The Assistant

BC Association of Legal Assistants *Winter 1996*

PRESIDENT'S COLUMN

By Jasbir Bains

The 1995/1996 year will be remembered for the changes made to the association. Some of these include new names for the association and newsletter, a new logo, and a new membership application.

On October 30, 1995 the association officially changed its name from the Western Association of Legal Assistants to the BC Association of Legal Assistants or "BCALA". It also changed the name of the newsletter from "L.A. Times" to "The Assistant".

As for social events, we held several with the first on December 5, 1995 at Ladner Downs with more than 100 people attending. The topic was, "What do law firms look for when hiring legal assistants". The second was "An Evening with Lindsay Kenney" at the Terminal City Club on March 26. Topics included sexual harassment and sports liability. On April 17, 1996 a dinner was sponsored by BCALA and Jerena Laursen of the BC Legal Resource Centre and co-hosted by CALA. The theme was the "Past, Present and Future" of the legal assistant profession. Two other events, one with Gail Forsythe, the Law Society's discrimination chairperson, speaking on harassment, and the other a brown bag lunch where the "The Paisley Snail" video was shown.

Work in progress includes several items on the burner, one of which is occupational title protection. Should we be successful in obtaining occupational title protection only voting members belonging to BCALA would be allowed to call themselves "Registered Legal Assistants" and use the initials "RLA".

BCALA has formed a No-Fault Committee chaired by Dee Rogers. If no-fault insurance goes through it will effect all legal assistants and not just those working in personal injury litigation.

Overall this has been a challenging year, but we have accomplished many of the goals we had.

BCALA owes a large thanks to the following law firms: Richards Buell Sutton, Guild Yule & Company, Harper Gray Easton, Farris Vaughan Wills & Murphy and Ladner Downs. I would also like to extend thanks to Lindsay Kenney for hosting the seminar at the Terminal City Club and to Jerena Laurson of the BC Legal Resourse Centre for co-hosting the supper meeting.

Finally, I wish the new board of directors the best of success and urge them to carry on and see through the changes that this board has begun.

INSIDE THIS ISSUE:

FROM THE EDITOR'S DESK

By Ann Halkett

Welcome to yet another edition of The Assistant. As you will have noticed a reader survey is enclosed with your newsletter. Please take a few minutes to complete it and fax it back to me. I would really appreciate your comments as my aim as Newsletter Committee Chair is to make the BCALA newsletter what members want it to be. You can be assured that all responses will be kept confidential, so feel free to tell me what you really think.

C.A.L.A. COLUMN

The Canadian Association of Legal Assistants, B.C. Branch invites any interested members of the BC Association of Legal Assistants to attend its annual dinner meeting on Wednesday, November 6, 1996 at O'Douls Restaurant. There will be interesting speakers - watch for flyers coming to your law firm!

EDUCATION UPDATE

Camosun College in Victoria will be starting a legal assistant program in January 1997. Camosun hopes to work in conjunction with Vancouver Community College and to offer a similar program. If interested in obtaining more information call the program coordinator, Carol Fengstad at 370-3276.

EDITOR'S NOTES

BCALA would like to encourage members to have their law firms advertise in *The Assistant*.

Reminder

It's time to order refills for your BCALA calendar. For details contact Jasbir Bains at 661-1701.

THE ASSISTANT

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Advertising

Rate includes four yearly issues:

Full back page	$275
Full page	$200
Half page	$100
Quarter page	$ 75
Business card	$ 50

Contact Ann Halkett for details.

History and Purpose

The BC Association of Legal Assistants (BCALA) is a voluntary non-profit association formed in 1979 to promote the professional development and continuing education of legal assistants in B.C. If interested in becoming a member contact Patricia Terlecki.

Submissions

Articles for The Assistant are gladly accepted. If possible please provide submissions in both hard copy and disk form (formatted for Word Perfect 5 1). The deadline for submissions for the next issue is January 24, 1997. The editor reserves the right to edit articles for brevity and grammar.

Disclaimer

All opinions or views expressed in The Assistant are those of the writers and not necessarily endorsed by BCALA or its directors.

JOIN BCALA

Continue your education and professional development.

SECRETARY'S REPORT

By Glenis Bryson

At the annual general meeting of the members of the BC Association of Legal Assistants held on September 11, 1996 the following were elected directors for the ensuing year: Jasbir Bains, Glenis Bryson, Patricia Terlecki, Ann Halkett and Jerena Laursen.

The President delivered his report to the members and touched briefly on highlights of the past year. A synopsis appears in this newsletter.

The Secretary provided the members present with a report on BCALA's application for occupational title protection, further details of which appear following this report.

The members approved an increase in membership fees from $50.00 to $65.00 for voting members and associate members effective January 1, 1997. The fee for student members will remain at $15.00.

The annual general meeting was attended by Jennifer Calhoun, Co-ordinator of the legal assistant program at Selkirk College in Trail, B.C. Jennifer provided an overview of that program and will be submitting a column to the newsletter.

At the Directors' meeting held on September 25, 1996, the following persons were elected as officers and chairpersons:

Jasbir Bains	-	President
Jerena Laursen	-	Vice President/Public Relations
Glenis Bryson	-	Secretary
Patricia Terlecki	-	Membership
Ann Halkett	-	Newsletter

We invite members to volunteer. We are working very hard on expanding our membership throughout British Columbia and would welcome your help.

OCCUPATIONAL TITLE PROTECTION

By Glenis Bryson

Following the April 17, 1996 dinner presentation at the Century Plaza Hotel regarding the future of the legal assistant profession, the directors of the BC Association of Legal Assistants approved the formation of a committee to explore the possibility of occupational title protection for its members. The committee, made up of representatives from BCALA, the BC Legal Resource Centre, the Canadian Association of Legal Assistants, Vancouver Community College and the Corporate Services Group, met and discussed how the application should be worded. It was decided to submit the words "Registered Legal Assistant" and the initials "RLA" be used to describe members of BCALA. The application was approved by the directors for presentation to the Registrar of Companies.

As part of the process required by the Registrar notices were placed during July and August in the Vancouver Sun and Victoria Times Colonist for three consecutive issues. The notices set out the words and initials BCALA wanted designated for exclusive use by its members. Any interested parties had 30 days to write to the Registrar to express views on the subject. The next step came on September 5th when the application was submitted to the Registrar. He will publish a further notice in the B.C. Gazette and will conduct extensive searches to ensure no conflicts exist. The Registrar may also contact other professional bodies who may have an interest or objection to the protection of the words being registered.

If the Registrar considers that the application is in the public interest he will then register BCALA as a society and issue a certificate of registration identifying the words and initials requested for the exclusive use of BCALA and its members.

Further information on the progress of the application will be provided in the next issue of the newsletter.

A special thanks goes to West Coast Title Search Ltd. for acting as BCALA's agent at no cost.

NO-FAULT IS NO ANSWER

By Joe Murphy, Lawyer with Murphy, Battista

There has been a great deal said recently about the possibility of our government bringing in a no-fault automobile insurance plan. The premier was recently quoted as saying he would bring in a no-fault scheme if it would lower automobile insurance premiums. The majority of my practice is acting for people who have been injured in automobile accidents and, as a result, I expect you to look critically at my comments about no-fault.

Most people do not understand what a no-fault auto insurance scheme is. Under our present scheme, everyone, including the responsible driver, receives a certain minimum level of wage loss benefits (called no-fault benefits). However, our system also holds the driver at fault responsible for the injuries and deaths caused. Where an accident victim's wage loss is greater than that which is automatically paid by ICBC in no-fault benefits following an accident, the victim is entitled to claim against the responsible driver for the balance of the income loss.

Our system is really a blend of both fault and no-fault and is regarded by most as the best auto insurance system in North America.

A no-fault scheme does away with the concept of responsibility. With no-fault, the responsible driver is no longer responsible for the injuries or deaths caused by his or her negligence. Accordingly, it would be more accurate to call this scheme "no-responsibility" rather than "no-fault".

The no-fault system, ignoring who was responsible for an accident, uses a fixed schedule of benefits to determine what, if any, payments are made to any given person (or the family of someone killed in an accident) rather than looking at their actual injuries and losses. The level of wage benefits and the type and amount of care and rehabilitation services depends upon the design of the scheme and the discretion of the clerks who are responsible for administering the scheme. Access to the courts is lost and while most people injured in an auto accident do not hire a lawyer, I have always thought that the threat of hiring a lawyer has levelled the playing field when a person has to deal with an ICBC adjuster. Most people do not know that approximately 1% of the people injured in car accidents end up going to trial; all the other claims are settled. A no-fault auto insurance scheme would be very similar to the current Worker's Compensation scheme.

