Insurance Law – LAW 440

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# A. Overview of Automobile Compensation System

## 1. Introduction

* *Insurance (Vehicle) Act* established compulsory system of insurance coverage through ICBC w/ the option of add’l coverage
  + **The Plan:** *IVA*, Part 1 mandates third-party limits of $200K, no-fault benefits and $1M in UMP
  + **Optional Insurance Contracts (OIC):** *IVA*, Part 4 and *IVR*, Part 13 – allows residents to purchase add’l no-fault benefits, UMP coverage, and own vehicle damage coverage
  + Both are addressed in *IVA*,Parts 5 and 6
* Third-party coverage is mandatory across Canada
* In practice, be aware of the *Local Government’s Act*, as circumstances may make it the fault of a design of the municipality
  + Has a 60 day notice requirement, and must be in writing

## 2. Overview of Automobile Compensation System

* New regulatory structure was introduced in 2007
  + Meant to give ICBC and private insurers a level playing field for “optional coverage”
  + However, important to be aware of the former legislation as many decisions have not be reinterpreted and infant claims may still arise
* Automobile insurance often appears with claims against other forms of insurance (re: story about Sikh wedding procession)
* **BC is a “tort jurisdiction with add-on no fault benefits”**
  + There is NO restriction on the right of a victim to sue a tortfeasor 🡪 can sue others, vehicle owner or vehicle driver
  + Not a “no fault system”, not a purely private system, and no monetary restrictions on personal injury claims
* **Means:** That no fault benefits paid or payable by ICBC are deducted from the tort damages assessed
* Unlike regular insurance, the *IVA* and *IVR* are NOT SUBJECT to the *contra proferentum* rule (*Squire v ICBC*)

## 3. Noteworthy Definitions and Regulatory Provisions

Definitions – *IVA*, s 1:

* **“certificate”** means a certificate of universal compulsory vehicle insurance issued under Part 1 or the regs;
* **"corporation"** means the Insurance Corporation of British Columbia (ICBC) continued by the *Insurance Corporation Act;*
* **"coverage"** means the right conferred on a person by this Act, the plan or an optional insurance contract to be indemnified against liability for, or compensated for, death, bodily injury, loss or damages;
* **"insurance"** means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event;
* **"optional insurance contract"** means a K of vehicle insurance other than vehicle insurance provided under the plan, and includes (a) a binding oral agreement, and (b) a K that provides insurance for a vehicle for which, or for the use or operation of which, a permit or licence is not required under the *Motor Vehicle Act*, if the contract provides that this Act applies;
* **“owner’s certificate”** means a certificate issued to an owner under the plan;
* **"plan"** means the plan of universal compulsory vehicle insurance referred to in **A2** and operated by the corporation under Part 1 and the regulations under that Part;
* **"policy"** means the instrument evidencing an OIC and includes an interim receipt, a renewal receipt or a binder, or writing evidencing the K, whether sealed or not;
* **"vehicle"** means motor vehicle or trailer;
* “**Insured**” is defined in *IVR*,Part 4 – Driver’s Certificate; Part 6 – Third Party Liability, Part 7 - No Fault Benefits, Part 10 – First Party Coverage
* **“highway”**:includes (a) every highway within the meaning of the *Transportation Act*, (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and (c) every private place or passage way to which the public, for the purpose of parking or servicing (def’n from *Motor Vehicle Act*)
  + Does not include and industrial road or forest service road (*Pierre v Miller*, 2010 BCSC)
  + Restriction of $10 license fee for reserve road disqualifies from being highway (*Galligos v Louis*)
  + Fact that abandoned railway bed was used by public without restriction means it is a highway (*ICBC v Routley*)
  + Evidence of use showed path was used by snowmobilers in the winter, but a walking trail in the summer – disallowed (*Bruneau*)

*Insurance (Vehicle) Act* (*IVA*)

* **A1.1 “driver’s certificate”** means a certificate issued…to a person who, under the *IMVA*, may obtain a driver’s license, and the certificate may be part of the driver’s license or a separate document
* **A2 ICBC to Provide Universal Compulsory Vehicle Insurance:** ICBC must operate the plan of universal compulsory vehicle insurance in accordance with this Act and the regulations 🡪 as directed under *IVR* Parts 6, 7 and 10
* **A7 Plan:** Subject to … compliance with this Act and the regs, ICBC must administer a plan of universal compulsory vehicle insurance providing coverage under a motor vehicle liability policy required by the *MVA*, of at least the amount prescribed, to all persons
  1. whether named in a certificate or not, to whom, or in respect of whom, or to whose dependants, benefits are payable if bodily injury is sustained or death results,
  2. whether named in a certificate or not, to whom or on whose behalf insurance money is payable, if bodily injury to, or the death of another or others, or damage to property, for which he or she is legally liable, results, or
  3. to whom insurance money is payable, if loss or damage to a vehicle results

from one of the perils mentioned in the regulations caused by a vehicle or its use or operation, or any other risk arising out of its use or operation

* **A17** **Limitation:** An action by an Insured against ICBC in respect of benefits, insurance money or indemnification…must be commenced within one year after the happening of the loss or damage or after the cause of action arose or as the regulations may provide
* **A22 Corporation to be notified of an action:** Requires litigants to serve ICBC with the Notice of Civil Claim for any “action for damages caused by a vehicle in British Columbia”
  + Must also file proof of service
  + Further steps in the action must not be taken until 8 days after the filing
* **A27** **Accident Report:** Person receiving an accident report under *MVA*, s. 67 must provide it to ICBC upon request
* **A28** **Medical Report:** Requires that any medical practitioner treating a person injured in an MVA to provide ICBC with a report of the injuries, their diagnosis, treatment and prognosis upon request
  + Includes a doctor, nurse, chiropractor, dentist, physical therapist, hospital employee
* **A29 Employer Report:** Requires that the employer of any person by or for whom benefits are claimed provide ICBC with a statement of their earnings upon request
* **A37(4) Certificate Deemed Void:** An OIC is deemed to have lapsed and is void immediately when the vehicle is registered and license in another province or state
* **A42.1(2) Offence to Provide False or Misleading Information:** Person commits an offence who (a) provides ICBC info material to a claim that the person *knew or ought to have known is false or misleading* or; (b) makes a statement or representation to ICBC…that the person *knew or ought to have known is false or misleading* in order to obtain payment for goods or services provided to a person making a claim, whether or not the goods or services were actually provided to that person
* **A75 Forfeiture:** Claims can be forfeited if the applicant if (a) in an applicant for coverage, they falsely describe the vehicle or knowingly misrepresentation a fact required to be stated, or (b) violates a term or condition of the Plan or OIC, or (c) makes a wilfully false statement wrt the claim
* **A95 “accident”:** unintentional mishap occurring in BC as a result of which a person suffers bodily injury, death, or loss of or damage to property that arises out of the use or operation of a vehicle
* **A95 “Designated Defendant”:** Means, in relation to an accident, the following persons:

1. each owner of a vehicle involved in the accident;
2. each operator of or passenger in or on a vehicle involved in the accident and each person vicariously liable for that individual;
3. any other individual who is involved in the accident and each person vicariously liable for that individual
   * and, in relation to claims made under A20 or an action under A24, includes ICBC

* **A95 "Vehicle action"** means an action brought in BC in which damages are claimed for bodily injury, death or loss of or damage to property that arises out of the *use or operation of a vehicle*
* **A98 Recovery for Loss of Income:** A person who suffers a loss of income (defined in **A95**) as a result of an accident is *entitled to recover from designated defendants*, as damages for the income loss suffered after the accident and before the first day of trial, **not** more than the net income loss that the person suffered in that period as a result of the accident
  + **“net income loss”** means that the income loss claim is net of taxes
* **A99 Structured Judgments**
  + For all other torts, damages are payable as a lump sum to the plaintiff
  + However, this provision allows the courts to award pecuniary losses on a structured, periodic basis

## 4. Limitation Periods

* *Limitation Act,* Section 6(1) – Creates a limitation period of 2 years “after the day on which the claim is discovered”
* For motor vehicle accidents, this begins on the day the accident occurs

## 5. Bad Faith

* ICBC has duty to take affirmative steps to attempt settlement within policy limits, and must give equal consideration to the interests of its Insured (*Shea v MPI*)
* ICBC has no duty to pay for the costs of independent legal advice where the only element of potential conflict is the possibility of an excess judgment (*McGee v ICBC*)
* ICBC must have reasonable grounds to assert breach of policy; contravention of duty of fair dealing and good faith may result in indemnity and award of punitive damages (*McDonald v ICBC*)

# B. Owner’s Certificate – Regulations, Part 2, ss. 3-10

## 1. Key Provisions

* **A1 "Owner's certificate" (OC)** means a certificate issued to an owner under the plan
  + ***MVA*, s 3(1)(c)*:*** The owner of a motor vehicle or trailer must, before it is used or operated on a highway…obtain for it an *owner's certificate* under the*IVA*
* **A33(1) Application for Insurance**: Before applying for any class or kind of licence under the MVA…applicant must apply for the corresponding **owner’s certificate** or **driver’s certificate**…
* **R10 Effect of owner's certificate:** An owner's certificate validated by the corporation evidences that an insured… has coverage under Part 6; Part 7, ss. 147-148 and Part 10, Division 2

## 2. Principal Operator

* **R1(1) Principal Operator:** Means the person who will operate the vehicle described in an application for a certificate for the *majority of the time the vehicle is operated* during the term of the certificate
* **R19(2)** An application for a certificate for (a) a vehicle… must provide… the name and driver’s licence number of the applicant and of the principal operator of the vehicle
* **A75** Misrepresentation of principle operator is a common reason for forfeiture of coverage
* Relevant time to determine whether the Plaintiff’s misrepresentation caused the Defendant to issue the policy is the time of the application or renewal (*Rai v ICBC*, 2005 BCSC)
* If there is a change of principal operator there is no obligation to inform ICBC before next renewal (*Grey* *v ICBC*, 1993)
* Burden of proof remains on ICBC throughout – i.e. to avoid coverage, ICBC must prove insured misrepresented principal operator (*Deol v ICBC,* 2007 BCSC)
  + Signed statement to ICBC re: the principal operator is not determinative (*Nerbas v ICBC*)
* There is no obligation on the Insured to notify ICBC of a change in principal operator prior to the renewal date
  + No diff between naming the wrong principal operator or leaving the application blank (*Lexus Holdings In’tl v ICBC*)

*Rai v ICBC*, 2005 BCSC

* P was registered owner of a Pontiac Sunfire; found damaged and burned in pub parking lot in Surrey
* ICBC denied coverage 🡪 argued Mother did not disclose the true identity of the principal operator at the time she applied for coverage; her son was the principal operator and she was the one holding the insurance (to lower her premiums)
* Grey 🡪 argued that she had purchased the Sunfire with the expectation that she expected to transfer ownership of him after he reinstated his license
* RATIO: “The relevant time to considered where the plaintiffs decision…is the date the plaintiff applied to an agent of the defendant for insurance coverage on that vehicle”

