

CHAPTER TWELVE: AUTOMOBILE INSURANCE (ICBC)

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CHAPTER TWELVE: AUTOMOBILE INSURANCE (ICBC)

This Manual is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. Nothing herein creates a solicitor-client relationship. All information in this Manual is of a general and summary nature that is subject to exceptions, different interpretations of the law by courts, and changes to the law from time to time. LSLAP and all persons involved in writing and editing this Manual provide no representations or warranties whatsoever as to the accuracy of, and disclaim all liability and responsibility for, the contents of this Manual. **Persons reading this Manual should always seek independent legal advice particular to their circumstances.**

I. INTRODUCTION

As of May 1, 2021, ICBC switched to a primarily no-fault system. This represents one of the biggest changes to the ICBC insurance system since its inception.

Under the former ICBC system, claims were handled through a mix of litigation and no-fault benefits. This meant that, while certain benefits were awarded regardless of the fault of the parties, in other situations one party in an accident would need to take the other party to court in order to gain access to compensation through the other party's insurance. Under the new system, the vast majority of all claims are handled on a no-fault basis, with some limited exceptions.

The new no-fault system means that insured parties will file a claim directly with ICBC in the vast majority of cases, and will be compensated for injuries directly by the insurer, regardless of whether or not they were at fault. ICBC will still internally assign fault to the parties when assessing claims in order to determine changes to premiums, but fault will not need to be shown to access injury compensation.

All claims for accidents occurring on or after May 1, 2021 are subject to this new no-fault system, known as Enhanced Care. Part I of this manual outlines benefits under this new system. However, because this chapter was written in June of 2021 (shortly after the introduction of the Enhanced Care system), please be aware that ICBC may make changes and clarifications to the system as they roll it out that are not reflected in this manual.

The new Enhanced Care system **does not apply to claims for accidents that occurred on or before April 30, 2021.** For claims that occurred before this date, please see Part II of this manual, which outlines the former system as it existed prior to the introduction of Enhanced Care.

II. GOVERNING LEGISLATION AND RESOURCES

A. *Books (Relevant to Claims Prior to May 1, 2021)*

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, SBC 2012, c 13 [LA].

NOTE: The IMVA and the 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.

C. Further Regulation (For Claims On or After May 1, 2021)

Basic Vehicle Damage Coverage Regulation, BC Reg 4/2021 [BVDCR].

Enhanced Accident Benefits Regulation, BC Reg 59/2021, [EABR]

Minor Injury Regulation, BC Reg 234/2018 (MIR)

Permanent Impairment Regulation, BC Reg 61/2021, (PIR)

Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation, BC Reg 60/2021, s 2(1) [IRR]

PART I: CLAIMS FOR ACCIDENTS ON OR AFTER MAY 1, 2021 (ENHANCED CARE)

Please note that the following portion of this chapter is meant to serve as a basic primer covering some of the key principles of the new ICBC system. Given that this no-fault system is new as of May 1, 2021, there are still certain portions of it that are being clarified, or that may adapt with implementation.

III. BASIC COVERAGE

Basic coverage is **mandatory** for all BC vehicles. 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)).

The following is included as part of Basic Coverage. Note that this is meant to be a high-level explanation, and insured individuals should refer to their policy for more detail and up-to-date information.

A. *Enhanced Accident Benefits: Overview*

Enhanced Accident Benefits are provided as part of basic coverage, and are outlined under Part 10 of the *Insurance (Vehicle) Act [IVA]*. These benefits apply to accidents on or after May 1, 2021, “in which there is bodily injury caused by a vehicle” (*IVA* ss 113 and 114(1)). These benefits are awarded on a no-fault basis, which means that they are paid directly by the insurer to the insured, irrespective of the fault of the insured (*IVA*, s 117). This also means that, under the new system, there is no longer a right of action (an ability to bring a lawsuit for damages against the other party) for injury arising from a vehicle accident (*IVA*, s 115). There are a few limited exceptions to this bar on actions for injury from a vehicle accident, which are outlined in [Section VII: When You Can Still Sue](#).

1. *Entitlement to Enhanced Benefits for BC Residents versus Non-Residents:*

BC residents are covered by Enhanced Accident Benefits for accidents in BC, and for accidents in other jurisdictions in Canada and the United States.

For non-residents involved in an accident within BC, or one outside of BC but involving a BC-registered vehicle, particular considerations may apply to determine eligibility. See s 119 of the *IVA* for more detail on entitlement to benefits in these circumstances.

2. *Claim deadlines and Requirement to report promptly:*

As a general rule, the insured has two years from the date of the accident within which to make a claim for Enhanced Accident Benefits (*Enhanced Accident Benefits Regulation*, BC Reg 59/2021, s 55(1), [*EABR*]). *However*, there are certain circumstances in which the deadline for making a claim may be measured differently. S 55 (1) of the *Enhanced Accident Benefits Regulation* sets out claim deadlines in specified circumstances. Please do not rely on this manual chapter as an authority for claim deadlines, and be sure to consult the regulation closely or speak with ICBC directly to confirm your deadline by which to make a claim, as it may change or may be case-specific.

Note that in order to access Enhanced Accident Benefits, the insured also has a duty to, “promptly notify the corporation of the accident” when an accident occurs (*EABR*, s 56(1)). If an insured fails to do so, “without reasonable excuse and to the prejudice of the corporation”, then benefits may be refused (*EABR*, s 56(2)). For this reason, it is important to not delay in reporting an accident to ICBC, as this may affect your ability to make a claim later.

Note that there may be other deadlines related to your Enhanced Accident Benefit claim not noted here.

3. *Other Sources of Compensation:*

When awarding Enhanced Accident Benefits, ICBC will not pay a benefit that is available from another source as, “compensation for the same accident” (*IVA*, s 122(2)), although they may pay the difference between the Enhanced Accident Benefit and the other source. Other sources listed include those such as workers compensation, the Canada or Quebec Pension Plans, an employment or union plan, or other insurance (*IVR*, s 18(2)). Note that the above still applies even if the insured makes the choice not to access these other sources that are available to them.

4. *Summary of Enhanced Accident Benefit Types:*

The following is a basic explanation of some of the Enhanced Accident Benefits included. Insured individuals should refer to their policy for more details, and up-to-date information.

a) *Healthcare and Rehabilitation*

These benefits cover healthcare and rehabilitation for those injured in a vehicle accident. These are available on a no-fault basis, and are typically paid directly by ICBC to your medical provider (though this is not always the case).

An insured party is entitled to the following treatments if needed to treat the injury in the 12 weeks after their accident: acupuncture, chiropractic, kinesiology, massage therapy, physiotherapy, counselling, and psychology. Note that there are certain prescribed fee and appointment quantity caps for each of these treatments, which vary depending on the treatment type (see *Enhanced Accident Benefits Regulation*, s 19, Table 1). Once the 12-week post-accident period and/or the number of pre-authorized appointments have elapsed, the insured must show that additional treatment is needed either, “to facilitate the insured’s recovery from the insured’s bodily injury” (*EABR*, s 19(a)), or to, “address a decline in the insured’s physical or mental function because of the insured’s bodily injury” (*EABR*, s 19(b)).

