

An Introductory Deskbook for Insurers

Fourth Edition



PARLEE McLAWS ^{LLP}
BARRISTERS & SOLICITORS | PATENT & TRADE-MARK AGENTS

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FOREWORD

Although a relatively small percentage of insurance claims actually end up in litigation, legal costs may be one of the most significant entries on the expense side of the insurer's ledger. It is important, therefore, for claims personnel to have a fundamental understanding of the litigation process and the role of legal counsel.

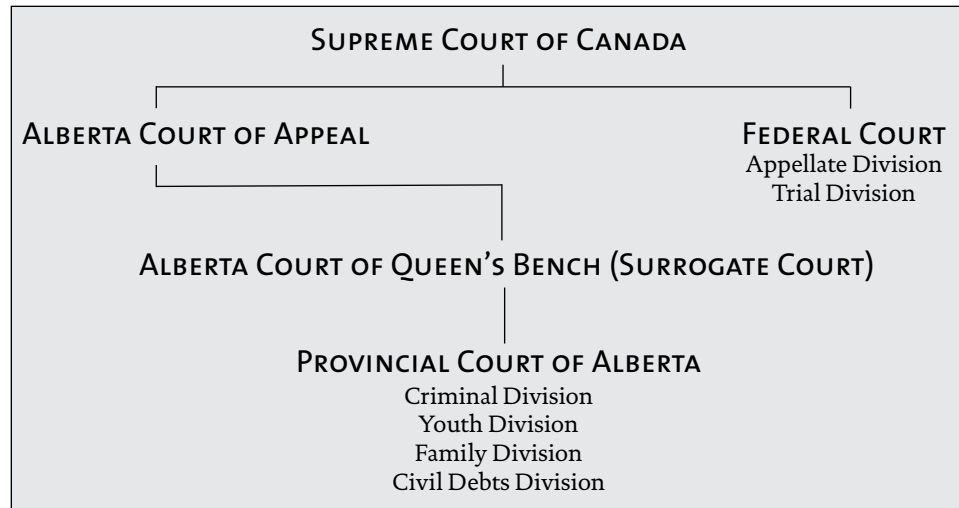
This manual is intended to assist claims personnel in the effective management of their files. If you have any questions arising from this handbook or regarding any other aspect of the insurance litigation process, please do not hesitate to contact any member of the Parlee McLaws LLP Insurance Litigation Practice Group. A list of the members of this group from our Edmonton and Calgary offices is found below. For more information, please visit our website at www.parlee.com.

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1. THE JUDICIAL FRAMEWORK: COURTS, JUDGES AND LAWYERS

THE CANADIAN COURT SYSTEM

Just as the Canadian political system is divided into distinct federal and provincial levels of government, the Canadian judicial system provides for distinct federal and provincial courts. The following diagram sets out the hierarchy of the court system as it exists in the Province of Alberta:



FEDERAL COURTS

The Supreme Court of Canada and the Federal Court of Canada are federal courts and both are constituted pursuant to Federal Statutes. Justices are appointed by the Federal Government.

The Supreme Court of Canada

The Supreme Court of Canada is constituted by the *Supreme Court Act*, R.S.C. 1985, c. S-26. It deals exclusively with appeals involving issues of law. Evidence is not presented before Supreme Court Justices and witnesses do not appear.

The Supreme Court of Canada is the highest Court in the land. There is, however, no absolute right of appeal except in criminal cases where there is a dissenting Justice. To have a particular matter heard, an application for “Leave” (or permission) to appeal must be made. As a general rule, the Supreme Court will refuse to hear any matter that is not of “national significance”.

In addition to the foregoing, the Supreme Court of Canada has a rather unusual jurisdiction respecting “references”. This jurisdiction permits the Court, on the request of either the Federal or Provincial Governments, to give opinions with respect to the constitutionality of proposed legislation.

The Federal Court of Canada

The Federal Court deals with “government matters”, including:

1. claims against the Crown;
2. various matters involving armed forces and armed forces personnel;
3. citizenship appeals;
4. income tax appeals; and
5. federal, provincial and inter-provincial disputes (upon agreement of the legislatures).

Except for claims involving the Federal Government, an insurer’s involvement with the Federal Court is likely to be extremely limited.

PROVINCIAL COURTS

The jurisdiction of provincial courts is defined by provincial legislation. In Alberta, there are three different levels of provincial courts:

1. the Alberta Court of Appeal;
2. the Court of Queen’s Bench of Alberta; and
3. the Provincial Court of Alberta.

The Alberta Court of Appeal

As the name suggests, the Alberta Court of Appeal deals exclusively with appeals from the lower courts. Except in rare cases, no original evidence is heard and no witnesses are presented before this court.

