

# CHAPTER TWELVE: AUTOMOBILE INSURANCE (ICBC)

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# CHAPTER TWELVE: AUTOMOBILE INSURANCE (ICBC)

## I. INTRODUCTION

### A. *General*

The automobile insurance system in BC is comprised of “no fault” benefit claims and indemnification for claims in tort law.

No fault benefits are included as part of the basic (compulsory) insurance coverage offered by the Insurance Corporation of British Columbia (ICBC or “the Corporation”) exclusively. As the name implies, payment of the no fault coverage is given regardless of whether any element of fault is attributed to the insured. Optional coverage above and beyond the basic coverage may be purchased from either ICBC or a private insurer under an optional insurance contract (“OIC”).

Claims for damages brought under tort law however do require the presence of a fault element on the part of the defendant to be successful. The victim of the accident (e.g. a personal injury claimant) may sue the other driver(s), the owner(s) of the insured car, manufacturer(s), automobile shop(s), municipality, insurer(s), or any other parties liable for the injury. Legislatively, there is no limitation on the maximum amount of damages that a court could award to a victim. However, case law and statute in may effectively cap certain heads of damage, such as non-pecuniary damages. Where the necessary conditions are met, ICBC may indemnify the insured for all or part of the assessed liability. This means that where damages are awarded to a victim in an accident, ICBC will pay those damages instead of the party (i.e. the insured) who is at fault.

It is important to determine whether the action is one that can be commenced in BC and whether the law of BC applies. For cases involving a BC resident who has been involved in an out-of-province accident, private international law rules will govern the action. Generally, for the substantive issues, the laws of the jurisdiction where the accident took place will apply. For procedural matters, the rules of the trial court will apply. A summary of out-of-province insurer qualifications, service procedures, and jurisdictional considerations is listed in **Section V**, below.

The *Insurance (Vehicle) Act* [IVA] and the *Insurance (Vehicle) Regulation* [IVR] form a code governing most aspects of auto insurance in BC. This chapter is not meant to be a comprehensive summary of the IVA or IVR, but rather is a guide to help people locate the relevant sections of the IVA and IVR that they are likely to encounter. A few preliminary concepts, which will be of use in understanding this chapter, are discussed immediately below.

#### 1. **Indemnification**

Drivers purchase car insurance to protect themselves in the event that they are found liable for damages. If the necessary preconditions are met, ICBC assumes liability for payment of benefits or damages to the claimant or victim of a car accident. Instead of the insured paying the damages claimed, the insurance company, “indemnifies” the insured.

#### 2. **Subrogation**

Subrogation is a common feature of insurance contracts. When ICBC assumes liability for payment of benefits or damages of any kind on behalf of the insured, ICBC is ‘subrogated’ to the right of recovery that the insured had against any other person (IVA, s 84), i.e., ICBC has all remedies available to it that the insured person might have exercised by him or herself (IVA, s 83).

### 3. Premiums and Point Penalties

Premiums are regular payments made by the insured to ICBC. Premiums are based on where the insured lives, how the vehicle is used, the type of vehicle, and the insured driver's claim record.

The point penalty system is authorized by sections 210 and 211 of the MVA. Section 28.02 of the *Motor Vehicle Act Regulations*, BC Reg 26/58, outlines the various breaches and/or offences of the MVA and the corresponding point penalties recorded.

### 4. Waiver

Section 85 of the IVA allows ICBC to waive a term or condition of an insurance contract (also known as "the plan"). However, in order for a term or condition to be waived, the waiver must be in writing **and** signed by an ICBC officer.

## ***B. Application of the Current Legislation, and Transitional Provisions***

On June 1, 2007, the IVA and accompanying IVR were amended. Transitional provisions in Parts 1, 4, and 5 of the IVA dictate which regime, old or new, will apply to a particular claim (ss 1.2, 58, and 74 respectively).

Generally, it is safe to say that the IVA and the IVR, taken as a whole, apply to:

- **Insurance policies** under the universal compulsory vehicle insurance plan set out by the Act (the "plan") that take effect on or after June 1, 2007;
- Optional **insurance contracts** that take effect on or after June 1, 2007;
- Any **claims** that arise under these insurance plans or contracts; and
- **Insured persons**, and **insurers**, and **ICBC** in relation to these insurance plans or contracts.

**NOTE:** The critical time to look at is the date on which the individual insurance policy or contract came into effect, or was renewed.

Claims and parties to the claims in relation to an insurance policy that came into effect before June 1, 2007 will continue to be governed by the old IMVA and IMVAR. It is entirely possible for a single accident to trigger the operation of both the old and new Acts simultaneously, (albeit in relation to different aspects of the resultant legal issues).

Although the IVA and IVR cover both ICBC and private insurer plans, some parts of the Act and Regulation apply only to one or the other. Specifically, the parts of the Act and Regulation that govern ICBC are Parts 1, 2, 3, 5, and 6 of the Act and Parts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 of the Regulation. The parts of the Act and the Regulation that govern the private insurers are Parts 4, 5, and 6 of the Act and Parts 13 and 14 of the Regulation.

Furthermore, the IVA and IVR apply to both universal mandatory coverage and optional coverage. Part 1 of the IVA applies to ICBC's mandatory coverage only. Part 4 of the IVA applies to optional coverage. Parts 5 and 6 of the IVA apply to both mandatory coverage and optional coverage.

## ***C. Seeking Legal Counsel for Your Claim***

Most personal injury lawyers will take motor vehicle accident claims on a contingency basis (a percentage of the total sum recovered) and offer a free consultation. Since this means that there is usually no cost

barrier, it is often wise to at least consult a lawyer to ensure that you will receive the amount to which you are entitled. Here are a few things to be aware of when consulting a lawyer for your claim:

### **1. Contingency Fees**

Contingency fees usually range between 20 percent and 25 percent if the case is settled before trial, and 33 percent if the case goes to trial. Some lawyers use a sliding scale, so that the fee increases as the trial date approaches. The Law Society of British Columbia imposes limits on contingency fees, and the claimant is unlikely to encounter lawyers who charge more than 33 percent.

### **2. The Contingency Fee Contract**

The contingency fee contract must be in writing and must contain a provision that it is the claimant's right to have the contract reviewed by the Supreme Court for reasonableness.

Contingency fee contracts often provide that if the claimant discharges the lawyer, the claimant will have to pay an hourly rate for services up to the date of discharge and that these fees must be paid before the lawyer will transfer the file to another lawyer. A claimant who discharges a lawyer can have the lawyer's bill reviewed by a Registrar of the Supreme Court in a hearing called an Assessment. The Registrar will make a ruling about the reasonableness of the bill and whether the claimant should be required to pay the bill right away.

### **3. Disbursement Costs**

Disbursement costs are the expenses incurred for photocopying, medical reports, transcripts of evidence, police reports, motor vehicle searches, etc. Most law firms will pay these costs for the claimant, and collect them at the end of the lawsuit.

### **4. Marshalling of Reports**

Over the course of the claim, the claimant's lawyer will collect your medical records, typically for the period from 2 years before the motor vehicle accident to the period following the accident, and deliver them to the defence counsel. As a claimant in a personal injury action, it is important to be diligent in pursuing recommended medical treatment and visiting a family physician, as clinical medical records are typically only generated when a patient attends at an appointment. The lawyer for the claimant and for the defendant(s)/ICBC may also arrange for independent medical evaluations with specialized doctors over the course of the claim.

If there is a claim for loss of prospective earnings or cost of future care, the claimant's lawyer may also collect and deliver economic briefs and reports by vocational specialists, accountants, actuaries, and other non-medical professionals.

The claimant's lawyer will also receive defence reports and expert summaries. All of this goes on behind the scenes. Claimants wishing to have a more active role in their file should not hesitate to contact their lawyers for periodic updates.

## **II. GOVERNING LEGISLATION AND RESOURCES**

### **A. Books**

Gregory, E.A. and Gregory, G.F.T., *The Annotated British Columbia Insurance (Motor Vehicle) Act* (Toronto: Carswell, 1995).

Continuing Legal Education Society of British Columbia, *British Columbia Motor Vehicle Accident Claims Practice Manual* (Vancouver: Continuing Legal Education Society of British Columbia, 2000).

Continuing Legal Education Society of British Columbia, *ICBC Motor Vehicle Accident Claims (November, 1988)* (Vancouver: Continuing Legal Education Society of British Columbia, 1988).

Continuing Legal Education Society of British Columbia, *Vehicle Insurance: British Columbia Legislation and Commentary* (Vancouver: Continuing Legal Education Society of British Columbia, 2007).

## **B. Legislation**

*Insurance (Motor Vehicle) Act*, RSBC 1996, c 231 [IMVA].

*Insurance (Motor Vehicle) Act - Revised Regulations (1984)*, BC Reg 447/83 [IMVAR].

*Insurance (Vehicle) Act*, RSBC 1996, c 231 [IVA].

*Insurance (Vehicle) Regulation*, BC Reg 447/83 [IVR].

*Notice to Mediate Regulations*, BC Reg 127/98 [NMR].

*Motor Vehicle Act*, RSBC 1996, c 318 [MVA].

*Motor Vehicle Act Regulations*, BC Reg 26/58 [MVA Regulations].

*Insurance Corporation Act*, RSBC 1996, c 228.

*Limitation Act*, RSBC 1996, c 266, s 3(2) [LA].

**NOTE:** The *Insurance (Motor Vehicle) Act* [IMVA] and the *Insurance (Motor Vehicle) Act - Revised Regulations (1984)* [IMVA Regulations] were amended and renamed the *Insurance (Vehicle) Act* [IVA] and *Insurance (Vehicle) Regulation* [IVR] respectively. The IVA and IVR came into force and effect on July 1, 2007. Note that there are transitional provisions governing whether the provisions of the old Act, new Act, or both Acts apply to an individual claim.

## **III. BASIC COMPULSORY AUTOPLAN COVERAGE**

ICBC is the sole provider of basic insurance for non-exempt vehicles in BC. Exempt vehicles are described in sections 43–44 of the IVA and also in section 2 of the IVR. For most vehicles owned, leased or operated in BC, third party liability coverage up to \$200,000 is only available from ICBC. Full coverage for exempt vehicles, extended coverage in excess of the basic coverage (third party liability insurance over \$200,000, IVR, s 67), and collision (“own damage”) insurance may be purchased from either ICBC or from private insurers. See **Section III: Optional Insurance**, below. Note that private insurers may have their own requirement for coverage that may be above and beyond the requirements of ICBC

Vehicles licensed in BC are required by law to carry basic compulsory coverage, which is evidenced by a certificate of automobile insurance issued under the IVA to someone licensed under the MVA (i.e. the “insured”).

**NOTE:** The definition of “the insured” varies somewhat from section to section in the IVA and IVR.

Driving while uninsured is an offence (MVA, s 24(3)(a)) which carries a maximum penalty of a fine of up to \$250 and/or imprisonment of up to three months (MVA, s 24(5)(a)). Driving an uninsured vehicle is also an offence (MVA, s 24(3)(b)) which carries a fine of at least \$300 and no more than \$2,000 and/or imprisonment for at least seven days and no more than six months (MVA, s 24(5)(b)).

## **A. *Scope of Coverage***

Subject to various limitations and exclusions, basic compulsory coverage is set out in the IVR and provides the insured with:

- indemnity for third party legal liability (Part 6);
- accident benefits; no-fault benefits payable for death or injury (Part 7);
- coverage for damages caused by uninsured or unidentified motorists (Part 8);
- first party coverage (Part 10);
- inverse liability (Division 1 of Part 10); and,
- underinsured motorist protection (UMP) (Division 2 of Part 10).

## **B. *Third Party Legal Liability: Part 6 of the IVR***

### **1. Indemnity**

This insurance indemnifies the insured against liability imposed on the insured by law for the injury or death of another, and/or loss or damage to another's property, to a total limit of \$200,000 (IVR, s 67), to be shared among the victims of a motor vehicle accident (Schedule 3, s 1). The base limit of liability is \$500,000 in claims made for a bus, and \$300,000 in claims made for a taxi or limousine. Extended Third Party Legal Liability coverage may be purchased at the insured's discretion. (See **Section III: Optional Insurance**, below). **If the insured is found legally liable, and no extended coverage has been purchased, he or she is responsible for payment of any claims in excess of the above limits.**

### **2. Who is Covered**

The definitions of "insured" for this part of the IVR may be found in IVR, s 63. For our purposes, the most relevant definitions of "insured" are:

- a) a person named in an owner's certificate; or
- b) an individual who operates the vehicle described in the owner's certificate with the consent of the owner; or
- c) an individual who operates the vehicle described in the owner's certificate while being a member of the owner's household.