Theoretically, the benefit of such a scheme is that it does away with the cost and delay of trying to determine who was at fault in the accident. Proponents argue that taking these disputes outside the court system and doing away with the necessity of lawyers is in everyone's best interest. On the face of it, this argument appears attractive. However, what is not recognized is that the most common and time consuming disputes in personal injury claims are not about who was at fault for the accident but rather about the nature, extent and effect of injuries. In my practice, I probably spend 85% of my time dealing with the nature of the injury and its affect on my client, not on fault for the accident. So, where is the savings?

An obvious consideration for choosing a plan of insurance is cost. We all know from having lived in British Columbia over many years what it costs to insure a car under our present system; it is not cheap but then nothing is. The premiums we have been paying each year have covered the cost of providing the no-fault benefits to everyone injured in an accident as well as the cost of covering the claims made by the accident victims against the responsible drivers. To the person buying insurance, no-fault would obviously be attractive if it reduced the cost of insuring a car (as long as you were not injured in an accident). A number of provinces in Canada and in the United States have tried no-fault systems. Currently, there are four provinces in Canada that have no-fault, including Ontario which, I think, is the best comparison. Ontario has had a nearly total no-fault system for the last four years and has found that the costs of insurance have been higher than in British Columbia and, more importantly, the increase in costs each year have been more than double that in British Columbia. Simply put, no-fault insurance does not cost less, it costs more.

There is no question that in our current system there are people advancing fraudulent claims. From time to time, we read in our local newspapers about individuals or groups of people who have attempted to defraud ICBC, UIC or various other plans. I would estimate that 5% of the personal injury claims received by ICBC may well be fraudulent. An ICBC official was quoted recently in the newspaper saying that the rate of fraud is 10-15%. This figure is ridiculous given the various checks and balances within the system. However, studies in jurisdictions where no-fault has been tried have shown that under a no-fault scheme the rate of fraudulent claims increases. These studies show that the time off work following injury increases substantially in a no-fault scheme where automatic wage benefits are paid, which to some apparently provide a disincentive to return to work.

Last, the issue of personal responsibility and road safety has to be considered. While it is difficult to know whether a no-fault/no-responsibility system would make our roads more or less dangerous, a study done many years ago in Quebec (the first Canadian province to institute such a scheme) showed a nearly 10% increase in traffic fatalities following the institution of a no-fault scheme. While it is somewhat difficult to understand how an increase in fatalities would result from no-fault insurance, I think it must be admitted by all that holding reckless drivers suddenly not responsible cannot make our roads any safer.

There are certain benefits to a no-fault insurance scheme. However, there are both personal and social costs to such a scheme. The question at the end of the day is whether you personally or, society generally, favours a no-fault scheme over our present scheme which holds the driver at fault responsible for his or her actions. From my perspective in acting for the victims of auto accidents, many of whom have brain or spinal cord injuries, I cannot accept for a moment a system that seeks to replace our current system of determining and paying what is fair compensation with what would, in essence, be a WCB system. The no-fault/no-responsibility system is not cheaper, it is obviously not fairer and it is not going to make our highways any safer. I just hope our government in Victoria realizes that!

GOT SOMETHING TO SAY?
Send submissions for The Assistant to:
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BCALA NO-FAULT COMMITTEE UPDATE

By Dee Rogers, Committee Chair

In July BCALA formed an "ad hoc" No-fault Committee to provide the membership and all legal assistants in the province with a voice in the no-fault insurance issue. The committee is working closely with the Trial Lawyers Association of B.C. as well as other professional groups and businesses which would be effected by changes to the existing motor vehicle insurance legislation.

The overall goal of the committee is to advise people, both inside the profession and outside, about the possible introduction of no-fault insurance in British Columbia and what that could mean to legal assistants as well as to current and future claimants. Committee members include Helen Wood, Linda Case, Jana Abramson, Lisa Novak and Elaine Darquin. As well key legal assistants have been recruited from firms in Vancouver including: Thora Arnason of Russell & DuMoulin, Kelly Enarson of Swinton & Co., Linda Donaldson of Harper Grey and Susan Leah Spencer of Ladner Downs.

So far we have no involvement from legal assistants in the interior but we will be targeting them shortly. Their involvement is essential in getting the word out to the entire province.

As for who we have contacted the list includes:

1. Gordon Campbell's office which put us in touch with Daniel Jarvis who is the Liberal ICBC critic. The Liberal party has not yet taken a position on no-fault. We were told that they will not take a position until a specific proposal is made as to the form that no-fault would take.

2. Lynn Stephens, my MLA.

3. The Canadian Association of Rehabilitation Professionals - an umbrella organization for approximately six other professional associations representing vocational consultants, rehabilitation professionals, work evaluators, etc.

4. The B.C. Insurance Adjusters Association;

5. The Private Investigators Association of B.C.;

6. The Coalition of People with Disabilities;

7. The Registered Nurses Association of B.C.;

8. The Injured Workers Human Rights Group of B.C.;

9. The Capilano College legal assistant program. The program coordinators fully realize that the future of the program could be in jeopardy if graduates are unable to find practicum positions and if people are unable to find work after graduation; and

10. B.C. Hydro to have them put an article in their newsletter. If this works we will contact B.C. Tel and B.C. Gas, etc.

We hope to get in touch with people from professional associations such as those who represent consulting engineers, actuaries and economists. As well we hope to contact legal placement agencies, registry agents and court reporters. A large portion of their business emanates from personal injury litigation - eliminate personal injury litigation and they will also feel it.

Much of the foregoing is work in progress and new ideas and contacts come up daily. People are starting to ask for more information when they realize they could be effected. The Trial Lawyers Association is putting together three information packages with each one being geared to a different level of knowledge or involvement with the issue. Please contact me if you know of anyone who would like a package.

You may ask what we hope to accomplish and how will it be done?

Well our goal is similar to that of the Trial Lawyers Association which is to stop the introduction of no-fault legislation in B.C., and if it is introduced then to

(Continued on page 9)

lobby against it to ensure that it is not passed in the Legislature.

The purpose of our committee is to work in concert with the Trial Lawyers Association by providing able and knowledgable legal assistants to assist with phone work or anything else along that line. But we also stand as our own committee with our own projects, ideas and approaches. We are contacting as many people as possible, whether connected to the legal profession or not, to make them aware of what is happening in the province regarding no-fault. The press has yet to get excited about this issue but if we wait until the legislation is proposed in the Legislature, or the media picks up on it, it will be too late!

Therefore, our main project will be to facilitate a letter faxing campaign. Monopolizing politicians' fax machines has proved very effective in other provinces. Receiving 500 letters makes a greater impression than receiving a petition with 500 names. However, timing is essential to the success of this type of campaign. We hope to provide people with a letter which they can fax themselves.

What can members do?

First, they can join our committee or they can volunteer as a "key" legal assistant in their firm to act as a liaison.

Second, they can inform themselves by asking the Trial Lawyers Association for its "No-Fault" newsletter and to be added to its mailing list.

Third, talk to family and friends. Do not let the government and ICBC make the argument that we are doing this just to save our jobs. Point out that almost everyone pays ICBC premiums which will go up with no-fault. For example, according to an October 1995 Trial Lawyers Association report premiums increased by 11.5% in the first year in Ontario when no-fault was introduced in 1994. In those U.S. states with systems similar to that which may be imposed in B.C. the average increase was 7.7%.

Fourth, do not be fooled into thinking that you will not be effected if you do not work as a legal assistant in the personal injury field. If those of us who are involved in that area lose our jobs, we will be looking for other positions, in family law, corporate commercial, litigation, corporate records, etc. As well articled students and new associates will also be after those jobs as firms will be hard pressed to absorb everyone out there.

Finally, the committee expects to meet again in October and I would be pleased to hear from anyone with suggestions and/or who would like to join. For information you can reach me at 273-3741.

THE OCCUPATIONAL THERAPIST AS AN EXPERT ANALYST ON THE COST OF FUTURE CASE IN LEGAL CASES

By Irene Harris, Alison Henry, Nancy Green and Joanne Dodson
Reprinted with permission from the Canadian Journal of Occupational Therapy, Volume 61, No. 3

Abstract

The purpose of this paper is to explain the legal criteria the court follows when awarding monies to an injured individual for cost of future care. It also describes the role of, and procedures used by, the occupational therapist in analyzing future care costs for the courts consideration. It describes the benefits to the client, the legal system and society arising from the occupational therapist's expertise, and the role the therapist plays in obtaining information related to the client's case from other professionals.

