CIVIL PROCEDURE

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I. INTRODUCTION

The survey covers those cases reported in the period from January 1, 1970, to January 1, 1972. Legislative amendments are considered only insofar as they have been the subject of litigation or judicial pronouncement.

II. JURISDICTION OF COURTS

A. *Local Judges*

On July 1, 1971 section 11 of the Judicature Amendment Act, (1970) (No. 4) [1] was proclaimed in force. This amendment extended the jurisdiction of Ontario County Court judges sitting as local judges of the Supreme Court to cover "the transacting of all such business as may be exercised . . . by the Supreme Court or a judge thereof under the Divorce Act (Canada)." [2] The legislation had previously been referred to the Ontario Court of Appeal for an opinion as to its constitutional validity. [3] It was argued against the validity of the legislation that Parliament had the undoubted power to designate the court having jurisdiction over a subject matter assigned to it by the B.N.A. Act. In the matter of divorce, Parliament had designated the trial division of the Supreme Court. In Ontario, that consists of a chief justice and twenty-six other judges of the high court and no others. It was contended that when the province attempted to make county court judges into high court judges, it entrenched upon the federal power to designate the divorce court having jurisdiction.

The Ontario Court of Appeal rejected this contention and held, following the decision of the Supreme Court in *Attorney-General v. McKenzie*, [4] that the right to grant a divorce remained vested in the high court and that the new amendment merely reorganized the administration of justice in that court by allocating divorce jurisdiction to courts presided over by local

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[1] Ont. Stat. 1970 c. 97. This appears as § 118 of the Judicature Act, ONT. REV. STAT. c. 228 (1970).

[2] *Id.* § 11(2).

[3] *Reference re* § 11 of the Judicature Amendment Act, [1971] 2 Ont. 521, 18 D.L.R.3d. 385.

[4] [1965] Sup. Ct. 490, 51 D.L.R.2d 623.

judges. Such a reorganization is within the power of the legislature under § 92(14) of the B.N.A. Act. The court pointed out that only those local judges who held patents from the Governor-General could exercise the new jurisdiction since by section 96 of the B.N.A. Act the power of appointment is federal. This meant that the county court judges in York who had formerly been excluded from the office of local judge, must receive patents from the Governor-General before exercising the extended jurisdiction.

B. *Residence*

There are conflicting decisions on the requirements of actual residence of a petitioner or respondent under the Divorce Act. The governing section, 5(1)(*b*) gives the court jurisdiction if "either the petitioner or the respondent has been ordinarily resident in [the] province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period." [5] Mr. Justice Houlden of the Ontario High Court interpreted the section to mean that a party must show ten months actual residence within the year immediately preceding the presentation of the petition. [6] He declined to follow the Manitoba Queen's Bench decision in *Wood v. Wood* [7] which held that the period from which the ten months' actual residence had to come was the period of the party's ordinary residence which had to be at least one year in duration but which was not limited to that period. This was the interpretation adopted by Mr. Justice Aikins in *Marsellus v. Marsellus.* [8] He was of the view that both constructions were reasonable but that by following the *Wood* case, gross inconvenience to persons such as members of the armed forces and civil service who were temporarily stationed abroad, could be avoided. The authors of *Canadian Divorce Law and Practice* suggest however, that until this conflict is resolved, solicitors should advise their clients according to the more restricted interpretation applied by Mr. Justice Houlden. [9]

C. *Jurisdiction of a Judge Alone*

In the case of *Anderson v. Anderson,* [10] the British Columbia Supreme Court was faced with a conflict between the procedure set out under the Divorce and Matrimonial Causes Act [11] and that specified by the Matrimonial Causes Rules, 1961. Under section 18(4) of the act an award of damages in a divorce action based on adultery is to be ascertained by a jury. Order 60, rule 19(2) of the rules, however, provides that all matrimonial causes

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[5] CAN. REV. STAT. c. D-8 (1970).

[6] Hardy v. Hardy, [1969] 2 Ont. 875, 7 D.L.R.3d 307 (High Ct.). *See also* Norton v. Norton, 14 D.L.R.3d 489 (N.S. Sup. Ct. 1970).

[7] 66 W.W.R. (n.s.) 746, 13 D.L.R.3d 383 (B.C. Sup. Ct. 1970).

[8] 75 W.W.R. (n.s.) 746, 13 D.L.R.3d 383 (B.C. Sup. Ct. 1970).

[9] J. MACDONALD & L. FERRIER, CANADIAN DIVORCE LAW AND PRACTICE 46-5 (1969).

[10] [1971] 1 W.W.R. 79, 16 D.L.R.3d 252 (B.C. Sup. Ct. 1970).

[11] B.C. REV. STAT. c. 118 (1960).

shall be heard by a judge without a jury unless, in an action for dissolution of marriage where damages are claimed, one of the parties applies for a jury trial. In this case neither party applied and the question before the court was whether a judge sitting alone had jurisdiction to award damages. Mr. Justice Munroe held that a judge alone did have such jurisdiction since by section 5 of the Court Rules of Practice Act [12] in conflicts between the Divorce and Matrimonial Causes Act and the rules of court, the latter prevail. [13]

III. Pre-Trial Procedure

A. *Writs of Summons*

(1) *Renewing a Writ*

Several jurisdictions considered applications to renew unserved writs of summons after the expiry of a limitation period. In a British Columbia case [14] the writ was issued in 1968. Over two years later, an application was made to renew it. An earlier decision of the court of appeal established the relevant principle: Where the effect of renewal will be to deprive the defendant of a limitation period which has accrued, the court's discretionary power should not be exercised in the plaintiff's favour unless he shows "very special circumstances." [15] The court found such circumstances in the following facts. Plaintiff's solicitor was having difficulty collecting medical reports from eight doctors. Protracted negotiations had been carried on between the solicitor and defendant's insurance adjuster. The adjuster knew a writ had been issued and assumed it had been maintained in effect. The adjuster also knew of the difficulty over the doctor's reports. On the basis of these facts, the court found the defendant would suffer no prejudice and granted the order for renewal. The plaintiff was put on terms that he serve the writ immediately.

An Ontario court did not consider that a solicitor's delay and a change of solicitors excused a delay of five years from the time the writ was issued until the application for renewal was made. "Judicial discretion must be exercised within the limits imposed by principles and authority, and not, of course, out of sympathy with the plight of an infant plaintiff who has been badly served by his legal advisers . . . . The proper remedy here is not against these respondents who have not in any way or at any time . . . encouraged or contributed to the failure to renew the writ . . . ." [16] The last sentence is a reference to a line of Ontario cases holding that a writ could only be renewed after the expiry of a limitation period where the defendant has lulled the plaintiff into a false sense of security, such as by promises of settlement, or

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[12] B.C. Rev. Stat. c. 83 (1960).

[13] The court cited Hepburn v. Hepburn, [1947] 1 W.W.R. 804 (B.C.) for the proposition that the Divorce Rules have statutory effect.

[14] Steneker v. Fairbrother, 71 W.W.R. (n.s.) 743 (B.C. Sup. Ct. Chambers 1969).

[15] Kelly v. Schuitema, 48 W.W.R. (n.s.) 491, 46 D.L.R.2d 38 (B.C. 1964).

[16] Power v. Anderson, [1971] 2 Ont. 739, at 741 (High Ct.).

that the writ is allowed to lapse. [17] This rigid position was ameliorated by the court of appeal in *Brown v. Humble,* [18] a case of a "solicitor's slip."

During this survey period, the Nova Scotia courts considered for the first time the renewal of a writ after a limitation period had passed. In *Moffat v. Rowding,* [19] the writ lapsed due to a solicitor's laxity. The appeal court affirmed the trial judge's exercise of discretion in favour of the plaintiff. In the absence of Nova Scotia authority, the court followed the Ontario case of *Brown v. Humble.* [20] Serious prejudice would be caused to the plaintiff if the application was refused. She was not responsible for the expiry of the writ. She was severely and permanently injured as a result of the defendant's alleged negligence. The court also took into consideration that the application for renewal was made only fourteen days after expiry of the writ. The chambers judge expressed his view that the rules should not be given a rigid and restrictive interpretation where to do so would work an injustice inappropriate to the circumstances. [21]

(2) *Service out of the Jurisdiction*

The New Brunswick Rules of Court provide that in certain specified instances, the court may allow service out of the jurisdiction. [22] For actions which do not fall within the specified types, service *ex juris* may be allowed where the court is satisfied that the plaintiff has a good cause of action and that it is in the interest of justice that the matter should be tried in New Brunswick. [23] *McCully v. Barber* [24] involved a car accident in Nova Scotia between two residents of Prince Edward Island, a situation which was not one of the specified instances. The court of first instance refused leave to serve a writ *ex juris* on two grounds. It could not be seen from the supporting affidavit that it was in the interest of justice that the matter be tried in New Brunswick. Moreover, the affidavit failed to establish the wrong complained of was actionable in New Brunswick and not justifiable by the laws of Nova Scotia. The appeal division dismissed the appeal, affirming the lower court on the first ground. In lengthy dicta, however, the appeal court considered two conflicting lines of authority in the province on what affidavit material need be filed to establish that the plaintiff has a good cause of action on a wrong occurring out of the jurisdiction. An earlier decision of the appeal

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[17] *See, e.g.,* Robinson v. Cornwall, [1951] Ont. 537 (High Ct.); McCarthy v. Kirk, [1955] Ont. W.N. 608 (Master); Sager v. Fulop, [1959] Ont. W.N. 50 (Master 1958).

