

DIGEST OF INSURANCE LAW

BRITISH COLUMBIA

Not revised for this Edition

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Supreme Court of British Columbia has unlimited jurisdiction in all civil cases. There are registry offices of court in principal centers of province. Proceedings can be commenced in any registry notwithstanding residence of plaintiffs or defendants.

There is also system of Provincial Courts whose jurisdiction in civil matters is limited to \$10,000 and is conferred solely by statute. Territorial jurisdiction of Provincial Court is entire province, but place of trial is regulated by Small Claims Act.

There are continuous sittings of Supreme Court in principal centers of province. Assize sittings are scheduled for other cities and towns.

Appellate Court

Court of Appeal is court of last resort in province, from which civil appeal to Supreme Court of Canada is possible only with leave. Court of Appeal has sittings only in Vancouver and Victoria. Supreme Court of Canada, at Ottawa, is final court in appellate process in Canada.

LAW

Law Reports

- A.C.W.S. – All Canada Weekly Summaries.
- B.C.D. Civ. – British Columbia Decisions, Civil Cases.
- B.C.L.R. – British Columbia Law Reports (1977 - current).
- B.C.R. – British Columbia Reports (1860 - 1947).
- B.C.W.L.D. – British Columbia Weekly Law Digest.
- C.C.L.I. – Canadian Cases on Law of Insurance.
- C.C.L.T. – Canadian Cases on Law of Torts.
- D.L.R. – Dominion Law Reports.
- F.C.R. – Federal Court Reports.
- I.L.R. – Insurance Law Reports (Canadian).
- N.R. – National Reporter.
- S.C.R. – Supreme Court Reports.
- W.W.R. – Western Weekly Reports.

Statutes and Regulations

The most significant statutes and regulations governing insurance law in British Columbia are the following:

- Class Proceedings Act, R.S.B.C. 1996, c. 50.
- Financial Institutions Act, R.S.B.C. 1996, c. 141.
- Insurance Act, R.S.B.C. 1996, c. 226.
- Insurance Corporation Act, R.S.B.C. 1996, c. 228.
- Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231.
- Revised Regulations (1984) Under the Insurance (Motor Vehicle) Act (1998 Consolidation).

ACCIDENT AND SICKNESS INSURANCE

Part 4 of the Insurance Act governs accident and sickness insurance. Part 4, however, does not apply to accidental death insurance, disability insurance, or insurance provided under a contract of automobile insurance.

Exemption from Seizure. If the insured designates a beneficiary to receive insurance money payable in the event of death by accident, any insurance money payable to the beneficiary is not subject to the claims of the creditors of the insured. Section 107 of the Insurance Act provides that while there is in effect a designation of beneficiary in favor of any one or more of a spouse, child, grandchild, or parent of the insured, the rights and interest of the insured in the insurance money and in the contract so far as either relate to accidental death benefits are exempt from execution or seizure.

Disease Induced by Accident. May, if facts of case warrant, be found to be natural result of accident and indemnity may be recovered.

Excepted Risks. Section 88 of the Insurance Act requires the insurer to set out every exception or reduction affecting the amount payable under the contract of insurance, either in the provision affected by the exception or reduction, or under a heading such as "Exceptions" or "Reductions." Section 89 of the same Act sets out statutory conditions that are deemed to be part of every accident or sickness contract.



Notice of Proof of Claim. Notice must be given in writing not later than 30 days from date claim arises on account of accident, sickness, or disability. Proof of claim must be given within 90 days from date of accident, sickness or disability. Failure to give notice or to furnish proof of claim within time limits does not invalidate claim if given as soon as reasonably possible and in no event later than one year from date of accident or date claim arises. Action shall not be commenced to enforce claim more than one year after furnishing of sufficient proof of claim. No action can be brought until 60 days after filing proof of claim, unless shorter period is fixed by policy.

Court has statutory jurisdiction to relieve against forfeiture where there has been imperfect compliance with statutory condition as to proof of loss or other matter required to be done by insured with respect to loss. Court's power extends to relief against forfeiture where there has been imperfect compliance with a contractual condition. *Falk Bros. v. Elance Steel* [1989], I.L.R. 1-2506 (S.C.C.).

ACCIDENTAL MEANS

There is no general statutory definition of "accident" or "accidental means" in British Columbia. The only definition for the word "accident" appears in Part 3 of the Insurance (Motor Vehicle) Act and this definition is only applicable to that part of the statute. Word "accident" found in insurance policy is to be given its ordinary and popular meaning as denoting unlooked for mishap or occurrence, or untoward event which is not expected or designed. This definition brings within term "accident" those events which result from negligence of actor whose acts are being considered even if that negligence is gross. *Mutual of Omaha Ins. Co. v. Stats*, [1978] 2 S.C.R. 1153; *Canadian Indem. Co. v. Walkem Machinery & Equip. Ltd. et al.*, [1976] 1 S.C.R. 309; *Martin v. American International Assurance Life Co.* (2001), 86 B.C.L.R. (3d) 4.

ADJUSTERS, AGENTS, AND BROKERS

Subject to certain limited exceptions, no person shall act in province as insurance adjuster or as an employed of insurance adjuster unless person holds a valid and subsisting license issued by the Insurance Council of British Columbia (the "Council"). Exceptions include barristers or solicitors, insurance agents while acting on behalf of an insurer, and manager, branch manager or employee of an insurer in the province who is acting for that insurer.