*Deol v ICBC*, 2007 BCSC

* Deol listed as principal operator; grandson got in accident in vehicle day after renewal
* ICBC denied coverage 🡪 argued grandson was principal operator
  + After purchase, 2003 Honda Civic was modified to include rims sand low profile
* ICBC must establish that someone other than the insured had the care, custody and control of the vehicle for the majority of the time during the period of coverage (per definition in regulator)
* TJ: Correctly referred to the principle established in *Grey* – must consider the date the claimant applied for coverage
* CA: Evidence of ownership, intended ownership or intended use at some intended time in the future is not determinative; that determination can only be established by ICBC after a period of time had lapsed in the term
* HELD: ICBC did not meet the burden of proof; coverage applies

## 3. Mid-Term Changes

* ICBC must be advised of certain changes during the coverage term; some in advance and others w/n a short period of time
  + Failure to report results in loss of 3rd party liability; means ICBC will seek entirety of payment from Insured in breach
* **R9(2)(a)** A change of address or acquisition of a subsequent vehicle must be reported within 10 days
* **R9(2)(b)** ICBC must be given advance notice of a change in vehicle use or territory use (related to principal use)
* **R9(2)(c)** Where premium of vehicle is based primarily on territory, notice of change of territory must be given w/n 30 days
* **R9(1)** “**territory**” – where kept when not being driven
  + **JD:** Insured must not use a vehicle outside the (a) declared use and (b) territory
  + Results in loss of coverage or 3rd party liability under **A75(b)** as a violation of a term or condition of or fraud in relation to the plan or the OIC
  + ICBC has a discretionary policy which must be exercised in good faith to relieve from forfeiture regarding incorrect territory, but not principal territory, providing they pay 10x the difference in the premium

## 4. What is included in the Owner’s Certificate coverage under The Plan?

* **R63-69 Third-Party Liability:** Coverage for injury/death/property damage caused while operating the vehicle (min $200K)
* **R Part 7 Accident Benefits:** No fault benefits (i.e. medical costs and wage loss)
* **R148.1 UMP:** Coverage for injury/death/property damage caused to you by an underinsured motorist (min $1M)
* **R148 Hit-and-Run/Uninsured Motorists:** Coverage for injury/death/property damage caused by an uninsured driver or a hit-and-run in BC (min $200K)
* **R147 Inverse Liability:** Provides coverage for costs of repairs to your vehicle when, due to legal restrictions, you cannot recover these costs from motorists in other parts of the Canada and the US

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| A. Third Party Liability Coverage | | B. First Party Coverage |
| Regulation, s 63 | Insures:   * Person named in as owner in OC * Another person driving with owner’s consent * Member of owner’s household * Where owner deceased, their personal representative * Where owner not an individual, an officer employee or partner of the owner and their household members * Passenger (for operation only)   Against (**R64**):   * Legal liability for injury/death/proper damage arising out of use or operation of described vehicle in Canada, US or vessel b/w | * Inverse liability: **R147** * Uninsured, H/R in Yukon, NWT, Nunavut, USA: **R148** * Part 7 (Accident Benefits) * UMP (as of January 9, 1992): **R148.1** |
| Regulation, s 65 | Also insures:   * Person named in owner’s certificate * Member of owner’s household * An employee or partner of owner and their spouses   While *driving any other vehicle* except:   * Operating as a garage business * Vehicle owned, regularly operated by an insured * Carrying passengers for hire * Not licensed under *MVA* (ATV’s) * Exempt vehicle * Where no consent, and no reasonable belief consent given |
| Regulation, s 66 | Also insures:   * **Passenger** (for operation only)   While in:   * Vehicle described in owner’s certificate |
| Regulation 67, 69 | To the extent of $200,000 (exclusive of interest, costs) |

# C. Driver’s Certificate Coverage – Regulations Part 4, ss. 42-51

## 1. What is included in Driver’s Certificate coverage under The Plan?

* DC is the insurance coverage attached to your driver’s license; functions a form of “fall back” source of 3rd party liability coverage when the Owner’s Certificate coverage cannot be relied upon
  + JD: Also a device for generating income for ICBC from poor drivers; based on penalty points
* **R50(1) Other Insurance:** Owner’s certificate or vehicle liability policy is primary insurance
* **R50(2)** This coverage is only available to the extent that the successful claim exceeds the limits of the primary insurance
  + Most likely applies where you’re driving an uninsured vehicle or an out-of-province vehicle with less than $200K
* **R49 Third Party Liability:** Provides coverage for injury/death/property damage that arises out of the use or operation by the insured of a vehicle that is not within the household or rented by the insured (minimum $200K)
* **R49.3** **Other Coverage:** Driver’s certificate is also evidence of:
  + **R Part 7 Accident Benefits:** No fault benefits (i.e. medical costs and wage loss)
  + **R148.1 UMP:** Coverage for injury/death/property damage caused to you by an underinsured motorist (min $1M)
  + **R148 Hit-and-Run/Uninsured Motorists:** Coverage for injury/death/property damage caused by an uninsured driver or a hit-and-run in BC (min $200K)

## 2. Key Provisions

* **A1.1 "driver's certificate" (DC)** means a certificate issued under this Part or the regulations under this Part to a person who, under the *MVA*, may obtain a driver's licence, and the certificate may be part of the driver's licence or a separate document
* **R42 “insured**” means (a) a resident named on a DC *other than* a person driving a vehicle that is exempted under A43 or A44, or (b) *for the purpose of payment of insurance money*, *if the person referred to in para (a) is deceased*, the personal rep of that person
* **R42 "resident"** means a person who is ordinarily resident in the Province, and includes (a) a student who is temporarily outside the Province for the purpose of studying… or (b) a member of the Canadian Armed Forces or the RCMP who is regularly stationed in the Province but is temporarily posted outside the Province
* **R43(1)(a) Certificate Incorporated in Licence**: For the purpose of the *IVA* and *IVR* **(a)** a DC is deemed to be incorporated into every valid and subsisting BC driver's licence **(i)** when the driver's licence is issued, and **(ii)** … at the beginning of the day following each subsequent anniversary date of the driver's birth

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| A. Third Party Liability Coverage | | B. First Party Coverage: **R49.3(1)** | |
| Insures (Who) | BC “resident” with driver’s license: **R42, R43**  *Godara v ICBC* – indicia work in BC, day-to-day life in BC, length of occupation, mail address, telephone number | Insures (Who) | BC resident (**R42**) with driver’s license and member of household |
| While Driving (What) | Vehicle NOT owned or leased by insured or household member: **R49(1)** | For (What) | * Part 7 accident benefits (no-fault) * H/R in Yukon, NWT, Nunavut and USA (i.e. s 148) * Division 2 of Part 10 UMP |
| Against | Legal liability for personal injury/property damage arising out of “use or operation” for MVA in Canada, US, or vessel between **R49** |
| To What Limit | $200K as set by s. (1.1) of Schedule 3: **R49.1(1)**   * Inclusive of costs and expenses: **R49.1(3)** |
| Except Where  **R49(1)** | 1. Operate without owner’s consent unless reasonable grounds to believe consent given 2. Operated for a garage business 3. Carry passengers for hire 4. Car is owned or regularly operated by the insured 5. Vehicle is not licensed by *MVA* and there are no reasonable grounds to believe it is licensed 6. Insured is operating a licensed ATV |

Priority of Claims

* **R49.2 Priority of Claims:** Sets out a priority to be used by the court to apportion the $200K, since it is unlikely that this amount will be enough to cover a full claim
  + Priority goes to claims for injury or death (90%) over property damage (10%)

# D. Third Party Liability – Regulations, Part 6, ss. 63-77

Introduction

* Main source of coverage for most claims
* Applies in three different situations:
  + **R63** Available to an insured respecting the operation of the described vehicle (involved in the accident)
  + **R65** Available to an insured while operating other vehicles (*Brown v Jones*)
  + **R66** Available to a passenger who operates a part of the described vehicle (i.e. swings the door open as the cyclist is going by, grabs the wheel when the driver is having a medical issue, etc.)

## 1. Key Provisions

* **R64 Indemnity:** Is the triggering section. There are four factors that must be present in order to afford coverage:

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| * + Arise out of the use or operation of the vehicle   + By the insured | * + Vehicle must be described in the owner’s certificate   + Must occur in Canada or the US or on a vessel travelling b/w |

* **R73(1) Duties of Insured**: An insured shall:
  1. promptly give CO written notice of (i) any accident involving death, injury damage or loss in which he or a vehicle owned or operated by him has been involved; (ii) any claim made in respect of the accident; (iii) any other insurance held by him providing coverage for the accident;
  2. on receipt of a claim, legal document or correspondence relating to a claim, immediately send ICBC a copy of the claim, document or correspondence;
  3. cooperate with ICBC in the investigation, settlement or defence of a claim or action;
  4. except at his own cost/risk, assume no liability and settle no claim;
  5. allow ICBC to inspect an insured vehicle or its equipment or both at any reasonable time
* **R73(2) Duties of Insured:** ICBC is **not liable** to an insured who, to the prejudice of the ICBC, fails to comply with these duties
* **R74 Duties of Corporation:** Upon receipt of a notice of claim that triggers the duty to defend, ICBC at its own expense shall:
  + Assist the insured by investigating and negotiating a settlement, if ICBC’s deems its assistance is necessary, and
  + Defend in the name of the insured any action for damages brought against the insured
* **R74.1 Rights of ICBC:** Once ICBC assumes the defence, they have exclusive conduct and control of it. Includes the right to:
  1. Appoint and instruct counsel to defend the action,
  2. Admit liability, in whole or in part, on behalf of the insured,
     + Issue: Does this mean ICBC can admit liability on your behalf and then up your premiums? Yes, though not always the case if you have a good driving record or if it’s a nominal claim
  3. Participate in any non-judicial process which has as its goal the resolution of a claim, and
  4. Compromise or settle the action

*Limitation Act* Provisions

* **R76** No person shall commence an action under Part 6 except w/n the limitation period fixed by the *Limitation Act*
* **LA6(1) Limitation Period:** Court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered
  + **8** Claim is discovered by a person on the first day on which the person **knew** or **reasonably ought to have known** an injury, loss or damage had occurred; for MVAs, this is the day of the accident
  + **18** Extended for minors; 2 year period starts the day they turn 19
  + **19** Altered for persons with disabilities; clock starts running when they cease to be under a disability or when it discovered on the basis of s. 8

