The Standard of Care of a Plaintiff's Personal Injury Lawyer in Alberta

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In recent years the Alberta courts have released several helpful decisions in the context of a professional negligence suit against personal injury lawyers that have significantly fleshed out the standard of care of a plaintiff's personal injury lawyer. The key recent decisions are ***Kitching v. Devlin***, 2016 ABQB 212, [2016] A.J. No. 391, a decision of P.R. Jeffrey J of the Alberta Court of Queen's Bench, and ***Adeshina v. Litwiniuk & Co***., 2010 ABQB 80, 483 A.R. 81, a decision of S.L. Martin J of the Alberta Court of Queen's Bench.[i] The recent Yukon Territory Supreme Court decision of ***Knapp v. James H. Brown Professional Corp. (c.o.b. James H. Brown & Associates)***, 2015 YKSC 22, [2015] Y.J. No. 39 per R.S. Veale J is a study in contrasts, and earlier decisions from the British Columbia Supreme Court (***Startup v. Blake***, 2001 BCSC 8, [2001] B.C.J. No. 16) and the British Columbia Court of Appeal (***Chaster (Guardian ad litem of) v. LeBlanc***, 2009 BCCA 315, 95 B.C.L.R. (4th) 299) are also informative. The purpose of this article is to review these decisions, and others, in order to flag benchmarks of the standard care of a plaintiff's personal injury lawyer in Alberta.

The Overarching Standard of Care

The overarching standard of care of a personal injury lawyer, and indeed all lawyers, is clear and is set out in the seminal case of ***Tiffin Holdings Ltd. v. Millican*** (1965), 49 D.L.R. (2d) 216 at 218-219 (Alta. S.C.), reviewed at (1965), 53 D.L.R. (2d) 674, affirmed [1967] S.C.R. 183:

> Lawyers are bound to exercise a reasonable degree of care, skill and knowledge in all legal business they undertake. Their liability arises out of a contract. The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor. It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that

> the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.
>
> It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of the case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed....
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> The obligations of a lawyer are, I think, the following: (1) To be skillful and careful; (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary; (3) To protect the interests of his client; (4) To carry out his instructions by all proper means; (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left him; (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

What is the foundational benchmark of the standard of care of the personal injury lawyer then?

> **(1) To be skillful and careful; (2) To advise his/her client on all matters relevant to his/her retainer, so far as may be reasonably necessary; (3) To protect the interests of his/her client; (4) To carry out his/her instructions by all proper means; (5) To consult with his/her client on all questions of doubt which do not fall within the express or implied discretion left him/her; (6) To keep his/her client informed to such an extent as may be reasonably necessary.**

The standard of care is not to be judged with the benefit of hindsight, but is to be judged in light of what the lawyer knew, or reasonably ought to have known, at the time of the acts of negligence alleged against him/her, and he/she will not be found liable for mere errors in judgment. As to errors in judgment, reasonably prudent lawyers may disagree or have different evaluations of an injury so long as it is based on a skillful and careful knowledge of the law and the client injury.[ii]

An interesting question is whether the personal injury lawyer, as a "specialist", has a higher standard of care than that of the generalist lawyer. Clearly this is the case within the context of medical malpractice.[iii] The recent case of ***Kitsui v. Slater Vecchio LLP***, 2016 BCSC 1039, [2016] B.C.J. No. 1174, a decision of M.M. Koenigsberg J of the British Columbia Supreme Court, obliquely suggests this may be so as well for the personal injury lawyer.[iv]

The Role of the Lawyer

There appears to be two distinct views of the role of a lawyer vis-à-vis the client illustrated, in general, by the case law. In one view, the lawyer takes a passive role, simply acts on the instructions of his or her client and in effect becomes the "voice of the client". In the opposing view, the lawyer takes a more active role and, as well as serving as the "voice of the client", also applies brakes to the process by advising and warning the client of the ramifications of certain steps the client wishes to take, actively advising the client as to the pros and cons of different options available, and advising on likely trial outcomes, as the matter may be headed for settlement negotiations in a mediation context or otherwise. It seems from ***Adeshina*** and ***Kitching*** that, in the view of these courts, the latter is the proper role of the lawyer, and thus this more active role will inform the standard of care required of the personal injury lawyer.

In ***Adeshina***, the plaintiff suffered injuries in a motor vehicle accident and retained two sets of lawyers, sequentially, to achieve compensation for his injuries, the Litwiniuk defendants and the McLeod defendants. The plaintiff had immigrated to Canada from Nigeria and worked as a bus driver for the City of Calgary and also as a security guard when he was involved in the June 17, 1999 motor vehicle accident. He was driving his 1999 Chevrolet motor vehicle at the speed limit in a northerly direction on Deerfoot trail Northeast in Calgary when he was hit by a large tractor-trailer truck, which caused him to lose control of the vehicle, spin a full 360° into the southbound lane, and then into a ditch. There was about $1700 in damage to his vehicle. As a

result of the accident he claimed to suffer numerous injuries, including chronic pain, severe cervical and lumbosacral whiplash, a closed head injury with concussion causing recurrent vertigo, hearing loss to his left ear, bilateral temporomandibular joint injuries requiring splint care, dramatic impingement syndrome of the right shoulder requiring surgical repair, left wrist injury requiring surgical repair, posttraumatic stress disorder and clinical depression requiring antidepressant medication. He had two surgeries to his right shoulder and surgery to his left wrist. There was a second surgery to his wrist after settlement.

The first set of lawyers, the Litwiniuk defendants, issued a statement of claim and put in significant time and effort and met frequently with the client to discuss various matters. A series of medical legal reports and/or treatment notes were obtained from medical practitioners and treatment service providers. The plaintiff's treating physician, Dr. John VanGoor, was actively involved in the case of the plaintiff.

One of the key issues in the lawsuit was whether the plaintiff was able to continue in his work as a bus driver, or at all. Mr. Power of the Litwiniuk law firm therefore organized a vocational assessment to be done by Dr. Berendt of Mandel & Associates over a period of several days. The plaintiff performed extremely poorly in the tests, however, and the doctor advised Mr. Power that he could not write a positive report as the plaintiff had tested as malingering, among other things. A written report was therefore not ordered, and only the raw test data remained.