[18] [1959] Ont. 586.

[19] 1 N.S.2d 489, 11 D.L.R.3d 216 (Sup. Ct. 1970); 1 N.S.2d 882, 14 D.L.R.3d 186 (1970).

[20] *Supra* note 18.

[21] 1 N.S.2d at 507, 11 D.L.R.3d at 228.

[22] N.B.R.C., O. 11, R. 1(1)(*a*)-(*b*).

[23] N.B.R.C., O. 11, R. 1(2).

[24] 2 N.B.2d 78 (O.B. 1969); 2 N.B.2d 346, 14 D.L.R.3d 216 (1970).

division [25] was overruled. It is not necessary to have affidavit evidence that the illegal wrong is not justifiable in the jurisdiction where it took place. The plaintiff is entitled to rely on a general presumption that the *lex loci* is the same as the *lex fori*. The difference between them, if any, is a matter of defence for the purpose of pleading and proof, the onus of which is on the party alleging the difference.

The British Columbia Court of Appeal clarified the practice to be followed in serving a defendant inside the province and another outside. The plaintiff had successfully applied for an order permitting the issue of a writ with liberty to serve notice of it outside the jurisdiction. On appeal, the order and service were set aside. That procedure would be necessary where there is no defendant inside the jurisdiction, but where there is such a defendant, the plaintiff should issue a writ, then apply for leave to issue a concurrent writ, and for leave to serve the concurrent writ (or notice of it, where the defendant is neither a British subject nor in a British dominion) outside the jurisdiction. [26]

In 1964, the Ontario prescribed form for third party notices was altered so that it is now issued in the name of the sovereign and contains a royal command to enter an appearance. In the case of defendants, the rules provide that where the defendant is neither a British subject nor in a British dominion, a notice of writ, which contains neither the sovereign's name nor her command, is to be served in lieu of the writ. What is the position of a third party, neither a British subject nor in a British dominion, who is served with the new third party notice? Shortly after the notice was amended, one such recipient had the service set aside as a nullity. The case was apparently overlooked when it was first decided in 1965 but is reported during the survey period with an editorial note explaining the delayed publication. [27] The rationale behind the service of a notice of a writ in lieu of a writ is that a foreigner, not subject to Her Majesty's authority, finds the royal address and command objectionable. The same rationale should apply to third party notices. An addition to the appendix of forms will avoid further attacks on the present notice as being a nullity when the third party is outside Her Majesty's dominions and is not one of Her subjects.

B. *Dismissal for Want of Prosecution.*

It is common for rules of court to provide that the defendant may move for dismissal of the plaintiff's action where there has been lengthy delay in prosecuting. [28] Until this survey period the principles applied by the courts

[25] Donald C. Miller Ltd. v. Miramichi Air Services Ltd., 44 Mar. Prov. 287 (N.B. 1960).

[26] Don's Trucking Service Ltd. v. Canadian Kenworth Ltd., 19 D.L.R.3d 705 (B.C. 1971).

[27] Nawroth v. Bernhardt, [1971] 3 Ont. 40 (County Ct. 1965).

[28] *See, e.g.*, Alta. R.C. 244; B.C. Sup. Ct. R., O. 36, R. 12; Man. Q.B. R. 284; N.B.R.C., O. 36, R. 12; N.S. Sup. Ct. R., O. 60, R. 9; Ont. R.P. 322; Sask. R.C. 193.

in deciding such a motion were fairly uniform. Where there is an inordinate delay shown (and the length of the delay considered "inordinate" will depend on the facts of the case), the courts consider whether the plaintiff has given a reasonable explanation for his delay and whether the defendant has been prejudiced by that delay. [29] Some courts went further; they considered that long delay is obviously prejudicial to the defendant and imposed an onus on the plaintiff to give a satisfactory explanation. [30] All the defendant need show in support of his motion is the mere fact of delay. The plaintiff was put in the further difficult position of having to prove a negative—lack of prejudice to the defendant. Where a limitation period has expired during the plaintiff's period of inactivity, there is also a presumption of prejudice to the defendant. If the plaintiff is successful in keeping his action alive after the inordinate delay, the defendant will have the benefit of a defence based on the statute of limitations. [31] Recently, in *Clairmonte v. Canadian Imperial Bank of Commerce,* the Ontario Court of Appeal reconsidered the principles applicable to such a motion. [32] The plaintiff issued a writ against a defendant bank in 1964. The alleged cause of action arose three years earlier. Pleadings were completed and in 1966 the defendant served a notice of production of documents. Nothing more was done by either party until the defendant moved in 1968 to dismiss for want of prosecution. A limitation period had expired and the defendant's chief witness, the bank manager allegedly implicated in the transaction complained of, had died in the meantime. The majority held that these two factors did not constitute sufficient prejudice to the defendant to warrant the dismissal of the plaintiff's action. Prejudice to the plaintiff should be weighed against prejudice to the defendant. Mr. Justice Laskin weighed the respective possibilities and probabilities of prejudice and gave his opinion "that a very strong case, much stronger than is shown by the defendant here, must be made out to justify the irretrievable demolition of the plaintiff's cause of action, especially when the defendant can be secured in costs and other terms of expedition can be imposed to avoid further delay." [33] The effect of the *Clairmonte* decision is to introduce a balancing of equities as a factor Ontario courts must consider; presumptions of prejudice to the defendant from lengthy delay and expiry of limitation periods are removed, as is the onus on the plaintiff once delay has been shown. In a later decision, the court of appeal clarified a lower court's erroneous interpretation of *Clairmonte.* It does not mean, as had been held by a master that the defendant is obliged to give warning to the plaintiff before moving for dismissal. Failure to give notice or collaborate with the

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[29] *See, e.g.,* Seamone v. Acadian Lines Ltd., 54 D.L.R.2d 442 (N.S. Sup. Ct. 1965); Russell v. Glassman (No. 2), 64 Man. 464 (1959); Halabicki v. Kuzik, 67 Man. 314 (1961); Ingle v. Peter Ucci & Sons Ltd., [1961] Ont. W.N. 318 (High Ct.).

[30] Piche v. Mitchell, [1963] 2 Ont. 193 (Master); May v. Johnston, [1964] 1 Ont. 467 (High Ct. Chambers 1961).

[31] *Id.*

[32] [1970] 3 Ont. 97.

[33] *Id.* at 112.

plaintiff's solicitor will not necessarily preclude a succesful motion to dismiss for want of prosecution. [34]

Only in very unusual circumstances can a plaintiff excuse his delay by fixing responsibility on his solicitor. In *Tiesmaki v. Wilson*, [35] the lawyer's procrastination was so extreme that the Law Society took disciplinary action against him and supplied the plaintiffs with a substitute. The plaintiffs were not themselves inactive; they had repeatedly urged the lawyer to proceed and eventually lodged a complaint with the Law Society. The court found their conduct naive but excusable. [36]

The Supreme Court of Canada considered an appeal from the Manitoba courts, where the referee, the trial judge and the court of appeal had all agreed that the plaintiff's action should be dismissed for want of prosecution. [37] The Supreme Court vacated the order of dismissal. Mr. Justice Hall, who delivered the opinion of the court, noted that its ordinary practice is not to interfere with discretionary matters of practice and procedure in a province. However he viewed this as "a special case in which the interests of justice require the Court to review what was done in the Courts below." [38] The substantial delay could be explained by the plaintiff's severe injuries combined with a progressive disability which could have been caused by the accident; medical experts were not able to ascertain this within the three-year period of delay. Unexpressed in this judgment is probably the same judicial reluctance to defeat a party's rights on a procedural point preventing a full trial of the matter as was expressed by Mr. Justice Laskin in the *Clairmonte* case: "It may very well be that [the plaintiff's] case is weak, but I have the conviction that she should be given every reasonable assistance to have her day in Court if the defendant can be adequately protected in costs and in the expedition of the trial." [39]

A 1964 addition to the Manitoba Queen's Bench Rules regarding dismissal for want of prosecution is in a dubious constitutional position. It was argued before the court of appeal that the new rule is *ultra vires* the rule-making power of the judges of the Queen's Bench because it eliminates judicial discretion in considering the motion, and thus is an interference with substantive rights and not just a procedural matter. Rule 284 and the 1964 addition thereto, 284A, read as follows:

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[34] Farrar v. McMullen, [1971] 1 Ont. 709 (1970).

[35] [1971] 2 W.W.R. 527 (Alta. Sup. Ct. Chambers).

[36] The general rule is that the lawyer's delay is not sufficient excuse to permit the plaintiff to continue his action when the defendant moves for dismissal: Alscope Explorations Ltd. v. McDiarmid, 47 W.W.R. (n.s.) 188 (B.C. Sup. Ct. Chambers 1964); Slade v. Albert, [1964] 2 Ont. 92 (High Ct. Master); Williams v. Racey, 7 W.W.R. (n.s.) 496 (Man. 1952). This is so even, as in the *Slade* case, where the lawyer has deceived the plaintiff into believing that the action was proceeding.

[37] Frank v. Albert, [1971] Sup. Ct. 637, 17 D.L.R.3d 491 (1970).

[38] *Id.* at 640, 17 D.L.R.3d at 493.

[39] [1970] 3 Ont. 97, at 112.