Insurance adjuster is a person who makes any adjustment or settlement of loss of property or damage to property located in province that is insured against by

contract of insurance other than contract of marine insurance.

Subject to certain limited exceptions, no person shall act in British Columbia as an insurance agent or insurance salesperson unless the person holds a valid and subsisting license issued by the Council.

Insurance agent is a person, other than an insurance company, who solicits, obtains or takes an application for insurance, or negotiates for or procures insurance, or signs or delivers a policy, or collects or receives a premium.

Insurance salesperson is an individual who is employed by an insurance agent or by an insurer to solicit, obtain or take an application for general insurance, or to negotiate for or procure general insurance, or to collect or receive a premium for general insurance.

Agent licenses are of two classes: (a) life insurance, or life insurance together with either or both accident or sickness insurance; (b) general insurance which is defined as insurance that is not life insurance.

Insurance Corporation of British Columbia (the "Corporation") may appoint agents who are licensed under the Financial Institution Act. The Corporation may also appoint Superintendent of Motor Vehicles, a government agent, or a person authorized in writing by the Corporation as agent, and the provisions of the Financial Institutions Act regarding agents do not apply to persons so appointed.

Law in British Columbia does not recognize term insurance broker and no provision is made for licensing of insurance brokers as is done in laws of most of other provinces. Brokers will be licensed as agents.

Adjusters, agents and brokers have duty in law to act with reasonable and proper skill in rendering services. Their liability may be found in contract, tort, equity or breach of warranty of authority. *Fletcher v. Manitoba Public Ins. Co.* (1990), 116 N.R. 1 (S.C.C.); *Fine Flowers Ltd. et al. v. General Accident Assurance Co. of Canada* (1977), 81 D.L.R. (3d) 139 (Ont. C.A.); *Wilcox v. Norberg & Wiggins Ins. Agencies Ltd. et al.*, [1979] 1 W.W.R. 414 (B.C.S.C.), *aff'd*, [1981] 1 W.W.R. 197 (B.C.C.A.); *Cosyns v. Smith* (1983), 146 D.L.R. (3d) 622 (Ont. C.A.).

Whether agent acts for insured or insurer is question of fact. If insured, by means of collusion with agent, attempts to commit fraud on insurer for their mutual benefit insured cannot argue that agent was the agent of insurer for that purpose. *Norwich Union Fire Ins. Co. v. LeBell*, [1899] 29 S.C.R. 470; *Bastedo v. British Empire Ins. Co.*, [1913] W.W.R. 905, 18 B.C.R. 377 (C.A.).

Insurer is liable for fraud of its agent when acting within scope of his agency even though fraud may be for agent's own benefit.

Knowledge of agent is usually deemed to be knowledge of principal and if agent represents insurer, insurer is deemed to have knowledge of circumstances known to agent.

AGE

Where insurer admits liability for insurance money payable to a minor, insurer shall pay the money to the Public Trustee in trust for minor. If insurance money is payable to a trustee for a beneficiary who is a minor, insurer shall pay money to the trustee but written notice of the payment must be given to the Public Trustee. Where representative of infant may, under law of domicile of infant, accept payments on behalf of infant, insurer may make payment to representative and is discharged to extent of payment.

Capacity of Minors. Minor who has attained age of 16 has capacity to make enforceable contract of accident and sickness insurance and contract of life insurance. Minor who has attained age of 18 years has capacity to receive insurance money payable to him and to give valid discharge.

Majority. Age of majority in British Columbia is generally 19.

ASSIGNMENT

See also "FIRE INSURANCE."

Continuing Insurer. Where retiring insurer ceases to do business in province and continuing insurer agrees to assume liability under contracts of insurance issued by retiring insurer, insured may enforce rights against continuing insurer.

AUTOMOBILE INSURANCE

Age. Minimum 16 years - unlawful to drive without valid driver's license. If person is between 16 and 19 years, application for driver's license must be made by parent or guardian. If person under 18 years application for registration and license of motor vehicle must be signed by parent or guardian or provide proof person is self-supported and unable to obtain signature of his parent or guardian.

Compulsory Insurance. There is compulsory universal automobile insurance administered and operated by Insurance Corporation of British Columbia, a provincial crown corporation. Terms of coverage are set out in Insurance (Motor Vehicle) Act and Revised Regulations (1984) under the Insurance (Motor Vehicle) Act (the

"Regulations"). Copy of Act and Regulations may be obtained from Queen's Printer for British Columbia in Victoria or via the internet at http://www.qp.gov.bc.ca/stat_reg/statutes.

British Columbia has mixed tort and no-fault automobile accident compensation scheme. Certain specified accident benefits are provided irrespective of fault in accordance with Part 7 of the Regulations.

Compulsory minimum third party coverage is \$200,000.

Extension insurance in form of underinsured motorist protection is included to provide coverage equivalent to person's own third party limits where other party's third party limits are less.

There are statutory provisions for recovery against Insurance Corporation of British Columbia where loss is occasioned by uninsured vehicle or unidentified motorist. Where loss is occasioned by unidentified motorist written notice must be given to Corporation as soon as reasonably practical but in any event within six months of accident.