A JDR was arranged by the Litwiniuk law firm and Mr. Power included the $1850 fee for the Mandel assessment in his disbursements attached to the bill of costs in his JDR brief. At the JDR the defence made a formal offer of judgment of $275,000. Mr. Power testified in the subsequent professional negligence action that he had not provided the plaintiff with an

assessment of the likely value of his claim at this point as he wanted to attend the JDR before providing an opinion.

The plaintiff was very unhappy with the JDR offer of the defence, and sought new counsel to represent his interests. He interviewed as many as 10 other lawyers, but settled on Mr. Steinfeld of McLeod & Company. It was found as a fact in the professional negligence action that Mr. Adeshina did not advise Mr. Steinfeld of the Mandel assessment.

Mr. Steinfeld and his associate Mr. Kantor then diligently prepared the matter for trial, obtaining up-to-date medical reports etc. Mr. Steinfeld's working notes estimated the possible range of recovery for the plaintiff as between $850,000 and $1.25 million, if all went well, but concluded that a $700,000 award would be a "home run". The plaintiff, largely based on the economic report of Ms. Cara Brown and legal research he had personally conducted, formed the firmly held belief that his case was worth $2 million. Mr. Adeshina was informed by the McLeod defendants that his desired amount was "completely unrealistic" and that an offer of $2 million to the defence was in essence a waste of time. There were memos to file by the McLeod defendants to confirm this advice to Mr. Adeshina.

Approximately one month before trial, Mr. Muller, who had taken over carriage of the file within the defence firm, noted the disbursement of the Mandel assessment testing in the bill of costs filed by the Litwiniuk defendants at the JDR, requested production of the test data, and when this request was refused by Mr. Steinfeld, brought an application to compel production of the test data, which was successful. The defence then retained their own expert to analyze the data and the result was a very negative report prepared by Dr. Braxton-Suffield, essentially repeating the assessment of the plaintiff as a malingerer. Mr. Steinfeld copied the plaintiff with this report and sent a letter in which he cautioned the plaintiff about the high risk of proceeding to trial in view of such negative data. The letter of Mr. Steinfeld further cautioned

against the negative cost consequences there could be at trial for failure to accept the defendant's offer of $388,000 plus reasonable costs and disbursements.

Notwithstanding, Mr. Steinfeld and Mr. Kantor made extensive preparations for trial, including an Agreed Statement of Facts, Agreed Exhibits for the file, and a list of witnesses for the trial judge. They conducted personal interviews with all the witnesses, updated and filed all appropriate expert reports on time, briefed various points of law and outlined the questions and areas to be covered in direct examination. The plaintiff was prepped to give his testimony by way of in person meetings which involved mock examinations in chief and cross examinations. Mr. Steinfeld received the instructions of his client to file a formal offer for $595,000, which offer was not accepted. Mr. Adeshina then sought the services of various lawyers to see whether they could take over his case on the eve of trial as he was not pleased with the amount of the latest defence settlement offer. These lawyers were not prepared to take carriage of the file and two of them said that he was in good hands with Mr. Steinfeld. Mr. Steinfeld then spoke with the family doctor Dr. VanGoor, who telephoned Mr. Adeshina recommending settlement. Following this call the plaintiff signed handwritten instructions for Mr. Steinfeld to accept the offer of $388,000 plus costs from the defence.

Mr. Adeshina then sued both the Litwiniuk law firm and the McLeod law firm, claiming that he had been pressured into settlement and that his damages should be assessed at the $1.8 million he should have received for his injuries, less the settled amount. He alleged negligence against the Litwiniuk law firm for including a reference to the Mandel disbursement in the bill of costs at the JDR, which led to disclosure of the negative testing results, and alleged negligence as against the McLeod defendants for their substandard advocacy with respect to production of the Mandel test data, and for pressuring him into a settlement to advance their own business interests, among other things.

At the outset of her judgment S.L. Martin J appears to endorse the more passive role of the lawyer, and states at paragraph 106:

> The fundamental characteristic of the lawyer – client relationship is that the client makes the decisions, as it is the client's rights and interests at stake. In essence, the lawyer advises and the client instructs. The lawyer's advice must be reasonable and competent. **While the client must be properly informed of available options**, there is no similar expectation in relation to decisions made by the client. The client will have individual needs and motivations and is believed to be in the best position to assess his or her best interests and to select the preferred course of conduct. The client engages in a multifactoral and contextual decision-making process, in which the client is permitted to place whatever weight he or she wants on the various considerations at play. (Emphasis added)

Later S.L. Martin J expands upon the duty of a lawyer to "advise and warn" a client so that a client might fully appreciate the risks of a particular course of conduct, at paragraph 374:

> A lawyer owes a separate duty to disclose to his or her client all information relevant to the matter for which the lawyer has been retained. While this is sometimes seen as falling under the rubric of negligence, it is better seen as part of the fiduciary obligation. **In some respects this fiduciary duty parallels the duty at common-law to advise and warn so that a client might fully appreciate the risks of the particular course of conduct**:... (Emphasis added)

And further at paragraph 380:

> Sometimes a lawyer's breach of the duty to advise and inform occurs for the failure to advise the client seek and obtain independent legal advice...

What benchmarks can we therefore take with respect to the role of the personal injury lawyer from this decision?