The Court Of Queen’s Bench of Alberta

The Court of Queen’s Bench is the court with which insurers are most familiar as all major civil cases are tried at this level in Alberta. The practices and procedures of the Court of Queen’s Bench are set forth in a manual called the *Alberta Rules of Court*. From the time of issuance of a Statement of Claim (the court document which initiates most civil actions) until the conclusion of trial or appeal, procedural steps in the lawsuit are governed by the *Rules of Court*.

The Court of Queen’s Bench deals with:

1. all civil matters over \$25,000.00 (except those limited matters in which the Federal Court has exclusive jurisdiction);
2. “serious” criminal offences;
3. administrative law matters; and
4. appeals from the various divisions of the Provincial Court.

The Justices of the Court of Queen’s Bench and Court of Appeal are appointed by the Federal Government. Upon proclamation of the *Justice Statutes Amendment Act* in 2001, the Surrogate Court falls under the umbrella of the Court of Queen’s Bench. The functions of the Surrogate Court, however, remain the same, dealing primarily with:

1. matters involving guardianship;
2. testamentary matters (i.e. wills); and
3. estate probate.

The Provincial Court of Alberta

The Provincial Court of Alberta is constituted by the *Provincial Court Act*, R.S.A. 2000, c. P-31 and its Judges are appointed by the Provincial Government. Generally speaking, the Provincial Court deals with:

1. most civil claims under \$25,000.00 except for:
 - (a) matters involving title to land;
 - (b) malicious prosecution, false imprisonment, defamation, criminal conversation, seduction or breach of promise of marriage;
 - (c) actions against Judges, Justices of the Peace or Peace Officers; and
 - (d) actions involving a local authority or school board for the recovery of taxes.
2. criminal matters involving summary conviction offences or less serious criminal offences;
3. some youth matters; and
4. some family matters.

The Civil Division of the Provincial Court of Alberta is most often referred to as the “Small Claims Court”. The procedural rules are much less stringent than the procedural requirements of the Court of Queen’s Bench. Unrepresented litigants often bring claims before this court. The purpose of the Provincial Court is to provide litigants with access to an expeditious and inexpensive litigation process. The Judges in the Civil Division of the Provincial Court often attempt to have parties negotiate a settlement of their claim rather than bring the matter to a Provincial Court trial. Accordingly, most parties in a Provincial Court action must either attend a Pre-Trial Conference or private mediation prior to a Small Claims trial.

As the monetary limit of the Small Claims Court has recently been raised to \$25,000.00, more insurance-related matters can now be dealt with at the Provincial Court level rather than the Court of Queen’s Bench.

THE DOCTRINE OF *STARE DECISIS*

The doctrine of “stare decisis” requires Judges of lower courts within a province to follow the previous decisions (the “precedents”) of higher courts. If the higher court has dealt with a particular issue in the past, the lower court Judge will be “bound” to follow that decision. Except for cases from the Supreme Court of Canada, which bind all courts, decisions from courts of other jurisdictions are not binding upon the courts in Alberta. These decisions may, however, have “persuasive value” in the sense that the Alberta court may concur with the other courts’ analysis.

The Role of Judges

The Judge plays a passive and impartial role as arbitrator in trial and in chambers. A Judge’s role has been expanded to also include participation in Judicial Dispute Resolution and in case management.

The Role of the Lawyer

The *Legal Profession Act*, R.S.A. 2000, c. L-8 permits the legal profession to be a self-governing body. The Law Society of Alberta is responsible for overseeing the activities and administration

of the profession, including matters of ethics, discipline, professional liability insurance, and competence. The standards of conduct that must be adhered to by lawyers are contained in the *Code of Professional Conduct* and the rulings of the Law Society of Alberta.

The Law Society of Alberta is managed by an elected Board of Directors known as “Benchers” who regulate the activities of the profession. The discipline committee deals with infractions of lawyers’ legal and ethical obligations. Punishment of offending lawyers can range from fines and reprimands to disbarment from the profession.

The legal profession in Alberta carries compulsory insurance against errors and omissions. Additionally, all lawyers in Alberta contribute to an “assurance fund”. This is a fund set aside by the Law Society for the purposes of compensating individuals who have sustained loss as a result of intentional misconduct by lawyers.

The rules of the Law Society do not allow lawyers to hold themselves out as experts in any part of the law. The Law Society does, however, provide for a mechanism whereby an individual lawyer is entitled to “restrict his or her practice” to a particular area of the law.

