

CHAPTER TWELVE: AUTOMOBILE INSURANCE (ICBC)

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CHAPTER TWELVE: AUTOMOBILE INSURANCE (ICBC)

I. INTRODUCTION

A. *Books*

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

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

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

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

B. *Legislation*

Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 [IMVA].

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

Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [IVA].

Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [IVR].

Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA].

Motor Vehicle Act Regulations, B.C. Reg. 26/58 [MVA Regulations].

Insurance Corporation Act, R.S.B.C. 1996, c. 228.

Limitation Act, R.S.B.C. 1996, c. 266, s. 3(2).

NOTE: The Insurance (Motor Vehicle) Act [IMVA] and the Insurance (Motor Vehicle) Act - Revised Regulations (1984) [IMVA Regulations] were amended and renamed the Insurance (Vehicle) Act [IVA] and Insurance (Vehicle) Regulation [IVR] respectively. The IVA and IVR came into force and effect on July 1, 2007. It is important to 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. *General*

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

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. Optional coverage above and beyond the basic coverage may purchased from either ICBC or a private insurer under an optional insurance contract (OIC). As the name implies, payment of the no fault coverage does not require any element of fault on the part of the insured.

Claims for damages brought in various torts however do require the presence of a fault element as a pre-condition to the success of the action. The victim of the accident (e.g. a personal injury claimant) may sue the other driver(s), the owner(s) of the insured car, manufacturer(s), automobile shop(s), municipal, 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 in the province may effectively cap certain heads of damage. Where the necessary conditions are met, ICBC may indemnify the insured for all or part of the assessed liability (i.e. where damages are awarded to a victim in an accident, the Corporation will pay those damages instead of the party who is at fault having to pay.)

For cases involving a non-resident of B.C. who has been involved in an accident in this province or a B.C. resident who has been involved in an out-of-province accident, private international law rules apply. Generally, for the substantive issues, the law of the jurisdiction where the accident took place will apply. For procedural matters, the rules of the trial court will apply.

NOTE: Before advising the client, it is important to determine whether the action is one that can be commenced in B.C. and whether the law of B.C. applies. A summary of out-of-province insurer qualifications, service procedures, and jurisdictional considerations is listed in **Section V**, below.

The Insurance (Vehicle) Act [IVA] and the Insurance (Vehicle) Regulation [IVR] form a code governing most aspects of auto insurance in B.C. The IVR alone runs 102 pages, and it is impossible to give a complete summary in a manual such as this. What follows is only a guide to help you locate the relevant sections of the IVA and IVR that you are likely to encounter.

A few preliminary concepts, which will be of use in understanding the rest of the chapter, are discussed immediately below.

1. Subrogation

This is a common feature of all insurance contracts and regulations. Specifically, when ICBC assumes liability for payment of benefits or damages of any kind, it is 'subrogated' to the right of recovery which the payee had against any other person (IVA, s. 84). In other words, ICBC has all remedies available to it that the compensated person might have exercised by him or herself, according to s. 83 of the IVA.

2. How ICBC Sets Premiums

Premiums are based on: where you live, how the vehicle is used, the type of vehicle, and the driver's claim record. Customers can vary their premiums by increasing/decreasing their deductibles, as well as the extent of their optional coverage. Experienced drivers may receive discounts up to 20 percent on optional insurance. There is an informal discount review body created by corporate policy to ensure that discounts are appropriately awarded, but this body was not created for the purposes of hearing formal appeals.

The point penalty system is authorized by ss. 210 and 211 of the MVA and is spelled out in MVA Regulations, s. 28.02. It has a bearing on insurance because the number of points, beyond the set limits, and accumulated during the first year, are taken into account when fixing premiums.

3. Waiver

Section 12 of the IVA stipulates that for the better administration of the plan, the Corporation may either generally, or for a particular case, waive a term or condition of the plan, but no term or condition shall be deemed waived by the Corporation unless the waiver is specifically in writing or signed by an officer of the Corporation.

D. Application of the Current Legislation, and Transitional Provisions

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).

For the sake of brevity, it is generally 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 the **Insurance Corporation of British Columbia** (ICBC or “the Corporation”)) 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).

The situation is more nuanced than the above description conveys however, and students are advised to refer directly to the Act to assess an individual case.

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

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

II. BASIC COMPULSORY AUTOPLAN COVERAGE

The IVA makes the Corporation the sole provider in B.C. of basic insurance for vehicles not exempt from the IVA. Exempt vehicles are described in ss. 43 – 44 of the IVA and also in s. 2 of the IVR. For most vehicles owned, leased or operated in B.C., third party liability coverage up to \$200,000 is only available from ICBC. Full coverage for exempt vehicles, extended coverage in excess of the basic coverage (third party liability insurance over \$200,000, IVR, s. 67), and collision (“own damage”) insurance may be purchased from either ICBC or from private insurers. See **Section III: Optional Insurance**, below. Note that private insurers may have their own requirement for coverage that may be above and beyond the requirements of ICBC.

Vehicles licensed in British Columbia 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)) for which the maximum penalty is a fine of not more than \$250 and/or imprisonment for not more than three months (MVA, s. 24(5)(a)). Driving an uninsured vehicle is also an offence (MVA, s. 24(3)(b)) carrying a minimum fine of \$300 and/or a maximum fine of \$2,000 and/or imprisonment for at least seven days and no more than six months (MVA, s. 24(5)(b)).

A. Scope of Coverage

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

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

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

1. Indemnity

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

2. Who is Covered

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

- a) a person named in an owner’s certificate; or
- b) an individual who, with the consent of the owner or while a member of the owner’s household, 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 is operating 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” has the following meaning:

- 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 for whose regular use the vehicle described in the owner's certificate is provided; and
- d) the spouse of an employee or partner described in paragraph (c) where the spouse resides with the employee or partner.

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

4. **Restrictions on Indemnity**

If an insured is operating a motor vehicle not described in an owner's certificate issued to him or her indemnity is **not** extended where s. 65(2):

- 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 an insured;
- the motor vehicle is used for carrying passengers for compensation or hire or for commercial use;
- the motor vehicle is in fact not licensed under the Motor Vehicle Act or similar legislation and the insured does not have reasonable grounds to believe the motor vehicle is licensed; or
- the insured is operating the vehicle without the consent of the owner and does not have reasonable grounds to believe that he has the consent of the owner.

