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| Law 435C.001 | Personal Injury Advocacy | 2022 Term 2 |
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**WEEK 11: Post-settlement and Post-judgment procedures / Part 7 Benefits / Subrogated Claims / Appeals**

1. **Teaching Objectives**

To ensure you understand what happens *after* a settlement or a trial, to ensure finality of the proceedings. This includes consideration of:

* Formal Offers to Settle and cost consequences
* Settlement Agreements
* Settlement Terms
* Settlement Documentation;
* BC Ferry Agreements in the case of multi-party litigation;
* Professional & Ethical Responsibilities
* Public Guardian and Trustee review of infant settlements;
* The *Health Care Costs Recovery Act*;
* Subrogation and the elimination of subrogation rights under the new section 83
* S. 83 deductions;
* Contingency Fee Agreements
* Prejudgement Interest
* Post-Judgement Interest
* Tax Gross-Up & Management Fees
* Taxation of a bill of costs
* The 6% disbursement cap; and
* Appeal deadlines and Appeals.

READINGS:

* Enforcing settlement agreements: *Roumanis v. Hill,* [2013 BCSC 1047](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1047/2013bcsc1047.html?autocompleteStr=2013%20BCSC%201047&autocompletePos=1);
* BC Ferry Agreements and Apportionment: *Conarroe v. Tallack,* [2020 BCSC 626](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc626/2020bcsc626.pdf)
* Part 7 benefits, section 83 deductions: *Skinner v. Dhillon,* [2021 BCSC 1992](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc1992/2021bcsc1992.html?autocompleteStr=2021%20BCSC%201992&autocompletePos=1)
* Formal Offers to Settle / Costs: *Park v. Donnelly,* [2018 BCSC 219](https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc219/2018bcsc219.html?autocompleteStr=2018%20bcsc%20219&autocompletePos=1)
* Ethical & Professional Responsibilities: [2015 LSBC 15](https://www.lawsociety.bc.ca/lsbc/apps/hearings/viewreport.cfm?hearing_id=812)
* Prejudgement interest, post judgement interest, management fees & tax gross up: *Rhodes v. City of Surrey*, [2020 BCSC 1318](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1318/2020bcsc1318.html?autocompleteStr=2020%20BCSC%201318&autocompletePos=1)
* Appeals: *Uy v. Dhillon,* [2020 BCCA 163](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.pdf) and *Steinlauf v. Deol,* [2022 BCCA 96](https://canlii.ca/t/jn2rr)

1. **Formal Offers - Offers to settle and cost consequences**

Formal offers to settle, whether accepted or rejected, can lead to cost consequences for the parties.

[*Rule 9-1*](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/168_2009_01#rule9-1) of the *Supreme Court Civil Rules* governs offers to settle:

#### *Definition*

*(1)In this rule, "offer to settle" means*

*(a) an offer to settle made and delivered before July 2, 2008 under Rule 37 of the former Supreme Court Rules, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,*

*(b) an offer of settlement made and delivered before July 2, 2008 under Rule 37A of the former Supreme Court Rules, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or*

*(c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that*

*(i) is made in writing by a party to a proceeding,*

*(ii) has been served on all parties of record, and*

*(iii) contains the following sentence: "The ............*[party(ies)]*............, ............*[name(s) of party(ies)]*............, reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."*

#### *Offer not to be disclosed*

*(2) The fact that an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the proceeding, until all issues in the proceeding, other than costs, have been determined.*

#### *Offer not an admission*

*(3) An offer to settle is not an admission.*

#### *Offer may be considered in relation to costs*

*(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.*

#### *Cost options*

*(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:*

*(a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;*

*(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;*

*(c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;*

*(d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.*

*[am. B.C. Reg. 119/2010, Sch. A, s. 21.]*

#### *Considerations of court*

*(6) In making an order under subrule (5), the court may consider the following:*

*(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;*

*(b) the relationship between the terms of settlement offered and the final judgment of the court;*

*(c) the relative financial circumstances of the parties;*

*(d) any other factor the court considers appropriate.*

#### *Costs for settlement in cases within small claims jurisdiction*

*(7) A plaintiff who accepts an offer to settle for a sum within the jurisdiction of the Provincial Court under the*[Small Claims Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96430_01)*is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.*

#### *Counter offer*

*(8) An offer to settle does not expire by reason that a counter offer is made.*

In *Park v Donnelly,* [2018 BCSC 219](https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc219/2018bcsc219.html?autocompleteStr=2018%20bcsc%20219&autocompletePos=1), the plaintiff was injured in a motor vehicle collision. ICBC was added as a statutory third party because the defendant was breached (to be explained briefly in lecture). The plaintiff was awarded $402,017 at trial. Eleven days before trial, ICBC made a formal offer to settle in the amount of $430,000 “old money” plus costs and disbursements, but after taking into account Part 7 benefits paid or payable, and after taking into account “any advances paid to date”. ICBC sought recovery of it costs since the plaintiff did not beat the offer at trial. The plaintiff argued the offer was ambiguous because it was “old money”, meaning previous amounts paid under Part 7 or advances would be deducted. The Court dismissed ICBC’s application for costs, finding that the offer to settle was unclear and ambiguous – it was confusing because it was “old money”, and it ought to have made clear the amounts to be deducted.

1. **Formal Offers - Settlement Agreements generally**

It is important to ensure an effective settlement agreement is reached and that all parties and lawyers understand the consequences of the agreement.

The terms of a settlement agreement must be given sufficient thought. An inadequate settlement agreement may give rise to numerous issues, for example:

* Was an agreement reached on all terms?
* Is it enforceable?
* What parties are bound?

Many parties experience “settler’s remorse” after a mediation, because, as is commonly said, a mediation is successful when all parties walk away from the table a little bit unhappy.

But if this happens, can a client simply walk away?

A settlement agreement is a contract. Any contract is enforceable.

In *Roumanis v. Hill,* [2013 BCSC 1047](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1047/2013bcsc1047.html?autocompleteStr=2013%20BCSC%201047&autocompletePos=1), the plaintiff changed her mind after a settlement offer was accepted by her lawyer, on her instructions. Sewell J. enforced the settlement, finding that the Court had no discretion to refuse to enforce a binding settlement made on the instructions of the client. The Court must give effect to a valid contract.

In *Fieguth v. Acklands Ltd.* [(1989), 37 B.C.L.R. (2d) 62 (C.A.)](https://www.canlii.org/en/bc/bcca/doc/1989/1989canlii2744/1989canlii2744.html?autocompleteStr=Fieguth%20v.%20Acklands%20Ltd.%20&autocompletePos=1), McEachern C.J.B.C. provided an overview of relevant principles regarding the formation and enforcement of settlement agreements. These principles were later summarized in *Re Rickards Estate v. Diebold Election Systems Inc.,* [2004 BCSC 1357](https://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc1357/2004bcsc1357.html?autocompleteStr=2004%20BCSC%201357%20&autocompletePos=1) at para. 23:

*(1) It is necessary to separate the question of formation of contract from its completion.*

*(2) Whether a contract is formed depends upon whether the parties have reached an agreement on all essential terms.*

*(3) It is common with settlements that the deal is struck before documentation can be completed. In such cases, if there is agreement on the essential terms a contract has been formed and the settlement is binding.*

*(4) Generally speaking, litigation is settled on the basis that a final agreement has been reached which the parties intend to record in formal documentation, rather than on the alternative basis that the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete.*

*(5) A settlement implies a promise to furnish a release (and a consent dismissal if an action has been commenced).*

*(6) Where an agreement has been concluded with documentation to follow, either party can tender whatever documents he or she thinks appropriate without thereby rescinding the settlement agreement.*

*(7) If the documents are not accepted there must be further discussion, but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.*

*(8) Not every disagreement over documentation consequent upon a settlement amounts to repudiation of a settlement.*

*(9) Parties who reach a settlement should usually be held to their bargains, and disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar.*

1. **Formal Offers - Settlement Documentation**

At the time of settlement, and post-settlement, there are additional considerations that must be taken into account.

Prior to settling, it is prudent that the client is appreciative of what expenses and deductions will be made from the settlement amount: legal fees, disbursements, costs, subrogated claims, etc.

Following the settlement, the lawyer must ensure that the proper procedures have been followed – releases, consent orders, etc. and, in making the requirement payments, the settlement funds are not mismanaged.