Various prosthetics, other medical equipment and certain prescription and non-prescription medications are also covered by this benefit (*EABR*, ss 21(1) and (4), and s 23), as are, “ambulance services from the scene of the accident” in certain prescribed circumstances (*EABR*, s 20).

Rehabilitation benefits are also available, “to contribute to the rehabilitation of an insured and to facilitate the insured's recovery from the insured's bodily injury” (*IVA*, s 124), which may include modifications to the insured’s home or vehicle (*EABR*, ss 24 and 25). In certain specified circumstances, compensation is also available to assist with the insured’s, “activities of daily living” (*IVA*, s 125(1)) which they could otherwise carry out before the accident. The amount of this benefit varies depending on the type of activity and the degree of assistance that the insured needs (see *EABR*, ss 27-31 for detailed calculations).

Certain transportation, lodging and meal expenses are also covered if required for the insured to receive care. Note that there are relatively strict requirements for reimbursement or coverage of such expenses, which can be reviewed in detail under *EABR* ss 32-34.

Finally, in certain instances, reimbursement is also available to cover certain travel, lodging and meal expenses for an individual to travel to assist the insured. This applies in cases where an insured is under 16 years old, is in intensive care, requires “major healthcare” (defined in section 1 of the Health Care (Consent)

and Care Facility (Admission) Act), has a “life threatening” bodily injury, or when their life is in, “imminent danger” (*EABR*, s 35(2)). The travel must be either:

- (a) to authorize treatment for the insured,
 - (b) to assist the insured to make a decision respecting major health care,
 - (c) to assist in the treatment of the insured’s bodily injury, or
 - (d) to assist the insured on other medical or compassionate grounds.
- (*EABR*, s 35(3))

Note that there is a cap on the amount that ICBC will cover, and that they will only cover these expenses for up to two individuals (*IVA* s 125(6) and *EABR* s 35(4)).

For all of the above benefits, **make sure to consult your policy closely to see which benefits require pre-approval from ICBC, and which do not.**

b) Caregiver Benefit

The *IVA* allow for benefits to be paid to an insured who is injured in an accident and, “whose main occupation at the time of the accident is taking care of, without remuneration, one or more persons who are under 16 years of age or who are regularly unable for any reason to hold any employment” and who is, “unable to continue providing that care because of the insured's bodily injury”. This benefit is not payable to an insured who is, “a full-time earner, temporary earner, student or minor”, as these classes of insured persons have access to other benefits (*IVA*, s 152 (1)).

Once 180 days have passed following the accident, the insured individual receiving the caregiver benefit may choose to transition to the income replacement benefit. They may also choose to continue receiving the caregiver benefit (*IVA* s 152(4)). ICBC has a legal duty to give the insured information to help them make this choice (*IVA* s 152(5)).

c) Income Replacement Benefit

Income replacement benefits are available to full-time, part-time and temporary earners in certain prescribed circumstances, as well as to certain non-earners (*IVA*, ss 131-134). The entitlement amount is, “90% of the insured’s net income” (*Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation*, BC Reg 60/2021, s 2(1) [*IRR*]), as calculated by certain formulas specified in the regulation. This amount of net income that can be used for calculation is up to a maximum of \$100,000, effective until March 31, 2022. This cap will change on a yearly basis beginning on April 1, 2022 (*IRR*, ss 2(2) and (3)).

As set out in the *Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation*, s 1(1), full-time, part-time and temporary earners are defined as follows:

“full-time basis”, in respect of employment, means

- (a) an insured is employed at one employment for not less than 28 hours, not including overtime hours, in each week of the year preceding the date of the accident, or
- (b) an insured is employed at one employment
 - (i) for not less than 28 hours per week, not including overtime hours, and
 - (ii) for not less than 2 years with periods of work not less than 8 months in duration and with gaps between periods of work not more than 4 months;

“part-time basis”, in respect of employment, means an insured is employed for less than 28 hours per week, not including overtime hours;

“temporary basis”, in respect of an insured who is a temporary earner, means the insured is employed but not on a part-time basis or full-time basis.

For part-time, temporary, and non-earners, after the first 180 days of benefits ICBC will initiate a process called determining employment (see *IRR*, s 13). This involves considering factors like, “education, training, work experience and physical and intellectual abilities of the insured immediately before the accident”, as well as factors like work experience and wages over the five years prior to the crash. If the insured part-time, temporary or non-earner is unable to do the determined employment as a result of the accident, then they continue to receive their benefit, and cannot receive a lower benefit amount than received prior to the determination of employment. For those able to hold their determined employment, the income replacement benefit ends (*IRR*, s 11(1)(b)).

Two years following the accident, if the insured is still unable to hold their pre-accident job but is able to work, ICBC will determine employment for the insured (*IRR*, s 14(1)). This process applies to full-time workers, as well as part-time, temporary and non-earners who have previously had their employment determined under the process above. Once employment is determined under this process, the insured has a year to search for such employment. Following the end of that year, if the insured is able to find work, and that work has a, “gross yearly employment income” lower than that used to calculate their prior income benefit, then ICBC will begin to pay the insured, “the lesser of the following”:

- (a) the difference between the income replacement benefit the insured was receiving before the employment was determined...and the net income from the determined employment as calculated under this regulation;
- (b) the difference between the income replacement benefit the insured was receiving before the employment was determined...and the net income the insured earns from employment.”

(*IRR*, s 10(1))

Some other circumstances in which income replacement benefits may end include when:

- “the insured is able to hold the employment that the insured held at the time of the accident” (*IVA*, s 146(1)(a))
- “the insured holds other employment from which the insured earns a gross income that is equal to or greater than the gross income that the insured earned from employment held at the time of the accident” (*IVA*, s 146(1)(b))

An insured who recovers from their injury and then suffers a relapse may also be entitled to re-instatement of their income replacement benefit. The calculation for this benefit varies depending on whether it has been less than two years or more than two years since the end of the prior benefit period (or since the accident if no prior income replacement benefits were received) (*IRR*, s 9).

Benefits for Students and Minors:

Certain benefits are also available to students aged 19 and over who are unable to continue their studies for a specified period due to an accident. If a student is eligible for both an income replacement benefit and a student benefit they cannot receive both, but are able to claim the larger benefit (*IRR*, Part 9). Similar benefits are also available for minors under age 19. Similarly, if a minor is eligible for both loss of studies benefit and an income benefit they cannot receive both, but are able to claim the larger benefit (*IRR*, Part 10).

