

**W—T**

---

**Capping Non-Pecuniary Damages:  
The Changing Landscape of Motor Vehicle  
Accident Claims in British Columbia**

Presented by: Sanjeeta Johal

Prepared by: Sanjeeta Johal & Bronwen Black

CAPPING NON-PECUNIARY DAMAGES: THE CHANGING LANDSCAPE OF  
MOTOR VEHICLE ACCIDENT CLAIMS IN BRITISH COLUMBIA

By: Sanjeeta Johal and Bronwen Black

TABLE OF CONTENTS

<i>INTRODUCTION</i> .....	2
<i>CHANGES TO THE CURRENT SCHEME IN BRITISH COLUMBIA</i> .....	3
1. <i>Quantum of Non-Pecuniary Damages</i> .....	3
2. <i>Increases to Statutory Accident Benefits</i> .....	6
3. <i>Handling of Motor Vehicle Claims by an Administrative         Regime</i> .....	6
<i>CONCLUSION</i> .....	9

## Introduction

In February 2018, the Attorney General for British Columbia announced significant changes to injury claims arising out of motor vehicle accidents. These changes arose out of a sweeping audit of the Insurance Corporation of British Columbia ("ICBC"), which indicated that the current rate structure would be inadequate for handling outstanding and anticipated new claims.<sup>1</sup>

According to ICBC, the fundamental problem with the existing regime arose from the increased number of claims and the elevated costs of dealing with these claims.<sup>2</sup> For example, the total cost of injury claims in British Columbia reached a record \$2.7 billion in 2016, which was an increase of \$1.2 billion from only seven years earlier.<sup>3</sup> ICBC further reports that the average settlement for minor injury claims has increased from \$8,220 in 2000 to \$30,038 in 2016, whereas the average settlement for serious injuries has only increased from \$38,014 in 2000 to \$48,078 in 2016.<sup>4</sup> Of the average settlement for minor injuries,<sup>5</sup> approximately \$16,500 is allocated to pain and suffering, \$7,500 to wage loss and medical care, and \$6,038 for taxable costs and disbursements.

In response to the results of this audit, the Provincial Government passed Bill 20 and Bill 22, which introduced a cap on "minor" injury claims arising out of motor vehicle accidents, changes to the statutory accident benefits scheme administered pursuant to Part 7 of the *Insurance (Vehicle) Regulation*, BC Reg 156/2000 ("Part 7 of the *Regulation*"), and introduced a new administrative regime to handle motor vehicle claims under \$50,000. These changes are expected to save ICBC more than \$1 billion annually at full implementation.<sup>6</sup>

In this paper, we will discuss the recent legislative changes to Part 7 of the Regulation and to the *Insurance (Vehicle) Act*, RSBC 1996, c 231 (the "*Insurance Act*"), which introduce a cap on minor injury claims and expand the accident benefits available to insureds under Part 7 of the Regulation. We will also discuss the creation of a new administrative regime under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 (the "*Tribunal Act*"), that will govern motor vehicle accident claims for \$50,000 or less.

---

<sup>1</sup> The Canadian Bar Association British Columbia Branch, "CBABC Position Paper on the Proposed ICBC Changes in Bill 20 and Bill 22", (May, 2018) at 1, online: < <https://www.cbabc.org/CMSPages/GetFile.aspx?guid=c8915bf0-132a-4fc5-af77-dbb5782b6c3b> > [CBABC].

<sup>2</sup> CBABC, *supra* note 1 at 1.

<sup>3</sup> ICBC, "Why we need changes to insurance", (2018) online: < <https://www.icbc.com/about-icbc/changing-auto-insurance-BC/Pages/Why-we-need-changes.aspx> > [I.C.B.C. Changes to Insurance].

<sup>4</sup> I.C.B.C. Changes to Insurance, *ibid*.

<sup>5</sup> See ICBC, "Auto Insurance in BC: What's Changing?" (2018) at 3, online: < <https://www.icbc.com/about-icbc/changing-auto-insurance-BC/Documents/Changes-to-auto-insurance-in-BC-factsheet.pdf> > [I.C.B.C. What's Changing] where I.C.B.C. defines "minor injuries" as sprains, strains, general aches and pains; cuts and bruises; mental anxiety and stress from a crash that last for a period less than 12 months.

<sup>6</sup> British Columbia, Legislative Assembly, 41st Parl, 3rd Sess, No 122 (26 April 2018) at 3:40 p.m., online: < <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/3rd-session/20180426pm-Hansard-n127#bill20-2R> > [Hansard, 26 April 2018 Bill 20].