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

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

5. **What is Covered**

In addition to the legal liability coverage (i.e. s.65 indemnification) outlined above, IVR ss. 67 and 69 stipulate in part, that ICBC shall also:

- a) pay for "reasonable" emergency medical aid so long as reimbursement is not provided to the insured by another insurer or under another Part;

- b) pay for emergency equipment or supplies provided to the insured (i.e. fire extinguishers, jacks or other necessary emergency equipment or supplies);
- c) pay all or some (depending upon the circumstances) of the costs taxed against the insured in an action, in accordance with the British Columbia Supreme Court Rules of Court for aggregated general and specific damages; and
- d) pay pre-judgment interest under the Court Order Interest Act or analogous legislation of another jurisdiction on that part of the judgment, and pay post-judgment interest under the Interest Act (Canada) 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; 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 IVR, s. 72(2).
- 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 and the Atomic Energy Control Act (IVR, s. 56(1)(a)).
- Under IVA s. 20 (uninsured vehicles), IVA s. 24 (hit and run accidents), IVR s. 49.3 (default of premiums), Part 7, or Part 10 in respect of 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)).
- Under IVA s. 20, IVA s. 24, IVR s. 49, IVR s. 49.3(1)(b), Part 6, or Part 10 in respect of punitive or exemplary damages or other similar non-compensatory damages (IVR, s. 56(1)(c)).
- a general or special assessment, penalty or premium, payable under the Workers' Compensation Act or similar Act (IVR, s. 72.1(1)(a)).

7. Duties of the Insured

ICBC is not liable to an insured who, to the prejudice of the Corporation, fails to comply with certain duties. Section 73 of the IVR states in part that an insured **must**:

- a) promptly give the Corporation written notice of any claim made for the accident, including any other insurance held by him or her providing coverage for the accident;
- b) help secure evidence and information and the attendance of any witnesses;
- c) cooperate with the Corporation in the defence of any action or proceeding, or in the prosecution of any appeal, taken by the Corporation on behalf of the insured;
- d) allow the Corporation to inspect an insured vehicle at any reasonable time; and

e) **must not:**

- i. voluntarily assume liability or settle any claim except at his or her own cost; or
- ii. fail to cooperate with the Corporation 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 shall, at its expense, assist the insured by investigating and negotiating a settlement where in its opinion such assistance is necessary, and subject to an application and directions given by the court under section 79 of the IVA defend in the name of 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 to settle out of court (IVR, s. 74.1).

10. Forfeiture of Claims and Exceptions

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;
- b) an applicant for coverage knowingly misrepresents or fails to disclose in the application a fact required to be stated therein;
- c) an insured violates a term or condition of or commits a fraud in relation to the plan or the OIC;
- d) an insured makes a “wilfully false statement” with respect to a claim under a plan of insurance. According to *Brooks v. ICBC* (1994), 89 B.C.L.R. (2d) 215 (S.C.), per Bouck J., the purpose of s. 19(1)(e) (now IVA, s. 75(c)) is to prevent intentionally deceitful misstatements for the purpose of defrauding the insurer; “exaggerated guesses” by an insured as to the value of a lost motor vehicle, or a figure 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.

The Corporation must relieve an insured from a forfeiture of the benefits under section 75 that it considers equitable if, as a result of an accident, the insured dies or suffers a loss of function of mind or body 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 is that it is to be read very broadly to include all of the definitions: see *Khatkar v. ICBC* (1993), 25 C.C.L.I. (2d) 243 (B.C. Prov. Ct.), per Stansfield Prov. Ct. J.

11. Breach of Conditions and Exceptions

Coverage may be lost if an insured breaches certain other conditions, including:

- a) failing to notify ICBC by prompt written notice of any claim and/or failing to cooperate with the Corporation in the investigation, settlement or defence of a claim or action to the prejudice of the Corporation (IVR, s. 73);
- b) unauthorized or unqualified operation of a motor vehicle (s. 55(3)(a));
- c) using the vehicle in illicit trades, racing, or to avoid arrest or other police action (ss. 55(3)(b), (c) and (d));
- d) towing an unregistered, unlicensed trailer (s. 55(4));
- e) using a vehicle for a purpose different from the use declared by the insured in the application for insurance (s. 55(2)) except as “occasionally” permitted. For example: “occasionally” using a vehicle to go to and from work when it is insured only for pleasure use. ICBC has ways to determine whether or not you are more than occasionally breaching such a condition and if such a change of use is contemplated, additional coverage should be bought (see Schedule 1, s. 2, Table 2 for the permitted uses); or
- f) misrepresenting the principal driver of the insured vehicle. Note that the court will consider the entire period covered by the insurance in determining who was the principal driver: see *Dehm v. ICBC* (1982), 32 B.C.L.R. 23.

There are exceptions to the breach of conditions. Despite any breach of condition, insurance money is still provided to **third parties** 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, R.S.C. 1985, c. C-46 (see also MVA Regulations, s. 28.02 Table 4):
 - s. 220: causing death by criminal negligence in the operation of a motor vehicle;
 - s. 221: causing bodily harm by criminal negligence in the operation of a motor vehicle;
 - s. 236: manslaughter;
 - s. 249: dangerous operation of a motor vehicle;
 - s. 252: failure to stop at the scene of 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(2) and (3): impaired driving causing bodily harm or death;
 - s. 259 (4): driving while disqualified;

- conviction under Youth Criminal Justice Act (Canada) for any of the above offences;
 - conviction or “similar result” in a jurisdiction in the U.S.;
 - conviction under ss. 95 or 102 of the MVA (both concern driving while prohibited);
 - conviction under a provision of the law of another Canadian or American jurisdiction similar to ss. 95 or 102 of the MVA; or
- c) permitting another person to use the insured’s vehicle and such use results in a conviction for any of the offences outlined above (IMVA Regulations, s. 55).