The role of the occupational therapist as an expert witness in court cases has gained attention in the occupational therapy literature in the past five years. Brangam (1987) and DeMaio-Feldman (1987) presented overviews of the role of the occupational therapist as an expert witness and offered some guidance on the principal issues surrounding court appearances. Potts & Baptiste (1989) presented a detailed picture of the role of the occupational therapist in testifying regarding chronic pain patients, outlining the assessment process and potential treatment recommendations. However, nothing has been published in Canadian occupational therapy literature relating to the growing role of the private practice occupational therapist as an expert analyst of what the courts refer to as "cost of future care".

This paper explains the legal criteria the court follows when awarding monies to an injured individual for cost of future care. It also describes the role of, and procedures used by, the occupational therapist in analyzing future care costs for the court's consideration as well as the benefits to the client, the legal system and society arising from the occupational therapist's expertise.

In order to understand the role of the occupational therapist as an expert analyst on the cost of future care in legal cases, one must also have some understanding of both the meaning of cost of future care and the legal system in which the occupational therapist works.

Definition of Cost of Future Care

The cost of future care analysis is a study carried out with the objective of identifying and costing services and equipment which injured individuals will require to maintain a quality of life similar to that enjoyed prior to injury.

The Legal System in British Columbia

In the case of an individual seeking a monetary award for physical injury (e.g. an automobile accident injury), the litigating lawyer's primary objective is to see that the client receives optimal medical care. Optimal care is legally interpreted to mean reasonable care, or all things that must be done to ensure reasonable care (Thornton v. Board of School Trustees of School District No. 57 (Prince George) [1978] 2 S.C.R. 267. The courts in British Columbia award monies based on the extent of physical and/or psychological damage sustained by the individual and his/her ability to engage in, or resume, gainful employment. In making settlement decisions, the courts do recognize that what is medically necessary is not limited to the physical well-being of the injured party, but also that happiness and physical well-being may be inextricably entwined, a concept well understood by occupational therapists.

The total amount of the settlement is meant to replace lost income, compensation for pain and suffering, and provide the injured party with equipment and services which would restore the level of independence the individual had prior to the injury. A financial ceiling is placed on damages categorized as non-pecuniary. There is no ceiling on the amount of money that can be awarded if the claim is directly related to the injury. However, the courts must be assured that there is medical justification for such claims and that the recommendations do not involve monies that society would consider to be unreasonable (i.e. enhancing an individual's prior quality of life) or the squandering of funds (Andrews v. Grand & Toy Alberta Ltd. [1978] 2

S.C.R. at 243-4.

The Occupational Therapist's Role in the Legal System

In the past, the legal system has used a variety of professionals to assemble costs related to future care. Physicians' opinions are heavily weighted and, traditionally, nurses' evidence has been accepted because of their skills in the observation and evaluation of patients.

Occupational therapists have many skills to offer the personal injury lawyer. They specialize in the study of the effects of disease and disability on an individual's functional performance in self-care tasks, leisure pursuits and vocational duties. Their holistic approach and familiarity with and ability to prescribe equipment based on an objective assessment of client need using the client-centred framework is valued by the courts in the preparation of future care judgments. The occupational therapist can assist legal counsel by preparing a cost analysis for the present and future care needs of the injured client relating directly to his/her residual functional abilities.

In carrying out a cost of future case analysis, a therapist is required to consider the client's lifestyle and goals as well as his/her physical needs in both the home and community environment. Should a previous lifestyle be impossible to restore or, in the case of a young person, a lifestyle pattern has yet to be established, a new or different home environment may be necessary in order to address the client's needs. In such cases options can be identified and costed as alternatives for the court to consider.

The therapist's role in cost of future case studies is that of an independent expert. The therapist is always bound by ethical considerations of what is best for the injured individual. Therefore, acting for the plaintiff or the defence in a particular case should make no difference to the conclusions reached or recommendations made.

The Future Care Analysis

A cost of future care report emphasizes the following key components: 1) the replacement of services which an individual previously provided for him/herself; 2) recommendations regarding equipment designed to compensate for physical deficits; and 3) requirements for therapeutic care directly related to the injury.

Prior to meeting with the client, the therapist must review all medical reports in order to determine the diagnosis, date of injury, prognosis and recommendations for future medical services such as surgery, physiotherapy and psychological counselling. This information must be reviewed again in preparing a report. In making recommendations regarding future needs, it is important to ascertain if the medical opinion is that the client's condition will improve, remain stable, or deteriorate.

Confidentiality rules must be followed. Often written consent forms must be obtained and individual facility policies concerning confidentiality followed.

The cost of future care assessment should take place in the client's home, or place of residence if in an institution. This enables the therapist to make specific observations of the client's ability to access the environment and function within that environment.

In addition to interviewing the client, it is generally advisable to interview family members or other caregivers directly involved in the client's daily activities, particularly if the client's competence or insight is questionable. A translator's services should be used if there are language difficulties.

Although it is preferable that appointments be scheduled at the convenience of the client, there are instances when it is advisable to schedule this time to coincide with a particular part of the client's routine. For example, one would schedule an assessment of a client with a feeding or meal preparation problem at meal time and an elderly client who rests in the afternoon in the morning.

Procedure for the Assessment

A standard procedure for assessments allows for consistency and minimizes errors and omissions. While the actual details of the assessment will be

adapted to meet the specific problems, needs and age of the client, certain standard assessment components should be included.

1. Interview

The initial interview is used to explain the purpose of the assessment and establish rapport. Information is obtained from the client regarding current physical complaints and their effects on functional activities. It is also important to consider present and future rehabilitation treatment, aids, equipment and services required by the client.

In reviewing these areas of concern, it is important to establish both the client's pre-injury and current activity levels. For example, when considering home maintenance needs, one notes whether the client had hired a professional to paint the home in the past or if the client had painted it him/herself.

2. Physical Assessment

The physical assessment should gather objective information regarding musculoskeletal status. This should include a review of range of motion, muscle strength, mobility, body dexterity, reaching, lifting and carrying capacity. This information is used to corroborate the client's self-report of functional limitations.

3. Functional Assessment

This assesses the ability of the client to perform functional activities within the home, such as reaching into the cupboards, getting in and out of the tub safely, managing stairs, or getting up and down from a chair or bed. Tolerance to sitting, standing and walking should also be assessed.

4. Assessment of the Home

Size, style and general appearance of the home and yard should be noted, if applicable. Physical features such as steps, location of the living space, bedroom and laundry facilities, and the ability of the client to access them safely and easily, are assessed. Special equipment currently used and home adaptations should be recorded. Projected future home modifications or equipment needs should also be considered.

5. Closing Interview

While the cost of future case recommendations will be based on the therapist's assessment of needs, it is valuable to discuss the client's own perception of his/her requirements. While a "wish list" should not be used to determine needs, the client may have identified a specific personal need or concern that is a valid consideration. The client may also not want the services or equipment that the therapist considers appropriate.

The Cost of Future Care Report

After assessing the client, the home and reviewing the medical reports, the therapist is in a position to prepare a report. The body of this report should include the subjective and objective information gathered during the assessment. This information is used as a basis for generating recommendations. In this way, the court's criteria for medical justification and reasonableness are met.

In compiling a list of recommendations for services and equipment, it is critical that therapists understand their role within the legal system. The therapist's expertise is in the area of identifying and assembling recommendations for services and equipment. When costing the recommendations, other professionals need to be consulted to establish: 1) frequency and duration of services; 2) replacement time of equipment and services; 3) maintenance schedule of equipment. For example, if physiotherapy is recommended, the physical therapist's opinion regarding frequency and duration of treatment should be obtained. If a wheelchair is recommended, the therapist should identify how frequently the chair needs to be serviced and the tires replaced.

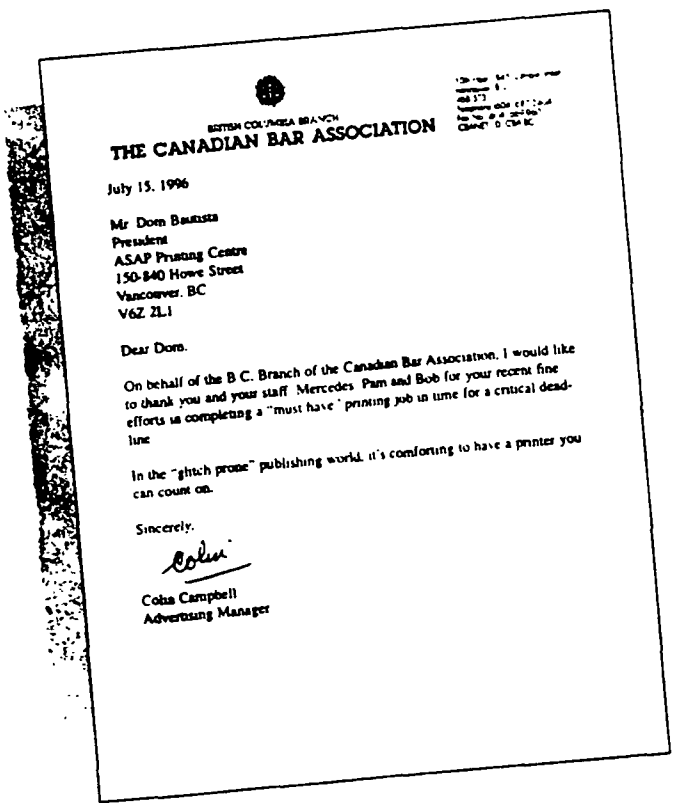
Benefits of the Cost of Future Care Analysis

Many people benefit from the cost of future care analysis including the client and family, professionals associated with the legal system, and society at large.