Vicarious Liability. Every person driving or operating motor vehicle who is a member of the household of owner of motor vehicle, and every person driving or operating motor vehicle who acquired possession of it with consent, express or implied, of owner is deemed to be agent or servant of owner and owner is thereby vicariously liable. Conditional purchaser is deemed to be owner, and the vendor is therefore not vicariously liable.

Income Loss. For motor vehicle accidents after June 17, 1997, past income loss damages (from loss date to trial date) is calculated based on net income loss instead of to gross income loss. §§52 and 54 of Insurance (Motor Vehicle) Act.

Guest Cases. Not applicable in British Columbia. Ordinary negligence sufficient.

"No-Fault" Coverage. As specified in Part 7 of the Regulations: (a) medical or rehabilitation benefits up to 150,000; (b) disability benefits for employed persons as defined: maximum of \$300 per week for total disability to end of disability; (c) disability benefit for homemakers: maximum of \$145 per week until disability ends or until age 65; (d) death benefits: death benefits are based on age and status of deceased insured and on statutes of dependent survivors (e) funeral expenses - maximum of \$2,000 before January 1, 1996; on and after January 1, 1996, maximum of \$2,500.

Notice of claim for benefits requires prompt notification of accident, a written report within 30 days of accident plus proof of claim submitted within 90 days.

Noncompliance to prejudice of Corporation results in forfeiture.

Action against Corporation for Part 7 accident benefits must be commenced within 2 years from date of accident for which benefits are claimed or where benefits have been paid, from date of last benefit payment received.

Service of process. Every person commencing action for damages caused by motor vehicle or trailer in province must serve Corporation with copy of originating process in action.

Process may be served *ex juris* without leave of court if motor vehicle accident occurred in British Columbia.

Notice to Mediate. For Supreme Court motor vehicle action after January 1, 1996, any party may deliver Notice to Mediate to other parties between 60 days after close pleadings and 77 days before trial date. Parties must agree on mediator 10 days after Notice to Mediate delivered. Compliance with Notice to Mediate Regulation is mandatory. Cost of mediation shared equally by parties or other agreed basis. Notice to Mediate has recently been expanded to most Supreme Court actions. See notice to Mediate (General) Regulation to the Law and Equity Act.

Structured Judgments. §55 of Insurance (Motor Vehicle) Act deals with structured judgments. If award of pecuniary damages exceeds \$100,000 court must order periodic payments if court considers it in best interests of plaintiff. No matter what amount, if plaintiff requests tax gross-up award, court must order periodic payments if not contrary to best interest of plaintiff. If no order for periodic payments made, court "may" award tax gross-up.

AVIATION

Control of aviation is entirely matter for Parliament of Canada in Ottawa.

As to effect of condition on ticket *see Montreal Trust Co. v. Canadian Pacific Airlines Ltd. et al.* (1976), 72 D.L.R. (3d) 257 (S.C.C.).

BAD FAITH

Insurers have a duty to initiate discussions of settlement within policy limits, and to act reasonably in settlement negotiations. Failure to do so may render insurer liable for any damages awarded in excess of policy limits. *Shea v. Manitoba Public Ins. Corp.* (1991), 55 B.C.L.R. (2d) 15 (S.C.).

Insurer's obligation to pay benefits under a disability policy is indistinguishable from any other contractual duty undertaken by a contracting party and its role should not be characterized as fiduciary. Punitive damages can be awarded where the insurer's conduct is of such a nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious character. Decision of Supreme Court of Canada in *Whiten v. Pilot Ins. Co.*, 2002 S.C.C. 18, is authority for proposition that punitive damages can be awarded in contract case if insurer commits actionable wrong for failure to deal with policyholders in good faith in addition to breach sued upon.

BROKERS

See "ADJUSTERS, AGENTS AND BROKERS."

BURGLARY INSURANCE

There is no statutory definition of burglary insurance.

"Theft Insurance" is defined in Insurance Act as insurance against loss of or damage to property caused by theft, wrongful conversion, burglary, housebreaking or robbery.

CLASS ACTIONS

Class action legislation in British Columbia is Class Proceedings Act, R.S.B.C. 1996, c. 50. Class action legislation does not guarantee right to commence class action. Five criteria must be satisfied to certify class action: 1) pleadings must disclose cause of action; 2) must be identifiable class of 2 or more persons; 3) proposed representative must be appropriate; 4) must be common issues; and 5) class action must be preferable procedure.

COSTS AND INTEREST

Award of costs is subject to discretion of court, but usually follows event unless court for good cause orders otherwise. Costs are determined according to Appendix B to Supreme Court Rules varying from Scale 1 to 5 depending on difficulty of case. Reasonable and proper disbursements necessary for litigation may be awarded. There are provisions for offers to settle by plaintiffs and defendants which, if refused, may result in higher awards of costs.

In British Columbia, courts add pre-judgment interest to money judgments from date cause of action arose to date of order according to provisions of Court Order Interest Act, R.S.B.C. 1996, c. 79. Pre-judgment interest not available on non-pecuniary damages relating to personal injury and death claims. Courts may also make

award of additional damages for post judgment interest to plaintiff which represents interest on damages from the date of judgment to date of payment of judgment according to the provisions of the Court Order Interest Act, R.S.B.C. 1996, c. 79.

