Packing & Fracking Defence Experts

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PACKING AND FRACKING THE DEFENCE EXPERTS

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I. Introduction

The purpose of this paper is to address some of the common issues and situations that arise in a personal injury action once the defence has decided to retain a medical expert or experts to assist in defeating or minimizing the Plaintiff's case.

The paper is divided into several sections which seek to identify the most common strategic concerns which arise regarding defence experts from the very outset of a case through to trial.

II. Initial considerations regarding defence medical examinations

The issues which need to be resolved, when plaintiff's counsel receives a demand that their client attend for a defence medical examination (DME), are:

1. whether the area of specialty of the DME doctor is appropriate;
2. whether there is good reason why the specific doctor being proposed should not carry out the DME; and
3. what the terms of attendance will be.

The first consideration will be mainly fact-specific, often concerning the matter of whether a second or subsequent DME is required. This latter aspect will be addressed later in this paper.

A. Should the proposed DME doctor be legitimately objected to?

We say "legitimately" objected to because there is a high threshold which a plaintiff will have to meet in order to have the DME denied or significantly modified on this basis. While in ***Wong v. Wong***, 2006 BCCA 540, at paragraph 41, the court noted:

> *… If there is any legitimate concern that a proposed medical examiner may have a bias in favour of the party seeking his appointment, the time*

> *to raise that objection is on the application to the court for his or her appointment under the rule…*

the reality is that there are few situations which will cause the court to disqualify a proposed DME doctor on this ground.

The threshold for disqualification is best described in ***Adelson v. Clint*****,** [1993] B.C.J. 1114 (S.C.).

> *… In my opinion, once the defendant has brought itself, within* R. *30(1), by nominating a medical practitioner or other qualified person in the context of the nature of the examination to be conducted, the burden then shifts to the plaintiff who opposes the appointment of that nominated medical practitioner to demonstrate by a preponderance of evidence that sufficient grounds exist to justify the court concluding that its discretion should not be exercised in favour of the appointment of a defendant's nominee.*

The foundation decisions on this issue were clearly influenced by the court's belief that the proposed DME doctor is a professional who would not misconduct himself or herself. ***Rasmussen v. Parmar*** (1977), 3 B.C.L.R. 78 (S.C.) aptly shows this.

> *The fact that the doctor is an uncle of the wife of the plaintiff's solicitor, with whom he is in litigation (and who I might mention is not counsel before this court), overlooks the fact that the doctor is a nominee of the court and it is of course expected that he will not misconduct himself. To refuse to appoint him simply because of some personal involvement of the plaintiff's solicitor would, in my view, be quite improper and I refuse to do that.*
>
> *The doctor mentioned may well be a defendant's doctor. The plaintiff's solicitor, by his affidavit, is undoubtedly unhappy with this particular doctor's diagnoses in other cases but that is something that can be adequately dealt with by counsel at the trial. If he wants to show some form of prejudice on the part of the doctor he can demonstrate that on cross-examination.*

Brown v. Smithson (1993), 78 B.C.L.R. (2d) 369 (S.C.) traces the origins of, and subsequent changes to, the considerations that could be taken into account.

> *10 The appointment of an expert to examine a party to a proceeding is made by the court. In practice the name is usually suggested by counsel who is seeking the examination. The court may refuse to accept such suggestion if it is not satisfied with the qualifications of the*

> *doctor whose name is proposed and the court will then make its own selection: Milburn v. Phillips (1963), 44 W.W.R. 637 (B.C.S.C.).*
>
> *11 In Rasmussen v. Parmar (1977), 3 B.C.L.R. 78 (S.C.), it was held (at p. 80) that "The law in British Columbia appears to be that the doctor is the nominee of the court, and that the only objection to the doctor suggested would be as to his qualifications." The authority cited for that proposition is Milburn v. Phillips. However, Wilson C.J.S.C. in that case did not suggest that dissatisfaction with the qualifications of the doctor whose name was proposed was the only ground upon which the court could decline to accept the nomination of counsel.*
>
> *12 In Wheeler v. White (1983), 49 B.C.L.R. 294, affirmed (1984), 7 D.L.R. (4th) 767 (C.A.), Master Halbert, in declining to appoint an expert nominated by counsel, did not hold that the expert was not qualified. He held (at p. 295) [B.C.L.R.], "Where, as in this proceeding, there is a willingness on the part of the person to be examined to accept any expert other than the one chosen by the applicant, coupled with material which supports a reasonable belief that there exists, in the mind of that person, a distrust or fear of the nominated specialist, it is my opinion that the court should exercise its discretion in favour of the person to be examined."*
>
> *13 In Lalonde v. Desrosiers (unreported February 28, 1983, #CA821533, Vancouver [1983] B.C.D. Civ. 3659-01), the Court of Appeal held that it was proper to take into account that the practitioner nominated conducted his practice in Vancouver and that the plaintiff lived in Penticton and that there would seem to be a definite possibility that the examination could take place in Penticton.*

Master Horn concluded that the selection of an expert to undertake a DME is at the discretion of the court and that grounds other than the lack of qualifications of the expert may be taken into account, including the convenience of the person being examined.

In ***Brown***, plaintiff's counsel objected to a particular orthopaedic surgeon conducting the DME because he alleged this doctor had behaved inappropriately on an earlier DME by asserting that the prior examinee's problems were due to a cancerous tumour which caused that examinee considerable distress. Master Horn rejected the defendant's nominee because, in light of the perception that the orthopaedic surgeon had "behaved badly toward one litigant and may behave badly to another, the court should look for a reasonable alternative. It was not plain to me that there was no reasonable alternative".

Although ***Adelson*** also goes on to state that the court should be provided with the names of three qualified practitioners, with information about each, and that the court would then choose its nominee, this suggested practice has never really gained any traction.

A plaintiff will have to show that there is something more than just an apprehension of bias, or a general mistrust of any doctor that may be suggested by a defendant, before a DME proposed doctor will be rejected.

For instance, in ***Wheeler*** it was noted to be significant that the DME involved psychiatric or psychological complaints.

In ***Hewitt v. Buell***, [1992] B.C.J. 2858 (S.C.) a female plaintiff was not ordered to attend a DME with a male orthopaedic surgeon where the evidence was that the only male specialists she would see were those recommended by her family doctor. Her family doctor had recommended a female orthopaedic surgeon in Calgary as an appropriate DME specialist. Master Doolan concluded that:

> *I am satisfied that the approach to take on this application is to cater to the sensitivities as advanced here by the plaintiff, particularly when there is a reasonable alternate choice available*.

In ***Williams-Quitzau v. Chow****,* 2010 BCSC 2024, the defendant attempted to retain Dr Leith to conduct a DME on the plaintiff even though Dr Leith had been a previous treating specialist of the plaintiff for a pre-existing condition. Notwithstanding his previous role, Dr Leith was content to act as an expert for the defendant. The plaintiff objected to Dr Leith conducting a DME examination on the basis of the prior doctor-patient relationship. Master Shaw agreed.

> *[39] With Dr. Leith having seen the claimant in the role of treating physician in the past, questions, at least in the mind of the plaintiff, arise about the ability of the physician now proposing to do an IME for the opposing party to be unbiased. The perception of neutrality of an expert opinion for an IME should, as much as is reasonably possible in the circumstances of each case, be free from any shadow of bias.*
>
> *[40] In these circumstances, the concerns of the plaintiff are reasonable. At the very least, there is a potential appearance of bias when an IME is conducted by a former treating physician of the plaintiff. It also appears from the article that if Dr. Leith was retained as an expert by the defence, this eliminates any chance of the plaintiff receiving any future treatment from this specialist, even though she had been his patient in the past.*

A Master's decision to allow a neuropsychological DME with Art Williams was overturned on appeal in ***Moll v. Parmar,*** 2012 BCSC 1835. This neuropsychologist had earlier critiqued the reports from the plaintiff's experts. The content of his first report convinced Mr Justice Meiklem that he lacked the necessary objectivity to warrant being appointed by the court to conduct a DME. His Lordship did not think it was appropriate for the court to allow a DME with an expert who had previously taken a strong stance as a reviewer of previous reports, bordering on advocacy, particularly in light of the provisions of Rule 11-2(1).

While ***Moll*** involved evidence from within the particular case itself that led to a concern about advocacy, rejection of a proposed a DME doctor on this ground should not be limited to just this situation. In fact, it would be open to a court to reject a doctor who has come in for consistent negative treatment in other cases. This occurred in ***Henry v. Reeves*** (unreported, Nanaimo Registry M53129, January 31, 2011) where plaintiff's counsel laid out a series of prior judgements with courts had been critical of the advocacy of a psychiatrist. Mr Justice Halfyard substituted a different psychiatrist for the one initially proposed by the defendant. However, prior decisions in which a psychiatrist had been labelled an advocate did not concern the Master in ***Kelly v. Sanmugathas,*** 2009 BCSC 958.

An analogy can also be drawn with the situation where there are cost consequences when a party persists in using an expert who has been heavily criticised in prior decisions: ***Heppner v. Schmand*** (1996), 24 B.C.L.R. (3d) 309 (S.C.); affirmed (1998), 59 B.C.L.R. (3d) 336 (C.A.) and ***Jayetileke v. Blake,*** 2010 BCSC 1478.

B. Terms of attendance at the DME

The following are typical terms that have been sought and either agreed to, or ordered by the courts, for DMEs.

1. *You will pre-pay the cost of _____'s reasonable expenses to attend. I will advise you of the amount that will be required. If hotel accommodation is required, your office will be responsible for the booking and payment of it.*

2. *Regardless of whether you choose to order a report from Dr. _____ and provide a copy to me, pursuant to Rule 11-6(8)(a) you will forward a copy of Dr. _____'s notes that record the history given to [him/her] by _____ and [his/her] observations and findings from the physical examination or assessment. These notes will be provided within two weeks of the DME.*

3. *Pursuant to Rule 11-6(8)(b), Dr. _____ is required to retain all drafts, notes, research papers or other material of any kind used or drafted in preparation of any*

report _____ provides. These materials will be preserved and provided to me as part of Dr. _____'s complete file, 14 days before any scheduled trial date, should you serve Dr. _____'s report for use at trial.

4. *Because of his/her memory or cognitive problems, _____ will be at liberty to be accompanied by a person of [his/her] choice. This person will not participate in, or interfere with, the examination, but will be entitled to make notes of what occurs or is said. Alternatively, you will arrange to have this DME video or audio recorded and a copy of the resulting disk will be provided to me within two weeks of the DME.*

The Court of Appeal in ***Wong v. Wong***, 2006 BCCA 540, at paragraph 30, stated that a chambers judge has discretion to allow the presence of a note taker at, or the video recording of, a DME. However, you will need the right facts to get this and at least some evidence of memory or cognitive problems.