12. Additional Notes

a) *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 ICBC can demand are noted in s. 11 (combined forms and information); s. 27 (accident report); s. 28 (medical reports); s. 29 (employers’ reports); and s. 30 (superintendent’s records).

According to *McKnight v. General Casualty Insurance*, [1931] 2 W.W.R. 315 (B.C.C.A.), 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 liability 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 have to give information regarding the accident itself.

b) *Limitations*

Under IVR s. 76, no person shall commence an action to enforce any third-party liability for bodily injury and/or property damage except as provided by s. 3(2)(a) of the Limitation Act. It provides a **two-year** limitation period for actions for damages for injury to a person or property, including damage action against a driver whose negligence is said to have caused loss and damages to the plaintiff; and against the owner of the vehicle driven by that driver.

c) *Service on ICBC*

Anyone who commences an action for damages caused by a motor vehicle or trailer must also serve the Corporation with a copy of the Writ of Summons in the same way the defendant is served and must file proof of the service in the court in which the action is commenced. No further step in the action can be taken until eight days after filing of the service in the court (IVA, s. 22).

d) *Mid-Term Changes*

The insured named in the owner’s certificate must:

- a) within 10 days after his or her address is changed or he or she acquires a substitute vehicle for the vehicle described in the certificate; or
- b) before the use of the vehicle described in the certificate is changed to a use to which a different insurance rate applies or the vehicle described in the

certificate is principally used in a territory other than the territory set out in the certificate

report the changes of address, vehicle, use or territory to a person referred to in s. 3 of the IVA, and pay or be refunded the resulting difference in premium.

If the premium for a vehicle is established on the basis of the territory in which the vehicle is primarily located when not in use and that territory as set out in the certificate is changed, the insured named on the owner's certificate must, unless the vehicle is being used by the insured for vacation purposes, report the change to a person referred to in s. 3 of the IVA within 30 days of the change, and pay or be refunded the resulting difference in premium

C. Accident ("No Fault") Benefits: Part 7 of the IVR

1. General

Regardless of who is at fault in an accident, ICBC pays benefits for injury to occupants of a licensed vehicle and to 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. ICBC*, [1995] 3 S.C.R. 405, the Supreme Court of Canada laid out a two-part test for determining if death or injury falls within the scope of s. 79(1):

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

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

2. Who is Covered?

According to s.78 of the IVR, "insured" includes, in part:

- a person named as an owner in an owner's certificate,
- a member of the household of a person named in an owner's certificate,
- an occupant of a vehicle that
 - i. is licensed in the Province and is not exempted under section 43 of the Act (vehicles from the federal or a provincial government other than B.C.), or
 - ii. is not required to be licensed in the Province, 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, or
- a resident of the Province 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 Act,
- the personal representative of a deceased insured.

3. Benefits Payable

a) Disability Benefits for Employed Persons

Where, within 20 days after an accident for which “no fault” benefits are provided, an injury sustained in an accident completely disables an insured who is an employed person from engaging in employment, then the Corporation is obliged to pay that insured “no fault” benefits (IVR, s. 80). It should be noted that “employed person” is defined in s. 78 as a person who, on the day of the accident for which the claim is made, is employed or is actively engaged in an occupation for wages or profit, or a person who for any 6 months during the previous 12 months immediately preceding the date of an accident for which the claim is made, is employed or actively engaged in an occupation for wages or profit. Eligible insureds who are totally unable to engage in employment can collect either 75 percent of their average gross weekly earnings (see s. 80 for calculation) or \$300 per week (whichever is less; see Schedule 3) for the length of the disability or 104 weeks (whichever is shorter).

b) Disability Benefits for Homemakers

Homemakers are also eligible for no fault benefits if an injury is sustained in an accident, and it substantially or continuously disables the insured from regularly performing most household tasks. Under IVR, s. 84(1), ICBC will compensate the insured for the duration of the disability or 104 consecutive weeks, whichever is shorter, for reasonable expenses incurred by the insured to hire a person to perform household tasks on the insured's behalf, up to a maximum of \$145 per week (see Schedule 3, s. 2). No compensation is payable for household tasks performed by the insured's family members (s. 84(2)).

c) Disability Beyond 104 Weeks

If at the end of the two years, the total disability continues, an insured under ss. 80 or 84 of the IVR shall continue to receive the payments for the duration of the disability or until the age of 65, whichever is shorter (s. 86). Where benefits are payable under the Canada Pension Plan, the no fault benefits otherwise payable are reduced by the amount of the Canada Pension Plan benefits (s. 86).

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

d) Medical or Rehabilitation Benefits

In addition to the total temporary disability benefits described above, ICBC is obliged 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 (s. 88(2)(c)). Pursuant to Schedule 3, s. 3, ICBC's liability for rehabilitation benefits is limited to \$150,000 for accidents that occurred on or after January 1, 1990. 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 towards funeral expenses if the accident that caused the death of the applicant occurred on or after January 1, 1996 (s. 4 of Schedule 3 of the IVR);
- b) \$5,000 if the deceased was a "head of a household" (i.e. was providing the "major portion" of household income), plus a Supplemental Death benefit of \$1,000 for each survivor other than the first, plus Additional Death Benefits of \$145 per week for the first survivor and \$35 per week for each additional survivor for a duration of 104 weeks (ss. 92 – 94), see Schedule 3 ss. 5, 6 and 7;
- c) \$2,500 if the deceased was a "spouse in household" (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 (ss. 92 - 94), see Schedule 3 ss. 5, 6, 8; and
- d) \$500 to \$1,500 for the death of each dependent child, depending on the child's age (see Schedule 3, s. 5).

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.