(Continued on page 15)

"Ask any of our clients."

How's this for starters?



THE CANADIAN BAR ASSOCIATION

July 15, 1996

Mr Dom Bautista
President
ASAP Printing Centre
150-840 Howe Street
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V6Z 2L1

Dear Dom,

On behalf of the B.C. Branch of the Canadian Bar Association, I would like to thank you and your staff Mercedes Pam and Bob for your recent fine efforts in completing a "must have" printing job in time for a critical deadline.

In the "glitch prone" publishing world, it's comforting to have a printer you can count on.

Sincerely,

Colin

Colin Campbell
Advertising Manager

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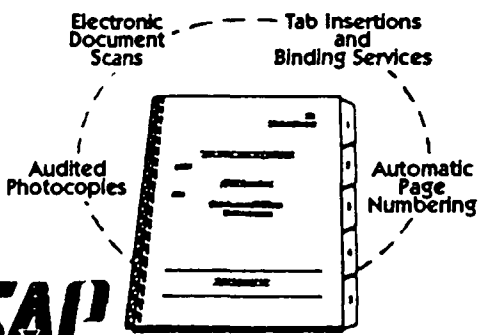

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These benefits are discussed below.

Benefits to Client/Family

Whenever possible, the goal of the recommendations is to aid a client to regain independence and resume previous roles by informing/educating the client and family of available equipment, techniques and services. The occupational therapist's recommendations help to verify or legitimize the client's functional problems related to his or her disability. Often, clients are unaware of entitlement to parking decals for persons with disabilities or the availability of items such as hand controls for a car.

Provision of services may reduce the burdens/demands on some family members. An example might be a daughter living independently who has assumed the extra duties of cooking and cleaning for a mother with a disability. In such a case, the therapist may recommend visiting home-maker's services or respite relief available from community services.

In the process of obtaining information about an individual's needs, particularly a child's an interdisciplinary team is formed to coordinate an effective program.

The therapist's focus on long-term needs assists the family to understand the alternatives and trends in the community. This helps them to plan for the future realistically and in a timely manner.

The report detailing costs for the service and equipment assists in ensuring that adequate funding is available to provide the client with the dignity associated with independence.

Legal System: Lawyers, Judges, Economists

The legal system benefits from an independently prepared, unbiased report, detailing reasonable costs which are directly related to the injury. Specific, factual and detailed information, including current costs and replacement requirements, provides the information from which an economist can project existing needs into future dollars. The report provides a basis for discussion of specific services and equipment and their relevance to the client. It assists the judge and/or jury to understand both the scope of the client's disability in practical terms and to determine the amount of the financial settlement.

Society

Some of the numerous benefits to society include the fact that the provision of services and equipment enables the individual to contribute to society within the home or workplace.

Adequate money is provided by the insuring agencies, thus reducing demands on government services. The assembly of costs directly related to a person's needs avoids either unrealistically high or inadequate settlements.

The Therapist's Relationship with Other Professionals

During the course of working on the future care analysis, the occupational therapist often contacts and works with numerous other professionals who contribute information to the case. The occupational therapist should be aware that both positive and negative reactions can be experienced during these contacts.

Both time-lines and time constraints can often be a problem when making these contacts. Most professionals have very busy schedules and it may be difficult to arrange appointments with them. Due to the nature of the court system, with deadlines for submission of evidence and requirements for up-to-date information, cost of future care reports must be compiled within a short period of time. Other professionals whose participation in the process is sometimes crucial may have difficulty meeting deadlines.

Occasionally, a professional may be suspicious or express hostility, particularly if the therapist has been employed by the defence counsel. This may happen if a professional has had a negative experience such as a previously expressed recommendation being ignored or misconstrued. In order to overcome these feelings on the part of the other professional, the therapist must

demonstrate excellent interpersonal and communication skills.

On the positive side, other professionals are generally very helpful because they are truly concerned with the best interest of the client. They appreciate being approached for their professional opinion and express interest in the welfare of the client. However, sometimes they assume an advocate's role, recommending an ideal rather than a reasonable scenario. In this case, the therapist must exercise judgment as to whether or not the recommendations are reasonable.

Summary

Occupational therapists have been recognized by the courts as expert witnesses regarding cost of future care analyses for persons who have sustained injuries or disabilities. The cost of future care analysis is based on a comparison of past and present roles and abilities related to self-care, leisure and vocation. The occupational therapist's role is to recommend appropriate services and equipment based on assessments of current and future needs. A variety of professionals and service providers may be contacted regarding these needs. Ultimately, the recommendations must be medically justifiable as well as financially feasible.

Conclusion

The described area of practice is growing in Canada as occupational therapists, primarily in private practice, identify the need for such a service in their communities and within the legal systems of their provinces. As well as identifying the need, therapists considering working in the area of cost of future care assessments must be comfortable working for either lawyers or insurance agencies (primarily automobile insurance agencies) and be willing and able to justify their assessments in a court of law.

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MEMBERSHIP UPDATE

By Patricia Terlecki

A membership fee increase was voted on and accepted at the Sept. 18th AGM to off-set rising operating costs. Members at the annual general meeting unanimously voted to increase the membership fee for voting and associate members from $50 to $65 effective January 1, 1997. Fees for students will remain the same. As well, since we changed the beginning of our membership year to run from January rather than September, there are still several members who have not paid their $25 membership fee which came into effect due to the change. If you in this category you will find a letter enclosed with your newsletter.

On a lighter note, since January 1, 1996 we have accepted 40 new applicants and we would like to take this opportunity to welcome the following individuals to our association:

Cynthia Davidson
Amanda Doyle-Fleishman
Jennifer Duffy
Valerie Fuller
Janis Green
Tamra Hall
Justine Kaiser
Marie-Christine Kanji
Angela LePlante
Eve Lauder
Mary McGillis
Lisa McKenzie
Julie Milton
Mariann Rabinovitch
Shariff Shaheen
Sylvia Shum
Heather Stewart
Cecilia Tam
Linda Todhunter
Michelle Usher
Clarice Walaska
Randi Weiss
Cecilia Wong
Elizabeth Almeida
Leah Johnson
Kim McClelland

Leslie McDougall
Wendy O'Neill
Susan Stupples
Cheryl Swedburg

To date, we have a total of 123 voting and non-voting members and with the number of applications being sent out, it looks like our membership will continue to grow.

A computer database of all members has been established and it is essential that the Membership Committee be notified of any address or telephone changes so that we may keep our database up-to-date.

GOT SOMETHING TO SAY?
Send submissions for The Assistant to:
Ann Halkett, Editor
Lidstone Young Anderson
1616 - 808 Nelson Street
Box 12147, Nelson Square
Vancouver, B.C. V6Z 2H2
Phone: 689-7400 Fax: 689-3444
Deadline: January 24, 1997

NEW HOUSE OF LORDS DECISION LIMITS DAMAGES FOR NEGLIGENT APPRAISERS

By Derek A. Brindle, Lawyer with Singleton Urquhart Scott

Hot off the bench: A decision from the English House of Lords that has dramatically limited the scope of damages recoverable from those who provide negligent information.

In three appeals (South Australian Asset Management Corporation v. York Montague Ltd., United Bank of Kuwait PLC v. Prudential Property Services Limited, and Nykredit Mortgage Bank PLC v. Edward Erdman Group Ltd.), the Court was called upon to determine the liability of appraisers who had provided their client lenders with a negligent overvaluation of real estate security for loan advances. It was proven that if the lenders had known the true value of the security, they would not have advanced the loan. In each case, a fall in the real estate market after valuation increased the losses that the lender eventually suffered.