Retirement Benefit:

Retirement income benefits are available to certain insured persons over the age of 65. An insured person receiving income replacement benefits is transitioned to the retirement benefit on whichever of the following two dates is later in time: either when they reach 65 years of age, or five years after becoming entitled to income replacement benefits (*IVA*, s 149). These benefits are calculated at, “70% of the insured’s net income as determined under subsection (2) of this section, less any pension income as determined under subsection (3).” (*IRR*, s 34(1)). The benefit is *not* available to those who are over 65 at the time of their accident and are not employed (*IVA*, s 148).

d) *Death Benefit*

Enhanced Care also provides for a death benefit, paid in a lump sum, for surviving spouses and dependants of the insured (*IVA*, ss 156-157). Death benefits for spouses are calculated by a formula which uses the deceased insured’s gross income. These spousal death benefits are capped at a maximum of \$500,000 (*EABR*, s 47(2)). Death benefits for dependants are calculated in accordance with the age of the dependant at the time of death, and are capped at a maximum of \$89,306 (*EABR*, s 48(2)).

e) *Permanent Impairment*

Enhanced Care provides for a lump sum payment to be made in cases of permanent impairment (*IVA*, s 129). This payment is calculated by:

- (a) determining if the insured has sustained a catastrophic injury in accordance with section 2,
- (b) determining the insured's permanent impairment rating in accordance with section 4, and
- (c) determining the compensation that corresponds to, as applicable,
 - (i) the catastrophic injury in accordance with section 8 [*permanent impairment compensation calculation — catastrophic injury*], or
 - (ii) the permanent impairment rating in accordance with section 9 [*permanent impairment compensation calculation — non-catastrophic injury*].

(*Permanent Impairment Regulation*, BC Reg 61/2021, s 3 [*PIR*])

Catastrophic injury is defined in detail in s 2 of the *Permanent Impairment Regulation*. Detailed information on the above calculations can be found in the *Permanent Impairment Regulation*.

The Enhanced Care system also includes a recreation benefit for those who are permanently impaired as a result of their injuries. This benefit provides support for the insured to participate in certain recreational activities following their injury. Note that this benefit is only available to those with a “catastrophic injury” or those, “with a permanent impairment rating of 20% or more as determined in accordance with the Permanent Impairment Regulation” (*EABR*, s 36(2)). The dollar amount awarded for this benefit correlates to the percentage degree to which the insured is deemed to be permanently impaired (*EABR*, s 36(7)).

B. *Basic Vehicle Damage Coverage*

Basic vehicle damage coverage is also a part of ICBC’s mandatory basic coverage (*IVA*, s 173), and provides indemnification for certain vehicle repairs and other losses resulting from vehicle damage that occur as a result of an accident in British Columbia involving, “at least two vehicles” (*IVA*, s 174(2)), in specified circumstances.

When indemnification is provided for basic vehicle damage, “[t]he total value of indemnification...must be reduced by the extent to which, expressed as a percentage, (a) the owner and the operator of the insured's eligible vehicle and a person in a prescribed class of persons is responsible for the accident, and (b) another person whose name is not ascertainable is responsible for the accident” (*IVA*, ss 174(4) and 175(4)). This means that the insured is only indemnified in accordance with the percentage amount for which they are found to be not responsible for the accident (i.e. if an insured fully responsible for the crash, they are not indemnified under this coverage). If there is another unknown person who is not responsible for the accident, indemnification is also reduced accordingly.

The indemnification provided for damage to or loss of an eligible vehicle is capped at \$200,000 (*Basic Vehicle Damage Coverage Regulation*, BC Reg 4/2021, s 15(2), [*BVDCR*]).

Indemnification is also provided for, “reasonable expenses incurred by the insured for loss of use in relation to the eligible vehicle in respect of the following: (a) hiring passenger directed vehicles; (b) using public transportation; (c) renting a substitute vehicle that is similar to the eligible vehicle, with the corporation's approval; [and] (d) using other alternative transportation with the corporation's approval” (*BVDCR*, s 18(2)), though this indemnification for passenger directed vehicles and public transportation does not apply if these expenses, “exceed expenses that would have been indemnified for renting a substitute vehicle that is similar to the eligible vehicle” (*BVDCR*, s 18(3)).

C. *Basic Third Party Liability*

The basic theoretical principle behind third party liability insurance is that it is meant to indemnify the insured for claims that may be brought against them by someone else. Under the no-fault system, care for injuries is provided directly by the insurer to the injured party, as outlined above. However, there are still certain instances where an insured party may find themselves facing a claim from another party in an accident, such as when the insured causes non-vehicle property damage, or is driving outside BC in a jurisdiction where the other party is entitled to sue.

This third party liability coverage, included as part of basic mandatory vehicle coverage, provides indemnity for this sort of property damage, as well as for injury or death that occurs in other jurisdictions in Canada or the United States, with certain specified exceptions (*IVR*, s 64). This indemnity for basic third party liability is capped at \$200,000 for most vehicles, with higher limits for buses, taxis and limousines (*IVR*, Schedule 3, s 1(1.1)).

D. *Uninsured Motorists*

This portion of basic coverage covers **non-vehicle property damage** caused to the insured's property by an uninsured (identified) motorist, in British Columbia (*IVA*, s 20). This insurance is capped at \$200,000 (*IVR*, Schedule 3, s 9(1)).

ICBC will not indemnify the claimant for amounts that the claimant can claim through, “any benefit, compensation similar to benefits, right to indemnity or claim to indemnity” that the claimant is entitled to (*IVR*, s 106(1)). This includes benefits such as those available under the *Workers Compensation Act* and the *Employment Insurance Act*.

The process for claiming under this section remains the same as under the old ICBC system, and involves the insured claimant applying to ICBC. Once this claim is sent, ICBC has the ability to settle in favour of the claimant or to require the claimant to take legal action (*IVA*, s 20(5)). See [Part II, Section IX.D.1 of this manual](#) technical information on ICBC's rights and obligations in this process.

E. Unidentified Motorists (Hit and Run)

This portion of basic coverage covers **non-vehicle property damage** caused to the insured's property by an unidentified motorist (i.e. a hit and run case) in British Columbia. This coverage allows the insured party to bring a legal action against ICBC as a nominal defendant in order to obtain damages (*IVA*, s 24).

This insurance is capped at \$200,000 (*IVR*, Schedule 3, s 9(1)), although a \$750 deductible is subtracted from the total coverage amount paid to the insured (*IVR*, Schedule 3, s 9(1)).

ICBC will not indemnify the claimant for amounts that the claimant can claim through, "any benefit, compensation similar to benefits, right to indemnity or claim to indemnity" that the claimant is entitled to (*IVR*, s 106(1)). This includes benefits such as those available under the *Workers Compensation Act* and the *Employment Insurance Act*.

Obligations of the insured in unidentified motorist cases:

It is critical that, to claim coverage, the insured must have:

- (a) **within 48 hours after the discovery of the damage**, made a report to the police of the circumstances in which the damage occurred,
 - (b) obtained the police case file number for the report, and
 - (c) on request of the corporation, advised the corporation of the police case file number.
- (*IVR*, s 107(1))

In addition, in order for a claimant to make a claim or get a judgment against ICBC in unidentified motorist cases, 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)). See [Part II, Section IX.D.2](#) of this manual for more details on the case law in relation to this requirement.