> 284. If the action is at issue two months before the commencement of any sitting of the court for which the plaintiff might give notice of trial, and he does not give notice of trial therefor and enter the action for trial, the action may be dismissed for want of prosecution.
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> 284A(1) Upon a motion to dismiss for want of prosecution, unless the plaintiff establishes to the satisfaction of the court that there has not been unreasonable or unnecessary delay or, if there has been undue delay, that there exists an adequate explanation and justification and that the defendant has not been prejudiced by the delay, the action shall be dismissed.
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> (2) Upon such a motion it shall not be an excuse
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> (a) that the defendant might have given notice of trial or entered the action for trial and there shall be no onus on the defendant to show that he was lulled into the belief that the plaintiff was not going to proceed with the trial;
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> (b) that the plaintiff was advised to delay by anyone other than his solicitor or counsel;
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> (c) that the delay was not the fault of the plaintiff but that of his solicitor or counsel.
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> (3) Upon such a motion affidavits shall be confined to the statement of facts within the knowledge of the deponent, and affidavits on information and belief shall not be received.

Then Chief Justice Smith and Mr. Justice Freedman (as he then was) accepted the argument that Rule 284A is *ultra vires.* The majority of the court decided the matter on the basis of Rule 284 alone and restored the referee's order of dismissal. With respect to the constitutional argument that Rule 284A is *ultra vires,* Mr. Justice Monnin (Dickson and Guy concurring) said:

> [N]otwithstanding that the Court itself has requested assistance in this aspect of the case from the Attorney-General, I am convinced after able presentation and most adequate factums that this is not a proper case to test the validity of Q.B.R. 284A. This motion should have been granted without any hesitation because of the unexplained and undue delay on the basis of Q.B.R. 284 as it stood before the amendment and as it has been in existence for many years. I am not evading a decision on a matter which is no doubt controversial and of interest to litigants and their counsel, as well as to the learned referee and the various trial judges who are constantly faced with this type of motion but it is only the duty of a court to decide the issue before it, and not to at tempt to settle the law for posterity.[40]

C. *Security for Costs*

1. *Grounds*

The Ontario Rules of Practice provide that in certain enumerated cases, a defendant may apply for an order requiring the plaintiff to give security for costs.[41] One of these instances is where the action is brought by a

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[40] Montreal Trust Co. v. Pelkey, 73 W.W.R. (n.s.) 7, at 29, 11 D.L.R.3d 101, at 122-23 (Man. 1970).

[41] Ont. R.P. 373(1)(*a*)-(*j*).

action fell within that description but resisted the defendant's application on the ground that the defendant had not discharged the onus of showing that the plaintiff was not possessed of sufficient property in Ontario to answer for the costs of the action. The Senior Master disagreed with the contention that there was such an onus on the defendant because the rule in question is entirely silent on the issue of the plaintiff's means, although other sub-sections stipulate that the plaintiff's lack of property in the jurisdiction must be shown by the defendant. Instead, the Senior Master held that there is an onus on the nominal plaintiff to show that he has sufficient property.

The plaintiff had relied on *Steinberg v. Blum* [44] which had imposed an onus on the defendant to show that the nominal plaintiff lacks means to answer for costs. It appears from the reasons in the *Steinberg* case, however, that Senior Master Marriott was influenced by the English practice. The English rules expressly stipulate that it must appear to the court that the nominal plaintiff will be unable to pay the defendant's costs. [45] Where, as in Ontario, the nominal plaintiff provision is silent regarding means, the *Steinberg* holding is difficult to rationalize. On the other hand, the making of the order is discretionary and the effect of the *Cohen* case is to better the court's discretion by imposing an onus on the plaintiff with respect to a factor regarding which the rule is silent.

Josuph v. Josuph [46] considered the applicability of the Ontario rules regarding security for costs to proceedings under the Divorce Act. Rule 374(1) of the Rules of Practice provides that a praecipe order may be obtained where it appears from the writ of summons that the plaintiff resides out of Ontario. It was held that such an order may not be obtained where the action is a divorce proceeding. Rule 2(*s*) provides that the words "writ" or "writ of summons" include a petition for divorce in Rules 12 to 31, and therefore would not include a divorce petition in Rule 374(1).

The terms of the Ontario rules appear only to contemplate an order being made against a plaintiff on the application of a defendant. It has long been held however, that the rule allows a third party to obtain an order against a defendant. In this survey period, it was held that a third party may obtain an order for security for costs against a plaintiff where the third party delivers a statement of defence to the plaintiff's statement of claim. [47]
nominal plaintiff. [42] In *Cohen v. Power,* [43] the plaintiff conceded that his

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[42] Ont. R.P. 373(1)(*f*).

[43] [1971] 2 Ont. 742 (Master's Chambers 1970).

[44] [1953] Ont. W.N. 246 (Master 1952).

[45] Sup. Ct. R.O. 23, R. 1(*b*).

[46] [1971] 2 Ont. 90 (Master's Chambers 1970).

[47] Monda v. Niagara Imperial Motel Ltd., [1970] 1 Ont. 736 (Master's Chambers 1969).

2. *Delay*

Two British Columbia cases have recently held that delay in applying for security for costs is not necessarily fatal. In *Frank Hills Logging Co. v. Hoeya Sound Logging Ltd.* [48] the application was made pursuant to section 264 of the Companies Act [49] and the delay between the application and the hearing of the motion was almost four years. The court of appeal stated that delay is only fatal if it lulls the plaintiff into a false belief that he may proceed without advancing more security. In this case the plaintiff had been told in open court that the defendant was intending to seek further security. The second case applied this reasoning to an application for security for costs made pursuant to the rules. [50]

3. *Material to be filed*

The proof required on this type of application differs from province to province. In Saskatchewan, Queen's Bench Rule 547(1) provides that a defendant must file an affidavit to the effect that he has a good defence on the merits, stating what that defence is. In *Midtown Draperies Ltd. v. Praire West Construction Ltd.* [51] two of the defendants used a letter from the plaintiff's solicitor and other materials showing the plaintiff's insolvency. Neither obtained security for costs since they had not filed affidavits as required by the rules. [52] Alberta and Nova Scotia have rules requiring similar affidavits.[53] In Ontario and British Columbia affidavits are not necessary although the courts do consider the nature of the defence when exercising their discretion in granting security for costs. [54]

4. *Effect on Order as to Costs*

In *Wellington v. Odlum,* [55] the Nova Scotia Supreme Court considered the effect on the ultimate order as to costs of an earlier grant of security for costs to one of two defendants. The plaintiff brought a negligence action against both the owner and driver of a motor vehicle. The defendant owner was given security for costs and, upon dismissal of the action against him, was awarded costs. The plaintiff was successful in his action against the other

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[48] [1971] 2 W.W.R. 471 (B.C. 1968).

[49] B.C. REV. STAT. c. 67 (1960).

[50] Officine Vittorio Ceccoli v. B.C. Hydro, [1971] 3 W.W.R. 81 (B.C. 1971). The court was considering O. 65, R. 6A, M.R. 981(*a*).

[51] 73 W.W.R. (n.s.) 69 (Sask. Dist. Ct. 1970).

[52] A third defendant was unsuccessful as the affidavit sworn and filed by its solicitor failed to name the source of the information which had led him to believe that his client had a good defence. Such information must come from an officer of the corporation. The court relied on *In re* Mintz, [1930] 1 W.W.R. 198, [1930] 2 D.L.R. 777 (Sask. 1929) where a similar omission was held to have rendered an affidavit objectionable.

[53] Scott v. Holmes, 6 W.W.R. 1190 (Alta. Sup. Ct. Chambers 1914); Black v. Siteman, 1 N.S.2d 947 (Sup. Ct. 1970).

[54] Hall v. Brigham, 5 P.R. 464 (Ont. Master's Chambers 1871), Frank Hills Logging Co. v. Hoeya Sound Logging Ltd., *supra* note 48.

[55] 19 D.L.R.3d 121 (Sup. Ct. 1971).

defendant and sought a Sanderson order [56] as to costs; that is an order that the successful defendant recover his costs from the unsuccessful defendant. The usual order, in a case where the plaintiff has proceeded reasonably in joining the second defendant, is called a Bullock order. [57] By this order the plaintiff pays the costs of the successful defendant but recovers those costs, as well as his own from the unsuccessful defendant. The plaintiff argued that this was a proper case for a Sanderson order since joining the defendant owner had been reasonable. He contended that the action against the owner had only proceeded to trial as the latter had failed to sufficiently disclose the nature of his defence in his pleadings and that as soon as it became apparent that the owner had a good defence, the plaintiff consented to dismissing the action. A Sanderson order, it was argued, would avoid circuity. The court was not persuaded. Mr. Justice Dubinsky stated that as the defendant owner was given security for costs earlier, he should not now be deprived of his rights to full costs. If he were left to recover his costs from the unsuccessful defendant, he would have to resort to Judgment Recovery which would allow him only about one half his costs.

