

# W—T—Injury

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**Recent Legislative Changes to the Law of  
Subrogation in Bodily Injury Actions in  
British Columbia:  
Progressive Legislative Change or Robbing  
Peter to Pay Paul?**

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## 1. Introduction

In February of 2018, The Attorney General of British Columbia announced significant changes to the handling of injury claims arising out of motor vehicle accidents. One such change was introduced in the form of Bill 20 – the *Insurance (Vehicle) Amendment Act*, which received royal assent on May 17, 2018 and, among other repercussions, amended section 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the “Act”).

Section 83 of the *Act* applies in relation to **bodily injury or death caused by a vehicle or the use or operation of a vehicle on or after May 17, 2018**. The legislative provision sets out categories of insurance benefits that are deductible from a tort claim and **effectively eliminates subrogation rights of various benefit providers**.

Although the new legislation regarding subrogation claims has been in effect for almost a year, many of the potentially significant practical legal implications that the operation of this new legislation may have on bodily injury claimants (either injured or killed through the use of a motor vehicle in our province), is still widely unknown.

Although these legislative changes in relation to bodily injury subrogation claims may not have received the same attention or headlines as perhaps other recent and significant legislative changes / Orders in Council, such legislative changes are anticipated to also serve to further impact an injured party's ability to recover previously compensable damages in motor vehicle bodily injury claims the province of British Columbia.

## 1. The New Legislation

The new section 83 expressly provides as follows:

### Liability reduced

83(1) In this section and in section 84, "benefits" means amounts paid or payable, or things or services provided or to be provided in kind, directly or indirectly and whether or not as a result of a right of indemnity,

(a) as benefits within the meaning of section 1.1,

(b) as follows, for a loss or expense similar to a loss or expense covered by benefits within the meaning of section 1.1:

(i) under insurance, wherever issued and in effect;

(ii) under the [Workers Compensation Act](#) or a similar law of a jurisdiction other than British Columbia;

(iii) under the [Employment Insurance Act](#) (Canada);

(iv) by the government of a province or territory of Canada, Canada or another jurisdiction;

(v) under terms or conditions of employment or an agreement for collective bargaining, and

(c) in prescribed circumstances, for a loss or expense similar to a loss or expense covered by benefits within the meaning of section 1.1,

but does not include

(d) a payment made under third party liability insurance coverage,

(e) health care services as defined in section 1 of the [Health Care Costs Recovery Act](#), or

(f) in prescribed circumstances, an amount paid or payable, or a thing or service provided or to be provided in kind, directly or indirectly and whether or not as a result of a right of indemnity, under paragraph (b).

(1.1) Despite paragraph (b) (ii) of the definition of "benefits" in subsection (1), compensation that is paid or provided, or that is payable or to be provided, under the [Workers Compensation Act](#) is excluded from the definition of "benefits" if either of the following applies:

(a) the person to whom the compensation is paid or provided, or payable or to be provided, elects not to claim compensation under section 10 (2) of that Act and the person is not entitled to compensation under section 10 (5) of that Act;

(b) the Workers' Compensation Board pursues its right of subrogation under section 10 (6) of that Act.

(2) 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.

(3) Nothing in this section precludes a person who is liable to pay or provide benefits from demanding from the person referred to in subsection (2), as a condition precedent to receiving the benefits, a release to the extent of the value of the benefits.

(4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid or provided, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.

(5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only.

(5.1) In estimating, under subsection (5), an amount of benefits that has not been ascertained, the court may not consider the likelihood that the benefits will be paid or provided.

(6) If, for the purposes of this section or section 84, it is necessary to estimate the value of benefits that may or must be paid or provided, the value must be estimated according to the value on the date of the estimate of the deferred benefits, calculated for the period for which the benefits are authorized or required to be paid or provided.

(7) Despite any right of subrogation a person may have under an agreement, the common law or an enactment, but subject to section 10 (6) of the [Workers Compensation Act](#) and section 84 of this Act, a person who pays or provides benefits, or who assumes liability to pay or provide benefits, is not subrogated to a right of recovery of the person referred to in subsection (2).

