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| Law 435C.001 | Personal Injury Advocacy | 2020 Term 2 |
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**WEEK 12:
UMP, Part 7 Benefits, Minor Injury Caps, Limits on Experts, and “No Fault”**

* 1. **TEACHING OBJECTIVES**
* The goal of our last substantive class this semester is to review some of the unique aspects of personal injury law in the motor vehicle context, including Underinsured Motorist Protection as well as Part 7 benefits, and to review the changes happening in this area of practice in British Columbia.
* We will review the monumental changes recently pursued in respect of motor vehicle accident injury claims, as well as other anticipated changes that affect the substantive and procedural aspects of personal injury practice generally.
	1. **UNDERINSURED MOTORIST PROTECTION (UMP)**
* Everyone who purchases a policy of insurance with ICBC has mandatory UMP of up to $1,000,000 in coverage. For a nominal premium, you can buy more coverage, either with ICBC or private umbrella insurers.
* This excess insurance is available to you and all members of your household if any of you are innocently injured through the fault of another motorist who does not carry enough liability insurance. This is because there are many motorists who purchase only the mandatory minimum in liability insurance, $200,000, or in the case of a foreign driver (Washington State, for example), they may have even less.
* UMP or UIM (Uninsured Motorist) is triggered only in two ways: (a) by a judgment in excess of the tortfeasor’s policy limits and where the tortfeasor is demonstrated to have no assets, or (b) with ICBC’s consent to a policy limits settlement in the tort action. Until either of these events, there is no determination that the tortfeasor is in fact “underinsured”.
* As set out by Finch, CJBC., in *Beauchamp v. ICBC,* 2005 BCCA 507:

*“Arbitration is not available until it is shown that the person claiming is an “insured”, and is claiming in relation to an accident with an “underinsured” motorist”. The definition of “underinsured motorist”, set out above, contains three elements, A person falls within the definition if he or she: (1) is the owner or operator of a vehicle; (2) is legally liable for the injury or death of an Insured; and (3) is unable to pay the full amount of the Insured’s damages.*

*Until those facts are either determined by judicial decision, or by admissions, there is no “underinsured motorist” and the arbitration provisions of the Regulations cannot be engaged.”*

* Once the UMP claim is perfected, if the value of the UMP claim cannot be resolved by way of negotiated settlement, the matter proceeds to arbitration.
* Procedurally, the insured claimant files a Notice to Arbitrate with the British Columbia International Commercial Arbitration Centre (BCICAC).
* There are various lawyers in Vancouver who act as arbitrators of UMP claims, including Donald Yule, Q.C. and Vince Orchard, Q.C.
* Sections [148.1 – 148.4 of the *Insurance (Vehicle) Regulation*](http://www.bclaws.ca/EPLibraries/bclaws_new/document/LOC/freeside/--%20I%20--/Insurance%20Vehicle%20Act%20RSBC%201996%20c.%20231/05_Regulations/10_447_83%20Insurance%20Vehicle%20Regulation/447_83_10.xml#part10_division2) address UMP Claims.
* Various deductions apply to an UMP claim, including the payout of the tort claim:

"deductible amount" means an amount

(a) paid or payable by the corporation under section 20 or 24 of the Act, or recoverable by the insured from a similar fund in the jurisdiction in which the accident occurs [i.e. the statutory payment payable by ICBC for a hit and run or a wholly uninsured claim],

(b) paid or payable under section 148 [the statutory payment of $200,000 for uninsured tortfeasors or hit and runs in the U.S., or the territories],

(c) paid or payable under Part 7 or under legislation of another jurisdiction that provides compensation similar to benefits [treatment benefits paid and payable are deducted],

(d) paid directly by the underinsured motorist as damages [i.e. the tortfeasor’s policy limits payout is deducted],

(e) paid or payable from a cash deposit or bond given in place of proof of financial responsibility,

(f) to which the insured is entitled under the [Workers Compensation Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96492_00) or a similar law of the jurisdiction in which the accident occurs, unless

(i) the insured elects not to claim compensation under section 10 (2) of the [Workers Compensation Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96492_00) and the insured is not entitled to compensation under section 10 (5) of that Act, or

(ii) the Workers' Compensation Board pursues its right of subrogation under section 10 (6) of the [Workers Compensation Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96492_00),

(f.1) to which the insured is entitled under the Employment Insurance Act (Canada),

(f.2) to which the insured is entitled under the Canada Pension Plan [CPP Disability benefits, if the claimant qualifies, are deductible],

(g) paid or payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,

(h) paid or payable under vehicle insurance, wherever issued and in effect, providing underinsured motorist protection for the same occurrence for which underinsured motorist protection is provided under this section,

(i) paid or payable to the insured under any benefit or right or claim to indemnity, or

(j) paid or able to be paid by any other person who is legally liable for the insured's damages [i.e. a tortfeasor who has assets];