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

F. First Party Coverage Under Part 10 of the IVR

1. Inverse Liability

Inverse liability protection provides for compensation for vehicle loss or damage in situations where an insured is travelling in another jurisdiction in Canada or the United States whose laws do not otherwise allow the insured to sue for such compensation. The amount of compensation is, "an amount equal to the amount of damages the insured would have recovered if the insured had had a right of action" (*IVR*, s 147(2)). In practice, this would mean that the amount that can be recovered under inverse liability would be limited if the insured is found to be partially or fully at fault.

Compensation under this section is limited to, "the least of the following: (a) the cost of repairing the vehicle; (b) the declared value of the vehicle; (c) the actual cash value of the vehicle" (*IVR*, s 147(3)).

2. Uninsured or hit and run accidents in Nunavut, the Yukon, Northwest Territories or United States of America

Section 148 of the *IVA* specifies coverage in situations where, "death or injury of an insured arises out of the operation on a highway in Nunavut, the Yukon Territory, the

Northwest Territories or the United States of America of an unidentified or uninsured vehicle, other than an uninsured vehicle owned by or registered in the name of the insured or a member of the same household as the insured.”

The coverage amount in these cases is capped at \$200,000 (*IVR*, Schedule 3, s 11).

Note that the insured has certain duties in order to access this coverage. The *IVA* specifies that ICBC, “is not liable...unless the insured or a representative of the insured”:

- (a) with respect to an accident with an unidentified vehicle, **reports the accident within 24 hours** after its occurrence to a policeman, peace officer, judicial officer or the administrator of any law respecting motor vehicles,
 - (b) within **28 days after the occurrence, files with the corporation a statement under oath** that the insured has a cause of action arising out of the accident against the owner or driver of an unidentified or uninsured vehicle and setting out the facts in support of that statement, and
 - (c) on the request of the corporation, allows the corporation to inspect the motor vehicle the insured occupied at the time of the occurrence.
- (*IVR*, s 148(5))

In addition to the above, 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**. 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
- (*IVR*, s 148(4))

3. *Underinsured Motorists*

Underinsured motorist protection provides damages for injury or death in circumstances in which the other party to the accident, “is legally liable for the injury or death of an insured but is unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured or his personal representative in respect of the injury or death” (*IVR*, s 148.1(1)). In such cases, ICBC will, “compensate the insured, or a person who has a claim in respect of the death of the insured, for any amount he is entitled to recover from the underinsured motorist as damages for the injury or death” (*IVR*, s 148.1(2)).

Circumstances in which underinsured motorist protection would apply are uncommon under the new no-fault system, but could arise in situations where the insured doesn’t have access to compensation for injury under Enhanced Care and the other driver is liable for the accident but is underinsured.

The amount of coverage for underinsured motorist protection is capped at \$1 million (*IVR*, Schedule 3, s 13).

Underinsured motorist coverage applies to accidents in both Canada and the United States (*IVR*, s 148.1(2)(b)). However, underinsured motorist coverage *only* applies in jurisdictions or situations where there is a right of action (an ability to sue) for damages from an accident injury (*IVR*, s 148.2(4)(a)). See [Section VII: When You Can Still Sue](#) for a list of situations in which an insured individual may still be able to sue for injury arising from an accident in BC.

In cases of hit and run accidents involving an underinsured motorist, underinsured motorist protection only applies where:

- (a) the hit and run accident occurs on a highway, and
 - (b) where the hit and run accident occurs in the Yukon, Northwest Territories or United States of America, there is actual physical contact between the insured or the vehicle occupied by the insured and the unidentified vehicle.
- (IVR, s 148.1(4))

It is important to note that, in relation to underinsured motorist protection, an insured is not permitted to settle an action without ICBC's written consent (IVR, s 148.2(4)(b)).

I. OPTIONAL INSURANCE (PART 4 OF THE IVA & PART 13 OF THE IVR)

Optional Insurance Contracts (“OICs”) are additional optional coverage that any person can purchase at their discretion. These typically either extend the limits of existing coverage (under the same terms and conditions as the coverage that is being extended), or provide coverage that is not already provided for (IVA, s 61(1)). OICs can be purchased through private insurers or through ICBC.

The following are *some of the common types* of coverage and what they provide for, over and above the Basic Compulsory Coverage, that are commonly available for discretionary purchase. The below is merely meant to be an outline of common OIC types, and so it is critical to refer to your policy to understand the specifics of what is covered in your OIC.

A. *Extended Third Party Liability*

Allows for an extension of third party liability coverage, on the same terms and conditions as the basic third party liability coverage.

B. *Income Top-Up*

Extends the upper limit of the coverage available under the income replacement benefit provided as part of basic coverage (i.e. if an insured has a pre-accident net income over \$100,000 this top-up might provide them greater coverage under this benefit).

C. *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).

D. *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).

II. SEEKING LEGAL COUNSEL

The new no-fault system means that a majority of claims will now be adjudicated directly by ICBC instead of going through the court system.

However, there are certain circumstances in which an insured party may still wish to consult with a lawyer. This includes cases that are exceptions to the no-fault system (see [Section VII: When You Can Still Sue](#)). This may also include certain instances in which an insured party chooses to dispute an ICBC decision in court, such as minor injury determination disputes, or liability and damage disputes (see [Section VI: Disputes With ICBC](#)).

Parties may also consult legal counsel for general legal advice about their claim.

Those seeking legal representation for disputes, to claim benefits, or for general legal advice about their claim should be advised that many personal injury firms operate on a contingency basis, and the insured may not have to pay up front fees. See [Part II, Section VIII.C: Seeking Legal Counsel for Your Claim](#) for more information about contingency contracts, as these were common under the old ICBC system, and many lawyers may still use them for representation under the new system.

III. DISPUTES WITH ICBC

If you have an issue with the outcome of your claim or with how it was decided, there are processes available to dispute your claim. Different procedures apply to different types of claim disputes. The following outlines the remedies for some common types of disputes that may arise with ICBC. **This section should be used with caution, as at the time of writing certain parts of the ICBC dispute process (minor injury disputes, and liability and damages disputes) were under review at the BC Court of Appeal.**

A. *Minor Injury Determination Disputes*

If your injury is classified as a minor injury, this places a cap on the amount on non-pecuniary damages that you can access (*IVA*, s 103(2)). Minor injury has a specific legal meaning, and is defined in s 101(1) of the *IVA* as: “a physical or mental injury, whether or not chronic, that

- (a) subject to subsection (2), does not result in a serious impairment¹ or a permanent serious disfigurement² of the claimant, and
- (b) is one of the following:
 - (i) an abrasion, a contusion, a laceration, a sprain or a strain;
 - (ii) a pain syndrome;
 - (iii) a psychological or psychiatric condition;
 - (iv) a prescribed injury or an injury in a prescribed type or class of injury;”³

Minor injury classifications may be disputed either internally, by speaking with your claim representative and their manager, or by making an application to the Civil Resolution Tribunal (CRT) to adjudicate on the matter. Note that ICBC does not make further information publicly available about the process or deadlines for disputing a determination internally.