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| Third Party Liability Coverage | |
| Insures: **R63** | * 1. a person named as an owner in an owner’s certificate;   2. an individual who, with the **consent** of the owner or as a member of the owner’s household, uses or operates the vehicle described in the owner’s certificate;   3. where owner is deceased, their personal rep or a person with that representative’s consent;   4. where owner is not an individual (i) an officer, employee or partner of the owner for whose regular use the vehicle is provided or (ii) a member of the household of an officer, employee or partner of the owner who, with consent of the owner, uses or operates the vehicle describe * **“Household”**: every person ordinarily residing in the same dwelling unit: **R1** * **Consent**:includes implied consent (*Ont Minister of Transport v Canadian General Insurance*) |
| Against What: **R64** | * Liability imposed on the insured by law for **injury or death** of another or **loss or damage** to property of another that:  1. arises out of the use or operation by the insured of a vehicle described in an OC, and 2. occurs in Canada or the US or a vessel travelling between them |
| Extension of Indemnity: **R65** Extends coverage for the insured to vehicles other than those described in the OC | |
| Also Insures: **R65(1)** | (a) owner in an owner’s certificate;  (b) member of the owner’s household;  (c) employee or partner of the owner for whose regular use the vehicle is provided, and  (d) the spouse of an employee or partner where the spouse resides with the employee or partner |
| Against What: **R65(2)** | “where insured is operating a motor vehicle not described in an owner’s certificate issued to the insured” |
| Except Where | (a) Operated in connection with a garage business  (b) Vehicle is owned or regularly operated by an insured (another person has an OC for the car)  (c) Vehicle is used to carry passengers for hire  (d) Vehicle is not licensed and there are no reasonable grounds to believe it is licensed  (e) Vehicle exempt under **A43** or **A44** –i.e. government vehicle, extra-provincial undertaking  (f) Insured operating vehicle w/o consent and does not have reasonable grounds to believe consent has been given |
| Method: **R65(3)**  [see below] | Where more than one OC evidences 3rd party liability insurance coverage of an insured under this section, the insured shall be compensated **only** under the certificate that **provides the higher or highest limit** of 3rd party liability insurance coverage, and, if the limits are equal, ICBC may determine the OC that applies |
| Extension of Indemnity to Passengers: **R66** [see below] | |
| To What Limit: **R67** | $200K: **R, Schedule 3**, **s 1(2)(c)**   * **Priority**: 90% claims arising from injury or death, 10% to loss or damage to property: **R68(1)** * **Additional Payments**: (a) emergency medical aid; (b) emergency equipment; (c) costs taxed against insured the amount offered in a settlement bears to aggregate of all damages; (d) pre- and post-J interest within the limits of Schedule 3, s 1; (e) indemnity of expenses, costs and reimbursements in relation to an optional insurance K |

## 2. Method: Extending of Indemnity to Secondary Coverage – No Stacking of Policies

* **R77 Other Insurance:** The insurance of the vehicle involved in the accident is primary and recourse to other insurance is only made if damages exceed this limit
  + **Means:** You cannot stack insurance – cannot trigger multiple policies on top of one another
  + Why is stacking not allowed? Meant to avoid households from cheating the system (i.e. everyone getting only $1M so it stacks up to $4M)
* **R65(3)** Where more than one OC could potentially cover the accident, the insured shall be compensated only under the certificate the provides the higher or highest limit of 3rd party liability insurance coverage
  + **Means:** You cannot engage the additional insurance in the Owner’s Certificate of other people in the Owner’s household, the driver, or other people in the driver’s household, unless the limit is greater than the primary insurance
* *Jones v* *Brown*: Where Jones was driving Brown’s vehicle and got in an accident
  + Brown Household:
    - Brown: $1M
    - Wife: $200K
  + Jone’s Household:
    - Jones: $1M
    - Wife: $2M
    - Daughter: $200K
  + **Primary Policy** = Brown’s as insurance of the vehicle that was in the accident ($1M)
  + **Secondary Policy** = Jone’s Wife ($2M)
    - Since she carries the greatest amount, and falls within the def’n of insured under **R65(1)**, Jone’s could access her insurance ONLY IF the liability exceeds Brown’s $1M policy
* REMEMBER: Only comes into play where a person is driving the another person’s vehicle with the owner’s consent

## 3. Extension of Indemnity to a Passenger

* **R66** Indemnity under this Part is extended to a passenger *in a vehicle described in an owner’s certificate* who, by *operating any part of the vehicle* while the *vehicle is being operated by an insured*, causes
  + Injury to death to a person who is not an occupant of the vehicle, or
  + Loss or damage to property that is not carried in or on the vehicle or in the care, custody or control of the Insured
* Common Scenarios: Front set passenger grabs steering wheel (interference or assistance) and passenger hits cyclist w/ door
* **Rationale:** Available to provide compensation to innocent victims (i.e. cyclists) and passengers trying to help

## 4. Vicarious Liability & Implied Consent

* **Vicarious Liability:** A way of establishing liability against the *owner of the vehicle*
  + Imposed for public policy reasons to ensure insurance money is available for victims of accidents
  + Owner of a leased vehicle is not exempt from vicarious liability regardless of the type of lease i.e. whether there was a residual right to purchase or not (*Yeung v Au*)
* BUT the owner is only vicarious liability if the person driving or operating the vehicle:

1. is living with **and** a member of the family of the owner/lessee; OR
2. acquired possession of the vehicle w/ the **consent**, *express or implied*, of the owner/lessee: ***MVA*, s 86(1), (1.1)**

* MEANS that vicarious liability can be imposed in II ways:
  1. Where the driver **is living** **with** and is a **member of the family** of the owner
     + “Living with and as a member of the family” requires evidence of a “family dynamic” - e.g. bond and affinity [blood relationship not conclusive], shared groceries, autonomy, etc. (*Rolleman v Blackmon*)
     + Provision must be construed in favour of the insured
  2. Where the driver acquired possession with the **express or implied consent** of the owner
     + Implied Consent: Occurs when possession is given to A, who lets B drive, who then gets into an accident. The owner need not know B. Requires demonstration of consideration of extending A’s authority to entitle A to allow B drive (*Minister of Transportation (Ontario)*)
     + Consent must be approached in a common-sense manner (*Snow v Saul*)
* Possible to acquire possession of a vehicle with consent and drive it without consent (e.g. asks to borrow another’s car to drive to Vancouver but proceeds to drive to Kamloops)

**Test for Implied Consent**: Consent is implied where it is clear that it would have been granted as a matter of course had it been sought from the owner (*Palsky v Humphrey*)

* Must have been a **willingness** and **expectation** in the owner’s mind at the time the vehicle was lent to the original borrower
  + The mere possibility that consent may have been granted is not sufficient…[must] consider all of the circumstances which existed at the time the driver acquired possession of the vehicle…
* Req’t that an owner have an actual expectation of a 3rd party driving the vehicle is relaxed where it is clear that consent would have been given, if sought, **as a matter of course** in the particular circumstances – this considers:
  + Prior or express rejection
  + Prior use without objection
  + Whether the original borrower was in the car
  + Whether the actual driver was known to owner
  + The age of the actual driver
  + Whether or not there was a valid reason for the actual driver to be driving (i.e. original borrower intoxicated)
* While this has objective components, it must be considered from the position of the owner
  + Requires evidence establishing that at the time the vehicle was loaned to the original borrower, that it was lent w/ the expectation that it would be driven by a third person OR that it would have been granted as a matter of course

*Godsman v Peck*, 1997 BCCA

**Facts:** Alexander owned a motorcycle. Alexander gave Godsman (co-worker) permission to test drive it. Godsman decided he was going to purchase it, but had not yet communicated this. Later on, Peck (friend of Godsman’s) drove the bike and got in an accident.

**Issue:** Is Alexander liable for the accident?

**Held:** Not liable, Alexander would not have loaned.

*Rolleman v Blackmon*, 2002 BCSC

**Facts:** Owner and driver shared a basement suite (were cousins). However, they paid rents separately and cooked separately. Owner allowed his cousin to use the car in the past, but had forbid him from doing so when he found he had no license.

**Issue:** Are the cousins “family members”?

**Held:** Not members of the same household, no vicarious liability.

*Snow v Saul*, 2010 BCCA

**Facts:** Saul (deaf) took out his hearing aids to avoid damaging them while working on car. His neighbour asked if his daughter-in-law could borrow a vehicle (Friesen – heroin addict). Saul thought he was lending to the neighbour. Friesen struck a pedestrian.

**Issue:** Is Saul vicariously liable?

**Analysis:** “Section 86 does not on its face “deem” one to have the owner’s consent when he or she does not have it in fact; nor does it impose a “legal” definition of consent that is at variance with the ordinary and natural meaning of the word”

**Held:** No consent found, not vicariously liable.

*Green v Pelley*, 2011 BCSC

* Family member driving b/c of medical emergency; likely to find consent

## 5. Operation of Vehicle (pp. 39-52)

* *Fraser Valley Taxi Cabs*discusses the history and purpose of the chain of causation tests wrt “operation of a motor vehicle”
  1. **Purpose Test:** whether the injuries arose from an ordinary and well-known activity to which an automobile is put (*Stevenson*)
  2. **Chain of Causation Test**: whether there was a continuous chain of causation between the **operation or use** of the vehicle and **P’s injuries**. If that chain is broken by an intervening act which is the factor giving rise to liability, the injury is not one which arises from the use or operation of the motor vehicle (*Moore’s Taxi* – *allowing disabled child out at dangerous intersection negligent action which severed causation*)
* **Test for Use or Operation** (*Amos v ICBC*):
  1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
  2. Is there some nexus or casual relationship between **A’s injuries** and the **ownership, use or operation** of his vehicle, or is the connection between the **injuries** and the **ownership, use or operation** of the vehicle *merely incidental or fortuitous*?
* Defendant must be a **motorist** w/n conception of the Act, or the action will sever the chain of causation test (*Vythingham*)
* No rule that policy is denied if tortfeasor engages in criminal activity (*Vythingham*)
* Chain of causation remains if vehicle is deliberately used to cause injuries (*Hannah v Doe*)
* Examples of use in pp. 72-75: police shootings, dismantling vehicle, repairs, criminal acts, dogs, other
  + However, **A90** introduced to ensure ICBC is not liable for acts of violence (result of *Amos v ICBC*)
* Purpose test not met by using the vehicle in an assault to block the flight path of a fleeing victim as it is not a well-known use to which cars are put (*Collier v ICBC*)

*Citadel General Assurance Co v Vythingam*, 2007 SCC

**Facts**: Vythingams were driving when a large boulder dropped from an overpass by F&R struck their vehicle. F&R were prosecuted and convicted. Were attempting to get access to the to F&R’s automobile insurance – had used their vehicle to transport the boulder’s to the overpass.