### **3. Extension of Indemnity**

According to IVR, s 65, indemnity is extended to an insured who operates a motor vehicle not described in an owner's certificate issued to the insured (i.e. someone else's car).

For the purposes of s 65 only, “insured” includes the following:

- a) a person named as an owner in an owner’s certificate;
- b) a member of the owner’s household;
- c) an employee or partner of the owner, where their regular use of the vehicle described in the owner’s certificate is provided for; and
- d) the spouse of an employee or partner described in paragraph (c) where the spouse resides with the employee or partner.

Note that, absent this expanded definition, “insured” would not otherwise cover a member of the insured’s household operating a vehicle not described in an owner’s certificate issued to the insured.

#### **4. Restrictions on Indemnity**

Section 65(2) of the IVR states that if an insured is operating a motor vehicle that is not described in an owner’s certificate issued to him or her, indemnity is **not** extended to the insured if:

- the insured is operating the motor vehicle in connection with the business of a garage service operator;
- the motor vehicle is owned or regularly operated by the insured;
- the motor vehicle is used for carrying passengers for compensation or hire or for commercial use;
- the motor vehicle is in fact not licensed under the MVA (or similar legislation) and the insured does not have reasonable grounds to believe the motor vehicle is licensed; or
- the insured is operating the vehicle without the consent of the owner and does not have reasonable grounds to believe that he has the consent of the owner.

Section 77 provides, in part, that an owner seeking to rely on the coverage provided for a vehicle not named in the owner’s certificate cannot do so if he or she also owns (or leases) the non-described vehicle that has been involved in the accident (i.e. you cannot just insure one vehicle and expect this to cover all of the other vehicles in your fleet).

Neither garage service operators nor their employees are covered by the owner’s certificate issued for customers’ vehicles while the vehicle is in the care, custody, or control of the garage service operator or his or her employee for a purpose relating to the business. “Garage service operator” is defined in Part 1 of the IVR as “the operator of a motor vehicle service facility and includes a dealer, service station operator, motor vehicle repairman, auto body shop repairman, wrecker operator, and the operator of a vehicle parking or storage facility” (s 57). To offset the effect of s 57, the garage service operator must obtain special coverage pursuant to s 150.

#### **5. What is Covered**

In addition to the legal liability coverage (i.e. s 65 indemnification) outlined above, IVR ss 67 and 69 states that ICBC may also pay for:

- a) “reasonable” emergency medical aid, so long as reimbursement is not provided to the insured by another insurer or under another Part;
- b) emergency equipment or supplies provided to the insured (i.e. fire extinguishers, jacks or other necessary emergency equipment or supplies);
- c) all or some (depending upon the circumstances) of the costs taxed against the insured in an action, in accordance with the British Columbia Supreme Court Rules, BC Reg 221/90 for aggregated general and specific damages; and
- d) the pre-judgment interest under the *Court Order Interest Act*, RSBC 1996, c 79 or analogous legislation of another jurisdiction on that part of the judgment, and pay post-judgment interest under the *Interest Act*, RSC 1985, c I-15 or analogous legislation of another jurisdiction on that part of the judgment, both within the limits set out in s 1 of Schedule 3 (IVR).

## 6. What is Not Covered

ICBC will **not** indemnify an insured for certain types of damage, including:

- loss or damage to property carried in or on a vehicle owned, rented or in the care, custody or control of an insured (s 72.1); or
- liability directly or indirectly arising out of the operation of attached equipment (i.e. machinery or equipment that is mounted on or attached to the vehicle, and which is not required for the safe operation of that vehicle) at a site where such equipment is operated, unless the attached equipment is used in accordance with the IVR (s 72(2)); or
- under Part 4, 6, 7, or 10 in respect of injury, death, loss or damage arising out of radioactive, toxic, explosive or other hazardous properties of prescribed substances under the *Atomic Energy Contract Act* (IVR, s 56(1)(a)); or
- under IVA, s 20 (uninsured vehicles), s 24 (hit and run accidents), s 49.3 (default of premiums); or
- under Part 7 or Part 10 in respect of any injury, death, loss or damage arising, directly or indirectly out of a declared or undeclared war or insurrection, rebellion or revolution (IVR, s 56(1)(b)); or
- under IVA, s 20, s 24, s 49, s 49.3(1)(b), Part 6 or Part 10 in respect of punitive or exemplary damages or other similar non-compensatory damages (IVR, s 56(1)(c)); or
- a general or special assessment, penalty or premium, payable under the *Workers’ Compensation Act* (British Columbia) or similar Act (IVR, s 72.1(1)(a)).

## 7. Duties of the Insured

An insured has a duty to report to ICBC mid-term changes, as required by s 9 of the IVR. These changes may result in an increase or decrease in the premiums paid to ICBC. The insured named in the owner’s certificate is obligated to report to an ICBC agent the following:

- a) any change in the insured's address within 10 days **after** the change;
- b) any acquisition of a substitute vehicle for the vehicle described in the certificate within 10 days **after** the acquisition;
- c) any anticipated change in the use of the vehicle described in the certificate to a use to which a different insurance rate applies **before** such a change;
- d) any anticipated change in the territory in which the vehicle described in the certificate is principally used **before** such a change; and/or
- e) any change in the location of where the insured vehicle is primarily located when not in use, within 30 days of the change, **if** the premium for the vehicle is established on the basis of this location, **unless** the vehicle is used for vacation purposes.

Furthermore, ICBC is not liable to indemnify an insured who, to the prejudice of ICBC, fails to comply with duties outlined in s 73 of the IVR. This section states that an insured:

- a) must promptly give ICBC written notice of any claim made for the accident, including any other insurance held by him or her providing coverage for the accident;
- b) must help secure evidence and information and the attendance of any witnesses;
- c) must cooperate with ICBC in the defence of any action or proceeding, or appeal, taken by ICBC on behalf of the insured;
- d) must allow ICBC to inspect an insured vehicle at any reasonable time;
- e) must, on receipt of a claim, legal document or correspondence relating to a claim, immediately send a copy to ICBC;
- f) must **not** voluntarily assume liability or settle any claim except at his or her own cost; and
- g) must **not** fail to cooperate with ICBC in the investigation, settlement or defence of a claim or action.

## 8. Duties of the Corporation

On receipt of a notice of a claim under Part 6 of the IVR, ICBC must, at its expense, assist the insured by investigating and negotiating a settlement where in its opinion such assistance is necessary, and defend the insured against any action for damages (s 74).

## 9. Rights of the Corporation

Upon assuming the defence of an action for damages brought against an insured, ICBC has the right, subject to section 79 of the Act, to the exclusive conduct and control of the defence. This right includes, but is not limited to, the right to appoint and instruct counsel, to admit liability, to negotiate, and/or settle out of court (IVR, s 74.1).

## 10. Forfeiture of Claims and Relief from Forfeiture

Certain conduct by the insured or applicant can result in "forfeiture", whereby the insured is deemed to have given up his or her right to be indemnified by ICBC. In this situation, the

claim for indemnification becomes invalid. Apart from exclusions, a claim may be forfeited under s 75 of the IVA if:

- a) an applicant for coverage falsely describes the vehicle for which the application is made to the prejudice of the insurer (s 75(a)(i));
- b) an applicant for coverage knowingly misrepresents or fails to disclose a fact that was required to be stated in the application (s 75(a)(ii));
- c) an insured violates a term or condition of or commits a fraud in relation to the plan or the OIC (s 75(b); see **Section II.B.11. Breaches of Conditions and Consequences**;
- d) an insured makes a “wilfully false statement” with respect to a claim under a plan of insurance (s 75(c)).

**NOTE:** According to *Brooks v Insurance Corporation of British Columbia* (1994), 89 BCLR (2d) 215 (S.C), per Bouck J, the purpose of s 19(1)(e) (now IVA, s 75(c)) is to prevent intentionally deceitful misstatements for the purpose of defrauding the insurer; “exaggerated guesses” by an insured as to the value of a lost motor vehicle, or figures inserted for the purpose of goading an insurer into action, are insufficient to deny coverage unless a fraudulent purpose on the part of the insured is shown.

However, ICBC may relieve the insured from forfeiture under s 75 if said forfeiture would be “inequitable”. Furthermore, ICBC **must** relieve an insured from forfeiture if: a) it is equitable to do so, and b) the insured dies or suffers a loss of mind or bodily function that renders the insured permanently incapable of engaging in any occupation for wages or profit (IVA, s 19(3)).

Because there are various definitions of “insured” in the IMVAR (and IVR), the only reasonable interpretation of s 19 (the relief of forfeiture provision discussed above) is that it is to be read broadly to include all of the definitions: see *Khatkar v Insurance Corporation of British Columbia* (1993), 25 CCLI. (2d) 243 (BC Prov. Ct.), per Stansfield Prov. Ct. J.

## 11. Breach of Conditions and Consequences

Insured persons must be careful to abide by the terms and conditions of their plans and OICs. Coverage may be lost if an insured breaches certain conditions, including, but not limited to:

- a) failing to comply with s 73 of the IVR, to the prejudice of ICBC (See **Section II.B.7 Duty of Insured**);
- b) operating a vehicle when not authorized and/or not qualified to do so (IVR, s 55(3)(a));
- c) using the vehicle in illicit trades, racing, or avoiding arrest or other police action (IVR, s 55(3)(b), (c) and (d));
- d) towing an unregistered and/or unlicensed trailer (IVR, s 55(4));
- e) using the vehicle for a different purpose than the one declared by the insured in his or her application for insurance, except as “occasionally” permitted (IVR, s 55(2(a))); or
- f) naming in the owner’s certificate someone as the principal operator of the insured vehicle who is not actually the principle operator (IVR, s 75).

**NOTE:** When the court determines who the principle driver is, it will consider the entire period covered by the insurance plan: see *Debm v Insurance Corporation of British Columbia* (1982), 32 BCLR 23.

Despite any breach of condition by an insured, insurance money is still payable to **third parties** by ICBC in cases where the insured person was:

- a) incapable of properly controlling the vehicle because of the influence of alcohol or drugs;
- b) convicted under any one of the following sections of the *Criminal Code*, RSC 1985, c C-46 (see also MVA\_Regulations, s 28.02 Table 4):
  - s 220 (criminal negligence causing death);
  - s 221 (criminal negligence causing bodily harm);
  - s 236 (manslaughter); s 249 (dangerous operation of a motor vehicle);
  - s 252 (failure to stop at an accident),
  - s 253 (driving while impaired or with a blood-alcohol level exceeding 80 milligrams per 100 millilitres);
  - s 254(5) (refusal or failure to give a breath sample);
  - s 255 (impaired driving causing bodily harm or death);
  - s 259 (4): driving while disqualified;
  - a conviction under the *Youth Criminal Justice Act* (Canada) for any of the above offences;
  - “similar result” or conviction of these offences in a jurisdiction in the U.S.; or
  - a conviction under ss 95 or 102 of the MVA or similar convictions under another Canadian or American jurisdiction (both concern driving while prohibited); or
- c) permitting another person to use the insured vehicle in a way that results in a conviction for any of the offences outlined above (*IMVA Regulations*, s 55).

## 12. Making a Claim Under Part 6: Procedural Steps and Considerations

### a) *Limitation Period*

Section 76 of the IVR provides that any action started to enforce third-party liability for bodily injury and/or property damage (i.e. claims made under Part 6 of the IVR) must comply with the LA. Section 3(2)(a) of the LA provides a two-year limitation period for actions for damages related to injuries to a person and/or property, including negligence claims against the driver and/or the owner of the vehicle driven.

Minors are not subject to a limitation period (LA s7). After the minor has reached age 19, s 3(2)(a) begins to apply and the two year limitation period commences. However, if the minor’s guardian or litigation guardian receives a Notice to Proceed, the limitation period is initiated notwithstanding the minor status (LA, s 7(6)). The Notice to Proceed must meet the requirements of the LA, ss 7(7)(a-g).

It is important to be aware of the limitation periods associated with IVR Part 7 benefits, see **Section III.C** below.