4. Conditions and Exclusions

ICBC is not liable to pay any of these benefits in any of the following situations (check the IVR very carefully, as the following is only a brief summary of some complicated provisions):

- if the applicant resides outside B.C. **and** the vehicle in which he or she was riding or driving at the material time was not designated in an owner's certificate (s. 96(a));
- if the applicant at the time of the accident was an occupant of, or was struck by, a vehicle that could not be licensed under the MVA or Commercial Transport Act (IVR, s. 96(b)(i));
- if the death or injury resulted from the injured persons suicide or attempted suicide whether "sane or insane" (s. 96(c));
- if applicant was an occupant of a vehicle being used in an illicit trade at the time of the accident (s. 96(e));

- 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 the Act (s. 96(f));
- Where,
 - a) an insured refuses to undergo any medical, surgical, or other similar treatment, which, in the opinion of the Corporation's medical adviser or vocational adviser, and in the opinion of the medical practitioner attending an insured, is likely to relieve in whole or in part the disability of the insured; or
 - b) an insured refuses to undergo a retraining or educational program likely to assist in his or her rehabilitation (s.90(1);

then s. 90(2) provides that ICBC may terminate benefits.

The Corporation must first give an insured at least 60 days notice in writing, by registered mail, of the Corporation's intention to terminate payment of benefits. 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 the insured is required to undergo is unlikely to relieve the disability, or that it may injuriously affect the balance of his or her health, or that the program is not likely to assist in rehabilitation (s. 90(3)).

5. Applicant's Duty

ICBC is not liable to an insured who, to the prejudice of the Corporation, fails to comply with certain duties. Sections 97 and 98 of the IVR state in part that an insured **must**:

- give prompt notice to ICBC of the accident, and provide a written report within 30 days of the accident, and provide a proof of claim within 90 days of the accident (s. 97). The proof of claim is a standard form authorized by ICBC and provided to applicants.; or
- if asked by the Corporation, promptly furnish a certificate of an attending medical practitioner, dentist, or chiropractor as to the nature and extent of the insured's injury and the treatment, current condition, and prognosis of the injury (s. 98).

Note that, for liability to cease, the Corporation must have suffered prejudice as a result of the applicant's failure to comply with ss. 97 and 98.

6. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under Third Party Legal Liability. These are contained in s. 19 of the IVA and s. 55 of the IVR. See **Section II.B.9: Forfeiture of Claims** and **Section II.B.10: Breach of Conditions**, above.

7. **Limitation Period**

Section 103 provides that no person shall commence an action in respect of accident benefits unless:

- he has substantially complied with the provisions of sections 97 to 100 that are applicable to him, and
- the action is commenced within **two years** after:
 - i. the date of the accident for which the benefits are claimed, or
 - ii. where benefits have been paid, the date he received the last accident benefit payment.

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

1. Protection of Third Parties from Damage by Uninsured Vehicles: s. 20 of the IVA

Under the new IVA, an uninsured motorist continues to be defined as someone who operates a motor vehicle without third party liability coverage (at least \$100,000).

When death, personal injury, or property damage results from the use of an uninsured vehicle, a claimant (anyone entitled to sue the uninsured motorist) may apply to the Corporation under s.20 for compensation.

On receipt of the application in the prescribed form, the Corporation must forward by registered mail a notice of it to the owner or driver of the uninsured motor vehicle, addressed to the latest, and any other, address shown for him or her in ICBC records (s. 20(3)).

Where ICBC pays out any amount under this section, it is subrogated to the rights of the person paid and the Corporation may maintain an action in its name or in the name of that person against the person liable (s. 20(11)).

a) ICBC May Take Control of the Defendant's Case

After ICBC has given notice to the owner or driver of the uninsured vehicle the Corporation is given authority over the resolution of the case.

ICBC is deemed to be the agent of the owner of the uninsured vehicle for service of notice. Thus the Claimant may commence an action against the owner/driver by serving ICBC with a Notice of Claim in Small Claims or Supreme Court.

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

If the claimant serves the uninsured owner/driver directly and the uninsured motorist does not enter an appearance or does not file a statement of defence, or does not appear at trial, or does anything that permits default judgment to be taken against him or her, then the Corporation may intervene on the action. ICBC essentially steps into the shoes of the defendant. The Corporation may defend the action in the name of

the defendant and conduct that person's defence. All acts done in this respect are deemed to be acts of the defendant (s. 20(7)).

2. Unidentified Motorist (Hit and Run) Victims: s. 24 of the IVA

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

No claim may be made nor judgment given against ICBC unless the court is satisfied that all reasonable efforts have been made to ascertain the identity of the owner and driver (IVA, s. 24(5)). If the identity of those persons cannot be ascertained, ICBC is authorized to compromise and settle any such claims, or to conduct the defence of the case as it sees fit.

NOTE: Before an action can be commenced, s. 24(2) requires written notice to the Corporation "as soon as reasonably practicable" and within six months after the accident. Once notice has been properly provided, the limitation period is two years from the date of the loss, pursuant to the Limitation Act.

3. Conditions of Liability Under ss. 20 and 24 of the IVA

ICBC is not liable to an owner of a vehicle who makes a claim under s. 24 of the IVA for loss or damage where the owner, without reasonable cause, has not:

- a) made a report to the police within 48 hours of discovering the loss or damage;
- b) obtained the police case file number for the report; and
- c) on the request of the Corporation, advised the Corporation of the police case file number (IVR, s. 107(1)).

ICBC is not liable for a claim under ss. 20 or 24 of the IVA for loss or damage to a vehicle arising while the vehicle is, without the consent of the owner, in the possession of another (IVR s. 107(2)(a)).

ICBC is not liable for a claim under s. 24 of the IVA by the Province, Canada, or by a municipality, public or private utility, or other similar person in respect to damage to a highway or a structure or thing placed or maintained in, on, under or over a highway (IVR, s. 107(2)(b)).

4. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under **Section II.B.9: Forfeiture of Claims** and **Section II.B.10: Breach of Conditions**, above. These are contained in s. 19 of the IVA and s. 55 of the IVR.

5. Limit of ICBC Liability

Notwithstanding the number of claims or the number of people making claims, the limit of ICBC's liability for payment of all claims under s. 20 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.

If, under s. 83 of the IVA or s. 81 of the IVR, an applicant has other insurance or has a right, benefit or claim:

- a) under the Workers' Compensation Act, R.S.B.C. 1996, c. 492, or a similar law or plan of another jurisdiction;
- b) under the Employment Insurance Act (Canada), R.S.C. 1996, c.23; or
- c) of the government of Canada, the government of another province or territory of Canada, or the government of a foreign jurisdiction,

ICBC is relieved from having to pay that part of a judgment equal to the right, benefit or claim or other insurance.