This necessity for a note taker was addressed in ***Makowsky v. Jawandha*** (unreported, Vancouver Registry January 30, 2008), in relation to the medical examination of the plaintiff by Dr. Sovio, an orthopaedic surgeon chosen by the defence. In addition to physical injuries, that plaintiff also alleged brain damage and memory problems. The plaintiff was ordered to attend the examination with Dr. Sovio and did so accompanied by a friend. It had been a term of the order that the plaintiff could have somebody he chose present at the examination. Dr. Sovio had no problem with the friend accompanying the plaintiff; however, he refused to complete the examination because the friend was making notes. The matter was returned to Madam Justice Gray who ordered that the examination was to proceed again with Dr. Sovio on the basis that the observer would take notes quietly and out of view of the doctor and patient. Her Ladyship also felt that there was a right for the observer to take notes so long as it did not slow or interfere with the examination.

The same result occurred in ***Green v. Gregory,*** 2010 BCSC 1919 where a similarly brain injured plaintiff agreed to attend an orthopaedic DME on the condition that someone accompany her to take notes. This was so ordered over the objection of the third party, ICBC.

The plaintiff was permitted to take a friend or a family doctor, but not another psychiatrist, to a psychiatric DME in ***Flores v. Bal*** 2009 BCSC 237.

In ***Foster v. Juhasz,*** 2009 BCSC 1101, Master Caldwell made the same order under similar circumstances. A note taker was allowed to attend with a brain injured plaintiff for a DME with Dr Semrau in ***Lorenz v Smith and Jones,*** (unreported, Nanaimo Registry M55297, January 28, 2010). A term of the DME that the plaintiff could attend with a note taker was also made in ***Carta v. Brown*** (unreported, June 19, 2012 - New Westminster Registry).

There is a further issue that highlights the importance of having an accurate record of what transpires at the DME. At trial, defence counsel often argue that there is a discrepancy between what the plaintiff has testified to and what she said to the defence medical experts. This issue arose in ***Shearsmith v. Houdek*****,** 2008 BCSC 997 where Mr. Justice Romilly said the following at paragraph 21:

> *When dealing with the issue of credibility in these types of trials, there is a comparison between the testimony of the plaintiff at trial and history given to the experts upon their examinations prior to the trial. In my view, this sort of comparison becomes valid only when the experts use a reliable method of recording what the plaintiff said when he or she gave his or her history. Without a reliable recording of what was in fact said by the plaintiff in an interview, it is difficult, if not impossible, to tell if the testimony and the accounts given to the experts were indeed different.*

This concern about having an accurate record was at the heart of the issue in ***Kelly***. While not being concerned about the psychiatrist's history of being labelled as an advocate in other court decisions, the Master was concerned about prior judicial comments as to his lack of accuracy as a note taker. For that reason and audio recording was ordered for the DME.

Although clearly in dissent, the views expressed by Madam Justice Saunders at paragraph 54 to 55 in ***Wong***, written over seven years ago, make even more sense with the further passage of time.

> *Third, the rapid development of technology allows the smallest devices to broadcast a conversation, and transmit images, without the overt act of recording on tape equipment. The size of the devices allows this to be accomplished without notice to others present. This new feature of technology, which is not engaged in this case, enhances the desirability of a process which encourages candour and, in today's parlance, "transparency".*
>
> *In my view, the approach to recording expressed in paragraph 48 of the reasons for judgment of the Chief Justice does not fully account for the omnipresent modern technology, and the degree of acceptance it has achieved as evidenced by the ubiquitous telecommunication devices on view in daily life. As long ago as 1986 a study on the Halton Project of videotaping interviews of police subjects, referred to in the Report to the Attorney General by the Police Commission on the Use of Video Equipment by Police Forces in British Columbia, 28 November 1986, concluded that such a procedure generated more open and complete statements than was achieved without use of the videotape technology. It*

> *is not self-evident, in my view, that use of video or audio equipment is an inhibitor to full exchange between people.*

On a cautionary note, a plaintiff who agreed to attend a DME without specifying any terms was found not to be entitled to have a note taker attend with him when he attempted to subsequently add that as a term of attendance: ***Minhas (Litigation guardian of) v. Virk***, 2011 BCSC 191.

5. *There will be no invasive tests. No x-rays or other imaging will be taken or arranged.*

While no invasive tests, x-rays or other imaging does seem to be the normal term of a DME: ***Green***, there are situations where invasive tests have been permitted.

Blood and urine samples were ordered to be taken at a DME where the defendants adduced evidence that raised at least the possibility that an addiction to prescription and/or illegal drugs might be contributing to the plaintiff's current disabilities. The samples were to be tested for the presence of drugs and for medical conditions or diseases: ***Siemens v. Motruk and Coote***, 2000 BCSC 1593. Privacy concerns were addressed by ordering that any report on the testing would be sealed.

In ***Mund v. Braun***, 2010 BCSC 1714, electro-diagnostic studies were allowed on the basis that they were simply an extension of a neurological examination, were minimally invasive and would not intrude on the plaintiff's privacy. A significant issue in dispute was the extent, if any, to which the plaintiff's alleged symptoms and disability resulted from post-traumatic thoracic outlet syndrome, myofascial pain syndrome, frozen shoulder, ulnar nerve damage, degenerative cervical disc changes or any combination thereof.

6. *Neither Dr. _____, nor anyone in his office, will attempt to have _____ sign or complete any releases, waivers, consents or other documents. Unless provided to me in advance for my pre-approval, _____ will be instructed not to sign or complete any documents.*

While this term is usually not contentious, there is the odd doctor who insists on their particular form of authorisation or consent. When this issue is in dispute, reliance will need to be had on law which has become somewhat unnecessarily muddied by decisions that, with the greatest respect, fail to adhere to *stare decisis* or follow the guidelines set out in ***Re: Hansard Spruce Mills Ltd***.

On this issue, we can begin with ***Peel Financial Holdings Limited v. Western Delta Lands***, 2003 BCCA 180 which involved the Supreme Court ordering a party to endorse a consent order. In overturning the decision on appeal, Chief Justice Finch stated the following.

> *[15] The second ground of appeal is that the judge had no power to order a party to consent to an order. A consent given pursuant to an order to do so would be no consent at all: see Rafferty v. Power (1993) 15 C.P.C. (3d) 48 (B.C.S.C.).*
>
> *[16] Counsel says the proposed form of order was devised upon the advice of the Registrar of this Court that in order to draw down the letter of credit a consent order would be required. Accepting that to be true for the moment, it does not follow that any party could be compelled to provide his consent merely because consent was necessary; or that any court had power to make such an order…*
>
> *[17] The Supreme Court judge cited no authority for his power to compel a party to consent, and no authority for such a power was provided to us. As I have said, a consent given pursuant to an order is a contradiction in terms.*

In a detailed analysis of *stare decisis* in ***R. v. M.P.S.****,* 2013 BCSC 1953, Mr Justice Romilly notes this doctrine is as old as the common law itself and that there can be no doubt that trial judges are bound to accept as binding the law as pronounced by appellate courts above them in their judicial hierarchy. His Lordship also cautions that trial courts should defer and give liberal breadth to rulings of appellate courts. Appellate decisions bind even if the lower court thinks that the higher court's precedent is clearly wrong or that the higher court's decision is wider than its rationale requires. The importance of granting this considerable deference, even to *obiter dicta,* is discussed more fully in ***R. v. Sellers***, [1980] 1 S.C.R. 527, ***Scarff v. Wilson*** (1988), 33 B.C.L.R. (2d) 290 (C.A.) and ***F. (N.) v. S. (H.L.)*** (1988), 60 B.C.L.R. (3d) 283 (S.C.)

Adhering to these principles, Mr Justice Lander, in ***Kobzos v. Dupuis*** 2006 BCSC 2047, and relying on ***Peel***, ruled that he could not compel the plaintiff to sign the authorisation and consent which Dr Baker sought for his DME. Dr Baker wished the consent and authorisation of the plaintiff to access her Pharmanet records, relevant previous medical records and to interview collateral sources of information. The law is as it should be at this point.

Things begin to go off track in ***Lewis v. Frye et al,*** 2007 BCSC 89 where, without reference to ***Peel***, the court ordered the plaintiff to execute authorisations for the production of medical documents.

Normal service was resumed in ***Stead v. Brown***, 2010 BCSC 312 where Mr Justice Hinkson, as he then was, dealt with an application compelling the plaintiff to

execute consent forms for the production of hospital and doctors' records. His Lordship, in very clear terms, determined that this could not be ordered.

> [21] In *Peel Financial Holdings Ltd. v. Western Delta Lands*, 2003 BCCA 180, the British Columbia Court of Appeal reviewed an order of this court requiring a party to endorse a consent order. Chief Justice Finch for a unanimous court wrote at paragraph 15:
>
> > The second ground of appeal is that the judge had no power to order a party to consent to an order. A consent given pursuant to an order to do so would be no consent at all: see *Rafferty v. Power* (1993), 15 C.P.C. (3d) 48 (B.C.S.C.).
>
> [22] And at paragraph 17:
>
> > The Supreme Court judge cited no authority for his power to compel a party to consent, and no authority for such a power was provided to us. As I have said, a consent given pursuant to an order is a contradiction in terms.
>
> [23] In *Lewis v. Frye*, 2007 BCSC 89, Hood J. wrote an extensive and considered decision with respect to whether or not a party could be compelled to sign authorizations for the release of third party records and concluded that a party could be so ordered.
>
> [24] Under the authority of *Spruce Hansard Mills Ltd.*, [1954] 4 D.L.R. 590, I am bound to defer to his decision unless:
>
> > a) subsequent decisions have affected the validity of the impugned judgment;
> > b) it is demonstrated that some binding authority in case law or some relevant statute was not considered; or
> > c) the judgment was unconsidered *nisi prius* judgment given in circumstances familiar to all trial judges where the exigencies of the trial require an immediate decision without the opportunity to fully consult authority.
>
> [25] Regrettably the decision of the Court of Appeal in *Peel Financial Holdings Ltd.* was not considered which [sic] Hood J. and I am persuaded that the binding nature of that authority if considered would have altered the conclusion reached by him had the authority been brought to his attention.
>
> [26] I conclude that the plaintiff in this case cannot be ordered to execute authorizations for the release of records in the [sic] of third parties…

Desjardins v. Huser, 2010 BCSC 977 is another decision in which an order was sought compelling a plaintiff to sign authorisations for the production of documents. Mr Justice Joyce made short work of the argument that ***Lewis*** should be followed, and ***Stead*** distinguished, because Mr Justice Hinkson was in error to follow ***Peel***. The argument made was that ***Peel*** involved forcing a signature on a consent order, while the issue before the court in ***Stead*** was the signature on an authorisation to produce documents. Mr Justice Joyce found this to be a distinction without a difference.

In ***Mund***, the DME doctor wanted the plaintiff to sign a governing law and jurisdiction agreement which would require any lawsuit by the plaintiff against the doctor to be brought in British Columbia. Mr Justice N. Brown dismissed this aspect of the application.

