Examination for Discovery: *Necessity, Strategy and Substantive and Procedural Law*

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Examination for Discovery: Necessity, strategy and substantive and procedural law

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In this paper I will first deal with the issue of whether it is necessary to conduct an examination for discovery when liability has been admitted, then address some strategic considerations and finally provide some substantive and procedural law on various subtopics involving examinations for discovery.

Conducting an examination for discovery when liability admitted - Is it necessary?

In his text, *The Art of Discovery* (Aurora, Ont.: Canada Law Book Inc., 1990), Robert B. White, Q.C. dismisses the notion that the purpose of discovery is confined to obtaining factual information about the opponent's case and obtaining admissions for use at trial. At page seven, he notes there are at least six purposes for discovery, including to:

1. understand the nature of the other side's case;
2. obtain a preview of the documentary evidence;
3. gain admissions for use at trial;
4. commit an opposing witness to his testimony;
5. fix and narrow the matters really in issue in the litigation; and
6. gain a sense of the personalities of some of the witnesses whom counsel will have to cross-examine a trial.

While Mr. White's book deals with both oral and document discovery, each of the six purposes he lists can apply solely to an examination for discovery. An admission of liability, therefore, does not end the usefulness of this pre-trial procedure nor the need to avoid surprises at trial on damages.

I undertake an examination for discovery in every case, including all cases where liability has been admitted. My main goals in these latter cases is to gain admissions for use at trial, understand the nature of the defendant's case,

commit the defendant to a certain version of events and obtain a sense of the personality of the defendant.

With respect to admissions useful for damages, this would encompass such things as establishing there was loss of consciousness and/or the extent of the LOC; that the defendant would not be surprised if the plaintiff was injured given the force of impact; whether the plaintiff was able to exit the vehicle on her own, required assistance or had to be extracted; observations about whether the plaintiff appeared to be injured at the scene; whether the defendant was injured in the collision and, if so, the extent of the injuries and their impact on employment and other activities, etc.

In a case where liability had been admitted on behalf of the defendant driver who struck two women in a crosswalk, the following was obtained on the defendant's examination for discovery:

Q And when did you first realize that there was another woman that you had struck?
A I could hear her screaming.
Q And what about Ms. B___ when you first saw her, was she unconscious?
A Yes.
Q And how long was she unconscious for?
A A minute or so.

This same examination for discovery also provided an insight into the personality of the defendant. My client told me that when she arrived in the waiting room of the court reporter's office, the defendant, the only other person there at the time, began to apologise profusely to her and was actually reduced to tears at the thought of how much worse the collision could have been.

Understanding the nature of the defendant's case and committing the defendant to a certain version of events helps to eliminate unwanted surprises at trial. To help cover off the usual boilerplate pleadings I ask the following series of

questions (this example involved an examination for discovery to be used on behalf of two plaintiffs who had separate actions arising out of the same collision):

Q Now, the next series of questions I'm going to ask you relate both to Mr. G_____ and Mr. S_____. Are you aware of any facts to suggest that either one of them was not wearing a seat-belt?
A No.
Q Or that their headrests were improperly adjusted?
A No.
Q Are you aware of any facts that either one of them has failed to follow their doctor's advice or to do everything reasonable to get better?
A No.
Q Are you aware of any facts that would suggest that their present condition is caused by previous or subsequent accidents, injuries or conditions?
A No.
Q By congenital defects?
A No.
Q Or by pre-existing or subsequent injuries or conditions?
A No.
Q Did you know Mr. G____ or Mr. S____ before this collision or have you seen or heard of them since?
A No.

Smith v. Moshrefzadeh, 2012 BCSC 1458, once again confirmed for me the importance of conducting an examination for discovery, even where liability has been admitted, to avoid or reduce the effectiveness of any damaging evidence from the defendant at trial. Mrs Smith was a commercial fisherman who had pre-existing knee problems but alleged that due to the injuries from the collision (not to her knees) she was unable to participate in all of the different types of fisheries as she had in the past. On cross-examination, the following was put to her regarding a conversation she supposedly had with the defendant at the scene:

Q You don't recall telling him that you were a fisher?
A I probably did, I tell most people I'm a commercial fisherman.
Q And he says you told him that you were getting out of the fishing because it was too hard on your body and because of the long hours?

