

THE CHANGING LANDSCAPE OF MOTOR VEHICLE ACCIDENT CLAIMS IN BRITISH COLUMBIA

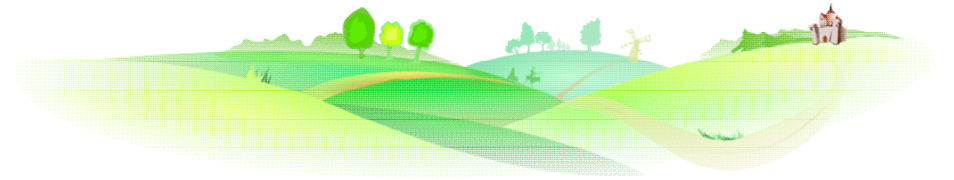
WTInjury Professional Development Lunch

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The Changing Landscape: Overview

- Changes to Part 7 Benefits
- Changes to Tort Claims/Damages Awards
- Changes to Litigation Procedures



Changes to Part 7 Benefits

- Quantum of Accident Benefits
- Limits on Recovery of Treatment Fees
- Limitation Period for Part Benefits
- Limits on Recovery of Subrogated Claims

Changes to Part 7 Benefits: Quantum of Benefits

- Increases to certain benefits:

Benefit	Previous Coverage	New Coverage
Wage loss payments	\$300/week	\$740/week
Home support benefits	\$145/week	\$280/week
Funeral costs	\$2,500	\$7,500
Death benefits	\$17,580-\$20,080	\$30,000
Lifetime allowance	\$150,000	\$300,000

- Lifetime allowance increase in effect January 1, 2018
- Other changes in effect April 1, 2019

Changes to Part 7 Benefits: Quantum of Benefits

- New payment guidelines for health services practitioners as of April 1, 2019

Health Service	Fee Limit for Assessment Visit & Report	Fee Limit for Standard Treatment	Number of Pre-Authorized Treatments*
Acupuncture	\$105	\$88	12
Chiropractic	\$199	\$53	25
Counselling	\$210	\$120	12
Kinesiology	\$135	\$78	12
Massage Therapy	\$107	\$80	12
Physiotherapy	\$250	\$79	25
Psychology	\$340	\$195	12
Occupational Therapy		\$112/hour	

- Preauthorized treatments available within 12 weeks of the date of the accident causing the injury
- Treatment outside the 12 week period post-accident isn't a "necessary health care service" unless the corporation's medical advisor or the insured's physician certifies in writing that the treatment is necessary
- Guidelines are supposed to be reviewed annually in relation to the Consumer Price Index

Changes to Part 7 Benefits: Limit on Recovery of Treatment Fees

- Changes to the recoverability of “user fees”, such that they can no longer be recovered as part of “special damages” claim
- Where treatment fees have been prescribed, no greater amount may be claimed in a tort action in British Columbia arising out of the use or operation of a vehicle (*Insurance (Vehicle) Act*, s. 82.2)
- Claimants that go to treatment providers that charge above the prescribed rate **will not** be able to recover the excess amount from the at-fault party
- Essentially, no tort claim for user fees for accidents that occur as of April 1, 2019

Changes to Part 7 Benefits: Limitation Period

- Limitation period for Part 7 benefits is the later of:
 - 2 years from the date of last payment;
 - 2 years from the date of the subject motor vehicle accident; or
 - 3 months after receipt of a written response from the corporation, issued in response to notice provided by the insured to the corporation in the prescribed form advising that the insured intends to advance a claim for Part 7 benefits that were denied by the corporation (if no response is received from the corporation, then “the action may be commenced at any time” per s. 103(1)(b)(ii))

Changes to Part 7 Benefits: Subrogated Claims

- Under previous legislation, Part 7 benefits (paid or payable) were deducted from tort claim payments
- Under s. 83(1) of the *Insurance (Vehicle) Act*, these deductions will now apply to all amounts paid or payable (or services provided) from: any insurance wherever issued; under the Employment Insurance Act; by any provincial government or the federal government; under the terms and conditions of employment or an agreement for collective bargaining; or under a loan made on the condition that it be repaid from the settlement or judgment
- WorkSafeBC and MSP are excluded from these changes
- The court may not consider the likelihood the benefits will be paid or provided in its analysis [s. 83(5.1)]
- Came into effect on **May 17, 2018**, when s. 83 of the *Insurance (Vehicle) Act* was amended by Bill 20.