> *[38] In any case, on the question of requiring the plaintiff to sign the Jurisdiction agreement, I am bound by Desjardins (Litigation guardian of) v. Huser, 2010 BCSC 977; Kobzos v. Dupuis, 2006 BCSC 2047; Stead v. Brown, 2010 BCSC 312; Peel Financial Holdings Ltd. v. Western Delta Lands, 2003 BCCA 180; Rafferty v. Power (1993), 15 C.P.C. (3d) 48 (BCSC); and Allan-Trensholme v. Simmie, [2006] B.C.J. No. 720 (BCCA). I do not have jurisdiction to order the plaintiff to sign the Jurisdiction Agreement. On the narrow point of whether jurisdiction remains with the court under the Civil Rules to require a party to sign an authorization for documents in the possession of a third party but over which the party has sufficient control, e.g. the party's clinical records kept by their physician, that is governed by the cited cases until such time as the Court of Appeal specifically rules on that. For now, the general question appears settled; and as for the facts at bar, in my view, the consent in this case falls squarely within the ambit of the authorities cited.*

Yousofi v. Phillips, 2010 BCSC 1178 provided Mr Justice Hinkson with a further opportunity to reaffirm the correctness of his decision in ***Stead***. This again involved an application to compel the plaintiff to execute and deliver authorisations for production of records.

Given the foregoing, the decision in ***Nikolic v. Olson,*** 2011 BCSC 125 is difficult to reconcile. This, too, was an application to force the plaintiff to sign authorisations. Mr Justice Williams relied on the decision in ***Lewis*** and his view that a somewhat overbroad conclusion had been taken from ***Peel***, notwithstanding that trial judges are bound to accept as binding the law as pronounced by appellate courts above them in their judicial hierarchy, such as the legal principle that there is "no authority to compel a party to consent". His Lordship defends the judgement

in ***Lewis*** by endorsing that judge's decision to apply an exception found in ***Re: Hansard Spruce Mills Ltd*** and not follow earlier decisions to the contrary.

It is then most surprising that Mr Justice Williams ignores the dictates of ***Re: Hansard Spruce Mills Ltd*** when faced with ***Stead*** and ***Desjardins***. He distinguishes these two cases on the basis that they relied on ***Peel***, which he found to be distinguishable on its facts. But such a finding was not open to him because, in ***Stead***, Mr Justice Hinkson had already determined that ***Peel*** applied in the context of authorisations and found that a signature could not be compelled. Similarly, in ***Desjardins*** Mr Justice Joyce had already rejected the very same argument that was before the court in ***Nikolic***. So, too, in ***Mund***. Therefore, Mr Justice Williams was bound by ***Stead***, ***Desjardins*** and ***Mund*** on the basis of ***Re: Hansard Spruce Mills Ltd,*** the very case he relied on earlier for an opposite result.

It is against the backdrop of the wrongly decided decision in ***Nikolic*** that the judgement in ***Kalaora v. Gordon***, 2011 BCSC 1360 occurs. The defendant sought an order that the plaintiff attend for a DME with a psychiatrist, Dr Smith. Dr Smith was adamant that he would not conduct the DME without the plaintiff signing his particular form of consent. Unfortunately, the court granted the order without having a copy of the written consent form before it. It is respectfully submitted that ***Kalaora*** is also wrongly decided as it is based, to a large degree, on ***Nikolic***, fails to adhere to *stare decisis* and ignores the principles set out in ***Re: Hansard Spruce Mills Ltd.***

What appears to be forgotten in some of these cases is that the plaintiff is either attending the DME because of a court order, or has consented to attend, pursuant to Rule 7-6. Explicit in that Rule is that the doctor can carry out an examination and provide a report to the defendant. Since the Rule already mandates this there is technically no need for a plaintiff to sign a document which simply duplicates what is in the Rule. (Even so, some plaintiff's counsel will have their clients sign a very basic form agreeing to be examined and allowing a report to be generated pursuant to the Rule.)

7. *You have determined that Dr. _____ will be available to attend the trial set to commence _____, if required for cross-examination. or [We have agreed that the trial will be set for _____ and you have determined that Dr. _____ will be available to attend the trial at that time, if required for cross-examination.] or [Once a trial date is agreed to you will immediately advise Dr. _____ and ensure [he/she] is available to attend trial, if required for cross-examination].*

8. *_____ will be seen by Dr. _____ within 30 minutes of the time scheduled for this DME. If not seen by then, _____ will be free to leave and [his/her] attendance will be credited as having satisfied the requirement to attend.*

This was made a term of the DME in ***Foster*** as well as in ***Carta***, but not in ***Green***, likely because she had travelled to Vancouver from out of town.

9. *There will be no surveillance of _____ during the DME or for any part of [his/her] travels to or from it.*

Again, ordered as a term in ***Foster*** and ***Carta***, but not ordered in ***Kelly***.

10. *Any documents forwarded to _____ will be via a secure method of delivery. Dr. _____ will at all times store the documents containing _____'s medical information in accordance with the Personal Information Protection Act, e-Health legislation and BCMA guidelines.*

11. *Despite the fact that _____ might ultimately agree to attend this DME without the requirement of a court order, [his/her] attendance at it will count as a first DME as though ordered under Rule 7-6(1).*

This condition arises because of an argument put forward by some defendants that any DME which the plaintiff attends without the need for a court order does not count as a first DME. They cite ***Dillon v. Montgomery***, 2011 BCSC 1417 for the authority for this proposition. In ***Dillon***, Master Bouck relied on ***Teichroab v. Poyner***, 2008 BCSC 1130 as support for her decision. Unfortunately, it does not appear that counsel made Master Bouck aware that ***Teichroab*** involved a completely different question; Should a previous Part 7 DME be treated as a first tort DME under (what was then) Rule 30? A completely different issue.

When that factual distinction is understood, ***Dillon*** loses much of its persuasiveness. It makes no sense to disregard, from the analysis, DMEs voluntarily agreed to. Otherwise, there would be no incentive for plaintiffs to ever agree, requiring needless chambers' applications where their counsel go through the motions (fully expecting to lose) only so they can preserve their client's rights for future applications. This runs counter to everything Rule 1-3 champions.

12. *If we cannot reach an agreement on these conditions, _____ will not be attending the DME with Dr. _____. _____ will not be responsible for any late cancellation fee.*

In order for a cancellation fee to be payable, the plaintiff would have to be the cause of the cancellation and there would need to be evidence that the doctor

made reasonable efforts to fill the appointment or otherwise mitigate his loss, but was unable to: ***Minhas*** and ***Labrecque v. Tyler,*** 2011 BCSC 429.

III. Second Defence Medical Examinations

A. The Interplay of "Part 7" Examinations and a Later Request for a "Tort" Examination

Plaintiff's counsel will often receive a request for their client to attend a medical assessment under Part 7 of the *Insurance (Vehicle) Act Regulations*, and then often at a later date receive a request for a second medical legal assessment in relation to their client's tort claim. Most of the time these requests will come from the same adjuster and some of the time these requests can be for assessments by experts practicing in the same medical discipline.

A plaintiff is required to attend a medical examination for the purposes of his or her Part 7 benefits by virtue of section 99 of the *Insurance (Vehicle) Act Regulations.*

> *Medical Examination*
>
> *99 (1) An insured who makes a claim under this Part shall allow a medical practitioner, dentist, physiotherapist or chiropractor selected by the corporation, at the expense of the corporation, to examine the insured as often as it requires.*
>
> *(2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section.*

A plaintiff can also be compelled to attend a tort medical examination, and a subsequent or "second" medication examination, for his or her tort action under Rule 7-6:

> *Order for medical examination*
>
> *(1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make*
>
> *(a) an order respecting any expenses connected with the examination, and*

> *(b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record*
>
> *Subsequent examinations*
>
> *(2) The court may order a further examination under this rule.*

It is important to determine whether the true purpose of a proposed first examination under Part 7 is limited to Part 7 issues or is in fact intended to be used by ICBC as a dual Part 7 and tort report. The reason is that if it is a dual purpose report it is much tougher for a defendant to get a "second" medical examination under Rule 7-1(2). The onus is always on the applicant to show why it is necessary to have a second medical examination of a plaintiff, and a party faces an "uphill battle" if seeking to have a second examination performed by a medical practitioner practicing in the same speciality or discipline as a practitioner who has already examined a person.[1]

In ***Rowe v. Kim***, [2008] B.C.S.C. 1710, the court notes that successful applicants "are those who are able to demonstrate that something has happened since the first examination which could not have been foreseen or which could not, for some other reasons, have been addressed by the first examiner."

An independent medical examination that is requested under Part 7 can be held to be a report for both Part 7 *and* tort purposes.[2] In deciding whether or not a medical report for Part 7 or tort purposes, the court had previously taken what was described as an "atomistic" approach to deciding to allow a second examination and considered many individual factors:

1. the instructions given by the adjuster for the examination;[3]
2. whether or not the adjuster handling the tort claim was independent from the ICBC rehabilitation coordinator handling the Part 7 claim;[4]
3. the scope of the examination,[5]
4. the contents of the report;
5. the position of the plaintiff with regard to the examination,[6]
6. whether the tort action was in contemplation or commenced at the time the Part 7 report was ordered and whether the plaintiff was represented by counsel at the time;[7] and

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[1] ***Hothi v. Grewal,*** [1993] 45 B.C.L.R. (3d) 394 (S.C.)
[2] ***Imeri v. Janczukowski*** [2010] B.C.J. No. 1932
[3] ***Robertson v. Grist*** [2006] B.C.J. No. 1873 and ***Antoniali v. Massey***, [2007] B.C.J. No. 2139
[4] ***Vorasarn v. Manning***, 30 B.C.L.R. (3d) 63
[5] ***Robertson***, supra.
[6] ***Soczynski v. Cai,*** [2011] B.C.S.C. No. 1817
[7] ***Robertson***, supra

7. whether there were any outstanding Part 7 benefits claimed by the plaintiff.[8]

More recently, and in particular since the decisions of Barrow J. in ***Teichroab v. Poyner,*** 2008 BCSC 1130 (CanLII), 2008 BCSC 1130, 62 C.P.C. (6th) 101, and Master McDiarmid in ***Soczynski v. Cai***, 2011 BCSC 1299 (CanLII), 2011 BCSC 1299, the court may be said to have adopted a more "holistic" view of the circumstances leading up to the application.