**Held**: No coverage as the actions were severed by failing to meet the chain of causation test. Mere use.

*Luberman’s Mutual Casualty Company v Herbison*, 2007 SCC

**Facts:** Wolfe believed he saw a deer while driving. He stopped, got out of his truck, removed his rifle, and shot it 🡪 it was Herbison.

**Issues**: Is this a claim in respect of a tort committed by Wolfe using his motor vehicle as a motor vehicle? Is there an unbroken chain of causation linking Herbison’s injuries to the use and operation of the vehicle that is shown to be more than simply fortuitous?

**Held:** No coverage, as no causation link found.

*Union v Rock Insurance*, 1960 SCC

**Facts:** Taxi was carrying a developmentally impaired child, pulled up across from the school, the child ran out, and was hit by the car.

**Issue:** Was the taxi driver using and operating his vehicle at the time?

**Held:** He had negligently allowed the child to cross the road. Breaking the chain of causation.

*Amos v ICBC*, 1995 SCC

**Facts:** Man from BC got turned around in L.A. He stopped, asked for directions, and was shot as he was driving away.

**Issue:** Can he claim no fault benefits?

**Held:** Coverage applies; the shooting was the direct result of the assailants' failed attempt to gain entry to the appellant's van and arose out of the appellant's ownership, use and operation of his vehicle

**Summary**: In order to prove a claim arising from the use and operation of the vehicle, claimants must satisfy the **purpose test** (*Stevenson*) and the **chain of causation test** (*Moore’s Taxi*). *Amos* can be reconciled by explaining that there it did not matter the use of another motorist’s vehicle – addresses no-fault benefit coverage.

# E. Breaches (Conditions of Certificate) – Regulations, Part 5, ss. 52-62

Breaches (pp. 51-76)

* **R55(1)** “**insured**”: an insured as defined by 42, 63, 65, 78, or 148.1(1)
  + Means it applies to all forms of insurance coverage (DC, OC, UMP, etc.)
* **R55(1.1) Breach of Conditions:** ICBC is not liable to an Insured who breaches a condition of this section or is deemed…to have breached a condition of **R49** Indemnity or **R Part 6** Third Party Liability Coverage
* Subsections set out nine different breaches and exceptions
  + Examples of breaches contained in pp. 81-83
* ALL relate to The Plan; however, OICs also have the same breaches but are found in Condition 3, Prescribed Conditions of Schedule 10

1. **R55(2)** Operation Contrary to Declared Use

* Insured must not operate a vehicle for which coverage is provided under **R49** contrary to the statements contained in the application for insurance for the vehicle, including:
  1. declared use
     + Vehicle Use Declaration: Pleasure, To and From Work or School, To and From Work or School >15 km, To and From Work or School where part of the trip is public transit, Use where everyone in the household has 10+ years driving experience, Use by seniors, Business Use
     + Allowed other uses for no more than 6 days in a calendar month
  2. statement relating to the time during which and the territories in which the vehicle may be operated
  3. a statement relating to the kinds of goods or number of passengers that may be carried in or on the vehicle
* **RESULT:** Loss of coverage under **R49**
* **“Operate”** means “use”: *Hudson v ICBC* ***–*** *insured’s car was vandalized when unattended in parking lot. But insured had car-pooled to work with others more than the permitted use for a pleasure-rated vehicle. Claim dismissed because vehicle was being used to go part way to and from work.*
* Exception: Where ICBC cannot demonstrate prejudice
  + Where car is incorrectly rated for use, but the accident occurs when the car is being used for its declared use, there is no breach (*McKay v ICBC*)
  + No breach if the premium paid is equal to or more than the premium that should have been paid (no prejudice)

2. **R55(3)(a)** Not Authorized and Qualified to Drive

* Insured shall not operate a vehicle for which coverage is provided under R49 or R49.3(1)(a) and (c), or Part 6 or 7, or Division 2 of Part 10 (a) if the insured is not authorized and qualified by law to operate the vehicle
  + Authorized = licensed
  + Qualified = competent
  + Have to have possession of a valid driver’s license and must be operating the vehicle in compliance with any restrictions on that license
* Suspension of driver’s license requires proof of suspension notice served (*ICBC v Jones*)
* See examples on p. 61 (driving a motorcycle w/o license, driving w/ invalid or expired DL, etc.)

3. **R55(3)(b)** Use for Illicit Trade or Transport

* Insured shall not operate a vehicle for which coverage is provided under R49 or R49.3(1)(a) and (c), or Part 6 or 7, or Division 2 of Part 10…(b) for an illicit or prohibited trade or transportation,
  + Breach occurs where the object or purpose of the use of the vehicle is to transport drugs; no breach where the object was to transport the driver and passengers merely b/c the driver possessed marijuana (*Blackstock v ICBC*)
  + “prohibited transport” does not include transport of the driver/occupant who is a suspected thief (*ICBC v City of Vancouver*)

4. **R55(3)(c)** To Avoid Police Arrest (or some other similar police action)

5. **R55(3)(d)** Race or Speed test

* **R2(1)(f)** Coverage does not apply to a vehicle being used in a contest, show or race, in advanced or performance driving training…”
* Race requires two vehicles, driving at high speeds to see how fast the car will go
* “Race” requires more than one vehicle; a “speed test” requires the vehicle be tested in some way or that the vehicle was racing against the clock. Merely driving at very high speed is not a “speed test” (*Blackstock v ICBC*; *Grewal v Simoncioni*)
* Following another car at high speed and passing it is not a race or speed test (*McGill v ICBC*)
* Driving car at high speed “to see what it could do” is a speed test (*Murray v ICBC*)

|  |
| --- |
| Exception: **R55(3.1)**   * **R55(3.1)** An insured does not breach a condition of **R55(3)** merely b/c the insured operates a vehicle in contravention of a restriction or condition imposed on his/her license   + Includes restrictions placed on a driver’s license under the GDL program (see p. 56) * N.B. *Jassal v Hera* was decided before GDL program was in place; if decided now, coverage would still apply |

6. **R55(5)** Owner Permitting Breach by Driver

* An insured named in a certificate or special coverage certificate must not permit the vehicle described in the certificate or special coverage certificate to be operated by a person or for a purpose that breaches a condition of this section or Part 6
* **Permitting Impaired Driver:** Must be evidence that driver is impaired (or unlicensed) for section to apply (*Laurie v ICBC*)
* **TEST:** If the insured knew or ought to have known, under all of the circumstances that the person s/he permitted to operate their vehicle would operate it in a manner that was not permitted by their insurance policy s/he would be liable to reimburse their insurer (*Co-Operative Fire and Casualty Co v Ritchie et al*, 1983 SCC; drunk wife drove hubby’s car)
  + No breach by owner/passenger notwithstanding conviction of driver for impaired driving and breathalyser reading of 0.19 (but no expert evidence regarding meaning of reading) (*Troha v Thurn*)
  + No breach by owner/passenger where deceased/driver had BAC of 0.21, and expert evidence that 90% of persons with such a reading would show visible signs of impairment (*Ondrick v Coleman*)
  + Breathalyser reading, expert evidence, eye witnesses to + speed, erratic driving = breach (*Stobbe v ICBC*)
* **Permitting Unlicensed**: Insured permits use of vehicle by an unauthorized and unqualified driver *if permission is express or unqualified*, or if s/he *fails to take those precautions* which are **reasonable** and **prudent** to avoid a contravention of the statutory condition (*Peters v SG10*)
  + Failure to follow industry practice of inspecting employee’s driver’s license is unreasonable, even where employee comes recommended from another reputable trucking firm (*Circle M Freight Lines v ICBC*)
  + Owner in breach where he makes no inquiry whether 18 year old had a driver’s license (*Nimmo v MPI*)

7. **R55(7.1)** Intentional Act of Violence

* Insured deemed to have breached a condition of R49 and Part 6 where the injury, death, loss or damage in respect of which his claim is made is caused by or results from an intentional act of violence committed by the insured, *while sane*, by means of a vehicle
* **A90 Limitation on Recovery for Acts of Violence:** ICBC not liable under the Act where “the dominant cause of any bodily injury to or death of a person is the use of any weapon or any object, other than a vehicle, used as a weapon”
  + **Why?** Meant to address “running down” cases; ICBC can recover funds from the driver in breach
* Purpose test not met by using the vehicle in an assault to block the flight path of a fleeing victim as it is not a well-known use to which cars are put (*Collier v ICBC*)

8. **R55(8)** Intoxicating liquor or drug or other intoxicating substance

* Breach if you’re operating if you’re so intoxicated that you are “incapable of proper control of the vehicle”
* **R55(8)** Insured deemed to have breached a condition… where

1. operating a vehicle while intoxicated to such an extent that s/he is **incapable of proper control** of the vehicle,
2. the insured is convicted of
3. a motor vehicle related *Criminal Code* offence,
   * + - N.B. Breaches for motor vehicle related *Criminal Code* offenses listed on p 94
4. an offence under section 95 or 102 of the [*Motor Vehicle Act*](http://www.bclaws.ca/civix/document/id/complete/statreg/96318_00), or
5. an offence under the law of…Canada/ US that is similar to a provision mentioned above…

* **R 55(9)** “**convicted**” includes being (a) convicted under the *Young Offenders Act*; (b) similar US legislation
* **R 55(9)** “**motor vehicle related *Criminal Code* Offence**”: an offence committed while operating or having care or control of a vehicle or that was committed by means of a vehicle
* **TEST:** Could the accident have been avoided if the Insured was sober?
  + If not, then there is no breach (*Smissen v ICBC****;*** *despite BAC 0.15, evidence of no erratic driving from independent witness following driver enough to prove there is no breach*)
* Onus of Proof
  + ICBC must establish on BOP that deceased was incapable of exercising proper control, not just that there was some impairments. Expert evidence may be sufficient but not always (*Kulbaba v ICBC*).
  + ICBC must prove that plaintiff’s state was beyond impairment to the point that s/he was incapable of driving properly. **Must prove** there is **incapacity** to exercise proper control **and** that alcohol **caused** it **(***McDonald v ICBC*).
    - Requisite level of incapacity can be and often is established by circumstantial evidence (*Patterson v ICBC*)
    - That the driver consumed alcohol before the accident in combination with evidence of careless driving may be, but will not necessarily be, sufficient to discharge the burden of proof (*Patterson v ICBC*)
    - Where driver exhibits symptoms of intoxication, and circumstantial evidence leads to conclusion of impairment, the fact that there may be alternate explanations for some of the driver’s symptoms will not displace the inference of incapacity (*Dhiman*)
* *Kulbaba* (CB, p. 71): Driver was out drinking and driving and got in an accident
  + **Issue:** Whether or not he was impaired to the point of being incapable of control
  + [9] Onus on the D to prove that the deceased was, at the time of the accident, under the influence of intoxicating liquor to such an extent as to be incapable of the property control of his vehicle; on a BoP
  + [11] Evidence of the analyst was that anyone with a BAC of 0.10, regardless of their tolerance to alcohol, is incapable of the property control of a vehicle and that the degree of incapacity increases as the BAC rises