Section 67.1 of the *Insurance (Vehicle) Regulation* (the "*Regulation*") provides further guidance respecting the applicable deductions as referenced in section 83(1)(c) of the *Act*:

#### **Limit of liability — loans and advance payments**

67.1 For the purposes of section 83 (1) (c) of the Act, the prescribed circumstance is that

(a) a person has a claim for damages respecting a loss or expense similar to a loss or expense covered by benefits within the meaning of section 1.1 of the Act,

(b) the person receives a loan or an advance payment in relation to the loss or expense, and

(c) the person must repay the loan or advance payment, in full or in part, if the person receives or is entitled to receive an award of damages, or enters into a settlement, in relation to the claim.

## **2. Interpretation and Application of the New Section 83**

The new section 83 of the *Act* has **expanded the categories of benefits that are deductible** from a tort claim from those available under automobile insurance alone (which were deductible prior to the amendments and included benefits under Part 7 of the *Regulation*), to benefits provided under extended health, disability and other types of insurance, government benefits, employment or collective bargaining agreements, as well as any loans or advance payments made in relation to the injured party's tort claim.

The benefits that are now to be deducted from a tort claim include benefits available under private insurance policies, such as extended health benefit plans, Employment Insurance and short-term / long-term disability policies. Additionally, by virtue of section 67.1 of the *Regulation*, amounts related to directions to pay and litigation loans are similarly deductible.

It is of note that the deductions are to be made whether the benefits are "**paid or payable**" and things or services "**provided or to be provided**", which necessarily includes any amounts and / or services that are to be sought in the future. However, the new section 83 precludes the Court from considering the likelihood that benefits will be paid or services provided when claimed in the future, while mandating that the Court make mandatory

deductions from any award, estimating the amount of available benefits if it is not readily ascertainable.

One further effect of the amendments is the **elimination of subrogation rights**, other than those of the Workers' Compensation Board ("WCB") and the Insurance Corporation of British Columbia ("ICBC"), for provided benefits. Subsection 83(7) specifically notes this to be the case "despite any right of subrogation a person may have under an agreement, the common law or an enactment."

### 3. Exceptions

Payments made under third party liability insurance, health care costs (i.e.: Medical Services Plan expenses) and (in prescribed circumstances) benefits payable pursuant to the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (the "WCA") are not included in the definition of "benefits" under section 83 of the *Act* and are, therefore, not deductible.

In relation to the *WCA* benefits, the prescribed circumstances giving rise to the exclusion from the said "benefits" are if the injured party:

- elects not to claim compensation under section 10(2) of the *WCA*;
- is not entitled to compensation under section 10(5) of the *WCA*; and
- is pursued by the WCB in relation to the WCB's right of subrogation under section 10(6) of the *WCA*.

### 4. Practical Implications

In practice, the amendments to the *Act* and *Regulation* are expected to potentially drastically reduce claims for wage loss, special damages and costs of future care in tort claims brought by injured parties who have access to first-party benefits. However, the amendments may also give rise to some unintended / unexplored consequences.



***(a) Effect on Recovery***

While upholding the apparent legislative intent of reducing costs expended by ICBC on injury claims, the amendments have effectively shifted the burden of compensating an injured party from the tortfeasor and onto the injured party's own insurer and, in certain circumstances, the injured party himself or herself.

***(b) Effect on Extended Health Benefit and Disability Benefit Policies***

With the elimination of the ability to proceed with subrogated claims against tortfeasors in injury claims, benefit providers may (and likely will), reconsider the terms of their policies concerning benefits payable in relation to losses or expenses arising out of motor vehicle accidents. For instance, extended health benefit providers could cease providing reimbursement for treatment or medication expenses to injured parties where the said expenses are incurred as a result of a motor vehicle accident caused by a third party. Similarly, disability insurers could include terms enabling them to forego paying wage loss benefits where the need for the said benefits arises as a result of a motor vehicle accident caused by a third party.

The effect would be that an injured party who has paid for certain benefits may not be able to access those benefits if he or she is injured as a result of a motor vehicle accident through no fault of his or her own.

***(c) Effect on Access to Necessary Treatment***

With the inclusion of advance payments in the definition of "benefits", the amendments preclude injured parties who are financially incapable of paying for treatment from continuing to attend such treatment under a direction to pay, even when medically recommended and necessary. This could create a further barrier for injured parties, who, as of April 1, 2019, are no longer able to claim treatment user fees, or amounts that treatment providers may charge in excess of the prescribed fee limits for treatments by virtue of section 82.2 of the *Act*, as part of their special damages claim.



Furthermore, depending on a particular ICBC adjuster's handling of requests for benefits under Part 7 of the *Regulation*, some injured parties may not be able to access treatment at all.