- **A lawyer owes a <u>duty to disclose</u> to his or her client all information relevant to the matter for which the lawyer has been retained.**

- **A lawyer has a <u>duty to advise and warn</u> the client so that the client can fully appreciate the risks of a particular course of conduct.**

- **Sometimes this duty to advise and inform the client will include an obligation to advise the client to seek and obtain independent legal advice.**

Kitching is even more explicit as to the required active role of the lawyer. The plaintiff Mr. Kitching was involved in a two vehicle accident at an intersection in Northeast Calgary and retained the defendant lawyer Mr. Devlin QC to get him fair compensation for the injuries he suffered. At the time of trial Mr. Kitching was 43 years old and had lived in Calgary for the past 15 years. At the relevant times Mr. Kitching was living in a common-law relationship with Ms. Guy. Mr. Kitching subsequently married another woman and had children. Between 2000 and 2005 he operated a successful drywall taping and finishing service as a sole proprietor. This business was growing by October 2007 and he had recently hired two new employees. The accident occurred on October 11, 2007 when Mr. Kitching was driving to work in his truck. Three of his employees were in the passenger seats. Mr. Kitching was driving northbound on 36 Street Northeast and was three quarters the way through the intersection when his vehicle was struck on the left side by a van operated by the defendant Wyatt. Mr. Kitching lost control of his vehicle and it was sent off the roadway toward a nearby daycare, where he crashed through the steel and chain link fence, through the daycare's playground, the concrete posts of an overhead sign, and playground equipment, until it finally stopped partially through a brick wall of the daycare. Mr. Kitching lost consciousness for up to two minutes. EMS attended at the scene and one of his employees' father drove Mr. Kitching to the nearby hospital, where a cast was put on his right wrist and he was released with instructions to contact his family doctor.

Mr. Kitching was still in severe pain one month following the accident, was using painkillers and could not return to work. Three months after the accident his pain continued and he had shut down his business. He experienced significant difficulties walking, laying down, sitting, sleeping and doing even simple actions such as lifting his arms. He stated that chronic pain prevented him from returning to any kind of employment. When asked about his symptoms at the time of trial he stated that he felt "virtually the same" and was still on the same medicine regimen and attended physiotherapy three times per week. He did not work and his wife and children handled all of the housework. He received disability coverage from the Canada Pension Plan and eventually received benefits from the Assured Income for the Severely Handicapped program. He underwent numerous medical examinations and was diagnosed by several of the doctors as suffering from Complex Regional Pain Syndrome, which is an uncommon form of chronic pain that affects the arms or legs. By the time of the JDR the treating physician records revealed uncertainty as to whether he continued to suffer from CRPS.

Mr. Kitching retained Mr. Devlin to advance his case and entered into a Contingency Fee Agreement. Mr. Devlin filed a statement of claim seeking damages, and prepared Mr. Kitching for approximately one hour for his questioning. During this time period Mr. Devlin also assisted Mr. Kitching with some other legal issues that he had, including indebtedness on a credit card to a bank. Mr. Devlin did not charge Mr. Kitching for these additional legal services.

Mr. Devlin and defence counsel Mr. Verjee agreed to participate in a JDR and Mr. Devlin informed Mr. Kitching that he would need to retain three experts in order to prepare reports for the JDR: a neuropsychological report, an actuary report and a neural – assessment to refute any suggestion that Mr. Kitching's problems were psychological. Ultimately the neuropsychological report was not obtained because Mr. Devlin did not believe there was evidence of a brain injury or cognitive dysfunction. Mr. Kitching was suffering financial pressures so Mr. Devlin and Mr. Kitching entered into a revised Contingency Fee Agreement

whereby Mr. Devlin would pay for the disbursements for the expert reports upon receipt of a higher percentage fee.

The primary allegation of professional negligence against Mr. Devlin was that he had failed to obtain the requisite expert reports to establish the "building blocks" necessary to quantify the damages of Mr. Kitching in preparation for the JDR. Mr. Devlin testified that since the medical reports from the treating physicians conflicted with each other he did not retain an occupational therapist to prepare a functional capacity evaluation, a housekeeping assessment, nor a future cost of care report. Neither did he retain a vocational therapist to prepare a vocational residual capacity evaluation, which would show what income Mr. Kitching could earn in a different job if he could not return to his prior position. Mr. Devlin reasoned that these reports would not be helpful at the JDR because they based their findings on the medical diagnoses, which he believed were largely inconclusive in the case. Mr. Devlin did request a future loss of income and future cost of care economic assessment from an economist at Economica, based on assumptions that Mr. Kitching was not working and was not able to work in the future. Mr. Devlin testified that he would provide the economist with the subsequently obtained report of an occupational therapist before trial and ask for a revised report. Once the revisions were complete Mr. Devlin would provide all of the expert reports he was to obtain by the required date in advance of the trial. Mr. Devlin also arranged for Mr. Kitching to attend an Independent Medical Examination but, in the result, the doctor's findings called into question the diagnosis of CRPS. No report was therefore prepared.

Mr. Devlin prepared a brief for the JDR and copied Mr. Kitching with the brief. Mr. Kitching was not happy with the draft and Mr. Devlin incorporated various comments, corrections and suggestions by Mr. Kitching, including in respect of the quantum being claimed, into a revised JDR brief. In the revised brief Mr. Devlin claimed on behalf of Mr. Kitching relief for damages, future loss of income and other heads of damages in an amount totaling over $1 million. The brief also indicated that relief was sought for future cost of care expenses which were to be

estimated and could be as high as an additional $1 million. Included in the JDR brief were medical reports prepared by Mr. Kitching's treating physicians and the physiotherapist. Mr. Devlin and Mr. Kitching then subsequently met to prepare for the JDR and discussed the claim, the accident and what to expect at the JDR. Mr. Kitching testified that, prior to the JDR, Mr. Kitching and Mr. Devlin did not agree to a range of numbers that Mr. Kitching would limit his claim to for the purposes of settlement, nor had they discussed a "lowest" settlement number range that would be acceptable.