Changes to Damages Awards: Overview

- Cap on Non-Pecuniary Damages for “Minor Injuries”
- Limits on Recovery of Items under Cost of Future Care

Changes to Damages Awards: Cap on “Minor Injuries”

- \$5,500 cap on non-pecuniary damages for “minor injuries”
 - Indexed yearly to CPI
- Effective as of April 1, 2019
- Classifying an injury as minor: the multi-step test
 1. *Is there a permanent serious disfigurement or serious impairment?* If so, it is not a minor injury
 2. *Does the injury fall under one of the enumerated categories?* If so, it is a minor injury
 3. *Mitigation?* Even if the injury involves a permanent serious disfigurement or a serious impairment, or if it falls outside one of the enumerated categories, it will still be considered a minor injury if there is a failure to mitigate

Step 1: Is there a permanent serious disfigurement or serious impairment?

- Definitions under the *Insurance (Vehicle) Act* and the *Minor Injury Regulation* provide more context
 - "permanent serious disfigurement", in relation to a claimant, means a permanent disfigurement that, having regard to any prescribed criteria, significantly detracts from the claimant's physical appearance;
 - "serious impairment", in relation to a claimant, means a physical or mental impairment that
 - (a) is not resolved within 12 months, or another prescribed period, if any, after the date of an accident, and
 - (b) meets prescribed criteria.

Step 1: Is there a permanent serious disfigurement or serious impairment (con't.)

- (a) the impairment results in a substantial inability of the claimant to perform
 - (i) the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,
 - (ii) the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or
 - (iii) the claimant's activities of daily living;
- (b) the impairment is primarily caused by the accident and is ongoing since the accident;
- (c) the impairment is not expected to improve substantially.

Step 2: Does the Injury Fall Into One of the Enumerated Categories?

Enumerated Categories

The *Insurance (Vehicle) Act* lists the following as a “minor injury”:

- Abrasions
- Contusions
- Lacerations
- Sprains or strains
- Pain syndromes;
- Psychological and psychiatric conditions;
- A prescribed injury or an injury in a prescribed type or class of injury

A minor injury includes a symptom or a condition associated with the injury whether or not the symptom or condition resolves within 12 months, or another prescribed period, if any, after the date of an accident.

Step 2: Does the Injury Fall Into One of the Enumerated Categories? (con't.)

Regulations provide further detail and add additional injuries:

- **Strain** – includes 1st and 2nd degree strains but excludes 3rd degree which include torn muscles
- **Temporomandibular joint disorder (TMJ)**
- **Pain syndrome** – means a syndrome, disorder, or other clinical condition associated with pain, including pain that is not resolved within 3 months;
- **Whiplash associated disorder (WAD)** – includes WAD I or II, but excludes WAD III or IV, which involve neurological symptoms, fractures, or dislocations of the spine
- **Psychological and psychiatric conditions** – which do not result in an incapacity beyond 16 weeks
- **Concussion** – which does not result in an incapacity beyond 16 weeks

Changes to Damages Awards: Further Definitions

- Defined terms under the *Insurance (Vehicle) Act* and the *Minor Injury Regulation*
- "incapacity", in relation to a claimant, means a mental or physical incapacity that
 - (a) is not resolved within 16 weeks after the date the incapacity arises, and
 - (b) is the primary cause of a substantial inability of the claimant to perform
 - (i) essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's incapacity and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,
 - (ii) the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's incapacity and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or
 - (iii) the claimant's activities of daily living.

Changes to Damages Awards: Further Definitions

- "activities of daily living" means the following activities:
 - (a) preparing own meals;
 - (b) managing personal finances;
 - (c) shopping for personal needs;
 - (d) using public or personal transportation;
 - (e) performing housework to maintain a place of residence in acceptable sanitary condition;
 - (f) performing personal hygiene and self-care;
 - (g) managing personal medication;

Step 3: Mitigation

- Failure to mitigate is now legislated in the *Minor Injury Regulation*
- Non-compliance with a prescribed treatment means claimant alleging a serious impairment arising from a minor injury will have the pain and suffering award capped as a minor injury if all of the following are true:
 - They did not follow prescribed treatment protocols;
 - They did not have a reasonable excuse for failing to follow the protocols; and
 - They are unable to establish that a serious impairment would have arisen even if they had followed the protocols.