D. *Payment into Court in Satisfaction*

A novel, although unsuccessful point was argued before the British Columbia Supreme Court. [58] The defendant, who had paid money into court in satisfaction of the plaintiff's claim, applied to have it paid back to him. He contended that the payment in constituted an offer of settlement and in accordance with contract principles, an offer may be withdrawn at any time prior to acceptance. The court noted the novelty of the argument and the lack of authority and rejected the contention. It was held that payments in are made not as offers but pursuant to the rules of court which allow certain period after the payment in during which the plaintiff has an absolute right to accept the sum paid in. Before the court of appeal, [59] the defendant abandoned his analogy to contract laws. Instead he argued that the absolute right of the plaintiff for the fourteen-day period set out in the rules may be vitiated by the plaintiff's fraud. The court of appeal agreed that the rules could not be used to cloak fraudulent conduct but dismissed the appeal on the ground that the defendant had failed to prove the fraud with the requisite particularity.

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[56] Sanderson v. Blyth Theatre Co., [1903] 2 K.B. 533. Formerly in Ontario there was a rule empowering the court to order that payment be made directly by one defendant to another (Rule 1140 of Ont. Rules, 1897). This is no longer in force but the power to so order may still be there under the Judicature Act, ONT. REV. STAT. c. 197, § 79 (1960). See HOLMSTEAD & GALE, ONTARIO JUDICATURE ACT AND RULES OF PRACTICE 342 (C. Gale ed. 1968).

A Sanderson order is often referred to as a modern version of the Bullock order. *See* Gilbert v. Barran, [1958] Ont. W.N. 98 (High Ct.); M. ORKIN, LAW OF COSTS 32 (1968).

[57] Bullock v. London General Omnibus Co., [1907] 1 K.B. 264 (C.A. 1906).

[58] Yee v. University of British Columbia, 73 W.W.R. (n.s.) 554, 13 D.L.R.3d 125 (B.C. Sup. Ct. Chambers 1970).

[59] [1971] 1 W.W.R. 761, 17 D.L.R.3d 373 (B.C. 1970).

In an unsatisfactory judgment, Mr. Justice Pennell of the Ontario High Court considered the position of the defendant if the plaintiff does not accept the sum paid into court within the prescribed period. [60] The defendant applied for it to be paid back to him and argued that once the time set out has expired, he would be entitled to such an order as of right. Pennell disagreed. He held that after the prescribed period the court has a discretion either to make or refuse an order for payment out. As he failed to give any reasons for his view, and he made the order requested without giving any of the facts which may have guided the exercise of his discretion, it is difficult to disagree with him. Unfortunately, the point does not appear to have been considered before and the judgment offers little guidance if it should arise again.

E. *Default Judgments*

The British Columbia Court of Appeal considered the effect of a 1970 amendment to the rules governing default judgments. [61] It is no longer necessary before signing judgment to file an affidavit of search in the registry for the filing of a defence [62] but the amendment left unimpaired the authority of an earlier court of appeal decision holding that there is a distinction between filing and delivering a defence. [63] It is still necessary to have an affidavit of non-delivery of defence.

A Nova Scotia plaintiff delivered a writ of summons and entered interlocutory judgment when the time for appearance had expired. He mailed the defendant a notice of a hearing for assessment of damages. All this was in accordance with the Nova Scotia Rules of Court. [64] Nevertheless the judge hearing the application for the assessment of damages required the plaintiff to file and deliver a statement of claim to the defendants. [65] The rules provide that the court in its discretion may require the filing of a statement of claim before it grants default judgment, but they are silent on the subject of delivery to the defendant. One would think that this is an instance of *expressio unius exclusio alterius* and that the judge was wrong. He gave no authority for his view; however, the procedure he required is that expressly set out in the Ontario Rules of Practice. [66]

F. *Discovery*

1. *Who May be Examined?*

The New Brunswick Rules of Court provide that persons adverse in interest may obtain an order to examine any officer of a corporate party or

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[60] A v. C, [1971] 2 Ont. 568 (High Ct.).

[61] Gordon Beach Estates Ltd. v. Bank of Montreal, [1971] 1 W.W.R. 238 (B.C. 1970).

[62] B.C. Sup. Ct. R., O. 41, R. 2.

[63] Ockey v. Dressler, 21 W.W.R. (n.s.) 522 (B.C. 1957).

[64] O. 13, R. 5.

[65] Deschenes v. Snair, 1 N.S.2d 484, 11 D.L.R.3d 613 (Sup. Ct. 1970).

[66] Ont. R.P. 44.

any employee. [67] In *MacLeod v. Saint John General Hospital*, [68] It was held that a party is entitled to examine both an officer and employees. The court viewed the purpose and intent of the rule as being "to assist the legal profession in preparing for the trial of an action . . . and to bring all pertinent facts before the court and as a result to avoid as far as possible an injustice to any party to an action because of a failure to present the full and complete case to the court." [69] This purpose and intent would be defeated if it were held that a party's right of examination were limited to a person in one class (officer), or another (employee). The effect of the decision is to read the disjunctive "or" between the two subsections of the rule, as if it were "and."

In *Kelly v. Abernethy* [70] the issue was whether a party's husband performing gratuitous services for her in the running of her business can be said to be an employee so as to allow discovery of him. The court adopted a similar approach to that used in *MacLeod*. The purpose of the rule was considered and since it is remedial in nature, the court construed it "so as to advance the remedy so far as the meaning of the words used by the legislature will permit." [71] Since the husband was performing services of the kind ordinarily performed by an employee, and the wife had authority to direct and control his work, it was not necessary to constitute an employment that he be paid for his services.

Who can be examined on behalf of a mentally incompetent not so found? The question is not covered by the Ontario Rules of Practice, but Mr. Justice Haines was of the view that if the mentally incompetent not so found is not competent to testify his guardian *ad litem* is subject to examination. [72] He based his view on two grounds. The rules provide that a party to an action may be examined; the guardian *ad litem* is a party by virtue of the definition of that word in the Judicature Act. [73] Moreover the rules provide that in all cases not covered by them, practice shall be regulated by analogy to the rules; [74] an appropriate analogy is in Rule 331 which provides that a

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[67] N.B. Sup. Ct. R., O. 31a, R. 1: Application may be made to a Judge of to the Registrar for an order that.—

(*a*) any party to an action, or in the case of a corporation any officer thereof, selected as hereinafter provided; or

(*b*) any person, including a body corporate, who is or has been an officer of or is or has been employed by any party to an action, and who is claimed to have some knowledge touching the questions in issue acquired by virtue of such employment;

be orally examined before an examiner before the trial by any person adverse in interest touching the matters in question in the suit.

[68] 2 N.B.2d 608 (Q.B. 1970).

[69] *Id.* at 610.

[70] 2 N.B.2d 749 (Q.B. 1970).

[71] *Id.* at 756.

[72] Tuition Acceptance Corp. v. Flannery, [1970] 3 Ont. 274 (High Ct.).

[73] ONT. REV. STAT. c. 228, § 1(*o*) (1970): "'party' includes a person served with a notice of or attending a proceeding, although not named on the record."

[74] Ont. R.P. 1.

guardian of an infant is subject to examination. Had he not been able to find guardian and infant sufficiently analogous to guardian *ad litem* and mentally incompetent not so found, Haines was conerned that the plaintiff might not be able to examine anyone. "The hardship which this would work is obvious and the whole principle behind our judicial system would be frustrated." [75]

2. *Opinion Edivence*

In an action for breach of a contract for the supply of pipe to transmit natural gas, the plaintiff examined the defendant's vice-president in charge of production and engineering, and the defendant's chief metallurgist. The witnesses refused to answer questions put for the purpose of obtaining their opinions on matters relating to the cause of failure of the pipes supplied. The judge of first instance granted the plaintiff's application for an order requiring the witnesses to answer. This was upheld by the British Columbia Court of Appeal. [76] The court considered that the true nature of opinion evidence of witnesses with special skills and knowledge is really evidence of fact. The specialists are "skilled interpreters of facts which other men cannot safely judge or interpret." [77] Earlier decisions of the court of appeal [78] were distinguished on the grounds that in those cases the specialist capacity of the witness was different than the capacity in which he was being examined. So, for example, a trustee in bankruptcy who was also an auditor could not be compelled to answer questions requiring his opinion on auditing practice; he was not the auditor of the company he represented in the action. [79] In the present case, however, the witnesses were being examined as officers of the plaintiff company who employed them for their special expertise. Moreover this expertise was put directly in issue in the pleadings. A decision in Ontario is in line with the above reasoning. In *Hilder v. East General Hospital,* [80] the plaintiff brought an application to require defendant doctors in a malpractice suit to answer questions designed to elicit an opinion. The doctors had pleaded that their treatment was "in accordance with the recognized and usual degree of skill and care in the specialty in which they practice." [81] The

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[75] *Supra* note 72, at 279. After the close of the survey period, Andreacchi v. Perruccio, [1972] 1 Ont. 508 (C.A. 1971) was reported. The effect of the latter case, a reference to the Ontario Court of Appeal under section 35 of the Judicature Act, is to overrule Haines J. in the *Flannery* case. The Court of Appeal held that the next friend of a mental incompetent not so found could not be examined for discovery.

[76] Westcoast Transmission Co. v. Canadian Phoenix Steel & Pipe Ltd., [1971] 1 W.W.R. 241, 15 D.L.R.3d 487 (B.C. 1970).

[77] *Id.* at 244, 15 D.L.R.3d at 490.

[78] *See, e.g.,* Blue Band Navigation Co. v. Price Waterhouse Co., [1933] 3 W.W.R. 49, [1933] 4 D.L.R. 447 (B.C.).

[79] *Id.*

[80] [1971] 3 Ont. 777 (Master).