A No.
Q You don't recall having a conversation like that with him?
A I don't recall telling him that. I might have said that I had had a job that was not to do with fishing, but I've never intended not -- to get out of fishing.
Q So your recollection, no conversation like that took place?
A No.

In his opening, defence counsel advised the trial judge that:

> It is anticipated the defendant will testify that after the subject accident, while waiting at the scene, he was told by the plaintiff that she had stopped fishing because of the long hours and because it was too hard on her body…As for the income loss, the -- in the terms of past wage loss, the defence position is that the -- foremost that the plaintiff wasn't going to be working the prawn fishery in any event, and certainly Mr. Moshrefzadeh's evidence I expect will go to that, and that also goes to the earning capacity in the future.

All of which was quite surprising to hear because on his examination for discovery, after telling me that the plaintiff was quite upset and shocked at the scene, the defendant stated that the extent of his conversation with her was "I comforted her and her daughter until the police arrived, tried".

In any event, the defendant either flubbed his lines on direct examination (he was present in court for the entire trial) or was overcome by the solemnity of the proceedings when it came time to testify.

Q And did she indicate one way or another whether she was staying in that profession?
A Honestly, I don't remember that detail of if she mentioned anything about a career change or anything like that. Our conversation did not last very long because the police officer arrived quite early.

I mention above that one of the obvious benefits of conducting an examination for discovery, even when liability has been admitted, is that you can obtain a sense of the personality of the defendant. The same holds true for the defendant and his view of what the plaintiff's lawyer will be like to deal with if this matter

goes to trial. If you appear prepared, and conduct yourself in a professional manner, that will not go unnoticed by the defendant. In some cases, that view of whom they are dealing with may make all the difference between a defendant "trying something on" at trial or thinking better of it.

Do you go in for the kill or hold back some cards?

This is a strategic decision which arises in many examinations for discovery. There is no one correct answer. Much will depend on the strength of other evidence you are aware of. Equally important will be your assessment of the character of the defendant. For example, has the defendant appeared reasonable and conceded fair points or has he been sitting there, arms crossed, giving very controlled answers?

In the crosswalk case noted above, I knew from the intelligence provided by my client, and the defendant's demeanour before me, that he had so much guilt about this collision that he would agree to almost anything. In a recent case, I knew I could independently prove the extensive damage to my client's vehicle but wanted to avoid the need to do so. I was fairly confident I could get that admission from the defendant, despite his initial reluctance to do so.

Q And there was some fairly extensive damage to the rear of Mr. G_____'s vehicle?
A I didn't see any damage.
A I saw -- I looked at his truck and I just saw a little bit of -- maybe a little dent on his bumper. That's all the damage I could see.
Q. Now, I have got these photos which ICBC has provided to me which indicate Mr. G_____'s vehicle and damage to it. Is that -- do you recognize that vehicle as the one that you rear-ended?
A. I don't remember that. Okay. Okay, that was the truck.
Q. So perhaps a bit more damage than you --
A. Yes, I didn't -- I didn't -- I was dazzled and hurting.

I decided on the opposite strategy in a case where I was happy with the quality of the independent evidence supporting my client's version of the collision and my realisation that I was dealing with a young defendant who was unable to confront the truth that she was at fault for the serious consequences of the collision.

In that case, the defendant was parked on a gravel shoulder in a rural area with parked vehicles lining both sides of the road. My client was coasting, on his off-road motorcycle with the engine off (he was underage), down the road to the left of the parked cars on his side of the road. The defendant, with two friends in the car, pulled out directly in front of the plaintiff while attempting a U-turn, causing serious orthopaedic injuries. Her statement to the police at the scene was that the plaintiff, while lying on the road, said to her "I was riding on the side by the cars". When asked whether that meant on the asphalt or on the gravel to the passenger side of the parked vehicles, the defendant was not sure.

