Personal Injury FOCUS

Sticks and stones may break my bones...

Courts wrestle with awards for the psychological component of physical injuries

The old-school approach of concentrating on objective injuries like broken bones, damaged tissues, screws, plates and hardware, while shying away from the psychological components of the impairments, may prove costly to plaintiff counsel when seeking a higher range of damages.

PATRICK BROWN

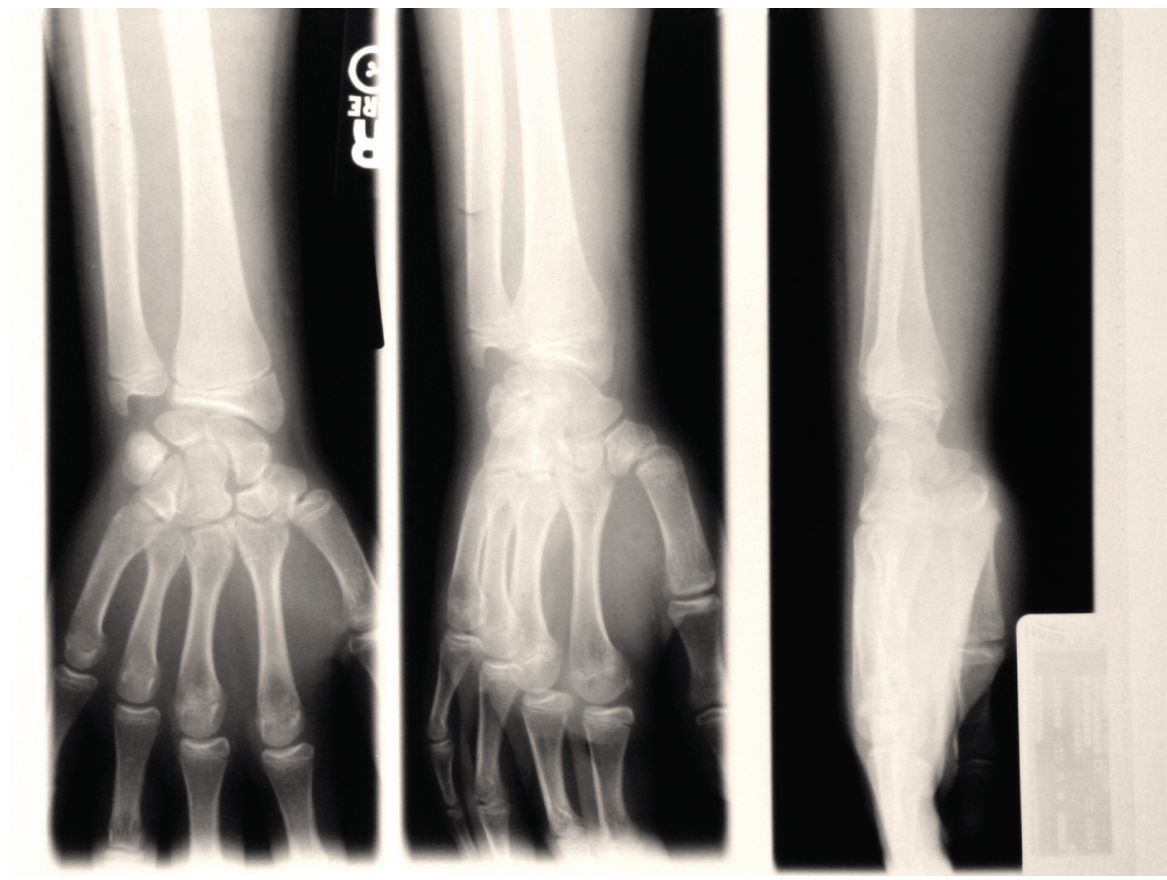
In *Rollin v. Baker,* [2010] O.J. No. 3665 (C.A.), Carole Rollin suffered a Colles fracture when she took a fall at her friend's house. Her case did not involve suing her friend. It was against Baker, the treating physician, for his failure to conduct follow-up x-rays to determine whether the fracture had properly set.

The trial judge found in favour of Rollin and awarded non-pecuniary damages of $90,000. The Court of Appeal reversed the award and reduced the damages to $30,000. *Rollin* has recently been used to suggest a fractured wrist gives rise to a maximum general damage award of $30,000. But a closer review of the decision reveals that its application is limited to the specific facts.

The court's assessment did not focus on the original injury and the future complications. Rather, the focus was on the injury to be attributed to Baker. Justice Gloria Epstein, speaking for the court, was clear that Baker should not bear responsibility for the fracture itself. Unlike other decisions involving fractures, there was no assessment of long-term complications or chronic pain. The long-term problems were not Baker's fault. The $30,000 award was restricted to the pain and suffering arising out of the two unnecessary surgeries that Rollin had to endure.