* An example:
	+ A British Columbian motorist, John Doe, suffers catastrophic injuries in a collision in Washington State.
	+ The at-fault motorist has only $50,000 in liability insurance.
	+ U.S. counsel settles out the claim at the at-fault motorist’s policy limits, but must seek ICBC’s consent to that settlement, and demonstrate that the tortfeasor has no or limited assets to satisfy the claim.
	+ If ICBC does not consent, the claim is not perfected.
	+ The only option then is to go to trial and get judgment.
	+ If ICBC does consent, or once an excess judgment is obtained, John Doe hires a lawyer in B.C. to file a Notice to Arbitrate.
	+ An arbitrator is mutually selected by ICBC and John Doe’s lawyer.
	+ The arbitrator sets deadlines for the disclosure of expert reports, discoveries, etc. and a hearing date is set.
	+ The hearing is privately conducted in a boardroom, but with live witnesses and cross-examination.
	+ The arbitrator assesses the value of the damages (if there is no judgment already) and then applies the requisite deductions.
	+ John Doe, because he is disabled from his injuries, is collecting a CPP Disability Pension. He has also been paid and is continuing to be paid Part 7 treatment benefits.
	+ John Doe’s damages are assessed at $1.5m.
	+ While he has $1m in UMP, the $50,000 paid out in Washington is deducted, as are his CPP benefits, past and prospective, as are the legal disbursements incurred in prosecuting the action.
	+ Thus, John Doe is undercompensated for his losses. But he would have been even more severely undercompensated if he didn’t have UMP coverage at all (which is thankfully mandatory at $1m). But, he would have been fully compensated if he had purchased the additional coverage for a total of $2m.
	+ One of our UMP cases proceeded to hearing on a narrow issue before Arbitrator Don Yule, Q.C., [Undisclosed v. ICBC, 25 August 2017](https://www.icbc.com/claims/disputes-appeals/Documents/undisclosed-vs-icbc-25aug2017.pdf).
		- At issue was whether the claimant lost the opportunity to become a partner in his father’s plumbing business because of his accident injuries, specifically a right shoulder injury that limited him from engaging in overhead work.
		- The arbitrator applied the law and found there was a real and substantial possibility that the claimant lost this opportunity, and assessed the chance of the opportunity being pursued, but for the collision, at 90%.
		- The assessment of the quantum and deductibles was not at issue, and these issues were subsequently resolved.
	1. **PART 7 BENEFITS**
* *Why do we call them Part 7 benefits*? Because these benefits are governed by Part 7 of the *Insurance (Vehicle) Regulations*.
* *Who is entitled to “Part 7 Accident Benefits”*? Section 79 states that Part 7 Accident Benefits are payable to anyone that is injured through the “use or operation of a motor vehicle” and who meets the definition of an “insured” in section 78:

**Coverage and benefits**

79 (1) Subject to subsection (2) and sections 80 to 88, 90, 92, 100, 101 and 104, the corporation **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 and that occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America.

**Interpretation**

78 In this part "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 section 42 who is not in default of premium payable under section 45 – (note that section 42 lists an “insured” as a **resident named on a driver's certificate** other than a person driving a vehicle that is exempted under section 43 or 44 of the Ac

(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 section 43 or 44 of the Act, 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 section 20 or 24 of the Act, and includes the personal representative of a deceased insured;

* Essentially, Part 7 benefits are meant to be expansive and cover almost anyone who is injured in a motor vehicle accident **regardless of who caused the accident**.
* Examples of scenarios where Part 7 does **not** apply (most of these involve accidents where there was no motor vehicle involved):
	+ Cyclist crashes on the road with no motor vehicle involvement;
	+ Road rage where the related assault occurs outside of the vehicle;
	+ The injured person is in the course and scope of his / her employment and may be a worker under the *Workers Compensation* regime.
* *What Accidents Benefits are included in Part 7*? Disability benefits, medical and rehabilitation benefits, funeral and death benefits.
* The maximum lifetime allowance is now doubled from $150,000 to $300,000. This change is retroactive to January 1, 2018.
	+ See: <https://news.gov.bc.ca/releases/2018AG0003-000164>
	+ Part 7 benefits hadn’t been increased since 1991
	+ The variety of treatment services covered is also expanded
	+ The government also pays a larger share of the cost, reducing user fees / out-of-pocket expenses for the injured individual
	+ Wage loss, home support, funeral costs, and death benefits have also been increased.
* **Disability benefits for employed persons (as the legislation currently reads):**

80 (1) Where, *within 20 days after an accident* for which benefits are provided under this Part, an injury sustained in the accident *totally disables an insured* who is an *employed person* from engaging in employment or an occupation for which the insured is reasonably suited by education, training or experience, the corporation shall, subject to section 85, pay to the insured for the duration of the total disability or 104 weeks, whichever is shorter, the lesser of the amounts determined under paragraphs (a) and (b): Note that ICBC’s maximum payment is $300 per week as defined in section 2 of Schedule 3. **(\*The NDP has now doubled this to $740/week).**

* The amount owing is “calculated by taking 75% of the insured's gross earnings for the 12 month period immediately preceding the accident and dividing by the number of weeks actually worked during that period”. Provided the plaintiff is averaging more than $300 per week, they receive the maximum amount from ICBC.
* **Deduction of other benefits** – Section 81 confirms that *Part 7 benefits are secondary* and paid only after deducting other benefits payable to the claimant.
* **Payments under *Workers Compensation Act****:* Section 82 states: Where an insured who is a worker to whom the Workers Compensation Act or a similar law of another jurisdiction applies is injured or killed in the course of his employment, **the corporation is not liable to pay benefits under this Part** for the injury or death, notwithstanding that the insured, his spouse or personal representative, has elected not to claim or has forfeited the insured's claim under the Workers Compensation Act or other similar law for the injury or death, except to the extent that the amount of any benefit payable under this Part exceeds the amount that would be payable to the insured, his spouse or personal representative under the Workers Compensation Act or other similar law for the same injury or death.
	+ *Note that this exclusion creates a huge issue for many claimants who are workers at the time of the accident but elect to proceed with the ICBC case instead of through WCB because they may not have disability benefits to help them survive through the litigation of their ICBC claim.*
* **S. 83(5) – Deductibility of Part 7 benefits from the tort award**

83 (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.