CONSTRUCTION OF THE POLICY

Policy of insurance is interpreted like any other contract of adhesion. Meaning of its terms is to be determined from language of contract as whole, which is to be given its plain and ordinary meaning consistent with true intention of parties. In private contracts of insurance, ambiguities in the terms of the contract shall be construed against author of contract *contra proferentum*. *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.* (1979), 112 D.L.R. (3d) 49 (S.C.C.). However, in automobile insurance, where public insurance scheme exists, the *contra proferentum* rule has no application to the statutory terms of a contract of insurance. *I.C.B.C. v. Joseph* (1989), 36 B.C.L.R. (2d) 248 (C.A.).

CONTRIBUTION

See “NEGLIGENCE.”

CREDITORS

See “ACCIDENT AND SICKNESS INSURANCE” and “DISABILITY INSURANCE.”

DEATH

Pursuant to §58 of Estate Administration Act, R.S.B.C. 1996, c. 122, executor or administrator of estate has same powers to bring action as deceased would have if living. Pursuant to §59 (1), (2) and (3), executor or administrator may bring an action, except for libel or slander, for all loss or damage to person or property of deceased in same manner and with same rights and remedies as deceased would, if living, be entitled to, with exception of damages for pain and suffering for personal injury, damages for loss of expectation of life, and damages for loss of expected earnings.

Where deceased was tortfeasor, the person wronged is entitled by §59 (6) of Estate Administration Act to continue existing action against executor or administrator or to commence action naming as defendant either executor or administrator or deceased.

Family Compensation Act, R.S.B.C. 1996, c. 126 creates cause of action for wrongful death. Action is for benefit of surviving spouse, parent, child or person to whom deceased stood in *loco parentis*. In assessing damages, any insurance payment shall not be taken into

account, except for death benefits paid pursuant to Insurance (Motor Vehicle) Act.

Presumption. Survivorship and Presumption of Death Act, R.S.B.C. 1996, c. 444 provides that where contract of accident insurance or of sickness insurance provides for payment to beneficiary on death of insured and both perish in common disaster, it is presumed beneficiary died first. Further, Supreme Court of British Columbia may declare person presumed to be dead.

See also “NEGLIGENCE.”

DISABILITY

Under the Financial Institutions Act, R.S.B.C. 1996, c. 228, disability insurance is by definition a type of life insurance. Part 3 of the Insurance Act governs life insurance.

Presumption. Survivorship and Presumption of Death Act, R.S.B.C. 1996, c. 444 provides that where contract of accident insurance or of sickness insurance provides for payment to beneficiary on death of insured and both perish in common disaster, it is presumed beneficiary died first. Further, Supreme Court of British Columbia may declare person presumed to be dead.

If a beneficiary is designated under a life insurance policy, the insurance money is not subject to claims of creditors of the insured. Furthermore, while a designation in favor of any of the spouse, child, grandchild or parent of the person whose life is insured is in effect, the insurance money and the rights and interest of the insured in it and in the contract are exempt from execution or seizure. Since a contract for annuities is by definition a type of life insurance, if a beneficiary from the above-mentioned group of persons is designated under such a contract, then the interest of the insured in the contract of annuity is also exempt from execution by his or her creditors. *Re Sykes* (1998), 48 B.C.L.R. (3d) 169 (C.A.).

Damages for mental distress, or aggravated damages, may be awarded for breach of disability insurance policy because it is a contract designed to provide peace of mind. The focus is on the effect on the insured and not on the conduct of the insurer. *Warrington v. Great West Life* (1996), 24 B.C.L.R. (3d) 1 (C.A.); (1995), 7 B.C.L.R. (3d) 43 (S.C.); *MacIsaac v. Sunlife* (1997), 48 C.C.L.I. (2d) 299 (B.C.S.C.); *aff'd* (April 30, 1999) Vancouver Registry CA023827 (B.C.C.A.).

FINANCIAL LIABILITY

Insurance (Motor Vehicle) Act authorizes Insurance Corporation of British Columbia to file with public authorities of other provinces, states or territory the requisite powers of attorney, undertakings, and agreements

pursuant to reciprocal insuring arrangements. Corporation is specifically authorized to enter into agreement not to set up defense in action that would not be available to insurer under motor vehicle liability policy in foreign jurisdiction, which is also requirement of foreign insurers filing in this province under Insurance Act. Foreign insurers conducting business in British Columbia must comply with provisions of Financial Institutions Act, R.S.B.C. 1996, c. 141. Section 159 of Act requires extra-provincial corporations who undertake trust, deposit or insurance business in British Columbia to first obtain a business authorization from the Financial Institutions Commission. In addition, there are a number of operational requirements that must be met by foreign insurers pertaining to the ownership, capital structure and management of the insurer.

Under Motor Vehicle Act, R.S.B.C. 1996, c. 318, person driving or operating motor vehicle shall possess his driver's license or driver's certificate and motor vehicle liability insurance card or financial responsibility card issued for vehicle he is driving or operating.

FIRE INSURANCE

Part 5 of Insurance Act governs policies of "fire insurance" which is defined as insurance against loss of or damage to property insured caused by fire, lighting or explosion due to ignition.