By the time the defendant spoke with ICBC some months later her version was that the plaintiff confirmed to her that he was riding (not coasting) to the right of the parked cars, was approaching her vehicle from behind and rode out onto the road between two parked cars. I was aware that, at the scene, the defendant's two passengers told the police the plaintiff did not say anything about how the collision occurred and they had no idea where the motorcycle came from. As a result, I decided not to confront her with the statements given to the police by her friends, but ensure that she could not explain away the inconsistent version of events.

Q. Did you hear a motorcycle engine at any time before the collision?
A. No, I did not.
Q. All right. When we left off, I was just asking you that your two friends who were in the vehicle with you, did they get out at the same time with you and go over with you to where Mr. A___ was?
A. Yes.

Q. Did they stay with you the entire time after that?
A. Yes.
Q. Were there other people who were first to him other than yourself and your friends?
A. I don't remember.

This case went from an initial strong denial of liability to settlement at mediation. After the inconsistency was pointed out, liability was barely mentioned and it played no role in the settlement figure.

Adverse in interest

When ICBC third parties itself into an action to contest the liability of a breached defendant, ICBC becomes a party adverse in interest to the plaintiff and, accordingly, the plaintiff is entitled to conduct an examination for discovery of a representative of ICBC: *Graham v. Hession* (1984), 55 B.C.L.R. 15 (C.A.).

Occasionally, counsel for ICBC will attempt to ask questions at the conclusion of the plaintiff's examination for discovery of a breached defendant. They are not entitled to do so because the breached defendant and ICBC have a common interest between them to defeat the claim of the plaintiff and, therefore, are not adverse in interest: *British Columbia v. Terry Logging Ltd.* (1984), 57 B.C.L.R. 265 (C.A.).

Notwithstanding that the defendant was the husband of the plaintiff, this did not change the fact that they were adverse in interest, thus allowing the plaintiff to examine him for discovery. In particular, the defendant could be examined with respect to his knowledge of the plaintiff and her physical and mental condition since the collision: *Banaschek v. Banaschek*, 2001 BCSC 67. Although, the weight to be given to any admissions made by a defendant family member

would be up to the trial judge: *Banyay v. Insurance Corp. of British Columbia* (1996), 26 B.C.L.R. (3d) 75 (C.A.).

Conduct of counsel at an examination for discovery

We have all attended examinations for discovery where the opposing counsel constantly interrupts, repeatedly issues reminders to their clients not to guess or speculate or subtly suggests the answer. The excerpts from the transcripts of the examinations for discovery found in *Colbeck v. Kaila et al* and *Dytuco v. Low*, 2007 BCSC 689 is a prime example. This was a joint judgement involving the same plaintiff and defence counsel at two separate examinations.

The leading case on the limited nature of permissible interruptions is *Kendall v. Sun Life Assurance Company of Canada*, 2010 BCSC 1556. There, Madam Justice Griffin strongly criticised the interruptions and objections made by counsel for the defendant in the examination for discovery of their representative.

> [11] The legal authorities emphasize the proposition that an examination for discovery is a cross-examination, and counsel for the examinee must not unduly interfere or interrupt the examination.
>
> [12] Counsel for the party being examined should not interfere on the cross-examination on examination for discovery unless it is "clearly necessary to resolve ambiguity in the question or to prevent injustice": *Day v. Hume*, 2009 BCSC 587 [*Day*] at para. 20. Any such intervention "should not be in a form that suggests to a witness what a desirable answer might be" (*Day* at para. 20). However, objections on the grounds of privilege are warranted as the scope of discovery does not extend to privileged matters: Rule 7-2(18)(a).
>
> [14] The newly imposed time limit on discovery makes it all the more important that the courts enforce the principle that counsel for the examined party must not unduly interfere or intervene during the examination for discovery. The time limit imposes a self-policing incentive on the examining counsel to be focused and to not waste time on