In cases where it is shown that the plaintiff will suffer chronic pain problems or additional psychological impairments arising out of the orthopaedic injury, the ranges are much higher.

The British Columbia Court of Appeal released its decision in *Rizzolo v. Brett,* [2010] B.C.J. No. 1801 on Sept. 14. The court reviewed the trial judge's award for a gentleman who had sustained a fractured ankle which went on to heal in "virtual anatomic alignment." Counsel for the defendant argued that the trial judge's award of $125,000 was so "inordinately high" that it ought to be overturned. They relied on a series of decisions which suggested an award of $75,000 was appropriate.



STAN ROHRER / ISTOCKPHOTO.COM

The court disagreed. The plaintiff had presented the case not simply as a healed fracture, but rather one of ongoing "chronic pain." A review of the case law revealed the appropriate range was "well over $100,000" when dealing with significant ongoing pain and where the plaintiff had previously enjoyed an active lifestyle or physical vocation.

Justice Nicole Garson, in upholding the award, reasoned that: "the award for non-pecuniary damages was largely based on the trial judge's conclusions that the respondent suffered and would continue to suffer from chronic debilitating pain that profoundly affected all aspects of his life. Viewed in this way, the award can not be said to be inordinately high." Rizzollo had returned to his job and was working, but the ankle was a constant source of pain

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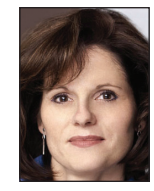
Expert evidence: Narrowing the privacy zone

Challenges to information that falls within what is commonly known as "the zone of privacy" protected by litigation privilege will likely resurface in light of the changes to Rule 53.03 of Ontario's *Rules of Civil Procedure*.



STACEY STEVENS

A significant amount of jurisprudence has already developed over the years on what constitutes disclosure of an expert's "finding" under Rule 31.06(3). However, the principles of fairness, impartiality and objectivity that drive Rule 53.03 suggest that mandatory disclosure of all the foundational information on which an expert opinion rests may result in an even narrower zone of privacy during the discovery phase.

The wording of Rule 53.03 mirrors the common-law interpretation of what information constitutes an expert's finding under Rule 31.06(3); expert reports must include, among other things, the instructions provided to the expert and the expert's reasons for his or her opinion, including a description of the factual assumptions on which the opinion is based, a description of any research conducted to form the opinion, and a list of every document, if any, relied on by the expert in forming the opinion.

Compare this to the Ontario Court of Appeal's decisions *General Accident Assurance Co v. Chrusz*, [1999] O.J. No. 3291 and *Conceicao Farms Inc. et al v. Zeneca Corp.* [2006] O.J. No. 3716. These decisions clarify that an expert's finding is not limited to his or her final findings; rather, pre-trial disclosure obligations under Rule 31.06(3) include any information on which the expert's finding rests. Further, the collective common-law decisions define the zone of privacy as "the area of privacy left to a solicitor after the

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Rule broadens pre-discovery disclosure obligations

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current demands of discoverability have been met," but do not go as far as Justice Ferguson did in *Browne (Litigation Guardian of) v. Lavery*, [2002] O.J. No. 564 (Sup.Ct.) where it was stated in obiter that "our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial."

Two decisions made after the December 2008 announcement that Ontario's *Rules of Civil Procedure* were being changed support the proposition that pre-discovery disclosure obligations under Rule 31.06(3) will broaden and the zone of privacy will become narrower as we continue to adapt to these changes.

Justice Ruth Mesbur addressed the issue of pre-trial disclosure obligations within the family law context in *Bookman v. Loeb*, [2009] O.J. No. 2741, relying on Rule 31.06(3) to determine the scope of counsel's obligation to disclose information underlying its expert's findings. Counsel for the respondent moved for production of the opposing expert's draft reports and attachments, letters of instruction, retainer, copies of accounts and meeting notes made by counsel and the expert. Counsel for the appellant took the position that delivery of the expert's final report was sufficient and met pre-trial disclosure obligations as it contained the expert's findings, opinions and conclusions. She argued that production of the expert's file, including correspondence between counsel, notes of meetings referred to in the report and details of the retainer was not properly producible as it was protected by litigation privilege.

Justice Mesbur disagreed and ordered production of all of the documents requested other than counsel's meeting notes. In defining the applicant's disclosure obligations, Justice Mesbur concluded that if the respondent was going to respond to the expert's opinion in a meaningful fashion he was entitled to know, among other things, what the expert was retained to provide an opinion on, whether those instructions changed over time, whether the expert's opinions themselves have changed over time, and what instructions or assumptions the expert was told to make, together with a list of all documents, articles or legal principles relied on by the expert.