## Changes to the Current Scheme in British Columbia

Bill 20 adds Part 7 to the *Insurance Act* by way of the *Insurance (Vehicle) Amendment Act, 2018* (the "*Insurance Amendment Act*"), while Bill 22 makes several changes to the *Tribunal Act* by way of the *Civil Resolution Tribunal Amendment Act, 2018* (the "*Tribunal Amendment Act*"). Taken together, Bill 20 and Bill 22 introduce three fundamental changes to claims arising out of motor vehicle accidents:

1. Bill 20 imposes a cap on non-pecuniary damages for "minor injuries";
2. Bill 20 increases the quantum of statutory accident benefits administered pursuant to Part 7 of the Regulation; and
3. Bill 22 expands the jurisdiction of the Civil Resolution Tribunal ("CRT") to administer claims for motor vehicle accidents under \$50,000, and to make determinations respecting the severity of the injury which will ultimately inform the availability of non-pecuniary damages awards over \$5,500.

Both of these Bills received royal assent on May 17, 2018. However, the increase to the statutory accident benefits scheme administered pursuant to Part 7 of the Regulation was made retroactive to January 1, 2018, while the cap on non-pecuniary damages for minor injury claims is effective as of April 1, 2019. In contrast, Bill 22 will not come into force until it is regulated to do so by the Lieutenant Governor in Council.<sup>7</sup>

Each of these changes is discussed in further detail below.

### 1. *Quantum of Non-Pecuniary Damages*

As noted above, effective April 1, 2019, the *Insurance Act* will establish a \$5,500 limit for non-pecuniary damages for minor injuries.<sup>8</sup> A "minor injury" is defined in the legislation as:

101(1)...a physical or mental injury, whether or not chronic, that:

(a) subject to subsection (2), does not result in a serious impairment or a permanent serious disfigurement of the claimant, and

(b) is one of the following:

(i) an abrasion, a contusion, a laceration, a sprain or a strain;

(ii) a pain syndrome;

(iii) a psychological or psychiatric condition; and

---

<sup>7</sup> See s 49 of the *Tribunal Amendment Act*.

<sup>8</sup> See proposed new s. 101 of the *Insurance (Vehicle) Act*, at s. 29 of Bill 20.

(iv) a prescribed injury or an injury in a prescribed type or class of injury.<sup>9</sup>

(2) Subject to subsection (3) and the regulations, an injury that, at the time of the accident or when it first manifested, was an injury within the definition of "minor injury" in subsection (1) is deemed to be a minor injury if

(a) the claimant, without reasonable excuse, fails to seek a diagnosis or comply with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury, and

(b) the injury

(i) results in a serious impairment or a permanent serious disfigurement of the claimant, or

(ii) develops into an injury other than an injury within the definition of "minor injury" in subsection (1).

(3) An injury is not deemed, under subsection (2), to be a minor injury if the claimant establishes that either of the circumstances referred to in subsection (2) (b) would have resulted even if the claimant had sought a diagnosis and complied with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury.

(4) For the purposes of this Part, 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.

Any injury that is captured under the definition of "minor injury" outlined above will be restricted to the \$5,500 cap for non-pecuniary damages. Any claims for past wage loss and special damages will be compensable in addition to the \$5,500 cap. All other injuries (i.e. non-minor injuries) will remain subject to the \$100,000 cap set by the Supreme Court of Canada (which, at present, is approximately \$370,000 when adjusted for inflation).

In effect, the *Insurance Amendment Act* creates a multi-step test to assess whether an injury will qualify as "minor" and be compensable beyond the \$5,500 cap. Although the initial diagnosis and determination of severity will be done by a medical professional,<sup>10</sup> once the new regime created by Bill 22 is in place (as detailed below), the CRT will have exclusive jurisdiction over disputes arising over the classification of the injury.

In applying the multi-step test, the CRT will first look to the definitions of "permanent serious disfigurement" and "serious impairment" to see if the injury is excluded from the

---

<sup>9</sup> See *Insurance (Vehicle) Amendment Act* at s 29.