1. **Release**

* A release is signed by the parties acknowledging that they are waiving all claims in connection with the matters giving rise to the action as a term of the settlement;
* Following the signing of a release, the plaintiff has no further claim against the defendant.
* In *Corner Brook (City) v. Bailey*,[2021 SCC 29](https://canlii.ca/t/jh43g), theSupreme Court of Canada recently opined on the effectiveness of a final release on claims that would have been unknown at the time of drafting.
  + Writing for a unanimous Court, Rowe J. affirmed at para. 21 that a release is a form of contract, and that the regular principles of contractual interpretation apply.
  + Rowe J. concluded at para. 27 that “*[a] release can cover an unknown claim with sufficient language, and does not necessarily need to particularize with precision the exact claims that fall within its scope.*”
  + This decision confirms that a properly drafted release will encompass all claims, both known or unknown, and that whether or not a release will be binding is dependent upon the precise wording of the release and the circumstances surrounding it (para. 43).

1. **Consent Dismissal Order**

* If pleadings have been filed the parties should sign and file a Consent Dismissal Order pursuant to [*Rule 8-3*](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/168_2009_01#rule8-3) of the *Supreme Court Civil Rules*;
* The order states that the action settled and the parties have agreed to have the Court dismiss the claim.

1. **Consent Dismissal Order versus Notice of Discontinuance**

* A notice of discontinuance *discontinues* the claim but does not waive or extinguish the party’s rights;
* It preserves the plaintiff’s right to re-file its claim, but this can be frustrated by a limitations defence.

1. **BC Ferry Agreements: Settling with One of Multiple Defendants**

The term “BC Ferry Agreement” arises from the case, *British Columbia Ferry Corp. v. T&N,* [1995 CanLII 1810 (BCCA)](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii1810/1995canlii1810.html?autocompleteStr=british%20columbia%20ferry&autocompletePos=2) [*BC Ferry*]. A “BC Ferry Agreement” is required where there are multiple defendants, who may be jointly and severally liable to the plaintiff, and the plaintiff is considering a settlement agreement with just one or some of the defendants, but not all.

In *BC Ferry,* the plaintiffs agreed to settle their claim against one of the defendants, on the following terms:

1. Neither B.C. Ferries nor the Province will seek to recover, either in the Action or by any other proceedings, any portion of the losses which it claims in the Action which by a Court or other tribunal may attribute to the fault of Yarrows. In particular, without limiting the generality of the foregoing, neither B.C. Ferries nor the Province will seek to recover such portion of its losses form the Defendants in the Action.
2. At the first reasonable opportunity, B.C. Ferries and the Province will advise the Court that they expressly waive any right to recover from the Defendants in the Action any portion of the losses which they claim and which the Court any attribute to the fault of Yarrows.

Under a *BC Ferry* Agreement, the plaintiff is waiving his or her right to pursue any further claim or proceeding relating to the settling defendant, directly or indirectly. The plaintiff agrees that the settling defendant’s ‘share’ of the liability has been paid in full and abandons any further claim against them.

The plaintiff is required to amend his or her NOCC to clarify that they are only seeking liability as against the remaining defendant(s), in order to prevent that remaining defendant(s) from having a third party claim against the settling defendant for contribution and indemnity.

However, the remaining defendant(s) will be motivated to want to apportion as much fault over to the settling defendant as possible, in order to minimize the remaining defendant’s exposure. This is accomplished through a third party notice for “declaratory relief” only. Meaning, the settling party can still be compelled as a “party” to participate and give evidence in a legal proceeding, but he or she is not exposed to judgment.

An example of a *BC Ferry* settlement was the plaintiff’s resolution with Nicholas Osuteye in *Crawford v. Nazif*. The plaintiff agreed to resolve with Mr. Osuteye on a without costs basis, abandoning any potential recovery of her damages award against him, in the event he was apportioned fault at trial. The defendant Dr. Nazif maintained a third party claim over against Mr. Osuteye for “declaratory relief” and an apportionment of fault. The goal of this was to reduce Dr. Nazif’s own exposure, by pointing the finger at Mr. Osuteye. But, was this a good strategy in front of a jury, for a physician defendant to blame her patient?

A recent decision confirms that a *BC Ferry* settlement is deductible from the trial award of damages against the remaining defendant(s): *Conarroe v. Tallack,* [2020 BCSC 626](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc626/2020bcsc626.pdf). Joint and several liability is not severed by the BC Ferry Agreement.

1. **Professional & Ethical Responsibilities**

The [*Code of Professional Conduct for British Columbia*](https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/) regulates the professional and ethical responsibilities for all lawyers in British Columbia. It provides a comprehensive list of all the responsibilities relating [undertakings](https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-5-%E2%80%93-relationship-to-the-administration-of/#5.1-6) and the [fees and disbursements](https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/#3.6) that the Law Society imposes upon lawyers. Noncompliance with these rules can have a real and tangible negative impact upon your practice.

The most common areas of complaints against lawyers include breaches of undertakings and disputes over fees and accounts.

After a settlement is reached, funds must then be delivered.

As a matter of general practice, the defendant issues a cheque to the plaintiff’s lawyer “in trust”, on the undertaking that the payment will be distributed on the terms required, including return delivery of a signed release. The lawyer will then pay out the required disbursements and fees, and pay the remaining to the client.

In [**2015 LSBC 15**](https://www.lawsociety.bc.ca/lsbc/apps/hearings/viewreport.cfm?hearing_id=812) the Law Society sanctioned a lawyer for breach of undertakings and mismanagement of settlement funds.

* The lawyer had his own law corporation but had a partnership/worked with a separate law firm;
* They had a 50-50 fee split agreement;
* Funds would be paid into the Law Firm, and then the Law Firm would pay him 50%;
* Statement of account, legal fees, and payment to the client was all processed through the Law Firm’s account;
* Following the conclusion of a client’s file, the Lawyer instructed DC to issue a cheque to his law corporation rather than the Law Firm;
* Cheque was forwarded on the Lawyer’s undertaking not to release the funds to the client until the release and consent dismissal order had been executed;
* The Lawyer breached this, depositing the cheque into his own account and paying out the client;
* The legal fees were calculated at $88,000; however, he instructed his paralegal and the accounting department that only $44,000 were claimed;
* He kept the remaining $44,000 and then paid out the remainder to the law firm;
* The Law Firm then paid him back $22,000 – 50% of the legal fees charged;
* He eventually paid back the Law Firm – when questioned about it – at this point he had already left the firm and started his own;
* The Law Firm brought a complaint
* He was sanctioned for:
  + Failure to deposit settlement funds into the trust account (of the Law Firm);
  + Breach of implied undertaking;
  + Failure to account to client for trust funds;
  + Questionable conduct.
* The Law Society concluded that a fine of $14,000 and costs of $2,000, made payable 8 weeks from the date of the decision, was an appropriate disciplinary action.

1. **Public Guardian and Trustee Review - Infant Settlements**

When an infant (anyone under the age of 19 in BC) is the plaintiff, a settlement must be approved by the  [Public Guardian and Trustee](http://www.trustee.bc.ca/).

For settlements of $50,000 or under, the PGT can approve or reject the settlement on the minor's behalf.

If the settlement is over $50,000, the PGT makes a recommendation to Court as to whether the settlement is adequate. The Court then makes the final decision whether the settlement will be approved. There is a [Practice Direction](https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD%20-%2012%20Infant%20Settlements%20and%20Fee%20Agreements%20-%20Applications%20for%20Approval.pdf) in this regard.

In *Lotocky v. Markle,* [2010 BCCA 75](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca75/2010bcca75.html?autocompleteStr=2010%20BCCA%2075&autocompletePos=1), the plaintiff infant suffered a brain injury during his birth. His parents were his litigation guardians in his medical malpractice action. The plaintiff lost at trial. The defendants were entitled to their costs, which were significant, at over $330,000. The plaintiff appealed the trial order, but agreed his parents agreed to abandon the appeal in exchange for the defendants’ waiver of their claim for costs. But they needed the PGT’s approval. The PGT obtained their own legal opinion that concluded the appeal had merit, and therefore refused approval of the ‘settlement’ on a waiver of costs (a settlement effectively worth less than $50,000, such that the PGT had the jurisdiction to reject the settlement). The parties applied to the BC Court of Appeal to approve the settlement. They did, overriding the PGT’s refusal. They gave the following reasons:

[66]         It is clear that payment of the trial costs would present a significant additional burden for the Lotocky family, and that this would inevitably affect Michael’s home life and future care.