The CRT is an independent administrative tribunal, authorized by the *Civil Resolution Tribunal Act* to adjudicate on minor injury determination, among other matters. The CRT process does not involve legal representation, and use of the CRT to resolve these disputes is meant to cut legal costs for all parties, although certain parties who require assistance can apply to have a helper or advocate to assist them in the tribunal process. For more details on the CRT, see Chapter 20 of the LSLAP Manual on the CRT and its procedures: <https://www.lslap.bc.ca/manual.html>

Note: As of March 2021, the BC Supreme Court has deemed the CRT’s authority to adjudicate on minor injury determinations as being unconstitutional (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348 (CanLII)). This is currently being appealed to the BC Court of Appeal. While this case is being decided, parties can choose to bring their minor injury determination disputes to either the CRT, or to have them adjudicated through the court system. It is unclear when this case will be decided, or how the outcome will affect the forum for these disputes going forward.

B. Liability And Damages Disputes

Following an accident claim, ICBC will compile information from various sources to determine liability. Per ICBC’s website, this internal process includes gathering information from other drivers, witnesses, or police reports, as well as conducting comparisons with similar accidents, or determining if there are any Motor Vehicle Act violations. Generally, this process results in a finding of partial, full or no fault in relation to the accident (i.e. the insured’s degree of liability).

Disputes about a finding of liability can be made internally through ICBC’s Claims Assessment Review process, in which an independent arbitrator reviews the liability decision. Per the ICBC website, an insured has 60 days after the initial decision within which to submit a Claims Assessment Review application, although ICBC may change this internal deadline, so it is always best to confirm the deadline as soon as possible.

Disputes about liability or damage assessments can also be disputed in certain circumstances by making an application to the CRT to adjudicate on the matter. The CRT has jurisdiction over liability and damages in cases where an accident occurred in BC, and was “caused by a vehicle or

¹ “‘serious impairment’, in relation to a claimant, means a physical or mental impairment that (a) is not resolved within 12 months, or another prescribed period, if any, after the date of an accident, and (b) meets prescribed criteria.” (*IVA*, s 101(1)). The prescribed criteria are further defined under s 3 of the *Minor Injury Regulation*.

² “‘permanent serious disfigurement’, in relation to a claimant, means a permanent disfigurement that, having regard to any prescribed criteria, significantly detracts from the claimant’s physical appearance” (*IVA*, s 101(1))

³ The *Minor Injury Regulation* specifies that the following are prescribed injuries: “a concussion that does not result in an incapacity; (b) a TMJ disorder; (c) a WAD injury.” (BC Reg 234/2018, s 1(1))

the use or operation of a vehicle as a result of which a person suffers bodily injury” (*IVA*, s 101) and where the total damage amount is less than or equal to \$50,000 (note that this damage cap to fall within CRT jurisdiction is, “including loss or damage to property related to the accident but excluding interest and any expenses referred to under section 49” of the *CRT Act*) (*CRT Act*, s 133(1)(c)).

NOTE: As of March 2021, the BC Supreme Court has deemed the CRT’s authority to adjudicate on liability and damage disputes as being unconstitutional ([Trial Lawyers Association of British Columbia v British Columbia](#)). This is currently being appealed to the BC Court of Appeal. While this case is being decided, parties can choose to bring their liability and damage disputes to either the CRT, or to have them adjudicated through the court system. It is unclear when this case will be decided, or how the outcome will affect the forum for these disputes going forward.

C. *Disputing Denied Benefits (in relation to Parts 1 AND 10 of the IVA)*

Disputes in relation to denied accident benefits can be handled by making an application to the CRT to adjudicate on the matter. This applies to benefits denied under Part 1 or Part 10 of the *IVA* (*CRT Act*, s 132(b)).

NOTE: The case of *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, mentioned above, did not strike down the CRT’s ability to adjudicate on disputes regarding denied benefits. As such, unlike minor injury and liability/damages disputes, parties *cannot* choose whether to bring their denied benefits disputes before either a court or the CRT, and must bring these disputes before the CRT.

Disputes about denied accident benefits may also be made internally through ICBC’s Claims Decision Review process. However, ICBC does not provide public information on the process or deadlines for this. Speak directly to your ICBC representative for more information about options for disputing denied benefits internally.

D. *Disputes About Basic Vehicle Damage Coverage*

Disputes related to Basic Vehicle Damage Coverage (see [Section III.B: Basic Vehicle Damage Coverage](#)) can be resolved either internally between the insured and ICBC, or through arbitration. This applies to disputes about:

- (a) the nature and extent of required repairs or replacement,
 - (b) the value of the damage to or loss of the eligible vehicle, or
 - (c) the price received, or the estimated price that would have been received, from the sale of the damaged eligible vehicle.
- (*BVDCR*, s 28)

This arbitration process must follow the *Arbitration Act*, as well as the rules laid out in ss 28-32 of the *Basic Vehicle Damage Coverage Regulation*. There is a two-year limitation date from the date of the accident to submit for arbitration (*BVDCR*, s 29(2)).

IV. WHEN YOU CAN STILL SUE

A. *Injuries from an Accident*

Section 115 of the *IVA* states that there is no longer a right of action (an ability to bring a lawsuit against someone) in British Columbia for injuries from a motor vehicle accident.

However, s 116(2) of the *IVA* outlines certain exceptions in which those injured in a motor vehicle accident can sue for certain non-pecuniary and non-compensatory damages (non-pecuniary damages are those that are difficult to assign a number value to, such as pain and suffering

damages. Non-compensatory damages are those that are not meant to directly compensate for the injury, such as punitive damages, which are designed to punish the defendant). The exceptions in which a person injured in a motor vehicle accident can still bring a lawsuit for non-pecuniary and non-compensatory damages are:

- a) a vehicle manufacturer, respecting its business activities and role as a manufacturer;
- b) a person who is in the business of selling vehicles, respecting the person's business activities and role as a seller;
- c) a maker or supplier of vehicle parts, respecting its business activities and role as a maker or supplier;
- d) a garage service operator, respecting its business activities and role as a garage service operator;
- e) a licensee within the meaning of the *Liquor Control and Licensing Act* whose licence authorizes a patron to consume liquor in the service area under the licence, respecting the licensee's role as a licensee in the sale or service of liquor to a patron;
- f) a person whose use or operation of a vehicle
 - (i) caused bodily injury, and
 - (ii) results in the person's conviction of a prescribed *Criminal Code* offence; (**see footnotes**)⁴
- g) a person in a prescribed class of persons. (**see footnotes**)⁵

Note that the government has reserved the right to pass new regulations restricting ss 116(a) - 116(e). They also reserve the right to pass further regulations clarifying exceptions under s 116 (g).