### b) *Duties Outlined in Section 73 of the IVR*

An insured must comply with s 73 of the IVR. Failure to do so may result in a claim being denied. See **Section II.B.7. Duties of the Insured.**

**c) Service on ICBC**

A claimant who starts an action for damages caused by a motor vehicle or trailer must also serve ICBC with a copy of the Notice of Civil Claim the same way the defendant is served and must also file proof of service in the court in which the action is started. No further step in the action can be taken until eight days after filing of the service in court (IVA, s 22).

**d) Information and Evidence**

ICBC has a broad right to compel the insured and others to provide information set out in the IVA. Specific types of information that ICBC can demand are noted in s 11 (combined forms and information); s 27 (accident report); s 28 (medical reports); s 29 (employers' reports); and s 30 (superintendent's records).

According to *McKnight v General Casualty Insurance*, [1931] 2 WWR 315 (BCCA), an insured need not provide information or evidence to an insurance company respecting a breach if the company is contemplating using such a breach to deny coverage to the insured. This is not considered to be refusing to cooperate with the insurer in the defence of the action. However, the insured may still have to provide information regarding the accident itself.

**C. Accident (“No Fault”) Benefits: Part 7 of the IVR**

**1. What are “No Fault” Benefits?**

Regardless of who is at fault in an accident, ICBC pays benefits for injuries to the occupants of a licensed vehicle and pedestrians and cyclists injured by a vehicle described in any owner's certificate. The accident benefits, commonly called “no fault” benefits, are payable to an insured for death or injury caused by an accident arising out of the owner's ownership, use, or operation of a vehicle in Canada or, with some restrictions, in the U.S. (IVR, s 79(1)).

In *Amos v Insurance Corporation of British Columbia*, [1995] 3 SCR 405, the Supreme Court of Canada laid out a two-part test for determining if death or injury falls within the scope of s 79(1). The following must be met:

- a) the accident must result from the ordinary and well-known activities to which automobiles are put; and
- b) there must be some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the plaintiff's injuries and the owner's ownership, use, or operation of his or her vehicle. That is, the connection between the injuries and the ownership, use, or operation of the vehicle must not be merely incidental or fortuitous.

*Amos* reversed the BC Court of Appeal judgment and held that the plaintiff's injuries were causally connected to the ownership and use of his vehicle. The plaintiff was shot while driving away from a gang who was trying to gain entry into his motor vehicle. However, Major J. noted that if the gunshots had been truly random and not causally connected to the plaintiff's ownership of the vehicle then his injuries would not have been covered under s 79(1).

**2. Who is Covered?**

Section 78 of the IVR contains a definition of “insured”, which includes, in part:

- a person named as an owner in an owner's certificate;
- a household member of a person named in an owner's certificate;
- an occupant of a vehicle that is licensed in BC and is not exempted under section 43 of the IVA (vehicles from the federal or a provincial government other than BC);
- any occupant of a vehicle that is not required to be licensed in BC, but is operated by a person named in a driver's certificate;
- a cyclist or pedestrian who collides with a vehicle described in an owner's certificate;
- a BC resident who is entitled to bring an action for injury or death under section 20 (uninsured vehicles) or 24 (remedy for hit and run accidents) of the IVA; or
- the personal representative of a deceased insured.

### 3. Benefits Payable

#### a) *Disability Benefits for Employed Persons*

ICBC is obligated to pay “no fault” benefits to an insured person if:

- a) within 20 days of the accident, the injury completely disables the insured; **and**
- b) the insured is an “employed person” (IVR, s 80).

An “employed person” is defined in s 78 of the IVR as a person who, on the day of the accident or for any 6 months during the previous 12 months immediately preceding the accident, is employed or actively engaged in an occupation for wages or profit. Eligible insured persons who are completely unable to engage in employment can collect either 75 percent of their average gross weekly earnings or \$300 per week, whichever is less, for the length of the disability or 104 weeks, whichever is shorter. See section 80 and Schedule 3 of the IVR for more details.

**NOTE:** There is a waiting period of seven days before disability benefits are paid out. Also, no benefits are paid for these initial seven days (IVR, 85).

#### b) *Disability Benefits for Homemakers*

Insured persons who are homemakers may also be eligible for no fault benefits. If a homemaker sustains an injury from an accident, and it substantially or continuously disables the insured from regularly performing most household tasks, ICBC will compensate the insured for the duration of the disability or 104 consecutive weeks, whichever is shorter (IVR, s 84(1)). The insured will be compensated for reasonable expenses incurred by the insured in hiring a person to perform household tasks on the insured's behalf, up to a maximum of \$145 per week (IVR, Schedule 3, s 2). However, there is no compensation for household tasks performed by an insured's family members (IVR, s 84(2)).

**c) *Disability Beyond 104 Weeks***

If at the end of the first two years, the total disability continues, an insured receiving benefits under s 80 or 84 of the IVR can continue to receive the payments for the duration of the disability or until the age of 65, whichever is shorter (IVR, s 86). The no fault benefits will be reduced by the amount of the Canada Pension Plan benefits if and when such benefits become payable to the insured (IVR, s 86).

**NOTE:** Any benefits payable under s 80, 84, or 86 of the IVR may be reviewed every 12 months and terminated by ICBC on the advice of its medical adviser (IVR, s 87).

**d) *Medical or Rehabilitation Benefits***

In addition to the disability benefits described above, ICBC is obligated to pay all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing service, or for necessary physiotherapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis (IVR, s 88(1)). In appropriate cases, ICBC may also provide attendant care to the insured to perform duties normally undertaken by the insured (IVR, s 88(2)(c)). Under Schedule 3, s 3, ICBC's liability for rehabilitation benefits is limited to \$150,000. Also, ICBC is not liable for expenses payable to the insured under a medical, surgical, dental, or hospital plan, or paid or payable by another insurer (s 88(6)).

**e) *Death Benefits***

In the event of the applicant's death, ICBC will pay:

- a) up to \$2,500 for funeral expenses (see s 91 and s 4 of Schedule 3 of the IVR);
- b) \$5,000 if the deceased was a "head of a household" (i.e. was providing the "major portion" of household income), plus a Supplemental Death benefit of \$1,000 for each survivor other than the first, plus Additional Death Benefits of \$145 per week for the first survivor and \$35 per week for each additional survivor for a duration of 104 weeks (see ss 92 – 94 and Schedule 3 ss 5, 6 and 7 of the IVR);
- c) \$2,500 if the deceased was a "spouse in household" (i.e. was supporting the household or helping to raise dependent children), plus a Supplemental Death benefit of \$1,000 for each survivor other than the first, plus Additional Death Benefits of \$145 per week for the first survivor and \$35 per week for each additional survivor for a duration of 104 weeks (see ss 92 - 94 and Schedule 3 ss 5, 6, 8 of the IVR); and
- d) \$500 to \$1,500 for the death of each dependent child, depending on the child's age (see Schedule 3, s 5 of the IVR).

**NOTE:** Status with respect to "head of household", "spouse of household" or "dependent child" is determined at the date of death resulting from a motor vehicle accident.

In addition, the *Family Compensation Act*, RSBC 1996, c 126 [FCA], creates a statutory right for claims to be brought by the surviving spouse, parent,

grandparent, or child of the deceased, in some cases appropriately as against ICBC.

The FCA provides a statutory scheme for fatal accident compensation that abrogated the common law rule that no one has a cause of action in tort against a person who has wrongfully caused the death of a third person (see *Gaida Estate v McLeod*, 2013 BCSC 1168).

The FCA intends to place the claimant in the same economic position that he or she would have enjoyed but for the death of his or her spouse, parent or child. There are only a limited number of family members that would be eligible for compensation under the FCA, and the definition of who qualifies for compensation is important. The starting point to determine eligibility for bringing a claim begins with section 1 of the FCA.

Compensation under the FCA is generally limited to the following:

- (1) damages for loss of love, guidance and affection (generally for infant children of the deceased only);
- (2) damages for the loss of services that would otherwise have been provided by the deceased to the remaining family members;
- (3) damages for the loss of financial support to the remaining family members;
- (4) limited out-of-pocket expenses incurred as a direct result of a death (funeral and related expenses); and,
- (5) damages for loss of inheritance.

#### ***f) Reinstatement and Revival of No Fault Benefits***

No fault benefits can be reinstated if a person receiving benefits goes back to work only to find that the injury comes back and prevents them from working (*Brewer v Insurance Corporation of British Columbia* (1999), 71 BCLR (3d) 248, [1999] BCJ No 2031 (BCSC)). This includes a situation where a plaintiff goes back to work prior to the end of the 104-week period and leaves work after the end of the 104-week period (*Symons v Insurance Corporation of British Columbia*, 2016 BCCA 207, 40 CCLI (5<sup>th</sup>) 178).

#### **4. Restrictions and Exclusion of Benefits**

Claimants should check the IVR carefully to find what restrictions are applicable to a given claim for benefits. The following is merely a brief summary of some very complicated provisions. Generally, ICBC is not liable to pay any of the benefits discussed above, in any of the following situations:

- if the applicant resides outside BC **and** the vehicle in which he or she was riding or driving at the material time was not designated in an owner's certificate (s 96(a));
- if the applicant at the time of the accident was an occupant of, or was struck by, a vehicle that could not be licensed under the MVA or *Commercial Transport Act* (s 96(b)(i));

- if the death or injury resulted from the injured person’s suicide or attempted suicide, whether “sane or insane” (s 96(c));
- if applicant was an occupant of a vehicle being used in an illicit trade at the time of the accident (s 96(e)); or
- if the death or injury is a result of the applicant’s medical condition, as distinct from an injury caused by the accident, unless the condition was itself a direct result of an accident for which benefits are provided under Part 7 of the IVR (s 96(f)).

Also, under s 90 of the IVR, ICBC may terminate an insured’s benefits if an insured refuses to undergo any:

- medical, surgical, or other similar treatment, which, in the opinion of the ICBC medical adviser and the medical practitioner attending the insured, is likely to relieve, wholly or partly, the insured’s disability; or
- retraining or educational program likely to assist in the insured’s rehabilitation.

If ICBC intends to terminate an insured’s benefits, ICBC must first give an insured at least 60 days’ notice in writing, by registered mail, of their intention to terminate benefits. Under section 90(3) of the IVR, the insured may, within that 60-day period, apply to the Supreme Court for an injunction against the termination of the benefits, on the ground that:

- the treatment required of the insured is unlikely to relieve the disability;
- the treatment may injuriously affect the balance of the insured’s health; or
- the treatment program is not likely to assist in rehabilitation.

## 5. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under Third Party Legal Liability. These are contained in s 19 of the IVA and s 55 of the IVR. See **Section II.B.10: Forfeiture of Claims and Relief from Forfeiture** and **Section II.B.11: Breach of Conditions and Consequences**, above.

## 6. Making a Claim Under Part 7: Procedural Steps and Considerations

### a) *Limitation Period*

Section 103 of the IVR provides that any action started to enforce no fault or accident benefits must do the following:

- the insured must have “substantially” complied with sections 97-100 (See **Section II.C.6.b: Duties in Sections 97-100 of the IVR**); and
- the action must be started within **two years** after the date of the accident for which the benefits are claimed, **or** where benefits have been paid, the date the insured last received a payment. This limitation period also applies to minors. In

other words, the limitation date for Part 7 actions for minors does not commence at age 19 but commences on the date of the accident.

***b) Duties in Sections 97-100 of the IVR***

An insured must meet the requirements set out in s 97-100 of the IVR. If an insured fails to do this to the prejudice of ICBC, ICBC may deny coverage of a claim. The following is a brief summary and claimants should refer to the IVR for more detail. The insured must comply with the following:

- give prompt notice to ICBC of the accident;
- provide a written report within 30 days of the accident;
- provide a proof of claim (a standard form authorized by ICBC and provided to applicants) within 90 days of the accident; and
- at ICBC's request, promptly provide a certificate of an attending medical professional as to the nature and extent of the insured's injury and the treatment, current condition, and prognosis of the injury;
- at ICBC's expense and request, be medically examined by someone selected by ICBC;
- where applicable, permit a post mortem examination and/or autopsy.

**NOTE:** For liability to cease (i.e. coverage to be denied), ICBC must have suffered prejudice as a result of the applicant's failure to comply.