Following statutory conditions are deemed to be part of every policy and shall be printed on every policy: 1) Misrepresentation, false description or fraudulent omission material to the risk avoids policy. 2) Property of others is not insured, unless interest therein of insured is stated. 3) Liability after change of interest in certain circumstances. 4) Failure to give notice of material change of risk avoids policy. 5) Termination by either insurer or insured with notice. 6) Requirements after loss including immediate notice of loss, delivery of proof of loss by statutory declaration as soon as practicable. 7) Fraud vitiates claim. 8) Agent of insured or person to whom insurance money may be paid may give notice and make proof of loss. 9) Obligation on insured to minimize damage. 10) Insurer's immediate right of access after loss or damage. 11) Appraisal in event of disagreement as to value or amount of loss. 12) Loss payable within 60 days after completion of proof of loss. 13) Insurer's right to repair, rebuild or replace. 14) One year limitation period from date of loss or damage. 15) Sufficiency of notice.

No alteration or omission of or addition to any statutory condition shall be binding on insured.

Smoke or Soot Damage. Caused directly or indirectly by fire can be recovered under fire policy.

Insurable interest always necessary to support claim under policy. Where there are several policies in force covering same interest, insurers under respective policies are each liable to insured for its rateable proportion of loss, unless otherwise expressly agreed in writing between insurers. Special provisions relating to operation of deductible clauses. Insurance on identified articles first loss insurance.

Court may declare unjust or unreasonable exclusion clauses not to be binding on insured.

Insurer has statutory right of subrogation to all rights of recovery of insured against any person, on making any payment of assuming liability therefrom under policy.

FRAUD

See "ADJUSTERS, AGENTS AND BROKERS"; "FIRE INSURANCE"; "REPRESENTATIONS AND WARRANTIES."

HUSBAND AND WIFE

For all purposes of law of British Columbia, married man has legal personality that is independent, separate and distinct from that of his wife and married woman has legal personality that is independent, separate and distinct from that of her husband. Married person is accorded legal capacity for all purposes and in all respects as if person were unmarried.

Charter of Rights Amendments Act, S.B.C. 1985, c. 68, amended Law and Equity Act, R.S.B.C. 1979, c. 224, to abolish inter-spousal immunity in tort action. Same act repealed Married Woman's Property Act, R.S.B.C. 1979, c. 252 which had permitted wife to effect policy of insurance on her own life or life of her husband for her separate use. Insurance (Motor Vehicle) Act Regulations were also amended by the Charter of Rights Amendments Act. Provision which excluded indemnity to insured driver who claims indemnity in respect of injury or death of his spouse arising from his operation of vehicle were repealed.

INFANTS

See "AGE"; "AUTOMOBILE INSURANCE" and "RELEASE."

LIABILITY INSURANCE

See also "AUTOMOBILE INSURANCE."

Ordinary comprehensive liability policies insure against "liability imposed by law" which includes judg-

ment of Court. *Moffat Tank Co. Ltd. v. Canadian Indem.*, [1974] 1 W.W.R. 688 (Alta C.A.).

Decision of Supreme Court of Canada in *Foundation of Canada Engineering Corp. Ltd. v. Canadian Indem. Co. et al.* (1977), 74 D.L.R. (3d) 266, is authority for proposition that comprehensive liability policy is not professional liability policy which covers professional errors or omissions.

Where insurer denies coverage to insured under liability policy, notwithstanding "no-action" clause (which prohibits suits by insured until amount payable has been determined by action or agreement), insured is entitled to join insurer as third party in tort action when it is "in interests of justice" and it is just and convenient to hear proceedings together to avoid multiplicity of proceedings and conflicting decisions on same issues. *Svetlichny et al v. Overend, et al. and Travelers Indem. Co. of Canada* (1982), 131 D.L.R. (3d) 664 (B.C.C.A.).

When person incurs liability for injury or damage to person or property of another, and is insured against that liability, and fails to satisfy judgment, and execution in respect of it is returned unsatisfied, the person entitled to damages has statutory right of action under Insurance Act to recover against insurer amount of judgment up to face value of policy, except in case of automobile insurance and subject to same equities as insurer would have if judgment had been satisfied.

Person who recovers judgment against insured in any province or territory of Canada in respect of claim for which indemnity is provided by motor vehicle liability policy, may maintain action against insurer to have insurance money applied in or towards satisfaction of his judgment. That right of action is not prejudiced by any assignment, transfer, waiver, surrender, cancellation or discharge of policy or its proceeds after event giving rise to claim; by any act or default by insured before or after event giving rise to claim; or by any contravention of Criminal Code of Canada or any statutes of any province or territory of Canada or of any state of United States of America by owner or driver of automobile.

Creditor of insured is not entitled to share in those insurance moneys unless his claim is one for which indemnity is provided by policy.

Insurer may require any other insurers liable to indemnify insured to be made parties to action and to contribute according to their respective liabilities, whether rateably or by way of first loss or by way of excess insurance.

Term or condition which is not set out fully in policy or in document in writing attached to it, when issued

is not valid or admissible in evidence to prejudice of insured or beneficiary.

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

Fire insurance within one year after loss or damage.

Accident and sickness insurance within one year after date insurance money became payable or would have become payable if it had been valid claim.

Life Insurance. Proceedings against insurer for recovery of insurance money shall not be commenced more than one year after furnishing of sufficient evidence of proof of claim or more than six years after happening of event on which the insurance money became payable whichever period expires first. Where determination has been made under Survivorship and Presumption of Death Act, action or proceeding against insurer for recovery of insurance money shall not be commenced more than one year after date of declaration.

Actions on all other policies of insurance must be commenced within one year after furnishing of reasonably sufficient proof of loss.