These exceptions also do not apply to voluntary operators and passengers in vehicles that, "knew or ought to have known...[were] being operated without the consent of the owner, the out-of-province owner or, in the case of a leased motor vehicle, the lessee" (*IVA*, s 116(1)). This means that voluntary operators and passengers in situations where a vehicle is being operated without the owner or lessee's consent cannot sue under the new system, even if they otherwise fit within the other exceptions outline in s 116(2).

B. Vehicle Damage

Sections 172 and 173 of the *IVA* state that there is no longer a right of action (an ability to bring a lawsuit against someone) in British Columbia in most circumstances for vehicle damage occurring in accidents involving at least two cars and occurring on- and off-highway.

However, there are certain prescribed classes of persons who may still have an action brought against them for vehicle damage from on-highway accidents, or who may start an action for vehicle damage from off-highway accidents (*IVA*, ss 172 and 173). See the *Basic Vehicle Damage*

⁴ Per the *IVR*, s 12, the following are prescribed *Criminal Code* offences: (a) section 220; (b) section 221; (c) section 235; (d) section 236; (e) section 239 (1); (f) section 320.13 (1); (g) section 320.13 (2); (h) section 320.13 (3); (i) section 320.14 (1) (a); (j) section 320.14 (1) (b); (k) section 320.14 (1) (c); (l) section 320.14 (1) (d); (m) section 320.14 (2); (n) section 320.14 (3); (o) section 320.15 (1); (p) section 320.15 (2); (q) section 320.15 (3); (r) section 320.16 (1); (s) section 320.16 (2); (t) section 320.16 (3); (u) section 320.17; (v) section 322 if the property stolen is a motor vehicle; (w) section 333.1 (1); (x) section 334; (y) section 335 (1).

⁵ Per the *IVR*, s 13, the following are part of the "prescribed class of persons": "(a) persons whose use or operation of a vehicle (i) caused bodily injury, and (ii) results in the persons' conviction under the [Youth Criminal Justice Act \(Canada\)](#) of one of the offences prescribed in section 12 of this regulation; (b) persons whose use or operation of a vehicle (i) caused bodily injury, and (ii) results in the persons' conviction in the United States of America of an offence that is the same as, or similar to, one of the offences prescribed in section 12 of this regulation; (c) persons whose use or operation of a vehicle (i) caused bodily injury, and (ii) results in the persons' conviction in the United States of America of an offence under a law similar to the [Youth Criminal Justice Act \(Canada\)](#) that is the same as, or similar to, one of the offences prescribed in section 12 of this regulation.

Coverage Regulation ss 6(2) and 8(2) for these exceptions in relation to both on-highway and off-highway accidents.

C. Uninsured and Unidentified Motorist Cases

As noted in [Part I, Sections III.D and E](#) of this manual, in order to claim damages in uninsured and unidentified motorist cases, a claimant may be required to bring legal action against an uninsured motorist, or (in unidentified motorist cases) against ICBC as a nominal defendant. As noted, under the new system the coverage for uninsured and unidentified motorist accidents only applies to non-vehicle property damage caused by such accidents, so the bars on litigation for injuries and vehicle damage discussed above would not affect the ability to litigate in these cases.

PART II: CLAIMS FOR ACCIDENTS ON OR BEFORE APRIL 30, 2021

Please note that the following portion of this chapter was written prior to April 30, 2021. Therefore, though it is written in the present tense, please be advised that it applies only to claims for accidents that occurred on or before April 30, 2021.

V. 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, the manufacturer(s), automobile shop(s), municipality, the 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 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 XII](#), 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 themselves (*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 *Motor Vehicle Act* [*MVA*]. Section 28.01 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.

Starting June 10, 2019, any traffic ticket a driver gets will have the potential to increase their ICBC insurance rates. Traffic tickets will be broken down into two categories: high-risk tickets and regular traffic tickets. High-risk tickets include but may not be limited to:

- Impaired driving incidents, including a 24-Hour Prohibition from driving, a 3-day prohibition from driving, a 7-day prohibition from driving, a 30-day prohibition from driving, or a 90-day Immediate Roadside Prohibition or Administrative Driving Prohibition. The increased insurance rates for impaired driving incidents will also include any individuals who have criminal convictions for impaired driving or refusing to provide a breath sample. The individual will be required to pay increased insurance rates once the individual’s mandatory driving prohibition is over.
- Electronic Device tickets, which increases insurance rates on top of adding to the Driver Risk Premium
- Excessive Speeding tickets, which also increases insurance rates on top of adding to the Driver Risk Premium
- Driving While Prohibited charges
- Criminal Code driving convictions

These increased insurance rates would start on September 1, 2019.

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, 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 are variable; 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 for motor vehicle injuries, and the claimant is unlikely to encounter lawyers who charge more than 33.33 per cent.

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. Law firms will often pay these costs for the claimant and collect them at the end of the lawsuit. Some law firms take a retainer fee for disbursements.

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. This will require the claimant to draft a letter granting their lawyer signing authorization. – this letter should address who is receiving the authorization (in this case, the lawyer) and for what purpose, related issues, or kinds of documents (in this case, disclosures) the authorization is for.

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.

VI. LIMITATION ON EXPERTS

(affecting all trials taking place after October 1, 2020, but not those for accidents that occur after the introduction of Enhanced Care on May 1, 2021)

Amendments were introduced to the *Evidence Act*, RSBC 1996, c.124 [EA] which limit the number of experts and expert reports that are used on the issue of damages in most trials, with judicial discretion to allow for additional experts in appropriate cases. The purpose of the amendments is to decrease the cost, complexity, and delay associated with using many experts in a trial. As a result, claims will be resolved more efficiently in court.

A. See ICBC Evidence Act Amendments and BILL 9 – 2020 - EVIDENCE AMENDMENT ACT, 2020 [EAA]

Changes:

- 1) For fast track claims (where the amount sought by the plaintiff is less than \$100,000.00), there will be a limit of one expert and one expert report per party, *EAA* 12.1 (2)(b).
- 2) For claims that are not considered to be fast track claims, there will be a maximum of three experts and expert reports for each party, *EAA* 12.1 (2)(a).
- 3) Parties involved in the claim can agree to use more experts than the limit if every party to the claim agrees, *EAA* 12.1 (4)(a)(b).
- 4) *EAA* 12.1(5) provides judicial discretion to allow for additional experts beyond the limitation for cases where:
 - a. The subject matter of additional expert to be tendered has not already been addressed by the other experts. *EAA* 12.1 (6)(a)
 - b. Without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding. *EAA* 12.1 (6)(b)
- 5) A limit is placed on the maximum amount recoverable from an unsuccessful litigant to \$3,000.00 per each expert report in motor vehicle personal injury cases, *EAA* 12.1 (9)(a)(i)(A). The total recoverable disbursements in motor vehicle personal injury cases will also be limited to 5% of the judgment or settlement, *EAA* 12.1 (9)(a)(i)(B).
- 6) Disbursements include all expenses used for the purpose of the lawsuit including expenses such as courier fees and photocopying. It will not include fees payable to the Crown such as filing fees, court fees, and jury fees. *EAA* 12.1 (9)(a)(ii).