[67]         Turning to the position of the Public Guardian and Trustee on the issue of costs, it takes no issue with the good intentions of the Lotockys, but says that their potential liability for trial costs creates an inevitable conflict of interest between them and Michael. It maintains that their endorsement of the settlement should therefore play no role in this Court’s examination of whether it is in Michael’s best interests to approve the settlement.

[68]         The Public Guardian and Trustee says that it, by contrast, is able to speak to Michael’s interests with the “purity of independence”. In that guise, it argues that the overarching issue must remain the merits of the appeal, and says it is not in Michael’s interests to abandon it. It maintains that it has acknowledged the parents’ burden of costs by offering to act as litigation guardian on the appeal, and carry the responsibility for the appeal costs. It is adamant, however, that it will not assume the parents’ responsibility for the trial costs.

[69]         While I do not doubt that the Public Guardian and Trustee’s position is well-intentioned, it is, with respect, artificial and misguided to judge the merits of the appeal in isolation from the financial ramifications that would arise from an unsuccessful appeal. This became abundantly clear when the Lotockys raised an argument that the offer of the Public Guardian and Trustee to undertake the appeal amounted to a determination under s. 7(3) of the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383, and that the Court should compel it to undertake the appeal on the same terms as the parents. Section 7(3) reads:

7(3)      If a litigation guardian is required for a young person under the Court Rules Act and is not otherwise provided for by the Infants Act, the Public Guardian and Trustee must act as litigation guardian for the young person if the Public Guardian and Trustee considers it is in the young person’s best interests to do so.

[70]         The Lotockys argued that they were not prepared to act as Michael’s litigation guardian for the appeal due to their financial circumstances. The Public Guardian and Trustee had nevertheless decided it was in Michael’s best interests that the appeal proceed. Thus a new litigation guardian was required, and under s. 7(3) the Public Guardian and Trustee must step into that role. As a trustee charged with acting in the best interests of the young person, it cannot properly use financial considerations as a reason to abandon its statutory role. It must accordingly take on the appeal by stepping into the same shoes as the former litigation guardian, and assuming her outstanding obligation for trial costs.

[71]         This argument was strenuously resisted by the Public Guardian and Trustee, and it ultimately withdrew its offer to undertake the appeal as litigation guardian and pay appeal costs, on the basis that it had not intended the offer to be an ultimate determination under s. 7(3). While its arguments were couched in terms of statutory construction, administrative policy, and budgetary constraints, I cannot resist the inference that its opposition was fuelled as well by the fact that, if the Court accepted the Lotockys’ argument, it faced significantly heightened financial risks in pursuing the appeal.

[72]         Essentially, it became evident that, if placed in the same position as the Lotockys, the Public Guardian and Trustee would decline to act on the appeal due to the financial risks. It was also apparent that if the Lotockys could have pursued Michael’s appeal on the terms proposed by the Public Guardian and Trustee, they would have had no hesitation in doing so.

[73]         In short, the outstanding obligation for Dr. Markle’s trial costs must play a part in deciding whether the settlement is in Michael’s best interests. While I appreciate the conflict of interest that potential liability creates for the litigation guardian, the financial burden and risks it represents cannot be ignored as the Public Guardian and Trustee advocates. His parents’ financial circumstances have significant repercussions for Michael’s well-being both now and in the future.

[74]         The Lotockys face a potential liability for $205,000 if the appeal is unsuccessful. I earlier indicated that I view the merits of the appeal as arguable at best. I am persuaded that those factors, taken together, make it untenable to proceed with the appeal. I am satisfied that it is in Michael’s best interests to approve the proposed settlement.

1. ***Health Care Costs Recovery Act***

The Province of British Columbia is entitled, by statute, to recovery of any health care costs expended to an MSP beneficiary if that beneficiary is injured as a result of a negligent third party, under the [*Health Care Costs Recovery Act*, SBC 2008, c. 27](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/08027_01). The *Act* does not apply to ICBC-insured tortfeasors, for obvious reasons (no point in moving funds from one government pocket to another). It does apply to all non-ICBC insurers of all accidents, including slips and falls, aviation accidents, medical malpractice, etc.

Under the *Act,* it is mandatory for parties to put the Province on notice of claims and settlements. If the Province does not sign off on a settlement, the settlement may not be enforceable.

In *Woo v. Crème de la Crumb,* [2020 BCSC 42](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc42/2020bcsc42.html?autocompleteStr=2020%20bcsc%2042&autocompletePos=1), the plaintiff beneficiary was catastrophically injured as a result of falling from a ladder at the defendant bakery’s premises. The Ministry’s claim, set out in its Certificate, totaled $801,170.12. The defendants challenged the admissibility of the Certificate. Skolrood J. found it admissible, reasoning as follows:

*[23]         Returning to the Minister’s Certificate here, I agree with the defendant that the language used does not track directly with the wording of ss. 16(1) and (2). It is not clear why that is as it would be relatively straight forward to simply provide the information in the manner contemplated by ss. 16(1) and (2) and in the language used therein.*

*[24]         That said, I am satisfied that the somewhat unartfully drafted Minister’s Certificate nonetheless conveys the information required by ss. 16(1) and (2). As noted, the first paragraph of the Minister’ s Certificate, after the preamble, certifies that Appendix “A” to the certificate sets out the “health care services claim” for the plaintiff for “personal injuries suffered as a result of the negligence or wrongful act or omission of a wrongdoer on or about 2015/02/17” (emphasis removed).*

*[25]         Again, “health care services claim” is defined to mean “a claim for the recovery of the past and future costs of health care services attributable to [the specified] personal injury”. The definitions of “past cost of health care services” and “future cost of health care services” make it clear that the specified costs are the costs of the health care services attributable to the personal injury. Further, Appendix “A” to the Minister’s Certificate, which sets out the various health care services and the associated costs, clearly identifies the plaintiff as the beneficiary as well as the date of the subject personal injury. In my view, it is clear to anyone reading the Minister’s Certificate that it identifies the health care services received by the plaintiff in respect of the personal injuries that were the subject of this litigation and the costs of those services, i.e. the information required by ss. 16(1) and (2).*

*[26]         The defendant seeks to distinguish between a “claim” for recovery of health care costs, which is what it says is set out in the Minister’s Certificate, and a certification that the health care services were received by the plaintiff, which is what is required under s. 16(1). The defendant submits that the former is in the nature of a pleading whereas the latter is a material statement of fact.*

*[27]         In the context of the HCCRA and the Minister’s Certificate, this is a distinction without a difference. Under the HCCRA, the only claim that may be advanced, either by the beneficiary (ss. 2 and 3) or by the government (ss. 7 and 8), is for recovery of the costs of health care services received by the beneficiary that are attributable to a wrongful act. The intent of a certificate issued under s. 16 is to identify both the relevant services and the associated costs. By listing the health care services and the costs in the appendix to the certificate, the Minister or his/her designate is stating the necessary material facts. Again, as I noted in para. 25 above, this should be clear to anyone reading the Minister’s Certificate.*

On appeal, *Woo v. Crème de la Crumb*, [2020 BCCA 172](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca172/2020bcca172.html?autocompleteStr=2020%20BCCA%20172&autocompletePos=1), Abrioux J.A., writing for a unanimous Court, gave the following comments on the *HCCRA:*

*93 The HCCRA came into force in April 2009. The purpose of the HCCRA is to enable the provincial government to recover health care costs provided to a beneficiary under the Medicare Protection Act, R.S.B.C. 1996, c. 286, resulting from the negligence or wrongful act of another person. As Justice Prowse stated in Beacon at para. 4, "[t]he undisputed intent of the Act is to shift the burden of health care costs from the public purse to wrongdoers who cause personal injury to beneficiaries."*

*94 Section 2 provides a beneficiary's right to recover past and future health care costs from the wrongdoer, which is subject to the government's right to intervene or assume conduct of the claim (s. 6) and receive the amount awarded for health care services (s. 20). The government has a subrogated right of the beneficiary to recover the past and future costs of health care services (s. 7). Section 3 imposes an obligation on a beneficiary who commences a personal injury proceeding to include a health care services claim in that proceeding, while s. 8 grants the government an independent right to recover by commencing a legal proceeding in its own name.*

*95 Section 16 provides the evidentiary mechanism for the government to recover the health care costs paid on behalf of a beneficiary by way of certificate evidence. Subsection (1) provides that a certificate setting out health care services received and that will likely be received in the future as a result of the negligence or wrongful act is proof of those health care services. Subsection (2) provides that a certificate setting out the cost of those health care services is conclusive proof of the cost of those services.*

Plaintiff’s counsel can accept a retainer to act on behalf of the Ministry in pursuit of the *HCCRA* claim, or not. Either way, it is critical to be cognizant of counsel’s obligations under the *Act* to ensure the Ministry is paid its due by the wrongdoer.

