EDITORIAL

BY KENNETH A. PRICE
BARRISTER & SOLICITOR

Ken Price has practiced in a variety of areas for almost forty years. For thirty of those he has practiced tort law. He is a past president of this organization, and is a founding member of TLABC. He has worked for years providing counsel to several social and legal agencies, and has been a regular contributor to TLABC and CLE legal education programs. He has also worked to keep lawyers vigilant in their duty to represent citizens against oppression by the state.

As I put pen to paper, Attorney General David Eby QC has just announced the introduction of new rules designed to reduce the cost of litigation by limiting the number of expert reports in personal injury actions. He says that he estimates that the restrictions on expert reports will save ICBC $400 million a year in costs. This is a pretty easy number to verify. All one needs to do is add up all the disbursement costs in litigated matters for medical and other expert opinion reports. Lawyers in this business will not debate the numbers much. We have all seen the costs of retaining experts in the bills we receive from them for their services. Head-scratching is my typical reaction when I see these bills, and I know I am not alone.

Although no one ever talked about it much, the money crunch in the expert opinion business was caused not so much by the growing use of experts over the years as it was by the extraordinary growth in the cost of their reports.

The reasons for the skyrocketing expenses in disbursements for expert reports are easy to pinpoint. Face it, there is a shortage of medical specialists in BC. Perhaps one of the hardest and most frustrating parts of a personal injury lawyer's practice is securing an expert to advise on the medical or other important issues in the case. The doctors know this. Add to that the fact that most doctors in BC are underpaid by the medical system for treating patients, it is no wonder they have increasingly looked to providing private expert consulting services to ICBC and the lawyers in order to supplement their income.

Unfortunately, the law of supply and demand has worked really well for the doctor experts, but not so well for ICBC's bottom line. To call a spade a spade, the free enterprise system, combined with the paucity of doctors in most specialist medical disciplines, has resulted in many cases where the doctors have simply charged more than the traffic can bear. Some of them now seem to have killed the goose that lays their golden eggs. The demand for expert reports will decline after the new changes come into effect, and the days of the $8,000 opinion reports are probably gone.

We cannot blame the doctors for setting arbitrary remuneration levels in what is essentially an unregulated trade. But we cannot blame the lawyers, either. In most cases, the lawyers SEE PAGE 24

the Verdict

SPRING 2019
Issue 160

theverdictmagazine.ca

ADDRESS CHANGES & UPDATES
tla-info@tlabc.org

Letters to the Editor
editor@tlabc.org

ADVERTISING INQUIRIES
Julia Chalifoux
julia@tlabc.org

The purpose of *the Verdict* is to provide information and opinion that is timely, practical, and relevant. The editor welcomes your submissions. Statements and opinions expressed are not necessarily those of TLABC.

Publication of advertising does not imply endorsement.

PUBLISHER
Julia Chalifoux
julia@tlabc.org

EDITOR EMERITUS
Kenneth A. Price

MANAGING EDITOR
Shawn Mitchell
shawn@tlabc.org

EDITORIAL BOARD
Candace Cho
Harmonie Roesch-West

LAYOUT & DESIGN
Julia Chalifoux

the Verdict is published quarterly by

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA
1111 – 1100 Melville Street, Vancouver BC V6E 4A6 CANADA

Tel: 604 682-5343 Toll Free: 1 888 558-5222
Email: tla-info@tlabc.org
Website: www.tlabc.org

Estimated readership: 6000
Registered with the National Library of Canada. ISSN No. 1185-8931

Publications Mail Agreement No. 40027828

Return undeliverable Canadian addresses to:

the Verdict, Circulation Department
1111 – 1100 Melville St.
Vancouver BC V6E 4A6
email: verdict@tlabc.org

FROM PAGE 4, EDITORIAL

have had no choice but to swallow hard and pay the bill.

The tit-for-tat practice of duelling experts, forced on us by aggressive defence counsel and ICBC adjusters, left plaintiffs' counsel with no choice but to join the fray. There is no worse feeling than being told by a judge in chambers or at trial that you are too late to adduce rebuttal evidence to an opposing expert report, or that your case fails because you did not adduce the proper expert opinion to support your claim.