***(d) Effect on Access to Justice***

Similarly, the inclusion of loans that are repayable on settlement or entitlement to an award of damages in the definition of "benefits" may preclude injured parties from being able to fully have their claims investigated, assessed and evaluated if they do not have access to wage loss or other collateral benefits.

With financial pressures mounting on an injured party following a motor vehicle accident, whether through medical expenses, wage loss or other accident-related losses or expenses, injured parties were previously able to access litigation loans that would be repayable upon the resolution of their claims. With the amendments, the amount of any litigation loan must be deducted from a tort claim. As a result, injured parties may now be forced into an early unfavourable settlement of their claim, due to ongoing financial pressure, thus further compounding access to justice concerns.

***(e) Potential Unintended Repercussions***

Because the deductions are to be made whether they are "paid or payable", a situation could arise where an injured party who has access to first-party benefits could end up in a worse situation than if he or she did not have extended health, disability or other benefits.

For instance, if benefits were in theory available to an injured party but not actually provided to him or her, the amount of those benefits must nevertheless be deducted from an award of damages, thereby reducing the claim by an amount that the injured party did not receive the benefit of.

A more worrisome scenario would be if benefits were provided to an injured party, deducted from the award of damages and subsequently became the subject matter of a subrogation claim as between the benefit provider and the injured party. The amendments arguably do not affect privity of contract as between the benefit providers and their insureds (i.e.: the injured parties).

In other words, the amendments have no effect on injured parties' contractual obligations to their benefit providers. As such, there is no legislative prohibition in place to preclude a benefit provider from attempting to recover payment from an injured party, despite that party being unable to recover compensation for the same as against the tortfeasor that is responsible for the injury that necessitated the treatment or time off work in the first place.

Although the outcomes of such scenarios will necessarily depend on the specific insuring agreements and policies in place, it is not difficult to imagine how the amendments could lead to potentially absurd results that are highly prejudicial to injured parties. Ultimately, the amendments affect several long-standing legal principles, such as the tort principle that a tortfeasor must put the injured party in the position that he or she would have been in absent the accident, and create a regime whereby an injured party has more accountability than the tortfeasor.

Additionally, the amendments are likely to further burden the Court system with post-trial hearings in relation to "paid or payable" amounts that must be deducted, given that benefits are only to be disclosed to the Court after an award for damages is made. This will undoubtedly create extended delays for injured parties in receiving the "fruits of their judgment" and may result in additional legal costs and expenses, opening up the opportunity for legal wrangling.

## **5. Practice Points**

The Court has yet to comment on the amendments, their interpretation or application. However, as the amendments are likely to cause sweeping changes to the handling of bodily injury claims arising out of motor vehicle accidents, litigants and counsel alike will need to be vigilant insofar as entitlement of injured parties to first party benefits and the deductibility of the same are concerned. Below are several practical suggestions to assist in this respect:

- Ensure that your client ascertains the existence of any available insurance benefits and is fully aware of the effects of utilizing and / or not utilizing them (i.e.: the "paid or payable" issue);

- Thoroughly review and consider the specific wording of any policies and / or subrogation agreements that your client may be the subject of, or a party to;
- Be diligent in preparing clients for Examinations for Discovery in order to ensure that they do not erroneously reference benefits that they do not actually have access to, so as to avoid improper or unjustified deductions to settlement offers or post-trial assessments;
- Determine the potential effects of deductible benefits in relation to formal offers to settle; and
- Ensure that retainer agreements / contingency fee agreements are clear and unambiguous with respect to the scope of retainer in relation to the inclusion or exclusion of fees and costs for any post-trial matters and hearings in relation to deductions of paid or payable benefits.

## 6. Conclusion

The amendments to section 83 of the *Act* and section 67.1 of the *Regulation* affect the overall entitlement to compensation by parties injured in motor vehicle accidents in British Columbia that occur on or after May 17, 2018. These amendments preclude recovery of benefits for losses or expenses in relation to which injured parties may have been diligent enough to obtain insurance, thus impacting on public policy considerations, which have traditionally favoured the purchase of insurance in Canada.

As discussed above, while it remains to be seen how the Court will apply the amended provisions, with respect to motor vehicle subrogation claims, a plain reading of the said provisions suggests that they can lead to potentially inequitable consequences in certain circumstances, which can be particularly unfavourable and potentially detrimental to injured parties in British Columbia.

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