1. **Elimination of subrogation rights under the new s.83**

Subrogation is a term that describes an insurer’s legal right by contract to pursue a third party wrongdoer for an indemnity paid to the insured, by stepping into the insured’s shoes. Subrogation clauses exist in most insurance policies, including in short and long-term disability benefit policies, and extended health care policies.

Thus, in addition to legal fees, costs, and disbursements, there may be subrogated interests that have to be paid out of the plaintiff’s settlement funds.

These claims are generally negotiable, depending on the terms of the advanced benefits.

Some employers or trusts providing disability benefits require 100% repayment.

It is critical to know who has a subrogated interest in the settlement or judgment and to resolve those interests on behalf of the client before disbursing settlement funds to the client.

The BC Government has made recent changes that prevent third party insurers from exercising their right to subrogation. [Section 83 of the *Insurance (Vehicle) Act*](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96231_01#section83) sets out categories of insurance benefits that are deductible from a tort claim and effectively eliminates subrogation rights of various benefit providers. S.83(7) of the *Insurance (Vehicle) Act*  states:

*(7) Despite any right of subrogation a person may have under an agreement, the common law or an enactment, but subject to section 130 of the Workers Compensation Act and section 84 of this Act, a person who pays or provides benefits, or who assumes liability to pay or provide benefits, is not subrogated to a right of recovery of the person referred to in subsection (2).*

This effectively precludes recovery of benefits through subrogation.

1. **Section 83 Deductions**

[Section 83 of the *Insurance (Vehicle) Act*](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96231_01#section83) allows for a reviewing Court to make a determination on the necessity of an award, and in an effort to prevent double recovery, the Court may order a deduction. This in particular applies to any award that may fall under what was formerly referred to as a Part 7 benefit.

The recent decision of *Skinner v. Dhillon,* [2021 BCSC 1992](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc1992/2021bcsc1992.html?autocompleteStr=2021%20BCSC%201992&autocompletePos=1), provides a summary of the relevant principles for S. 83 deductions, and provides a list of relevant authorities for litigating these deductions. In *Skinner,* Branch J. states at para. 3 that “*[t]he Court's findings on the income loss and cost of care are of particular moment for any s. 83 determination. These heads of damages tend to overlap with the first party insurance benefits available under Part 7, and s. 83 is designed to prevent double recovery in relation to same.*”

Branch J. summarized the relevant principles to s.83 deductions by reviewing the wording of s.83(5) at para 15:

*15      Sections 83(5) and (5.1) of the Act provide for the deductions to the tort award sought here:*

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

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

In *Skinner,* Branch J. adopted the reasoning of Davies J. in *Boparai v. Dhami*, [2020 BCSC 1813](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1813/2020bcsc1813.html). In *Boparai,* Davies J. summarised the principles to be applied in assessing whether it is appropriate to make any deductions at para. 30:

*[30] Although the facts of those cases and the awards made were different than those now before me, my review of the legislation and consideration of applicable jurisprudence leads me to conclude that the following principles govern the determination of whether, and if so to what extent, awards for the cost of future care made in tort proceedings should be deducted under s. 83 of the Act and Part 7 of the Regulation:*

*1) Two purposes are served by the deductibility of benefits that a plaintiff in a tort action is entitled to receive from ICBC. The first determines the sum that the plaintiff receives when her tort claims are adjudicated. The second is to prevent the plaintiff from being compensated twice. See: Quigley v. Jonsen, 2020 BCSC 216 [ at para. 3; Luck v. Shack,2020 BCSC 1074 at para. 19 [.*

*2) A defendant who seeks a deduction under s. 83 of the Act has the burden of establishing that a deduction should be made. See: Lynn v. Pearson, (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para. 18.*

*3) There must be strict compliance with the statute in determining what deductions, if any, should be made. Any "uncertainty as to whether a Part 7 benefit will be paid must be resolved in favor of the plaintiff'. Any uncertainty created by the Regulation may lead the court to conclude that only a nominal deduction is appropriate: See: Li. v. Newson, 2012 BCSC 675 at paras. 14(c) and (i); Luck at para. 28.*

*4) Although there are substantive differences in ICBC's obligations to provide non-discretionary benefits under s. 88(1) of the Regulation and discretionary benefits under s. (2) both are liable to deduction from a tort award. See: Quigley at para. 10 citing Ayles v. Talastasi, 2000 BCCA 87 at para. 32; Luck at para. 29.*

*5) The filing of the affidavit of an adjuster authorized to "irrevocably, unequivocally and unconditionally'' agree to pay for any treatment referenced in the reports of the medical experts who testified at trial up to the amount awarded by the jury may fully resolve uncertainty as to whether a benefit will be paid as Part 7 benefits. See: Wark v. Kang, 2020 BCSC 196 at para. 44; Aarts–Chinyanta v. Harmony Premium Motors Ltd., 2020 BCSC 953 at paras. 80 and 81.*

*6) Although the filing of such an affidavit may carry considerable weight it does not, however, relieve the court of its obligation to independently analyse the evidence and then determine to the extent that it is able to do so the Part 7 benefits which the plaintiff is likely to receive in the future: See: Sangha v. Inverter Technologies Ltd., 2019 BCSC 1174 [at paras. 15 and 16.*

*7) Judges must be cautious when assessing a suitable amount to deduct from a cost of care award. Examples of uncertainties a judge should consider includes: how long the plaintiff will need the service; and, the possibility of legislative changes that may take away (or alter) a plaintiff's eligibility for Part 7 benefits. See: Cikojevic v. Timm, 2012 BCSC 574 at para. 14; Sangha at para. 9.*

*8) Deductibility under s. 83(5) of the Act of entitlement to Part 7 benefits is not to be determined based upon a plaintiff 'making' or 'advancing' a claim. Section 83(5) only reduces a defendant's liability to the amount of the Part 7 benefits to which a plaintiff is entitled that correlate to the claim as determined and assessed by the court. The defendants have the burden of establishing such correlation as to both the claim and the quantum of the award made. See: Siverston v. Griffin, 2020 BCSC 528 at paras. 46 and 47.*

*9) Although such correlation may be readily ascertainable by factual findings when liability for and the quantum of entitlement for cost of future care are reduced to judgment by a trial judge sitting without a jury, when a lump sum award is made by a jury determining correlation of the award to the services and treatments available under Part 7 and the degree of correlation may not be possible. See: Siverston at para. 48 and 49; Elliot v. McCliggot, 2020 BCSC 1129 at para. 13.*

*[Emphasis in original]*

Branch J. also adopted the reasoning from the ruling of *Aarts-Chinyanta v Harmony Premium Motors Ltd,* [2020 BCSC 953](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc953/2020bcsc953.html?autocompleteStr=2020%20BCSC%20953&autocompletePos=1). In *Aarts-Chinyanta* MacDonald J. summarised the two-step process that a reviewing Court should undertake when considering if s. 83 deductions are appropriate:

*[53] … First, the court should determine whether the plaintiff has received or is entitled to receive Part 7 benefits as defined in the Act. Second, once entitlement is established, the court should estimate the amount of the deduction.*

MacDonald J. states that the principles that a reviewing Court must consider when making a s.83 deduction at paras. 78-81:

*[78] As I understand the principles flowing from Schmitt and subsequent jurisprudence, if there is no statutory entitlement to benefits, there can be no deduction because an ICBC specialist cannot authorize deductions beyond what the statute permits. Once statutory entitlement is established, based on the award and the legislation, the question is whether the Part 7 benefits are mandatory or discretionary. If the benefits are mandatory, the court must deduct. No further evidence is required. If the benefits are discretionary, in that ICBC may pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award. Alternatively, the court may deduct a nominal amount to reflect the uncertainty of the plaintiff receiving the future benefits.*

*[79] There is an exception to the general rule regarding discretionary benefits. The exception is where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward. Once presented with such evidence, the court must be satisfied the undertaking or promise is sufficient in that there is no significant uncertainty the benefits will be paid: Sangha. If the court is satisfied with the undertaking or promise, the court should deduct the benefits from the damages award because the uncertainty has been removed.*

*[80] ICBC can therefore make post-trial representations regarding ongoing access to benefits to which entitlement is already established. In addition to the findings of fact and award of damages at trial, this Court may consider representations from ICBC specialists regarding whether the conditions subsequent to ongoing entitlement (e.g., 12 month reviews) will be waived or enforced. ICBC can provide assurances with respect to discretionary conditions which ICBC controls.*

*[81] In summary, ICBC cannot undertake to do more than it was empowered to do under the legislative scheme, consistent with the findings at trial. ICBC representations cannot broaden entitlement at the outset: Andrews at para. 25. However once entitlement is established, ICBC can reduce or eliminate any contingencies associated with its exercise of discretion. Post-trial affidavit evidence is admissible for this purpose.*

*[Emphasis in original]*

S.83 deductions are not applied for by ICBC after every trial, but it is an area of law that is good to be familiar with.