Exceptions:

- 1) The limitation of the number of experts will not apply if an expert report has been served before February 6, 2020, and the trial date set out in the notice trial is before October 1, 2020, *EAA* 12.2 (2)(b)
- 2) The \$3,000.00 limit to recoverable on expert reports and the 5% limit on disbursements would not apply if the cost for experts has already been incurred prior to February 6, 2020, or a notice of trial has been filed and served prior to February 6, 2020, for a trial before October 1, 2020. *EAA* 12.2 (3)(b)

VII. 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, *IVA*, s 61),

and collision (“own damage”) insurance may be purchased from either ICBC or from private insurers. See [Section X: 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). This includes:
 - 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 X: Optional Insurance](#), below). **If the insured is found legally liable, and no extended coverage has been purchased, they are responsible for payment of any claims in excess of the above limits.**

As of September 16, 2019, ICBC introduced a new insurance category (blanket insurance certificate) for transportation network services (TNS) or ride-hailing companies such as Uber and Lyft. The blanket basic coverage provides coverage up to \$1,000,000 third party liability when the vehicle is a) hailed by passengers through the online platform and b) is operated to transport the passengers (*IVR*, s 154). This blanket coverage is not for individual drivers and it is mandatory for ride-hailing companies.

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.
- d) where the owner is not an individual,
 - (i) an officer, employee or partner of the owner for whose regular use the vehicle described in the owner's certificate is provided, or
 - (ii) a member of the household of an officer, employee or partner of the owner, who, with the consent of the owner, uses or operates the vehicle described in the owner's certificate.

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.

As of September 1, 2019, ICBC requires drivers to list out all the household members who may drive their vehicles, regardless of the number of times they may drive it. In addition, non-household members such as employees who may be driving the insured’s vehicle for more than 12 times a year will also be required to be listed at the time of purchasing the policy. The additional members listed will be factored into the calculation for the premium paid.

See: <https://www.icbc.com/insurance/costs/drivers-experience-crash-history/Pages/Default.aspx>.

If a household member or non-household member, who was not listed on the principal’s policy, gets involved in an accident, ICBC will have the right to impose a financial

penalty on the principal's policy and the principal may also be subjected to a higher premium rate when renewing the policy in the future.

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 them, 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 for commercial use; used for carrying passengers for compensation or hire
 - In respect of a TNS-only vehicle operated under a transportation network services authorization, this corporation's exemption applies only if injury or death of another, or loss or damage to property of another, arises out of the operation of the TNS-only vehicle when
 - (a) the vehicle has been hailed by or for passengers through the use of the online platform to which the transportation network services authorization relates, and
 - (b) the insured is operating the vehicle for the purposes of picking up, transporting or dropping off those passengers.
- 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 they have 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 they also own (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 their 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 *Supreme Court Civil Rules*, BC Reg 56/2019 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*, ss 20 (uninsured vehicles) or 24 (hit and run accidents), under *IVR*, s 49.3 (default of premiums); or
- under Part 7 or Part 10 of the *IVR* 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*, ss 20 or s 24, under *IVR*, ss 49 or 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 them 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 their 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 their 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 their 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 IX.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 CanLII 3304 \(BC SC\)](#), 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 IX.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 their 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 principal 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 [*Dehm v Insurance Corporation of British Columbia*, 1981 CanLII 608 \(BC SC\)](#).

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 28.01 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(1) (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 IX.C: Accident \(“No-Fault”\) Benefits: Part 7 of the *IVR*](#) 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 III.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 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 for accidents before April 1, 2019); s 29 (employers' reports); and s 30 (superintendent's records).

According to [McKnight v General Casualty Insurance Co. of Paris, 1931 CanLII 473 \(BC CA\)](#), 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, 1995 CanLII 66 \(SCC\)](#), 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 their 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 their vehicle. The plaintiff was shot while driving away from a gang who was trying to gain entry into their 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 their 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 per cent 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, s 2(a) of the *IVR* for more details. Starting April 1, 2019, this amount will be increased to \$740 per week.

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*, s 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(b)). However, there is no compensation for household tasks performed by an insured's family members (*IVR*, s 84(2)). Starting April 1, 2019, this amount will be increased to \$280 per week.

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 \$300,000. For qualification: the amount by which the liability of the corporation is limited in respect of each insured injured:

- in the same occurrence on or after January 1, 1990 and before January 1, 2018 must not exceed \$150 000, and
- in the same occurrence on or after January 1, 2018 must not exceed \$300 000.

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*, starting April 1, 2019, this amount will be increased to \$7,500);

- 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 s 92 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 s 92 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 \(CanLII\)](#)).

The *FCA* intends to place the claimant in the same economic position that they would have enjoyed but for the death of their 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 CanLII 6570 \(BC SC\)](#)). 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 \(CanLII\)](#)).

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 they were 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 the 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 the 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 IX.B.10: Forfeiture of](#)

[Claims and Relief from Forfeiture](#) and [Section IX.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 IX.C.11.b: Duties in Sections 97-100 of the IVR](#)); and
- the action must be started by the later of the following:
 - a. with **three months** after the date of the response from ICBC;
 - b. within **two years** after the date of the accident for which the benefits are claimed;
 - c. where benefits have been paid, with **two years** after the date the insured last received a payment.
- These limitation periods also apply 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, they are 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) and *Civil Resolution Tribunal Act*, s 13).

c) Rights and Obligations of ICBC

If ICBC receives such an application under s 20, it must forward a notice 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 they do 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 them, 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 IX.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 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 a nominal defendant. For accidents occurring outside BC, see [Section IX.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 a 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 CanLII 1263 \(BC CA\)](#), 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 against ICBC as a nominal defendant, 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 IX.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 IX.B.10: Forfeiture of Claims and Relief from Forfeiture](#) and [Section IX.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, their personal representative;
- (b) a person who can provide written proof that they are 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 they 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, they will be responsible for paying for the remaining costs of repair to the vehicle, unless the insured person purchased collision coverage (see [Section X.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 the 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 their 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?***

\$1,000,000 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 their 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 their 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 their 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 place where 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 IX.B.10: Forfeiture of Claims and Relief from Forfeiture](#) and [Section IX.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)).

VIII. OPTIONAL INSURANCE (PART 4 OF THE *IVA* & PART 13 OF THE *IVR*)

A. *Introduction to OICs*

Optional Insurance Contracts (“OICs”) are additional optional coverage that any person can purchase at their 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 of 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 (s 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 VIII.B.10: Forfeiture of Claims and](#)

[Relief from Forfeiture](#) and [Section VIII.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 and 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 breached 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 their 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)).

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.

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***

(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 their 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 they sue for more than the deductible, they 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 their 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.

IX. 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 their 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, they 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 their 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 them when they make 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 they cannot mow the lawn or lift a bag of flour, and then goes outside and does just that, they run 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 themselves 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 they are without discretion in settling claims, and that they are 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; the 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 20: Small Claims Procedure** for more information (the information may hold 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 per cent to blame for the accident, their damages will be reduced by a corresponding amount of 50 per cent.