It is very important that an insured seek to receive all benefits from Workers' Compensation, Employment Insurance, private insurance (e.g. insurance provided through an insured's employer) or any other possible source of coverage. ICBC will not be obliged to pay benefits that could have been received from another source. By the time the decision has been made that ICBC is not liable for these amounts, the limitation period for making a claim through the other source will most likely have ended.

Section 106 of the IVR further stipulates that no amount shall be paid by ICBC under section 20 or 24 of the Act if the amount is payable as a benefit, indemnity, or as compensation from another source, including: Workers Compensation, Employment Insurance, and any government.

NOTE: The determination of whether an insured is legally entitled to recover damages, and the amount of the damages, shall be made by agreement between the insured and the Corporation. Any dispute as to entitlement or amount shall be submitted to arbitration under the Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (IVR, s. 148.2).

IA s. 148.7 has been repealed and the sale of excess underinsured motorist protection is not dealt with specifically in the IVA or IVR. Excess underinsured motorist protection may still be purchased through insurers and presumably is intended to be covered under IVA Part 4 (Optional Insurance Contracts).

E. First Party Coverage Under the IVR

1. IVR Part 10, Division 1: Inverse Liability and Uninsured or Hit and Run Accidents Outside B.C.

a) Section 147 Claims

The basic compulsory coverage will also pay for loss or damage to a B.C. vehicle resulting from an accident when the accident occurred **outside B.C.**, in a place in Canada or the U.S. where 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. because the defendant cannot be identified following a hit and run collision).

Under s.147 of the IVR, "insured" means

- (a) the person named as an owner in an owner's certificate,
- (b) if the person referred to in paragraph (a) is deceased, the personal representative of that person,
- (c) a person who can supply written proof that he is the beneficial owner of a commercial vehicle described in an owner's certificate, but who, because of the licensing requirements of interprovincial or interstate trade, is not named as the owner on the certificate, or
- (d) the renter of a vehicle described in an owner's certificate;

"Loss or damage" in this section means loss or damage to which collision coverage applies (which is optional: see **Section III.B.2: Collision**, below). Compensation for loss or damage is to the extent to which the insured would have recovered if he or she had a right of action (IVR, s. 147) – but is limited to the lesser of the cost of repairing the vehicle, the declared value of the vehicle, or the actual cash value of the vehicle.

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.

b) Section 148 Claims: Uninsured or hit and run accident in Nunavut, the Yukon, Northwest Territories or United States of America

A person named as an owner in the owner's certificate, or a member of the household of the person in an owner's certificate, who suffers death or injury in the Nunavut, Yukon, Northwest Territories or the U.S. for which an unidentified or uninsured vehicle is responsible, is entitled to compensation from ICBC. The Corporation's liability is limited to \$200,000 (Schedule 3, s. 11 of the IVR). Payments are subject to adjustment if recovery or partial recovery is made from another party (s. 148(2)).

ICBC is not liable under IVR s. 148(5) for an accident with an unidentified vehicle, unless the insured or the insured's representative:

- a) reports the accident within 24 hours after its occurrence to the police, peace officer, judicial officer, or the administrator of any law respecting motor vehicles;
- b) files with ICBC, within 28 days after the occurrence, 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 vehicle or uninsured vehicle and setting out the facts in support of that statement; and
- c) upon request of the Corporation, allows the Corporation to inspect the motor vehicle the insured occupied at the time of the occurrence.

Any payment made pursuant to s. 148 shall be deducted from any amount the insured is entitled to recover under Parts 6 or 7 (ss. 148(6) and (7)).

Section 106 (1) of the Act applies to claims under s. 148 of the IVR. Thus no amount shall be paid by ICBC under section 148 if the amount is payable as a benefit,

indemnity, or as compensation, from another source, including: Workers Compensation, Employment Insurance, and any government.

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.

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

This part of the basic compulsory coverage provides protection 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 \$1,000,000 for each insured person (Schedule 3, s. 13 of the IVR).

It is available where death or injury of an insured is caused by the operation of a vehicle operated by an underinsured motorist in Canada or the United States. The insured need not be in his or her car to be eligible to be compensated. ICBC provides this coverage automatically to all holders of a valid B.C. driver's license and members of their household (IVR, s. 49.3).

a) Who is Covered?

The “insured” under s.148.1 includes:

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

b) Restrictions on Liability and Special Conditions

For accidents occurring outside B.C., the **law of the jurisdiction determines the legal liability of an underinsured motorist** where the accident occurred, whereas the **amount** of the UMP claim is determined by B.C. law. 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).

c) Forfeiture and Breach of Conditions

Under IVR, s. 148.2(5), the same provisions apply as those outlined under Third Party Legal Liability (see **Section II.B.9: Forfeiture of Claims** and **Section II.B.10: Breach of Conditions**, above.). An award otherwise available under UMP will be reduced by any amount forfeited by a breach outlined in s. 55.

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.

III. OPTIONAL INSURANCE (IVA PART 4 & IVR PART 13)

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. Formerly, Part 9 of the IMVA Regulations (Extension Insurance) covered material under this part. Under the new legislation, Part 9 has been replaced by IVA Part 4 (Optional Insurance Contracts) and IVR Part 13 (Optional Insurance Contracts). The term OIC includes, but is not limited to policies providing coverage for: excess third party liability, own vehicle damage, excess UMP, and excess no-fault income replacement.

The IVA s. 61(1.1) provides that an OIC that extends coverage in an existing certificate or policy may, limit 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" (s. 61(2)).

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

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

The IVA s. 61(1.2) provides that an OIC may **not**, in respect of third party liability insurance coverage:

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

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

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

A. Extended Third Party Legal Liability

Third Party Legal Liability insurance may be increased from the basic compulsory \$200,000 (taxis and limousines require \$300,000; buses \$500,000) to a greater amount. The exclusions and conditions that apply to the basic Third Party Legal Liability coverage (Part 6) also apply to this extended coverage. See **Section II.B.9: Forfeiture of Claims** and **Section II.B.10: Breach of Conditions**, above.