At the JDR Mr. Devlin took a very active role, shuttling between the parties in an effort to effect a settlement. Defence counsel Mr. Verjee took the position that Mr. Kitching was contributorily negligent to the extent of 50%, that he had eyewitness testimony to substantiate this claim of the contributory negligence of Mr. Kitching, that he had surveillance evidence as well that would diminish the plaintiff's claim, and that the defence was not willing to pay any more than five years of income replacement for future wage loss. Further, at the JDR Mr. Verjee produced a doctor's report which, if accepted by the court, would have strongly diminished the claim of the plaintiff. Mr. Devlin related all of this to Mr. Kitching, and also reminded Mr. Kitching of the positive aspects of his case. Mr. Kitching requested to speak directly to the defence counsel Mr. Verjee to discuss the negative doctor's report, and did so. Mr. Verjee advised Mr. Kitching that if he did not accept the settlement offer, the defence would make a formal offer to settle for $350,000, or a different number, which Mr. Devlin later advised him would have cost consequences. Mr. Devlin agreed to reduce his contingency fee from 35% to 25% in order to effect the settlement. A lunch break was then taken away from the meeting rooms during which Mr. Kitching and Ms. Guy had an opportunity to talk. Following this break, Mr. Kitching advised Mr. Devlin that he would accept the defence offer. Mr. Devlin had not advised Mr. Kitching of what range of damages he could expect to obtain at trial, but he had told Mr. Kitching at the JDR that it would be hard to do any better at trial than the $350,000 settlement offer.

Several days later Mr. Kitching wrote an email to Mr. Devlin outlining why he was not satisfied with the settlement reached. At this time he did not state that he was pressured into the settlement. He requested that Mr. Devlin take the matter up with defence counsel again to achieve a higher number. Mr. Devlin replied in detail to his concerns and stated that reneging on the settlement would be unethical and if he did so Mr. Kitching would have to find a new lawyer. Contemporaneously Mr. Devlin wrote a detailed memo to file summarizing what transpired at the JDR.

With respect to the role of counsel, P.R. Jeffrey J also states that it is necessary for the lawyer to present the client with his or her available options, at paragraph 125:

> ***Adeshina*** at para 106 describes the dynamics of the lawyer – client relationship in circumstances similar to this case. **After reasonable and competent research and diligence, the lawyer should present the client with his or her available options.** The client, and not the lawyer, makes the ultimate decisions as to which option to pursue. This is because the client knows his or her individual needs and is in the best position to assess his or her interests and select the appropriate course of conduct. The client may place whatever weight he or she wants on the various considerations. **In other words, the lawyer advises and the client instructs**. (Emphasis added)

With respect to advising the client regarding settlement in a situation where certain information may be missing, (as in ***Kitching***, where not all of the expert reports had been obtained), P.R. Jeffrey J states at paragraph 128:

> Lawyers have specific obligations when advising clients whether to accept a settlement. The Alberta Court of Appeal held in *Webb v. Birkett*, 2011 ABCA 13, at paras 54-56, the lawyer must obtain "sufficient reliable information" in order to advise the client, when in the family law context. **If that information is not complete, the lawyer must advise his or her client that they may be accepting less or paying more than what would be required according to law. To the extent possible, the lawyer should provide the client with an assessment of the value of what might be lost or paid over what was**

> **necessary on the basis of the information then available. The lawyer should also discuss with the client the reasonableness of the proposed settlement and the pros and cons of that settlement in comparison to other available options**. (Emphasis added)

And further at paragraph 253:

> I accept Mr. Rodin's [the defence expert] conclusion that Mr. Devlin attended the JDR with a sufficient amount of medical evidence to be able to participate in the JDR and further to recommend settlement there. More important, in the absence of evidence responding to a critical challenge to the claim is whether the lawyer adequately explains the situation to the client when recommending settlement. For the client to make an informed decision, the lawyer can satisfy that obligation by explaining any deficiencies in the evidence procured to date and of the risks that declining settlement, for example so that such missing information can be generated, may result in adverse not favorable evidence. T**he lawyer must try to help the client understand the more likely potential legal outcomes from the different options facing them (in this case settling or not settling), plus facilitate the clients consideration of their own individual unique drivers.** Examples are their own particular values, inclinations, objectives, risk appetite, insecurity or confidence, financial pressure, disdain for trial, availability for further litigation process given other demands on their time, and so on. (Emphasis added)

And explicitly with respect to the passive versus active role of the lawyer, at paragraphs 273-278:

> I find that Mr. Kitching was the sort of client that wanted to be more involved in his case than less. This was manifest, for example, in his careful line by line review of the JDR Brief and his insistence at speaking directly with Mr. Verjee towards the end of the JDR meeting.
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> That inclination is not necessarily a bad thing or a good thing; everyone is different. Mr. Kitching's nature and preference was to understand and to be involved. It influenced his expectations of Mr. Devlin. Mr. Kitching was not the sort to leave things with his lawyer and accept whatever that lawyer may wish to do or decide for him. He wanted to understand all that might occur as the process unfolded and to be guided by his lawyer

in how to act, behave and speak, to maximize his compensation but also just because it was his way. He wanted to understand in advance the traps he feared may be laid for him by the lawyer opposite, the pitfalls, the dangers, and the risks. These are all very normal concerns and stresses for which one's lawyer can be looked to for guidance. Mr. Kitching did not always know what to ask from Mr. Devlin, but expected his counsel to let him know what he would need to know.

Some lawyers encourage such engagement by the client, in part so the client feels they are well served through the process, regardless of the result of the process, and so that they can provide informed instructions when called on to do so. If taken too far by a client, however, such intense engagement can indicate a desire on their part not just to maximize their legal position but to manipulate and control the process in an effort to achieve an outcome that exceeds their due. The lawyer must not countenance that....

... The lawyer must do their best to ensure the client is brought to a place of sufficient understanding on all decisions the retainer agreement between them leaves to the client.

Prudent lawyers will discuss with their clients periodically, but certainly at the outset of a retainer, the sorts of decisions that will arise if the retainer is performed. They will seek to agree on the scope of authority of the lawyer to make decisions alone and those which the properly informed client will make. They will discuss the nature and frequency of reporting expected. They will discuss how the client can draw to the lawyer's attention any questions or concerns about the work product or about the solicitor client relationship ...