THE EFFECTIVE MANAGEMENT OF LEGAL COUNSEL

It is good management for insurers to supervise the activities of their legal counsel. The following are a few suggestions for claims personnel to consider:

- determine the hourly rate charged by each lawyer;
- ensure that your files are “matched” with the lawyer having the appropriate experience and expertise;
- require junior lawyers or students-at-law to be used whenever possible for appropriate tasks, such as research, document reviews, and attending simple motions;
- after retaining legal counsel, request their written comments respecting coverage, liability, quantum, further investigation required, potential for early settlement and other relevant issues;
- insist upon progress reports to update the status of a file;
- following Examinations for Discoveries, ensure that you receive a detailed analysis, including a summary of evidence given, a discussion of the credibility of witnesses, and recommendations for further handling;
- require counsel to provide copies of all pleadings and relevant documents;
- explore offers of settlement at the earliest possible date and, if the matter is going to trial, always employ the formal settlement rules;
- if lengthy Discoveries or a trial is contemplated, obtain an estimate of expected costs;
- insist upon pre-authorization of both the use of experts and expert costs;
- insist upon itemized accounts;
- insist that any travel required on the file to be pre-authorized by the insurer; and
- consider the use of alternative dispute resolution on all matters scheduled to proceed to trial.

2. THE LEGAL BASIS OF THE CLAIM: CONTRACTS, TORTS AND LIMITATION PERIODS

THE “CAUSE OF ACTION”

A lawsuit is called an “action”. A civil action is started when a Statement of Claim, or, in certain cases, an Originating Notice, is filed with the Clerk of the Court of Queen’s Bench. In the case of a Provincial Court action, the originating document is called a Civil Claim. Each Statement of Claim filed with the Clerk of the Court is given an action number for identification purposes.

The phrase “cause of action” refers to the legal basis of the claim. The majority of causes of action encountered by insurers involve claims in contract and in tort. It is, therefore, appropriate for insurers to have some understanding of the elements of both contract and tort and the limitation periods that apply.

CONTRACT

A contract is a legally enforceable agreement between two parties. With some exceptions, contracts can be entirely oral and, therefore, failure to reduce an agreement to writing does not make it unenforceable (although it certainly invites dispute respecting the terms and conditions of the agreement).

In order to successfully sue for breach of contract, the Plaintiff must demonstrate that:

1. there is a legally enforceable agreement;
2. the agreement has been breached by the Defendant;
3. the breach has caused loss or damage;
4. the Defendant has no proper defence to the claim; and
5. the lawsuit has been commenced within the time prescribed by law.

Common defences to an action for breach of contract include:

1. lack of capacity (lack of legal competence to make the contract in the first instance);
2. misrepresentation inducing the contract;
3. duress or undue influence;
4. mistake of fact;
5. illegality of the contract as a whole; and
6. breach of condition or warranty by the Plaintiff.

TORT

In law, a “tort” is a civil wrong, other than breach of contract, for which the Court will provide compensation. The tort most frequently encountered by insurers is the tort of negligence (the negligent infliction of loss or injury upon another). There are, however, a large number of other causes of action in tort including:

1. intentional injury to person or property (assault, battery, trespass to land, etc.);
2. nuisance (unlawful interference with property rights);
3. conversion (improper taking of chattels);
4. defamation;
5. occupiers’ liability;
6. products’ liability;
7. strict liability; and
8. misrepresentation (negligent misstatement).

In the context of commercial insurance, only some of the above torts will fall within the coverage extended by comprehensive or commercial general liability policies. In particular, those torts involving intentional infliction of damage would either be expressly excluded by the terms of the policy or perhaps impliedly excluded by virtue of the common law relating to insurance.

Vicarious Liability

Vicarious liability is a concept with which insurers should be familiar. The doctrine of vicarious liability imposes liability upon one person for the improper conduct of another. It usually arises in the context of an employer-employee or a principal-agent relationship. In such circumstances, the common law does allow the employer to sue his own employee to recover the damages for which he was found vicariously liable. As well, many comprehensive general liability policies will expressly name the employees as insureds along with the employer, thereby triggering either an express or implied waiver of subrogation/contribution proceedings.

Another form of vicarious liability that is frequently encountered by insurers on motor vehicle accident files is the liability of an owner for the negligent operation of his vehicle by another. In Alberta, Section 187 of the *Traffic Safety Act*, R.S.A. 2000, c. T-6 makes the owner of a motor vehicle liable for damages caused by the negligence of the driver where the driver:

- (a) is living with the owner as a member of his or her family; or
- (a) has possession of the vehicle with the consent, express or implied of the owner.

Contributory Negligence

A Plaintiff who has in some way contributed to his loss by his own negligence is only entitled to recover from the Defendant that portion of the loss not caused by the Plaintiff's own negligence. If, for example, in a standard two vehicle accident claim, the court rules that the Plaintiff was 40% responsible for the accident and the Defendant 60% responsible for the accident, the Plaintiff would only be able to recover from the Defendant 60% of his or her damages. The applicable legislation in Alberta is entitled the *Contributory Negligence Act*, R.S.A. 2000, c. C-27.