Changes to Damages Awards: Cap on “Minor Injuries”

Burden of Proof & Onus

- Part 2 of the *Minor Injury Regulation* states the burden of proof that the injury is not a “minor injury” is on the party making that allegation.
- Interpretively it appears the injury is presumed to be minor to start, unless the burden is overcome that it is not

Multiple Injuries

- If a person suffers more than one injury as a result of a collision, each injury must be diagnosed separately as to whether or not it is a minor injury.
- If one or more injuries is minor and one or more is not, the total non-pecuniary damages for all of the injuries is the sum of: 1) up to the maximum minor injury cap of \$5,500 for all minor injuries combined plus 2) the amount of damages for the non-minor injury or injuries

Changes to Damages Awards: Future Care

- Section 82.2 has been added to the Insurance (Vehicle) Act by Bill 20
 - provides an injured claimant cannot recover an amount paid to a health care practitioner that exceeds the amount set by regulation for any “health care loss.” “Health care loss” is defined as “a cost or expense **incurred or to be incurred** for health care provided by a health care practitioner.”
 - This would affect both special damages and cost of future care claims as a result
- Future care awards not to be based on actual treatment costs projected, but rather compensated at the limited amounts that ICBC pays per session as Part 7 benefits.
- For example: for a future care award for massage therapy, only \$80 will be compensated for each additional future session needed. The patient must cover the difference.
- ICBC currently plans to leave Part 7 benefits open at the conclusion of a tort claim rather than making lump-sum future care awards.

Changes to Litigation Procedure: Overview

- Experts
- The CRT

Changes to Litigation Procedure: Experts

- February 11, 2019 Order in Council – additions and amendments to the *Supreme Court Civil Rules*
- Rule 11-8 – Experts in Vehicle Actions
- Further amended by Order in Council no. 131 on March 22, 2019

Changes to Litigation Procedure: Experts

Limitation on Expert Evidence

(3) Except as provided under this rule, a party to a vehicle action may tender, at trial, only the following as expert opinion evidence on the issue of damages arising from personal injury or death:

- (a) expert opinion evidence of up to 3 experts;
- (b) one report from each expert referred to in paragraph (a).

- Note: applies to **damages** experts only – liability experts not captured

Changes to Litigation Procedure: Experts

Additional experts and reports by consent

(4) If all the parties to a vehicle action consent,

(a) the parties may tender expert opinion evidence of one or more additional joint experts, appointed in accordance with Rule 11-3, in excess of the limit set out in subrule (3)(a), or

(b) a party may tender as evidence one or more additional reports from an expert referred to in subrule (3)(a), in excess of the limit set out in subrule (3)(b).

Changes to Litigation Procedure: Experts

Additional experts and reports by application

(5) On application by a party to a vehicle action, the court may do any of the following if the court is satisfied that it would further the object of these Supreme Court Civil Rules:

(a) provide for expert opinion evidence of one or more additional experts, in excess of the limit set out in subrule (3)(a), by

(i) ordering the parties to appoint a joint expert in accordance with Rule 11-3, or

(ii) appointing an expert under Rule 11-5;

(b) allow the party to tender as evidence one or more additional reports from an expert referred to in subrule (3)(a), in excess of the limit set out in subrule (3)(b).

Changes to Litigation Procedure: Experts

Limitation on disbursements for expert evidence

(8) In a vehicle action, only the following amounts may be allowed or awarded to a party as disbursements for opinion evidence on the issue of damages arising from personal injury or death:

(a) the amount incurred by the party for up to 3 expert reports, whether or not the reports were tendered at trial, provided that each report was

(i) served in accordance with these Supreme Court Civil Rules, and

(ii) prepared by a different expert;

(b) the amount incurred by the party for

(i) a report allowed under subrule (4) or (5),

...

(iii) a report prepared by an expert appointed by the court under Rule 11-5(1);

(c) the amount incurred by the party for an expert to give testimony at trial in relation to a report, referred to in paragraph (a) or (b), that was prepared by an expert.

Changes to Litigation Procedure: Experts

Transition – application of rule

(10) Subject to subrule (11), this rule applies to all vehicle actions, whether or not a notice of claim for the vehicle action was filed before the coming into force of this rule.

Updated as of March 22, 2019:

Transition – exceptions for existing vehicle actions

(11) The following exceptions apply in relation to a vehicle action for which a notice of claim was filed before February 11, 2019:

(a) the limits set out in subrule (3) do not apply

(i) to any report of an expert that was served in accordance with these Supreme Court Civil Rules before February 11, 2019, or

(ii) To the vehicle action if the trial date set out in the notice of trial filed in relation to the vehicle action is on or before December 31, 2019;

(b) the limits set out in subrule (8) do not apply

(i) to amounts that were necessarily or properly incurred for expert opinion evidence before February 11, 2019, or

(ii) to the vehicle action in the circumstances referred to in paragraph (a)(ii).