* In [Del Bianco v. Yang, 2020 BCSC 410](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc410/2020bcsc410.pdf), ICBC sought an order that the judgement for cost of future care granted at trial be entered **less $56,648, pursuant to s. 83(5),** the value of annual massage therapy treatments until the plaintiff’s age 75. The plaintiff was 35 years of age. ICBC thus was promising to pay the benefits ordered for the next 40 years, but under Part 7, rather than paying them out as part of the judgment. Mr. Justice Groves was critical and skeptical of ICBC’s promise to pay, and only permitted the deduction of one year’s worth of kinesiology sessions:

[13] It is concerning to the court that the representative of ICBC, Andrew Rudkowski, has not, in his affidavit, explained the failure of ICBC prior to trial to pay the massage therapy costs of the plaintiff. Liability for these motor vehicle accidents was never seriously in dispute. The injuries that required massage therapy, therapy that was necessary for Mr. Del Bianco to work, and effectively minimalize the extent of his tort claim, were lower back, shoulder and soft tissue injuries.

[14] Equally concerning is the apparent exaggeration, even today, less than one year into a potentially 40-year commitment, as to the extent of ICBC’s commitment to pay what was ordered after trial. In paragraph 6, Andrew Rudkowski deposes that “ICBC will reimburse Mr. Del Bianco for the necessary health care services he has incurred since March 22, 2019 and he incurs in the future”. That is, as noted by defence counsel, not true. They will only reimburse under their payment schedule of $80, when the court determined on the evidence the cost of such treatment at $85.

[15] Counsel for the plaintiff ably argued about the difficult financial circumstances that his injury and the actions of ICBC placed on the plaintiff from the time of the accident until, essentially, the time of this application. For whatever reason, unexplained, ICBC refused to pay for his massage therapy treatments….

[16] The court is faced with the representations of a claims specialist from ICBC that they will, in the future, pay these costs. The evidence about the lack of financial viability of ICBC, as attested to by the Cabinet Minister responsible for ICBC, the Attorney General, is not significantly disputed. Nor is it disputed that ICBC is not prepared to pay for massage therapy at a rate that the court has ordered.

[17] Additionally, and though this was not raised by counsel, but is a concern to the court, it is hard to know and predict, dare I say impossible to know and predict, at what rate ICBC will, in the future, be paying for massage therapy costs. This is not just a short-term future. This is 40 years. If, as now, this would require the plaintiff to pay the difference himself, to pay over and above what ICBC is prepared to pay, when the tort award was intended to fully compensate him. He may perhaps then seek reimbursement from ICBC. This creates a 40-year responsibility on this plaintiff to keep track of receipts, to make requests and deal with adjusters at ICBC. That is completely inconsistent with the general purpose of litigation and tort awards, to create some finality between the parties.

[18] In light of the history of non-payment by ICBC for no apparent reason, as experienced by the plaintiff, it is unrealistic, in my view, to require him for a period of 40 years, to have to continue to deal with an adjuster at ICBC in order to obtain what the court has already ordered he is entitled to.

[19] Additionally, as noted by the plaintiff, there is just too much uncertainty as to the ability of ICBC to make the payments at a rate ordered by the court. They are, today, not prepared to pay at the rate the court ordered. There is too much uncertainty related to their past history of being disinterested or disrespectful of the plaintiff’s claims. There is too much uncertainty as to what the future holds for ICBC, as evidenced by the affidavit of the plaintiff, for the court to have absolute confidence that if money is deducted from the tort award for Part 7 scheduled benefits, that they will actually be paid.

…

[21] As such, I am not prepared to deduct amounts for massage therapy under s. 83 from the plaintiff’s tort award. These comments relate to the massage therapy treatments to age 65 and the massage therapy treatments from age 65 to age 75. There is, as noted above, in the circumstances of a 40-year payment period, too much uncertainty and, frankly, too much of a requirement placed on this plaintiff to potentially request reimbursement weekly for funds not paid directly by ICBC, but payable out of his pocket. That is simply too much to expect.