Before the House of Lords decision, the Court of Appeal held that the lenders were entitled to recover the full difference between the unpaid loan amount - including interest - and the amount realized on the security. It was the appraiser, according to the Court of Appeal, who bore the whole risk of the loan transaction, which wouldn't have occurred if it was not for the appraiser's negligence. The appraisers were accordingly liable for increased losses due to a fall in the market price of the underlying securities after the negligent valuations.

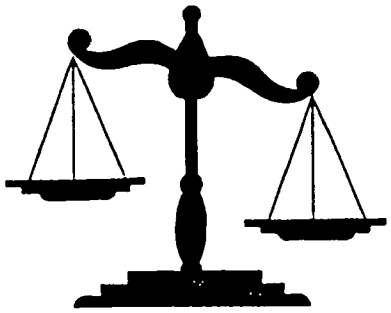
The appraisers, in their appeal to the House of Lords, argued that they should not be held liable for more than the difference between the true value of the property at the date of the negligent valuation, and the over-stated value. On June 20, 1996, the House of Lords agreed that the appraiser should not be saddled with the whole risk of the loan transaction. Their Lordships held that the appraisers were not liable for that part of the losses attributable to the fall in market value of the loan securities after the date of the negligent valuations.

The unsuccessful lenders argued that if they had been aware of the greater risk brought on by the over-valuations, they would never have advanced the loans, and therefore would have suffered no loss. The House of Lords rejected this argument, concluding that the appraiser in each case had never been asked to "advise on the risk of default, which would depend upon a number of matters outside his knowledge, including the personal resources of the borrower, but merely to give information with respect to valuation".

In doing so, the House of Lords made a point of distinguishing the role of *information provider* from that of an *advisor*. An advisor, as opposed to an information provider, would have been responsible for the full loss.

"The principle," pointed out the Court, "distinguishes between a duty to *provide information* for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course of action he should take. If the duty is to *advise* someone as to what course of action should be taken, the advisor must take reasonable care to consider all the potential consequences of that course of action".

LAW PRIMER



Case Digests

Ed Note: The following Case Notes are reprinted from the Civil Law Digest with the permission of the Continuing Legal Education Society. For subscription information telephone 893-2162 or toll free (800) 663-0437. To order full text judgments telephone (604) 535-1197 or toll free (800) 927-3377.

COSTS - Conduct of parties - Defendant's use of clearly flawed reports and testimony of expert warranting special costs against defendant.

The plaintiff sued for damages for personal injuries arising out of a minor motor vehicle accident. At trial, the defendant introduced the expert evidence of an engineer to the effect that the plaintiff could not have been injured. The court did not accept that evidence and awarded damages of $173,265. The plaintiff applied for special costs, asking the court to express its disapproval of the clearly flawed reports and testimony of the expert. The plaintiff had retained her lawyer under a 30% contingency fee and she asked that the costs be fixed at 80% to 90% of the contingency fee. HELD, application allowed. The reports and testimony were flawed and other judges in other cases had rejected similar evidence given by members of the same engineering firm for similar reasons. Yet the defendant's insurer, I.C.B.C., still had apparently not instructed counsel not to use that firm of engineers. The conduct complained of was reprehensible and deserving of rebuke. Special costs would be fixed at $40,000 plus reasonable disbursements.

Heppner v. Schmand, S.C., Shaw J., Doc. Campbell River S1026, S1530, May 28, 1996, 8 pp. [CLE No. 96-6496] // Supplementary reasons to judgment digested at [1996] D.C.L. 185; [1996] D.P.I.L. 63. // Howard A. Milner, for plaintiff; David J.F. Tees, for defendants. // Expert evidence: T. Harper, P.Eng. - rejected.

CHARTER OF RIGHTS - Remedies - Availability - Administrator of estate not able to apply for Charter remedy on behalf of deceased.

A. died while being detained in police cells. The administrator of her estate sued the Crown, the police and others for damages, claiming that A.'s detention and confinement was a breach of her right to life, liberty and security of the person under the Charter and a breach of other of her Charter rights. The defendants applied under R.19(24) for an order dismissing the action as disclosing no reasonable claim. HELD, action dismissed. Section 24(1) of the Charter permits "anyone" whose rights have been infringed to apply for a remedy. An application for a s.24 remedy cannot be made by an estate administrator who seeks relief in respect of the alleged infringement or denial of the rights or freedoms of the deceased.

Wilson Estate v. Canada, S.C., Shabbits J., Doc. Duncan S4521, May 29, 1996, 11 pp. [CLE No. 96-6618] // Robert B. Morales, for plaintiff; William T. Morley, for several defendants.

CREDITORS' REMEDIES - Execution // RECEIVERS - Appointment by court - Pension Benefits Standards Act, s.63(1), exempting benefits from "execution, seizure or attachment" - Prohibition extending to appointment of receiver. // RECEIVERS - Nature of appointment - Appointment constituting mode of "execution" rather than mode of equitable relief.

In 1994 the plaintiff obtained judgment against the defendant, her former teacher, in the amount of $90,000 as damages for sexual assault. The defendant also pleaded guilty to criminal charges arising out of the assaults. Before the plaintiff obtained her judgment the defendant fled Canada, having sold his house and disposed of other assets. The plaintiff applied under s.36 of the Law and Equity Act and Rules 42(5) and 47

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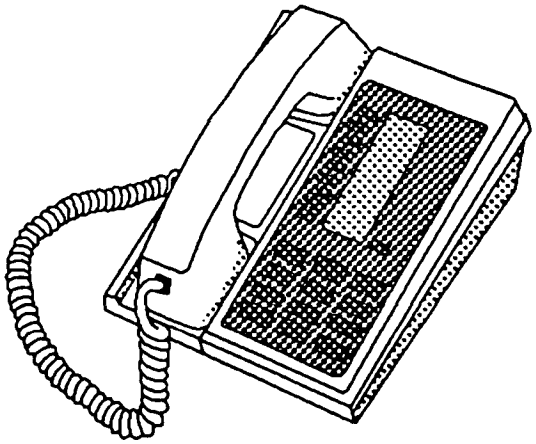

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for the appointment of a receiver to collect, at source, the proceeds of the defendant's pension plan. The defendant would commence receiving benefits in June 1996. The plaintiff said that despite s.63(1) of the Pension Benefits Standards Act, which exempts benefits from "execution, seizure or attachment", the remedy she was seeking was not "execution" at all, or, alternatively was "equitable execution" which is not prohibited by the Act. HELD, application dismissed. Nothing in the Act as a whole or s.63 in particular suggests any reason why the legislature should prohibit some forms of enforcement of a money judgment but not others. On the contrary, the intention of the legislature seems to have been that a pension benefit should not be diverted either by the voluntary act of the pensioner or by the coercive acts of the pensioner's creditors. The words "execution, seizure or attachment" are very wide and no policy reason can be discerned from the Act why they should be given a narrow meaning. Nor is there any policy reason why the legislature should have intended to prohibit enforcement of a money judgment against pension funds by direct means of execution, seizure or attachment, but not intended to prohibit the enforcement of such a judgment by the indirect means of equitable execution. A further reason for refusing the application was that the appointment of a receiver is no longer a mode of equitable relief, as contended by the plaintiff. It is a mode of "execution", which s.63(1) prohibits.

Klyne v. Young, S.C., Master Horn, Doc. Nanaimo S00724, April 4, 1996, 25 pp. [CLE No. 96-6838] // Judgment affirmed on appeal in a brief judgment of Lander J., digested at [1996] Civ. L.D. 424 // Adam de Turberville, for plaintiff; James C. Carlson, for defendant. // Principal case authorities: Industrial Development Bank v. Canadian Plywood Corp., [1972] 1 W.W.R. 298 (B.C.S.C.); Overseas Aviation Engineering (G.B.) Ltd, Re, [1962] 3 All E.R. 12 (C.A.); Singh v. Singh, [1942] 1 W.W.R. 737 (B.C.C.A.); Simon v. Simon (1984), 45 O.R. (2d) 534 (Ont. H.C.); Thomson v. Gill, [1903] 1 K.B. 760 (C.A.).

EMPLOYMENT - Wrongful dismissal - Notice - Employer giving inadequate notice of termination not entitled to re-elect and to extend employment for longer working notice.