[81] *Id.* at 778.

master noted a conflict of authority on the question [82] and preferred an approach allowing questions eliciting an opinion where the party being examined is defending his conduct and his conduct is squarely in issue in the pleadings.

3. *Use of Discovery at Trial*

In addition to assisting the examining party to know the case he has to meet, the examination for discovery also enables him to procure admissions which will dispense with formal proof of his own case or which will destroy his opponent's case. [83] Three cases arose during the survey period on the effect of using the opposite party's examination when it contradicts other evidence proferred by the examining party. In a New Brunswick case, [84] the plaintiff was found to have weakened his own case by introducing evidence of the other party which gave a different version of the speed and relative positions of cars in a motor vehicle accident. "In a sense it may be said that he approbates the evidence of the Defendant he has so put in." [85] The "approbation" is not complete however; a Nova Scotia case held that the examining party may still adduce evidence to contradict statements in the opposite party's examination which he has introduced. The court then weighs the whole of the evidence, including the discovery evidence, accepting and rejecting as it sees fit. [86] By introducing evidence on behalf of the opposite party which contradicts his own, the examining party may relieve his opponent of the need to lead any evidence. A British Columbia plaintiff gave his oral evidence of how the accident causing his injuries occurred, then read in portions of the defendant's examination which contained the defendant's explanation of the occurrence. The defendant called no evidence. The court pointed out that there was no need to put in the defendant's version, that there was no issue of credibility since the defendant did not testify in person, and his version was not challenged by the plaintiff. By putting in two contradictory explanations, the plaintiff was held to have failed to meet the burden of proof on him. [87]

4. *Psychiatric Examinations*

The statutory authority for a court to order medical examinations of parties is identical in Ontario and Manitoba: "In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily

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[82] Not allowing questions eliciting opinion evidence: Weisberg v. Kerbel, [1961] Ont. W.N. 209 (Senior Master Marriott), *aff'd* [1961] Ont. W.N. 210*n*; Preston Mines Ltd. v. Toronto Iron Works Ltd., [1962] Ont. W.N. 242 (Senior Master Marriott), *aff'd* [1962] Ont. W.N. 244*n*. Allowing such questions: Connecticut General Life Ins. Co. v. Montreal Trust Co. (High Ct. Feb. 15, 1971 unreported).

[83] Modriski v. Arnold, [1947] Ont. W.N. 483, at 484, [1947] D.L.R. 321, at 322.

[84] Hodnett v. Vienneau, 3 N.B.2d 301 (County Ct. 1970).

[85] *Id.* at 301.

[86] Traders Group Ltd. v. Carroll, 2 N.S.2d 321 (1970).

[87] Tsatsos v. Johnson, 74 W.W.R. (n.s.) 315 (B.C. Sup. Ct. 1970).

injury sustained by any person, the court . . . may order that the person in respect of whose injuries damages or compensation are sought, shall submit to a physical examination by a duly qualified medical practitioner . . . ." [88] Courts of both jurisdictions considered whether, in view of the statutory expression, "a *physical* examination," the courts have power to order a psychiatric examination. In *Rysyk v. Booth Fisheries Canadian Co.,* [89] the plaintiff, claiming damages for bodily injuries, pleaded *inter alia*: "He has suffered and is still suffering intense pain and discomfort, his enjoyment of life has been lessened and his ability to work and earn a living is seriously affected." In *Dilka v. Bender,* [90] the plaintiff alleged *inter alia*: "As a further result of the said injuries, the Plaintiff has changed from a happy, carefree young lady to an apprehensive and nervous person and she has taken psychiatric treatment and will have to take psychiatric treatment in the future." By these pleadings alleging personality change arising from physical injury, the plaintiffs put their psychiatric status in issue. The Ontario Court of Appeal in *Rysyk* upheld the trial judge's order for a psychiatric examination. This clarified conflicting decisions of high court judges on the issue. [91] The court reached its result by noting the purpose of the provisions—to provide a fair trial and a just result, and by applying the fair, large and liberal interpretation called for by the Interpretation Act so as to ensure the attainment of the object. While the court will resist an unwarranted invasion of privacy by insisting on the relevancy of the questioning, a plaintiff who puts his psychiatric state in issue cannot resist a reasonable effort by the defendant to obtain information to meet that issue. The task of the Manitoba court in *Dilka* was easier; the question had never received direct judicial consideration in Manitoba so the judge followed the Ontario Court of Appeal in *Rysyk* with which he "entirely agreed."

G. *Limitation Periods*

Two Manitoba cases considered a 1968 amendment to the Limitation of Actions Act allowing an extension of limitation periods when the intended plaintiff can establish "facts of a decisive character which were at all times outside the knowledge, actual or constructive, of the plaintiff" until a time outside the limitation period. [92] Both applications for a time extension were dismissed. The amendment was not meant to apply to a situation where, because of slow administrative procedures, the plaintiff was unable to qualify for legal aid in time to start the action within the prescribed period. [93] Nor

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[88] Manitoba Queen's Bench Act, MAN. REV. STAT. c. C 280, § 86(1) (1970); Ontario Judicature Act., ONT. REV. STAT. c. 228, § 75(1) (1970).

[89] [1971] 1 Ont. 123, 14 D.L.R.3d 539 (1970).

[90] [1971] 4 W.W.R. 580 (Man. Q.B.).

[91] *See, e.g.,* Angelov v. Hampel, [1965] 2 Ont. 178 (High Ct.), Smith v. Thyssen, [1965] 2 Ont. 797 (High Ct. Chambers) (psychiatric examination refused); Barwick v. Targon, [1969] 1 Ont. 1 (High Ct. 1968) (psychiatric examination ordered).

[92] An Act to amend The Limitations of Actions Act, Man. Stat. 1966-67 c. 32.

[93] McKay v. Winnipeg General Hospital, [1971] 1 W.W.R. 65 (Man. Q.B. 1970).

would it protect a plaintiff who had not made sufficient inquiries to turn up "reasonably discoverable" facts; instead he had relied on defendant's testimony at a coroner's inquest. This had turned out to be misleading although not deliberately so. In the latter case, the court noted that the Manitoba provision under consideration is unique in Canada although English authorities arising out of similar legislation in England are useful. [94]

The Ontario Limitations Act provides that where a person is under a legal disability of infancy or mental incompetence, an action may be brought by such person when the disability ceases although that is beyond the limitation period. [95] An infant plaintiff was attempting to sue a physician and a hospital but could not rely on the section outlined. [96] The Medical Act provides a twelve-month limitation period and the Public Hospitals Act a six-month limitation period. In neither statute is there an extension period for those under legal disabilities. The Limitations Act does not extend to any action where the time for bringing it is specially limited by another statute. [97]

In *Kushner v. Wellesley Hospital*, [98] the plaintiff sued as administratrix under the Ontario Fatal Accidents Act. The deceased had been operated on and died in hospital shortly after the operation. The hospital was unsuccessful in arguing that the action was barred by The Public Hospitals Act which provides: "Any action against a hospital or any person or persons employed therein for damages for injury caused by negligence in the admission, care, treatment or discharge of a patient shall be brought within six months after the patient is discharged from or ceases to receive treatment at the hospital and not afterwards." [99] The court of appeal held that the words "injury" and "ceases to receive treatment" in the provision are not referable to the situation where the patient has died in hospital. It would require clear language to deprive persons of a right conferred by a statute of general application existing in Ontario for ninety years (the Fatal Accidents Act).

The same limitation provision of the Ontario Public Hospitals Act was held not to apply to out-patients because the definition section of the act distinguishes between patients and out-patients. [100]

IV. TRIALS

A. *Judicial Conduct of Trials*

There have been a few significant cases in the survey period dealing with the role of the trial judge. In *Phillips v. Ford Motor Co.* [101] the Ontario

[94] McCormick v. Morrison, 73 W.W.R. (n.s.) 86, 13 D.L.R.3d 474 (Man. Q.B. 1970).

[95] The Limitations Act, ONT. REV. STAT. c. 246, § 47 (1970).

[96] Philippon v. Legate, [1970] 1 Ont. 392 (1969).

[97] *Supra* note 95, § 45(2).

[98] [1971] 2 Ont. 732.

[99] The Public Hospitals Act, ONT. REV. STAT. c. 378, § 37 (1970).

[100] Johnston v. Wellesley Hospital, [1971] 2 Ont. 103 (High Ct. 1970).

[101] [1971] 2 Ont. 637, 18 D.L.R.3d 641.

Court of Appeal concluded that in the court below [102] Mr. Justice Haines had attempted to direct an inquiry rather than preside over a trial. The court criticised his constant interruptions as going beyond the questioning necessary to clear up obscurities in the evidence and at times amounting to an assumption of the examination and cross-examination. Mr. Justice Evans considered the tests ordered to be done by the court, and commented that such procedure defeated the purpose of pleadings and discovery as it resulted in new areas to be explored by the plaintiffs and met by the defendants. "The injection of new theories of liability during the course of trial is not permitted to counsel, except in unusual circumstances, and is no less objectionable when proposed by the Court." [103] Evans said there was no doubt that Haines was actuated by the highest motives, but his zealous participation, irrespective of motive, unfortunately caused him to lose sight of the issues raised by the parties and he launched an investigation on behalf of Canadian motorists. [104]

Excessive intervention, to a lesser degree, was the sin of the trial judge in *Magel v. Krempler.* [105] The court of appeal seemed to have considerable sympathy for the trial judge who was driven to the point of taking part in examination and cross-examination by counsel's concealment of injuries suffered by the plaintiff in a previous accident. The plaintiff was also claiming damages for nervous shock but counsel had failed to disclose the fact that his client had been under psychiatric care for five years prior to the accident. Despite this justification, the court held that the trial judge had gone beyond correct procedure and had allowed himself to be drawn into the arena to the extent that he seemed like a protagonist. [106] On a review of evidence the court increased the plaintiff's damages from $200 to $1,000.