1. **Contingency Fee Agreements**

The primary method for plaintiffs’ lawyers to charge for their legal services in the field of injury litigation is through the use of contingency fee agreements. These are permissible in the field of injury litigation under [*Rule 3.6-2 Contingent Fees and Contingent Fee Agreements*](https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/#3.6-2)of the Law Society’s *Code for Professional Conduct.*

* The Contingency Fee Agreement that is signed initially with the client will indicate the percentage of the award that is to be paid in order to satisfy legal fees;
* In addition to the legal fee, the agreement may also specify that disbursements are to be subtracted from the settlement, along with interest on the disbursement, and applicable taxes;
* Disbursements may include medical expenses, investigation expenses, copying, printing, scanning, faxing, research, insurance, etc. will be paid;

For discussion: what role do CFAs play in improving access to justice?

1. **Prejudgement interest**

Prejudgment interest is intended to supplement an award for pecuniary damages that the plaintiff receives as a result of an order. This is meant to act as a form of compensation for the interlocutory period between when the tortious incident occurred and when the award is given.

Prejudgment interest is regulated by [Part 1 of the *Court Order Interest Act,* RSBC 1996, c 79](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96079_01#part1)*.* S.1, of the *COI* *Act* states:

***Court order interest***

*1 (1) Subject to section 2, a court* ***must*** *add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.*

*(2) Despite subsection (1), if the order consists in whole or part of special damages, the interest on those damages must be calculated from the end of each 6 month period in which the special damages were incurred to the date of the order on the total of the special damages incurred*

*(a) in the 6 month period immediately following the date on which the cause of action arose, and*

*(b) in any subsequent 6 month period.*

*(3) For the purpose of calculating interest under subsection (2), and despite subsection (2), if the date of the order occurs*

*(a) before a date 6 months after the date on which the cause of action arose, or*

*(b) after the end of a 6 month period but before the end of the subsequent 6 month period, interest must be calculated from the date on which the special damages were incurred to the date of the order.*

*(4) If part of an order represents income loss arising from personal injury or death and one or more payments have been made before the date of the order to replace, provide indemnification for, compensate for or protect against some or all of the income loss or for any other purpose related to the income loss, the amount of the income loss on which interest may be calculated under this section must be reduced by the amount of each such payment as of the date of the receipt of the payment.*

[Emphasis added]

As seen from the above, prejudgement interest is not discretionary. It is mandated by the *COI Act* (*Kim v. Choi,* [2020 BCSC 1790](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1790/2020bcsc1790.html?autocompleteStr=2020%20BCSC%201790%20&autocompletePos=1) at para 12; *Gould v. Gould Estate (Trustee of)*, [2010 BCSC 16](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc16/2010bcsc16.html?autocompleteStr=2010%20BCSC%2016%20&autocompletePos=1) at para. 36).

Prejudgement interest is applicable to any award that is pecuniary in nature. In *Sharma v. Chan*, [2017 BCSC 1651](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc1651/2017bcsc1651.html?autocompleteStr=2017%20BCSC%201651&autocompletePos=1), Voith J. ruled that past wage loss is a pecuniary loss when the sum in question is easily ascertainable, and thus is subject to the *COI Act:*

*35 The reality is that in some cases a plaintiff's past wage loss can be fixed with precision. This is so, for example, when a plaintiff is employed, is then injured, misses work for a fixed period of time and then returns to work. In such cases the plaintiff's past wage loss claim is straightforward and can be fixed or calculated with precision. The exercise is largely arithmetical in nature. The claim advanced by such a plaintiff is clearly "pecuniary" in that the plaintiff seeks compensation for his or her actual wage losses.*

*36 In other cases, the assessment or calculation of the plaintiff's past wage loss is more complicated. A plaintiff's employment history may, for example, be more sporadic. The court is nevertheless still required to ascertain what that plaintiff would have earned. The claim continues, however, to be a claim for "loss of earning capacity". It continues to be in the nature of a "pecuniary" loss. Finally, it is, I am satisfied, a pecuniary loss to which s. 1 of the COI Act applies.*

While the *COI Act* implies a mandatory duty to award prejudgement interest on pecuniary award, it explicitly precludes the award of prejudgement interest for non-pecuniary damages. S.2 of the *COI Act* reads as follows:

***Interest not awarded in certain cases***

*2 The court must not award interest under section 1*

*(a) on that part of an order that represents pecuniary loss arising after the date of the order,*

*(b) if there is an agreement about interest between the parties,*

*(c) on interest or on costs,*

*(d) if the creditor waives in writing the right to an award of interest, or*

*(e) on that part of an order that represents nonpecuniary damages arising from personal injury or death.*

In *Dhillon v. Jaffer,* [2013 BCSC 1860](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1860/2013bcsc1860.html?autocompleteStr=2013%20BCSC%201860&autocompletePos=1), rev'd on other grounds, [2014 BCCA 215](https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca215/2014bcca215.html?autocompleteStr=2014%20BCCA%20215&autocompletePos=1), leave to appeal ref'd (2015), [2014] S.C.C.A. No. 384, Melnick J. considered the issue of whether or not prejudgement interest was applicable to awards for loss of opportunity and general damages. This case surrounded solicitor’s negligence, which caused the plaintiff mental distress. In these supplemental decisions, Melnick J. embarked on an analysis of the interplay between what awards could be considered to be of a pecuniary nature under the *COI Act.* At paras. 4-11 Melnick J. discusses what the essence of a pecuniary award is:

*4 The terms "pecuniary" judgment is not defined in the Act. A useful starting point is Wepruk (Guardian ad litem of) v. McMillan Estate (1993), 33 B.C.A.C. 114 (B.C. C.A.) [Wepruk]. The issue on appeal in Wepruk (Guardian ad litem of) was whether the appellant was entitled to court order interest pursuant to s. 1 of the Act for an award for future support and other benefits pursuant to the Estate Administration Act, R.S.B.C. 1996, c. 122. As part of her analysis, Madam Justice Prowse looked at the 1987 Report on the Court Order Interest Act by the Law Reform Commission of BC ("LRC"). In that report, the LRC noted that the term "pecuniary judgment" had not been used by it in its original report that led to the Act. Rather the Commission had used the words "sounding in money" to distinguish monetary awards from non-monetary awards such as decrees of divorce or injunctions, and the Legislature adopted "pecuniary judgment" to signify that concept. In Wepruk (Guardian ad litem of), Madam Justice Prowse used the LRC's originally suggested terms as an interpretive tool in concluding that the money awarded to the appellant in the case before her "unquestionably sounds in money" and that the award thus constituted a pecuniary judgment to like effect (see Cabaniss v. Cabaniss, 2010 BCSC 513 (B.C. S.C.)).*

*5 In B. (K.L.) v. British Columbia (1998), 163 D.L.R. (4th) 550 (B.C. S.C.) [K.L.B.], a case that dealt with the interpretation of s. 2(e) of the Act, Madam Justice Dillon stated at para. 3:*

*3 Section 1(1) of the Court Order Interest Act, R.S.B.C. 1996, c. 79 establishes the general rule that pre-judgment interest is to be added to a "pecuniary judgment". This refers to any monetary award and is not used in the sense of describing one of the heads of damages (V.(J.L.) v. H.(P.) (1997), 40 B.C.L.R. (3d) 73 at 75). Statutory interest is awarded on any monetary judgment that is not excluded under section 2 of the Court Order Interest Act.*

*6 As well see Mullins v. Levy, 2006 BCSC 1723 (B.C. S.C.) [Mullins], where Mr. Justice Holmes stated at paras. 3 and 4:*

*[3] At trial the plaintiff was found to have been assaulted, apprehended and falsely detained, and as a result awarded general damages of $15,000, and special damages of $148.74.*