B. Own Damage Coverage

1. General

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.

2. 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).

3. 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).

4. 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).

5. Limit on Liability

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

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

6. 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. Such ICBC policy includes:

a) 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).

b) Exclusions to Own Damage Coverage

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;
- 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.

c) 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.

7. Forfeiture of Claims and Breach of Conditions

Apart from exclusions, a claim may be forfeited under IVA s. 75 or IVR s. 169, or if certain conditions are breached, including failure of the insured to comply with the IVR, or breach by the insured of any regulation (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 any offence under ss. 249, 252, 253, 254, or 255 of the Criminal Code;
- c) operating a vehicle when not authorized and qualified (IVR, s. 55);
- d) using the vehicle in illicit trade, or to avoid arrest, or other police action (s. 55);
- e) towing an unregistered, unlicensed trailer (s. 55);
- f) permitting others to breach a condition (s. 55);
- g) using a vehicle in a manner contrary to the insured person's statement in his or her application for coverage, the result being a form of breach of condition. This happens most commonly in cases where coverage of a vehicle for "pleasure purposes" is applied for, and the vehicle is damaged when in fact being used to take the insured person to or from work (s. 55 sets out the specifics);
- h) failing, without reasonable cause and to the prejudice of the Corporation, (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 the Corporation 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 the Corporation, 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 (IA Regulations s. 136 (b)).

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

8. Exceptions to Forfeiture

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

9. Reporting Accidents

Coverage may be denied where an insured person fails, without reasonable cause and to the prejudice of the Corporation, to comply with ss. 67 or 68 of the MVA. 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.

10. 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.**

C. *Own Damage Disputes with ICBC*

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

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.

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

- a) the client can go through ICBC’s internal appeal procedure by asking the adjuster to review his or her decision and, if there is no change, by asking the claims manager to review it. If the client is still not satisfied, the third step is to present the client’s case to an appeal panel; or
- b) the client can sue. This is commonly the most satisfactory course, particularly where the amount in issue is relatively small, as where the damage is about the same amount as the “deductible”. Such an action is not brought against ICBC under the policy, but against the driver (and owner, MVA, s. 86) whose negligence is said to have caused the accident. In such a case, that ICBC was not liable to pay the “deductible” to its own insured does not relieve the negligent party from liability, assuming always that negligence can be established.

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

NOTE: If ICBC denied liability to indemnify a person insured by it and that person is sued, ICBC is entitled to apply to the court to be joined as a third party (IVA, s. 77(3)). Upon being made a third party, ICBC can then defend the action fully, notwithstanding its previous denial of liability to indemnify the defendant (s. 77(4)). In *West v. Cotton* (1994), 98 B.C.L.R. (2d) 50 (S.C.), the third party, ICBC, conducted the defence of a defendant to whom it denied coverage and who did not participate in the proceedings. Having succeeded in proving his

claims, the plaintiff was not entitled to recover his or her costs, with one exception: that being against the third party. In this case, ICBC would have suffered significant prejudice if it had been precluded from presenting its defences as third party since the defendant did not demonstrate any interest in maintaining the action.

IV. PERSONAL INJURY CLAIMS

A. Making a Claim with ICBC

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

1. Dial-A-Claim

When calling Dial-a-Claim, the claimant will be put in touch with a representative who will take down pertinent details of the accident, including the time, date, place, license identification of the vehicles involved, etc. The representative will ask the claimant to give a brief narrative of how the accident occurred. This narrative will be taken down and entered into the computer files at ICBC. The claimant will then be given a claim number that will follow the claim and the claimant through the entire process. The claim number enables ICBC to find the claimant's file through any office and to quickly identify the adjuster who is dealing with the claim.

2. Meeting with the Adjuster

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

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

3. The Adjuster's Perspective

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

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

Where fault is an issue, claimants may find the adjuster manipulating their narrative to place them in a negative light. This is often done in very subtle ways and claimants should be aware of it so that they can guard against it. Typically, an adjuster will draw a map or diagram of the

accident scene and state that it is “not to scale”. The Corporation may later claim that the diagram is an accurate depiction of the accident and tantamount to a confession of fault.

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

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

4. The “Independent” Medical Assessment

Under the IVR, ICBC may appoint a doctor to make an “independent” medical assessment of the claimant’s condition. 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 the Corporation, do exist. They check up on claimants and the evidence that they gather can be used against claimants. For example, if the claimant says that he or she cannot mow the lawn or lift a bag of flour, and then goes outside and does just that, he or she runs the risk of being photographed and/or videotaped by a person employed by ICBC.

6. “Minimal Damage” and ICBC Policy

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

B. Identifying Parties to the Dispute

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

- the injured party (be they a driver, occupant, or bystander) or the estate of the deceased;
- his/her relatives;
- the registered owner of vehicle;

- the guardian of a party lacking the requisite mental capacity to commence an action.

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

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

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

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

NOTE: When the accident occurred "in the course of employment", the Workers Compensation Act [WCA], R.S.B.C. 1996, c.492, 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 unreasonable conduct are negligence claims. Negligence encompasses all departures from accepted reasonable standards.

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

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

D. Private Settlements

Private settlements should be discouraged. Potential plaintiffs who consult an ISLAP clinician regarding an action for damages for personal injury should always be advised to consult a lawyer prior to settling a claim, whether privately or with ICBC. Similarly, potential defendants in such matters should be told to seek the advice of a lawyer and to contact ICBC prior to paying out any sums, so as not to prejudice their rights and their plan of insurance with ICBC.

E. Inequality of Bargaining Power

A release of claim for personal injuries may be set aside as inequitable by the courts in circumstances where it can be shown there was inequality of bargaining power between the parties.

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

On the basis of the preponderance of the evidence, 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 18A of the B.C. Supreme Court Rules of Court, if the evidence leads the court to conclude that the plaintiff was misled, even if unintentionally, into believing the document signed was releasing claims in areas that the plaintiff believed to be irrelevant.