Another type of unwarranted judicial conduct arose in the case of *Austin v. Austin* [107] where a judge hearing a petition for divorce on the grounds of cruelty took in private, the evidence of the fifteen-year-old son. The judge had secured the agreement of counsel to waive rights of cross-examination and to treat the evidence as though adduced in open court. In the opinion of the Saskatchewan Court of Appeal, evidence which may have tipped the scales was given in private without the right to cross-examine or reply. Mr. Justice Brownridge said that despite the merits of a private interview of a child in custody case, this was not a proper case for such a procedure. [108]

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[102] [1970] 2 Ont. 714, 12 D.L.R.3d 28 (High Ct.).

[103] *Supra* note 101, at 659, 18 D.L.R.3d at 663.

[104] *Id.*

[105] 75 W.W.R. (n.s.) 37, 14 D.L.R.3d 593 (Man. Q.B.).

[106] *Id.* at 42-43, 14 D.L.R.3d at 599.

[107] 73 W.W.R. (n.s.) 289, 13 D.L.R.3d 498 (Sask. 1970).

[108] *Id.* at 293, 13 D.L.R.3d at 502.

B. *Status of Assessors*

Under Ontario rule 267(1) the court may appoint a skilled person to furnish assistance for the purpose of better determining "any matter of fact in question." In the *Phillips* case, [109] the court of appeal criticized the fact finding role assumed by the assessor at trial. It stated:

> The expert is not a judicial officer charged with the responsibility of determining the matters in issue, nor is he a Court-appointed investigator empowered to advance possible theories and state, as conclusions of fact, opinions based on matters not advanced in evidence. While Rule 267 permits the Court to obtain the assistance of experts in such a way as it thinks fit, such assistance must be restricted to the purpose of better enabling the Court to determine from the evidence adduced the questions of fact in issue. In my opinion [the assessor] totally misconceived his position and became, with the approval of the presiding Judge, a partisan advocate. [110]

An expert under this rule, according to the court, ought not to determine questions of fact nor should he examine and cross-examine witnesses. His function is limited to explaining to the judge evidence adduced by the parties which is within his sphere of expertise. [111]

C. *Solicitors*

There are several cases dealing with solicitors' slips. In two of these cases, *Gomez v. Gomez* [112] and *Miller v. Miller,* [113] section 13(3) of the Divorce Act [114] allowing a decree nisi to be set aside was called in aid of the unfortunate client. In both cases, respondents in divorce actions succeeded in having the decrees set aside on the ground that due to negligence of their solicitors, their answers to the divorce petitions were not filed.

Setting aside a decree absolute under section 11(2) of the act is considerably more difficult as the wife in *Hitsman v. Hitsman* [115] discovered. The solicitors for both parties shared the mistaken belief that the respondent wife's right to maintenance under an earlier order of a magistrate would not be affected by the divorce. However, when she tried to claim for outstanding maintenance under the order, her application was dismissed on the ground that her marriage had been dissolved. In dismissing the application to set aside the decree absolute, Mr. Justice Wright held that it was necessary to prove fraud under section 11(2). He rejected counsel's argument that if a solicitor's slip results in a miscarriage of justice the court will always be ready

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[109] [1971] 2 Ont. 637, 18 D.L.R.3d 641.

[110] *Id.* at 661, 18 D.L.R.3d at 665.

[111] *See also* Wright v. Collier, 19 Ont. App. 298 (1892); Schiff, *The Use of Out-of-Court Information in Fact Determination at Trial,* 41 CAN. B. REV. 335, at 371-73 (1963).

[112] [1971] 1 W.W.R. 639, 16 D.L.R.3d 589 (B.C. Sup. Ct. Chambers 1970).

[113] [1971] 4 W.W.R. 472, 19 D.L.R.3d 366 (B.C. Sup. Ct. 1970).

[114] Can. Stat. 1967-68 c. 24.

[115] [1970] 2 Ont. 573, 11 D.L.R.3d 450 (High Ct.).

to grant relief. [116] He suggested that perhaps there were other remedies to redress the harm done through this "regrettable professional mutual mistake." [117]

In a recent case before the Ontario taxing officer, a client who was the victim of a solicitor's bad advice, did not have to seek a separate remedy in an action against his solicitor. Instead, the taxing officer found it to be a proper case for disallowance of the solicitor's fee. [118] Along the same lines, the judge in the *Miller* [119] case required the respondent's solicitor to personally pay the costs of the motion to set aside the decree nisi and the petitioner's travelling expenses.

The disposition of costs in *Desjardins v. Theriault* [120] was probably small consolation to the unfortunate plaintiff whose solicitor, although able to prove the defendant's liability to the plaintiff, failed to claim or prove any special or general damages. The defendant was deprived of his costs, the judge being influenced by the fact that plaintiff would have succeeded in the action but for the solicitor's negligence.

In *Blundon v. Storm* [121] the defendant was awarded costs on an application by the plaintiff for an extension of the time for bringing an appeal as the failure to appeal in time was due to a misinterpretation of the rules by the plaintiff's solicitor. Because the mistake was reasonable, however, leave was granted as the interests of justice required it. [122]

V. Costs

A. *Costs Between Husband and Wife*

It is within the discretion of the judge to refuse costs to a successful litigant and it was a common practice in both England and Canada not to require an unsuccessful wife to pay her husband's costs. [123] In 1968, the English Court of Appeal in *Gooday v. Gooday* [124] reconsidered this practice and concluded that since modern conditions find many women capable of achieving financial independence from their husbands, there should no longer

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[116] Counsel relied on the case of Russell v. Osler, 20 Ont. W.N. 178, at 179-80 (Weekly Ct. 1920).

[117] *Supra* note 115, at 576, 11 D.L.R.3d at 453.

[118] *Re* Solicitor, [1971] 1 Ont. 138 (Sup. Ct. Taxing Office 1970).

[119] *Supra* note 113.

[120] 3 N.B.2d 260 (County Ct. 1970).

[121] 1 N.S.2d 621, 10 D.L.R.3d 576 (1970).

[122] *Compare with* Adcock v. Algoma Steel Corp., [1970] 3 Ont. 560 (High Ct.) where delay by the defendant's solicitor in proceeding to trial was deliberate and prolonged. An application to traverse the action was granted but Wright J. took the opportunity to denounce the shameful delays of over four years as ill serving the cause of justice.

[123] J. MacDonald & L. Ferrier, Canadian Divorce Law and Practice 39-2 (1969).

[124] [1968] 3 All E.R. 611, [1968] 3 W.L.R. 750 (C.A.).

be any presumption in favour of the wife and every case should be dealt with as the circumstances require. In *Seminuk v. Seminuk* [125] Mr. Justice Davis viewed the *Gooday* case as authority for the proposition that costs should follow the event. Mr. Justice Disbery of the same court disagreed in the case of *Schartner v. Schartner.* [126] He pointed to Lord Justice Widgery's direction that a trial judge must do "what is right and just in the case before him" and that there would still be many cases justifying application of the old practice. [127] Disbery, therefore, awarded $350 costs to an impecunious wife in respect of her unsuccessful defence which he found to have been reasonably and honestly raised. [128] He refused her any costs in respect of an unsuccessful counter petition for maintenance, however, and since the petitioner had not asked for costs, there was no award against the wife. [129]

An award of costs to an unsuccessful wife is more common in British Columbia since the Divorce Rules go a step further than those of other provinces. Rule 30(1) provides that costs of a divorce action are in the discretion of the court, [130] and in subsection (2) it is provided that "a Judge may at any time pending action, and if necessary from time to time, make an order as he thinks fit for payment of or security for the wife's costs, notwithstanding that the decision of the Court at the trial of the action is against the wife." [131] The inclusion of this specific guideline as to wife's costs has led one British Columbia judge to declare that the old principle that a wife is entitled to costs unless she has ample funds of her own [132] or unless her solicitor had no reasonable grounds for believing she was prosecuting or defending a just cause, still prevails. [133] In the case under consideration, the

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[125] 68 W.W.R. (n.s.) 249, at 257, 4 D.L.R.3d 253, at 260 (Sask. Q.B. 1969).

[126] 10 D.L.R.3d 61 (Sask. Q.B. 1970).

[127] *Supra* note 124, at 618, [1968] 3 W.L.R. at 757.

[128] *See also* Knight v. Knight, 68 W.W.R. (n.s.) 464, 5 D.L.R.3d 438 (B.C. Sup. Ct. 1969) where a successful husband was required to pay his wife's costs.

[129] Willson v. Willson, 67 W.W.R. (n.s.) 671, 3 D.L.R.2d 509 (B.C. Sup. Ct. 1969) *applied. See also* Miller v. Miller, 1 N.S.2d 773 (Sup. Ct.) where the petitioner was granted a divorce on grounds of adultery and the respondent wife was successful on her cross-petition for divorce on the grounds of cruelty. Both were awarded costs against each other.