*[4] The judgment for general damages is clearly a "pecuniary judgment" under s. 1(1) of the Court Order Interest Act, and subject to s. 2 it is mandatory that"...a court must add to a pecuniary judgment an amount of interest ... the court considers appropriate in the circumstances...".*

*7 Although both B. (K.L.) and Mullins were successfully appealed on other grounds, the Court of Appeal in B. (K.L.) v. British Columbia, 2001 BCCA 221 (B.C. C.A.), upheld Madam Justice Dillon's conclusion that the awards in question in that case were pecuniary judgments that were excluded from attracting interest pursuant to s. 2(e) of the Act.*

*8 Finally, in Woo v. ONNI Ioco Road Five Development Ltd. Partnership, 2012 BCSC 1445 (B.C. S.C.) [Woo], a declaration that resulted in a monetary order was found to be a pecuniary judgment for the purposes of s.1 of the Act (para. 10). This case involved the plaintiffs successfully applying for a declaration of rescission of a real estate contract for purchase and sale. This entitled them to the return of monies paid under the contract. The plaintiffs then applied for court order interest. The difficulty with the request was that a 'declaration' was one of the original remedies distinguished from pecuniary judgments by the LRC. Though the LRC recommended, at page 66 of the Report, that a declaration that money is owing should attract prejudgment interest, the case law was conflicting. Thus, the question for the court was whether this specific declaration was a pecuniary judgment or not. The court considered the underlying principle for the award of prejudgment interest, which is that the plaintiff has been kept out of their money, and should be compensated for the harmful effects of delay. In conclusion the court held at para. 36 that the declaration was a pecuniary judgment as the plaintiff was kept out of their money, while the defendants had use of it.*

*9 In light of the above authorities, I conclude that both my awards for damages for loss of opportunity and for general damages are pecuniary judgments for the purpose of s. 1(1) of the Act. Both remedies are, in essence, monetary awards or "sound in money". They do not fall into any other recognized categories such as a divorce decree or injunction. They are awarded as a lump sum. Woo notwithstanding, there does not appear to be any case law that restricts the notion of "pecuniary judgment" based on the principle that a plaintiff has not been kept out of their money. In fact, Woo reaffirms that the main consideration is whether the award is monetary. The courts have also recognized that the application of s. 1(1) is mandatory unless expressly excluded by the Act (V. (J.L.) v. H. (P.) (1997), 40 B.C.L.R. (3d) 73 (B.C. S.C.) [J.L.M.], at para. 8).*

*10 That brings me to the consideration of whether either award is excluded from the application of s. 1 of the Act by s. 2.*

*11 A "pecuniary judgment" is not to be confused with a head of damages (see B. (K.L.) at para. 3; V. (J.L.) at para. 5). That is, "pecuniary judgment" does not refer, solely, to pecuniary damages. Therefore, unless explicitly excluded under s. 2, non-pecuniary damages are also included in the calculation of interest under s. 1.*

1. **Post-judgement interest**

Post-judgement interest is intended to compensate a successful plaintiff for the delay in their receipt of an award following an order. These delays may be caused by an appeal, or other unforeseen circumstances. Post-judgement interest is regulated by [Part 2 of the *Court Order Interest Act,* RSBC 1996, c 79](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96079_01#part2)*.* S.7, of the *Act* states:

***Interest rate***

*7 (1) In this section, "interest rate" means an annual simple interest rate that is equal to the prime lending rate of the banker to the government.*

*(2) A pecuniary judgment bears simple interest from the later of the date the judgment is pronounced or the date money is payable under the judgment.*

*(3) During the first 6 months of a year interest must be calculated at the interest rate as at January 1.*

*(4) During the last 6 months of a year interest must be calculated at the interest rate as at July 1.*

*(5) Despite subsection (2), interest in respect of a judgment pronounced before April 1, 1992 must be calculated from the later of that date or the date the money is payable under the judgment***.**

When the delay in payment of an award has been caused by an appeal, the successful plaintiff will be compensated for the delay using the interest rates stipulated under s.7 (3) or 7(4) of the *COI Act*. This was determined in *Pallos v. Insurance Co. of British Columbia*, [1995 CanLII 1463 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii1463/1995canlii1463.html#document), in which Finch J.A. concluded that:

*8 Before a determination as to entitlement to interest can be made, it is necessary to identify the date or dates upon which entitlement to interest is to be decided. It is settled law that a plaintiff who succeeds on appeal ought, so far as the calculation of interest is concerned, to be placed in the same position he would have had if the trial court had made the order obtained by the plaintiff on appeal: see Lewis Realty Ltd. v. Skalbania (1980), 25 B.C.L.R. 17, 18 C.P.C. 174 (C.A.). It is also settled that interest on the amount by which a judgment is increased for future loss of capacity to earn income is to be calculated as from the date of judgment at trial: see Freitag v. Davis (1984), 54 B.C.L.R. 112 (C.A.).*

This was subsequently affirmed by the BC Court of Appeal in the decision of *Hockin v. B.C. Bancorp*, [1996 CanLII 3685 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1996/1996canlii3685/1996canlii3685.html).

There are other events that can delay the provision of an award. An example of this was provided in the oral reason Ahmad J. in *Layton v. Perales* (Unreported), Vancouver Registry, Docket: M155171, 20210113. In this decision, the defendant had not paid out an award of $299,883.34 that had been awarded by judgement on October 9, 2019, leading the plaintiff to seek an order that the defendant pay post-judgement interest in the amount of $4,935.59.

While the defendant did not dispute that post-judgement interest was warranted given the circumstances, they argued that the judge should use their discretion under s.8 of the *COI Act* to vary the interest payable to the plaintiff. In laying out the factual circumstances of the application, Ahmad J. summarized the circumstances as follows:

*[8] The defendant refers to three particular circumstances that delayed the payment and which he says are atypical. The first was the occurrence of COVID-19 that delayed proceedings and did not allow the court to operate on a normal schedule. The second was a period of time in March 2020 in which the defendant sought to set down an application to deal with the issue of amounts payable matters, but to which they had no reply from the plaintiff. Finally, and most notably and most importantly to the defendant, he says that due to the uncertainty of the application of s. 83 of the Insurance (Vehicle)Act, R.S.B.C. 1996, c. 231, it was uncertain of the amount that would ultimately be payable to the plaintiff. The defendant was reluctant to make payment until those uncertainties with the application of s. 83 were determined*

Ahmad J. ruled that none of the reasons provided by defence counsel were sufficient to warrant the variation of the post-judgement interest payable to the plaintiff. Ahmad J provided the following reasons for declining to do so:

*[10] I accept that the occurrence of the COVID-19, lapses in communication and some uncertainty in the law may be, in some cases, a source of uncertainty and delay. I am not satisfied that in this case those circumstances are sufficient to invoke my discretion to vary the date on which interest is payable as contemplated by s. 8 of the Act.*

*[11] First, the disputed amount relates to interest that was payable between the periods of October 9, 2019, and December 16, 2019, a period in which the implications and the effect of COVID-19 had not yet occurred. Given that timing, I do not accept that any variation should be made on that basis.*

*[12] Secondly, to the extent that the defendant received no response for requests for a hearing date, he could have unilaterally set the matter for hearing in accordance with the Rules. His failure to do so may have been a matter of his counsel’s professional courtesy, for which I make no criticism. However, it cannot form the basis for a variation of the interest payable pursuant to s. 8 of the Act.*

*[13] That leaves the uncertainty of the law in respect of the application of s. 83 of the Insurance (Vehicle) Act. However, the law is the law. Until it is changed by the legislature or interpreted by the Court, a person must comply with the rights and obligations imposed by the law as it stands. I do not find that the possibility of a change to the law, or any uncertainly of the law, is a sufficient basis on which to base a s. 8 variation*.

A recent case that summarizes and discusses both pre- and post-judgement income, in addition to management fees, is the decision of *Rhodes v. City of Surrey*, [2020 BCSC 1318](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1318/2020bcsc1318.html?autocompleteStr=2020%20BCSC%201318&autocompletePos=1). The plaintiff was involved in a single vehicle accident, and alleged that the City of Surrey’s negligent winter road maintenance caused the plaintiff’s accident. The plaintiff suffered severe injuries as a result of the accident, and at trial in November 2015 a jury awarded her $3,576,000 in damages (*Rhodes v. City of Surrey*, [2016 BCSC 1880](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1880/2016bcsc1880.html?autocompleteStr=2016%20bcsc%201880&autocompletePos=1)). This award subsequently reduced to $223,537 after the jury found that the plaintiff was contributorily negligent and was apportioned 75% liability. They jury also ruled that the plaintiff had failed to mitigate her damages. The plaintiff appealed this decision. The BC Court of Appeal in *Rhodes v. Surrey (City)*, [2018 BCCA 281](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca281/2018bcca281.html?autocompleteStr=2018%20bcca%20281&autocompletePos=1), upheld the jury’s contributory negligence ruling, but found that the jury’s ruling on the failure to mitigate must be set aside. As such, the plaintiff’s award was changed to 25% of $3,576,000, or $894,150.