As noted by the court in ***Teichroab v. Poyner,*** [2008] B.C.S.C. 1130, the more closely an examination under Part 7 resembles a tort examination, the more relevant it will be to the exercise of the discretion under Rule 7-1(2) and the *less likely* it will be that a second examination will be ordered:

> *Generally, the more closely an examination performed under a contractual obligation or for purposes of a claim for Part VII (now Part 7) benefits resembles an independent medical examination under Rule 30(1) (now Rule 7-6(1)), the more relevant it will be to the exercise of the discretion conferred by the Rule, and the less likely it may be that an order under that Rule (referring to 7-1(2)) will be made. That is so because the purpose of Rule 30 is, in part, to put the parties on an equal footing in terms of their ability to explore the issues in the case ... To the extent an assessment prepared under a contract of insurance or in relation to a claim for Part VII benefits puts a defendant on an equal footing, the need for an assessment under Rule 30(1) will be mitigated.*

In the recent case of ***Rathgeber v. Freeman***, 2013 BCSC 2117 (CanLII) the Court applied this holistic approach in considering whether the Plaintiff should be examined again pursuant to the tort claim after having been seen some time previously by the same defence doctor pursuant to Part 7.

The Court did allow the second examination and stated:

> *[26] Taking a holistic view of the circumstances, Dr. Kousaie's 2009 report is comprehensive and to some extent addresses issues more relevant to a tort claim than a Part 7 claim. The results of the CT scan and the shift in focus to the plaintiff's neck injury, however, are issues which the defence may need to address. There is, however, nothing in the evidence before me to show why a further examination, rather than a review of the available materials by Dr. Kousaie or some other qualified specialist, is necessary to achieve reasonable equality with respect to medical evidence. While I do not wish to be taken as suggesting that the proposed examiner should, in all cases, provide an affidavit with respect*

[8] ***Antoniali***, supra

to the necessity for a further examination, such an affidavit would have been of significant assistance to me in this case.

B. Request for a Subsequent Tort Medical Examination

Pursuant to Rule 7-6 (2), the Court may order subsequent medical examinations after a Plaintiff has already been examined in the tort claim.

In deciding whether to grant a second examination, the B.C. Court of Appeal in ***Wildemann v. Webster*** (1990), 50 B.C.L.R. (2d) 244 (C.A.) confirmed that the overriding principle the court should consider is that evidentiary equality between the parties should be ensured. However, the court will also consider the following principles when a subsequent defence medical examination is sought:

1. Once a party has obtained a medical examination, any subsequent medical examination is at the discretion of the court. That discretion is to be exercised judicially considering the evidence adduced and the particular instances of the case.[9]

2. The overriding question is whether a second medical examination is necessary to ensure reasonable equality between the parties; however, reasonable equality does not mean that the defendant must be able to match expert for expert or report for report.[10]

3. The fact that the magnitude of the loss is greater than previously known is not, in and of itself, sufficient to permit a second examination;[11]

4. Passage of time, alone, will not justify a second examination;[12]

5. The applicant must show a cogent medical reason why it is necessary to have a second examination. A difference of opinion between medical professionals is not a cogent medical reason;[13]

6. A second examination to permit the defendant a further opinion on the same subject matter will not be allowed;[14]

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[9] ***Trahan v. West Coast Amusements Ltd.*** 2000 B.C.S.C. 691 and *Herni v. Derbyshire*, [1999] B.C.J. No. 1750
[10] ***McKay v. Passmore***, [2005] B.C.S.C. 570
[11] ***Heitala v. Reib,*** [1993] B.C.J. No. 2555
[12] ***De Sousa v. Braddaric et al,*** [2011] BCSC 1134
[13] ***Heitala v. Reib***, [1993] B.C.J. No. 2555
[14] ***Bedard (Guardian ad litem of) v. Coquitlam School District No. 43***, [1997] B.C.J. No. 2115

7. A second examination may be appropriate where there is some question that could not have been dealt with on the first examination. Those applications which do succeed are often granted because something has occurred since the first examination which was not foreseeable or which could not have been addressed by the examiner on the first occasion;[15]

8. In considering how to exercise the discretion to grand a second medical examination, the court should take into account the timeliness of the application in light of Rule 40A (now Rule 11-6) and the practicalities of trial preparation;[16]

9. The invasive nature of an assessment and the effect on a plaintiff are factors to be considered by the court.[17]

For most recent applications of these principles see also ***De Sousa v. Bradaric,*** 2011 BCSC 1134 (Master in Chambers) upheld on appeal in ***De Sousa v. Bradaric***, 2011 BCSC 1400, and ***Knowles v. Watters***, 2012 BCSC 1578 (Master in Chambers).

Based on the above noted factors, while a defendant may be able to show that a second medical examination is warranted, only extenuating circumstances should permit a second examination to be conducted by a different doctor with the same discipline as the doctor who performed the first examination.

Plaintiff's counsel should be always be wary of the decision of ***Dillon v. Montgomery et al.,*** [2011] B.C.S.C. 1417, in which the courts supports the idea that a "further examination" contemplated by Rule 7-6(2) means an examination ***in addition to one previously ordered under Rule 7-6(1).***

In ***Dillon*** the Court held that as the Plaintiff had attended the first tort examination "voluntarily" (i.e.: without a Court Order) the second proposed examination was *not* a subsequent DME.

> …The plaintiff attended the examination by Dr. McGraw voluntarily: ***Tehicroab v. Poyner,*** 2008 BCSC 1130 at para. 24. In those circumstances, the defendants need only meet the lower threshold required for an order under Rule 7-6(1). Nonetheless, the fact that the plaintiff has undergone medical examination at the defendants' request is still a relevant consideration for the court in exercising its discretion under Rule 7-6(1).

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[15] ***Antoniali***, supra.
[16] *McKay*, supra.
[17] Bedard, supra.

It should be noted that ***Teichroab*** was considering whether a Part 7 exam could be considered a "first examination" not whether a voluntary attendance by a Plaintiff at an examination in the tort action was or was not a "first examination". The writer submits that it seems illogical that Plaintiffs should all require a Court Order for every proposed defence medical examination so as to make sure any subsequent examination is not seen as the "first examination".

When faced with a request for an independent medical examination under Part 7, counsel should always inform ICBC in writing that they are of the opinion that the medical examination is for the purposes of the tort action the plaintiff is attending because they are required to do so under the Rules, and the plaintiff will only attend on the basis that he or she will receive a copy of the expert's report.

Sometimes counsel will have a client who has already attended a Part 7 medical examination before retaining counsel. If so, counsel should immediately request a copy of the medical report in order to determine the true purpose of the examination, and whether or not future examinations should be agreed to under the tort action.

If a legitimate request for an independent medical legal exam under the tort action is requested, counsel may want to protect their client from future medical examinations by only agreeing to the request on the following basis:

> Our client is attending the requested medical examination on the basis that he or she is required to do under Rule 7-6(1) of the Supreme Court Civil Rules, and his or her attendance at this medical examination is not on a voluntary basis (see *Dillon v. Montgomery* et al., [2011] B.C.S.C. 1417). If you are not agreeable to the foregoing, we will require a court order under Rule 7-6(1) in order for our client to attend the medical examination.

IV. Late Defence Medical Examinations for "Responsive Reports"

More and more frequently, plaintiff's counsel are being burdened with last minute requests for their clients to attend medical examinations past the 84 day deadline for the purposes of a "rebuttal" or "responding" report pursuant to Rule 11-6(4). The requests are usually a defendant's attempt to obtain fresh opinion evidence and have it admitted into evidence under the disguise of a responding report. Typically, these requests will come when defendants are past the 84 day deadline and realize they have insufficient evidence for trial.

Under the former Rule regarding the form and notice of expert opinion evidence [Rule 40A] there was no requirement to give advance notice of expert opinion evidence that was true rebuttal evidence, that is, evidence responding to the other side's expert opinion evidence and not having an affirmative nature of its own.[18] Determining whether expert evidence fell into the truly "responsive" category was often the subject of dispute. [19] Pure rebuttal opinion could be, in effect, given "by ambush" at trial, subject to rulings as to scope or admissibility by a trial judge.

The clear intention of the *Supreme Court Civil Rules* 11-6(3) and (4) was to prevent this pattern of practice, and to compel early and timely disclosure of all medical opinion, including rebuttal or responsive opinions.

> *Rules 11-6(3) and (4) stipulate:*
> *Service of report*
>
> *(3 Unless the court otherwise orders, at least 84 days before the scheduled trial date, an expert's report, other than the report of an expert appointed by the court under Rule 11-5,* ***must*** *be served on every party of record, along with written notice that the report is being served under this rule,*
>
> *(a) by the party who intends, with leave of the court under Rule 11-3 (9) or otherwise, to tender the expert's report at trial, or*
> *(b) if 2 or more parties jointly appointed the expert, by each party who intends to tender the expert's report at trial.*
>
> [emphasis added]
>
> ***Service of responding report***
>
> *(4) Unless the court otherwise orders, if a party intends to tender an expert's report at trial to respond to an expert witness whose report is*

[18] ***Kelley v. Kelley*** [1995] B.C.J. No. 3055; ***Stainer v. Plaza***, 2001 B.C.C.A 133
[19] ***Palmer v. Kim***, 2007 BCSC 1868; ***Kroll v. Eli Lilly Canada Inc.***, [1995] B.C.J. No. 412.

> *served under subrule (3), the party must serve on every party of record, at least 42 days before the scheduled trial date,*
>
> *(a) the responding report, and*
>
> *(b) notice that the responding report is being served under this rule*

Once the new Rules came into place issues arose very quickly about what the proper scope of a "Responding Report" under Rule 11-4 would be. ICBC defendants took the position that they could (1) await the arrival of the Plaintiff's expert reports at the 84 day limit and (2) assess those reports and then (3) decide whether to have the Plaintiff seen by their own experts to prepare expert reports "responding" to the Plaintiff's experts. It is key to note that the defendants were not just seeking late defence medical examinations to do "pure rebuttal reports". In their view of the new Rule, the time limit for defence medical examinations and defence "fresh" opinion reports was the 42 day limit. Their position was essentially two different time lines for the Plaintiff and Defendant expert evidence.

It didn't take long for this issue to work its way into the Courts. In ***Wright v Brauer*** 2010 BCSC 1282 an application for a responsive defence medical examination past the 84 day limit was made. The application was supported by the affidavit of a legal assistant stating that the defendants sought a late defence medical examination so that their expert could properly respond to the expert evidence of the Plaintiff.