The plaintiff started working for the defendant in 1978 as a receptionist. She became a service representative in 1982 and a senior service representative in 1988. In December 1993 the plaintiff received a letter from the defendant, saying her position had become obsolete. The letter said she would be expected to remain at her job until the start of her planned maternity leave in February 1994, and that her employment would end at the end of that leave in August 1994. The plaintiff hired a lawyer in February 1994. That prompted the defendant to write a letter in July 1994 saying the plaintiff would be assigned the job of market segmentation analyst, which was a temporary position she could fill, at her usual salary, from August 1994 for a period of six months. The defendant set out that if the plaintiff refused that job, she would be deemed to have resigned. Plaintiff's counsel replied, saying the plaintiff had no qualifications or experience in the offered job. She refused it and sued for damages. The trial judge found that the defendant terminated the plaintiff's job in August 1994 and that it was not entitled to later reverse its position to say that her employment would not then cease but would continue for six months as working notice. The judge also found that the market analyst position was not sufficiently equivalent to the plaintiff's job that it could be regarded as a lateral transfer. After finding that she had been dismissed, expressly or constructively, the trial judge went on to find that the defendant had not discharged the onus of proving that it would have been reasonable for the plaintiff to have accepted the market analyst position to mitigate her damages. The trial judge awarded damages in the amount of $66,854, the equivalent of 14 months' notice. The defendant appealed. HELD, appeal dismissed.

Per Newbury J.A. (McEachern J.A. concurring): An employer is always entitled to terminate a contract of indefinite hiring. The cause of action arises where the employer fails to give reasonable notice of termination. The trial judge read the December 1993 letter from the defendant as meaning that the plaintiff's employment would cease when her leave ended. After that, it was

not open to the defendant to unilaterally re-elect that the plaintiff's employment would in fact continue for six more months' working notice, despite the fact that the statutory leave intervened. It was not necessary to go further and to discuss the doctrine of repudiation as it applied to cases of wrongful dismissal. The contract of employment was terminated without reasonable notice and damages were assessed on a proper basis.

Per Huddart J.A.: The trial judge found that the defendant repudiated the employment contract and that the plaintiff's acceptance of that repudiation brought the contract to an end. That is the usual result of inadequate notice. It is not a necessary corollary to the "right to the services of an employee" that an employer who has given inadequate working notice is entitled to withdraw its notice of termination or vary its terms during the notice period. Nor does it necessarily follow that inadequate notice cannot constitute repudiation. In essence, the trial judge found that the defendant's conduct, including the letters to the plaintiff, constituted a continuing repudiation of the employment contract. It was implicit in his finding of express or constructive dismissal that it was open to the plaintiff in August 1994 to accept the defendant's conduct as having repudiated the contract. The judge did not consider the July 1994 letter to be a genuine offer of continuing employment or a genuine mitigating opportunity. He saw it as nothing more than an ultimatum, a final stipulation in a dispute, with which he concluded the plaintiff should not have to comply in the face of the defendant's previous conduct. That verdict was open to him on the evidence.

Elderfield v. Aetna Life Insurance Co. of Canada, C.A., McEachern C.J.B.C., Newbury & Huddart JJ.A., Doc. Vancouver CA020359, August 16, 1996, 20 pp. [CLE No. 96-7154] // Christopher J. O'Connor and Angus M. Gunn, for appellant; Andrew M. Rigg, for respondent. // Principal cases considered by Huddart J.A.: Frost v. Knight (1872), Ex. 111; Heyman v. Darwins, Ltd., [1942] 1 All E.R. 337 (H.L.); Park v. Parsons Brown & Co. (1989), 63 D.L.R. (4th) 108 (B.C.C.A.); Suleman v. B.C. Research Council (1990), 52 B.C.L.R. (2d) 138 (C.A.).

INSURANCE - Actions - Duty to defend - Defence costs - Insurer defending claim involving covered and uncovered liabilities having right to have defence cost obligation assessed retrospectively.

The petitioners insured the respondents under a directors' and officers' liability policy. The policy covered all "loss" for "Wrongful Acts", a term limited to acts and omissions arising solely in the discharge of the respondents' duties as directors and officers of D.Ltd. The policy expressly excluded claims "brought about by or contributed to by the dishonesty" of the directors and officers and claims attributable to the directors and officers gaining any "personal profit or advantage to which they were not legally entitled". The policy contained no waiver by the insured of their right to retain and instruct counsel of their choice in defending any claim covered by the policy. In 1993 E.Co. sued D.Ltd., the respondents and two other companies arising out of a share sale and option agreement. E.Co. alleged that the respondents had suppressed certain information regarding the value of D.Ltd.'s shares, made false representations and breached their fiduciary duty to disclose accurate information about the shares, and acted in bad faith. E.Co. said that it sold a large number of its shares to a company related to D.Ltd. at a price much lower than it would have accepted had the respondents not committed the various alleged breaches. It sought rescission or damages in lieu. The petitioner took the position that it was entitled to appoint one counsel to represent the three respondents. The respondents obtained an order supporting their claim to entitlement to be separately represented by counsel of their choice. Although the chambers judge recognized that some of the claims fell outside the policy, she declined to direct the petitioner to appoint counsel to defend only those claims that potentially fell under the policy while calling on the respondents to obtain their own independent counsel with respect to claims falling outside the policy. She said such an order would be impractical and unworkable. The judge did not resolve all issues of payment of defence costs. The respondents claimed that the petitioner was liable for 100% of the defence costs, even though some of the claims involved uncovered obligations. On a further application to a second judge, the judge accepted the petitioner's position that it should pay 50% of the

defence costs of the respondents W. and D. and 25% of the costs of the respondent C., without prejudice to proceedings at the end of the main action to reapportion the percentages. The respondents appealed, seeking an order that the petitioner pay all the costs of W. and D. and 75% of C.'s defence costs. The action was settled before the appeal was heard. HELD, matter referred back to Supreme Court. It seems both illogical and inequitable to require an insurer which has not sought to shirk its obligations, to bear the entire cost of defending a mixed claim in the face of clear terms that require it to pay the cost of defending only claims related to the discharge of directors' and officers' duties and that exclude losses arising from dishonest acts or the making of personal profits. If the court were to require the petitioner to pay the entire defence costs of the insured, it would provide them with a windfall merely because one or more of the allegations that were covered by the policy were advanced among several that were not covered. There is authority to the effect that, unlike the duty to defend, the obligation to indemnify in respect of defence costs should be "assessed retrospectively". That suggestion offers the solution to the almost insurmountable difficulty of apportioning defence costs on the basis of pleadings alone, before or even after trial. Here, the policy required the insured to provide information and cooperation to the petitioner, yet counsel for the insured had resisted providing copies of their accounts and other information that would provide some basis for the apportionment of their fees. That information would have to be provided and the matter then referred back to the Supreme Court.

Per McEachern C.J.B.C. (concurring): The case having been settled, the petitioner was entitled to have its defence cost responsibility determined objectively in the manner proposed. It would have to be left to another day to decide whether, had the action not settled, the petitioner would have been required to make interim payments towards the cost of defence as the action progressed.

Continental Insurance Co. v. Dia Met Minerals Ltd., C.A., McEachern C.J.B.C., Newbury & Proudfoot JJ.A., Doc. Vancouver CA020228, CA020258, June 12, 1996, 22 pp. [CLE No. 96-6661] // M.J. Gregory Walsh, Q.C., for three appellants; John L. Finlay, for one appellant; D. Barry Kirkham, Q.C., for respondents. // Principal case authorities: Budd Co. v. Travelers Indemnity Co., 820 F. 2d 787 (6th Cir., 1987); Insurance Co. of North America v. Forty-Eight Insulations Inc., 633 F. 2d 1212 (1980); Kerr and Lawyers' Professional Indemnity Co., Re (1995), 25 O.R. (3d) 804 (C.A.); Nichols v. American Home Assurance Co. (1990), 45 C.C.L.I. 153 (S.C.C.).

PRACTICE - Class actions - Court certifying class action involving more than 2,000 home owners who had installed electric heating panels later ordered disconnected.

The plaintiffs were two members of a group of more than 2,000 consumers living in British Columbia who had radiant ceiling heating panels installed in their homes. The panels were subsequently ordered disconnected by the Chief Electrical Inspector for the province. The panels had originally been approved by the defendant Canadian Standards Association ("CSA"), which had resulted in approval under the federal and provincial electrical codes. The plaintiffs sued for damages and applied to have the action certified as a class action against four classes of defendants, namely, the designer/manufacturers, who were no longer in business, the distributors, also no longer in business, the CSA and the public regulatory authorities. HELD, application allowed in part. It appeared that the plaintiffs would fairly and adequately represent the interests of the class, that questions affecting individual members of the class did not predominate heavily over questions common to the class, that a significant number of members had no valid interest in individually controlling the prosecution of separate actions, that other means of resolving the claims were not more practical and efficient and that the administration of the class proceeding would not create greater difficulties than those likely to be experienced were relief to be sought by other means. The issues of defective design/manufacture and negligence on the part of CSA were appropriate for certification and resolution. Following the resolution of those common issues it would remain to consider whe ther the province

(Continued on page 25)

breached a duty of care in permitting installation of the panels. It was doubtful that the defendant municipalities would ever have a place in the litigation and the third party notices issued against them would be stayed.