1. **Tax gross-up and management fee**

**Tax gross-up:**

A cost of future care award is founded on the theory that the tortfeasor must provide a fund from which the victim may draw to meet future expenses as they occur. It is a presumption of law that the fund will be invested and will earn income. Tax must be paid on the interest received from the fund.

Because the award of damages presumes that the sum awarded will be invested and will earn interest, the amount the plaintiff receives will almost invariably be reduced because of the tax implications. Therefore, awards for future cost of care are “grossed up” to offset the tax payable on the investment, ensuring that the plaintiff has a sum sufficient to satisfy his or her future needs**.**

The decision of *Townsend v. Kroppmanns*, [2002 BCCA 365](https://www.canlii.org/en/bc/bcca/doc/2002/2002bcca365/2002bcca365.html?autocompleteStr=2002%20BCCA%20365&autocompletePos=1), affirmed [2004 SCC 10](https://www.canlii.org/en/ca/scc/doc/2004/2004scc10/2004scc10.html?autocompleteStr=2004%20SCC%2010&autocompletePos=1), discussed the law on tax gross-up and management fees. In the BC Court of Appeal, Finch C.J.B.C., writing for a unanimous Court, stated at paras 33-35:

*33 Since 1978 damage awards for seriously injured plaintiffs have been broken down into their various components including non-pecuniary damages, past loss of income, loss of capacity to earn income in the future and cost of future care. The award for cost of future care is usually based on evidence as to various anticipated costs of providing adequate care for the injured plaintiff over the course of her lifetime. The costs will not be incurred until dates or times in the future, but the law allows a one-time lump sum award to be made at the conclusion of the trial. That lump sum amount is determined by "capitalizing" the future costs. Because the lump sum can earn interest for the plaintiff, the law recognizes that the present amount required to provide for future care will be less than the sum of all future care costs. Expert opinion evidence has therefore been admitted to reduce those future costs to a present lump sum amount. (Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 (S.C.C.), Thornton v. Prince George Board of Education, [1978] 2 S.C.R. 267 (S.C.C.), Teno v. Arnold, [1978] 2 S.C.R. 287 (S.C.C.).)*

*34 The next step in the development of this law was the recognition that the income earned on the lump sum award for costs of future care would be taxable. Once the tax was paid on the fund's income, the remainder would be insufficient to provide for the future costs when they were incurred. Accordingly, the case law acknowledged the need to increase the lump sum award by an amount sufficient to pay income tax on the fund's income and to leave intact a fund sufficient to pay for the future costs as they were incurred. This is the concept of "tax gross-up." (Watkins v. Olafson, [1989] 2 S.C.R. 750 (S.C.C.).)*

*35 The purpose of the award for cost of future care, and the purpose of the add-on for tax gross-up, is to ensure that a seriously injured plaintiff is adequately cared for during the rest of her life. (See Andrews, supra, and Cherry (Guardian ad litem of) v. Borsman (1992), 94 D.L.R. (4th) 487 (B.C. C.A.).)*

Tax gross up is to be determined as of the date damages are assessed, deemed to be the date of the original trial judgment, and on the basis of the total sum awarded (*Hockin v. B.C. Bancorp*, [1996 CanLII 3685 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1996/1996canlii3685/1996canlii3685.html)).

The marginal tax rate required for calculating the tax gross up is determined by “stacking” the income from investing the future cost of care award onto the income earned from investing the future income loss award and onto residual earnings. In *Hodgins v. Street*, [2010 BCSC 455](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc455/2010bcsc455.html?autocompleteStr=2010%20BCSC%20455&autocompletePos=1), Kelleher J. summarized the impact of “stacking” for calculating tax gross up pioneered by economist Robert Carson at paragraph 15 as follows:

*[15] The plaintiff’s income is “stacked” to protect the cost of care award from grossing-up with an assumed tax rate that is too low. Stacking treats the income from sources other than the cost of care component as “first dollars”, and income from investment of the cost of care component as “second dollars”, so the second dollars will attract the highest applicable marginal tax rate.*

This method of calculating tax-gross up was endorsed in the decision of *Cikojevic v. Timm*, [2012 BCSC 1688](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1688/2012bcsc1688.html?autocompleteStr=2012%20BCSC%201688&autocompletePos=1), where Brown J. endorsed the approach taken by Mr. Carson, and subsequently adopted by Kelleher J., at paras. 35 & 36.

At the Supreme Court of Canada, in *Townsend v. Kroppmanns*, [2004 SCC 10](https://www.canlii.org/en/ca/scc/doc/2004/2004scc10/2004scc10.html?autocompleteStr=2004%20SCC%2010&autocompletePos=1) Deschamps J. expanded upon the justification for tax gross up and management fees:

*21 This final and most important principle is that the plaintiff has property of the award. The plaintiff is free to do whatever he or she wants with the sum of money awarded: Andrews, supra, at pp. 246-47. On this issue, I am in complete agreement with the reasons delivered by Finch C.J.B.C. in the Court of Appeal. He held that it is not relevant to inquire into how the plaintiff chooses to spend the amounts recovered for the assessment of damages for management fees and tax gross-up. Consequently, management fees and tax gross-up are to be assessed based on the first assessment of damages and not according to the amount available for investment as eventually found at some indeterminate future date. In other words, the appropriate basis for calculation is the one determined at trial, without considering what happens thereafter. It is improper for a trial judge to consider what the plaintiff does with awarded damages. As Dickson J., as he then was, wrote in Andrews, supra, at pp. 246-47:*

*It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes.*

**Management fees:**

The award of damages for future pecuniary losses will normally involve an estimate of a periodic sum of annual loss occurring over a given period of time expressed in terms of present value. This in turn implies that the sum is invested appropriately in interest bearing securities to yield an effective return. However, the plaintiff may lack the necessary intelligence or sophistication to invest the money wisely and there is a risk that the fund will be depleted prematurely.

In such circumstances, the Court will award management fees with respect to the future cost of care and loss of future earnings. The projected cost of the management assistance is added to the damages so that the fund will subsist for the required length of time.

In *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 SCR 650, Sopinka J., writing for a unanimous Court, explained the basis of a management fee award as follows at para. 2:

*…The only principle that appears to be applicable is that the defendant must take the plaintiff as he finds him, including his state of intelligence. Whether this is low by reason of the injuries complained of or its natural state, a management fee or an investment counselling fee should be awarded if the plaintiff's level of intelligence is such that he is either unable to manage his affairs or lacks the acumen to invest funds awarded for future care so as to produce the requisite rate of return.*

The award for management fees covers a wide range of possible expenses such as record keeping and accounting for various investments, professional advice and commissions and fees associated with the buying and selling of investments. The rationale for management fees and some basic principles were set out in the Law Reform Commission of British Columbia, *“Report on Standardized Assumptions for Calculating Income Tax Gross-Up and Management Fees in Assessing Damages”* (1994).