9. **R55(4)** Driving a vehicle with an unlicensed trailer attached

# F. No Fault Benefits – Regulations, Part 7

## 1. Introduction

* Available to a person injured or killed in Canada or US in accidents that arise out of the use or operation of a motor vehicle
* Are subject to the restrictions found in **A90** and **A55(3)** , but are otherwise available regardless of who caused the accident
* Three main categories:
  1. Medical and rehabilitation benefits (both mandatory and permissive)
  2. Disability benefits for employed persons and homemakers
  3. Death benefits
* Cases listed on CB, pp. 79-81 and *Holbauer*
* No definition of benefits

|  |  |
| --- | --- |
| Part 7 Accident Benefits (No Fault) | |
| Who is an “Insured”: **R78** | * Person named in owner’s certificate * Member of named owner’s household * Person named in driver’s certificate * Member of named driver’s household * Occupant of BC licensed, insured car * Cyclist/pedestrian hit by BC insured car * BC resident with claim under A20 (uninsured vehicle), A24 (hit and run) |
| Type of Benefits | |
| Disability Benefits for Employed Person: **R80** | * **R78** “Employed person” - person (a) who on the date of an accident is employed/actively engaged, or (b) who (ii) for any 6 months of the 12 months preceding the date of an accident, *is employed/actively engaged in an occupation for wages or profit* * **R80(1)** Total disability from engaging in employment or occupation for which the insured is reasonably suited by education, training or experience: (for “total disability” see *Halbauer v ICBC*) * Must totally disable insured within 20 days of accident * Lesser of 75% of gross average earnings or $300/week **R80(1)(a), (b)(iii); R Sch 3, s 2(a)** * Payable for maximum of 104 weeks * Must account for other disability payments, WCB, EI, etc. **R81, 82, 83** * **R86(1)** After 104 weeks, payments continue to age 65 or end of disability, whichever is shorter * CPP payments brought into account **R86(2)** * No monetary limit to the amount of payment that may be made under this section |
| Disability Benefit for Homemakers: **R84** | * **R78** “Homemaker” – member of a household who, without payment, does the majority of housekeeping for the household * **R84(1)** Injury that substantially and continuously disables insured from regularly performing most of the insured’s household tasks * Must injure or disable within 20 days of accident * Reimbursement of *reasonable expenses* incurred to *hire replacement services* to a maximum of $145/week: **R84(1), R Sch 3, s 2(b)**   + No reimbursement of family members **R84(2)**; where the Insured’s mother not “family” for purposes of Regulation (*Watson*) * Payable for maximum of 104 weeks **R84(1)** * **R86(1)** After 104 weeks, payments continue to age 65 or end of disability, whichever is shorter * CPP payments brought into account **R86(2)** * No monetary limit to the amount of payment that may be made under this section |
| Medical & Rehabilitation Benefits: **R88** | * **R88(1) Mandatory**: All reasonable medical, surgical, hospital, nursing, therapy etc. * To a maximum of $150K/insured person: **R Sch 3, s 3(2)** * Courts view strictly; must fall within one of the enumerated services * **R88(2) Discretionary**: For all services that are likely to promote rehabilitation of an insured in the opinion of ICBC’s medical adviser   + Requires written pre-approval   + **R88(4)** ICBC not liable for expenses payable by any other insurance policy; if you have a private plan, must claim through that first   + **R88(7)** Will not pay anymore than the medical college fee; must recover balance of fees as part of tort claim   + **R89** All disagreements over discretionary expenses subject to arbitration |
| Funeral Expense: **R91** | * Reimbursement for burial and funeral expenses to a maximum of $2.5K: **R Sch 3, s 4** |
| Death Benefits | * **R92(1)** describes family members; includes children, spouse and head of household * Benefits based on age and status of deceased: **R92(2)** * $500-$5000: **R Sch 3, s 5** * Supplemental Death Benefit: **R93(1)** * $1000/survivor, other than the first **R Sch 3, s 6** * Additional Death Benefit: **R93(2)(a)(b)** * $145/week for 104 Weeks for first survivor * $35/week for 104 weeks for each additional survivor * For up to 2 years * Rationale: Spouses receive death benefits; others receive lesser sums |
| **Exclusions**   * Breaches: **R55(3)** * Restrictions: **R96** | * Non-BC resident not occupant of BC insured car * Occupant of or is struck by a vehicle that could not be licensed under MVA * Occupant of unlicensed vehicle, unless occupant reasonably believed it was licensed * In course of suicide (or attempt) * Occupant of vehicle used for illicit/prohibited trade/transportation * Where injury/death is caused, *directly or indirectly*, by sickness or disease – unless directly caused by motor vehicle accident |

Disability Passed Two Years **R86**

* Benefits are reviewable annually and terminable on advice from the corporations medical advisor
  + No monetary maximum under this section
  + ICBC has no jurisdiction to initiate a “review” more than once every 12 months (*Carter v ICBC*)
  + ICBC may not avoid responsibility to pay by not arranging for its medical adviser to examine P (*Charles v ICBC*)
* **R86(5)** After expiration of 104 week period established in 86(1), where insured returns to work but, because of injuries, is incapable of earning the amount of present disability benefits, the CO will pay the difference between his disability benefits and the amount the insured is presently earning through employment
* *Halbauer v ICBC*, 2002 BCCA
  + [17] Discussion throughout regarding the pleadings; didn’t set out what the issues were
  + [20] Definition of disability – inability to perform all substantial material acts
  + [39] Addresses wording of **R80** – argument rejected that permanent disability from ones own occupation on the day of the accident created an entitlement to benefits to age 65; may have obligation to find some other employment that you are suitably entitled to
  + [45] Wrong for ICBC to conclude that the plaintiff was not totally disabled from employment when he obtained a full time job; should have determined if he was capable of doing the job
    - Eventually went back to doing a job where he was accommodated to some extent; but evidence given at trial that he wouldn’t have lasted long after going backed
  + [48, 52, 55] Onus not on the plaintiff to establish no job exists for which he is suited; onus on ICBC to show the existence of an occupation for which the insured is reasonably suited
  + [64] Although the claimant was disentitled from benefits, he again became entitled to benefits once the employment ended; the right to disability benefits was revived and there was no req’t of continuous disability

### a. Who is Insured?

* **R78 "Insured"** means

(a) a person named as an owner in an owner's certificate…

(c) a member of the household of a person named in an owner's certificate,

(c.1) an insured as defined in R42 who is not in default of premium payable under A45,

(c.2) a member of the household of an insured described in paragraph (c.1),

(d) an occupant of a vehicle that

(i) is licensed in the Province and is not exempted under A43 or A44, or

(ii) is not required to be licensed in the Province, but is operated by a person named in a driver's certificate,

(e) a cyclist or pedestrian who collides with a vehicle described in an owner's certificate, or

(f) a resident of the Province who is entitled to bring an action for injury or death under A20 or A24,

and includes the personal representative of a deceased insured

* **R79(1)** ICBC shall pay benefits to an insured in respect of **death or injury** caused by an accident that arises out of the use or operation of a vehicle that occurs in Canada or the US or on a vessel travelling between
  + **R79(2)** Where an accident occurs in the US or a vessel travelling between Canada and the US, no benefits are payable to (a) a cyclist or (b) a pedestrian unless he is named in an owner’s certificate or driver’s certificate or is a member of the household of a person named in a certificate
* **R85 Waiting Period**: No disability benefits are payable under R80 or R84 unless insured is disabled for a period of more than 7 days or for the first 7 days after the disability commenced

### b. Disability Benefits

* **R78 “Employed person”** means person (a) who on the date of an accident is employed/actively engaged, or (b) who (ii) for any 6 months of the 12 months preceding the date of an accident, is **employed**/**actively engaged** in an **occupation** for **wages** or **profit**
  + Monthly living allowance paid as part of government sponsored training course does not make recipient “employed” (*Bradley v ICBC*)
  + Person not “employed” when entered into agreement to begin work on a condition [“when roads permit”] (*Martin v ICBC*)
  + Weekly house-cleaning for aunt sufficient to meet definition (*McIvor v ICBC*)
  + Insured not employed when on WCB benefits at date of accident (*Lancaster v ICBC*)
* **R81(2) Deduction of Other Benefits:** ICBC not responsible for disability payments unless the weekly gross total of other disability compensation (as defined in R81(1)) is less than 75% of the weekly gross lost earnings of the insured, in which case the corporation shall pay to the insured the lesser of (a) the amount of disability benefits payable under R80, or (b) the weekly net lost earnings of the insured
* **R81.1(1) Employment During Total Disability:** If an insured becomes capable of engaging in employment but, because of injuries suffered, is incapable of earning an amount that exceeds 125% of the disability benefits under R80 and R81, the insured may keep earnings from that employment, without deductions, in an amount that does not exceed 25% of those disability benefits. Any amounts earned in excess of 25% of disability payments will be deducted from the disability benefits payable.
* **R82, R83** NFBs will be reduced by the amount of benefits payable under *WCA* or *EIA*, regardless of whether the Insured chooses to pursue the claims under those statutes
* **R87** Any benefits payable under R80, R84, or R86 may be reviewed every 12 months and terminated by ICBC on the advice of the CO’s medical adviser
  + ICBC has no jurisdiction to initiate a “review” more than once every 12 months (*Carter v ICBC*)
  + ICBC may not avoid responsibility to pay by not arranging for its medical adviser to examine P (*Charles v ICBC*)

### c. Medical and Rehabilitation Benefits

* **A88(2)** Permissive benefits are to provide: (a) accessible vehicle; (b) alterations to insured’s residence for accessibility; (c) reimbursement for attendant care; (d) reimbursement for the purchase, repair, or replacement of medical and accessibility supplies; (e) funds for vocational or other training (i) consistent with insured’s pre-injury occupation and post—injury skills and abilities and (ii) may return insured as nearly as practicable to pre-injury status or improve post-injury earning capacity; (f) funds for costs the CO in its sole discretion agrees to pay
  + **R78 "rehabilitation"** means the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self sufficiency that, allowing for the permanent effects of his injuries, is, with medical and vocational assistance, **reasonably achievable** by him
  + **R88(3)** Insured must first obtain written approval from CO before incurring an expense or obligation under (2)
* **R90(1)** ICBC may terminate benefits for refusal to undergo treatment or training; subject to appeal under **R90(3)**
* Permissive nature of entitlement does not give ICBC unfettered discretion – must be exercised fairly according to an objective standard (*Heare v ICBC*)
* ICBC may not avoid responsibility to pay by not arranging for its medical adviser to examine Plaintiff (*Charles v ICBC*)