Campbell v. Flexwatt Corp., S.C., Hutchison J., Doc. Victoria 95 2895, June 17, 1996, 32 pp. [CLE No. 96-6826] // Malcolm D. Macaulay, Q.C., Deborah A. Acheson, Q.C. and Patrick Guy and K. Whitley, for plaintiffs; William M. Holburn, Q.C. and J. Dale Stewart, for defendant C.S.A.; Thomas H. MacLachlan and Timothy Leadem, for British Columbia; John R. Singleton and Jeffrey A. Hand, for six municipalities; Derek Creighton, for City of Vancouver. // Principal case authorities: Harrington v. Dow Corning Corp., [1996] Civ. L.D. 231; [1996] P. Inj. L.D. 79; Tiemstra v. Insurance Corp. of British Columbia, [1996] Civ. L.D. 278; [1996] P. Inj. L.D. 96.

REAL PROPERTY - Condominiums - Bylaws - Validity - Court upholding bylaw restricting occupation of strata lot to persons age 55 and older - Court setting aside second bylaw containing absolute prohibition on leasing.

The petitioners, who lived with their son, age 51, since their purchase of a condominium in 1990, applied to set aside two bylaws of the respondent strata corporation which they alleged were unfairly prejudicial to them. The first restricted occupancy to persons age 55 or older. The second prohibited owners from leasing their strata lots to others. HELD, application allowed in part. The truth of the petitioners' assertion that the age restriction reduced the pool of potential purchasers and thus reduced the value of their strata lot was not self-evident. The age restriction might enhance the desirability of the lot amongst persons over 55 and add value. The petitioners produced no expert evidence to support their position. The Human Rights Act contains no prohibition on age discrimination in the purchase of strata lots at all. The intent of the legislature manifested in ss.4 and 5 of the Act is to permit the creation of retirement communities by means of age restrictions whether the occupants rent or own the premises. Nothing in the Condominium Act affects that result. Accordingly, the age restriction bylaw was within the jurisdiction of the strata corporation. With respect to the restriction on renting, the authorities, although conflicting, have to be regarded as establishing that a bylaw which contains an absolute prohibition on leasing is not a "limit" on same, as permitted by s.30 of the Condominium Act. Accordingly, the bylaw in question had to be set aside.

Marshall v. Strata Plan No. NW 2584, S.C., Henderson J., Doc. Vancouver A961321, August 1, 1996, 19 pp. [CLE No. 96-7065] // Gustav Grunberg, for petitioners; Patrick A. Williams, for respondents. // Principal case authorities: Mattiazzo, Re, S.C., Doc. Vancouver A850287, March 21, 1985 - followed; Von Schottenstein v. Strata Plan 730 (1985), 64 B.C.L.R. 376 (S.C.) - not followed; Winnipeg School District No. 1 v. Craton, [1985] 2 S.C.R. 150; 453048 British Columbia Ltd. v. Strata Plan KAS 1079 (1994), 43 R.P.R. (2d) 293 (B.C.S.C.) - not followed.

WILLS & ESTATES - Passing of accounts - Consent to executor's accounts and "release and discharge" signed by beneficiaries not preventing beneficiary from requiring executor to pass accounts under Trustee Act, s.101(2).

The beneficiaries of an estate signed a document approving the executor's accounts, waiving the formal passing of the accounts and releasing the executor. One of the beneficiaries later applied under s.101 of the Trustee Act and R.32(1) for an order requiring the executor to pass his accounts. HELD, application allowed. Section 101(1) of the Trustee Act contemplates approval of accounts by the beneficiaries without a formal passing of accounts. Section 101(2) applies "notwithstanding the above" and allows a beneficiary, among others, to require a formal passing of accounts. The phrase "notwithstanding the above" means "despite; in spite of; without prevention by" and indicates the subsection was intended to stand on its own and apart from s.101(1). Since there was no reference to waiver or consent by the beneficiaries in s.101(2), the "release and discharge" signed by the applicant could not prevent him from requesting the executor to pass his accounts according to the express

terms of s.101(2).

Mitchell Estate, Re, S.C., Harvey J., Doc. Vancouver 212440, June 28, 1996, 10 pp. [CLE No. 96-6789] // A. Davis, for applicant; Thomas G. Keast, for executor.

READING THE LEGAL WORLD - IMPROVING CLIENT COMMUNICATION

By Cheryl Stephens
Chair, Plain Language Section
B.C. Branch, Canadian Bar Association

A law office can be intimidating for people who seldom visit one. The legal environment is alien to most people - those who eventually become your clients. They are unfamiliar with the language, processes, and concepts you take for granted.

Add the problem of illiteracy, and a client can be overwhelmed. The latest statistics show 38% of the population have real trouble reading or can only read day-to-day material that is simple and clearly laid-out. These statistics apply to people whose first language is English -- the rates are even higher for others.

To tackle illiteracy's effects on delivery of legal service and public access to justice, the Canadian Bar Association produced the report: Reading the Legal World. Literacy and Justice in Canada. The 1991 report recommends ways for all sectors of the community to improve the situation.

In B.C., the C.B.A. Plain Language Section set up a Literacy Group which produced an information kit for law firms. The kit suggests how to adapt office practices to meet the needs of clients with low literacy or lack of understanding of the legal environment. The suggestions are broad enough to benefit all your clients. For a copy of the kit, call Mary Lou Power at 687-3404.

HOW TO RELEASE A CERTIFICATE OF PENDING LITIGATION

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A certificate of pending litigation may be released in several ways. The most common forms of release are those by way of solicitor's letter or by registrar's certificate. Examples of these forms of release are available in the Land Title Practice Manual, Vol. 1, Part 15, pages 21-27. An LTA Form 17 application must accompany each form of release. Land Title Office fees are $20.00. A brief description of the requirements for each of these common forms of release follows:

S.234 - Where action neither dismissed nor discontinued -Release by Letter

Where the action has neither been dismissed nor discontinued, the registrar may cancel the certificate of pending litigation on the written request of the party initiating the proceeding or by his solicitor. The letter from the solicitor should be on the law firm's letterhead and must state three important points: (1) that he was the solicitor when the action was commenced; (2) that he still is the solicitor; and (3) that the action has neither been dismissed nor discontinued. Where the solicitor requesting the cancellation is not the same as the solicitor who initiated the action, the registrar will require a court certified copy of the Notice of Appointment of Change of Solicitor attached in support of the letter.

If the letter is filed by the party initiating the proceeding, the same three points must be included, i.e.: (1) that he was the petitioner (plaintiff); (2) that he still is the petitioner (plaintiff); and (3) that the action has neither been dismissed nor discontinued.

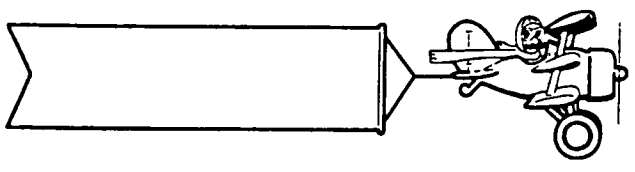
The party's signature must be witnessed by an officer and the officer certification statement must appear on the letter.

S.233 - Where action dismissed -Release by Registrar's Certificate

Where the action has been dismissed, the registrar will cancel the certificate of pending litigation upon filing a certificate of the registrar of the court that issued the certificate of pending litigation. The registrar's certificate must be endorsed by the registrar of the Court of Appeal, and must certify that the action has been dismissed and that the time limited for appeal has expired and no notice of an appeal has been filed with him. If a notice of appeal has been filed with the Court of Appeal, then the registrar's certificate must state that a notice of appeal has been filed and has been finally disposed of, and the dismissal of the action has not been set aside by the Court of Appeal or the Supreme Court of Canada.

S. 232 -Where action discontinued -Release by Registrar's Certificate

Where the action has been discontinued, the registrar will cancel the certificate of pending litigation upon filing a certificate of the registrar of the court that issued the certificate of pending litigation, certifying that the action has been discontinued in whole or in part as to the land in respect of which the certificate of pending litigation is registered.



PRACTICE UPDATE

Questions & Answers
By Joanne Power, Manager Registrar Program

Ed. Note: BCALA is pleased that the Registrar of the Supreme Court of British Columbia has given permission to reprint the "Questions & Answers" as selected by Ann Halkett from its January and June "Registrar's Newsletter".

If you have a question you would like answered by the Registrar please submit it in writing to Ann Halkett at Lidstone Young Anderson and it will be forwarded to the Registrar's attention.