No action shall be brought for recovery of money payable under contract of insurance until expiration of 60 days after proof of loss filed or happening of event on which insurance money is payable according to contract, whichever period is shorter.

Every action by insured against Insurance Corporation of British Columbia in respect of benefits, insurance money or indemnification payable under plan shall be commenced within one year after the happening of loss or damage or after cause of action arose or as Regulations may provide in case of any coverage, but not afterwards. In case of recovery for Part 7 accident benefits the Regulations specify action must be commenced within two years from date of accident or where benefits have been paid, from date of last benefit payment received.

Every person commencing action for damages caused by motor vehicle or trailer in province must serve Corporation with copy of originating process in action in manner provided for serving a defendant in action and shall file proof of service in court in which action is pending and no further steps shall be taken until expiration of eight days after filing.

Where proceedings are brought against Insurance Corporation of British Columbia as nominal defendant no proceedings shall be brought against Corporation as nominal defendant where bodily injury or death of person or damage to property arises out of use or operation in province of motor vehicle by unidentified motorist

unless person bringing proceedings gives written notice to Corporation as soon as reasonably practicable, and in any event, within six months after accident that caused bodily injury, death or property damage.

Person receiving accident report under §67 of Motor Vehicle Act shall, within 24 hours of request for it by Corporation, mail or deliver copy to Corporation.

Where claim is made against Corporation for loss occasioned by uninsured or unidentified motorist, owner of vehicle must, within 48 hours after discovery of loss or damage, make report to police of circumstances in which loss or damage occurred, obtain police case file number for report and at request of Corporation, advise Corporation of police case file number.

Under the British Columbia Limitation Act, R.S.B.C. 1996, c. 266, there is a two-year limitation period for most tort actions. Section 3 (2) (a) of the Act provides that a person shall not bring action after expiration of two years after date on which cause of action arose for damages in respect of injury to person or property including economic loss arising from injury whether based on contract, tort or statutory duty.

Estate Administration Act, §59 (6). Normal limitation periods apply to action against deceased wrongdoer.

In case of infant running of time with respect to limitation period applicable to claim by infant is postponed until he reaches age of majority except when Notice to Proceed delivered to infant's guardian and Public Trustee in which case time begins to run on date of delivery of notice. In case of action against physician or hospital maximum postponement period is six years.

There are special limitation periods governing actions against federal crown, municipalities, hospitals, physicians, and others.

NEGLIGENCE

Contributory negligence is not complete defense to claim brought in British Columbia.

Negligence Act, R.S.B.C. 1996, c. 333, provides that where by fault of two or more persons, damage or loss is caused to one or more of them, liability to make good damage or loss is in proportion to degree to which each person was at fault. Where it is not possible to establish different degrees of fault, liability is apportioned equally. Unless Court otherwise directs liability for costs of parties to every action is in same proportion as their respective liability to make good loss or damage.

Liability of Joint Tort-feasors and Rights of Contribution. Act provides that where damage or loss has been caused by fault of two or more persons, Court deter-

mines degree to which each person was at fault, and where two or more persons are found at fault, they are jointly and severally liable to person suffering damage or loss, but as between themselves, in absence of contract express or implied, they are liable to make contribution to and indemnify each other in degree in which they are respectively found to have been at fault. Where plaintiff is also at fault and two or more tort-feasors contributed to plaintiff's loss, tort-feasors are liable only severally, not jointly, whether all tort-feasors are sued as defendants or not, and the plaintiff's right of recovery against each tort-feasor is limited only to the degree that that tort-feasor is at fault. *Leischner v. West Kootenay et al.* (1986), 70 B.C.L.R. 145 (C.A.).

Death. Where person dies who would have been liable under Negligence Act if he had continued to live, an action or third party proceeding may be brought, maintained or continued against his personal representative.

Judgment Against One of Several Persons Jointly Liable. Law and Equity Act, R.S.B.C. 1996, c. 253, provides that obtaining of judgment against any one person jointly liable does not release any others jointly liable who have been sued in proceeding, whether others may have been served with process or not. Every person against whom judgment has been obtained, and who has satisfied judgment, is entitled to demand and recover in court, contribution from any other person jointly liable with him.

NO-FAULT INSURANCE

No-fault insurance is available under Part 7 of Revised Regulation (1984) under Insurance (Motor Vehicle) Act. See "AUTOMOBILE INSURANCE" for details.

PRIVILEGED COMMUNICATIONS

There are a number of grounds based on which privilege may be claimed. Solicitor-client privilege protects all communications between a client and his or her solicitor for the purpose of seeking and obtaining legal advice. Once a communication is protected by this type of privilege, it will always remain privileged.

The second type of privilege is litigation privilege which attaches to all communications, reports, statements, photographs, or any other material that is produced by a third party for the predominant purpose of assisting the client's solicitor in conduct of litigation that is commenced or contemplated. It should be noted that a report produced for an adjuster by a third party may or may not be privileged depending on whether when the report was produced litigation was seriously contemplated and whether the report was produced for the pre-

dominant purpose of litigation. This type of privilege generally protects the subject communications only for the duration of the original litigation, and not for any subsequent litigation.

Closely related to litigation privilege is the “solicitor’s brief” privilege. Where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation, he is entitled and required, unless the client consents, to claim privilege for such collection. Copies of documents which were created for dominant purpose of litigation may be privileged even though the originals may not be.