* **Disability benefits for homemakers** - 84 (1) Subject to section 85 and subsection (2) of this section, where, within 20 days after an accident for which benefits are provided under this Part, an injury sustained in the accident *substantially and continuously disables* an insured who is a homemaker from regularly performing most of the insured's household tasks, the corporation shall compensate the insured for the period of the disability or 104 consecutive weeks, whichever is shorter, for reasonable expenses incurred by the insured to hire a person to perform the household tasks on the insured's behalf, subject to a maximum amount per week as set out in section 2 of Schedule 3. (2) No compensation is payable under this section in respect of household tasks performed by a member of the insured's family. *Note that this does not extinguish the plaintiff’s right to pursue an in-trust claim in the tort action.*
	+ The NDP is increasing home support benefits to $280 per week
* **Waiting period** - 85(1) No disability benefits are payable under section 80 or 84 unless the insured is disabled for a period of **more than 7 days.**
* **Disability beyond 104 weeks -** 86(1) Where an injury for which disability benefits are being paid to an insured under section 80 or 84 continues, at the end of the 104 week period, to the disabled insured as described in the applicable section, the corporation shall, subject to subsections (1.1) and (2) and sections 87 to 90, continue to pay the applicable amount of disability benefits to an insured described in section 80 or 84 (a) for the duration of the disability, or(b) until the insured reaches 65 years of age, whichever is the shorter period. **Note - this becomes a deductible amount under section 52 of the *Insurance (Vehicle) Act* and also under the UMP provisions.**
* **Review of benefits -** 87 Any benefits payable under section 80, 84 or 86 may be **reviewed every 12 months** and terminated by the corporation on the advice of the corporation's medical advisor – Note that termination requires the advice of a medical expert and is not subject to the whim of ICBC.
* **Medical and rehabilitation benefits** – 88(1) Where an insured is injured in an accident for which benefits are provided under this Part, the corporation shall, subject to subsections (5) and (6), pay as benefits **all reasonable expenses** incurred by the insured as a result of the injury for **necessary** medical, surgical, dental, hospital, ambulance or professional nursing services, or for **necessary** physical therapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis. *Note that the test is one of “reasonable expenses” and this has been the subject of much judicial commentary – for example ICBC will routinely cut off chiro, massage or physio despite the fact there has been an ongoing medical recommendation.*
* **Exceptional rehabilitation expenses – section 88 continued**
	+ Acquisition by the insured of one motor vehicle equipped as necessary and appropriate to its use or operation by the insured
	+ Alterations to the insured's residence that are necessary to make the residence accessible to and usable by the insured
	+ Reimbursement to the insured for the costs of attendant care, other than care provided by a member of the insured's family, where the insured has returned to and is residing in the community but is not capable of performing some or all of the tasks necessary to sustain an independent lifestyle,
	+ Reimbursement to the insured for costs incurred from time to time by the insured for the purchase and reasonable repair, adjustment or replacement of one or more of the following items: wheelchair, bed, aid for communication, transfer equipment,
* The total amount payable by ICBC for rehabilitation expenses is now increased to $300,000 from $150,000 as per AG David Eby’s announcement last year.
* 88(6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer. *Note – this section confirms that ICBC is a secondary insurer of last resort.*
* **Power to terminate benefits for refusal to undergo treatment or training** - 90 (1) Where, in the opinion of the corporation's medical adviser or vocational adviser and in the opinion of the medical practitioner attending an insured who is receiving benefits under section 80, 84, 86 or 88, (a) any medical, surgical or other similar treatment is likely to relieve in whole or part the disability of the insured, or (b) a retraining or educational program is likely to assist in the rehabilitation of the insured, the corporation may require the insured, at the expense of the corporation, to undergo treatment or complete the program. (2) Subject to subsection (3), where an insured refuses to comply with a requirement under this section, the corporation may, after giving the insured at least 60 days' notice in writing, by registered mail, postage prepaid, addressed to the insured at his last address according to the corporation's records, terminate payment of benefits under section 80, 84, 86 or 88.
* Note: Death and funeral benefits are also available, and have been increased by the government’s recent announcement: $30,000 for death benefit, $7,500 for funeral expenses.
* **Restriction on benefits** – s. 96 The corporation is not liable to pay benefits under this Part in respect of the injury or death of a person

(a) who is resident outside the Province and, at the time of the accident, is the occupant of a vehicle not described in an owner's certificate,

(c) who commits suicide or attempts to commit suicide, whether he is sane or insane,

(e) who is the occupant of a vehicle that, at the time of the accident, is being used for an illicit or prohibited trade or transport, or

(f) whose injury or death is caused, directly or indirectly, by sickness or disease, unless the sickness or disease was contracted as a direct result of an accident for which benefits are provided under this Part.

* Under section 99 of Part 7, ICBC can compel the insured to a **medical examination** with one of its physicians:

**Medical examination**

**99**    (1) An insured who makes a claim under this Part shall allow a medical practitioner, dentist, physiotherapist or chiropractor selected by the corporation, at the expense of the corporation, to examine the insured as often as it requires.

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

* These early IMEs under Part 7 may bind ICBC’s ability to later send the injured plaintiff to another independent medical examination with a new physician in the context of the tort action.

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| * In *Huppee v. Nowlin,* 2018 BCSC 27, the defendant wanted to compel the plaintiff to a vocational assessment, but ICBC had already compelled the plaintiff to an early vocational assessment just 18 months before under Part 7:

[24]        The parties agree that an examination under Part 7 may or may not be considered as a first independent medical examination in the tort action, depending on the circumstances. This issue has been the subject of many previous decisions in British Columbia. In *Vorasarn v. Manning*, [1997 CanLII 2351 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2351/1997canlii2351.html), 1997, 30 B.C.L.R. (3rd) 63, the Court of Appeal drew a clear distinction between ICBC’s rehabilitation department, who were responsible for handling the plaintiff’s claim as an ICBC insured, with ICBC’s role in handling the defence of the plaintiff’s tort claim on behalf of the defendant.[25]        In *Rathgeber v. Freeman*, [2013 BCSC 2117 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc2117/2013bcsc2117.html), Master Keighley summarized the evolution of the approach taken by courts on such applications, and concluded that the court now looks at all of the surrounding circumstances as opposed to focussing on what he described as an ‘atomistic view’:[18]      Until quite recently, in considering applications of this nature (namely, defence applications for medical examinations in tort actions following prior examinations in Part 7 claims), the court may be said to have taken an atomistic view of the circumstances leading up to the application, considering, for example:1. Whether the adjuster and/or counsel in the tort action were excluded from participating in the selection of the examiner: *Vorasarn v. Manning*, [1997 CanLII 2351 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2351/1997canlii2351.html), [1997] 30 B.C.L.R. (3d) 63 (B.C.C.A.); *Hamada v. Semple*, [1983] B.C.J. No. 1307;
2. Whether the Part 7 adjuster was also adjusting the tort claim: *Robertson v. Grist*, [2006 BCSC 1245 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc1245/2006bcsc1245.html);
3. Whether there was agreement within ICBC to use the Part 7 report in the tort action: *Robertson v. Grist, supra;*
4. Whether the tort action was in contemplation or commenced at the time the Part 7 report was ordered and whether the plaintiff was represented by counsel at that time: *Robertson v. Grist*, *supra;*
5. What the Part 7 examiner was instructed to address in his/her report: *Longva v. Pham*, [2007[ B.C.J. No. 1035, 42 C.P.C. (6th) 385; *Rowe v. Kim*, [2008] B.C.J. No. 2423, [2008 BCSC 1710 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1710/2008bcsc1710.html);
6. Whether the scope of the Part 7 report was limited to a rehabilitation opinion relevant only to Part 7 issues: *Longva v. Pham, supra.*

[19]      More recently, and in particular since the decisions of Barrow J. in *Teichroab v. Poyner*, [2008 BCSC 1130 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1130/2008bcsc1130.html), 62 C.P.C. (6th) 101,and Master McDiarmid in *Soczynski v. Cai*, [2011 BCSC 1299 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1299/2011bcsc1299.html), the court may be said to have adopted a more holistic view of the circumstances leading up to the application.[26]        In Barrow J.’s decision in *Teichroab v. Poyner*, [2008 BCSC 1130 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1130/2008bcsc1130.html), 62 C.P.C. (6th) 101, which is referenced in *Rathgeber*, Barrow J. stated the following at para. 24:… It may be that this is a distinction which will make little difference to the analysis in most cases because the same factors which are to guide the exercise of the discretion under Rule 30(2) now *Supreme Court Civil Rule*7-6(2) will inform a decision to be made under Rule 30(1), now *Supreme Court Civil Rule*7-6(1) when there has been an earlier assessment. Approaching the matter in this way serves to focus the inquiry on the exercise of the discretion with a view to the purpose of the Rule and obviates the need to guess as to whether, and if so when, a first assessment not ordered under the Rule may have evolved into such an assessment. Generally, the more closely an examination performed under a contractual obligation or for purposes of a claim for Part VII benefits resembles an independent medical examination under Rule 30(1), now *Supreme Court Civil Rule* 7-6(1) the more relevant it will be to the exercise of the discretion conferred by the Rule, and the less likely it may be that an order under that Rule will be made. That is so because the purpose of Rule 30 is, in part, to put the parties on an equal footing in terms of their ability to explore the issues in the case (see *Milburn v. Phillips* (1963), [1963 CanLII 497 (BC SC)](https://www.canlii.org/en/bc/bcsc/doc/1963/1963canlii497/1963canlii497.html), 44 W.W.R. 637 (B.C.S.C.), *Wildemann v. Webster* (1990), [1990 CanLII 206 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1990/1990canlii206/1990canlii206.html), 50 B.C.L.R. (2d) 244 (C.A.), and *Guglielmucci v. Makowichuk* (1996), [1996 CanLII 2127 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1996/1996canlii2127/1996canlii2127.html), 18 B.C.L.R. (3d) 68 (C.A.)[*Guglielmucci*]). To the extent an assessment prepared under a contract of insurance or in relation to a claim for Part VII benefits puts a defendant on an equal footing, the need for an assessment under Rule 30(1) now *Supreme Court Civil Rule* 7-6(1) will be mitigated.[27]        I conclude that I must review all of the surrounding circumstances in order to determine whether the Assessment constituted a first independent medical examination of the plaintiff, including the circumstances that gave rise to the Wallace Report and the contents of the report itself.…[36]        I do not find the defendant’s argument that neither the tort adjuster nor defence counsel were involved in instructing Dr. Wallace regarding either his Assessment or his report to be persuasive because although they may not in fact have played an active role, they had the opportunity to do so.…[50]        I find that the Assessment by Dr. Wallace was a first independent medical examination.…[54]        The evidence here does not satisfy me that a further medical examination is required to accomplish the objective of putting the parties on a level playing field because the defendant has not met its onus of establishing that there is a question or matter that could not have been dealt with at the previous examination.…[58]        I consider the conclusion in *Rathgeber v. Freeman* to be applicable here. After finding that the Part 7 report resembled a report in a tort claim in that case, Master Keighley went on to state in para. 26:There is, however, nothing in the evidence before me to show why a further *examination*, rather than a review of the available materials by Dr. Kousaie or some other qualified specialist is necessary to achieve reasonable equality with respect to medical evidence.* 1. **NEW EXPERT EVIDENCE LIMITATIONS**
* By Orders in Counsel made February 11, 2019 and March 22, 2019, the Province amended Rule 11-8(11) of the BC Supreme Court *Rules,* without due notice, accompanied by a press release from Attorney General David Eby confirming that “The rules committee did not recommend these changes and was not asked to approve these changes. These changes were a decision [unilaterally] made by government.”
* The effect of the rule change was to limit the number of damages experts in motor vehicle injury actions to a maximum of three.
* The TLABC brought a petition seeking to have the amended Rule quashed in [Crowder v. British Columbia, 2019 BCSC 1824](https://www.bccourts.ca/jdb-txt/sc/19/18/2019BCSC1824.htm). The TLABC argued three points:

a)    the Rule 11-8 Orders were contrary to a convention that requires such changes to be proposed or approved by the Committee; b)    the Rule 11-8 Orders were not authorized by the *Act*; andc)     the Rules 11-8 Orders were unconstitutional in that they contravene s. 96 of the *Constitution Act, 1867* by inhibiting the power of the Supreme Court of British Columbia to control its process and by denying access to the court to litigants. * *Crowder* was heard and decided by Chief Justice Hinkson. He found for the petitioner:

[120]     I find that the effect of the impugned Rule is to change the substantive law of evidence that has guided this Court from its inception, and I find that this is not one of the exceptional cases referred to by Justice Lambert where the *Rules* may create new substantive law*.* Accordingly, I find that the Rule 11-8 Orders (and with it, the impugned Rule) are not authorized by the *Act*.[121]     However, as changes to the substantive law could be made under primary legislation such as the *Evidence Act*, I will now consider the third ground advanced by the petitioners. …[124]     The petitioners argue that the impugned Rule unconstitutionally infringes the superior court’s core jurisdiction because it is a mandatory rule, eliminating judicial discretion, which impacts the court’s process in a way that rises to the level of an impairment. [125]     The petitioners contend that the impugned Rule strikes at the integrity of the adjudicative process, while depriving the court of the power to control and protect that process, by: a)    impairing a party’s right to be heard and to prove its case through otherwise admissible evidence;b)    specially benefitting defendants, in that the plaintiff bears the burden of proof of facts involving significant medical and economic complexity; c)     limiting plaintiffs’ litigation privilege in respect of proof of damages; d)    compromising the adversarial system of civil litigation by requiring routine resort to court-appointed experts in personal injury cases; and,e)    purporting to eliminate judicial discretion to the contrary.…[185]     Considering the totality of the submissions and the evidence before me, I find that the impugned Rule compromises and dilutes the role of the court, and encroaches upon a core area of the court’s jurisdiction to control its process.…[196]     I find that the impugned Rule infringes on the court’s core jurisdiction to control its process, because it restricts a core function of the court to decide a case fairly upon the evidence adduced by the parties. The effect of the impugned Rule is to require the court to play an investigatory function in place of its traditional non-adversarial role, contrary to the principle of party presentation.* AG Eby’s response to his loss in *Crowder*? <https://www.cbc.ca/news/canada/british-columbia/b-c-s-attorney-general-raising-the-spectre-of-no-fault-auto-insurance-legal-opponents-say-1.5350958>
* Eby then decided to re-approach the three-expert-limit cap through an amendment of BC’s *Evidence Act*, but not only is there a three-expert limit, but the government restricts the amount recoverable from the unsuccessful part for the cost of each expert report ($3,000) and the total amount recoverable is limited to 5% of the settlement or judgment amount!
* The CBABC’s position? <https://www.cbabc.org/News-Media/Media-Releases/2020/CBABC-opposes-changes-evidence-act>

“Expert fees for reports often exceed $3,000 and the cost of gathering evidence to present to court, including expert reports, is usually more than 5% — even in the most straight-forward of claims,” said Ken Armstrong, CBABC President. “Limiting the recovery of these expenses means only people with financial means will be able to present their case fully to a judge. These proposed changes disproportionately limit access to justice for our most marginalized residents.”Armstrong continued, “In an effort to resolve ICBC’s financial problems, the BC government is shifting the financial burden to BC residents and creating an access to justice issue for injured people who cannot afford to present their case with these restrictions in place.”***Food for thought***: As the Attorney General of the Province of British Columbia, is David Eby in a conflict of interest in prioritizing the interests of ICBC – one litigant – above the interests of all litigants in British Columbia? Should the Legislature’s Conflicts Commissioner be making an inquiry? COMMISSIONER’S ROLEThe Conflict of Interest Commissioner is an independent, non-partisan Officer of the Legislative Assembly who is responsible for impartially administering the Act.The Commissioner has three primary roles:* To provide confidential [**advice**](https://coibc.ca/resources-for-members/) to Members about their obligations under the Act;
* To oversee the [**disclosure process**](https://coibc.ca/disclosure-process/), including meeting with each Member at least annually to review the disclosure of the Member’s financial interests;
* **To respond to allegation that a Member has contravened the Act, and conduct an**[**Inquiry**](https://coibc.ca/about/#Making_a_Complaint)**if warranted.**
	1. **MINOR INJURY “CAPS”:** A refresher on our lesson about these caps from Week 4’s lecture on non-pecuniary damages:
* For motor vehicle accidents occurring after April 1, 2019, non-pecuniary damages for injuries that fall under the definition of “minor injury” are capped at $5,500. The two key pieces of legislation on this topic at the ***Insurance (Vehicle) Act*, RSBC 1996, c 231 [the *Act*]** and the **Minor Injury Regulation, BC Reg 234/2018 [the *Regulation*]**.
* Despite the cap on non-pecuniary damages, the other heads of damage remain “un-capped” (i.e. past/future income losses, loss of housekeeping capacity, future care, in-trust claims, etc.)
* What injuries fall under the definition of “minor injury”? Section 101(1) of the ***Act*** defines “minor injury” and “serious impairment”:

**“minor injury**” means a physical or mental injury, whether or not chronic, that 1. Subject to subsection (2), does not result in a serious impairment or a permanent serious disfigurement of the claimant, and
2. Is one of the following:
3. An abrasion, a contusion, a laceration, a sprain or a strain;
4. A pain syndrome;
5. A psychological or psychiatric condition;
6. A prescribed injury or an injury in a prescribed type or class of injury;

“**serious impairment”**, in relation to a claimant, means a physical or mental impairment that1. Is not resolved within 12 months, or another prescribed period, if any, after the date of the accident, and
2. Meets prescribed criteria.
* Section 2 of the ***Regulation*** provides the prescribed injury for definition of “minor injury”:

2. The following injuries are prescribed injuries for the purposes of paragraph (b) (iv) of the definition of “minor injury” in section 101 (1) of the Act:(a) a concussion that does not result in an incapacity;(b) a TMJ disorder;(c) a WAD injury. * Section 1 of the ***Regulation***sets out the following definitions:

**“incapacity”,** in relation to a claimant, means a mental or physical incapacity that1. Is not resolved within 16 weeks after the date the incapacity arises, and
2. Is the primary cause of a substantial inability of the claimant to perform
3. Essential tasks of the claimant’s regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant’s incapacity and the claimant’s reasonable efforts to use the accommodation to allow the claimant to continue the claimant’s employment, occupation or profession,
4. The essential tasks of the claimant’s training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant’s incapacity and the claimant’s reasonable efforts to use the accommodation to allow the claimant to continue the claimant’s training or education, or
5. The claimant’s activities of daily living;

**“activities of daily living”** means the following activities:1. Preparing own meals;
2. Managing personal finances;
3. Shopping for personal needs;
4. Using public or personal transportation;
5. Performing housework to maintain a place of residence in acceptable sanitary condition;
6. Performing personal hygiene and self-care;
7. Managing personal medication;

**“pain syndrome”** means a syndrome, disorder or other clinical condition associated with pain, including pain that is not resolved within 3 months;**“psychological or psychiatric condition”** means a clinical condition that1. Is of a psychological or psychiatric nature, and
2. Does not result in an incapacity;

**“sprain”** means an injury to one or more ligaments unless all the fibres of at least one of the injured ligaments are torn;**“strain”** means an injury to one or more muscles unless all the fibres of at least one of the injured muscles are torn; * Efforts must be made to accommodate an impairment and to continue employment, training/education, or activities daily living. Section 3 of the ***Regulation*** sets out the prescribed criteria for the definition of “serious impairment”:

**3**  For the purposes of paragraph (b) of the definition of "**serious impairment**" in section 101 (1) of the Act, the claimant's physical or mental impairment must meet the following prescribed criteria:(a)the impairment results in a substantial inability of the claimant to perform(i)the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,(ii)the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or(iii)the claimant's activities of daily living;(b)the impairment is primarily caused by the accident and is ongoing since the accident;(c)the impairment is not expected to improve substantially.* Section 101(2)-(3) of the ***Insurance (Vehicle) Act*** establishes that serious impairment caused by a failure to mitigate what was once a “minor injury” continues to be deemed a minor injury:

(2)Subject to subsection (3) and the regulations, an injury that, at the time of the accident or when it first manifested, was an injury within the definition of "minor injury" in subsection (1) is deemed to be a minor injury if(a)the claimant, without reasonable excuse, fails to seek a diagnosis or comply with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury, and(b)the injury(i)results in a serious impairment or a permanent serious disfigurement of the claimant, or(ii)develops into an injury other than an injury within the definition of "minor injury" in subsection (1).(3)An injury is not deemed, under subsection (2), to be a minor injury if the claimant establishes that either of the circumstances referred to in subsection (2) (b) would have resulted even if the claimant had sought a diagnosis and complied with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury.* Section 5 of the ***Regulation***sets out that where a claimant sustains more than one injury in an accident, each injury is to be diagnosed separately as to whether the injury is a “minor injury”. If there are both minor injuries and non-minor injuries, the cap applies to the damages for the non-minor injuries.
	+ For example, if a claimant sustains a broken leg and soft tissue injuries, the cap applies to the soft tissue injuries. The non-pecuniary damages for the broken leg will not be capped.
	+ Damages for non-pecuniary damages is limited to $5,500 for all of the minor injuries combined.
* Revisiting the question: What injuries fall under the definition of “minor injury”?
	+ Is a concussion a “minor injury”?
* The ICBC website sets out that where an injury continues to impact a claimant’s life for more than 12 months (i.e. unable to go to work or school, have to modify work hours/duties, or unable to care for self), the injury will no longer fall under the definition of “minor injury”.
* Who determines whether a claimant’s injury is “minor”? The claimant’s physician. However, if the physician is unable to make a clear diagnosis, the claimant is not recovering as expected, or factors are present that complicate the claimant’s recovery from the injury, the physician must refer the claimant to a “registered care advisor”. The registered care advisor must then assess the claimant’s injury within 15 days and provide a report outlining the diagnosis or treatment of the claimant’s injury within 10 days.
* If a dispute arises over what is or is not a minor injury, a claim may be brought through the Civil Resolution Tribunal (the “CRT”). Under section 133(1)(a) of the ***Civil Resolution Tribunal Act,* SBC 2012, c 25**, the CRT has jurisdiction in determining whether an injury is a “minor injury” for the purposes of the ***Act***.
* Who has the burden of proving that an injury is or is not “minor”?
	+ Section 4 of the ***Regulation***: “In civil proceedings relating to an injury, the burden of proof that the injury is not a minor injury is on the party making the allegation that it is not a minor injury.”
	1. **THE NEW FRONTIER: “NO FAULT”**
* On February 6, 2020, AG David Eby announced that the NDP government would be moving to an entirely new “no fault” system of automobile insurance, by May 2021.
* From ICBC’s website:

The B.C. government and ICBC are creating a new way of doing auto insurance.Coming May 2021\*, **Enhanced Care** **coverage** will:* Save drivers approximately 20 per cent or $400, on average, on their auto insurance
* Give all British Columbians access to significantly enhanced medical care, recovery and wage loss benefits if they’re hurt in a crash, **regardless of who was responsible**

How is this possible? With Enhanced Care coverage, the costs associated with our litigation-based system, like those for **expensive lawyers** and legal fees, are largely removed – and those savings will go toward lowering your rates and dramatically improving your benefits. **You can have peace of mind knowing you’ll always get the care you need if you’re injured in a crash**.* Does this sound too good to be true?
* Why have “expensive” lawyers had been involved until now? Because ICBC has not offered fair compensation to injured claimants in the past.
* Does the rhetoric from the NDP bring lawyers into disrepute in the eyes of our community? What are the repercussions of the insinuation that lawyers are (a) unnecessary, and (b) too expensive?
* The NDP were elected on a platform promise not to bring in No Fault insurance.

**Why the change and when was the decision made?** See: <https://vancouversun.com/news/politics/from-no-fault-hater-to-no-fault-lover-the-inside-story-on-david-ebys-decision-to-revamp-icbc/> “Eby has been quietly working to develop no-fault auto insurance in B.C. since November 2018,”“He fired a warning shot to trial lawyers in October 2019: ‘In going after these reforms, they should be careful what they wish for, because there won’t be many options left for government after that.’”“By then, Eby knew no-fault was coming.”  |
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| **Voices in opposition:**  |  |

* The official campaign against: <https://www.notonofault.com/>
* **Opposition Liberal critic Jas Johal** said the no-fault legislation simply creates a bigger, bureaucratic ICBC where injured people have little say in their recovery.
* **Insurance Bureau of Canada**:

“Minister Eby has made clear, and British Columbians have acknowledged, they’ve lost trust in ICBC, but today we’re being asked to put our lives in their hands,” said Aaron Sutherland, vice-president of the Insurance Bureau of Canada, which represents private auto-insurers. “British Columbians should be concerned about that.”

* **Canadian Bar Association, BC Branch**:

The Canadian Bar Association, BC Branch (CBABC) is **deeply disappointed** in the announcement made today by Premier John Horgan and Attorney General David Eby to introduce a “no-fault” insurance plan to address ICBC’s ongoing financial problems.

CBABC is opposed to no-fault insurance for British Columbians. Across the country, these programs have been proven to reduce the rights of injured victims to have their claims assessed based on their individual circumstances.

* **Law Society of British Columbia**:

“The right of legal assistance and the right to have disputes about fair compensation for motor vehicle accidents determined by the courts are rights that should not be set aside simply to solve ICBC’s problems,” said President Craig Ferris, QC. “The Law Society is concerned that individuals who are injured in a motor vehicle accident, through no fault of their own, will find themselves alone in dealing with an insurance monopoly that historically has focused more on cost reduction than assisting those in need.”

“We are concerned that the proposed regime will discourage seriously injured and disabled accident victims from getting the legal advice they need,” President Ferris added. “The Law Society will be bringing our concerns to the attention of the Attorney General and Minister responsible for ICBC, as well as other Members of the Legislative Assembly.”

* 1. **HOUSEKEEPING**
* Next week’s class (by Zoom) will be our last class of the semester.
* We will circulate, in advance, a past year’s examination for discussion and review.
* Please send us your questions about any of the lectures this semester, and we’ll also answer those live on the video conference call.
* We will record the call for those of you who are now international and may not be able to join us at the scheduled time.
* The final exam is scheduled for **Monday, April 20, 2020 at 9:00 a.m**. Students will complete the examination by computer (remotely) and will be graded as usual.
* We encourage you to **please complete the online course evaluation** and let us know what improvements we can make for the course next year! The evaluation is now open until Monday, April 13. You should have already received an email from support@SEOT.ubc.ca on March 28th that directs you to the teaching evaluation site.