***D. Uninsured Motorists or Unidentified Motorist (Hit and Run) Cases***

**1. Claims Against Uninsured Vehicles: Section 20 of the IVA**

While it is against the law, there are some drivers who operate motor vehicles without any insurance. If a claimant suffers damages from an uninsured motorist, he or she is not without a remedy. Instead, the claimant may make a claim to ICBC for compensation.

***a) Definition of Uninsured Vehicle***

Under the current IVA, an "uninsured motorist" continues to be defined as someone who operates a motor vehicle without third party liability coverage of at least \$100,000. When death, personal injury, or property damage results from the use of an uninsured vehicle, a claimant may apply to ICBC under s 20 for compensation.

***b) Limitation Period***

The claimant must meet the requirements set out in the LA. The claimant has two years from the date of the loss to start an action for personal injury, death, and/or property damage (LA, s 3(2)).

***c) Rights and Obligations of ICBC***

If ICBC receives such an application under s 20, it must forward a notice it to the owner or driver of the uninsured motor vehicle, by registered mail (IVA, s 20(3)). If ICBC pays out any amount under this section, it is subrogated to the rights of the person paid (i.e. the successful claimant). Also, ICBC may maintain an action in its name or in the name of the successful claimant against the person liable (IVA, s 20(11)).

After ICBC has given notice to the owner or driver of the uninsured vehicle (“the defendant”), it has control over the resolution of the case. ICBC is deemed to be the agent of the defendant for service of notice. Thus, the Claimant may start an action against the defendant by serving ICBC with a Notice of Claim in Small Claims or a Notice of Civil Claim in Supreme Court.

ICBC has the authority to settle or consent to judgement, at any time, in the name of the uninsured defendant. But, if the defendant responds within the time limit indicated in the notice, then ICBC is not entitled to recover from the defendant without a judgment (s 20(5)).

If the claimant serves the uninsured defendant directly and he or she does not enter an appearance or does not file a Response to Civil Claim, or does not appear at trial, or does anything that permits default judgment to be taken against him or her, then ICBC may intervene. ICBC can defend the action in the name of the defendant. ICBC’s acts are deemed to be the defendant’s acts (IVA, s 20(7)).

**d) *ICBC Liability Limited***

There is a limit to how much ICBC will pay out for any individual claim made under section 20 of the IVA. Regardless of the number of claims or the number of people making claims, the limit of ICBC’s liability arising out of the same accident is \$200,000, including claims for costs, pre-judgment, and post-judgment interest (see IVR, s 105 and Schedule 3, s 9(1)).

The insured and the claimant both have an obligation to seek other sources of coverage. Applicants may have other sources of insurance, including claims or benefits under the Workers’ Compensation Act, RSBC 1996, c 492, the Employment Insurance Act (Canada), RSC 1996, c 23, and/or the government of Canada or provinces or territories. It is important that applicants apply for all benefits they are entitled to under the above sources of coverage or other similar sources coverage since ICBC is relieved from paying the of judgment equal to what is provided by these sources.

Furthermore, applicants should also apply for all benefits and/or coverage from any private insurance that they may have as soon as possible. An applicant may have private insurance through their employer. ICBC may not be obligated to pay benefits that could have been received (note: need not actually receive) from another source. If a decision is made concluding that ICBC is not liable for these amounts, the limitation period for making a claim through the other source will most likely have ended. See section 81, 83 and 106 of the IVR for more details.

Also, see **Section II.D.3. Exclusion of ICBC Liability**, below.

**NOTE:** Any dispute as to entitlement or amount of damages an insured is entitled to recover must be submitted for arbitration under the *Commercial Arbitration Act*, RSBC 1996, c 55 (IVR, s 148.2).

**NOTE:** Excess underinsured motorist protection may still be purchased through insurers and presumably is intended to be covered under IVA Part 4 (Optional Insurance Contracts).

## 2. **Claims Against Unidentified or Hit and Run Motorists: Section 24 of the IVA**

Where personal injury, death, or property damage over \$150 arises out of the use of a vehicle on a road **in British Columbia** and the identity of the driver and owner cannot be ascertained (or the ascertained owner is not liable, as would be the case if the vehicle had been stolen), the injured party may sue ICBC as nominal defendant. For accidents occurring outside BC, see **Section II.E.1: Inverse Liability and Uninsured or Hit and Run Accidents Outside BC**.

### **a) *Reasonable Efforts to Ascertain Identity***

In order for a claimant to make a claim or get judgment against ICBC under s 24 of the IVA, the court must first be satisfied that all reasonable efforts have been made to ascertain the identity of the owner and/or driver (IVA, s 24(5)). *Leggett v Insurance Corporation of British Columbia*, [1992] BCWLD 2370, states that the critical time of taking steps to ascertain the identity of the driver is immediately at the scene of the accident, and that reasonable efforts must be interpreted in the context of the claimant's position and ability to discover the driver or owner's identity. This could include taking down the description of the vehicle, including the license plate number, if the claimant is able to at the scene. If the identity of those persons cannot be ascertained, ICBC is authorized to settle any such claims, or to conduct the defence of the case as it sees fit.

### **b) *Written Notice to ICBC***

To proceed with the claim, the claimant must give written notice to ICBC "as soon as reasonably practicable" and within six months of the accident (IVA, s 24(2)).

### **c) *Police Report Requirements***

A claimant must make an accident report to the police (IVA, s 107(1)). More specifically, the claimant must:

- make a report to the police within 48 hours of discovering the loss or damage;
- get the police case file number for the police report; and
- on ICBC's request, advise ICBC of the police case file number.

If a claimant fails to comply with the above without reasonable cause, then ICBC will not be liable to pay the claim made under s 24 of the IVA.

### **d) *Limitation Period***

Once notice has been properly provided, the claimant must also meet the requirements set out in the LA. The claimant has two years from the date of the loss to start an action for personal injury, death, and/or property damage (LA, s 3(2)).

### 3. Exclusion of ICBC Liability

There are certain situations where ICBC will not be liable to pay a claim made under section 20 and/or section 24 of the IVA. ICBC will **not** be liable:

- to a claimant, under s 24 of the IVA, who fails to comply with section 107(1) of the IVA without reasonable cause (see **Section II.D.2.c): Police Report Requirements**);
- to a claimant, under s 20 or 24 of the IVA, for loss or damage arising while the vehicle was in the claimant's possession without the owner's consent (i.e. stolen) (IVR, s 107(2)(a)).

### 4. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under **Section II.B.10: Forfeiture of Claims and Relief from Forfeiture** and **Section II.B.11: Breach of Conditions and Consequences**, above. These are contained in s 19 of the IVA and s 55 of the IVR.

#### *E. First Party Coverage Under Part 10 of the IVR*

#### 1. Inverse Liability and Uninsured or Hit and Run Accidents Outside British Columbia: Part 10, Division 1 of the IVR

##### *a) Section 147 Claims: Inverse Liability*

##### (1) What is Inverse Liability?

Inverse liability coverage is part of the basic insurance plan, which covers costs to vehicle repairs when an insured is involved in an accident out of British Columbia. More specifically, the basic compulsory coverage will pay for loss or damage to a BC vehicle resulting from an accident occurring **outside BC**, but in Canada or the U.S. if the insured does **not** have a right of action under the law of:

- the place where the accident happened; or
- the place where the person responsible for the accident is a resident (e.g. unidentified defendant following a hit and run collision).

##### (2) Who is Covered?

Section 147 of the IVR has its own definition of "insured", which includes:

- (a) the person named as an owner in an owner's certificate or if deceased, his or her personal representative;
- (b) a person who can provide written proof that he or she is the beneficial owner of a commercial vehicle described in an owner's certificate; or

(c) the renter of a vehicle described in an owner's certificate.

(3) What is Covered?

“Loss or damage” in this section means damage to the vehicle and does not include compensation for medical or rehabilitation costs. Compensation is to the extent to which the insured would have recovered if he or she had a right of action. In other words, ICBC will pay to the extent that the other driver is found liable (IVR, s 147). However, this amount is limited to the lesser of the cost of the vehicle repair, the declared value of the vehicle, or the actual cash value of the vehicle.

(4) Dispute Resolution

If the insured is found to be at fault or partially at fault, he or she will be responsible for paying for the remaining costs of repair to the vehicle, unless the insured person purchased collision coverage (see **Section III.B.2: Collision**, below). If a dispute between the claimant and ICBC arises under this section, it must be arbitrated. Once the arbitrator adjudicates the dispute, the reasons for the decision must be published.

***b) Section 148 Claims: Accidents in Nunavut, Yukon, Northwest Territories or U.S.A.***

This section deals with the scenario of a person having a motor vehicle accident in Nunavut, the Yukon, or Northwest Territories, or the U.S. that involves an uninsured or unidentified motorist.

(1) Who is Covered?

A person involved in a motor vehicle accident may be entitled to compensation under section 148(2) of the IVR, if that person:

- is a person named as an owner in the owner's certificate, or a household member of the person named as an owner in the owner's certificate;
- suffers death or injury in the Nunavut, Yukon, Northwest Territories or the U.S.; **and**
- the vehicle responsible is an unidentified or uninsured vehicle.

(2) How Much is the Coverage?

ICBC's liability (i.e. the payout) is limited to \$200,000 (see Schedule 3, s 11 of the IVR). Payments are subject to adjustment if recovery or partial recovery is made from another party (IVR, s 148(2)).

(3) Exclusion or Limitation of Liability by ICBC

If a claim is made under this section, the claimant must be sure to comply with the requirements set out in s 148 of the IVR. ICBC will **not** be liable (i.e. ICBC will not compensate the claimant) in the following situations:

- if the insured has a right of recovery under an unsatisfied judgment;
- if the insured was operating a vehicle without the consent of the vehicle's owner;
- if the insured fails to comply with s 148(4)(b) **to the prejudice of ICBC** (see immediately below); **or**
- if the insured fails to comply with s 148(5) (see immediately below).

(4) Insured's Obligations Under Section 148(4) and (5) of the IVR

Under section 148(4)(b) of the IVR, the insured:

- must file a copy of the originating process with ICBC within 60 days of the action commencing; **and**
- must not settle a claim without the written consent of ICBC

Under s 148(5) of the IVR, the insured (or his or her representative) must:

- for accidents involving an **unidentified** vehicle, report the accident, within 24 hours of the accident, to the police, or the administrator of any law respecting motor vehicles;
- file with ICBC, within 28 days of the accident, a statement under oath that: a) the insured has a cause of action arising out of the accident against the owner or driver of an **unidentified or uninsured** vehicle and b) setting out the facts in support of that statement; **and**
- at ICBC's request, allow ICBC to inspect the insured's motor vehicle that was in the accident.

**NOTE:** Payments made under s 148 will be deducted from the amount an insured is entitled to under Parts 6 or 7 of the IVR (s 148(6) and (7)). Also, ICBC will not be liable to pay any benefit, indemnity, or compensation payable from another source, including: Workers Compensation, Employment Insurance, and any government bodies (s 106(1)).

(5) Dispute Resolution

Any dispute between the claimant and ICBC under this section must be arbitrated. The arbitrator who adjudicates the dispute must publish the reasons for the decision (IVR, s 148(8)).

2. **Underinsured Motorist Protection (UMP): Part 10, Division 2 of the IVR**

*a) What is UMP Coverage?*

\$1 million of UMP coverage is part of the basic compulsory coverage motorists have with ICBC. It provides compensation against bodily injury or death for the victim of an accident caused by a motorist who does not carry sufficient insurance to pay for the claims. The maximum coverage under UMP is \$2,000,000 (which an insured must pay an extra premium to purchase) for each insured person (Schedule 3, s 13 of the IVR). This limit includes claims for prejudgment and post-judgment interest and costs. See section 148.1(5).

**b) *Prerequisites for UMP Coverage***

Generally, UMP coverage is available where an insured's death or injury is caused by the operation of a vehicle operated by an underinsured motorist, and occurs in Canada or the U.S.

If an insured is making a claim for UMP coverage in relation to a **hit and run accident**, there are additional requirements that need to be met. Under section 148.1(4), the following criteria must also be met:

- the accident must occur on a highway; and
- the accident must have **physical** contact between the insured vehicle and the unidentified vehicle, **if** it occurred in Nunavut, the Yukon Territory, the Northwest Territories, or the United States.