A communication between parties to a dispute for the purpose of settling that dispute is privileged. The law regarding this type of privilege, also known as “without prejudice” privilege, is not settled, but it appears that in British Columbia, in an action by or against a third party, a communication protected by this type of privilege during a previous proceeding not involving the third party will remain privileged, unless there are exceptional circumstances involved. *Middlekamp v. Fraser Valley Real Estate Bd.* (1992), 71 B.C.L.R. (2d) 276 (C.A.).

Another category of privilege is “common interest” privilege which protects communications between a litigant or his or her solicitor and a third party or his or her solicitor when the third party has a common interest with the litigant in the outcome of an anticipated or pending litigation. The communication has to, for the predominant purpose of the anticipated or pending litigation although the third party may not necessarily be a party to that litigation.

Communications made by one spouse to the other during their marriage is also privileged. Under both Canada Evidence Act, R.S.C. 1985, c. C-5 and the British Columbia Evidence Act, R.S.B.C. 1996, c. 124 neither spouse is compellable to disclose any communication made to him or her by the other spouse during their marriage. It should be noted that the privilege only protects the communications made to a spouse, and the spouse may be compelled to disclose his or her side of the communication. This privilege belongs to the spouse to whom the communication was made and may only be waived by him or her.

Traditionally confidential relationships such as that of a physician and patient or priest and penitent are not protected by privilege and, for example, the physician or the priest may be compelled to testify as witnesses.

PRODUCTS LIABILITY

Products liability cases brought in tort are determined by ordinary negligence principles and not on basis of strict liability as is case in certain American jurisdictions. Some commentators have suggested, however, that de facto strict liability does arise in Canadian products liability law because in an action for breach of contract brought by a purchaser against a vendor of a defective product, plaintiff may be entitled to rely on statutory warranties of fitness for purpose or warranties of merchantable quality, implied into every contract for the sale of goods by Sale of Goods Act, R.S.B.C. 1996, c. 410, in addition to any other express warranties given.

RELEASE

See also “NEGLIGENCE.”

Settlement based on covenant not to sue entered into between plaintiff and one of two tort-feasors does not effect release of other tort-feasor. Release of one joint tort-feasor would however effect release of other. *Dixon et al v. R. in Right of British Columbia et al.* (1980), 24 B.C.L.R. 382 (C.A.).

In law of contract, validity of contract depends upon consensual agreement between parties. If element of consent is lacking because one party signed document fundamentally different from document he intended to sign, plea of non est factum may be available. Similarly, party may also claim for rescission or rectification if there was common mistake as to some essential fact at time contract was entered into. Common mistakes occur when both parties share same misconception. Person is barred from claiming non est factum if he was guilty of carelessness or negligence in executing release. Burden is on him to show that he took all reasonable precautions with respect to execution of document. *Araki v. Wlodyka*, [1983] 5 W.W.R. 361 (B.C.S.C.).

It is acceptable to include terms in release that neither party envisages will arise. Thus, injured party may grant valid release of claim even though his injuries may worsen at later date.

Where parties to release are under common mistake as to existence or non-existence of personal injuries, that portion of release referring to such injuries is voidable. *Araki v. Wlodyka, supra.*

Statutory Release. Insurance (Motor Vehicle) Act. Person who has claim for damages and who receives or is entitled to receive benefits respecting claim is deemed to have released his claim to extent of benefits. Those are “no-fault” accident insurance benefits provided under Part 7 of Regulations to Insurance (Motor Vehicle) Act or “no-fault” benefits similar to those described in



Part 6 of Insurance Act provided under contract or plan of automobile insurance whenever issued or in effect. Nothing precludes Insurance Corporation of British Columbia from demanding, as condition precedent to payment, release to extent of payment.

Insurance Act. Where insurer makes payment on behalf of insured under motor vehicle liability policy to person allegedly entitled to recover from insured, it constitutes release, to extent of that payment, of any claim that person or anyone claiming through him may have against insured. Payment by insurer in respect of certain medical, dental, hospital, and funeral services constitutes release, to extent of that payment, of any claim that insured or anyone claiming through him may have against insurer. But nothing precludes insurer from demanding release, to extent of payment. Similar statutory release applies to payments of accident insurance benefits by insurer to its insured.

Infant's Claims. Age of majority is 19 years.

At common law, infant may enter into settlement agreement without guardian, but it is generally voidable at his instance.

Common law position has been modified by Rules of Court and by Infants Act, R.S.B.C. 1996, c. 223. Scheme of those provisions is to nullify releases and indemnities given by parents to insurers in respect of settlement of their infant's claims unless court approval and/or approval of Public Trustee is obtained. If agreement is obtained by guardian of minor and consideration is \$50,000 or less, and if agreement has been approved by Public Trustee, it will be binding on infant. If, however, the agreement is for settlement of a claim for unliquidated damages by an infant, the Public Trustee's agreement will be sufficient only if the agreement was reached before a proceeding for recovery of the damage is commenced. If proceeding is commenced to recover liquidated damage on behalf of an infant or if the consideration proposed is greater than \$50,000, the approval of the court is required. Otherwise, no settlement or compromise of infant's monetary claim is binding on the infant.

Approval by both Court and Public Trustee is required when infant's claim being compromised is for damages in respect of infant's person or property or is for recovery of any unliquidated sum. In all other cases involving more than \$10,000 consideration, only approval of court is required.