> questions that will not advance the purpose of investigating the case or obtaining admissions for use at trial.
>
> [15] While the time limit on examination for discovery creates an incentive on the examining party to be efficient, it unfortunately also creates a risk that counsel for the examinee will be inefficient by unduly objecting and interfering on the discovery, for the purpose of wasting the limited time available. If that party is economically stronger than the examining party, it also can strategically increase the costs of litigation this way, by burdening the financially disadvantaged party with having to bring a court application to obtain a proper discovery.
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> [16] The proper conduct of an examination for discovery within the spirit of the *Rules* thus relies on the professionalism of counsel for the party being examined.
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> [17] As held by the Ontario Superior Court in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.* (2006), 83 O.R. (3d) 438 at para. 4:
>
> > Improper interference by counsel in the other party's discovery undermines the purposes of discovery, prolongs it, fosters professional mistrust and generally offends the overall purpose of the Rules….
>
> [18] A largely "hands off" approach to examinations for discovery, except in the clearest of circumstances, is in accord with the object of the *Rules of Court*, particularly the newly stated object of proportionality, effective July 1, 2010. Allowing wide-ranging cross-examination on examination for discovery is far more cost-effective than a practice that encourages objections, which will undoubtedly result in subsequent chambers applications to require judges or masters to rule on the objections. It is far more efficient for counsel for the examinee to raise objections to the admissibility of evidence at trial, rather than on examination for discovery.

In paragraphs 39-41, 48-49 and 52, Madam Justice Griffin sets out some of the specific conduct that was objectionable.

> ….The witness had not been examined extensively on this area of questions and it was wrong for counsel to suggest that the questions had been canvassed thoroughly already. Furthermore, counsel for the defendant improperly attempted to assist the witness by overstating the witness' prior evidence, as a cue to the witness.

> …The witness was perfectly capable of stating that she did not understand the question if she did not understand it. By objecting, counsel appeared too protective of the witness. This not only interferes with cross-examination, one wonders what is the value of this type of behaviour in terms of the overall litigation strategy. It is unlikely that a trial judge would allow such overly protective objections during the course of a trial. A witness may be lulled into a false sense of security when her counsel indulges in overprotective behaviour on examination for discovery.
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> Furthermore, it would be wrong to overlook the fact that part of the dynamic operating in examinations for discovery is psychological. By continuing to interrupt the examining counsel, the objecting lawyer seeks to derail the authority of the examiner over the witness and undermine the flow of the examination. When one reads the entire discovery transcript, you can see the effectiveness of this strategy in that the witness appears to become more and more obtuse as the discovery progresses, taking issue with more and more questions and becoming less and less helpful with her answers. Again, one has to wonder about the overall benefit of this strategy to the defendant. While it might have prevented the examining counsel from obtaining helpful admissions, it can also create the impression that the witness is evasive, an impression that might be left with the trial judge if passages are read-in at trial.
>
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>
> …Nevertheless, considerable respect ought to be shown for the professional judgment of counsel for the examining party on how to best approach an examination for discovery. It is not up to counsel for the party being examined to dictate the opposing side's decisions on which relevant areas of questioning should be the focus of the discovery. It is also not in accord with the object of proportionality to make it the function of the court to become involved in micro-managing examination for discovery questions.

Given the fact that the interruptions by counsel for the defendant made the examination for discovery virtually useless for the plaintiff, the representative

was ordered to re-attend for a further seven hours at the expense of the defendant.

In some ways, it is difficult to reconcile the fact that similar interruptions were criticised in *Kendall* while they were not in *Colbeck*.

In a medical malpractice case, *Ornstein v. Starr*, 2011 ONSC 4220, counsel for the defendant took the position that having admitted liability there was no need for an examination for discovery of his client because "As a defendant in this action, Dr. Starr cannot reasonably be expected to comment on the plaintiff's damages". (As the chambers judge noted "If the defendant as witness on discovery, can *not* reasonably be expected to provide *evidence* that can be relied upon, on the issue of the plaintiff's claimed damages and the matters in dispute in that regard, who can?") Defence counsel took the position that if the plaintiff insisted on conducting an examination for discovery her counsel would have to establish the relevance of each question. Defence counsel was true to his word and, other than allowing his client to state is name and confirm he was a plastic surgeon, instructed the doctor not to answer any questions. The defendant was ordered to re-attend and answer questions, with the plaintiff being awarded substantial indemnity costs of $9,000.