All this started back in the 1980's. Not long after becoming Chief Justice of the Supreme Court, Mr. Justice McEachern became an early promoter of the concept of *proportionality* in the conduct of personal injury actions. He frowned on jury trials because they took too much time. He was restrictive in allowing medical reports and other expert evidence from engineers, accountants, psychiatrists, etc., admonishing counsel that judges were quite capable of making findings of fact without them. It was clear to those of us practising at the time that Chief Justice McEachern wanted to simplify and abbreviate personal injury litigation. He was under a lot of pressure because of judge shortages, long waiting times for trials, and expanding trial lengths, and his position as the chief administrative Justice was not easy. Keeping the lid on unwieldy litigation was a high priority. From his comments both on and off the Bench, it was clear that the Chief Justice was prepared to accomplish his administrative agenda even at the expense of what lawyers had previously regarded as the inalienable right to a full rather than summary trial.

The Chief Justice's crusade for proportionality in process caught on in some respects. But the concept of proportionality as applied to the evolution of the trial process was less quick to catch on. Unfortunately, the inconsistent way in which the concept of proportionality was applied to the admissibility of expert evidence at trial simply left lawyers pulling their hair out in confusion.

By way of example, the practice of increasing use of expert reports was strongly resisted by Chief Justice McEachern in the l980's. I still remember, appearing at trial before the Chief Justice 40 years ago and having my expert report(s) rejected on the basis that the opinion of the expert usurped the role of the trial judge in assessing the evidence. The very next week, I appeared again in front of the Chief Justice on another trial. This time, after having elected to *not* call expert evidence on a particular issue, I was faced with the court rejecting my argument, opining that I needed expert evidence to support such a claim.

In the end, the proliferation of the use of expert evidence overtook Mr. Justice McEachern's early efforts to stifle it. Throughout the next three decades, the use of expert evidence in personal injury litigation really took on a life of its own, and conscientious plaintiffs' counsel really had no choice but to pull out all the stops in the interests of not being blind-sided by the failure to call such evidence. They were caught between a rock and a hard place.

Where the proliferation of expert reports really took off, however, was when the rule-makers essentially bowed to the wishes of the medical profession. Doctors did not want to go to court, so the legal system obliged them. Written reports were now the preferred, if not required, means of adducing expert evidence at trial. *Viva voce* evidence from doctors was to be discouraged.

Fast forward to today. Mr. Eby is understandably doing everything he can to put out his alleged dumpster file at ICBC. In his quest for economy he has, perhaps unwittingly, given us reason to pause to re-examine the paramount objective of our Rules of Court. He has very simply reaffirmed the already codified maxim that *proportionality* is to be the objective in the conduct of litigation. It has been so through two iterations of the Rules of Court, the pioneering judge who pressed for it, and now, ironically, because of the money.

However, the historic resistance to the adoption of proportionality in the civil litigation process can be blamed on many more things than simply having too many expert reports. In the end, justice must be seen to have been done, even if this means a trial cannot be run as efficiently as a robotic assembly line. The new rule enacted to cut down on the number of such reports is not, in itself, going to solve the difficult task of balancing the objective quest for proportionality against the subjective need to preserve justice.

Mr. Eby must tread carefully here. Proportionality means more than efficiency. Despite the present objectives sought by the Attorney General, he must at all costs resist the growing trend to blend the insurance system and the justice system into a single entity. Limits on expert reports are one thing. Even in the quest for justice, such limits, along with putting an end to the collection and hoarding of unnecessary or archaic procedural trappings, may be tolerable. But proportionality for the sake of bean-counting alone must not be allowed to infringe or interfere with the ultimate goal of treating fairly each and every person who seeks his full and fair protection of the legal system.

More important yet, the law of damages, including the assessment of damages in personal injury cases should be off-limits to the Attorney General. He cannot be allowed to invent an arbitrary system which usurps the laws of negligence, no matter how urgent his tasks as ICBC may seem.

We must all continue to extol the fundamental differences between the tort system and the car insurance system. ICBC is in the process of managing money in and money out. If governments want to rake large bags of that money off the top, they cannot continue to foist the consequences of that thievery onto the victims of tortious conduct. Those victims should not have to subsidize the vagaries of those who hurt them, anymore than they should not have to give a whit about bureaucratic incompetence or government greed.

So, Mr. Eby, cut around the edges as you apparently must. Tweaking costs at ICBC is fair game under the present circumstances. But remember that participation in the court system is sometimes a necessary evil for hurt people. Evolution in the law of damages for negligence has been hard won on the backs of the injured, and no one else. No one can accuse the judiciary or the lawyers of opening the flood gates here. To the contrary, restraint in the assessment of damages to individuals in Canada has been a feature of the justice system long before even the Trilogy came down 40 years ago. Any further arbitrary interference in the assessment of damages for the sake of political expediency is simply the wrong way to go. V