**c) *Who Is Covered?***

Section 148.1 of the IVR has its own definition of "insured". Note that the insured need not be in his or her car to be eligible for compensation. Under this section, "insured" includes, but is not limited to:

- a person named in the owner's certificate and members of his or her household;
- any person who is an occupant of the insured vehicle;
- any person with a valid BC "driver's certificate" (i.e. driver's license) and members of his or her household; and
- any person entitled, in the jurisdiction in which the accident occurred, to maintain an action against the underinsured motorist for damages because of the death of one of the insured.

**d) *Who is Not Covered?***

There are certain people who are not entitled to UMP coverage. Section 148.1(3) of the IVR describes when ICBC will not be liable. The following are most relevant, whereby coverage is denied if:

- the insured's vehicle was in fact not licensed and the insured had no reasonable grounds to believe it was; or
- the vehicle's operator or passenger did not have the owner's consent to operate or be in the vehicle and ought to have known there was no consent (i.e. the operator or passenger is in a stolen vehicle).

*e) UMP Coverage and Accidents Outside B.C.*

For accidents occurring outside BC, the **law of the accident occurred determines the legal liability of an underinsured motorist**, whereas the **amount** of the UMP claim is determined by BC law. See section 148.2(6) of the IVR.

UMP protection does not apply in a jurisdiction where the right to sue for injuries caused by a vehicle accident is barred by law (IVR, s 148.2(4)). UMP coverage does not apply to vehicles used as buses, taxis, or limousines (s 148.4).

*f) Forfeiture and Breach of Conditions*

Under section 148.2(5) of the IVR, the same provisions that apply to those outlined under Third Party Legal Liability also apply here (see **Section II.B.10: Forfeiture of Claims and Relief from Forfeiture** and **Section II.B.11: Breach of Conditions and Consequences**, above.). An award otherwise available under UMP will be reduced by any amount forfeited by a breach outlined in s 55.

*g) Dispute Resolution*

Any dispute between the claimant and ICBC must be arbitrated. An arbitrator who adjudicates a dispute under this section must publish the reasons for the decision (IVR, s 148.2(1.1) and ((2.1)).

## IV. OPTIONAL INSURANCE (PART 4 & PART 13 OF THE IVR)

### A. Introduction to OICs

Optional Insurance Contracts (“OICs”) are optional coverage that any person can purchase at his or her discretion. The following are **some** of the **types** of coverage, over and above the Basic Compulsory Coverage, that may be purchased at the owner’s option from a private insurance company. The term OIC includes, but is not limited to policies providing coverage for excess third party liability, excess own vehicle damage, excess UMP coverage, and excess no-fault income replacement.

**NOTE:** Formerly, Part 9 of the IMVA Regulations (Extension Insurance) covered material under this part. Under the current legislation, it has been replaced by Part 4 of the IVA (Optional Insurance Contracts) and Part 13 of the IVR (Optional Insurance Contracts).

#### 1. Limiting and Excluding Coverage Under an OIC

Section 61(1.1) of the IVA provides that an OIC that extends coverage in an existing certificate or policy may nevertheless **limit** the extended coverage as follows:

- by prohibiting a specified person or class of persons from using or operating the vehicle;
- by excluding coverage for a specified risk; or
- by providing different limits of coverage for different persons or risks or classes of persons or risks.

**NOTE:** The above prohibition, exclusion, and limit are not binding on the insured unless the policy has printed on it in a prominent place and in conspicuous lettering the words

“This policy contains prohibitions relating to persons or classes or persons, exclusions or risks or limits of coverage that are not in the insurance it extends” (IVA, s 61(2)).

In an OIC, an insurer may provide for further exclusions and limits to coverage for losses in respect of:

- the loss of the vehicle;
- damage to the vehicle; or
- the loss of use of the vehicle.

Section 61(1.2) of the IVR provides that an OIC may **not**, in respect of third party liability insurance coverage:

- prohibit a person who is living with and as a member of the family of the owner of the vehicle from using or operating the vehicle; or
- exclude or provide different limits of coverage for that person.

Despite any provision of the IVA or IVR, an insurer is not liable to an insured under an OIC for loss or damage in circumstances specified in the owner’s policy if:

- the OIC relates to a vehicle that is not required under the *Motor Vehicle Act* to be licensed and insured (IVA, s 61(7)(a)); and
- the owner’s policy is endorsed with a statement that the insurer is not liable to the insured for loss or damage in those circumstances (61(7)(b)).

## ***B. Types of OICs***

### **1. Extended Third Party Legal Liability**

Third Party Legal Liability insurance may be increased from the basic compulsory \$200,000 (taxis and limousines require \$300,000; buses \$500,000) to a greater amount. The exclusions and conditions that apply to the basic Third Party Legal Liability coverage (Part 6) also apply to this extended coverage. See **Section II.B.10: Forfeiture of Claims and Relief from Forfeiture** and **Section II.B.11: Breach of Conditions and Consequences**, above.

### **2. Own Damage Coverage**

Own Damage protection is provided by Collision, Comprehensive, or Specified Perils coverage. It covers loss or damage sustained to the vehicle named in the owner’s certificate.

#### ***a) Types of Own Damage Coverage***

##### **(1) Collision**

This insurance covers loss or damage to the insured vehicle resulting from upset or collision with another object, including the ground or highway, or impact with an object on or in the ground. This type of insurance is available with a wide choice of deductibles (IVR, s 150).

(2) Comprehensive

This insurance covers loss or damage from any cause other than collision or upset. In addition to the Specified Perils listed below, this includes vandalism, malicious mischief, falling or flying objects, missiles, and impact with an animal. Comprehensive coverage is subject to various deductibles (IVR, s 150).

(3) Specified Perils

This insurance is more limited than Comprehensive. It covers only loss or damage caused by fire, lightning, theft or attempted theft, windstorm, earthquake, hail, explosion, riot or civil commotion, falling or forced landing of an aircraft or part of an aircraft, rising water or the stranding, sinking, burning, derailment or collision of a conveyance in or on which a vehicle is being transported on land or water (IVR, s 150).

**b) *Limit on Liability***

The limit on the amount of indemnity payable is determined, by whichever of the following is lesser (IVR, s 169 & Schedule 10 s 5):

- a) the cost of repair of the vehicle and its equipment;
- b) the actual cash value of the vehicle and its equipment; or
- c) the declared value of the vehicle and its equipment.

**c) *Exclusion of Liability***

Own Damage Coverage does **not** cover loss or damage:

- to tires, unless the loss or damage is caused by fire, theft, or malicious mischief, or is coincidental with other loss or damage;
- to any part of the vehicle resulting from mechanical breakdown, rust, corrosion, wear and tear, explosion within the combustion chamber, or freezing, unless caused by fire, theft, malicious mischief or coincidental with other loss or damage;
- consisting of mechanical or physical failure of the vehicle or any part of it; or
- to contents of the vehicle including personal effects.

Other situations to which coverage does **not** apply are:

- embezzlement;
  - conversion (i.e., when a seller does not own the vehicle sold);
  - voluntary parting of ownership, whether or not induced to do so by fraud; and
- towing of an uninsured vehicle that is required to be insured

**d) Coverage Available Through ICBC Policy**

Although Part 9 of the IMVAR has been repealed and many of its sections are not covered by the IVA or IVR, ICBC continues to implement much of the content of that Part through internal policy. The following are types of policies that are available through ICBC policy.

(1) Loss of Use Coverage

Loss of Use coverage can be purchased only in conjunction with Own Damage (collision, comprehensive, or specified perils coverage). It provides reimbursement up to the limits purchased by the insured for expenses incurred for substitute transportation when a valid claim can be made under Own Damage coverage. Subject to the regulations, an insurer may provide for exclusions and limits of loss in an OIC, in respect of loss of use of the vehicle (IVA, s 65).

An OIC providing insurance against loss of use of a vehicle may contain a clause to the effect that, in the event of loss, the insurer must pay only an agreed portion of any loss that may be sustained or the amount of the loss after deduction of a sum specified in a policy. For such a clause to have legal effect, it must be printed in a prominent place on the policy and in conspicuous lettering contain the words “this clause contains a partial payment of loss clause” (IVA, s 67).

(2) Limited Depreciation Coverage

This optional coverage is available for first owners of certain new vehicles who have purchased Own Damage Coverage. Its purpose is to protect the owner from the high rate of depreciation during the first two years of the vehicle’s life, when such depreciation is a significant factor in payment of a claim by ICBC. Total Loss Payout is the full purchase price or the manufacturer’s list price, whichever is less. Damage for other than a total loss will be repaired with similar kind and quality of parts, without depreciation.

**e) Forfeiture of Claims and Breach of Conditions**

Apart from exclusions described above, a claim may be forfeited:

- under s 75 of the IVA, which states that an insured must not falsely describe the vehicle in respect of which the application is made, misrepresent or fail to disclose in the application a fact required to be stated, violate a term or condition of the insurance contract, or wilfully make a false statement with respect to a claim;
- under s 169 of the IVR;
- if certain conditions are breached, including failure of the insured to comply with the IVR; or
- If any regulation is breach by the insured. For an exhaustive list, see IVR, s 55.

The principal examples of failure to comply with, or breach of, regulations are:

- a) being under the influence of liquor or drugs so as to be incapable of proper control of the vehicle;
- b) being convicted for an offence under ss 249, 252, 253, 254, or 255 of the *Criminal Code*;
- c) operating a vehicle when not authorized and qualified (IVR, s 55);
- d) using the vehicle in illicit trade, or to avoid arrest, or other police action (s 55);
- e) towing an unregistered, unlicensed trailer (s 55);
- f) permitting others to breach a condition (s 55);
- g) using a vehicle in a manner contrary to the insured person's statement in his or her application for coverage, the result being a form of breach of condition. This happens most commonly in cases where coverage of a vehicle for "pleasure purposes" is applied for, and the vehicle is damaged when in fact being used to take the insured person to or from work (s 55 sets out the specifics);
- h) failing, without reasonable cause and to the prejudice of ICBC, (i) to make a police report within 48 hours after the discovery of theft, loss, or damage; (ii) to obtain a police case file number; and (iii) to advise ICBC within seven days of making the report to the police of the circumstances of that loss or damage as well as the police case file number (s 136 (a)); and
- i) failing, without reasonable cause and to the prejudice of ICBC, to comply with ss 67 or 68 of the MVA, or similar provisions in the law of another Canadian or American jurisdiction, relating to the duties of a driver directly or indirectly involved in an accident (IVR, s 136(b)).

**NOTE:** The IA Regulations, under s 128, sets out the circumstances in which ICBC may enforce a right of recovery against a person who, with the consent of the insured, has the care, custody or control of the insurer's vehicle.

***f) Exceptions to Forfeiture***

If a vehicle is used "contrary to statement in application", the right to indemnity is not forfeited when the damage occurs during a mere "occasional" use of the vehicle in violation of the statement in the application. These exceptions are the same as those permitted for "occasional use" in third-party liability cases (see above and Schedule 1, s 2, Table 2).

***g) Reporting Accidents***

Coverage may be denied where an insured person fails to comply with ss 67 or 68 of the MVA without reasonable cause and to the prejudice of ICBC. The onus of proving compliance lies on anyone who is bound to report.

Section 67 of the MVA deals with the duty to file accident reports in cases where aggregate damage apparently exceeds \$1,000, or where there is any bodily injury, and provides that the reports are normally confidential.

Section 68 deals with the immediate duties of persons in charge of vehicles involved in a highway “incident”, namely: to remain at the scene, render assistance, and provide identification of person and insurance coverage. If the other vehicle is unattended, the driver of the colliding vehicle must leave full identification conspicuously posted.

Any breach of these duties is an offence punishable under the MVA. Similar duties are created by ss 249 and 252 of the *Criminal Code*. A breach of them can result in more severe penalties. These duties apply to any highway “incident” regardless of any insurance aspects of the case, and even if the driver was only “indirectly” involved in the incident.

#### ***h) Limitation***

There is some confusion about which claims must be brought within one year of the accident and which have a limitation period of two years. The IVA stipulates that any action by an insured person against ICBC “shall be commenced within **one year** after the happening of the loss or damage, after the cause of action arose, or after the final determination of the action against the insured (IVA, s 17 & 76(7)). IVR s 103, on the other hand, stipulates that no action shall be brought against the Corporation for loss or damage under Part 7 of the IVR after the expiration of two years from the occurrence of the loss or the last day benefits were provided. From a practical point of view, **it is almost always better to commence an action as soon as possible to avoid any problems with limitation periods.**

#### ***i) Dispute Resolution and Appeals Process***

The Lieutenant Governor in Council may make regulations respecting mediation or arbitration including, without limitation, regulations providing to a party to a vehicle action the ability to require the parties to engage in mediation or arbitration and setting out when and how that ability may be exercised and prescribing any other results that flow from the exercise of that ability (IVA, s 96).

