccommodate them; and
3. What the key stages are in the life of a file.

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Adopting Best Practices in Case Planning in Litigation

It does not seem to matter who you talk to these days, whenever you ask how it is going, the answer is always the same: "*crazy busy*". It is been that way for a while and it is not likely to change, so the question is, what do you do about it?

You could work harder and work faster but the real answer is, you have got to work more efficiently.

There are lots of time management approaches but in the area of personal injury file management, the best approach is case planning. We're not talking about Case Planning Conferences, although those can help. Case planning is looking at a file the first day it comes into your hands and starting to plan it out based on its basic characteristics. Those initial considerations will guide your first (and subsequent) steps and set the tone of the file.

One of those initial considerations will be the age of your client, as each age group will require a different approach to the case plan.

An elderly client may have other health issues that impact their injuries and rate of recovery. There may be a lot more records to collect. Mental competency should be considered, and it may be prudent to start the action sooner if life expectancy is a concern due to their advanced age.

Younger clients (infants) will have a much longer "horizon" for starting an action but you must also be prepared to receive a Notice to Proceed.

The Public Guardian and Trustee of British Columbia may also be involved from time to time, and certainly at settlement. You will also require a Litigation Guardian and determine who is most appropriate for that role. Case planning extends to the development of the body of the case. This will include events that may occur, issues that may emerge and various steps required to build the case over several years.

One of the events that may occur in a catastrophic injury case is the exhaustion of your client's Part 7 benefits before the matter can be brought to trial. If the client's needs are such that the Part 7 benefits are being drawn down quickly – called the "burn rate" – you must plan the case proactively to find alternative sources of funding and support services, or request a tort advance, well before the benefits are depleted so the client is not floundering months before the trial is to take place.

There are many more initial considerations, events and issues to be considered that will help the file to be run more proactively and efficiently, and this applies to both the rehabilitation and litigation sides of the file. There may not be less work to do, but at least you'll know where it's likely to come from! !

Dee Rogers, teacher extraordinaire and paralegal at Jarvis McGee Rice LLP returns to lead the Case Planning seminar on May 2, 2015, which bookends six days of PI courses.

Judicial Views on Diversity

(*continued from page 1*)
ensure that companies disclose their gender information annually. This small gesture has now seen that there are more women taking positions on boards of directors. In spite of this, BC, Alberta and PEI have not asked for any public input from the commission.

For Ontario, the progression continues: The advisory committee overseeing their judicial appointments shows that over the last 26 years their bench has transformed into the most diversified in the country.

Other provinces have followed suit in transforming the gender stereotypes with respect to appointments to the bench, with Quebec even having more women than men. Their law society has initiated projects for racialized lawyers. They have made numerous recommendations and are at the forefront in creating programs to foster an effort to minimize the difficulties for the visible minorities. While this offers hope for provincial success, the Federal bench is lagging in a staggering way. Under the Harper government, there have been a meager two appointments of women.

And we in BC wonder about the two vacancies in the SCBC, as the Harper government has not convened the Judicial Appointment Committee since November 2014. !

The recorded version of this lecture is available. *Dom Bautista is now preparing for the June 2 lecture: Does culture colour the courts? Stacie Gin, paralegal at Heritage Law assisted him in writing this article.*

Briefly! is intended to provide information on new developments in litigation and law practice management.

For information, contact Dom Bautista at 604.685.2727 or at dom@lawcourtscenter.com

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