[130] The other nine provinces and the Yukon have a similar provision. For a list of specific rules, see J. MACDONALD & L. FERRIER, *supra* note 123, at 39-1.

[131] *Compare with* Ontario Rule 387, *as amended* by O. Reg. 285/71. § 11. This rule provides that interim alimony and interim disbursements may be applied for any time after the statement of claim has been delivered. In Boerop v. Boerop, [1970] 3 Ont. 289 (Sup. Ct. Master's Chambers) the Senior Master was of the opinion that this rule applied in a case under the Divorce Act where the respondent had counter-petitioned for interim alimony and maintenance. It should be noted that the rule allows an award only of those "cash disbursements actually and properly made by the plaintiff's solicitor."

[132] As was the case in *Re* Hood Infant, 72 W.W.R. (n.s.) 312 (B.C. Sup Ct. Chambers 1969).

[133] Dixon v. Dixon, 72 W.W.R. (n.s.) 317 (B.C. Sup. Ct. 1969) *applying* Hynds v. Hynds, 50 W.W.R. (n.s.) 426 (B.C. Sup. Ct. 1964).

wife had been successful in her petition for divorce on the grounds of three years separation. Counsel for the husband unsuccessfully argued that there ought to be no award of costs against his client as there was no matrimonial offence involved.

In a similar situation in Ontario however, Mr. Justice Wright adopted the view that to give a petitioner costs only because she had not committed a matrimonial offence gives "an unreal adversary quality to a proceding based on a tacit agreement not to continue cohabitation . . . ." [134] He refused to award costs stating that "generally, costs should not be awarded in granting petitions under s. 4(1)(*e*)(*i*) of the *Divorce Act* unless there is some element of blame alleged and proven in connection with the marriage or separation." [135]

Except in Ontario and the Northwest Territories, a wife may obtain interim costs or suit money upon application to the court. [136] The power of the court to enforce this order was considered by the Appeal Division of the New Brunswick Supreme Court in *Webber v. Webber.* [137] The respondent husband had not complied with an order to pay suit money and the judge ordered the answer and cross-petition struck out. On appeal, it was held that there was no authority in the Divorce Act or rules allowing the judge to deprive the respondent of his right to a full defence. It was said that "[t]he order for suit money is not one relating to corollary relief; it relates to costs." [138] For this reason the usual methods of enforcing orders for costs must be employed.

B. *Legal Aid Costs*

Under the British Columbia legal aid plan there can be no award of costs, with the exception of disbursements, since the principle of indemnification is inapplicable to a legal aid client who has incurred no liability. [139]

Under the Ontario plan, a legal aid recipient may recover costs but they become the property of the Law Society. [140] Solicitors' fees and disbursements are paid out of the fund thus created. [141] Two cases in the survey period deal with the powers of the taxing officer on appeal from the Legal Accounts Officer's review of the solicitor's bill. [142] Section 115 of the regulations gives the taxing officer the power to hear and dispose of every appeal by affirming, increasing or decreasing the amount allowed by the

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[134] Woodbeck v. Woodbeck, [1970] 1 Ont. 662, at 664, 9 D.L.R.3d 244, at 246 (High Ct. 1969).

[135] *Id.*, 9 D.L.R.3d at 246.

[136] See J. MacDonald & L. Ferrier, Canadian Divorce Law and Practice 40-1 (1969) for a list of the specific rules.

[137] 3 N.B.2d 94 (1970).

[138] *Id.* at 96.

[139] Poole v. Poole, [1971] 3 W.W.R. 98, 17 D.L.R.3d 745 (B.C. Sup. Ct.).

[140] Ont. Stat. 1970 c. 55, § 18.

[141] Ont. Stat. 1968-69 c. 60, § 8.

[142] Appeals are provided for by § 111 of Ont. Reg. 257/69.

Legal Accounts Officer. [143] Taxing Officer Saunders held that under section 111 of the 1969 regulations, a taxing officer cannot interfere with the discretion of the Legal Accounts Office unless there is an error in principle or an error in the interpretation or application of Part IV or certain specified schedules of the regulations. [144] Saunders was considering an appeal from a disallowance by the Legal Accounts Officer of several hours claimed by the solicitor. Eight-tenths of an hour was spent making clothing arrangements for the accused and accompanying him while he got a haircut. Although more inclined to view this as a legitimate claim by the solicitor, Saunders held that the Legal Accounts Officer's determination would have to stand as it was a valid exercise of his discretion. The solicitor claimed for 80.8 hours of preparation and this was reduced to 50.8 hours by the Legal Accounts Officer pursuant to section 107 of the regulations. [145] Saunders found that the Legal Accounts Officer had erred in principle in applying this section. He purported to reduce the solicitor's time because a law clerk, approved by legal aid, had spent an additional 33.4 hours helping to interview and prepare for trial. The Taxing Officer held that there was no relation between this fact and the time claimed by the solicitor. Saunders also saw no relation between the amount of time spent in preparation and the amount of time spent in court. The fact that the preliminary hearing had only lasted three and one half days and the trial, two days did not mean that only 50.8 hours could be spent in preparation. Thirdly, the fact that the solicitor had been called to the bar in 1969 could not be used to reduce the number of hours of preparation in order to get around the problem of a fixed hourly rate. It was apparent that the Legal Accounts Officer had thought the solicitor over-prepared but he had failed to properly exercise his discretion by indicating where the over-preparation had taken place. The appeal was allowed increasing the account from $3490.50 to $4545.50.

Taxing Officer McBride had few kind words for the Legal Accounts Officer who disallowed certain witness fees and reduced the counsel fee by half. [146] The witnesses were a doctor who had treated the plaintiff and a photographer who had taken photographs relevant to the action. The Legal

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[143] This section has been repealed by Ont. Reg. 317/70, § 2 and has not been replaced. Since the power to appeal is still in the regulations, the taxing officer must still have the power to dispose of the appeal. *See Re* Solicitor, [1971] 2 Ont. 631, at 633 (Sup. Ct. Taxing Office).

[144] *Re* Solicitor, [1971] 2 Ont. 573 (Taxing Office 1970). Under the predecessor to § 111 (§ 103, Ont. Reg. 100/67) it had been held that the Taxing Officer had a broad authority to revise the fee and was not restricted to cases where the Legal Accounts Officer had wrongly exercised his discretion. *See Re* Solicitor, [1968] 1 Ont. 734 (Sup. Ct. Taxing Office).

[145] 107. The Legal Accounts Officer may disallow in whole or in part fees for,

(a) proceedings

(i) unreasonably taken or prolonged

....

(c) preparation that is unreasonable in its nature, scope or time expended.

[146] *Re* Solicitor, *supra* note 143.

Accounts Officer had disallowed the fees on the grounds that the witnesses were experts—a reason which McBride calls "transparent nonsense." [147] McBride also allowed an increase in counsel fees from $250 to $500, saying that the former amount for a full day in a complex case was an insult and that either the Legal Accounts Officer had failed to exercise his discretion or had done so on a wrong principle. [148] He added these general remarks:

> I cannot help but speculate on the future of the legal aid plan in the light of the nit-picking, almost audibly unreasonable disallowances made by the Legal Accounts Officer in this case .... I cannot think of any reason at all, either technical or of substance, [for the dissallowance] other than simply a grim determination to disallow these disbursements. [149]

C. *Solicitors' fees*

A solicitor may withdraw or alter a bill before it is referred for taxation. In *Fairway Construction Ltd. v. McGuire* [150] the British Columbia Court of Appeal had to consider the right of a solicitor to withdraw a bill after the client had expressed an intention to refer, but before he had taken any legal steps in that direction. The solicitor replaced his bill for $3500 for one amounting to $11,500 and applied to have it taxed. The application was granted and the client appealed, taking the objection that the solicitor was bound by the first bill. The court allowed the appeal being of the view that the steps taken by the client, although informal, invoked the reasons upon which the courts have held that a solicitor cannot withdraw a bill without leave, after legal proceedings have been taken for its taxation. Chief Justice Davey explained the reason for the rule:

> [I]f a solicitor submits a bill and a client wants it taxed before he pays and the solicitor has the right, without any restriction, to withdraw the bill and submit another one for a much higher amount of taxation, the client may very well feel that he cannot safely pursue his request for taxation because it may be that in the result he will have to pay considerably more than he was charged in the first instance. [151]

An increasingly significant factor in the assessment of solicitor's fees, is the time spent by clerks and students on the client's behalf. In a recent Ontario case, [152] Taxing Officer McBride considered this matter and concluded that there were some cases where the involvement of clerks and students reached a point where it could no longer be considered merely an item of the solicitor's overhead. It was his view that solicitors had traditionally justified their daily and hourly rates on the grounds of high overhead. But if a solicitor used the services of clerks and students and taxed at a lower rate for work done by them, he would be able to claim for fewer

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147 *Id.* at 635.
148 *Id.* at 633-34.
149 *Id.* at 636.
150 71 W.W.R. (n.s.) 396 (B.C. 1969).
151 *Id.* at 397.
152 *Re* Solicitors, [1971] 3 Ont. 470 (Sup. Ct. Taxing Office).

hours spent personally and thus would probably save the client money. In the case under consideration, however the taxing officer did not compute these services separately and in fact, reduced the whole amount claimed on the grounds that it was unreasonable. He refused to tax solely on the basis of time spent, stating that it was necessary to determine what services, such as knowledge, experience and expertise, the solicitor offered other than the expenditure of time. It is important in taxing costs to ask what, if anything, did the solicitor accomplish for his client. Being of the view that the solicitors here did not accomplish $1275 worth in defending an alimony and custody action, he reduced the fee by $375. [153]

VI. APPEALS

A. *Leave to Appeal*

Section 38 of the Supreme Court Act [154] provides that the court of highest resort in a province may grant leave to appeal a final judgment to the Supreme Court where "in the opinion of that court, the question is one that ought to be submitted to the Supreme Court for decision." It has been held that the provincial court has an unfettered discretion, [155] but these guidelines have been set down: leave should be granted if the matter sought to be appealed involves an important question of law or is a matter of public interest. [156] In *Royal Trust Co. v. Ford* [157] leave to appeal was granted in a question of testamentary capacity of a man with an estate of more than one million dollars. The fact that the case did not involve any questions of law or matters of public importance did not, in the view of the majority, preclude the granting of leave. The amount involved, "combined with other circumstances of this unusual case" in respect of which the court apparently had the benefit of full submissions, [158] satisfied two of the three judges that the question ought to be submitted to the Supreme Court. The dissenter, Mr.