Continuation of or further examination for discovery

When a second examination for discovery is sought there is a heavy onus on the applicant to justify this by demonstrating that the complexion of the case has materially changed as a result of the passage of time, new heads of damage are now being advanced, intervening events since the last discovery have materially altered the prosecution or defence of the case or that full and frank disclosure was not made at the first discovery: *Lewis v. Lewis*, 2010 BCSC 1925.

Rule 7-2(2) is not to be interpreted as allowing a party to have multiple examinations for discovery adding up to seven hours: *Humphrey v. McDonald,* 2011 BCSC 1288. If an examination for discovery has occurred under Rule 15-1, but then the case is subsequently removed from fast- track, this does not allow a party a further seven hours of discovery: *Brown v. Dhariwal*, 2013 BCSC 2419.

In *Li v. Oneil,* 2013 BCSC 1449, although framed as an application for a further examination for discovery, Master Muir found that it was in fact an application for a continuation of the first discovery. The defendant was entitled to continue her discovery of the plaintiff regarding questions left on the record, to ask questions based on documents requested at the discovery and subsequently produced and to examine on documents produced since the first discovery even though not requested there. This reasoning was followed in *Brown*.

Document and information requests made at discovery

In *LaPrairie Crane (Alberta) Ltd. v. Triton Projects Inc.*, 2012 BCSC 1594 an application was brought to enforce the production of documents requested at the examination for discovery. While the defendant relied on Rule 7-2 (the Rule governing examinations for discovery) as their legal basis for production, Master Bouck was of the view that this part of the application should have been brought under Rule 7-1. Her honour noted that a party cannot get around the principles laid down in *Kaladjian v. Jose,* 2012 BCSC 357 by seeking disputed documents at an examination for discovery.

At the examination for discovery, plaintiff's counsel did not object on the record to the documents or information requested. Consequently, the defendant took the view that if no objection is made, or counsel remains silent, then the documents and information requested have to be produced. However, Master

Bouck determined that silence does not mean consent and that a party is entitled to a change of mind upon reflection, or upon taking legal advice. If a change of mind occurs, the examining party still has a remedy under Rules 7-1 and 7-2(22)-(24).

Duty to be informed

Bearing in mind the time limit for examinations for discovery under Rule 7-2, the principle of proportionality and the underlying objective of having just, speedy and inexpensive determinations of every proceeding on its merits, there is an obligation on a person being examined to make reasonable efforts to prepare for that discovery. This will almost certainly require that the examinee has reviewed the documents produced by all parties: *Gardner v. Viridis Energy Inc.*, 2012 BCSC 1816.

The fact that an examinee answers "I don't know" or "I don't remember" is not a sign that the witness is being evasive or unresponsive, unless that becomes a pervading theme, or that he has come unprepared. This is particularly so when the witness agrees to inform himself and provide more fulsome evidence later: *Greg Court Developments Ltd. v. Sievert,* 2014 BCSC 551.

Effect of reading in inconsistent discovery evidence

It has been suggested that some older cases decided that reading in a defendant's examination for discovery evidence on liability, which contradicted the plaintiff's version of events, was fatal to the plaintiff's case. In *Duncan v. Mazurek,* 2010 BCCA 344 the court concluded that these cases did not go that far.

> … While the plaintiff may be at some risk in reading in such evidence as part of her case, where there is contradictory evidence it is my view that the trial judge must retain discretion to weigh it all in reaching his findings.

Scope of the examination for discovery

While there has been a clear change in the scope of document production under Rule 7-1, the same cannot be said for Rule 7-2. Mr Justice N. Smith analysed the distinction that now exists between oral examination for discovery and discovery of documents in *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166. Document discovery begins with the "prove or disprove a material fact" test and only moves to the much broader "relating to every matter in question in the action" level upon the requesting party showing the need for it. The scope of an examination for discovery remains throughout at the broader level. There is, however, a limitation imposed on oral discovery in the form of time limits; seven hours (or more if consented to or ordered) for a regular action and two hours (or more if consented to or ordered) for a fast-track action.

There is no general proposition that, in a claim against an institutional defendant, the general practices of the defendant cannot be explored on examination for discovery. Rather, the authorities suggest that it is a question of the degree to which it can be pursued: *Kendall*.