REPRESENTATIONS AND WARRANTIES

Contract of insurance is not rendered void or voidable by reason of any misrepresentation or any failure to disclose on part of insured in application or proposal or

otherwise, unless misrepresentation or failure to disclose is material. Question of materiality is one of fact.

Where insurer fails to disclose or misrepresents fact material to contract for life insurance, contract is voidable by insured, but in absence of fraud, contract is not voidable if contract has been in effect for two years. Exception to the two-year rule arises in cases of disability insurance, or when misrepresentation is with respect to the age of the insured.

In contracts of accident and sickness insurance, statutory conditions include condition to effect that no statement by applicant or person insured at time of application shall be used in defense of claim or to avoid contract unless it is contained in application or any other written statements or answers furnished as evidence of insurability. Applicant and each person to be insured shall disclose all material facts. Where contract has been in effect continuously for two years, failure to disclose does not render contract voidable except in case of fraud.

In cases of automobile insurance, Insurance (Motor Vehicle) Act, s.19 provides for forfeiture of claims where: (a) application for owner's certificate, to prejudice of corporation, has falsely described motor vehicle or trailer in respect of which applicant is made; (b) applicant for owner's certificate or driver's certificate knowingly misrepresents or fails to disclose in application fact required to be stated in it; (c) insured violates term or condition of plan; (d) insured commits fraud in respect of the Act; or (e) insured makes wilfully false statement with respect to claim under plan.

However, where forfeiture would appear inequitable, Insurance Corporation of British Columbia may relieve person from forfeiture. Further, Corporation shall relieve insured person from forfeiture of benefits it considers equitable if he dies or suffers loss function of mind or body as result of accident that renders him permanently incapable of engaging in any occupation for wages or profit.

Notwithstanding act or default of insured which results in forfeiture of indemnity, Corporation will pay third party claims to limits of defaulting insured's owner's certificate and then may seek recovery from its own insured in breach.

Where statement is representation or warranty is determined primarily by intention of parties in construing the insurance contract as whole.

SERVICE OF PROCESS

Document or notice for any purpose of Insurance Act may be served on insurer by leaving it at or sending it by registered post to its head office in province or by

serving office of insurer or, in case of extra-provincial corporation registered in province, attorney appointed by it under Insurance Act.

Insurance companies, other than those incorporated in British Columbia or Canada, and having principal head office in province, must appoint attorney, upon whom service of process is legal and binding on insurer.

Insurance Act also requires insurer who issues motor vehicle liability policy outside Province to file with Superintendent of Financial Institutions an undertaking that on receipt from Superintendent of any notice or process served on Superintendent in respect of its insured, insurer will immediately have notice or process served on its insured.

Service outside jurisdiction. In those instances enumerated in Rules of Court, party is permitted to issue process in British Columbia for service outside province, without leave of Court. In other instances, Court may grant leave. In cases involving motor vehicle accidents within province, service outside jurisdiction may be made as of right. Similarly, where foreign party is necessary or proper party to proceeding properly brought against some other person duly served in province, or proceeding arises out of goods or merchandise sold or delivered in province, service *ex juris* will be as of right.

An individual can now be served substitutionally, by mail or double registered mail without a court order. Where a corporate party can be served by serving one of its officers or directors personally, service by mail may be effective service on the company. The procedural requirements for service by mail are strict and must be followed precisely in order to effect proper service.

Under provisions of Insurance (Motor Vehicle) Act, on making or assuming liability for payment of insurance benefits, Insurance Corporation of British Columbia is subrogated to and shall be deemed assignee of all rights of recovery against any other liable in respect of loss, damage, injury or death of every person to whom, or whose benefit or in respect of whom benefit or insurance moneys are paid or to be paid, and may bring action in name of insured or in its own name to enforce those rights. Where money is received and burden of loss is

shared by insured and insurer, net amount, after deduction of costs of recovery is divided between them in same proportion they bear loss.

WAIVER AND ESTOPPEL

Waiver requires communication by insurer of clear intention not to rely on rights contained in policy. *Maritime Life v. Saskatchewan River Bungalows*, [1994] 2 S.C.R. 490.

Insurance Act provides, moreover, that no term or condition of a contract of insurance shall be deemed to be waived by insurer in whole or in part unless waiver is stated in writing and signed by person authorized for that purpose by insurer. Neither the insurer nor insured shall be deemed to have waived any term or condition of contract by any act relating to appraisal of amount of loss or to delivery and completion of proofs or to investigation or adjustment of any claim under contract.

“Without prejudice” offer by insurer does not constitute waiver of statutory condition which vitiates claim founded on fraudulent proof of loss. *Kelowna Realty Ltd. v. Canadian Indem. Co.*, [1978] 4 W.W.R. 276 (B.C.S.C.).

WORKERS' COMPENSATION

Vast majority of businesses and industries in province are required to register with Workers' Compensation Board by Workers Compensation Act, R.S.B.C. 1996, c. 492.

Personal injury claim by worker whose employer is registered under Act is barred by statute if wrongdoer is worker whose employer is registered under Act, and if wrong was committed by worker in course of his employment. Action is barred whether or not injured worker seeks compensation under provisions of Act.

If claim is not barred, injured worker must choose between claiming compensation under Act or proceeding independently with damage claim against wrongdoer. If worker claims W.C.B. benefits under Act, Workers' Compensation Board will be subrogated to his rights and will assume full conduct of any action.