Mr. Justice Savage made one of the first interlocutory rulings about this interesting issue:

> **12** Rule 11-6(4) was enacted to fill a lacuna in the Rules. Under the former Rules, Rule 40A permitted parties to call expert evidence in reply without notice at trial. In order for such evidence to be admitted, however, it had to be truly responsive to the expert evidence of a witness called by the opposing party.
>
> **13** In *Stainer*, *supra*, the British Columbia Court of Appeal considered Rule 40A(3) and the scope of the Court's discretion to admit responsive evidence. At paragraphs 16-18, Finch J.A. said:
>
> > [16] ... The admission of expert evidence is now governed by Rule 40A(3)
> >
> > > An expert may give oral opinion evidence of a written statement if the opinion has

> been delivered to every party of record at least sixty days before the expert testifies.
>
> [17] That rule applies equally to all parties. In the normal course, a defendant will wish to protect his right to adduce expert evidence at trial by giving the notice required by that rule. But the court retains a discretion to admit responsive evidence of which notice has not been given: *Pedersen v. Degelder* (1985), 62 B.C.L.R. 253 (B.C.S.C.); *Kroll v. Eli Lilly Canada Inc.* (1995), 5 B.C.L.R. (3d) 7 (S.C.); and *Kelly v. Kelly* (1995), 20 B.C.L.R. (3d) 232 (S.C.). In the latter case Mr. Justice Williamson said:
>
> > I would restrict, of course, as courts I think must, the practice of having opinion evidence without notice strictly to truly responsive rebuttal evidence, and I think that if that rule is carefully observed, there should be no difficulties.
>
> [18] That is, in my respectful view, a correct statement of the proper practice

In ruling against the defence application for a late defence medical assessment for the claimed purpose of "rebuttal opinion", Mr. Justice Savage ruled:

> **16** Rule 40A gave the Court discretion to admit responsive evidence of which notice had not been given. Rule 11-6(4) now provides that notice must be given of responsive expert evidence (although I note that the Court retains discretion to admit expert evidence of which sufficient notice has not been given).
>
> **17** I would expect that, in the ordinary course, an examination would be ordered under Rule 7-6(1) where a person's medical condition was in issue in an action, provided it was requested in a timely way.
>
> **18** However, at this point in time in the action, the defendants are limited to what Mr. Justice Williamson referred to in *Kelly, supra,* as "truly responsive rebuttal evidence". The application must be considered in that light; the question on this application is not one of notice, but whether the Examination should be ordered to enable the defendant to file

> responsive evidence. The authorizing Rule, 7-6(1) uses the term "may".
>
> **19** In *Kroll v. Eli Lilly Canada Inc.* (1995), 5 B.C.L.R. (3d) 7, Sanders J., as she then was, noted that "true response evidence, does not permit fresh opinion evidence to masquerade as answer to the other side's reports".
>
> **20** In *C.N. Railway v. H.M.T.Q. in Right of Canada*, 2002 BCSC 1669, Henderson J. considered the admissibility of "reply reports" holding that only the portions of the reports that provided a critical analysis of the methodology of the opposing expert were admissible as responsive evidence. The portions of the reports describing the authors' own opinions on the matters in issue were not admitted.
>
> **21** In this case, the defendants do not explain why an examination is required in these circumstances, other than a statement by a legal assistant that counsel says such is "necessary to properly defend this action and to respond to the reports of Dr. Weckworth and Dr. O'Connor". Master McCallum in *White v. Gait*, 2003 BCSC 2023 declined to order an examination where it had not been shown why such was required to produce a responsive report.
>
> **22** In my opinion, the bare assertion reported to a legal assistant in this case is insufficient to support an order under Rule 7-6(1) that the plaintiff attend the Examination, when the defendants are limited to providing response reports under Rule 11-6(4). In the circumstances, the application is dismissed. The plaintiff is entitled to costs of the application

The defendant applied a different approach in ***Luedecke v. Hillman***, [2010] B.C.J. No. 2096. In that case the application for a late defence medical examination for a responsive report was supported by an affidavit from the defence expert saying essentially (1) that he needed to see the Plaintiff to do a responsive report and (2) he acknowledged that the report must be confined to true responsive evidence. The application by heard Master Scarth in Chambers and was granted. Mr. Justice Cullen handled the appeal from the interlocutory order of Master Scarth.

Mr. Justice Savage's ruling in ***Wright v. Brauer*** was considered by Mr. Justice Cullen, but he did eventually allow the physical assessment of the Plaintiff for the purpose of a medical opinion. He stated:

> 54 I agree with the conclusion of Mr. Justice Savage in ***Wright v. Brauer***, supra, to the effect that there is an evidentiary threshold to be met before an order under Rule 7-6(1) should be made in contemplation of an expert's report under Rule 11-6(4). That threshold is different from that for ordering an expert's report under Rule 11-6(3). To reach the requisite threshold under Rule 11-6(4) the applicant must establish a basis of necessity for the examination to **properly respond** to the expert witness whose report is served under subrule (3) by the other party. It is not simply a matter of demonstrating a need to respond to the subject matter of the plaintiff's case.

Mr. Justice Cullen offered, however, a strongly worded caution with regard to the emerging pattern of practice amongst insured defendants to circumvent the object and purpose of early expert opinion disclosure:

> **56** I am alive to the concern expressed by the plaintiff's counsel that Rule 11-6(4) may be seen as a means for defendants to circumvent the more onerous notice provisions of 11-6(3) and routinely seek to obtain reports that more properly should be sought under that latter rule. I conclude, however, that such a concern can be met as it was with the practice of having opinion evidence without notice under the old Rule 40A. In that regard, the words of Williamson J. in *Kelley v. Kelley* (1995), 20 B.C.L.R. (3d) 232 (S.C.) are apt:
>
> > I would restrict, of course, as courts I think must, the practice of having opinion evidence without notice strictly to **truly responsive rebuttal evidence**, and I think if that rule is carefully observed, there should be no difficulties.

In spite of Mr. Justice Cullen's comments the practice developed of seeking a responsive defence medical examination based on an affidavit of "necessity" from the defence expert.

Some clarity was brought to the situation when ***Luedecke v. Hillman*** and ***Wright v. Brauer*** were both contemplated by Master Bouck in ***Labrecque v. Tyler***, [2011] B.C.J. No. 634. In ***Labrecque***, there was again an affidavit from the defence expert attesting to the need to see the Plaintiff to properly respond to the Plaintiff's expert(s). However, in spite of that, Master Bouck denied the application.

In declining an assessment of the Plaintiff under the guise of "rebuttal opinion" alleged by the insured defendant, Master Bouck explained as follows:

> **40** Furthermore, *Luedecke* represents a situation whereby the plaintiff's case significantly changed upon the delivery of expert reports. Until that time, the defence did not appreciate the case that was expected to be met. That is different from the circumstances here where, again, Dr. MacKean's opinion has been known to the defence for several months.
>
> **41** Lastly, on the question of prejudice, the defendant's application comes at a time when the plaintiff could or should be preparing for trial. An examination by Dr. Piper would disrupt that preparation and should not be ordered: *White v. Gait*, 2003 BCSC 2023; *Benner v. Vancouver (City)*, 2007 BCSC 1998.
>
> **42** As observed by the court in *Benner v. Vancouver (City)*, a party "who takes no timely steps to exercise its rights under [Rule 7-6] does so at its peril": para. 39.

Master Bouck explained that the decisions in ***Wright*** and ***Luedecke*** were consistent and entirely reconcilable---and the difference was not in the presence or absence of the affidavit from the defence doctor. He stated that "the difference between outcomes in these two cases lies in the facts".

Master Bouck effectively turned the inquiry about the merits of a proposed late defence medical examination for rebuttal opinion back into the proper questions: (1) Why had the defence not obtained expert opinion(s) in a timely fashion earlier in the process? (2) Why does the defence doctor need to see the Plaintiff to do a truly "responsive report"?[20]

These were the same questions which had been the focus of late defence medical examination authorities prior to the introduction of the new Supreme Court Civil Rules in 2010. [21]

After Master Bouck's decision a definite trend has been developing in which attempts at late defence medical examinations, even supported by an affidavit of "necessity" from a defence doctor have been denied. The denial has not focused

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[20] Master Caldwell reached a similar conclusion in a decision from October 2011 in ***Godfrey v Black*** Unreported 2011, October 7, Chilliwack Registry, M21668

[21] See ***Mackichan v. June and Takeshi*** 2004 BCSC 144; ***Giles v. Emde*** 2002 BCSC 1754; ***Cruikshank v. Rathy*** 2003 BCSC 1215; ***White v. Gait*** 2003 B.C.S.C. 2023**;** ***Agesen v ICBC*****,** 2010 BCSC 428

on the evidentiary burden as much as it has focused on an inquiry into the factual matrix. The key inquiry has boiled down to… why so late in the day?

Scott v Ridgway 2011 BCSC 1604 was one of the next cases to consider a responsive report late defence medical examination. There was an affidavit in support of the need to conduct a functional assessment. The defendant also argued prejudice as their responding report would be less persuasive if no testing was done. Master Taylor allowed the application. It was appealed and in ***Scott v Ridgway***, 2011 BCSC 1552 Madam Justice Kloegman denied the late defence medical examination.

She decided:

> *[6] I am not persuaded that the plaintiff is required to attend before Dr. Banks in order for the defendant to file a responsive report. I am aware of the prejudice claimed by the defendant that their expert's opinion may be given less weight because of a lack of examination of the plaintiff. However, if they are prejudiced, it is of their making and not the result of any conduct by the plaintiff.*

In relation to those background facts Her Ladyship noted:

> *[2] It is important to note that the plaintiff served its report by Dr. Robertson, vocational consultant, in February of this year. It was not until June, some four months later, that the defendant requested the plaintiff attend before another vocational consultant, Dr. Banks, for seven hours of functional testing.*

Her Ladyship also made a comment about the apparent "cribbing" in the supporting affidavit of the defence expert:

> *[3]…I can place no reliance on Dr. Cook's affidavit because the salient wording has been lifted from another affidavit sworn by another expert in another case with other expertise than that of Dr. Cook.*

In ***Gregorich v. Gregorich***, Unreported 2011, December 16, Victoria Registry, 09-4160, the prevailing jurisprudence was again contemplated by Mr. Justice MaCaulay where he denied the relief sought by the defendant applicant:

> *[6] In Labrecque, Master Bouck reviewed the earlier decisions of Luedecke and Wright at some length and concluded that the differing outcomes in those two cases arose from distinctions that are factual rather than of principle nature. …. I accept and adopt the analysis of Master Bouck in Labrecque.*

..
[8] In that regard I accept that there was no significant change to the medical presentation of the plaintiff's case at or near the end of the time period fixed by Rule 11-6(3). Indeed, the defendant has known since at least early May 2011 that the plaintiff's expert had diagnosed an L1 compression fracture as a result of the MVA that resulted in chronic back pain…
***
[10] For reasons that are unexplained, the doctor's office did not responded to the letter until November 17, 2011. At that time the doctor's administrative assistant wrote:

Dr. Wahl has reviewed your letter of September 1, 2011, in which you inquire if he feels it would be worthwhile for him to provide you with an expert opinion. Dr. Wahl feels he would need to examine and investigate him as a formal IME. He also suggests that a pre-IME CT scan thorough columbar spine would be helpful.

I do not accept that response as an admissible or adequate basis to demonstrate a need for a medical examination in order to respond to the plaintiff's first expert's report. I reiterate that the defendant could have applied much earlier for a general IME but apparently chose not to.