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 they 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 per cent fault on the part of the other driver and obtaining a 50 per cent 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 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, 1973 CanLII 1692 \(BC SC\)](#) at page 719, 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 them to the terms of the agreement which they 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 them to show that the transaction is fair and reasonable.” See also [Pridmore v Calvert et al., 1975 CanLII 1091 \(BC SC\)](#).

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 their deed. In other words, if the person’s mind does not go with the deed of signing, the release is not truly their deed.

Unconscionability and misrepresentation may also be successful grounds for rendering an otherwise valid Release of Claim invalid. Unconscionability can be established when the bargain was an unfair one and when there is an inequality of power in the bargaining positions. See [Morrison v. Coast Finance Ltd., 1965 CanLII 493 \(BC CA\)](#). Misrepresentations are untrue or misleading statements made during a negotiation. See [Clancy v Linquist, 1991 CanLII 795 \(BC SC\)](#), per Scarth J.

In [Mix v Cummings, 1990 CanLII 1 \(BC SC\) \[Mix\]](#), 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 they 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 \(CanLII\)](#), 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 [Section IX.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 20: Small Claims Procedure**.

A claim commenced in Small Claims court can be transferred to the Supreme Court on application by one of the parties or by a judge on their 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 they are 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 the Supreme Court.

2. *Civil Resolution Tribunal*

Starting April 1, 2019, the Civil Resolution Tribunal (CRT) began making decisions on the following matters, when there is disagreement between a claimant and ICBC:

1. classification of an injury as a minor injury;
2. entitlement to receive accident benefits claimed;
3. decisions regarding who is at-fault in the crash and settlement amounts for all motor vehicle injury claims below a threshold that will not exceed \$50,000. (i.e. liability and damage disputes)

NOTE: As of March 2021, the BC Supreme Court has deemed the CRT's authority to adjudicate on **minor injury determinations** and **liability and damage disputes** as being unconstitutional (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348 (CanLII)). This case is currently being appealed. At present, this means that parties can choose to bring minor injury determination disputes, as well as liability/damage disputes in relation to cases with damages of up to \$50,000, to either the CRT or through the court system. Disputes regarding entitlement to receive accident benefits are unaffected by this decision and will proceed solely through the CRT. It is unclear when this appeal will be decided, or how the outcome will affect the forum for these disputes going forward.

For claims started before April 1, 2019, the upper limit of \$5,000 applies and the claim must be made under the CRT's small claims jurisdiction – this is not the same as the Small Claims Court.

The Civil Resolution Tribunal is designed to be accessible, economical, and without the need for legal representation. Claimants will still be able to hire a lawyer for most motor vehicle claims made on or after April 1, 2019, should they choose to do so. In some circumstances, the claimant may have to ask the CRT for permission to hire a lawyer. Decisions made by the Civil Resolution Tribunal can be reviewed by the Supreme Court of British Columbia.

For more details, Chapter 20 of the LSLAP Manual on the CRT and its procedures:
<https://www.lslap.bc.ca/manual.html>

You can also find useful information on the CRT's website:

3. ***Supreme Court of British Columbia***

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

Actions involving the ICBC for damages over \$50,000 (effective July 2, 2019) come within the jurisdiction of the Supreme Court of British Columbia (*Accident Claims Regulations*, s 7). 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 their own initiative. The judge must be satisfied that the monetary outcome of the claim will not exceed \$50,000. 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 \$50,000.

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 *IVR* 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 sometime 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.
 - Rule 11-8 is modified in a fast track action:
 - Rule 11-8 (3): Except as provided under this rule, a party to a vehicle action may tender, at trial, only the following as expert opinion evidence on the issue of damages arising from personal injury or death:
 - (a) expert opinion evidence of up to 3 experts;
 - (b) one report from each expert referred to in paragraph (a).

Rule 11-8 (3) (a) is to be read as if the reference to “3 experts” were a reference to “one expert”.

- Rule 11-8 (8): In a vehicle action, only the following amounts may be allowed or awarded to a party as disbursements for expert opinion evidence on the issue of damages arising from personal injury or death:
 - (a) the amount incurred by the party for up to 3 expert reports, whether or not the reports were tendered at trial, provided that each report was
 - (i) served in accordance with these Supreme Court Civil Rules, and
 - (ii) prepared by a different expert;

- (b) the amount incurred by the party for
 - (i) a report allowed under subrule (4) or (5),
 - (ii) a report referred to in subrule (6) or (7), or
 - (iii) a report prepared by an expert appointed by the court under Rule 11-5 (1);
- (c) the amount incurred by the party for an expert to give testimony at trial in relation to a report, referred to in paragraph (a) or (b), that was prepared by the expert.

Rule 11-8 (8) (a) is to be read as follows: the amount incurred by the party for one expert report, whether or not the report was tendered at trial, provided that the report was served in accordance with these Supreme Civil Court Rules.

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 the 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 their 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 \$380,000.

Effective April 1, 2019, there will be a limit of \$5,500 on payouts for pain and suffering for minor injuries. ICBC is working to create a legal definition of what is a minor injury. It will include sprains, strains, general aches and pains, cuts and bruises, and mental anxiety and stress from a crash.

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 their 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.

c) *Cost of Future Care*

Cost of future care is the cost of the claimant's future care over their 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, orthopaedic 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 they 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 CanLII 3814 \(BC SC\)](#), 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 CanLII 616 \(BC SC\)](#), 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 counteroffer 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 the 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 their claim as they proceed 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 their own disbursements, with **nothing** or **less than nothing**: a debt to the insurer and their 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.

X. 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 B.C., 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. *Assessment of Damages*

The court in [*Wong v Wei, 1999 CanLII 6635 \(BCSC\)*](#), 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 B.C., it will go through the B.C. Provincial or B.C. Supreme Court).

If an accident occurs outside B.C. and the defendant(s) resides outside of B.C., 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 B.C. court's jurisdiction on the basis that the B.C. 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 B.C. court is *forum non conveniens*).

The B.C. court has jurisdiction *simpliciter* where there is a real and substantial connection between B.C. and the defendant or between B.C. and the subject matter of the action. Section 10 of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003 c 28 [CJPTA] lists the circumstances in which it is presumed that there is a real and substantial connection.

In situations 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 B.C. 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. 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.

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 B.C. court;
- ii) not raise any coverage defence which would not be available to an insurer in B.C. respecting a B.C. insured; and
- iii) pay any motor vehicle judgment against the insured up to the minimum liability limits required by B.C. (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 \(CanLII\)](#)).

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 B.C. 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 4-5 of the *Supreme Court Civil Rules*, in any of the circumstances enumerated in s 10 of the *CJPTA*, the B.C. plaintiff can serve the out-of-province defendant without an order of the court.

Notable circumstances for which this is the case include:

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

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.

b) With the Leave of the Court

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