<sup>10</sup> Hansard, 26 April 2018 Bill 20, *supra* note 6.

definition of minor injury under s. 101(1). Under the *Insurance Act*, "permanent serious disfigurement" is defined as a permanent disfigurement that, having regard to any prescribed criteria, significantly detracts from the claimant's physical appearance. "Serious impairment" is defined as 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. With respect to the foregoing 12 month period, ICBC has stated that the duration of the injury will be assessed on the basis of symptoms having a significant effect on activities of daily living, such as work or school.<sup>11</sup>

If the injury does not qualify as a permanent serious disfigurement or a serious impairment, the next step involves consideration of whether the injury falls into one of the following categories expressly set out under the definition of minor injury in s. 101:

- (i) an abrasion, a contusion, a laceration, a sprain or a strain;
- (ii) a pain syndrome;
- (iii) a psychological or psychiatric condition; and
- (iv) a prescribed injury or an injury in a prescribed type or class of injury.<sup>12</sup>

With respect to subsection (iv) above, the *Insurance Amendment Act* allows the provincial government to modify the definition of "minor injury" without legislation.<sup>13</sup> In this regard, the Attorney General has issued a preliminary statement as follows:

...we anticipate that the regulations will include temporomandibular joint disorder (TMJ) – pain in your jaw joint and in the muscles that control jaw movement – as well as the more minor whiplash associated disorders (WAD) 1 and 2 in the definition. The most serious of whiplash-associated disorders will not be included in the definition, nor will third degree sprains, strains, broken bones or brain injuries. We are also working in consultation with the medical community to refine and narrow the scope of mental-health conditions, which are listed in the legislative definition of minor injury.<sup>14</sup>

The final step in the test for determining whether an injury qualifies as a "minor injury" requires consideration of the issue of mitigation under s. 101(2) and (3) of the *Insurance Amendment Act*. Under s. 101(2), even if an injury qualifies as a permanent serious disfigurement and/or results in serious impairment, or if an injury falls outside the definition of a minor injury, it may still be deemed as a "minor injury" if the claimant fails,

---

<sup>11</sup> I.C.B.C. What's Changing, *supra* note 5 at 3.

<sup>12</sup> See *Insurance (Vehicle) Amendment Act* at s 29.

<sup>13</sup> CBABC, *supra* note 1 at 5; and for a critical analysis of the changes see: Erik Magraken, "Are there any other major changes in the BC legislation?" online: < <http://bc-injury-law.com/blog/icc>>.

<sup>14</sup> Ministry of the Attorney General, Statement "Further transparency on regulations planned for ICBC reform" (2 May 2018).

without reasonable excuse, to seek a diagnosis or fails to comply with treatment in accordance with the diagnostic and treatment protocol prescribed for that injury. However, under s. 101(3), if the claimant can establish that a serious impairment, permanent serious disfigurement, or an injury outside the definition of a minor injury would have resulted even if he or she had sought a diagnosis and complied with the diagnostic and treatment protocol prescribed for that injury, then the injury will not be deemed to be a minor injury.

## **2. Increases to Statutory Accident Benefits**

Accident benefits are provided by ICBC to their insureds pursuant to Part 7 of the Regulation regardless of liability.<sup>15</sup> Even if an insured is wholly liable for a motor vehicle accident, they are still entitled to medical benefits, wage loss benefits, and death benefits, when applicable. These benefits are separate and distinct from any compensation that may be owed by the at fault party in the context of a claimant's tort claim.

Retroactive to January 1, 2018, the provincial government has increased the lifetime allowance for medical care and recovery costs for those catastrophically injured from \$150,000 to \$300,000.<sup>16</sup> In addition, as empowered by s. 45.1 of the *Insurance Act*, and effective April 1, 2019, the following increases to no fault benefits will take effect:

- Wage loss payments will increase from \$300/week to \$740/week;
- Home support benefits will increase from \$145/week to \$280/week;
- Funeral costs will increase from \$2,500 to \$7,500; and
- Death benefits will be "simplified" and will increase from a current range of \$17,580 - \$20,080, to \$30,000.<sup>17</sup>

Further, as set out in s 45.1(4) to (8) of the *Insurance Act*, these amounts will be reviewed every five years and tabled before the Legislative Assembly in order to ensure they remain "fair".<sup>18</sup>

## **3. Handling of Motor Vehicle Claims by an Administrative Regime**

---

<sup>15</sup> Halsbury's Laws of Canada (online), *Insurance*, "Motor Vehicles" at HMV-198 "What constitutes and goals of no-fault insurance"; and Continuing Legal Education Society of British Columbia, "BC Motor Vehicle Accident Claims Practice Manual", (February, 2018) at § 5 online: <<http://pm.cle.bc.ca/clebc-pm-web/manual/42751/book/view.do?highlight=%22no+fault+benefits%22#/C/1283330>> [CLEBC]; and sees I.C.B.C. What's Changing, *supra* note 5 at 1.

<sup>16</sup> CBABC, *supra* note 1 at 8.

<sup>17</sup> CLEBC, *supra* note 15 at § 5; and see CBABC, *supra* note 1 at 9.