While the scope of an examination for discovery continues to be quite broad, it is still an examination of the knowledge of the *party* being examined. In *Hopp v. Lopez*, 2012 BCSC 2179, the plaintiff, having no recollection of what he advised a chiropractor or how he was feeling at that time, could not be expected to speculate on what the chiropractor may or may not have recorded and why.

Speaking to a client during their examination for discovery

The leading case on the limits placed on counsel communicating with their client during the client's examination for discovery is *Fraser River Pile* &

Dredge Ltd. v. Can-Dive Services Ltd. (1992),72 B.C.L.R. (2d) 240 (S.C,).

There, Mr Justice Wong set out the following guidance to counsel:

> 1) Where a discovery is to last no longer than a day, Counsel for the witness should refrain from having any discussion with the witness during this time. In order to maintain the appearance of proper conduct, Counsel and the witness should not even be seen to converse during any recess.
>
> 2) Where a discovery is scheduled for longer than one day, Counsel is permitted to discuss with his or her witness all issues relating to the case, including evidence that is given or to be given, at the conclusion of the discovery each day. However, prior to any such discussion taking place, Counsel should advise the other side of his or her intention to do so.
>
> 3) Counsel for the witness should not seek an adjournment during the examination to specifically discuss the evidence that was given by the witness. Such discussion should either wait until the end of the day adjournment or until just before re-examination at the conclusion of the cross-examination.

Despite suggestions to the contrary in earlier case law, asking a party whether they had any discussions with their counsel during a break is, in fact, a proper question. However, solicitor-client privilege will prevent any further exploration beyond that: *More Marine*.

Examination for Discovery

Necessity, strategy and substantive and procedural law

Adam de Turberville

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- Understand the defendant's case
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- Fix and narrow the issues in the litigation
- Understand the personality of the defendant

Why Discover the Defendant if Liability is Admitted?

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- To get admissions on issues related to damages

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- To get a sense of the defendant

Admissions

- Establishing there was loss of consciousness and/or the extent of the LOC

Admissions

- Establishing there was loss of consciousness and/or the extent of the LOC
- The force of impact

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- How the defendant's injuries affected work and other activities

Admissions

Q And when did you first realize that there was another woman that you had struck?

A I could hear her screaming.

Q And what about Ms. B___ when you first saw her, was she unconscious?

A Yes.

Q And how long was she unconscious for?

A A minute or so.

Avoiding Nasty Surprises at Trial

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- What might the defendant have seen?

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Q Now, the next series of questions I'm going to ask you relate both to Mr. G_____ and Mr. S_____. Are you aware of any facts to suggest that either one of them was not wearing a seat-belt?

A No.

Q Or that their headrests were improperly adjusted?

A No.

Avoiding Nasty Surprises at Trial

Q What observations did you make of the plaintiff at the scene?

Avoiding Nasty Surprises at Trial

- What might the defendant have seen?
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Avoiding Nasty Surprises at Trial

Q Did you speak with the plaintiff following the collision?

Avoiding Nasty Surprises at Trial

Q Did you speak with the plaintiff following the collision?

Q Did you overhear the plaintiff saying anything after the collision?

Avoiding Nasty Surprises at Trial

- *Smith v. Moshrefzadeh*, 2012 BCSC 1458

Avoiding Nasty Surprises at Trial

Q And he says you told him that you were getting out of the fishing because it was too hard on your body and because of the long hours?

A No.

Q So your recollection, no conversation like that took place?

A No.

Avoiding Nasty Surprises at Trial

"It is anticipated the defendant will testify that after the subject accident, while waiting at the scene, he was told by the plaintiff that she had stopped fishing because of the long hours and because it was too hard on her body…"

Avoiding Nasty Surprises at Trial

Q Did you have any conversation with Ms. Smith following the collision?

A Yes, I did. I comforted her and her daughter until the police arrived, tried.

Q And did you make any observations about Ms. Smith at the scene, how she was?

A She was quite upset and shocked.

Avoiding Nasty Surprises at Trial

Q And did she indicate one way or another whether she was staying in that profession?