Justice Mesbur's order mirrors the specific requirements outlined in Rule 53.03. Her reasons are motivated by the principles of fairness and objectivity.

This gives rise to the following questions: Is Justice Mesbur's decision a sign of the times to come? Will pre-trial discovery obligations widen and the zone of privacy be narrowed? These questions may be answered by Master P.E. Rogers's statements in *Ikea Properties Ltd. v. 6038212 Canada Inc.* [2010] O.J. No. 3449 (Sup.Ct.). Master Rogers considered the level of pre-trial disclosure required by a party who was relying on expert findings as part of a Rule 20 motion. In ordering complete disclosure of the foundational information supporting the expert's findings, Master Rogers characterized Rule 53.03 as providing "useful guidance of what is not within the zone of privacy required to protect our adversarial system."

As the one-year anniversary of the rule changes approaches, we will undoubtedly see further decisions interpreting these changes. Whether the court continues to narrow the boundaries of the zone of privacy remains to be seen. ■

Stacey Stevens is an associate lawyer with Thomson Rogers in Toronto. Her practice is dedicated to representing injured people and their families in matters relating to personal injury, accident benefits entitlement, products liability, occupier's liability and sexual assault.

Commercial host owes two duties of care

Drunk
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where the injured plaintiff was not the person who became inebriated in the defendant's establishment. Justice Major, for the court, stated, "It is a logical step to move from finding that a duty of care is owed to patrons of the bar to finding that a duty is also owed to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose a risk."

So it is well established in Canada that a passenger injured in an accident caused by a drunken driver potentially has a cause of action against both the drunken driver and the commercial establishment that over-served the driver. In which circumstances will a court consider that the passenger must also bear some apportionment of fault? What arguments can counsel acting for the injured passenger raise to limit the plaintiff's degree of contributory negligence?

Most commonly, to prove contributory negligence on the part of a plaintiff/passenger, defence counsel is able to point to the fact that the plaintiff/passenger was drinking at the establishment together with the defendant/driver, and therefore knew or ought to have known how much the defendant/driver had to drink and that the defendant/driver was therefore likely to be impaired. However, plaintiff's counsel should be aware of the decisions in *Reekie v. Messervey* [1989] B.C.J. No. 797 (B.C.C.A.), *Shaw v. Storey* [1991] B.C.J. No. 245 (B.C.C.A.) and *Dennis v. Gairdner* [2002] B.C.J. No. 2017 (B.C.S.C), which support the argument that a passenger's knowledge that the driver had been drinking, without any other evidence (for example, without evidence of the plaintiff's knowledge of the amount consumed by the driver or without evidence that the defendant was displaying visible signs of impairment), is insufficient to support a finding of contributory negligence.

There is another interesting argument that counsel acting for a plaintiff/passenger may raise to limit the degree to which the court attributes contributory negligence to the plaintiff/passenger. The argument is based on the principle that a commercial establishment owes, and may be found in breach of, two separate and distinct duties of care: (1) to the intoxicated patron, and; (2) to third parties who might be harmed as a result of the acts of the intoxicated patron.

In the hypothetical case of a passenger and driver who both left a commercial establishment drunk, and then were involved in a motor vehicle accident on their way home caused by the negligence of the drunken driver, the drunken driver will usually be attributed the largest apportionment of liability. The main issue becomes the relative degrees of liability to be attributed to the commercial establishment as compared to the drunken passenger.

This issue was considered in *Holton v. MacKinnon* [2005] B.C.J. No. 57 (B.C.S.C.), *Pilon v. Janveaux* [2005] O.J. No. 4672 and [2006] O.J. No. 887 (both Ont. C.A.). Plaintiff's counsel may refer to these cases to argue that the commercial establishment should bear a higher percentage of fault than the drunken passenger, because the commercial establishment may have breached two separate duties owed to the drunken passenger: first, as a patron who became intoxicated in the establishment and second, as a third party who could reasonably be expected to come into contact with another patron who became intoxicated in the establishment, namely the drunken driver. By contrast, the drunken passenger has breached but one duty: to take reasonable care of himself.

While individuals who plan ahead to make arrangements for a ride home from restaurants or bars should be commended for their foresight, they may still face a finding of contributory negligence if they are injured in an accident and their designated driver was drunk. Counsel acting for these injured passengers will need to consider the available arguments to reduce their clients' relative liability, especially where a commercial host is involved. ■

Bernie Buettner and Michael Thomas are partners at Harper Grey LLP in Vancouver. They represent plaintiffs in personal injury claims.