<sup>18</sup> British Columbia, Legislative Assembly, 41<sup>st</sup> Parl, 3<sup>rd</sup> Sess, No 122 (23 April 2018) at 1:50 p.m., online: <<https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/3rd-session/20180423pm-Hansard-n122#bill20-1R>>

The *Tribunal Amendment Act*, which has yet to come into force,<sup>19</sup> will introduce a number of significant changes to the *Tribunal Act* and to the overall handling of motor vehicle accident claims. The most significant change will grant the CRT exclusive jurisdiction over claims arising out of the use and operation of a motor vehicle that fall within the CRT's monetary jurisdiction<sup>20</sup>. While the "tribunal limit amount" has yet to be determined by regulation, a monetary limit of \$50,000 has been formally announced by Press Release and quoted in Bill 22's Hansard debates.<sup>21</sup>

This change will expressly limit the discretion of the court with respect to claims within the jurisdiction of the CRT. Pursuant to s. 15 of the *Tribunal Amendment Act* (which will add s. 16.1 to the *Tribunal Act*):

(1) Subject to subsection (2) and section 16.4 (1) and (2), if a court determines that all matters in a proceeding before it are within the jurisdiction of the tribunal, the court must,

(a) in the case of a claim within the exclusive jurisdiction of the tribunal, dismiss the proceeding,

(b) in the case of a claim in respect of which the tribunal is to be considered to have specialized expertise, dismiss the proceeding unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim, or

(c) in any other case, stay or dismiss the proceeding, as the court considers appropriate, unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim.

(2) Subject to section 16.4 (1) and (2), if a matter in a proceeding before a court is an accident claim within the jurisdiction of the tribunal described in section 133

---

<sup>19</sup> See: Index of B.C. Regulations, "Consolidated Regulations" (June 30, 2018), online: <<http://www.bclaws.ca/civix/document/id/regulationbulletin/regulationbulletin/index%20of%20bc%20regulations%20-%20june%2030,%202018>>.

<sup>20</sup>Section 2 of the *Tribunal Amendment Act* will amend s. 1 of the *Tribunal Act* to include the definition of "accident claim" which will give the CRT jurisdiction over claims under the Division 7 of Part 10. Section 2 of the *Tribunal Amendment Act* also adds to s. 1 a provision that the CRT will have *exclusive* jurisdiction and specialized expertise over all claims provided for within Part 10. Section 4 of the *Tribunal Amendment Act* will add s. 2.1 to the *Tribunal Act* which lists the claim categories that are under the general authority of the CRT. Included under s. 2.1 are claims in respect of accidents, as defined in section 132, under Division 7 of Part 10. Specifically, s 132 states: "'accident", (a) except in respect of the benefits referred to in section 133 (1) (a), has the same meaning as in section 101 [definitions and interpretation] of the Insurance (Vehicle) Act, or (b) in respect of the benefits referred to in section 133 (1) (a) of this Act, has the same meaning as in section 1.1 [definitions] of the Insurance (Vehicle) Act."

<sup>21</sup> See Ministry of Attorney General, News Release, 2018AG0025-000716, "ICBC legislation focuses on affordability and supporting crash victims" (23 April 2018), online: <[https://archive.news.gov.bc.ca/releases/news\\_releases\\_2017-2021/2018AG0025-000716.pdf](https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2018AG0025-000716.pdf)>; and Civil Resolution Tribunal, "Province of BC Expands Civil Resolution Tribunal's Jurisdiction" (2018), online: <<https://civilresolutionbc.ca/province-bc-expands-civil-resolution-tribunals-jurisdiction/>>; and see British Columbia, Legislative Assesmbly, 41<sup>st</sup> Parl, 3<sup>rd</sup> Sess, No 125 (25 April 2018) at 2:35 p.m. (Hon. D. Eby), online: <<https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/3rd-session/20180426pm-Hansard-n127#bill22-C>> [Hansard 25 April 2018].

(1) (c) in relation to a minor injury, the court must stay the proceeding until the tribunal determines that a party has established that there is a substantial likelihood that damages will exceed the tribunal limit amount unless it is not in the interests of justice and fairness for the tribunal to make that determination.

(3) For the purposes of subsection (2), "minor injury" and "tribunal limit amount" have the same meaning as in section 132.

In determining whether it is in the interests of justice and fairness for the tribunal to adjudicate a claim, the court is directed by s. 15 of the *Tribunal Amendment Act* to consider the following factors (which will be set out in s. 16.3 of the *Tribunal Act*):

(a) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being adjudicated by that court to establish a precedent;

(b) whether an issue raised by the claim or dispute relates to a constitutional question or the *Human Rights Code*;

(c) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by that court;

(d) whether all of the parties to the claim or dispute agree that the claim or dispute should not be adjudicated by the tribunal;

(e) whether the claim or dispute should be heard together with a claim or dispute currently before that court; and

(f) whether the use of electronic communication tools in the adjudication process of the tribunal would be unfair to a party in a way that cannot be accommodated by the tribunal.