[11] In Wright, Master Bouck commented on the peril for a party that does not take timely steps to exercise rights under Rule 7-6 (see paragraph 42). That comment is opposite here. Further, the response from the orthopaedic surgeon's office suggests the scan and medical examination is, as the Master found in the case before her, "to respond generally to the subject matter of the plaintiff's case and, as such, is no justification for the order sought"(see paragraph 37).

…

[13] I dismiss the defendant's application. The defendant had ample time to pursue an IME and cannot now shoehorn it in under the guise of seeking limited response expert evidence. I stress that nothing in these reasons prohibits the orthopaedic specialist responding to the plaintiff's expert reports, without any examination of the plaintiff, if the defendant chooses to so proceed.

This pattern of examining the background facts continued in ***Sparacino*** v ***Transportaction*** Lease Systems Inc, Unreported 2012, April 16, Vancouver Registry, M103587. In ***Sparacino*** Mr. Justice Davies stated:

> *[3] It seems to me that if Dr. Smith were to include observations of the witness in his report, those observations are going to be new observations and will be new opinion evidence. That is not allowed under the rules for rebuttal evidence relied upon by the defence in seeking the IME.*
>
> *[4] I also observe that, although there are no psychiatric reports delivered by the plaintiff before the deadline for delivery of expert reports, there were clearly indicia of psychiatric issues being at play, so a psychiatric opinion could have been sought by the defence much earlier than now.*
>
> *[5] The defence will not be prejudiced by there being no interview. It has the ability to continue to defend on the basis of a rebuttal report that is purely rebuttal by reference to the existing material.*

In ***Turnbull v. Yarmohammadi***, [2012] B.C.J. No. 380 Master Baker ruled against requiring a similar assessment. Much of his ruling was predicated on early knowledge of the Plaintiff's case and that the opinions offered should not have been a "surprise" to the defence:

> *[11] I think this case is very close to, if not on all fours with, Master Bouck's decision and analysis in* Labrecque v. Tyler, *2011 BCSC 429, and in particular, Judge Macaulay's succinct decision in* Gregorich v. Gregorich, *Victoria file 094160 dated, it looks like, the 16th of December, 2011.*
> *[12] I am of the view that nothing substantial contained in the reports in early January, and particularly the report of Dr. Salvian, should have surprised the defence.*
> *[13] Dr. Salvian was consulted and gave a report which became part of the clinical records of the family doctor, Dr. Murphy. The clinical records, including that report, were made known to the defence long ago. In fact, Dr. Salvian's, I will call it report number one, which was dated 2010, was listed in the plaintiff's list of documents in April of 2011.*
> *[14] In that report it is clear that Dr. Salvian, if he did not very specifically diagnose carpal tunnel syndrome or thoracic outlet syndrome -- and I do not decide at this point whether he did or he did not -- made it absolutely clear, at least to me, that that was a significant factor in his mind.*
> **..**
> *[16] I also agree with Mr. Parsons that his latter report does not add significantly to that, not in such a fresh way that would justify surprise on the part of the defence.*
> *[17] That being the case, I take Mr. Parsons at his word, and I agree it would have been perfectly appropriate had at some point before the 84-day deadline the defence requested an IME to deal with Dr. Salvian's perspectives; that would have been appropriate.*

> *[18]* ***To wait after that point is to -- as I think one authority, perhaps Mr. Justice Macaulay used the phrase -- "shoehorn" the opinion into a compacted, truncated chronology, i.e., the 42-day limit for a responsive report, when, in fact, it should have been anticipated well in advance of that and it should have been subject to the same 84-day rule.***
> *19 Again, nothing in this precludes the defence from delivering a responsive medical report. It is just as in the* **Gregorich** *case, I do not see that it is necessary to do that to direct the independent medical examination.*

A similar result followed in ***Stavert v. Andrews***, Unreported 2011, June 14, New Westminster, S114680, where Master Caldwell dismissed a defence request for an "11th hour assessment" of the claimant again on the basis of timing and with the backdrop of express knowledge of the Plaintiff's claim:

> *[9] There is nothing here, in my mind, that raises new issues. Had this application been brought a year ago, I do not think we would even be here in court. It would not likely be opposed. But the rules have changed in terms of disclosure. There are longer dates and proportionality dictates that you need to look at these early. This is simply too late in the day in all of the circumstances. It would not have been, again, if this was a new complaint, but exactly the complaints are arising now are those which arose two years ago or more, and it is simply not on at the point to direct this appointment. The application is dismissed.*

In ***Becker v. Zetzos*** (May 2, 2013), Vancouver Registry M121679 (S.C.), Master McCallum dealt with an application on whether the plaintiff should be required to attend for an independent medical examination, supplemental to or in support of the preparation of a responsive report. The application in ***Becker*** was made after the time limited for filing new or fresh expert reports, but before the deadline for responsive reports. There was affidavit evidence from the doctor who was proposed to carry out the independent medical examination. Interestingly, it closely tracked the evidence that was before Cullen J. in *Luedecke*. The doctor in *Becker* deposed as follows:

> In order for me to assist the court and properly prepare a rebuttal to the expert report of [the other doctor] I must physically examine the Plaintiff and ask him the usual questions that a doctor would ask in order to elicit any information upon which to ground my expert rebuttal report. I could not give a proper rebuttal opinion report of the Plaintiff which assists the court and opines on the movement, functioning, diagnosis, prognosis, distribution of symptoms,

> recommendations, suitability for work, and etiology of the Plaintiff without physically examining the Plaintiff and where appropriate palpating the Plaintiff.

Master McCallum referred to ***Luedecke v. Hillman*** but concluded that the evidentiary threshold had not been met in the matter before him. At paragraphs 17 and 18, he said:

> *[17] In this case I say the evidentiary threshold has not been crossed. [The doctor's] letter is simply saying that he cannot give a proper rebuttal opinion report to assist the court without examining the plaintiff. In support of that position he goes through what seems to me to be simply a description of the work he would do if he were preparing a report in the first instance.*
>
> *[18] He has [the other doctor's] report. He does not say, as he could have, what there is about that report that would lead him to think that he himself needs to examine the plaintiff. The defendant has not met the evidentiary threshold to support the request for a physical examination of the plaintiff prior to preparation of a rebuttal report*

A more recent case to consider the law in this area is ***Jackson v. Yusishen***, 2013 BCSC 1522. In ***Jackson*** Mr. Justices Barrow considered a defence application for a rebuttal functional capacity report. In the course of his decision he provides a thorough analysis of the development of the law in relation to applications for late responsive defence medical examinations since the introduction of Rule 11-6 (2). He discusses and summarizes the facts and the decisions in ***Wright***, ***Luedecke,*** ***Labreque*** and ***Becker.***

Barrow J. goes on to confirm that factors beyond the "evidentiary threshold" of the affidavit in support of the late defence medical examination are important.

> *[27] Other factors, aside from the evidentiary threshold, influence the discretion the court has to order an independent medical examination for purposes of the preparation of a responsive expert report. In fact, it appears that those other factors were influential in the different outcomes in Luedecke and Becker. In Luedecke, the responsive expert report was sought to address a report obtained by the plaintiff and served at or near the deadline for the service of expert opinion evidence. The plaintiff's report addressed the plaintiff's ability to continue his employment as a pilot. Although passing reference had been made to that issue at the plaintiff's discovery, it appears that it was not an issue that the defendant ought to have reasonably anticipated, and thus while the report sought was a responsive report, it would play a significant role in "levelling the*

playing field", which is, as was pointed out by Finch J.A. in Stainer, the primary purpose of Rule 7-6.

[28] On the other hand, in Becker, Master McCallum thought it unlikely, perhaps very unlikely, that the defendant in that case did not anticipate a report of the sort the plaintiff served, and to which the defendant wished to respond, supported by an independent medical examination.

[29] Turning to the facts in this case, I am not satisfied that the evidentiary threshold has been met. There is no evidence from the occupational therapist who is to conduct the evaluation. The only evidence is in an affidavit from counsel for the defendant's legal assistant, who has deposed that:

18. The Defendant has reviewed the Functional Capacity Evaluation report of Carole Kennedy dated June 27, 2013 and served by Plaintiff [sic] counsel on July 9, 2013 and requires a Functional Capacity Evaluation in order to properly respond and rebut the opinion of Carole Kennedy.

[30] In a subsequent affidavit, the defendant's counsel's letter of instruction to the occupational therapist has been exhibited. The two paragraphs of that letter pertinent to the issue are as follows:

The court seeks your expert assistance in the field of occupational therapy providing functional capacity evaluations and cost of care assessments to determine any functional limitations which the Plaintiff may have and to provide your opinion on his cost of future care needs. I am not asking for an opinion on causation of the Plaintiff's injuries but merely what functional limitations the Plaintiff has at the current time and what services or equipment are required to ameliorate those concerns.

I further request that you review the report of Carol Kennedy and provide the Court with your opinion on whether you agree with each of the recommendations made in her report of June 27, 2013 and, if not, the reasons for any disagreement with her recommendations.

[31] In some respects, the foregoing two paragraphs cast this issue into relief. The second paragraph seeks what might be properly regarded as a responsive opinion. There is nothing in the evidence in this case as to why it would be necessary for an occupational therapist to conduct a comprehensive functional capacity evaluation in order to respond to the functional capacity evaluation and cost of care reports of the plaintiff's expert. On the other hand, it is obvious why an independent physical

> *examination of the plaintiff would be necessary to carry out the request set out in the first paragraph of the letter of instruction. The difficulty is that the report which would be generated as a result would not be a responsive report per se. It would, rather, be a fresh or new opinion and subject to the constraints that such opinions are subject to.*

The law appears to be crystallizing somewhat in the area of late defence medical examinations for rebuttal reports. The court is alive to the fact that defendants have attempted to use Rule 11-6(4) in an attempt to "shoehorn" in a report dealing with issues that should have been contemplated well before the 84 day deadline. A defendant is not allowed to "sit on his hands" and not act in a timely way and expect the court to be sympathetic regarding this issue.

When resisting such an application it appears that the focus of the Plaintiff's submissions should be directed to establishing that the fundamental nature of the Plaintiff's injuries and the types of medical evidence likely to be called should have come as no surprise to the Defendant. In the event that an order for a responsive defence medical examination is made, the Plaintiff should seek a term that the report produced be limited to purely responsive evidence.

At the end of the day the admissibility of any report produced will be in the purview of the trial judge. An example of this occurred in ***Crane v. Lee***, [2011] B.C.J. No. 1285. In ***Crane*** the defence attempted to introduce a "rebuttal opinion". Mr. Justice Smith ruled as follows regarding the practice of serving fresh opinion in the guise of "rebuttal opinion" purporting to be served under Rule 11-6(4):

> *[22] Rule 11-6 (4) is intended to apply only to evidence that is truly responsive or in rebuttal to specific opinion evidence tendered by the opposite party.* ***It is not intended to provide defendants with a general exemption from the basic time limit for serving expert reports that is set out in Rule 11-6 (3). Defendants who delay obtaining or serving expert evidence until after the plaintiff's opinions have been received, then attempt to introduce all of their expert evidence as response, do so at their peril.***
>
> *[23]* ***In this case, I found that the report was not limited to true responsive evidence. It stated the author's opinion on the nature and cause of the plaintiff's injury—the central issue that both sides had to address from the outset—and was based upon a review of all the medical records, including some not referred to by Dr. Field in his report. As such, I considered it to be a free-standing medical opinion that ought to have been served pursuant to Rule 11-6***

(3). I ruled the report inadmissible, with the result that there was no expert evidence before me to contradict Dr. Field's opinion.