[153] There were other interesting cases dealing with costs. *See* Hazelton v. Quality Products Ltd., [1971] 1 Ont. 1 (1970) on taxation of an item of preparation for trial; Evaskow v. Int'l Bhd. of Boilermakers, 71 W.W.R. (n.s.) 565, 9 D.L.R.3d 715 (Man. 1969) on the principles applied in awarding solicitor-and-client costs; Shea v. Miller, [1971] 1 Ont. 199 (1970), Warren v. Stuart House Int'l Ltd., [1970] 2 Ont. 220 (Sup. Ct. Taxing Office 1969) on the retrospective effect of a change in the rules regarding costs or the tariffs; Harrington v. Na-Churs Plant Food Co. (Canada) Ltd., [1971] 2 Ont. 514 (Sup. Ct. Taxing Office) on the factors considered when taxing counsel fee in an action settled by acceptance of money paid into court.

[154] CAN. REV. STAT. c. S-19 (1970).

[155] C.N.R. v. Croteau, [1925] Sup. Ct. 384, at 386, [1925] 3. D.L.R. 1136, at 1138; Kozak v. Beatty, 20 W.W.R. (n.s.) 497, at 501, 8 D.L.R.2d 435, at 440 (Sask. 1957).

[156] Kozak v. Beatty, *supra* note 155; Lake Erie and Detroit River Ry. v. March, 35 Sup. Ct. 197, at 200 (1904); Comité Conjoint des Métiers de la Construction v. Canada China Clay & Silica Co., [1945] 1 D.L.R. 255, at 258 (1944); Richard v. Hoban, 3 N.B.2d 473 (1970).

[157] 73 W.W.R. (n.s.) 1, 13 D.L.R.3d 351 (B.C. 1970).

[158] *Id.* at 3, 13 D.L.R.3d at 353.

Justice Branca, expressed fear that now leave might be given under section 38 in any case where a large amount of money was involved.

The judicial dicta shows that a case appealed to the Supreme Court ought to involve larger questions than the rights of the litigants. The provincial courts of appeal ought to be allowed to determine finally those rights in all but the few cases involving important questions of law or matters of public interest. It has been suggested that in the past the Supreme Court was justified in acting as a general court of appeal since it represented the only alternative to the Privy Council for those provinces with less-established judicial systems. [159] There seems to be no need for the Supreme Court to continue to operate in this manner and guidelines which would exclude cases involving only private interests should be adopted by the provincial courts of appeal.

In *Massecotte v. Boutin,* [160] the Supreme Court had to resolve a conflict between section 41 of the Supreme Court Act [161] and section 18 of the Divorce Act. The former act provided that leave to appeal to the Supreme Court may be granted within thirty days from the time fixed by section 64 or within such further time as the Court may, either before or after the expiration of the thirty days, fix. Under the Divorce Act, [162] the leave to appeal may be granted within thirty days from pronouncing of the judgment or within an extended time, provided the extension was granted before the expiration of the thirty days. The court held that the Divorce Act prevails saying: "[w]hen faced with two acts of Parliament, one of which, generally, is intended to deal with the establishment of the Supreme Court and the appellate jurisdiction possessed by it, and the other one of which, specially, is intended to deal with divorce and does, in fact, deal with the subject exhaustively, we must . . . apply the principle which states that the provisions of the special statute . . . must take priority over those of the general statute." [163]

A question arose as to whether an amendment to the Supreme Court Act [164] transferring the power to authorize *per saltum* appeals from the provincial court of last resort to the Supreme Court was procedural or substantive. The appellant, who was seeking to establish retrospective operation of the amendment, argued that the right remained the same in substance and that only the manner of exercising the right had changed; namely, by applying to the Supreme Court for leave rather than the provincial court of

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[159] Russell, *The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform,* 6 OSGOODE HALL L.J. 1, at 29.

[160] 13 D.L.R.3d 640 (1969).

[161] CAN. REV. STAT. c. 259 (1952).

[162] Can. Stat. 1967-68 c. 24.

[163] *Supra* note 160, at 642.

[164] CAN. REV. STAT. c. 44 (1970 1st Supp.) *amending* CAN. REV. STAT. c. S-19, § 39 (1970).

appeal.[165] The court disagreed, holding that this was a matter of jurisdiction and that the statute could not be applied retrospectively to give the court the power to grant leave to appeal *per saltum* proceedings begun prior to the commencement of the enactment.

In *Beers v. Olney*[166] the British Columbia Court of Appeal considered the effect of filing a satisfaction piece on the right of a party to appeal. In this case the plaintiff had been awarded $1150. He took the money and filed a satisfaction piece acknowledging satisfaction of the judgment. Almost contemporaneously he filed a notice of appeal and the defendant objected on the grounds that the plaintiff was precluded from appealing, having accepted the money and filing the document acknowledging satisfaction of the judgment. The court took a different view, finding that the satisfaction piece was no more than a specialized form of receipt. The language of the document did not suggest any waiver of rights neighter did the rule[167] pertaining to these documents.

B. *Stay of Execution Pending Appeal*

Ontario Rule 506(1) provides that execution of a judgment shall be stayed pending appeal.[168] A judge of the Ontario Court of Appeal, sitting in chambers, held in *Re Junior Golds Securities Corp.*[169] that this rule (then 500(1)) applied only in respect of the processes of the court and not to other tribunals. This decision was recently overturned in *Re Occhipinti*[170] where the court appeal stayed an order of the discipline committee of the College of Pharmacy to suspend the appellants' registration as pharmaceutical chemists. The court held that the word "judgment" in the rule includes all judgments in respect of which the court of appeal has appellate jurisdiction.

C. *Evidence on Appeal.*

Three cases during the survey period show different aspects of the introduction of new evidence on appeal. In *Lengert v. Gladstone*[171] the plaintiffs neglected to claim an item of cost in building the boat which was the subject matter of the litigation. They also wanted to introduce the fact that it had ben sold by them after trial for $5,770. The plaintiffs contended that leave to introduce this evidence was not necessary as it came within the

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[165] Royal Bank v. Concrete Column Clamps (1961) Ltd., 19 D.L.R.3d 621, at 624 (1971).

[166] [1971] 2 W.W.R. (n.s.) 397, 17 D.L.R.3d 741 (B.C. 1970).

[167] O. 41, R. 11(1).

[168] The § reads:

> Unless otherwise ordered by a judge of the Court of Appeal, the execution of the judgment appealed from shall, upon an appeal being set down to be heard, be stayed pending the appeal, but, if the judgment appealed from awards a mandamus or an injunction, execution shall not be stayed unless so ordered by the judge appealed from or a judge of the Court of Appeal.

[169] [1950] Ont. W.N. 461 (Chambers).

[170] [1970] 1 Ont. 741 (1969).

[171] 11 D.L.R.3d 726 (B.C. 1970).

terms of Rule 7(2)(*c*) of the British Columbia Court of Appeal Rules (1959) which provided that leave was not needed where the evidence is of matters that have arisen since the date of decision. The court held that neither item claimed constituted a "matter" which had arise since the date of the decision appealed from was merely "evidence" which had arisen after trial. Since the failure to introduce proper evidence at trial as to the value of the boat was the fault of the plaintiffs, they would be required to bear the cost of a new trial on the issue of damages.

The defendant in *Ramsay v. Rennie* [172] was also unsuccessful in introducing evidence on appeal as the court was of the opinion that he had not acted with sufficient diligence in informing his lawyer at the time of the trial of all the facts. The evidence was not unavailable at trial and, therefore, could not be introduced on appeal.

The New Brunswick Appeal Court exercised its discretion in favour of a plaintiff who claimed to have suffered further injuries as a result of the defendant's negligence and allowed her to adduce evidence on appeal as to the extent of these injuries. [173] The court was careful to point out that this was the rare case and that the normal rule that damages are to be assessed once and for all at trial would not be departed from without a substantial case being made out. Even though all the new facts did not arise after the trial, the court admitted the whole of the evidence as a matter of practicality.

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[172] 1 Nfld. & P.E.I. 53 (P.E.I. 1970).

[173] Kenny v. Ross E. Judge Transport Ltd., 2 N.B.2d 430 (1970).