*The reason why courts occasionally award management fees is that if the plaintiff is forced to pay for investment assistance from the awards for cost of care and loss of future earnings, those funds will be exhausted prematurely. The projected cost of the management assistance is therefore added to the damages so that the fund will subsist for the required length of time. Unlike the gross-up, management fees are allowed with respect to the awards for both cost of future care and the loss of future earning capacity.2 Research conducted on behalf of the Committee indicated that while principles were developing in the case law with respect to the circumstances in which a management fee should be allowed, there appeared to be little uniformity in the size of management fees in relation to the total award for future loss. The basis for arriving at a particular amount was rarely stated adequately.*

*Award of a management fee is not automatic. A case for it must be made out. The leading case is I.C.B.C. v. Mandzuk, in which the Supreme Court of Canada upheld an award of a management fee to a quadriplegic plaintiff who, though mentally unimpaired, lacked the education and ability to invest the future loss award so as to produce the necessary income needed for lifetime care. The Supreme Court held that a management fee should be awarded when a plaintiff is unable to manage his or her affairs or lacks the ability to invest the fund to produce the required return for the fund to be self-sustaining for the proper length of time. It laid down a requirement for a factual basis to support a claim for a management fee. Specifically, the evidence must show:*

*• a necessity for management assistance;*

*• a necessity for investment advice in the circumstances;*

*• the expected cost of these services.*

*The Supreme Court did not go as far as the majority in the British Columbia Court of Appeal, which stated in its judgment in Mandzuk that “most people would need professional advice” to manage a large fund for a lifespan of care. This difference between the judgments highlights an unresolved problem. It is whether or not a fee should be allowed to a plaintiff who has normal intelligence and ability, but who lacks investment experience. Some courts have taken the position that anyone can buy bonds and guaranteed investment certificates without assistance, so no fee is required for a plaintiff in this category. Others have awarded nominal sums to allow for some initial investment planning and accounting services.*

The quantum of management fee will depend upon the degree of assistance required by the plaintiff. The Law Reform Commission suggested there are four levels of fees (at page 45):

*Level 1 – The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover.*

*Level 2 – The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award.*

*Level 3 – The plaintiff will need management services in relation to custody of the fund and accounting for investment on a continuous basis.*

*Level 4 – The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.*

Damages for fund management require an exercise of judgment and are to be assessed, not calculated. The award depends on the evidence adduced in each particular case: *Lee (Guardian ad litem of) v. Richmond Hospital Society*, [2003 BCCA 678](https://www.canlii.org/en/bc/bcca/doc/2003/2003bcca678/2003bcca678.html?autocompleteStr=2003%20BCCA%20678&autocompletePos=1). The fundamental question to be addressed in each particular case is the level of management assistance which is required by the injured plaintiff to achieve the requisite rate of return: *Bystedt v. Hay*, [2007 BCCA 84](https://www.canlii.org/en/bc/bcca/doc/2007/2007bcca84/2007bcca84.html?autocompleteStr=2007%20BCCA%2084&autocompletePos=1).

1. **Bills of Costs and Taxation**

Disbursements are out of pocket expenses incurred by the lawyer.

Cost and disbursements are assessed at the conclusion of the matter – after settlement or judgment. If you are entitled to costs, you must prepare a Bill of Costs.

* A Bill of Costs lists a number of categories of expenses and items you can claim on the tariff;
* For each category, the party indicates the amount of “units” expended in relation to it;
* There may be a state minimum and maximum for particular items, some are set at an assigned number;
* The total number of units is then added up and multiplied by the unit value according to the prescribed scale of costs.

In addition to the Bill of Costs, you must prepare a list of disbursements for things like: court filing fees, photocopying, faxes, amounts paid to experts, witness fees, etc.

It is important for plaintiff’s counsel to have an understanding of what costs have been incurred. Settlement offers are presented as *plus reasonable costs and disbursements* or *all inclusive*. When the latter is presented, the client must be advised of what costs and disbursements will be deducted from that total.

Once the Bill of Costs and disbursements are completed, they are sent to the other party for agreement.

If agreement is not reached, an appointment is made to have the costs assessed by the Registrar of the Supreme Court – this process is referred to as a Taxation Hearing.

Parties will prepare submissions addressing any disputed costs and disbursements, justifying their claims. At the Taxation:

* Go through the Bill of Costs with the Registrar;
* Provide justification via invoices, receipts, affidavit evidence;
* Registrar will sign a certificate of costs;
* The filed certificate becomes enforceable as a judgment.

1. **The 6% Disbursement Cap**

As was previously alluded to earlier in the course, the Government of British Columbia has imposed a 6% cap on all disbursements incurred in the course of litigating a motor vehicle injury claim. This has been done through the passing of the [*Disbursements and Expert Evidence Regulation*, BC Reg. 31/2021](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/210_2020), which is a regulation of the [*Evidence Act,* RSBC 1996, c 124](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96124_01).

S. 5 of the *Regulation* states:

***Limits on amount of disbursements***

***5****(1) In this section:*

*"disbursement limit" means, in relation to a vehicle injury proceeding,*

*(a) the amount that is 6% of the total award of damages assessed by the court in the vehicle injury proceeding or, if an offer to settle the vehicle injury proceeding is accepted, 6% of the amount offered, or*

*(b) if the court dismisses the vehicle injury proceeding or, at the conclusion of the vehicle injury proceeding, does not make an award of damages, the amount determined by the court;*

*"excluded disbursements" means the following:*

* 1. *fees payable to the Crown under the Supreme Court Civil Rules;*

*(b) fees payable to the sheriff for non-refundable deposits in civil jury trials under the Supreme Court Civil Rules;*

*(c) disbursements incurred by a party if the court ordered the costs of the proceeding to be paid as special costs;*

*(d) disbursements incurred for an expert report on the issue of liability, if the court ordered that those expenses are excluded disbursements.*

*(2)Only the following may be allowed or awarded to a party in a vehicle injury proceeding as disbursements:*

*(a) disbursements up to the disbursement limit;*

*(b) excluded disbursements.*

*(3)The limits set out in subsection (2) do not apply*

*(a) to a vehicle injury proceeding if*

*(i) a notice of trial was filed and served before August 12, 2020, and*

*(ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is before June 1, 2021, or*

*(b) to a vehicle injury proceeding if*

*(i) a notice of trial was filed and served before August 12, 2020,*

*(ii) the trial date set out in the notice of trial filed in relation to the vehicle injury proceeding is on or after June 1, 2021, and*

*(iii) the court is satisfied that the party necessarily or properly incurred disbursements before August 12, 2020 in excess of the disbursement limit.*

This regulation applies to all motor vehicle related injuries post August 12, 2020, and limits a Court’s ability to award disbursements that exceed 6% if the total award of damages from the Court, or in the case of an offer to settle, 6% of the amount offered.

It has been argued that this regulation disproportionately effects plaintiffs, as the cap is based entirely upon the award that they can expect to receive from their claim.

In *Zhang v Srott*, [2021 BCSC 1971](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc1971/2021bcsc1971.html?resultIndex=1), counsel for the plaintiff was opposing an application from the defendant requiring the plaintiff independent medical examination (“IME”) by a psychiatrist. The plaintiff opposed the application on the basis of the cost implications that would be incurred if the IME did proceed.

Master Elwood stated that, while regrettable, the law as it stands must be applied:

*37 As stated, I have some sympathy for the plaintiff's argument based on fairness and equality.*

*38 Since it is based on an award of damages or a settlement amount, it appears that the limit in the Disbursement Regulation on recoverable disbursements only applies to plaintiffs. Since they have the legal onus of proving liability and damages, it is reasonable to assume plaintiffs will inevitably incur disbursements assembling evidence to litigate their claims. Some of these disbursements will be incurred before plaintiffs' counsel can advise their client in a meaningful way on the value of the claim.*

*39 Moreover, the cost of reasonable disbursements in any given case is not necessarily a function of the value of the claim. For example, a plaintiff who suffers a broken foot, soft tissue injuries and headaches may reasonably need to incur as much in disbursements for expert reports as a plaintiff who suffers a traumatic brain injury. A plaintiff without employment may reasonably need to incur as much in disbursements as one who lost a lucrative career as a venture capitalist.*

*40 Many of the disbursements required to prepare a plaintiff's case for trial will be incurred before the plaintiff fully knows the defendant's case. Following receipt of the defendants' expert reports, a plaintiff might reasonably incur additional expenses to obtain responding reports or to prepare for cross-examination.*

*41 It stands to reason, therefore, that the burden of the limit on recoverable disbursements may fall disproportionately on certain plaintiffs.*

**Discussion: Does the 6% disbursement cap represent an attempt by the BC Government to make it as difficult as possible to effectively litigate motor vehicle injury claims in advance of no fault claims becoming the norm?**

1. **Appeals**

* It is important to diarize the appeal period following a trial judgment. Parties have 30 days to file a Notice of Appeal.
  + The liability judgment in *Uy v. Dhillon,* 2019 BCSC 1136 was appealed; the appeal was dismissed, see [2020 BCCA 163](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.pdf)
  + The lost housekeeping capacity award in *Kim v. Lin,* 2016 BCSC 2405 was appealed; the appeal was dismissed, see [2018 BCCA 77](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.pdf)
  + Our firm recently successfully defended ICBC’s appeal in *Steinlauf v. Deol,* [2022 BCCA 96](https://canlii.ca/t/jn2rr)
  + Appellate practice is complex and it is best practice to retain outside counsel who are experienced and reasonably known for their advocacy work in the Court of Appeal. Trial lawyers may not always be great appellate lawyers!