### d. Death Benefits

* What do you get?
  + Death benefit under R 92
  + Funeral expenses under R79
  + Supplemental survivor benefits under R93
* **R92(1) "dependent child"; “head of household”; “spouse in household”** – both head of household and spouse of household include spouses who were not, at the date of the accident, residing in the household
* **R92(2)** Subject to R94, ICBC shall pay a **death benefit** as set out in **R Sch 3, s 5** where (a) the death of an insured is caused by an accident for which benefits are provided under this Part, and (b) the deceased insured is survived by (i) a spouse, dependent child or dependent parent, or (ii) a parent, where the deceased insured is a dependent child
* **R Sch 3, s 5:**

|  |  |  |  |
| --- | --- | --- | --- |
| **Column A** | **Column B** | **Column C** | **Column D** |
| **Age of Deceased** | **Head of Household** | **Spouse in Household** | **Dependent Child** |
|  | **$** | **$** | **$** |
| Less than 5 years | — | — | 500 |
| 5 to 9 years | — | — | 1 000 |
| 10 to 18 years | 5 000 | 2 500 | 1 500 |
| 19 and over | 5 000 | 2 500 | 1 000 |

***i. Funeral Expense***

* **R79** Where death of an insured is cased by an MVA…ICBC shall promptly reimburse for burial and funeral expenses to the limit set in **R Sch 3, s 4** ($2500)

***ii. Lump Sum***

* **R102** ICBC may, at any time, make a lump sum payment of benefits or otherwise alter the form of payment to benefit the insured

***iii. Supplemental Survivors Benefits***

* **R93(1) Supplemental, additional and survivor's death benefits:** Where the deceased insured is survived by a spouse and one or more dependents, or by more than one dependent, ICBC shall pay, in addition to the benefit payable under R92, a **supplemental death benefit** in the amount set out in R Sch 3, s 6 ($1K) for each survivor, other than the first
* **R93(2)** Where the deceased insured is survived by a spouse and/or one or more dependents, in addition to the benefits payable under R92, pay, for the period of 104 weeks after the death of the deceased insured,

1. Add’l death benefits in the amount set R Sch 3, s 7 ($145/week) for the first survivor, and
2. survivor's death benefits in the amount set in R Sch 3 s 8 ($35/week) for each survivor, other than the first,

but the total amount payable under this subsection shall be reduced by the amount of any payment under R80 and R84 (disability benefits for employed persons and homemakers)

### e. Entitlement

* **R55(3)** Breaches
  + ICBC not liable to pay benefits if deceased was in breach of conditions in R55(3)
* **R96 Restrictions:** ICBC not liable to pay benefits in respect of the injury or death of:

1. A person who is a non-BC resident and is the occupant of a vehicle not described in an OC
2. A person who, at the time of the accident is:

(i) Occupant of or is struck by a vehicle that could not be licensed under *MVA*

* + - * Benefits not payable to occupant of mini-bike where it could not be licensed (*Isaacson v ICBC*)

(iii) Occupant of unlicensed vehicle, unless occupant reasonably believed it was licensed

1. In course of suicide (attempt)
2. Occupant of vehicle used for illicit/prohibited trade/transportation
3. Where injury/death is caused, *directly or indirectly*, by sickness or disease – unless directly caused by MVA
   * + Part 7 benefits not payable where MVA made symptomatic pre-existing condition (*Mawji v ICBC*)

* To continue receiving Part 7 benefits after an accident, insured must demonstrate they are incapable of working **any** job – i.e. has a **total disability**. Not limited to original employment (*Halbauer v ICBC*)
  + Once a *prima facie* case has been made by insured, onus shifts to ICBC to prove otherwise.

### f. Claiming Procedure

* **R94(1) Rules for payment of death benefits:** any benefits payable under R92 or 93 in respect of a spouse of a deceased insured shall be paid to the spouse
  + **R94(4)** Addresses any benefits payable under R92 or R93 for or on behalf of a dependent child of deceased insured
* **R94(5)** Where a deceased insured is survived by dependents, the total amount of benefits payable under R92 and R93 shall be **divided equally** among and paid to the surviving dependents
* **R95(1) 60 day rule and common disaster**: Benefits payable under R92 and R93 shall be paid to a person who survives the deceased insured by at least 60 days
  + **R95(2)** Where the death of the head of household and of a spouse or dependent is caused by a common disaster, benefits payable under R93 shall be paid only in respect of the death of the head of the household
  + **R95(3)** ICBC may waive survival rule
* **R97(1) Notice of Claim:** Where an accident occurs for which accident benefits are provided, insured shall:

1. promptly give the corporation notice of the accident,
2. not later than 30 days from the accident, mail to the CO by registered mail, or deliver to the nearest claims centre, a **written report** on the accident with **particulars** of the circumstances in which the accident occurred and the consequences of the accident, and
3. within 90 days from the date of the accident furnish ICBC with a proof of claim in a form authorized by ICBC

* **R97(2)** ICBC is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section

### g. Limitation Period

* **R103** Sets out the limitation for claiming Part 7 benefits
* Two years from the latest of one of three events:
  + The day of the accident;
  + The date of the last benefit payment under this Part (*Drew v Levco*); or
  + The date on which ICBC receipts a Notice of Intent to Claim (but must be issued within 2 years of the accident)
* *Limitation Act*, s. 7 does not apply to **R103** limitation (*Roy v ICBC*; *infant claiming for add’l medical benefits more than 2 years after previous payments was statute-barred*)

## 2. Deduction of No Fault Benefits from Tort Claims (pp. 102-103)

* **A83(1) “benefits”** mean those defined in **A1.1** (prescribed benefits) and those provided under vehicle insurance wherever issued and in effect
* **A83(2)** Claim is released to the extent of benefits claimed; must deduct NFBs received or expected to be received from ICBC from the final tort judgment
  + Deduction applies to both mandatory coverage and liability coverage under an OIC
  + Why? Meant to avoid double recovery and to determine the amount to be paid on a judgment
* **A83(4)** Prohibits parties from disclosing the amount of benefits paid (or expected to be paid) or the court or jury until the court has assessed the amount of damages
  + However, in practice, this evidence makes it in (i.e. Why did you stop seeing a chiropractor? ICBC stopped paying)
* **A83(5) Accounting of Benefits:** Following the assessment of damages, but before entry of the judgment, the NFBs should be disclosed. If not yet ascertained, court must estimate the value of the future NFBs and the judgment against the tortfeasor is entered for the balance only.
  + **A83(6) Formula**: Estimate for future payments = value on the date of the estimate of a deferred benefit, calculated for the period for which the future payments are authorized or required to be made
* Raises III potential problems:
  + Want to protect against the deduction of past NFBs that have not been paid where there is an entitlement to them
  + Protecting against loss of entitlement to future benefits
  + How do you calculate or estimate the value of future benefits for the purpose of determining the amount of the judgment against the tortfeasor?

Relevant Cases

* NFBs are deducted even if not previously paid (*Baart v Kumar*)or if insured is disentitled to them (*Peterson v Bannon*)
  + **Test:** Is the plaintiff a person who is or would have been entitled to Part 7 benefits? (*Sovani v Jin*)
  + D bears the onus of proving P is entitled to benefits which D seeks to deduct (*Uhrovic v Masjhuri*)
  + Uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of P (*Uhrovic*)
* Disagreements b/w the Insured and ICBC re: NFBs is not relevant to deductibility (*Schmitt*)
* No deduction where D is not insured under a MV liability policy (*Ruckheim v Robinson**– homeowner policy where dog escaped and caused accident*)
* ICBC not required to make undertaking before future benefit deduction allowed. But court, in assessing benefit to be deducted, may consider ICBC’s discretion (*Schmitt v Thomson*, 1995 BCCA)
* Out-of-Province insurer that paid NFBs to its Insured cannot recover those benefits from tortfeasor in Action in BC; barred by **A83(2)** (*Matilda v Macleod,* BCCA)
* Deduction does not apply to a settlement (*Girardol v Greyeyes*)
* Death benefits payable under Quebec no-fault scheme are deductible under A83 (*Gurniak v Norquist*, 2003 SCC)
* Insured settled tort and Part 7 claims and then died as results of injuries. Dependent children not entitled to **death** benefits because all claims released prior to death (*Hansen v ICBC*)

*Sovani v Jin*, 2005 BCSC

* Jury award which was reduced on appeal; was back to BCSC for several determinations wrt damages
* Future Care Award valued at $425K
  + D: Argued this should be reduced by approx. $95K based on **A83** reductions
  + P: Argued that the D was estopped form engaging the deduction since ICBC had and continued to refuse to pay any NFBs since 1998
* Referenced *Baart v Kumar* re: general purpose is “shifting responsibility for future care needs from the tortfeasor to a body that provides insurance regardless of fault”
  + Provision necessarily takes away the right to claim NFBs away from a person other than the Insurer
* **Central Question**: When considering an NFB deduction, is whether the P is a person who is or would have been entitled to the benefits?
  + If the answer is affirmative, the court MUST estimate the value of the future payments that the corporation is authorized or required to make under the regulation
  + Issue over delivery of these benefits is not a relevant consideration

*Gurniak v Norquist*, 2003 SCC

* Death benefits payable under Quebec’s no-fault scheme are deductible under s. 25. No matching is required between the heads of damage and no fault benefits

# G. UMP (Underinsured Motorist Protection) – Part 10, Division 2, ss. 148.1-148.4

Introduction

* Statutory form of 1st party coverage that provides indemnity to an insured in the event that an at-fault motorist has insufficient liability insurance or other assets with which to pay a judgment
* Mandatory coverage under an owner’s certificate: **R10(1)** and driver’s certificate: **R49.3(1)(c)**
  + **Aside:** R148.1(1)(j) Definition of “deductible amount” includes an amount (j) paid or able to be paid by any other person who is legally liable for the insured’s damages. JD: Says provision yet to be engaged; suggest that a third party who is able to pay for the damages may be expected to pay.
* **R148.1(7)** Where more than one certificate provides UMP to any insured, the insured is paid under one certificate only (i.e. no stacking)
* **R148.1(8)** Where an insured has access to UMP under both an OC and a DC, payment shall be made under the OC
* **R148.2(1)** Determination of entitlement to and the amount of UMP compensation is to be determined *by arbitration*
  + For the purposes of calculation the quantum of an UMP claim, damages must be assessed according to the law of BC, even if the accident occurred outside BC. ICBC may apply to be added to the underlying tort action, and the result is binding in any subsequent arbitration.
  + Must be a judgment against a tortfeasor before there can be an “underinsured” motorist (*Dahl v Whitehill*). Until there is such a judgment, ICBC cannot be compelled to arbitrate (*Beauchamp v ICBC*)*.* However, see **R148.2(1.1)**, which now provides that a dispute about whether a person is an insured for UMP purposes may be submitted for arbitration without a judgment in the underlying action.