While good counsel fashion their approach to suit the client's needs, this does not mean counsel fall short of the standard of care every time a client's informational need is, unreasonably, for coddling or for comprehensive, patient, painstaking repeated explanations, and that need goes unmet. The test is objective, not subjective. (Emphasis added)

The benchmarks then:

- **If information is not complete in settlement negotiations, the lawyer must advise his/ her client that they may be accepting less or paying more than will be required according to law. To the extent possible, the lawyer should provide the client with an assessment of the value of what might be lost or paid over what was necessary on the basis of the information available.**

- **The lawyer should also discuss with the client the reasonableness of the proposed offer and the pros and cons of that settlement in comparison to other available options.**

- **Prudent lawyers will discuss with the clients periodically, but certainly at the outset of a retainer, the sorts of decisions that will arise as a retainer is performed. They will seek to agree on the scope of authority of the lawyer to make decisions alone and those which the properly informed client will make.**

- **They will discuss the nature and frequency of reporting expected.**

<u>Scope of the obligation to obtain expert reports</u>

At the heart of the allegations against Mr. Devlin in ***Kitching*** was that he had not obtained sufficient expert reports in order to properly evaluate his client's case prior to settlement at the JDR. Mr. Kitching called Mr. Helmut Berndt as an expert and Mr. Berndt put forward the "building blocks" thesis of the scope of the obligation to collect expert reports. In Mr. Berndt's view, as set out in the judgment, expert reports were necessary to properly assess the magnitude of the plaintiff's personal injury claim. It seems that in his view the primary building block would be prepared by an occupational therapist and would opine on whether the plaintiff could perform some or any of the functional duties or activities of his pre-accident employment. Further, the occupational therapist would also report on the cost of future care, and provide a housekeeping assessment which would address how much the plaintiff would need to pay other people to get the things done around the home that he could no longer do. A vocational expert would be retained to prepare a vocational residual capacity evaluation which

would determine whether the plaintiff could be retrained for a different occupation and what impact that would have on his income. Mr. Berndt advanced a standard of care that required a "complete quantification of all of the heads of damages, assisted by appropriate expert evidence" before settlement discussions could occur, such as in a JDR. He acknowledged, however, that a client could settle cases without all of the necessary information as long as the lawyer told the client what information was missing.

The defence expert, Mr. Rodin, took a different view. He advocated for a more practical, flexible and less robotic standard of practice and stated that, before negotiations for settlement could occur, the counsel and the client only need know "the potential magnitude of the claim". In other words, the standard of care would be to quantify the maximum amount of damages before attempting to settle a file. Although expert reports would be required to prove damages at trial, they were not necessary for a JDR, and indeed it may be ill advised to seek out some expert assessments that could be harmful to a plaintiff in advance of settlement negotiations. He accepted Mr. Devlin's explanation that he had not ordered the various expert reports because there was too much uncertainty around Mr. Kitching's future medical prognosis. While the various expert reports were the building blocks, "maximal medical improvement" is the foundation upon which those blocks rest.

P.R. Jeffrey J concludes at paragraphs 208 – 213:

> ... Since the circumstances did not require Mr. Devlin to order a FCE [the occupational therapist report], he cannot be faulted for not ordering either of these additional reports.
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> Based on the totality of the evidence, I find that Mr. Devlin's actions did not fall short of the standard of care in preparing the evidentiary foundation for the JDR. JDRs, like trials, proceed at a point in time, on the basis of the best evidence then available. **Lawyers help their clients by putting forward the best case they can from that available**

evidence, emphasizing the strengths of the client's case and acknowledging but downplaying the weaknesses. They do so for that client in the manner required by the particular process, here by preparing the JDR Brief, preparing them self and preparing the client.

Mr. Devlin put forward Mr. Kitching's best position, in a manner suitable for JDR, by procuring and presenting the "high-end" case, maintaining the position for settlement purposes that Mr. Kitching was permanently and fully disabled.... **He also prudently avoided acquiring still further information that had a higher risk of eroding than it did of helping Mr. Kitching's position...**

Lawyers are not required in all cases to procure every expert report before settlement discussions can occur. Expert reports are expensive and take time. The standard of care proposed by Mr. Berndt would frustrate parties' interest in resolving disputes.

The Alberta Court of Appeal in *Webb* acknowledges, as did Mr. Berndt, that a client can settle without having all of the necessary information. A party never has all *possible* information. The objective is to have sufficient reliable information. What is sufficient varies by case. It is a function of such things as the stage of the process in which settlement is contemplated, the nature of the claim and any competing claims to be defended, the particular client's litigation objectives, appetite for continuing the fight and availability for added steps in the process, what might be thought to "work" for any known tendencies of the party opposite, and so on. (Emphasis added)

Benchmarks:

- **Lawyers are not required in all cases to procure every expert report before settlement discussions can occur.**

- **Lawyers may proceed in the JDR on the basis of the best evidence then available, and put forward the best case they can from the available evidence – they should procure and put forward the "high-end" case.**

- **Lawyers should avoid acquiring information that has a risk of eroding the position of their client.**

<u>Need a lawyer give an estimate as to the range of damages likely at trial before settlement?</u>

It was clear in the ***Kitching*** decision that Mr. Devlin did not quantify a range of damages that he could expect to obtain at trial for Mr. Kitching prior to settlement. However, Mr. Kitching insisted on input in drafting the final form of the JDR brief and was familiar with all of the materials heading into the settlement discussion at the JDR. In Mr. Rodin's view, a lawyer should never tell a client what they could expect to obtain at trial because a trial was unpredictable and a lawyer should not unjustifiably raise a client's expectations. In the result, P.R. Jeffrey J held that Mr. Devlin had not breached the standard of care by failing to give Mr. Kitching a range of damages that he might expect to obtain a trial. He states at paragraphs 219 – 220:

> Regardless of when it is in the litigation process that settlement is contemplated, with less information the lawyer's commensurate advisory duties are heightened. Notwithstanding the difficulties in forecasting an injured plaintiff's success at trial, it is not an impossible task. But it must be done in a way that reflects the uncertainty inherent in the nature of the file. In the context of personal injury law, forecasting does not need to be precise and their accuracy depends on how many variables are controllable, what information is known, and what information is unknown. Whenever a forecast is made, the lawyer should help the client understand it in context, such as it being a function of certain assumptions that would have to be proven at trial for the forecast to be reliably reflect [sic] the possible trial outcome. **However, a lawyer is not obligated to give a client a forecast if the circumstances make it unreasonable to do so. If that is the situation, the lawyer must explain that to the client.**
>
> **A lawyer may reasonably opine on what a claim might be worth before any information other than the client's description of symptoms and cause are provided.** This is not negligence.... **In each situation the lawyer must make clear the basis for the opinion, stating what is assumed and what sorts of future events may cause the**