##### **(1) How Decisions Regarding Liability are Made**

Disputes frequently arise when the vehicle of a person insured by ICBC is damaged by another insured person. In that situation, an adjuster will decide the degree of fault between the two parties. The adjuster’s decision is based on traffic regulations, and the rules of negligence, with the party in contravention of the MVA generally being found at fault. If both parties have contravened some regulation, however, a 50-50 assessment is often made. This is also the case when there are no independent witnesses.

##### **(2) Appeal Process: Two Routes**

If a client is dissatisfied with an adjuster’s decision, there are two available courses of action:

- a) the client can go through ICBC’s internal appeal procedure by asking the adjuster to review his or her decision and, if there is no change, by asking the claims manager to review it. If the client is still not

satisfied, the third step is to present the client's case to an appeal panel; or

- b) the client can sue. This is commonly the most satisfactory course, particularly where the amount in issue is relatively small, as where the damage is about the same amount as the "deductible". Such an action is not brought against ICBC under the policy, but against the driver (and owner, MVA, s 86) whose negligence is said to have caused the accident. In such a case, that ICBC was not liable to pay the "deductible" to its own insured does not relieve the negligent party from liability, assuming always that negligence can be established.

There are two ways in which to frame the action. The plaintiff can either claim the total amount of damage resulting from the negligence, even though ICBC has already paid a portion of it, or the plaintiff can claim merely the amount that ICBC has not paid. Remember, however, that a plaintiff cannot collect twice, and if he or she sues for more than the deductible, he or she may be held to be acting as a trustee for the Corporation and therefore liable to account for anything in excess of the deductible. In either case, the plaintiff bears the onus of proving the negligence alleged against the defendant.

**NOTE:**

If ICBC denied liability to indemnify a person insured by it and that person is sued, ICBC is entitled to apply to the court to be joined as a third party (IVA, s 77(3)). Upon being made a third party, ICBC can then defend the action fully, despite its previous denial of liability to indemnify the defendant (IVA, s 77(4)). In *West v Cotton* (1994), 98 BCLR (2d) 50 (SC), the third party, ICBC, conducted the defence of a defendant to whom it denied coverage and who did not participate in the proceedings. Having succeeded in proving his claims, the plaintiff was not entitled to recover his or her costs, with one exception: that being against the third party. In this case, ICBC would have suffered significant prejudice if it had been precluded from presenting its defences as third party since the defendant did not demonstrate any interest in maintaining the action.

## V. PERSONAL INJURY CLAIMS

### A. *Making a Claim with ICBC*

The IVR provides for a number of benefits that are administered by ICBC, as the motorist's insurer, in instances where the motorist damages his or her automobile and/or sustains injuries after an accident. These regulations can be thought of as the motorist's "insurance policy". All of the benefits to which a motorist is entitled are explained in the IA Regulations. ICBC adjusters in claim centres around the province administer these benefits. The following outlines the general process to be expected.

A claimant must also keep in mind that drivers have certain responsibilities at the scene of an accident. For a full list of these responsibilities, please see **CHAPTER THIRTEEN: MOTOR VEHICLE ACT** of the LSLAP Manual.

#### 1. **Dial-A-Claim**

When calling Dial-a-Claim, the claimant will be put in touch with a representative who will take down pertinent details of the accident, including the time, date, place, license identification of the vehicles involved, etc. The representative will ask the claimant to give a brief narrative of

how the accident occurred. This narrative will be taken down and entered into the computer files at ICBC. The claimant will then be given a claim number that will follow the claim and the claimant through the entire process. The claim number enables ICBC to find the claimant's file through any office and to quickly identify the adjuster who is dealing with the claim.

## 2. Meeting with the Adjuster

The Dial-a-Claim representative will schedule an appointment for the claimant at a local claim centre. When the claimant goes to the appointment, he or she will talk to an adjuster about the accident. The adjuster will ask the claimant to make a statement about how the accident occurred and about the injuries that the claimant sustained.

The adjuster will also ask the claimant to sign "No-Fault Benefit Claim Forms". These forms are not "releases" and by signing them, the claimant is not waiving any of his or her rights to benefits or to damages for injuries or loss emanating from the accident. The forms simply allow for the release of the claimant's MSP number, the claimant's SIN number, information from the claimant's doctor, and information from the claimant's employer. Nonetheless, it would be prudent for unsophisticated or illiterate claimants to have someone other than the adjuster go over the forms with them before signing.

## 3. The Adjuster's Perspective

While the adjuster is an agent of the claimant's own insurance company, for purposes of administering the "no-fault benefits" the adjuster is also an agent of the tortfeasor's insurance company and, in that capacity, has an interest in minimizing the claimant's injuries and damages.

The adjuster will typically encourage the claimant to minimize the extent of the injuries or damages. The claimant should be aware of this and should guard against agreeing that everything is satisfactory when it is not. Claimants should be cautious not to express optimism about their injuries and should try to neither understate nor overstate their injuries.

Where fault is an issue, claimants may find the adjuster manipulating their narrative to place them in a negative light. This is often done in very subtle ways and claimants should be aware of it so that they can guard against it. Typically, an adjuster will draw a map or diagram of the accident scene and state that it is "not to scale". The Corporation may later claim that the diagram is an accurate depiction of the accident and tantamount to a confession of fault.

The claimant should avoid agreeing with interpretations of the accident that are made by the adjuster and should endeavour to have the adjuster transcribe the claimant's exact words. Typically, the adjuster will write out the claimant's statement in longhand and then ask the claimant to review it. The claimant may feel reluctant to make changes because the adjuster has taken the time to write out the statement. The claimant should not hesitate to make changes and initial them, or to ask the adjuster to start all over again.

**The claimant should be extremely careful in making statements to the adjuster.** The claimant must understand that these statements will later be scrutinized. In cases involving serious injury and cases where liability is disputed, the claimant should have a lawyer with him or her when he or she makes statements to the adjuster.

## 4. The "Independent" Medical Assessment

Under the IVR, ICBC may appoint a doctor to make an "independent" medical assessment of the claimant's condition even after your own doctor has assessed you'. While some of these doctors are objective, others may have a strong defence bias. Their task is to see if they can

locate weaknesses in the claimant's case. The claimant should take care neither to exaggerate nor to minimize the injuries.

## 5. ICBC Private Investigators

The claimant should be aware that private investigators hired by ICBC do exist. They check up on claimants and the evidence that they gather can be used against claimants. For example, if the claimant says that he or she cannot mow the lawn or lift a bag of flour, and then goes outside and does just that, he or she runs the risk of being photographed and/or videotaped by a person employed by ICBC.

## 6. "Minimal Damage" and ICBC Policy

The claimant should also be aware that ICBC has a well-publicized policy of declining to honour claims for injuries or losses where there is "minimal damage" to the automobiles and/or persons involved in the collision. Where the damages fall below \$1,000, a claimant may find him or herself confronted with an adjuster who states flatly that ICBC has a policy of refusing to pay claims in certain cases where science has established that injuries and damages cannot occur. An adjuster may also tell a claimant that he or she is without discretion in settling claims, and that he or she is required to employ classifications and a system of scaling, with an unsuccessful or unsatisfactory result for the claimant. In all these situations, the claimant should know that these decisions do not represent the **law**, but are merely ICBC **policy**, and can be and often are challenged successfully in court, where judges may give larger awards. Recently, it appears that ICBC may be revoking this policy.

### ***B. Identifying Parties to the Dispute***

The plaintiff(s) in a given case may be any or all of the following:

- the injured party (which could be the driver, occupant, or bystander) or the estate of the deceased; the relatives of the injured party; the registered owner of the vehicle in the accident; and/or the guardian of a party lacking the requisite mental capacity to commence an action.

In general, anyone whose negligence may have caused or contributed to the motor vehicle accident should be joined as a defendant. This might include:

- the drivers; passengers; the estate of deceased defendants; registered owners of vehicles; ICBC or other insurers; ministry of BC transportation; municipalities; the parties responsible for the manufacture or maintenance of the vehicle; and/or employers.

Appropriate third parties to the dispute will often include insurance companies (including ICBC) who, while not themselves tortfeasors, may be under an obligation to indemnify the defendant.

**NOTE:** It is very important to properly determine who the parties are. Failure to do so may adversely affect the client's claim, and/or may result in an empty judgement. See **Chapter 22: Small Claims Procedure** for more information (the information holds true in Supreme Court as well).

**NOTE:** When the accident occurred "in the course of employment", the *Workers Compensation Act* [WCA], RSBC 1996, c492, may apply. Where the WCA is engaged, the Act assumes exclusive jurisdiction over the case, and an action in tort is barred. It is therefore extremely important to fully explore the employment relationship(s) of both plaintiffs and defendants before proceeding. See **Chapter 7: Workers' Compensation** for more information.

### ***C. The Fault Requirement***

**The present system of accident compensation is fault-based.** The claimant sues in tort, which can be divided into two areas: intentional torts and negligence. Injuries that are caused with intent to contact (in the case of battery) are intentional torts. Injuries that are caused by a lack of reasonable care by one party are negligence claims. Negligence encompasses all departures from accepted reasonable standards.

A prerequisite to any tort action is that the damages suffered by the claimant were not caused by the claimant's own fault. If the claimant is partly at fault for the accident, damages will be reduced in accordance with the claimant's degree of fault. For example, if the claimant is 50 percent to blame for the accident, his or her damages will be reduced by a corresponding amount of 50 percent.

Cases where fault is an issue frequently go to trial. Claimants should be advised that often the adjuster will suggest a claimant is fully at fault for the accident, when in fact she or he may only be partially at fault. The claimant should recognize that the adjuster is trying to dissuade the claimant from litigating a claim. The claimant may well end up establishing 50 percent fault on the part of the other driver and obtaining a 50 percent settlement.

#### ***D. Private Settlements***

**Private settlements should be discouraged.** Potential plaintiffs should always consult a lawyer prior to settling a claim, whether privately or with ICBC. Similarly, potential defendants in such matters should seek the advice of a lawyer and to contact ICBC prior to paying out any sums, so as not to prejudice their rights and their plan of insurance with ICBC.

#### ***E. Inequality of Bargaining Power***

The courts may set aside a release of claim for personal injuries on the grounds that it was in circumstances where it can be shown there was inequality of bargaining power between the parties.

In *Towers v Affleck*, [1974] 1 WWR 714 at 719 (BCSC), Anderson J. stated that the question to be determined is whether "the plaintiff has proved by a preponderance of evidence that the parties were on such an unequal footing that it would be unfair and inequitable to hold him or her to the terms of the agreement which he or she signed. While the court will not likely set aside a settlement agreement, the court will set aside contracts and bargains of an improvident character made by poor and ignorant persons acting without independent advice unless the other party discharges the onus on him or her to show that the transaction is fair and reasonable." See also *Pridmore v Calvert* (1975), 54 DLR (3d) 133 (BCCA).

On the basis of the preponderance of the evidence (or on a balance of probabilities), therefore, the following questions should be asked:

1. Was there inequality of bargaining power?
2. If so, would it be unfair or inequitable to enforce the release of claim against the weaker party?

Where a plaintiff signs a Release of Claim, the defendant will not be able to dismiss a claim the plaintiff subsequently makes using Rule 9-7 of the BC Supreme Court Civil Rules, if the evidence leads the court to conclude that the plaintiff was misled, even if unintentionally, into believing the document signed was releasing claims in areas that the plaintiff believed to be irrelevant.

This reasoning relies on the plea of *non est factum* (Latin for "not my deed"), a common law plea allowing a person who has signed a written document in ignorance of its character to argue that, notwithstanding the signature, it is not his or her deed. In other words, if the person's mind does not go with the deed of signing, the release is not truly his or her deed.

Unconscionability and misrepresentation may also be successful grounds for rendering an otherwise valid Release of Claim invalid. See *Clancy v Linquist* (1991), 2 CCLI (2d) 63 (BCSC), per Scarth J.