Legal Profession Act, s.71(1) and Rule 57

Q: What are the costs to be awarded to a successful party in a review under the Legal Profession Act?

A: The entitlement to costs on a review under the Legal Profession Act is determined by the "1/6" rule:

Section 71(11)

"Unless the registrar, due to special circumstances, otherwise orders,

(a) a member whose bill is reviewed shall pay the costs of the review if 1/6 or more of the total amount of the bill is subtracted from it, and

(b) the person by whom payment is to be made shall pay the costs of the review if less than 1/6 of the total amount of the bill is subtracted from it."

In terms of the quantum of costs, the Registrar may either apply the tariffs set out in Appendix B to the Rules of Court, following the items set out in the decision Goulay & Spencer v. Krezymon (1991, unreported Vancouver Registry J900171) or the Registrar may summarily determine the amount. The authority for this is set out in s.71(14):

"On conclusion of a review under this section, the registrar may

(a) give a certificate for the amount the registrar has allowed to the member for fees, charges and disbursements, and

(b) summarily determine the amount of the costs of the review and add it to the amount shown on the certificate."

Factors which would affect the choice include whether the review is opposed, the nature of the issues, that is whether they were substantial or otherwise, and the length of the review. For example, if the client takes no issue with the account but is simply unable to pay and the solicitor is able to justify the account in a matter

of minutes, the registrar may consider a flat fee such as that used for default judgments in Schedule 1 of Appendix B.

Family Relations Act

s.5(1) Q: Where is the jurisdiction to annul a marriage?

A: Family Relations Act, s. 5(1) states:

"The Supreme Court continues, subject to the Divorce Act (Canada) to have jurisdiction in all matters concerning the custody of, access to and guardianship of children, dissolution of marriage, nullity of marriage, judicial separation, alimony and maintenance."

(See also Rule 60).

Small Claims Act

s.13(2) Q: Can a Supreme Court decision on appeal from the Small Claims Court be appealed?

A: Small Claims Act, s.13(2) states:

"There is no appeal from an order made by the Supreme Court under this section."

Rule 3(4)Q: Is it necessary to file a Notice of Intention to Proceed under Rule 3(4) when there are no parties of record upon which it can be served?

A: No. Rule 3(4) states:

"In a proceeding where judgment has not been obtained and no step has been taken for one year, no party shall proceed until

(a) the expiration of 28 days after service of notice of that party's intention to proceed on all other parties of record...."

Rule 37(20) Q: What is the correct procedure for filing a judgment once an Acceptance of Offer (Form 65A) has been delivered?

A: Rule 37 (20) states:

"If a party fails to comply with the conditions of an accepted offer to settle, the other party may

(a) apply for an order in the terms of the accepted offer, or

(b) continue the proceeding as if there had been no accepted offer."

Correspondence with the Court Q: What procedure should we follow if counsel wish to know the status of a reserve judgment?

A: It is improper for counsel to correspond directly with the judiciary. The only proper way for such an enquiry to be made, if it is made at all, is by a letter to the registry to the attention of Trial Division/District Registrar where it will be dealt with promptly and appropriately. (See 27 June 1988 Practice Direction, B.C. Annual Practice 1995, p.553)

Rule 41(14)(c) & Court Order Interest

s.7(2) Q: From what date does interest accrue on an amount awarded under a Certificate of Costs?

A: This question was recently canvassed by Madam Justice Boyd: Syed v. Randhawa (Unreported 1996, Vancouver Registry No. C917885, specifically at page 5):

"In this case while there is no sum certain of money payable under such time as the taxation hearing is concluded and a certificate of costs issued by the Registrar, I am satisfied that, by virtue of the combined effect of Rule 41(14)(c) and section 7(2) of the Court Order Interest Act, costs are payable upon pronouncement of the judgment and interest accrues from the date of the judgment and not from the date of the taxation unless the court specifically provides that interest shall not run until some later date...In effect, a taxation of costs is a formality in the nature of the entry of an order."

Rule 57 Q: Can a successful plaintiff assess its costs before the defendant's counterclaim has been heard and the entire action has been disposed of?

A: In a recent unreported decision (1996, Vancouver Registry No. C941442), Madam Justice Boyd found that the rule based on the decision of the Nova Scotia Supreme Court, Appeal Division, in the Trustees of the United Church of Canada v. Teal (11 C.P.C. 167) was inapplicable when the plaintiff's success was final rather than interlocutory. At page 5, Boyd, J

"I am not satisfied that the Teal decision has any application in a case such as that before me where the main action has been settled between the parties with a court order which follows awarding costs to the successful litigant. While the words 'to be paid forthwith' have not been used by the master, the tenor of the order is the same It is a final judgment in the main action."

Rule 1(5) &(8) Q: **Can court documents be filed in a registry other than where the proceeding was first commenced? (Note: not applicable to motions which are covered by Rule 44(16), (18) & (19).)**

A: Rule 1(5) states:
"The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

Rule 1(8) "registry" states:
"'registry' means the office of the court in which the proceeding was commenced or is pending;"

These rules support the common sense position that the answer is no, unless the file is physically located in another registry. An example would be a file transferred to Revelstoke from Kelowna for hearing of a motion pursuant to Rule 44(16). Counsel may wish to file affidavits in Revelstoke for the convenience of both the court and the parties involved.

Rule 41 Q: **Can we issue process for enforcement such as garnishing orders, writs of seizure and sale, certificates, etc. when the order has been pronounced, but has not been entered?**

A: Ordinarily garnishing orders, writs of seizure and sale, certificates, etc. will only be issued at the counter when a copy of the entered order is available. Where the order has not been entered, counsel should be referred to the District Registrar. District Registrars should be extremely cautious in issuing any execution proceedings unless either the clerk's notes or the reasons for judgment set out the order clearly. (See Access Mortgage Group Ltd. v. Denis, (1984) 56 B.C.L.R. 255.)

Rule 64(7)Q: **Can a registrar use a signature stamp on a court document?**

A: A signature stamp cannot be used on the original document as this requires the signature of the Registrar. A signature stamp could however be used on copies of the original document.

(Continued on page 30)

Rule 13Q:	**How do you serve an appointment pursuant to the Legal Profession Act on a client outside British Columbia?**
A:	**An appointment should be served in accordance with Rule 13:** **"Service of an originating process or other documentation on a person outside B.C. may be effected without order...."** **The appointment would have to be endorsed pursuant to Rule 13(2).**
Employment Standards Act, Part 12, ss.102-111 Q:	**What is an order of the Employment Standards Tribunal?**
A:	**The Employment Standards Tribunal issues orders on appeals of Determinations. Like Determinations, these orders may be filed in a Supreme Court Registry. The orders are enforceable in the same manner as judgments of the Supreme Court in favour of the Director for the recovery of a debt in the amount stated in the order.** **Most orders are based on a written decision issued by the Employment Standards Tribunal. The Employment Standards Tribunal does not issue a separate order. An order may confirm, vary or cancel the Determination under appeal.**

DISORDER IN THE COURT: A COLLECTION OF 'TRANSCRIPTS'

By Richard Lederer - taken from the Internet

Ed Note: For this issue we are printing the second half of Richard Lederer's "Disorder in the Court".

Mary Louise Gilman, the venerable editor of the National Shorthand Report has collected many of the more hilarious courtroom bloopers in two books - Humour in the Court (1977) and More Humour in the Court, published a few months ago. From Mrs. Gilman's two volumes, here are some of my favourite "trasquips", all recorded by America's keepers of the word:

Q. When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go, gone also, would he have brought you, meaning you and she, with him to the station?

MR. BROOKS: Objection. That question should be taken out and shot.

Q. And lastly, Gary, all your responses must be oral. O.K.?
What school do you go to?
A. Oral.
Q. How old are you?
A. Oral.

Q. What is your relationship with the plaintiff?
A. She is my daughter.
Q. Was she your daughter on February 13, 1979?

Q. Now, you have investigated other murders, have you not, where there was a victim?

Q. ...and what did he do then?
A. He came home, and next morning he was dead.
Q. So when he woke up the next morning he was dead?

Q. Did you tell your lawyer that your husband had offered you indignities?
A. He didn't offer me nothing; he just said I could have the furniture.

Q. So, after the anesthesia, when you came out of it, what did you observe with respect to your scalp?
A. I didn't see my scalp the whole time I was in the hospital.
Q. It was covered?
A. yes, bandaged.
Q. Then, later on...what did you see?
A. I had a skin graft. My whole buttocks and leg were removed and put on top of my head.

Q. Could you see him from where you were standing?
A. I could see his head.
Q. And where was his head?
A. Just above his shoulders.