A Honestly, I don't remember that detail of if she mentioned anything about a career change or anything like that. Our conversation did not last very long because the police officer arrived quite early.

Avoiding Nasty Surprises at Trial

- What might the defendant have seen?
- What might the defendant have heard?
- What might the defendant know?

Avoiding Nasty Surprises at Trial

Q Did you know Mr. G____ or Mr. S____ before this collision or have you seen or heard of them since?

A No.

Avoiding Nasty Surprises at Trial

Q Are you aware of any facts that either one of them has failed to follow their doctor's advice or to do everything reasonable to get better?

A No

Avoiding Nasty Surprises at Trial

Q Are you aware of any facts that would suggest that their present condition is caused by previous or subsequent accidents, injuries or conditions?

A No.

Q By congenital defects?

A No.

Q Or by pre-existing or subsequent injuries or conditions?

A No.

In For the Kill or Hold Back Cards

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Q And there was extensive damage to the rear of the truck?

A I didn't see any damage. I just saw -- maybe a little dent on his bumper. That's all the damage I could see.

Q Now, I have got these photos which ICBC has provided to me which indicate Mr. G_____'s vehicle and damage to it. Is that -- do you recognize that vehicle as the one that you rear-ended?

A I don't remember that. Okay. Okay, that was the truck.

Q So perhaps a bit more damage than you --

A Yes, I didn't -- I didn't -- I was dazzled and hurting.

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Q All right. When we left off, I was just asking you that your two friends who were in the vehicle with you, did they get out at the same time with you and go over with you to where Mr. A___ was?

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Conduct at Discovery

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- *Colbeck v. Kaila et al and Dytuco v. Low,* 2007 BCSC 689

Conduct at Discovery

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"Do you understand what that means?"

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"He said that was his best estimate."

Conduct at Discovery

"Don't guess. If you can give an estimate, you can give an estimate, but don't make a wild guess."

"If you don't know, don't guess."

"Do you understand what that means?"

"He said that was his best estimate."

"He said he didn't."

Conduct at Discovery

"Don't guess. If you can give an estimate, you can give an estimate, but don't make a wild guess."

"If you don't know, don't guess."

"Do you understand what that means?"

"He said that was his best estimate."

"He said he didn't."

"You have to go from your memory. Don't guess.

Conduct at Discovery

"Or if you don't have any memory then you don't have to answer."

Conduct at Discovery

"Or if you don't have any memory then you don't have to answer."

"But he's already said he doesn't know when the plaintiff came –

"Don't interfere."

"– in front of him."

Conduct at Discovery

"Now remember you're not allowed to guess."
"Jesus Christ, Linda."
"You have to give answers from your memory."
"Stop interfering."
"I'm not."

Conduct at Discovery

"Do you mind? I might as well get comfortable."

Conduct at Discovery

Conduct at Discovery

"Do you mind? I might as well get comfortable."

"For the record Mr. M____ is putting his feet on the boardroom table and leaning back in his chair."

Conduct at Discovery

Conduct at Discovery

- *Kendall v. Sun Life Assurance Company of Canada,* 2010 BCSC 1556

Conduct at Discovery

- *Kendall v. Sun Life Assurance Company of Canada,* 2010 BCSC 1556

"[11] The legal authorities emphasize the proposition that an examination for discovery is a cross-examination, and counsel for the examinee must not unduly interfere or interrupt the examination."

Conduct at Discovery

- *Kendall v. Sun Life Assurance Company of Canada,* 2010 BCSC 1556

"….Furthermore, counsel for the defendant improperly attempted to assist the witness by overstating the witness' prior evidence, as a cue to the witness. …The witness was perfectly capable of stating that she did not understand the question if she did not understand it."

Conduct at Discovery

- *Kendall v. Sun Life Assurance Company of Canada,* 2010 BCSC 1556

"Furthermore, it would be wrong to overlook the fact that part of the dynamic operating in examinations for discovery is psychological. By continuing to interrupt the examining counsel, the objecting lawyer seeks to derail the authority of the examiner over the witness and undermine the flow of the examination."