> **opinion to no longer be reliable**. It will always be subject to caveats and assumptions; some will be obvious and go without saying while others will need to be expressly stated. That need to do so will vary situation by situation, based in large part on the level of understanding of the particular client. An opinion is not rendered negligently merely because the client is not told everything that is known to be unknown, particularly when the context of the communication (including the solicitor client exchanges up to then) gives the lawyer sufficient confidence, as was the case here, that the client already knows what information remains outstanding. (Emphasis added)

And further at paragraph 249:

> ... Mr. Devlin *may* have had in mind specific or even approximate numbers for maximum and minimum recoveries at trial, or high and low estimates of recovery at trial, **but he was not under any obligation to tell them to his client**. A lawyer is not negligent for not doing so. (Emphasis added)

Benchmarks:

- **A lawyer is not obligated to give the client a forecast if the circumstances make it unreasonable to do so.**

- **A lawyer may reasonably opine on what a claim might be worth before any information other than the client's description of symptoms and cause are provided. In each situation the lawyer must make clear the basis for the opinion, stating what is assumed and what sorts of future events may cause the opinion to no longer be reliable.**

<u>A Contrasting View</u>

A contrasting view of the standard of care of a personal injury lawyer on the above points, more akin to that expressed by the expert Helmut Berndt in the ***Kitching*** decision, was recently expressed by R.S. Veale J in ***Knapp v. James H. Brown Professional Corp. (c.o.b. James H. Brown & Associates)***, 2015 YKSC 22, [2015] Y.J. No. 39. In ***Knapp*** the 45-year-old female

plaintiff, an Austrian citizen who was generally employed as an accountant, was injured in a motor vehicle accident in September 1999 on the Top of the World Highway northwest of Dawson City, Yukon. The plaintiff was sleeping in the sleeper portion of a truck, unrestrained by a seatbelt, at the time of the accident. The truck, driven by her common-law spouse, entered the ditch and rolled over, trapping the plaintiff in the truck for over two hours. She was transported by ambulance to the Dawson City Nursing Station where she was diagnosed with a possible wedge fracture of the 10th thoracic vertebrae of her spine. She was fitted with a back brace and prescribed analgesics. She used the brace for approximately 2 months. She returned to Austria for a period of employment and received further treatment there. She then immigrated to Canada in November 2000, where she consulted an orthopedic surgeon and a spinal surgeon and had chiropractic treatments.

She retained James P. O'Neill of James H Brown & Associates to pursue a personal injury action on her behalf. She signed a Contingent Fee Agreement and completed a "Personal Injury Questionnaire", which had a section entitled "wage loss". She was advised to keep a diary of how the injuries affected her. She was also given a document entitled "Personal Injury Instructions to Client" which discussed a potential claim for lost wages and earnings. Just prior to the expiration of the limitation period a statement of claim was issued and approximately 4 months later Mr. O'Neill wrote a letter to the insurer setting out itemized figures at which he was prepared to recommend settlement. He did not have instructions from the plaintiff to send the letter and he did not provide her with a copy. This letter to defence counsel enclosed two medical reports but did not set out the nature of the plaintiff's injury, the degree of pain and suffering of the plaintiff nor the impact on her life and ability to work. The letter did not provide case law in support of any position of the plaintiff, including that her reduced work capacity was permanent if treated without surgery. Further, the trial judge noted, O'Neill did not at any time in his retainer send a letter or memorandum to the plaintiff setting out the claimed heads of damages, ranges of dollar values for each head of damages, nor an overall value of the claim. He did not advise her in writing of items that might reduce her claim such as the seatbelt

defence put forward by counsel for the insurer, and the possible percentage amount of the potential reduction.

The insurer's defence counsel responded with a counteroffer. A student in Mr. O'Neill's office prepared research analysis of the viability of the seatbelt offense. Although photographs of the accident scene were available, Mr. O'Neill did not keep the photographs in his file and took no further steps to have an expert analyze the accident scene vis-à-vis the alleged seatbelt defence.

A mediation was arranged. The mediator requested a two or three page summary of the issues as "helpful but not necessary" prior to the mediation, but Mr. O'Neill did not prepare a summary nor a mediation brief. The mediation agreement was not mailed to the plaintiff prior to her attendance at the mediation meeting and she testified that she did not understand the finality of the mediation process. In the professional negligence trial the judge flagged the deficiency in note taking of Mr. O'Neill. In preparation for the mediation Mr. O'Neill prepared five pages of notes which documented for the first time the plaintiff's income history pre-and post accident. The notes did not indicate a discussion of any of the heads of damages claimed, including loss of capacity to earn income, nor was there a discussion of the seatbelt issue nor the total claim to be advanced at mediation. There was no notes regarding a discussion with the plaintiff of the risks of settling early, prior to her intended surgery, or settling without the required expert reports, and an estimate of what she would be sacrificing. It was the testimony of Mr. O'Neill that the plaintiff wanted to settle as financially she could not wait, but this testimony was not accepted by the trial judge. The photographs of the accident scene and the damage to the tractor cab were not present at the mediation. The plaintiff was not advised by Mr. O'Neill as to the potential value of her future earning capacity. At the mediation Mr. O'Neill advised the plaintiff that if she did not accept the offer proposed she risked a seatbelt defence reduction of 0 - 75%, no income recovery because she was working at 100% in March 2000, and that she could be ordered to pay court costs. Mr. O'Neill further said that he would not take the case to court and she would have to get a new lawyer if she did not accept the settlement. The

plaintiff signed a Memorandum of Agreement produced by the mediator, and later signed a Final Release. The trial judge found that she was pressured into a settlement.[v] The plaintiff later resiled from the settlement and commenced an action against the lawyer O'Neill.