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

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

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

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

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

F. Dealing with Lawyers

Most personal injury lawyers will take motor vehicle accident claims on a contingency basis. Contingency fees are calculated as a percentage of the gross sum that is recovered. Lawyers are reluctant to work on a contingency basis, however, unless there is a good chance that they will recover damages for the claimant. If a case does not appear winnable, lawyers may ask the claimant to pay an hourly rate, or at least to pay disbursement costs up front.

1. Contingency Fees

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

2. The Contingency Fee Contract

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

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

3. Disbursement Costs

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

4. Marshalling of Reports

Over the course of the claim, the claimant's lawyer will collect medical records and deliver them to the defence counsel. 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 professionals. The claimant's lawyer will also receive defence reports and expert summaries. All of this goes on behind the scenes, and unless the claimant's lawyer is vigilant about sending the claimant reporting letters, the claimant will be unaware of any of these activities.

5. Common Concerns

Claimants often worry that their lawyers are not keeping them up to date. Claimants should understand that some lawyers handling personal injury cases set up their operation as a sort of factory. They handle large numbers of cases, staff their offices with paralegals, send out form letters and rarely meet their clients. Clients should not be afraid to book an appointment with their lawyer to get a progress report on their case.

G. Which Court has Jurisdiction?

1. Provincial Court, Small Claims Division

The Small Claims limit is \$25,000 (effective September 1, 2005). Accordingly, claims for minor injuries may come within the jurisdiction of the Provincial Court. The procedure for bringing a case to trial in Small Claims Court is fully set out in this Manual in **Chapter 22: Small Claims Procedure**.

A claim commenced in Small Claims court can be transferred to Supreme Court on application by one of the parties or by a judge on his or her own initiative. Such an application should be made as early as possible for a greater chance of success. A judge at the settlement/trial conference, at trial, or after application by a party at any time, **must** transfer a claim to Supreme Court if he or she is satisfied that the monetary outcome of a claim (not including interest and expenses) may exceed \$25,000. However, there may be exceptions. A claim will remain in the Small Claims Division if the claimant expressly chooses to abandon the amount over \$25,000. For personal injury claims, a judge must consider medical or other reports filed or brought to the settlement/ trial conference by the parties before transferring the claim to Supreme Court.

2. Supreme Court of British Columbia

Actions for damages over \$25,000 (effective September 1, 2005) come within the jurisdiction of the Supreme Court of British Columbia. Although ISLAP clinicians cannot appear in the Supreme Court, the following represents a brief overview of the procedure for bringing a case to trial at this level.

A claim commenced in Supreme Court can be transferred to the Small Claims on application by one of the parties or by a judge on his or her own initiative. The judge must be satisfied that the monetary outcome of the claim will not exceed \$25,000. 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 \$25,000.

a) Regular Trial

(1) The Writ of Summons

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

(2) The Statement of Defence

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 Statement of Defence.

(3) Reserving a Trial Date

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

(4) The Examination for Discovery

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

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

b) Fast Track Litigation - Rule 66

This rule was introduced to provide an efficient and less expensive means of dealing with cases where the trial will last less than two days. To elect to use this method, an endorsement in Form 137 is added to the statement of claim or statement of defence. This rule ceases to apply if:

1. the parties to the action file a consent order to that effect;
2. the court, on its own motion or on the application of any party, so orders; or
3. none of the parties to the action applies for a trial date within four months after the date on which this rule becomes applicable to the action.

Each party must also provide and deliver to all parties involved a list, in Form 93, of the documents that are or were in the party's possession, placed in a convenient order with a short description of each document. Examinations for Discovery are limited to a maximum of two hours under this rule; however, a party may apply to the court to have this time extended. Furthermore, Examinations for Discovery are to be completed no later than 14 days before the trial date, unless both parties have consented or the court has ordered another date. Under Rule 66, trials must be heard **without** a jury, and trial agendas must be filed in Form 137 no later than two days before the trial. The trial agendas are to include:

1. the opening statement by each party;
2. the examination in chief of each expected witness;
3. the cross-examination of each expected witness;

4. the final submission by each party; and
5. any other matter that may affect the length of the trial.

The court may adjourn the trial to a new date not subject to this rule if it considers the matter, given the time estimates provided by each party, will exceed two days.

c) *Expedited Litigation Project - Rule 68*

Rule 68 became effective on September 1, 2005. Expedited litigation may only be pursued if the claim is for

1. money;
2. real property;
3. personal property, **and**,

the total of the following amounts is \$100,000 or less, exclusive of interest and costs:

1. the amount of any money claimed in the action by the plaintiff for pecuniary loss;
2. the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;
3. the fair market value, as 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.

Trials held under Rule 68 must be heard without a jury. Parties to the action under this rule must also, within 15 days after the close of pleadings or within 15 days after the action becomes an expedited action, whichever is later, prepare and deliver a list to the other party of:

1. all documents referred to in the party's pleading;
2. all documents to which the party intends to refer at trial; and
3. all documents in the party's control that could be used by any party at trial to prove or disprove a material fact.

Under Rule 68, no party may conduct Examinations for Discovery unless the parties consent or the court makes such an order. If examinations are to take place, they must not exceed two hours unless the parties otherwise consent. Within 60 days after the close of pleadings or within 60 days after the action becomes an expedited action, whichever is later, each party to an expedited action must deliver to each other party a list, in Form 141, of the witnesses that the party delivering the list proposes to call at the trial of the expedited action. This list must:

1. include the party delivering the list, if that party intends to give evidence at trial; and
2. exclude any expert witnesses.

The list must also include a written summary of the evidence that the party believes that witness will give at trial. Under an expedited action, a party may not call more than one expert of the party's choosing.

Case Management Conferences may also be held, following the rules governing such an event. The Case Management Conference may be requested by one of the parties to the action by filing a requisition in Form 142, or may be ordered by the court.

Trial Management Conferences are set by the registrar and are held 15 - 30 days before the trial date. Each party attending the trial management conference must file a trial brief and deliver a copy to each party no later than seven days before the trial management conference.