C. Failure to Examine the Plaintiff

There are a number of other issues which may arise in relation to defence expert evidence. One issue which occurs on occasion is a service on the Plaintiff of a Medical Legal Report from a defence doctor who has not seen the Plaintiff at all and has conducted a "records review". Unlike a true responsive report, these reports often are put forward as a stand-alone opinion premised on information gleaned from the medical records.

The failure of a medical expert to personally assess a Plaintiff has been both a reason to reject the report[22] or alternatively, a reason for the Court to attribute the report little weight.[23]

V. The DME Report

For a variety of general admissibility issues relating to expert evidence, see *From Qualifications to Rebuttal: The Testimony of Experts in Court*, a paper presented at last year's conference.

This current paper will not repeat what was written there, but will address some of the technical requirements relating to expert's reports.

A. Objections to admissibility

Under the former Rule 40A(13) and (14), failure to give "reasonable notice" of any objections to the other side's experts' reports could be fatal: *Awan v. Canada (Attorney General),* 2010 BCSC 942.

Under the new Rules objections to the admissibility of the DME report itself, or to portions of the opinions contained within it, must be made on the earlier of the date of the trial management conference or the date that is 21 days before trial: Rule 11-6(10). Sub-rule (11) mandates that an objection must not be permitted at trial if the required notice was not given, subject to the court exercising its discretion otherwise.

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[22] ***Ruscheinski v. Biln***, 2011 BCSC 1263; ***Dhaliwal v. Bassi***, 2007 BCSC 549

[22] ***Johal v Meyede***, 2013 BCSC 2381; ***Rizzotti v Doe*** 2012 BCSC 1330

In ***Farand v. Seidel,*** 2013 BCSC 323 the defendant failed to object in a timely way to a cost of future care report. The defendant had no particular reason for failing to object in time, other than inadvertence. The court declined to allow the objection.

> *I do not think simple inadvertence is a good reason for the court to relieve from the operation of Rule 11-6(10). The timelines for the exchange of expert reports and the taking of objections to them are part of a general scheme in the Supreme Court Civil Rules to provide for the timely disclosure of the parties' positions on matters. That can have a number of benefits, including promoting the resolution of disputes and promoting the efficient use of court time.*

Rule 11-7(2) also requires that notice to cross-examine the expert must be made within 21 days of service of the report and that if no such notice is given the expert need not attend the trial to give oral testimony.

B. Production of an expert's file

Rule 11-6(8)(a) and (b) now control the timing and the nature of what has to be disclosed from an expert's file. In *First Majestic Silver Corp. v. Davila,* 2012 BCSC 1250, the defendants argued that this Rule replaced the common law and that production was now limited to what was clearly stated in Rule 11-6(8)(b), namely the "contents of the expert's file relating to the preparation of the opinion". The plaintiffs argued that the Rule simply pushed back the time at which the entire expert's file must be disclosed. Mr Justice Myers agreed with the defendants.

> *On the plain wording of the rule, I do not agree that it only modified the timing for the disclosure. The words "relating to the preparation of the opinion" must be given some meaning. In effect the rule settles the gray area dealt with in the decisions cited above. I therefore decline to order the notes made during the course of the trial.*

C. Admissibility of non-compliant reports

The most common non-compliance is with the time limit required for service of reports, either original or responsive, or the attempt to frame a report as being supplementary when it is in fact not.

In ***Perry v. Vargas****,* 2012 BCSC 1537, Mr Justice Savage had to rule on the admissibility of what the plaintiff termed a supplementary report delivered on the eve of trial. The plaintiff relied on Rule 11-6(6) for supplementary reports and the discretion of the court to admit late reports under Rule 11-7(6).

> *[9] Rules11-6(6) (a party's own expert) and 11-6(5) (a jointly appointed expert) are cognate provisions designed to deal with circumstances where an expert's opinion "changes in a material way". Rule 11-6(6) contains an election. In the case of one's own expert, a party must determine whether it still seeks to rely on the expert report notwithstanding the material change. If it does so, the party must promptly serve a supplementary report.*
>
> *[10] Rule 11-6(6) was not intended to allow experts to add either fresh opinions or bolster reasons upon reviewing for the first time or further reviewing material under the guise of there being a material change in their opinion. To provide otherwise would surely defeat the purpose of the notice provisions contained in Rules 11-6(3) and 11-6(4) and the requirement of R. 11-7(1).*

After deciding that the late report did not qualify as a supplementary report, a determination was then required as to whether the discretion to admit the late report should be exercised in favour of the plaintiff. To do so, it was necessary to rule on the purpose and focus of Rule 11-7(6).

> *[16] Rule 11-7(6)(a) focuses on the conduct of the party seeking to tender the report. It requires that there has been due diligence in fact finding. With respect to the Support Component, the only facts relevant here are records of a treating physician. The Reply Component refers to the expert not being aware of the other medical legal reports, called "records", which were delivered in accordance with R. 11-6(3) 84 days before trial.*
>
> *[17] No effort was made to suggest there was due diligence here. While the expert may not have had or reviewed this material through inadvertence or omission, it cannot be said that this arose despite due diligence of the party seeking to tender the Late Report, so R. 11-7(6)(a) does not apply in this case.*
>
> *[18] Rule 11-7(6)(b) focuses on whether there is prejudice to the party against whom the evidence is sought to be tendered. Of course there are cases where reports are delivered a few days late where there is no prejudice. This is not such a case. Delivering a new expert report without any notice well outside of business hours on a Friday evening before a trial commencing Monday morning places the opposing party in obvious difficulties. In my view there is some prejudice to the defendants given the untimely delivery of the Late Report.*
>
> *[19] More generally, delivering expert reports on the eve of trial is antithetical to the purpose of the Rules regarding expert reports, which*

> *seek to ensure the parties have reasonable notice of expert opinions. Compliance with the Rules allows considered review of the expert opinions, the obtaining of important advice, and possible response reports. Under the former Rules, in Watchel v. Toby, [1997] B.C.J. No. 3150, 33 M.V.R. (3d) 115, Kirkpatrick J., as she then was, excluded in its entirety a late report delivered 12 days before trial where there was insufficient time to obtain any opinion evidence to answer the report.*
>
> *[20] Rule 11-7(6)(c) allows the court to admit expert evidence in the interests of justice. It is a separate provision so it can apply in circumstances where the relaxing provisions of Rules 11-7(6)(a) and (b) are not met. Effectively, it provides that the court retains a residual discretion to dispense with the other requirements of R. 11.*
>
> *[22] In my view the discretion provided for in R.11-7(6)(c) must be exercised sparingly, with appropriate caution, and in a disciplined way given the express requirements contained in Rules 11-6 and 11-7. That is, the "interests of justice" are not a reason to simply excuse or ignore the requirements of the other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the Supreme Court Civil Rules. None was provided.*

These views, on both Rule 11-6(6) and 11-7(6), were followed in ***Animal Welfare International Inc. v. W3 International Media Ltd.***, 2013 BCSC 2144. The reasoning in ***Perry*** was also endorsed in ***XY, LLC v. Zhu***, 2013 BCCA 352.

A more relaxed approach to the application of procedural rules is found in ***Milliken v. Rowe,*** 2011 BCSC 1458. There, the plaintiff's treating orthopaedic surgeon was allowed to testify notwithstanding the failure of the plaintiff to seek to have him qualified to provide opinion evidence. Although not entirely clear from the decision, it appears as though no proper report was obtained from this specialist. Despite that, Mr Justice Davies wished to have evidence of the diagnosis and prognosis of the plaintiff's injuries, over the objections of the defendant. He did so from a belief that the determination of damages in the case should be based upon the best evidence available. His Lordship found that the ability to achieve a just result should be served, rather than thwarted by, the application of procedural rules. To counter any prejudice, the defendant was afforded the opportunity to call further rebuttal evidence before judgement was rendered.

VI. Cross-examination of the DME doctor

A. Some Basic Concepts

Geoffrey D.E. Adair, in his text *On Trial*, identifies several basic approaches or techniques that may be employed in cross-examination of the expert witness. These approaches provide a very good starting point for the analysis and preparation for the cross of a defence expert. Not every approach may apply in each case but as you analyze the expert and the evidence you face you should give some consideration to each basic area.

(i) Exploring and if appropriate, challenging the background and qualifications of the expert

You may identify that the expert is not particularly familiar with the specific issue in your case (i.e.: an orthopedic surgeon who has focused on lower extremities in a shoulder case). You may also find that an expert has previously written on or worked in a field that helps you (A doctor testifying in a chronic pain case for the defence who had years before helped establish a hospital chronic pain facility and who can help educate the Court about what chronic pain is). In some cases a careful search may reveal that an expert has overstated or exaggerated their qualifications and their credentials.

(ii) Exploring the bias of the expert

In the appropriate case it may be helpful to show that the expert is in this case (and perhaps in other cases) an advocate for the defence as opposed to providing the Court with fair guidance. This may involve a review of their previous cases and previous commentary by the Courts and/or information about their primary source of income (ICBC defence work).

(iii) Attacking the factual assumptions upon which the opinion is based and the methodology of analysis

You will want to look carefully for any significant instances where the expert has been misinformed or has misunderstood relevant facts. A careful review of the records provided to the expert and a comparison between those records and all the records and information which is available in the case is always warranted. Clearly any mistaken key fact may detract greatly from the expert's conclusions.

As to methodology, it is often helpful to highlight in cross-examination those areas which may be relevant but the expert has "neglected" or accord fair weight in his or her assumed facts. We all know it looks very bad when a plaintiff expert gets

"tunnel vision" and neglects to mention and properly and fairly deal with a relevant pre-existing condition or injury. It can be equally undermining to a defence opinion when you can show the defence doctor went out of his way to avoid discussing the subject accident as an important "clue" and instead focuses on everything else as a cause ("cherry picking ").

(iv) Contrasting the opinion with other leading authorities

It may be that you can demonstrate that the expert has a view on the subject matter of the case (chronic pain or Thoracic Outlet Syndrome or Fibromyalgia) that is not in keeping with the weight or tide of developing medical theory in the area. To the extent that you can accomplish a disconnect between the expert and the prevailing theories you may weaken the effect of the expert's ability to persuade the Court.