|  |  |
| --- | --- |
| UMP Coverage | |
| Insured: **R148.1(1)** | 1. Occupant of vehicle described in owner’s certificate 2. Individual named as owner, lessee in owner’s certificate 3. Member of household of (ii) 4. Individual named in driver’s certificate 5. Member of household of (iv) 6. Person entitled to bring action for wrongful death of person described in (i) – (v) |
| Against | * **R148.1(2) “underinsured motorist”** A tortfeasor who is unable to pay full damages for accident occurring in Canada, USA or vessel between arising out of use or operation of a motor vehicle |
| Amount For | [$1 million – “deductible amount” = UMP coverage]  Maximum amount of $1M/insured (**R Sch 3, s 13**) inclusive of interests and costs (**R148.1(5)**) less any “**deductible amount**” as defined in **R148.1(1)**:   1. Payment under A20, A24 2. Payment under R148 3. Part 7 payments (NFBs) 4. Amount recovered from tortfeasor 5. Payment from WCB 6. Payment from any third party liability policy 7. Payment from any other indemnity policy 8. Payment under CPP 9. Payment under *EIA* 10. Payment under any benefit or right or claim to indemnity 11. Payment by any other person legally liable |
| Who is Not Covered | * Persons who does not own a car, does not have driver’s license, does not live in household where anybody does, and are injured as pedestrians – i.e. not occupants of an insured BC motor vehicle |
| Exclusions | * **R55(3)** Breaches:i.e. unauthorized or unqualified, illicit or prohibited trade or transportation, to escape or avoid arrest, in race or speed test * **R148.1(3)(a)** Occupant of unlicensed car, unless occupant had reasonable grounds to believe car licensed * **R148.1(3)(a)** Operator or Passenger who knows/ought to know that car is being operated without owner’s consent – i.e. joyriders * **R148.1(4)(a)** Hit and run not on highway * **R148.1(4)(b)** Hit and run in USA, Yukon etc. where there is no physical contact |

# H. Special Provisions under the *Insurance (Vehicle) Act*

## 1. Hit and Runs – A24 and R148

**A24** Hit and Runs in BC

* **A24** Applies to accidents in BC
  1. If injury/death/property damage b/c of the use or operation of a vehicle on a highway in BC and (a) the names of the owner and driver of the other vehicle is not ascertainable, or (b) the name of the driver is not ascertainable and the owner is not liable (re: vicarious liability), the person can bring an action against ICBC as a nominal D
     + Restricted to accidents on “highways in BC” – see def’n in *MVA*
  2. Must give ICBC notice as soon as reasonably practicable and in any event, within 6 months of the accident
  3. Can add ICBC as a nominal D par way through an action started under subpara (1)
  4. ICBC may deny generally allegations in respect of the unidentified vehicle and its owner and driver, and need not set out facts
  5. Judgment must not be given unless court is satisfied that (a) *all reasonable efforts* have been made to ascertain the identity of the unknown owner and/or driver, and (b) the identity of those or that person is not ascertainable
     + Whether claimant had pursued the investigation to identify the vehicle and its owner and driver as resolutely and resourcefully as they would have done in like circumstances if the claimant themselves intended to pursue an action (*Leggett v ICBC*)
  6. If identity is ascertained, that person can be added later as a D in the action despite *MVA l*imitation period

**(9)-(11)** Outlines how ICBC can pursue the debt if, after, judgment or settlement has been obtained, they have identified the owner and/or driver

* Injury/death losses limited to $200K (inclusive of interests and costs): **R105(2); R Sch 3, s 9(1)**
* Recovery for property damage is limited to $750: **R105(2)**; **R Sch 3, s 9(2)**
* **R106 Exclusion of Other Insured Loss:** ICCC will not pay any claims under A24 where that part of the claim is paid by some other method (insured claim = WCB, *WIA*, or the government)
* **R107 Conditions of Liability**: ICBC not liable to an owner of a vehicle who makes a claim under A24 if the owner, *without reasonable cause*, has not: **(1)** (a) w/n 48 hours of discovery of damage reported it to police; (b) obtained the police case file number and (c) advised ICBC of this number on their request or **(2)** for (a) a claim under A24 for damage to a vehicle, it’s equipment, or property carried in or on it while the vehicle is, without consent of the owner, in the possession of another, or (b) a claim by a municipality, public or private utility or other similar person in respect of damage to a highway or structure or thing in/on/under/over it

Challenges

1. Notice in Time
   * Despite A24, the time limit begins to run from the date the victim (insured) knew or ought to have known of the alleged involvement of an unidentified motorist (*Jamt v Shurman*, 1985 BCSC)
   * Plaintiff may not be aware of the involvement of unidentified vehicle; **R107(1)(a)** requires police report w/n 48 hrs
2. Sufficiency of Notice under A24(2)
   * Statement 3 weeks after accident indicating unID’d motorist involved but not expressly making claim is sufficient (*Goltzman v McKenzie*)statement to ICBC estimator 4 days post-accident sufficient (*Hecker v Thomson*)
3. Limitation Period
   * Six month timeline in A24(2) acts as notice period; however, also subject to the *Limitation Act* (2 years from date of accident) (*Gibson v ICBC*, 1995)
   * N.B. **A17** Does NOT apply to this circumstance
4. What are “all reasonable efforts”?
   * Court cannot render judgment unless satisfied claimant has made all reasonable efforts to ID the unID’d motorist
   * **TEST**: Whether claimant had pursued the investigation to ID the vehicle and its owner and driver as resolutely and resourcefully as they would have done if the claimant themselves intended to pursue an action (*Leggett v ICBC*)
     + Spoke to the other party, but didn’t realize he was hurt; agreed to pay their own costs; realized later he was hurt but didn’t have the contact information for the other party
   * **Reasonable Efforts**: Prompt notice to ICBC and PO, advertising and posting notices for witnesses, interviewing residents at accident scene. Reasonable to leave info gathering to PO in context of freeway accident (*Morris v Doe*)
   * Miscopying license plate is sufficient (*Walker v Farnel*)
   * Being taken to hospital by offending motorist who promised to stay but did not, with no name or licence obtained, sufficient (*Lock v ICBC*)
   * “Reasonable” is synonymous w/ logical, sensible and fair – not absurd or unwarranted lengths (*Raisanen v ICBC*)
   * Reasonable efforts subjective to position and condition of P. Not reasonable to expect injured P to post signs at scene or place newspaper ads where accident was on remote stretch of highway (*Nicholls v ICBC, 2011 BCCA*)
   * Subjective condition of claimant must be taken into account (*Larsen v Doe*)
   * Medical evidence not required to find claimant in state of shock
   * Failure to post notices at accident scene or take any other post-accident steps fatal to claim (*Godara v ICBC*)
   * Rarely enough to rely upon report to police (*Tessier v Vancouver*)

*Leggett v ICBC*, 1992 BCCA – Satisfaction of s 24(5) Requirements

**Facts:** Claimant did not make effort to identify driver at time of accident. Later realized injury, took a number of steps to identify motorist (returned to accident for 10 days, posted advertisements, spoke to nearby residents).

* Protection against fraudulent claims is only one of the purposes of the requirement that the claimant show inability to identify the other driver and owner as a condition of being able to claim under the section. Overall purpose of the section is to limit the exposure of ICBC to claims brought by person who have done everything they reasonably could to protect what ordinarily would be their own interests, which become the interests of ICBC.
* **TEST**: Claimant must know that the vehicle has been in an accident and must have been in such a position and condition that it would be **reasonable** for the claimant to discover and record the appropriate information. Claimant cannot say “I acted reasonably in not taking the trouble to find out”.
  + *Reformulation*: Whether claimant had pursued the investigation to identify the vehicle and its owner and driver as resolutely and resourcefully as they would have done in like circumstances if the claimant themselves intended to pursue an action.

**R148** Hit and Runs in Territories or USA

* **R148(1) “insured**” means (a) named owner in owner’s certificate; (b) member of the household; (c.1) an insured as def. in R42, (c.2) member of (c.1) household and includes a personal representative of a deceased insured
* **R148(1) "unidentified vehicle"** means a vehicle (a) that causes injury or death to an insured by making physical contact with the insured or their vehicle and (b) in respect of which the names of the owner and driver, or driver if the owner is not liable for their action is not ascertainable
  + **Means:** Physical contact required
* **R148(2)**Where death or injury of an insured arises *out of the operation on a highway* in the Territories or the USA of an unidentified vehicle, ICBC shall compensate the insured for any amount they would have been entitled to claim from the unidentified owner/driver – but limited by:
  + **R148(3)** Limited to the lesser of:

1. total amount of damages
2. $200K (inclusive of interests and costs) per **R Sch 3, s 11;** or
3. the minimum limits applicable to 3rd party liability insurance coverage in the jurisdiction of the accident

* **R148(4)** Liability limited by this section – must not start an action related to the claim w/o notifying ICBC
* **R148(5)** ICBC not liable unless:
  1. The insured or representative reports the accident within 24 hours to a police or judicial officer;
  2. The insured files a statement with ICBC under oath within 28 days, statement that they have a claim arising from the accident against the owner/driver of the unidentified vehicle and setting out the facts; and
  3. Allows ICBC to inspect the vehicle the insured occupied at the time of the occurrence
* **R148(6)** Part 6 benefits shall be deducted from any amount the insured is entitled to recover
* **R148(7)** Part 7 or similar benefits of the jurisdiction shall be deducted
* **R148(8)** Determination of whether an insured is entitled to recover damages and if so, their amount, is by agreement between the insured and the CO