The judge of a trial management conference may make the following orders:

1. a trial scheduling plan;
2. admissions of fact at trial;
3. admission of documents at trial; including
4. imposing time limits for the direct or cross-examination of witnesses, opening statements and final submissions;
5. direct evidence of witnesses be presented at trial by way of affidavit;
6. the parties present opening statements and final submissions in writing; and/or
7. the number of days reserved for the trial be changed.

H. Damages

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

1. How Damages are Assessed

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

2. Heads of Damage

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

The major heads of damage are as follows:

a) *Non-pecuniary Damages*

Non-pecuniary damages are awarded to **compensate** the claimant for pain and suffering, loss of enjoyment of life, loss of expectation of life, etc. In 1978, the Supreme Court of Canada placed a cap of \$100,000 on awards for non-pecuniary damages in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 83 D.L.R. (3d) 452 (S.C.C.). This means that the limit for this head of damages after adjusting for inflation, is now just over \$300,000.

b) *Loss of Prospective Earnings*

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

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

c) *Cost of Future Care*

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

d) *Special Damages*

Special damages compensate the claimant for expenses like drugs, crutches, 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 he or she took the lump sum and invested it. Another advantage is that the claimant does not suddenly come into a large sum of money and run the risk of spending it foolishly. The advantage to the insurer is that the Corporation doesn't have to pay out all of the money at once and is entitled to derive income from it.

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

I. Costs

In addition to the claim for damages, the claimant should claim costs. Courts award costs as crude compensation for the costs of pursuing the claim. Costs are calculated or assessed on the basis of a tariff set out in the Supreme Court Act, R.S.B.C. 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 the 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. This process will likely be repeated several times. These types of negotiations are expensive, time consuming, slow, and frustrating.

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. Authority for the Notice to Mediate Regulation, B.C. Reg. 127/98 is contained in s. 44.1 of the IA. The regulation came into force on April 14, 1998. 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. Within 10 days after the Notice has been delivered to all parties, the parties must jointly agree upon and appoint a mediator. The mediation must occur within 60 days of the mediator’s appointment, unless all parties agree in writing to a later date. If one party fails to comply with a provision of the Notice to Mediate Regulation, any of the other parties may file a Declaration of Default with the court. 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. 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. ICBC* (1990), 44 B.C.L.R. (2d) 303 (S.C.), Esson C.J. summarizes the law respecting the insurer's duty to its insureds in certain areas discussed therein. In this particular case, ICBC acted in good faith, and in a fair and open manner, followed the course the insured wished to take. Among the points raised in the judgment are: i) the exclusive discretionary power of ICBC to settle liability claims places the insured at the mercy of the insurer ii) this vulnerability imposes duties on the insurer to act in good faith and deal fairly, and to not act contrary to the interests of the insured, or, at least, to fully advise the insured of its intention to do so; iii) the insurer's duty to defend includes the obligation to defend by all lawful means the amount of any judgment awarded against the insured.

See also *Shea v. Manitoba Public Insurance Corporation* (1991), 55 B.C.L.R. (2d) 15 (S.C.), per Finch J.

4. Formal Offers to Settle and Cost Consequences

Under Rule 37B 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.

For Rule 37B 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[name of party making the offer].... reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding". The fact that an offer has been made **cannot** be disclosed to the court or jury until all issues in the proceeding, other than costs have been assessed.

The court, in assessing costs has broad discretion to consider a refusal to settle in making an order with respect to costs. 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, or award double costs for all or some of the steps taken in the proceeding after the delivery date of the formal offer.

Where the plaintiff refuses an offer to settle, 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. This rule penalizing a plaintiff for overreaching the true value of a claim can be catastrophic in its potential to visit financial ruin upon a claimant who does not exercise a sober and realistic assessment of his or her claim as he or she proceeds into Supreme Court. It is entirely within the realm of possibility that a claimant who refuses to accept an offer of \$26,000.00, after judgment for \$25,000.00 (i.e. lower than the offer to settle) would finish the day, after paying the insurer's costs and disbursements, and his or her own disbursements, with **nothing** or worse: a debt to the insurer and his or her own lawyer for disbursements. It should be stressed to clients that the lawyer who is hired to do a personal injury case is supposed to be objective, realistic, and not inclined to simply tell the client what they want to hear. When a lawyer talks about the risks of litigation, this penalty for misjudging the value of a case is one of the most important risks to consider.

V. CLAIMS INVOLVING OUT-OF-PROVINCE INSURERS OR ACCIDENTS

A. *Conflict of law issues*

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

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

1. Limitation Periods

Subsequent cases have confirmed that limitation laws are generally (but **not** always) substantive. Students are strongly advised to consult the Supervising Lawyer before offering any advice relating to this, and other, conflict of laws issues.

2. The access of damages

The court in *Wong v. Wei*, (1999), 65 B.C.L.R. (3d) 222 (S. C.) 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*

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

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

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

In situation involving parallel proceedings in two jurisdictions, it may be necessary to engage in a *forum conveniens* analysis to determine the most convenient jurisdiction within which to hear the matter. In determining the most efficient forum to hold the trial, a court may consider, among other things: where witnesses live; whether injury or disability makes it difficult for one party to travel; and which substantive law will apply (applying complex foreign laws in a 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. A complete listing of all B.C. and extra-provincial insurance companies who are eligible for automobile insurance is available on the Financial Institutions Commission website, at www.fic.gov.bc.ca.

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

2. No Fault Benefits and Underinsured Motorist Protection (UMP) Entitlements

S.83(2) of IVA provides that a person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits. Thus, the section provides a defence, limiting the extent of liability to a defendant where the plaintiff is entitled to benefits under the IVA or another vehicle insurance scheme. This defence is also available for out-of-province insurers who eligible to provide insurance in BC. The defendant bears the burden of proving the amount of any entitlement (irrespective of actual payment).

An out-of-province insurer may also be liable to provide UMP coverage notwithstanding that its policy does not include such coverage.

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, the 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 B.C.

a) Without a Court Order

According to Rule 13(1) of the Supreme Court Rules in any of the circumstances enumerated in s.10 of the Court Jurisdiction and Proceedings Transfer Act

(CJPTA), the BC plaintiff can serve the out-of-province defendant without order of the court.

Notable circumstances for which this is the case include:

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

b) With 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.