In the result of the professional negligence action, the trial judge found that O'Neill was negligent for failing to research the British Columbia and Yukon case law to reach an informed opinion prior to sending the initial settlement letter, and for having failed to obtain instructions from his client.[vi] Further, although the trial judge realized that it was important to keep a client's expectations in check, there was an overriding duty to inform the client and obtain the client's instructions prior to sending an opening settlement offer. A reasonably prudent lawyer would review the case law and each head of damage before sending a settlement offer to ensure that it comprehensively addressed the claim, and also assess the impact of the seatbelt defence before the defence lawyer raised it.[vii] The trial judge held that the case should have been built in a structured fashion, which would include a functional capacity evaluation, vocational assessment and an economic report.[viii] Further, he held that reasonably prudent plaintiff counsel will prepare for mediation in the same way they would prepare for trial, unless they had express and informed instructions not to do so. This includes securing any expert reports and thoroughly canvassing the law.[ix] In these regards the judgment of R.S. Veale J in ***Knapp*** stands in stark contrast to that of P.R. Jeffrey J in ***Kitching.***

To the extent that ***Knapp*** does not explicitly conflict with ***Kitching*** and ***Adeshina***, what benchmarks can be deduced?

- **There is nothing inherently wrong with the wording "I am prepared to recommend settlement" in a letter to defence counsel, as long as the recommendation is based on research and an evaluation of damages, and, most importantly, the client's instruction.[x]**

- **Research must be done within the context of case law of the appropriate jurisdiction.**

- **If there is a question about a possible seatbelt defence, it is incumbent on plaintiff's counsel to thoroughly examine the issue and determine whether or not the defence is viable. The onus is on the defendant to prove that the seatbelt was not in fact worn and also that the injuries would have been prevented or lessened if the seatbelt had been worn. A blanket concession of a percentage reduction as a result of the seatbelt defence in the absence of such analysis does not meet the standard of care.[xi]**

- **Briefs or Mediation Summaries and case law, while optional for mediation, "are nonetheless absolutely essential where counsel wish to convince the other side or the mediator of their views on the law or practice".[xii]**

- **It is incumbent on plaintiff's counsel to provide his/her client with the Mediation Agreement prior to the mediation meeting and adequately prepare the plaintiff for the role he/she will play at the mediation.[xiii] More particularly, such preparation should include:**

  – An explanation as to why the mediation is potentially beneficial in the case;

  – An explanation as to the mediation process in detail;

  –An explanation to the client of his or her role in the mediation;

  – – Advice to the client as to what your opening position will be, and why, and, having reviewed the opening position, obtaining the instructions of the client;

  – Advice to the client as to where you realistically expect settlement can be reached;

  – A thorough review of the evidence and the arguments you intend to present;

  – A thorough review of the evidence and arguments you expect the other side to present;

> **– Make sure your client is completely comfortable with plans to proceed to mediation and that the client has complete confidence in the battle plan you are prepared and your ability to carry it through.**[xiv]

- **A reasonably prudent plaintiff's lawyer is concerned about a client seeking an early settlement and would, at the very least, set out the pros and cons in writing and have the client sign acknowledging receipt and confirming the early settlement instruction.**[xv]

<u>Substandard Advocacy</u>

Although to be clear, in the result of ***Adeshina*** Mr. Steinfeld was found not to be negligent. He was found to have not met the standard of preparation expected of a reasonably competent advocate in his response to the application by the defence to obtain disclosure of the Mandel test data, however, which the judge characterized as "substandard advocacy". It was disclosure of this negative test data that allegedly contributed to Mr. Adeshina's decision to accept what to him was an improvident settlement offer. Mr. Steinfeld was faulted for not being completely conversant with the file such that he could rebut the defence submission that they had just learned about the Mandel test data some three weeks before trial. In fact notations regarding the Mandel data were in the bill of costs filed at the JDR, a considerable time earlier.[xvi] With respect to the standard of care of a lawyer in morning chambers, S.L. Martin J states at paragraph 207:

> An advocate is expected and relied upon to follow customary practices and common expectations around research, evidence, and the presentation of argument. There is an expectation that the lawyer knows the law in the case he or she is presenting. **A competent lawyer is expected to prepare thoroughly, marshall available facts and applicable legal principles, and put forward arguments in support of his or her client's position.** (Emphasis added)

And more fully at paragraph 280:

> ... The conduct necessary to meet the standard of care required to prepare for a chambers motion is conduct of a more non—technical nature, and the standard of care can be set in the absence of expert opinion. The role of an advocate is to marshall facts to convince. **The primary pillar on which persuasion rests is preparation.** The customary norm is that counsel is expected to know both the law and the facts, and the courts and clients are entitled to rely on full preparation. **It is most unlikely that an expert would testify that a full review of file was not expected practice**,... (Emphasis added)

With respect to the difference between a lawyer's personal opinion and a lawyer's professional obligation, S.L. Martin J states at paragraph 259:

> The Plaintiff's argument on this point also fails to appreciate the critical distinction between a lawyer's personal opinion and a lawyer's professional obligations. In an action alleging negligent advocacy, the focus should be on whether the lawyer advanced a competent argument and not on what he or she personally thought the law was or the result should be. Daily, lawyers are called upon to advance positions that may or may not accord with their own assessment of the jurisprudence or the merits. Lawyers are retained to speak for others and are to put forward the best case possible for their clients, within the limits of the law and ethics. The key issue in the case at bar is whether the client's position was advanced with due care.