In *Mix v Cummings* (1990), 46 CCLI 203 (BCSC) [*Mix*], per Perry J., a general release discharging and releasing defendants from all claims, damages, and causes of action resulting, or that will result, from injuries received in an automobile accident was upheld on the following basis:

1. the court found no mutual mistake of fact based on a misconception as to the seriousness of the injuries sustained in the accident;
2. the release was not the product of an unconscionable or unfair bargain; and
3. the plea of *non est factum* and want of *consensus ad idem* were unfounded in the circumstances.

The implication of the *Mix* judgment is that the presence of any of the above factors in a particular set of facts may be sufficient to invalidate a general release. Note, however, that the mere fact that a plaintiff's injuries became more serious than he or she anticipated when signing a release will generally **not** invalidate the release.

#### ***F. Plaintiff's Duty to Mitigate***

The plaintiff has a duty to mitigate his/her injuries after an accident. Generally, this means following your doctor's instructions so that recovery from any injuries is as quick as possible. Failing to follow your doctor's instructions can aggravate the injury and prolong recovery, thus increasing expenses. If this is the case, ICBC will argue that your failure to mitigate and speed up the recovery should decrease the amount of money to which you are entitled. This occurred in *Rasmussen v Blower*, 2014 BCSC 1697, where the plaintiff was counselled to do physiotherapy and massage, but only attended one appointment of each. The trial judge stated that the plaintiff should have shown more perseverance and given time to allow the medical treatments to work. Due to the plaintiff's failure to mitigate, the trial judge reduced the plaintiff's award by 20%.

If you find that you are unable to afford certain treatments that are mandated, you should apply for coverage through Part 7 (no-fault) benefits (see **Part II.C**). A judge will not take a failure to apply for these benefits as an excuse for not continuing with treatment (*Rasmussen v Blower*).

#### ***G. Which Court has Jurisdiction?***

##### **1. Provincial Court, Small Claims Division**

The Small Claims limit is \$35,000 (effective June 1, 2017). Accordingly, claims for minor injuries may come within the jurisdiction of the Provincial Court. The procedure for bringing a case to trial in Small Claims Court is fully set out in this Manual in **Chapter 22: Small Claims Procedure**.

A claim commenced in Small Claims court can be transferred to Supreme Court on application by one of the parties or by a judge on his or her own initiative. Such an application should be made as early as possible for a greater chance of success. A judge at the settlement/trial conference, at trial, or after application by a party at any time, **must** transfer a claim to Supreme Court if he or she is satisfied that the monetary outcome of a claim (not including interest and expenses) may exceed \$35,000. However, there may be exceptions. A claim will remain in the Small Claims Division if the claimant expressly chooses to abandon the amount over \$35,000. For personal injury claims, a judge must consider medical or other reports filed or brought to the settlement/ trial conference by the parties before transferring the claim to Supreme Court.

## 2. Supreme Court of British Columbia

The Supreme Court of British Columbia is governed by the *Supreme Court Civil Rules*.

Actions for damages over \$35,000 (effective June 1, 2017) come within the jurisdiction of the Supreme Court of British Columbia. The following represents a brief overview of the procedure for bringing a case to trial at this level.

A claim commenced in Supreme Court can be transferred to the Small Claims on application by one of the parties or by a judge on his or her own initiative. The judge must be satisfied that the monetary outcome of the claim will not exceed \$35,000. Such an application should be made as early as possible for a greater chance of success, and where appropriate, may be accompanied by an express statement by the plaintiff abandoning any claim to damages in excess of \$35,000.

### a) *Regular Trial*

#### (1) The Notice of Civil Claim

A claim in the Supreme Court of British Columbia is initiated by filing a Notice of Civil Claim. The Notice of Civil Claim is served upon ICBC and the defendant(s). The IAR deals with situations where there are unknown drivers, hit and run accidents, etc. Where the defendant is an uninsured motorist, ICBC will receive the pleadings and file a defence.

#### (2) The Response to Civil Claim

After the claim has been served, ICBC will appoint defence counsel on behalf of the insured, or on behalf of itself if there is an uninsured motorist, and file a Response to Civil Claim.

#### (3) Reserving a Trial Date

After the Response to Civil Claim is filed, the parties will reserve a trial date. The trial date usually falls approximately two to two-and-a-half years ahead. The reason for this delay is that the court registry is overbooked. The delay is not usually a problem since it takes some time to organize the trial and it is often not until some time after the accident that the full extent of the claimant's injuries can be determined. If additional time is required, when the trial date arrives, the trial can be adjourned by consent of the parties.

#### (4) The Examination for Discovery

Once the trial date is reserved, an Examination for Discovery may be held. Discovery of the plaintiff is initiated at the option of defence counsel and will typically occur six months to one year after the lawsuit is initiated. The Discovery will usually take one day but can last longer in certain cases. Prior to the Discovery, defence counsel will scrutinize the claimant's statements to the adjuster. At the Discovery, the defence counsel will cross-examine the claimant about the manner in which the accident occurred and the extent of the claimant's injuries.

Most cases are not settled until after the Discovery, since it is at this stage that defence counsel is able to assess the credibility and seriousness of the claim and make a determination respecting the sort of damages to which the claimant may be entitled.

**b) *Fast Track Litigation - Rule 15-1***

This rule was introduced to provide an efficient and less expensive means of dealing with cases where the trial will last 3 days or less.

Fast track litigation may apply to an action if:

1. The only claims in the action are for money, real property, builder's lien, and/or personal property  
  
    **and** the total of the following amounts is \$100,000 or less, exclusive of interest and costs:
  - a) the amount of any money claimed in the action by the plaintiff for pecuniary loss;
  - b) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss; and
  - c) the fair market value, at the date the action is commenced, of all real property, all interests in real property, all personal property and all interests in personal property claimed in the action by the plaintiff.
2. The trial of the action can be completed within 3 days
3. The parties to the action consent, **or**
4. The court, on its own motion or on the application of any party, so orders.

**NOTE:** The court is not prevented from awarding damages in excess of \$100,000

If this rule applies to an action,

1. any party may file a notice of fast track action in Form 61;
  2. the filing party must serve all other parties on record with a copy; **and**
  3. the words "Subject to Rule 15-1" must be added to the style of proceeding, immediately below the listed parties, for all documents filed after the notice of fast track action is filed or if the court so orders.
- This rule ceases to apply if the court, on its own motion or on application of any party, so orders.
  - Parties to a fast track action can serve on another party a notice of application or an affidavit in support of an application **ONLY** after a case planning conference or a trial management conference has been conducted in relation to the action. This rule does not apply if:

- a. The court orders the fast track action to cease;
  - b. If an application is made by a party, judge, or master to relieve a party from this requirement if
    - i. It is impracticable or unfair to require the party to comply; **or**
    - ii. The fast track litigation application is urgent;
  - c. If the action is scandalous, frivolous, or vexatious (as per Rule 9-5);
  - d. If the action will proceed by summary judgment or summary trial (Rule 9-6 and 9-7);
  - e. If an application is made to add, remove, or substitute a party; **or**
  - f. The parties consent.
- Fast track action must be heard by the court without a jury.
  - Examinations for discovery of a party of record by all parties of record who are adverse in interest must not, in total, exceed 2 hours or any greater period to which the person to be examined consents, unless otherwise ordered by a court
  - All examinations for discovery in a fast track action must be completed at least 14 days before the scheduled trial date, unless the court orders otherwise or the parties to the examination consent.
  - If a party to a fast track action applies for a trial date within 4 months after the date on which this rule becomes applicable to that action, the registrar must set a date for the trial that is not later than 4 months after the application for a trial date.

## ***H. Damages***

Claimants often have unrealistic expectations about the amount of damages they are likely to receive. Claimants should be cautious about listening to stories of awards told by relatives and friends as these stories may be exaggerated and/or may be missing crucial pieces of information.

### **1. How Damages are Assessed**

The court will determine what damages a claimant is entitled to on the basis of precedent. It is therefore possible to project what the court will award by looking for similar cases. The judgments will outline the nature of the injuries sustained by the claimant and court's assessment of damages.

### **2. Heads of Damage**

To understand an award, it is necessary to consider all the heads of damage. For example, a claimant who is a brain surgeon at the height of his or her career and who has a finger amputated might have a loss of prospective earnings claim in the millions and a relatively small claim for non-pecuniary losses. In contrast, a claimant who is retired and has a leg amputated

may have a relatively low loss of prospective earnings claim but a relatively high claim for non-pecuniary damages.

The major heads of damage are as follows:

**a) *Non-pecuniary Damages***

Non-pecuniary damages are awarded to **compensate** the claimant for pain and suffering, loss of enjoyment of life, loss of expectation of life, etc. In 1978, the Supreme Court of Canada placed a cap of \$100,000 on awards for non-pecuniary damages in *Andrews v Grand & Toy Alberta Ltd*, [1978] 83 DLR (3d) 452 (SCC). This means that the limit for this head of damages after adjusting for inflation, is now about \$360,000.

**b) *Loss of Prospective Earnings***

Loss of prospective earnings is the capitalized value of the claimant's loss of income from the time of the accident to the claimant's projected date of retirement. The capitalization rate will be calculated by using present rates of return on long-term investments, and an allowance will be made for the effects of future inflation. In determining the value of prospective earnings, the claimant's earning capacity over his or her working life, prior to the accident, will be evaluated. In a claim for the capitalized value of lost prospective earnings, the defendant will seek to reduce that amount by introducing evidence of future contingencies.

In calculating loss of prospective earnings, the figure that is used is the loss of Income Net of Taxes, as opposed to Gross Income Loss under Part I, s 2.1 of the *IA*. This applies to any unintentional accidents that occur after June 17, 1997. This amendment was brought into force on October 1, 1997 by Orders in Council numbers 949 and 1080.

**c) *Cost of Future Care***

Cost of future care is the cost of the claimant's future care over his or her expected life span. As with loss of prospective earnings, cost of future care is capitalized and reduced for contingencies.

**d) *Special Damages***

Special damages compensate the claimant for expenses like drugs, crutches, orthopedic shoes, and artificial limbs. Claimants should keep every document, receipt and bill that relates to their accident. The claimant must have the originals to be reimbursed.

**3. Lump Sum Awards and Structured Settlements**

Damages can be paid in a lump sum or through a structured settlement. A structured settlement is an arrangement where the damages to which a claimant is entitled are left under the control of the insurer. The insurer enters an annuity contract with the claimant and agrees to pay that claimant a certain income for a set period of time. Structured settlements are often recommended in infant cases and cases where the claimant has a mental disability or infirmity. In rare cases, a court imposes a structured settlement.

Structured settlements are worth considering if the amount of the principal settlement exceeds \$50,000 to \$100,000. These arrangements offer advantages for the claimant and the insurer. One advantage for the claimant is that the interest gained on that settlement is not taxable. The claimant therefore gets much more money than if he or she took the lump sum and invested it. Another advantage is that the claimant does not suddenly come into a large sum of money and run the risk of spending it foolishly. The advantage to the insurer is that the Corporation doesn't have to pay out all of the money at once and is entitled to derive income from it.

Structured settlements can be set up through a number of licensed dealers in British Columbia. Various options are available. For example, the claimant could receive a lump sum every five years, an indexed monthly sum, a monthly sum that decreases over the years, or a monthly sum and periodic lump sum payments. Most dealers do not charge for providing projections of the various income streams and the costs associated with them.

## ***I. Costs***

In addition to the claim for damages, the successful claimant should claim costs. Courts award costs to compensate for the costs of pursuing a claim. Costs are calculated or assessed on the basis of a tariff set out in the *Supreme Court Act*, RSBC 1996, c 443. They do not fully compensate the claimant for the cost of pursuing the litigation but go some distance toward paying for the disbursements and a portion of the legal fees charged by the lawyer. Claimants in Small Claims court can claim “expenses” but not counsel fees.

## ***J. Reaching a Settlement Before Trial***

### **1. Negotiation**

Following examination for discovery, defence counsel will write a detailed reporting letter to the adjuster making recommendations about a settlement. The adjuster will present the defence counsel's recommendations to ICBC, which may or may not accept them. Upon reply, defence counsel will inform the claimant's counsel of ICBC's position. If the claimant is unwilling to settle, the claimant's counsel may contact the adjuster and submit a counter-offer, or continue to prepare the claimant's case for mediation or trial. This process will likely be repeated several times.