## 2. Uninsured Vehicles – A24 and R, Part 8

* NOT the same as UMP – that is for R148.1(1) “underinsured motorists”
* **A20** Applies where the driver is identified, but the other motorist is uninsured
  + “uninsured motorist” means a driver with less than $100K 3rd party liability insurance driving in BC
* **R148** addresses uninsured claims in the Territories and the US
* **A20 (1) "Claimant"** means a person who alleges that he or she has a right of action against an **uninsured motorist** for damages arising from bodily injury to or the death, or loss of or damage to property, caused by or arising out of the use or operation of a motor vehicle
  + Passenger who grabs wheel causing car accident is not a “motorist” (*Jove v Paialunga*)
  + Onus on ICBC to establish defendant motorist is insured (*Ozdoba v ICBC*)
  + **A20(2); R108** Claimant may apply under Form under **R Sch 4** to ICBC for payment of damages
* **A20(3)-(10)** Outlines process for litigation or settlement
  + ICBCnotifies uninsured driver or owner to; ICBC can settle with or consent to judgment in favour of the claimant OR require the claimant to bring or continue an action
  + If default judgment will be made against uninsured motorist, ICBC must be notified. ICBC can assume defence on uninsured motorist’s behalf (to limit their liability).
    - Failure to follow procedure in **A20(6)** upon uninsured motorist failing to appear/defend is fatal to claim against ICBC (*Ducker*)
    - Where ICBC is given notice of intent to take default judgment and does nothing, it may not be added as a defendant (to contest liability) (*Reynolds v Nelson*)
  + However, ICBC cannot consent to settlement in excess of $200K without notifying the uninsured motorist
* **A20(11)** ICBC, on making a payment to a claimant, is subrogated to the claimant’s rights against any other person liable and may bring an action to recover damages against the other person
  + ICBC may only pursue reimbursement where uninsured accepts fault, otherwise they must pursue claim or show defendant is insured (*Ozdoba v ICBC*)
* **A20(17)** If any motorist liable for all or part of the claimant’s damages is insured, the issue is between that motorist and the claimant – insured pays full amount of the loss barring contributory negligence (joint and several)
* **R105(2) Limit of Liability:** Limited to $200K (inclusive of interests and costs) per R Sch 3, s 9(1)
* **R106 Exclusion of Other Insured Loss:** ICBC will not pay any claims under A24 where that part of the claim is paid by some other method (insured claim = WCB, *WIA*, or the government)
  + P must bring a separate action for recovery of monies from ICBC, in which action ICBC may raise and prove R106 reduction (*Shahidi v Oppersma*)
* **R107 Conditions of Liability**: ICBC not liable to an owner of a vehicle who makes a claim under A24 if the owner, *without reasonable cause*, has not: **(1)** (a) w/n 48 hours of discovery of damage reported it to police; (b) obtained the police case file number and (c) advised ICBC of this number on their request or **(2)** for (a) a claim under A24 for damage to a vehicle, it’s equipment, or property carried in or on it while the vehicle is, without consent of the owner, in the possession of another, or (b) a claim by a municipality, public or private utility or other similar person in respect of damage to a highway or structure or thing in/on/under/over it

## 3. Forfeiture and Relief from Forfeiture – A75

* **A75 Forfeiture:** All claims are invalid and the right of an [anyone] to insurance money under the plan or an OIC is forfeited if
  + the applicant for coverage under the plan or the OIC (i) to the *prejudice of the insurer*, **falsely** describes *the vehicle* or (ii) knowingly **misrepresents** or **fails to disclose** *a fact required* to be stated in the application,
  + the insured **violates a term or condition** of or **commits a fraud** in relation to the plan or the OIC, or
  + the insured makes a **wilfully false statement** with respect to the claim.
* Applies to BOTH the Plan and OICs (found in Part 5)
* Insured is obligated NOT to assist another insured in deceiving the insurer (*Peterson v Bannon*)
* **Description of Vehicle**
  + Statement made, without any knowledge of its truth, that stolen truck lease payments were up to date was **wilfully blind** and false (*Skurator v Commonwealth Insurance Co*)
* **Wilfully False Statement**: Done intentionally, knowingly and purposefully **without justifiable excuse**. Distinguished from act done carelessly, thoughtlessly, heedlessly or inadvertently (*Gill v**ICBC*)
  + Typically false statements relate to who the driver was – due to alcohol or drug consumption, who the principal operator of the vehicle was, the use or territory of the vehicle, circumstances surrounding an alleged theft
  + Onus on ICBC to prove statement wilfully false; cogent evidence is required to support any allegations of dishonesty (*Peterson v Bannon*)
  + False statements to PO at scene re: driver ID are not made wrt the claim, but breach of *MVA* (*Roggozinsky v ICBC*)
* **MUST prejudice the insurer – i.e. statements must be material**
  + Materiality: Whether statement is **capable** of affecting the mind of the insured in either the **management** of the claim or the **decision** to pay it (*Brown v ICBC*)
  + If insured makes a wilfully false statement about the subject matter of the claim, that person risks forfeiture if the statement is material to any issue arising in the claim (*Inland Kenworth*)
  + Statement that stolen truck had been in repair shop approx. 320 hours was material as it implied truck was more valuable (*Doetzel v TCBC*)

*Brown v ICBC*, 2004 BCCA

* **Facts**: Brown and 4 passengers rolled his truck in a parking lot. They left the scene, and the next morning Brown reported to the police and ICBC that his vehicle was stolen. Over the weekend he admitted that he had lied. Brought an action claiming cost of repairing his vehicle or its write-off value. ICBC counterclaimed for ~$24K it paid to a passenger for personal injuries caused by the vehicle being rolled.
* **Held**: Statement of driver wilfully untrue. Evidence on which judge could properly conclude this. Sent back to the trial to determine the issue of relief from forfeiture.
  + **Dissent:** Evidence does not establish that the false statement was capable of affecting any decisions ICBC might make as to the management of or payment of the passenger’s claim. It is therefore not material.

*Peterson v Bannon*,1993 BCCA

* **Facts**: Peterson (A) was P in two actions: (1) **tort action:** damages for negligence from Bannon for his operation of a motor vehicle; (2) no-fault benefits action: allegedly entitled to Part 7 benefits
  + Peterson was passenger in Bannon’s vehicle. Brown stated that he remembered seeing headlights, yelled at driver, and flipped the car. Provided for ID of other driver “not known – hit and run”.
* **Held**: Peterson’s wilfully false statements were made with respect to “a claim” and were material to his claim to accident benefits. Issue not with whether the lie *did* affect mind of ICBC, but whether it could have done so. Forfeited claim.

Relief from Forfeiture – A19

* **A19(2) Discretionary Relief:** If a forfeiture would *appear inequitable*, ICBC **may** relieve a person affected by it from the forfeiture of **all or any** insurance money
* **A19(3) Mandatory Relief:** ICBC **must** relieve an insured from a forfeiture of the benefits 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

## 4. Third Party Rights – A76-78

* Provisions meant to ensure third parties receive their compensation. Creates a statutory cause of action against the tortfeasor’s insurer. Amounts to an absolute liability for the Insurer to pay the victim.
  + Accompanied by right of the Insurer to seek compensation from the Insured if they later prove some breach
* Part 5 – General Provisions
  + Applies to The Plan and OICs
  + Purpose is to give direct action against the tortfeasor’s auto liability insurer
  + Can settle directly with the plaintiff and seek money from ICBC
  + Historical reason was to protect victims of car accidents; victims not protected if the Insurer was able to refuse to provide indemnity whenever the Insured was in breach
* **R76(1) “claimant”**  means a person who has a claim or judgment against an insured for which indemnity is provided by the Plan or an OIC
* **R76(2)** Entitles claimant to have insurance monies applied against the judgment or settlement against insured
* **R76(3)** Creates the statutory cause of action directly against the liability insurer; representative claim
  + Claimant may, on behalf of himself or herself and all persons having judgments or claims against the insured who is covered by the indemnity, bring an action against the insurer to have insurance money applied to those claims
* **R76(4)** The insurer may at any stage compromise or settle the claim
* **R76(5)** Other creditors of the Insured cannot seek payment under this section; money is reserved for creditors of claims covered by the Plan or OIC
* **R76(6)** Sets out several circumstances the Insurer CANNOT use in defence to an action in this section
  1. Any change in the status of coverage by the insured after the event which gave rise to a claim
  2. Any breach by the insured
  3. Contravention of the *Criminal Code* or some other law
* **R76(7) Limitation Period:** One year from the final determination of the action against the Insured, including appeals
* **R76(8)** Not a defense that an instrument issued as a vehicle liability policy by an insurer and alleged by a party to be one is *not* a vehicle liability policy
* Issues:
  + Did the Insurer follow all the procedural req’ts?
  + Was the Insured liable to the claimants?
  + Was the settlement reasonable?
  + Was the insured in breach?

Rights of Insurer – A77

* An Insurer under an OIC may set up a defense it would otherwise have against claims; but ONLY for property claims
  + In combination with **R76(6)**, this makes this provision near absolute liability for the Insurer
* **R77(1)** OIC Insurer may avail itself of any defense against a person claiming under A76(3) in respect of property damage
* **R77(2)** If an insurer has paid an amount to a person under A76 by way of settlement or otherwise, that it would not otherwise be liable to pay, and has personally delivered or forwarded by registered mail to the last known address of the insured a demand for reimbursement of that amount*, the insured is liable to reimburse the insurer that amount, and the insurer may enforce the right by action in court*
  + Statutory right of action for the Insurer against the deadbeat Insured
  + Recovery by ICBC is against any insured in breach, including unnamed insured (*ICBC v Joseph*)
  + An Insurer’s claim for reimbursed against an Insured who breached, must be tried in a separate action and NOT in the main tort claim (*Bliefernich v Freeman*)
  + ICBC may not claim reimbursement from an insured who is not personally in breach (*ICBC v Wolford*)
  + Where an insurer seeks reimbursement it must follow the process exactly (*ICBC v Hosseini*)
* **R77(3)** If an Insurer denies liability to an insured, it may add itself as a third party
  + **Means:** When ICBC denies coverage to an Insured, they can add themselves to the litigation as a third party and insert themselves into the process so that they can raise any defenses the defendant would be able to raise (control the litigation)
* **R77(4)** Insurer may then contest the Insured’s liability and the amount of any claim, and may (a) deliver a response to civil claim; (b) other pleadings; (c) have production and discovery; and (d) E and XE witnesses at trial
* **A77(5)-(8)** addresses insured’s reimbursement to insurer
* **A77(9)** The insurer may apply to court to require any other insurers liable to indemnify the insured in whole or in part in respect of judgments or claim…be made parties to the action, and (b) contribute according to their respective liabilities, whether the contribution is rateably or by way of primary or excess insurance, as the case may be:

Payment of Insurance Money Into Court – A78

* **R78(1)** The insurer may apply to the court without notice for an order allowing it to pay the insurance money into court, and the court may so order, on the notice, if any, it considers necessary if
  + a person obtains a judgment against an insured and is entitled to bring an action under A76(3), and
  + there are or may be other claimants, or there is no willing person capable of giving and authorized to give a valid discharge for payment
* **R78(2)** If an insurer pays money into court in accordance with an order made under (1), the registrar or other proper officer of the court may give a receipt to the insurer for that payment
* **R78(3)** An insurer to whom a receipt is given under subsection (2) is discharged from (a) any liability for the money paid, and (b) any claims in respect of the money paid that might be made by or on behalf of the persons entitled to the money

# I. Optional Insurance Contracts (Not examinable)

* Act, Part 4 applies to OICs alone
* Part 5 and 6 apply to mandatory and OICs
* Same breach provisions find their way through the R Schedules into OICs – i.e. forfeiture, third party rights, deduction of no fault benefits, no coverage for use of a weapon, etc.