Regarding the standard of care in conducting legal research, at paragraph 262:

> The reasonably competent lawyer is not required to know and retain in memory all of the law regarding a particular legal issue. **Rather, a lawyer is required to have sufficient knowledge of fundamental principles related to the legal services being provided to alert him or her to further points to be researched**:... (Emphasis added)

With respect to the materials filed in morning chambers, at paragraph 273:

> ... The materials placed before the Chambers Justice, both in writing and orally by both counsel, were **sufficient to raise the salient issues and arguments.** (Emphasis added)

The Alberta Court of Appeal has recently commented on the standard of care regarding legal research in ***Malton v. Attia***, 2016 ABCA 130, [2016] A.J. No. 428. The appellate court, *per curiam*, states at paragraph 78:

> The trial judge was dissatisfied with the appellants' legal research in three areas. One of those related to the failure to identify binding Alberta appellate authority, which the trial judge located after writing her preliminary ruling. Whether the other problems identified by the trial judge were actually examples of substandard legal research would be, we suggest, open for debate. In any event, none of them fell short of the **ethical standard to not "deliberately refrain from informing a tribunal of any relevant adverse authority that the lawyer considers to be directly on point and that has not been mentioned by another party"**,… (Emphasis added)

Benchmarks:

- **The competent lawyer is expected to prepare thoroughly, marshal available facts and applicable legal principles, and put forward arguments in support of his or her client's position.**

- **The materials filed and arguments made must be sufficient to raise the salient issues and arguments.**

- **A lawyer is required to have sufficient knowledge of the fundamental principles related to the legal services being provided to alert him or her to further points to be researched.**

- **The ethical standard is that a lawyer should not deliberately refrain from informing the court of any relevant adverse authority that the lawyer considers to be directly on point and that has not been mentioned by another party.**

SUMMARY OF BENCHMARKS

- **The foundational standard of care of a lawyer is: (1) To be skillful and careful; (2) To advise his/herclient on all matters relevant to his/her retainer, so far as may be reasonably necessary; (3) To protect the interests of his/her client; (4) To carry out his/her instructions by all proper means; (5) To consult with his/her client on all questions of doubt which do not fall within the express or implied discretion left him/her; (6) To keep his/her client informed to such an extent as may be reasonably necessary.**

- **A lawyer owes a <u>duty to disclose</u> to his or her client all information relevant to the matter for which the lawyer has been retained.**

- **A lawyer has a <u>duty to advise and warn</u> the client so that the client can fully appreciate the risks of a particular course of conduct.**

- **Sometimes this duty to advise and inform the client will include an obligation to advise the client to seek and obtain independent legal advice.**

- **If information is not complete in settlement negotiations, the lawyer must advise his or her client that they may be accepting less or paying more than will be required according to law. To the extent possible, the lawyer should provide the client with an assessment of the value of what might be lost or paid over what was necessary on the basis of the information available.**

- **The lawyer should also discuss with the client the reasonableness of the proposed offer and the pros and cons of that settlement in comparison to other available options.**

- **Prudent lawyers will discuss with the clients periodically, but certainly at the outset of retainer, the sorts of decisions that will arise as a retainer is performed. They will seek to agree on the scope of authority of the lawyer to make decisions alone and those which the properly informed client will make.**

- **They will discuss the nature and frequency of reporting expected.**

- **Lawyers are not required in all cases to procure every expert report before settlement discussions can occur.**

- **Lawyers may proceed in the JDR on the basis of the best evidence then available, and put forward the best case they can from the available evidence – they should procure and put forward the "high-end" case.**

- **Lawyers should avoid acquiring information that has a risk of eroding the position of the client.**

- **A lawyer is not obligated to give the client a forecast if the circumstances make it unreasonable to do so.**

- **A lawyer may reasonably opine on what a claim might be worth before any information other than the client's description of symptoms and cause are provided. In each situation the lawyer must make clear the basis for the opinion, stating what is assumed and what sorts of future events may cause the opinion to no longer be reliable.**

- **There is nothing inherently wrong with the wording "I am prepared to recommend settlement" in a letter to defence counsel, as long as the recommendation is based on research and evaluation of damages, and most importantly, the client's instruction.**[xvii]

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  – A thorough review of the evidence and arguments you expect the other side to present;

  – Make sure your client is completely comfortable with plans to proceed to mediation and that the client has complete confidence in the battle plan you are prepared and your ability to carry it through.[xx]

- **A reasonably prudent plaintiff's lawyer is concerned about a client seeking an early settlement and would, at the very least, set out the pros and cons in writing and have the client sign acknowledging receipt and confirming the early settlement instruction.[xxi]**

- **The competent lawyer is expected to prepare thoroughly, marshal available facts and applicable legal principles, and put forward arguments in support of his or her client's position.**

- **The materials filed and arguments made must be sufficient to raise the salient issues and arguments.**

- **A lawyer is required to have sufficient knowledge of the fundamental principles related to the legal services being provided to alert him or her to further points to be researched.**

- **The ethical standard is that a lawyer should not deliberately refrain from informing the court of any relevant adverse authority that the lawyer considers to be directly on point and that has not been mentioned by another party.**

END

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[i] As she then was.
[ii] ***Knapp v. James H. Brown Professional Corp. (c.o.b. James H. Brown & Associates)***, 2015 YKSC 22 at paras. 47, 48, citing ***Startup v. Blake***, [2001] B.C.J. 16 and ***Chaster (Guardian ad litem of) v. LeBlanc***, 2009 BCCA 315.
[iii] ***ter Neuzen v. Korn*** (1995), 127 D.L.R. (4th) 577 at para. 33
[iv] referencing ***Central Trust Co. v. Rafuse***, [1986] 2 S.C.R. 147 at para. 58
[v] At para. 127
[vi] At para. 135
[vii] At paras. 138,139
[viii] At para. 143
[ix] At para. 163
[x] At para. 133
[xi] At paras. 158, 159
[xii] At para. 164
[xiii] At para. 169
[xiv] At para. 169
[xv] At para. 178
[xvi] In her decision, Madam Justice Martin finds that the result would have been no different with respect to the application for production of the raw data of the neuropsychologist and that production would have been ordered. She further concludes that even if all of the facts had been

provided with specificity, disclosure was supported by the correct reading of Rule 217 and would have been both a probable and reasonable exercise of judicial discretion. She also opines that even an appeal of the Chamber's Justice Order would not have been successful. She further concludes that there was no negligence by Mr. Steinfield and that Mr. Steinfield worked hard for a client whose expectations were unrealistic. The case against Mr. Steinfield and the McLeod Defendants was dismissed.

[xvii] At para. 133
[xviii] At para. 164
[xix] At para. 169
[xx] At para. 169
[xxi] At para. 178