### **2. Mediation**

The Notice to Mediate is a new process by which any party to a motor vehicle action in Supreme Court may compel all other parties to the action to mediate the matters in dispute. (*Notice to Mediate Regulation*, BC Reg 127/98, s 2 [NMR]). The Notice to Mediate process does not provide a blanket mechanism to compel parties into mediation. Rather, this process provides institutional support for mediation in the context of motor vehicle actions.

The party that wishes to initiate mediation delivers a Notice to Mediate to all other parties in the action no earlier than 60 days after the pleading period, and no later than 77 days before the date set for the start of the trial. Within 10 days after the Notice has been delivered to all parties, the parties must jointly agree upon and appoint a mediator (NMR, s 6). The mediation must occur within 60 days of the mediator's appointment, unless all parties agree in writing to a later date (NMR, s 5). If one party fails to comply with a provision of the NMR, any of the other parties may file a Declaration of Default with the court (NMR, s 11). If this occurs, the court has a wide range of powers, such as staying the action until the defaulting party attends mediation, or making such orders as to costs that the court considers appropriate.

The parties will share the cost of the mediator equally, unless the parties agree on some other cost sharing arrangement (NMR, s 9(2)(b)). The hourly rates of mediators vary, and this is a factor to be considered in selecting a mediator. The mediator will probably spend about one hour preparing for the mediation, and the mediation session will last about three hours.

### 3. ICBC's Obligations to the Insured

ICBC has an obligation to protect the insured by making an effort to settle the claim in the limits of the amounts of coverage. Insurers are under an obligation to consider the interests of their insured in deciding whether to settle a claim. The insurer assumes by contract the power of deciding whether to settle and it must exercise that power in good faith.

In *Fredrikson v Insurance Corporation of British Columbia* (1990), 44 BCLR (2d) 303 (SC), Esson CJ. summarizes the law respecting the insurer's duty to its insureds in certain areas discussed therein. In this particular case, ICBC acted in good faith, and in a fair and open manner, followed the course the insured wished to take. Among the points raised in the judgment are:

- i) the exclusive discretionary power of ICBC to settle liability claims places the insured at the mercy of the insurer;
- ii) this vulnerability imposes duties on the insurer to act in good faith and deal fairly, and to not act contrary to the interests of the insured, or, at least, to fully advise the insured of its intention to do so;
- iii) the insurer's duty to defend includes the obligation to defend by all lawful means the amount of any judgment awarded against the insured.

See also *Shea v Manitoba Public Insurance Corporation* (1991), 55 BCLR (2d) 15 (SC), per Finch J.

### 4. Formal Offers to Settle and Cost Consequences

Under Rule 9-1 of the *Supreme Court Rules*, a plaintiff or defendant who refuses a reasonable offer to settle may be penalized for needlessly dragging out the litigation.

**NOTE:** An offer to settle does not expire due to a counter offer being made.

For Rule 9-1 to be engaged, a formal offer to settle must be made in writing, and delivered to all parties of record, and must contain the language:

- "The .....[party(ies)]....., .....[name(s) of party(ies)]....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

Such an offer to settle must not be disclosed to the court/jury or set out in any proceeding until all issues in the proceeding, other than costs, have been determined. Also, an offer to settle does not constitute an admission.

If a plaintiff accepts an offer, the sum of which falls in the jurisdiction of the Provincial court (*Small Claims Act*), they are **not** entitled to costs, other than disbursements. However, this rule can be overridden if the court finds a sufficient reason for the proceeding taking place in the Supreme Court.

The court, in assessing costs has broad discretion to consider a refusal to settle in making an order with respect to costs. The court may consider:

- whether the offer ought to have reasonably been accepted;
- relationship between the terms of settlement and the final judgment of the court;

- relative financial circumstances of the parties; and/or
- any other factor the court considers appropriate.

Based on such considerations, the court **may** do one or more of the following:

- if it determines that the offer ought reasonably to have been accepted, then the court may deprive a party of costs, to which it would otherwise be entitled, for steps taken after the date of service or delivery of the offer to settle;
- award double costs for all or some of the steps taken in the proceeding after the delivery date of the formal offer;
- award a party costs for all or some of the steps taken in the proceeding after the delivery date of the formal offer which that party would be entitled to had the offer not been made;
- Where the plaintiff refuses an offer to settle from the defendant, and the eventual judgement is no greater than the offer, the court may award the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of the offer.

The rules penalizing a plaintiff for overreaching the true value of a claim can be catastrophic, and can visit financial ruin upon a claimant who does not exercise a sober and realistic assessment of his or her claim as he or she proceeds into Supreme Court. It is entirely within the realm of possibility that a claimant who refuses to accept an offer of \$30,000.00, after judgment for \$29,000.00 (i.e. lower than the offer to settle) would finish the day, after paying the insurer's costs and disbursements, and his or her own disbursements, with **nothing or less than nothing**: a debt to the insurer and his or her own lawyer for disbursements.

It should be stressed to clients that the lawyer who is hired to do a personal injury case is supposed to be objective, realistic, and not inclined to simply tell the client what they want to hear. When a lawyer talks about the risks of litigation, this penalty for misjudging the value of a case is one of the most important risks to consider.

## VI. CLAIMS INVOLVING OUT-OF-PROVINCE INSURERS OR ACCIDENTS

### A. *Conflict of Law Issues*

Following *Tolofson v Jensen* (1995), 100 BCLR (2d) 1, in Canada, the substantive law to be applied in torts is the law of the place where the activity occurred, rather than the place where the action is being tried.

When foreign law applies to an action commenced in BC, unless all counsel can agree on the substantive law that applies, counsel seeking to rely on the foreign law has the burden of proof to establish the content of that law. This is often supported by expert opinion evidence in court.

#### 1. **Limitation Periods**

Subsequent cases have confirmed that limitation laws are generally (but **not** always) substantive.

#### 2. **The access of damages**

The court in *Wong v Wei*, (1999), 65 BCLR (3d) 222 (SC) drew a distinction between the availability of heads of damage, which is a matter of substantive law, and the assessment or quantification of damages, which is a matter of procedure.

## **B. Jurisdiction**

In general, any claim will likely go through the court where the accident occurred (i.e. if the accident was in BC, it will go through the BC Provincial or BC Supreme Court).

If an accident occurs outside BC and the defendant(s) resides outside of BC, the issue of jurisdiction should be carefully examined before the limitation period expires in either jurisdiction.

Counsel should keep in mind that a plaintiff has two claims, one in tort and the other against a first party insurer for Part 7 (or equivalent) benefits. The jurisdiction issue for the two claims should be considered separately.

The defendant can challenge a BC court's jurisdiction on the basis that the BC court has no jurisdiction to hear the matter at all (i.e. the court lacks jurisdiction *simpliciter*) or that there is a more convenient jurisdiction within which the case may be heard (i.e. the defendant argues that the BC court is *forum non conveniens*).

The BC court has jurisdiction *simpliciter* where there is real and substantial connection between BC and the defendant or between BC and the subject matter of the action. Section 10 of CJPTA lists the circumstances in which it is presumed that there is a real and substantial connection.

In situation involving parallel proceedings in two jurisdictions, it may be necessary to engage in a *forum conveniens* analysis to determine the most convenient jurisdiction within which to hear the matter. In determining the most efficient forum to hold the trial, a court may consider, among other things: where witnesses live; whether injury or disability makes it difficult for one party to travel; and which substantive law will apply (applying complex foreign laws in a BC court may require expensive expert witnesses to be called).

## **C. Out-of-province Insurers**

### **1. Interprovincial or International Reciprocity**

Each Canadian province and territory and each U.S. state has legislation governing the licensing, operation, and insurance coverage of motor vehicles. Provinces cannot regulate insurers operating outside of their borders. However, out-of-province insurers often agree to be bound by the court rules in British Columbia if their insured vehicle causes an accident by way of B.C. business authorizations (licences) or a Power of Attorney and Undertaking ("PAU").

The Canadian Council of Insurance Regulators maintains a repository of all PAUs filed in Canada by U.S. and Canadian auto insurers. A listing of companies that have filed a PAU can be found on the CCIR's website at [www.ccir-ccra.org](http://www.ccir-ccra.org). A complete listing of all British Columbia and extraprovincial insurance companies that have been issued "business authorizations" in British Columbia is available from FICOM and can be downloaded from their website at [www.fic.gov.bc.ca](http://www.fic.gov.bc.ca).

In the case of a claim made against the insured of an out-of-province insurer, PAUs or licences obligate the out-of-province insurer to:

- i) file an appearance in BC court;
- ii) not raise any coverage defence which would not be available to an insurer in BC respecting a BC insured; and
- iii) pay any motor vehicle judgment against the insured up to the minimum liability limits required by BC (i.e. \$200,000).

**NOTE:** Failure by an out-of-province insurer to disclose that it has signed a PAU cannot be grounds for claims of bad faith or negligence (*Pearlman v American Commerce Insurance Co*, 2009 BCCA 78).

## 2. Underinsured Motorist Protection (UMP)

Underinsured Motorist Protection is mandatory first-party coverage provided by ICBC to compensate an insured in the case of injury or death caused by an at-fault motorist. Generally, most residents of B.C. will have access to UMP coverage as the definition of an “insured” set out at s 148.1 of the IVA includes:

(a) an occupant of a motor vehicle described in the owner's certificate,

(b) a person who is

(i) named as the owner or renter in the owner's certificate where that person is an individual,

(i.1) an assigned corporate driver, or

(ii) a member of the household of a person described in subparagraph (i) or (i.1),

(b.1) a person who is

(i) an insured as defined in section 42 and who is not in default of premium payable under section 45, or

(ii) a member of the household of an insured described in subparagraph (i), or

(c) a person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the underinsured motorist for damages because of the death of a person described in paragraphs (a), (b) or (b.1), and, for the purpose of the payment of compensation under this Division, includes the personal representative of a deceased insured.

If a claimant is injured in an accident caused by an individual with limited or no insurance, the IVA still provides for compensation. However, UMP coverage is coverage of last resort, and ICBC often requires a claimant to exhaust all other avenues before accessing UMP, including litigating against an at-fault motorist with limited coverage.

Under UMP, the basic coverage received is \$1 million. However, excess UMP coverage to \$2 million can be purchased by paying a premium on ICBC insurance.

From the UMP coverage, ICBC is entitled to make various deductions under s 148.1 of the IVR (under the definition of “deductible amount”). The deduction of a plaintiff's other insurance entitlements can have a significant impact on the value of a legitimate claim.

## 3. Optional Insurance Contracts and Excess Coverage

Section 80 of IVA provides that if there is an optional insurance contract and any other vehicle insurance (none of which are identified as being issued “in excess” of the others) then each insurer is liable only for the rateable proportion of any loss, liability, or damage. For example, if Policy A provides coverage up to \$100,000 and Policy B Provides coverage

of \$300,000 and the liability of the insured is assessed at \$100,000 then Policy A would pay out \$25,000 and Policy B would pay \$75,000.

Policies providing coverage “in excess” will be triggered only if the limit of other insurance coverage is reached.

Part 4 of the IVA regulates contracts for excess and optional insurance coverage.

There is no formal, established claims-handling protocol between ICBC and private excess auto insurers in BC. Absent any express agreements between ICBC and the excess insurer, neither insurer has any control over the other. Therefore, the plaintiff’s counsel should not assume that ICBC is sharing all information and documents with the excess insurer.

#### 4. Service Outside BC

##### a) *Without a Court Order*

According to Rule 13(1) of the *Supreme Court Rules*, in any of the circumstances enumerated in s 10 of the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA), the B.C. plaintiff can serve the out-of-province defendant without order of the court.

Notable circumstances for which this is the case include:

- Actions concerning a tort committed in BC; and
- Actions concerning contractual obligations, where:
  - the contractual obligations, to a substantial extent, were to be performed in British Columbia; or
  - by its express terms, the contract is governed by the law of British Columbia.

In cases where a PAU operates, the claimant need not serve the out-of-province insured directly as the PAU appoints B.C.’s Superintendent of Financial Institutions as the out-of-province insurer’s counsel to accept service for any lawsuit against the insured arising out of a motor vehicle accident that took place in B.C.

The B.C. plaintiff must obtain an order for service outside BC if the facts of the claim do not fall within one of the recognized categories listed in s 10 of CJPTA.