Changes to Litigation Procedure: Experts

- In fast track actions, only one expert allowed
- Rule 15-1 is amended by adding the following subrule:

Application of Rule 11-8

(12.1) In a fast track action,

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

(b) Rule 11-8 (8) (a) is to be read as follows:

(a) the amount incurred by the party for one expert report, whether or not the report was tendered at trial, provided that the report was served in accordance with these Supreme Court Civil Rules

Changes to Litigation Procedure: Experts

- Changes will eventually apply to all actions for damages for personal injury or death, not just motor vehicle claims

Transition – exceptions for existing actions, other than vehicle actions

(12) The following exceptions apply in relation to an action, other than a vehicle action, for which a notice of claim was filed before February 1, 2020:

(a) the limits set out in subrule (3) do not apply to any report of an expert that was served in accordance with these Supreme Court Civil Rules before February 1, 2020;

(b) the limits set out in subrule (8) do not apply to amounts that were necessarily or properly incurred for expert opinion evidence before February 1, 2020

Changes to Litigation Procedure: The CRT

- British Columbia's Civil Resolution Tribunal (CRT) is the first online tribunal in Canada and one of the first examples in the world of "online dispute resolution" being incorporated into the public justice system.
- Established under the Civil Resolution Tribunal Act in 2012
- Initially had jurisdiction over small claims and strata property (condominium) disputes.
- On April 23, 2018, the government of British Columbia introduced legislation to expand the CRT's jurisdiction to include certain motor vehicle accident disputes as well as disputes under the Societies Act and the Cooperative Association Act.

Changes to Litigation Procedure: The CRT

- The CRT to gain exclusive jurisdiction over:
 - Classification of an injury as a minor injury; and
 - Entitlement to receive accident benefits claimed.
- The CRT to gain jurisdiction / “specialized expertise” over:
 - Decisions regarding liability and quantum for all motor vehicle injury claims up to \$50,000.

Source: *The Civil Resolution Tribunal Act*, s. 133, as amended by Bill 22

Changes to Litigation Procedure: The CRT

- 28 day limitation period if claim brought in wrong forum (s. 12 of the *Tribunal Amendment Act* (which will create s. 13.3 and s. 13.4 of the *Tribunal Act*))
- Limit on recoverable fees and expenses if award in Supreme Court is less than \$50,000 (Section 32 of the *Tribunal Amendment Act* (which will add s 135(4) to the *Tribunal Act*))

Changes to Litigation Procedure: The CRT

How do we get our claims out of the CRT and back before the Supreme Court of BC?

- New test is “substantial likelihood”
- It is “presumed” that a claim will fall within the \$50,000 monetary limit unless a party can prove that there is a substantial likelihood that the damages will exceed the tribunal limit. (s.135(1) of the *CRT Act*)
- If a party can prove with sufficient evidence that there is a substantial likelihood that the damages will exceed the tribunal limit, the party may request that the claim be heard in the Supreme Court (s. 135(2)(b) of the *CRT Act*)

Takeaway: the burden is on the plaintiff to prove, with evidence, that there is a substantial likelihood a claim will exceed the \$50,000 limit.

Changes to Litigation Procedure: The CRT

How do we get our claims out of the CRT and back before the Supreme Court of BC?

- An accident claim may also proceed before the SCBC if all parties consent (s. 16.4(2)(b) of the *CRT Act*)
- The CRT may refuse to resolve a claim if it decides the issues in the claim or dispute are too complex for the dispute resolution process of the tribunal or otherwise impractical for the tribunal to resolve (s. 11(1)(c) of the *CRT Act*)

Changes to Litigation Procedure: The CRT

- Government may be a party to claim falling within CRT jurisdiction (s. 9 of the Tribunal Amendment Act (which will repeal and replace s. 9 of the Tribunal Act))
 - The government is otherwise excluded from appearing before the CRT. This will allow for road maintenance claims, for example
- Parties permitted to be represented by a lawyer in relation to motor vehicle accident claims (s. 16 of the *Tribunal Amendment Act* (which will add s. 20.1 to the *Tribunal Act*))
 - Other claims within the jurisdiction of the CRT do not allow parties to retain counsel
 - This provision was created in recognition of the fact that ICBC will be represented by experienced adjusters, and in light of the significant increase in the CRT's monetary jurisdiction.

Changes to Litigation Procedure: The CRT

- Tour of CRT website
<https://civilresolutionbc.ca/>
- CRT Timeline

The Changing Landscape

Questions?