(v) Contradicting their opinion with prior statements

You may be able to establish through their own previous publications or through previous reported cases or through transcripts obtained from fellow counsel that the expert has previously taken an opposite position or a more "balanced" position on a key issue in another case which differs with their opinion on that point in your case. To the extent you can hint or demonstrate that the expert perhaps "tailors his opinion" to suit the circumstances ("He who pays the piper calls the tune") you will likely undermine the weight of the opinion.

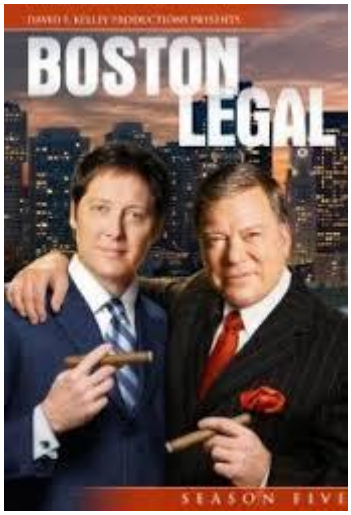
Other ideas which may be of use, depending on the case and the expert involved include:

Be careful about trying to be Dr. House

This may be at times the hardest thing for lawyers to accept. No matter how brilliant you are, you are almost certainly not smarter than the doctor in his field. Although the internet and our work with many personal injury cases does give us a

lot of access to medical information, we can never know a subject as well as a doctor who has dedicated his whole life to it. So generally speaking do not try to "out-doctor" the physician. If you are going to challenge the medical view of the doctor it is important to ensure that you are very well informed on the relevant medical issue (ideally with the able assistance of your own expert and backed by authoritative texts) and keep it to one or two key propositions.

A more effective method is to do what we (hopefully) do best and change the playing field to an area where you as a lawyer are the expert.



"So many questions. One at a time, I'm only human... Actually I'm not, I'm Denny Crane"

Seek Agreement and Narrow the Issues

It can be helpful to begin with a series of leading questions which the defence doctor admits that he agrees with. Ideally the more of such points you can establish the better. If possible, you may be able to narrow the case down to the smallest point of disagreement and minimize much of the defence doctor's expertise to really just his or her choice to *believe* or not believe the Plaintiff. (Hopefully the nice plaintiff and the lay witnesses will help the finder of fact see it differently).

For example:

"There is general agreement in the field of medicine that many people recover within a relatively short period from soft tissue injuries suffered in MVAs?

"Yes…yes they do"

"But some people, perhaps 10% or so, have chronic injuries which persist for years after motor vehicle accidents?"

"Well..yes"

"Here in BC we have doctors working in places such as St Paul's Chronic Pain Clinic to help these people to cope and live with chronic pain?

"Yes"

And some of those people developed their chronic pain from trauma such as motor vehicle accidents?

"Yes"

"So motor vehicle accidents can sometime lead to chronic pain?"

"Yes"

And for us then the issue here comes down to whether Mr. or Mrs _____is one of those people who continues to experience chronic pain from his or her MVA?

"Yes, I suppose it is"

Although the expert may still ultimately disagree with as to whether your client is or is not "one of the people who develop chronic pain after a motor vehicle accident" you have gained some valuable ground and created an "air of reality" to your theme of the case.

Sometimes even if you can't get agreement that the accident caused your client's situation (chronic pain), you ***may*** still get an agreement from the defence doctor that the accident may well be one of the contributing causes. If you can establish that you have done your job and focused on the area where you are the expert (the law i.e.: material contribution) while allowing the doctor to be the expert in his area… and still proven your case.

B. Eliciting opinions without notice

There is some controversy about whether, in cross-examination, an opposing expert can be asked to provide an opinion for which no notice has been given.

This was allowed in ***Haida Inn Partnership v. Touche Ross & Co***. (1989), 34 B.C.L.R. (2d) 80 (S.C.). The defendants called a lay witness concerning the plaintiffs' knowledge of certain matters in support of a limitation defence. The

plaintiffs qualified the witness as a chartered accountant and sought an opinion from him as to the appropriate debt-equity ratio for a hotel investment. The defendants objected because no notice had been provided and the witness had not given expert opinion evidence in direct examination. However, the court held that the opinion was admissible to rebut the opinions of other experts called by the defendants (decided at a time when no notice was required for rebuttal opinions).

Alternatively, the opinion was admissible because:

> *The opinion should not have come as a surprise to the defendants. When they chose to call Mr. Hughes, they knew that he had given that opinion to the plaintiffs in 1978. The only surprise is that a somewhat more general opinion was elicited during cross-examination. In these circumstances the prejudice to the defendants is no greater than that faced by any party calling a witness who has relevant factual knowledge that may contradict the view of the facts held by that party.*

In ***MacEachern v. Rennie and Canadian National Transportation Limited***, 2009 BCSC 1465, the defendants called one of the plaintiff's treating doctors to give expert opinion evidence. The defendants sought to prevent the plaintiff from eliciting in cross-examination an opinion about the prognosis and future treatment of her Hepatitis C, of which there had been no notice given. Mr. Justice Ehrcke's provided three reasons for allowing this evidence. First, the plaintiff was entitled to respond to all the opinion evidence led by the defendants, not just that which was contained in the written statement of the expert being cross-examined. Second, the proposed evidence was also truly responsive as a rebuttal to the opinion of another expert witness called by the defendants. Third, the case management order relating to expert witnesses did not require a party to give notice of the questions it proposed to ask in cross-examination of another party's witnesses, even if those questions elicited an expert rebuttal or reply opinion.

This issue was also addressed in ***Longstaff v. Robinson***, 2008 BCSC 1488 where Mr. Justice Goepel was in no doubt that cross-examination is not limited to the subject areas addressed in direct examination.

> *[53] The plaintiff having chosen to call Ms. Henderson as a witness, albeit on damages, the defendants were entitled to cross examine her at large in regard to any matter in issue. The plaintiff could no longer claim her opinion as to whether Mr. Robinson met the standard of care was privileged. Given her qualifications the defendants were within their rights on cross examination to elicit from her the fact that she had given an opinion to the plaintiff concerning the quality of Mr. Robinson's work and if the defendants had so chosen they could have gone further and elicited the opinion itself.*

In ***Skadberg Construction Ltd. v. Buchholz,*** 2010 BCSC 991 the plaintiff called a witness who was not tendered or accepted as an expert but gave his "views" on whether the lockup stage had been reached, a material issue in the case. A few years earlier this witness has sworn an affidavit in which he expressed an opinion on the lockup stage issue. The defendant sought to qualify him as a construction expert and obtain the opinion expressed in the affidavit. No notice had been given to the plaintiff. The trial judge did not allow this, restricting ***MacEachern*** to a situation where "the opinion that the party sought to elicit was truly responsive to an opinion that had been given…While the plaintiff is aware of Mr. Schultze's evidence as provided in the affidavit, no notice has been provided that Mr. Schultze will be qualified as an expert and will be giving opinion evidence upon which the defendant presumably relies to support her case."

Skadberg was appealed, 2012 BCCA 488, and a new trial was ordered because of the disallowed cross-examination. The court questioned whether the issue of an opinion being truly responsive or not has any relevance to cross-examination. In finding that the project had reached lockup in January 2008, the trial judge placed considerable reliance on the opinion evidence adduced by Skadberg Construction as to the meaning of that term. However, in my view, she erred in not permitting Ms. Buchholz to adduce opinion evidence from Mr. Schultze.

> *As I will explain, in light of the manner in which Skadberg Construction presented its case, Ms. Buchholz was entitled to elicit Mr. Schultze's opinion on whether the project had reached lockup. I should note that because of the way in which this case was conducted I have not found it necessary to consider the more general question of whether Rule 40A applies at all to a situation in which a party cross-examining a witness who was not called as an expert, seeks to elicit relevant opinion evidence from that witness.*

The Court of Appeal was correct to question this. With respect, those decisions which allowed such cross-examination only if it was eliciting a responsive opinion overlook the fundamental role of cross-examination, which *The Law of Evidence in Canada*, at pages 1133-1134, describes as:

> *§16.112 The oft-quoted words of Wigmore that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" indicate its great value in the conduct of litigation. Three purposes are generally attributed to cross-examination:*
>
> *(1) to weaken, qualify or destroy the opponent's case;*
>
> *(2) to support the party's own case through the testimony of the opponent's witnesses;*
>
> *(3) to discredit the witness.*

> *To accomplish these ends, counsel is given wide latitude and there are, accordingly, very few restrictions placed on the questions that may be asked or the manner in which they may be put. Any question which is relevant to the substantive issues or to the witness' credibility is allowed.*

***R. v. Lyttle*,** 2004 SCC 5 applied this reasoning.

> *Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.*
> *[emphasis in original]*

An analogy can be drawn from ***Downey v. St. Paul's Hospital et al.,*** 2006 BCSC 1300 where the defendants wanted the plaintiff to call one of the defendant doctors for cross-examination by them if the plaintiff read in opinions obtained from that doctor at an examination for discovery. The court declined to order that.

> *To superimpose Rule 40A on the right to a party to read-in evidence from an examination for discovery would severely impair the purpose of examinations for discovery and the right of a party to obtain admissions helpful in their case.*

Under Rule 11-6, unlike Rule 40A, notice must be given even for truly responsive opinions. Eliciting an opinion on cross-examination would be virtually impossible if notice is required and this Rule is found to apply.

C. The use of authoritative literature in cross examination

An expert can rely on a variety of sources and resources in opining on the questions posed to him in both direct and cross-examination. This includes other experts' observations and opinions, research and learned treatises: ***Mazur v. Luc****as,* 2010 BCCA 473.

An expert can be cross-examined on authoritative literature in an attempt to undermine or weaken his opinion. The correct procedure is set out in ***R. v. Marquard****,* [1993] 4 S.C.R. 223.

> *The proper procedure to be followed in examining an expert witness on other expert opinions found in papers or books is to ask the witness if she knows the work. If the answer is "no", or if the witness denies the work's authority, that is the end of the matter. Counsel cannot read*

> *from the work, since that would be to introduce it as evidence. If the answer is "yes", and the witness acknowledges the work's authority, then the witness has confirmed it by the witness's own testimony. Parts of it may be read to the witness, and to the extent they are confirmed, they become evidence in the case.*

While receiving the answer "No" to the first two questions may be the end of this line of cross-examination, it may not be the end of the matter regarding the weight to be given to that expert's opinion. Being unaware of literature, which others have testified to as being authoritative, might be just as damaging to the expert in the long run as confirming a contrary opinion.

In a more recent case, ***McKerr v. CML Healthcare Inc.***, 2012 BCSC 1712, Madam Justice Power applied the law in ***Marquard*** to determine that the theory of another expert did not become evidence in that case when the totality of the testimony of the defendants' expert was considered. The defendants' expert did not accept the scientific construct underpinning the theory and an analysis of the language used in the theory suggested considerable scientific uncertainty.