Another significant change will grant the CRT exclusive jurisdiction over disputes regarding whether a claimant's injury falls under the definition of a "minor injury" pursuant to the *Insurance Act*. The CRT will also have exclusive jurisdiction over accident benefit entitlements falling within its monetary jurisdiction.

Other notable changes to the handling of claims by the CRT include the following:

1. Section 12 of the *Tribunal Amendment Act* (which will create s. 13.3 and s. 13.4 of the *Tribunal Act*) will create a 28 day limitation period to bring a claim in the correct forum if a claimant has erroneously requested a resolution with the CRT or the court.<sup>22</sup>

---

<sup>22</sup> British Columbia, Legislative Assembly, 41st Parl, 3rd Sess, No 127 (26 April 2018) at 2:30 p.m., online: <<https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/3rd-session/20180426pm-Hansard-n127#bill20-2R>> [Hansard, 26 April 2018].

2. Section 32 of the *Tribunal Amendment Act* (which will add s 135(4) to the *Tribunal Act*) states that if a claim is brought in the BC Supreme Court and is resolved for an amount within the monetary jurisdiction of the CRT, the plaintiff will only be entitled to recover fees and expenses that would have been recoverable at the CRT.
3. Sections 18 and 30 of the *Tribunal Amendment Act* (which will repeal and substitute the existing s. 32(1)(e) and amend s. 93 of the *Tribunal Act*) will create regulation-making and rule-making powers to limit experts, including the power to require a single joint expert.<sup>23</sup> The intention of this provision is to move in the direction of a shared-expert model.<sup>24</sup>
4. Section 9 of the *Tribunal Amendment Act* (which will repeal and replace s. 9 of the *Tribunal Act*) will permit the government to be a party to motor vehicle accident claims falling within the jurisdiction of the CRT.<sup>25</sup> The government is otherwise normally excluded from appearing before the CRT. This provision will allow a party to allege, for example, that a road was poorly built, or that there were insufficient safeguards on the road, without having to step outside of the authority of the CRT.<sup>26</sup>
5. Section 16 of the *Tribunal Amendment Act* (which will add s. 20.1 to the *Tribunal Act*) will permit parties to be represented by a lawyer in relation to motor vehicle accident claims (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.

## Conclusion

Canadian provinces have adopted a variety of accident insurance schemes, but British Columbia has been the last jurisdiction in Canada to rely on the full tort system for accident benefits. With the passing of Bill 20 and Bill 22, however, the provincial government is changing the landscape of motor vehicle accident claims in British Columbia.

The intention of the provincial government is to save costs and to preserve judicial resources by diverting smaller claims into an administrative forum. However, many questions remain. For example, how does the 28-day limitation period set out in s. 12 of the *Tribunal Amendment Act* (for bringing a claim into the correct forum if a claimant

---

<sup>23</sup> See also s 30 of the *Tribunal Amendment Act*.

<sup>24</sup> Hansard 25 April 2018, *supra* note 21; and see British Columbia, Legislative Assembly, 41<sup>st</sup> Parl, 3<sup>rd</sup> Sess, No 129 (7 May 2018) at 4:05 p.m.

<sup>25</sup> Amendments to the *Crown Proceeding Act*, RSBC 1996, c 89 are set out under s 39 of the *Tribunal Amendment Act*.

<sup>26</sup> Hansard 26 April 2018, *supra* note 22.

has erroneously requested a resolution with the CRT or the court) interact with the 2-year limitation period normally governing motor vehicle accident claim? It also remains unclear whether motor vehicle accident claims falling within the jurisdiction of the CRT will be heard by electronic communication or at an in-person hearing. In the words of Attorney General David Eby when discussing the matter during the Committee stage reading of Bill 22:

It's always open to the civil resolution tribunal to have an in-person hearing, but for the vast majority of disputes, the medical evidence is going to speak for itself. The records provided by the claimant and the respondent — I'm not sure what terms, actually, the CRT uses, but by the two parties to the matter — will be largely paper-based. If it's necessary, maybe to evaluate credibility or something like that, they can meet in person.<sup>27</sup>

Any system that can adjudicate disputes in a cost-effective, less complex, and more efficient manner is to be lauded. It remains to be seen whether the changes introduced by the provincial government in relation to motor vehicle accident claims can attain these goals.

---

<sup>27</sup> Hansard 25 April 2018, *supra* note 21.