Joint And Several Liability

Insurers should also be aware that in cases of multiple Defendants, they may be required to pay the Plaintiff 100% of his loss even though their insured was judged by the court to be only partially responsible for the loss if the Defendants were found jointly and severally liable for the loss or damage. Pursuant to the provisions of the Alberta *Tort-Feasors Act*, R.S.A. 2000, c. T-5, a Plaintiff is entitled to recover all of his judgment from **any one** of multiple Defendants whose negligence has jointly caused the Plaintiff's loss. In such an instance, that Defendant is left to pursue "contribution" from the remaining Defendants, although this may be a hollow remedy if the other Defendants are uninsured or penniless.

LIMITATION PERIODS

It is important to become familiar with the limitation periods for commencing legal action. The *Limitations Act*, R.S.A. 2000, c. L-12 has replaced the "old" *Limitation of Actions Act*, R.S.A. 1980, c. L-15, and governs the majority of limitation periods. The *Limitations Act* applies where a claimant seeks a remedial order in a proceeding commenced after the Act came into force, for claims after March 1, 1999, whether the claim arose before or after the coming into force of this Act. Where the claimant knew or ought to have known of a claim and the claimant has not sought a remedial order before the earlier of the time provided by the "old" *Limitation of Actions Act* or two years after the coming into force of the *Limitations Act*, the Defendant is entitled to immunity from that claim. Two important sections of the *Limitations Act* are:

1. Section 11: Actions for the recovery of money must be brought no later than 10 years after the action arose.
2. Section 3(1): Subject to Section 11, all other actions have the following limitation periods, depending on which period expires first:
 - (a) 2 years after the date on which the claimant first knew, or ought to have known, that an injury, attributable to the defendant, occurred which warrants the commencement of an action; or
 - (b) 10 years after the claim arose.

Section 3 of the *Limitations Act* provides for two limitation periods—the "discovery limitation period" and the "ultimate limitation period". The discovery limitation period [section 3(1)(a)] is two years from the date on which the claimant first knew or, in the circumstances, ought to have known, that the injury warrants bringing a proceeding. The *Limitations Act* also provides for an ultimate limitation period [section 3(1)(b)] which is ten years after the claim arose. The *Limitations Act* stipulates that a claim must be commenced upon the earlier of the two different limitation periods.

SOME EXAMPLES OF LIMITATION PERIODS FOUND IN OTHER ACTS INCLUDE:

Type of Action	Applicable Limitation	Relevant Statute
Damage claim against municipality arising from snow etc. on street or sidewalk	21 days after accident	s. 531(2) of the <i>Municipal Government Act</i> , R.S.A. 2000, c. M-26 (MGA)
Damage claim against municipality occasioned by failure to repair accident roads, highways, etc.	Notice within 30 days after	s. 532(9) of MGA
Defamation	3 months after discovery of the publication of defamatory material, the plaintiff must give notice, in writing, of his or her intention to bring an action either within 7 days, if the publication is in a daily newspaper, or 14 days, in the case of any other newspaper or broadcast	s. 13(l) of the <i>Defamation Act</i> , R.S.A. 2000, c. D-7
Action against the Provincial Crown for failure to maintain a highway in a reasonable state of repair	Notice of claim and injuries to be served within 1 month after accident	s. 38(8) of the <i>Public Highways Development Act</i> , R.S.A. 2000, c. P-38
Action by Crown to recover claim for hospital services against tort-feasor's insurer	6 months after the expiration of the beneficiary's limitation period to commence an action against the tort-feasor	s. 67 of the <i>Hospitals Act</i> , R.S.A. 2000, c. H-12

3. PROCEDURAL STEPS IN A LAWSUIT

PLEADINGS

Pleadings include Statements of Claim, Statements of Defence, Counterclaims, Defences to Counterclaim, Reply, Reply to Defence to Counterclaim, Joinder of Issue, Demands for Particulars, Reply to Demand for Particulars, Originating Notices and Petitions. Each pleading is required to contain a statement in summary form of the material facts upon which the party relies for his or her claim or defence. The Alberta *Rules of Court* set out a number of formal requirements that

must be complied with in each pleading. The *Rules of Court* also include timelines for the issuance and service of pleadings. For example, a Statement of Claim must be served within 1 year after it is issued or filed, and a Statement of Defence must be filed 15 days after the Statement of Claim is served on a Defendant, unless the Defendant receives a waiver of the timeline from the Plaintiff.

In order to avoid a multiplicity of lawsuits, Defendants are entitled to issue contribution proceedings against other parties whom the Defendants feel may be liable for the Plaintiff's loss. If a Defendant believes that the Plaintiff is liable, or partially liable, contributory negligence should be pled in the Statement of Defence. If a Defendant believes that a Third Party is liable, or partly liable, a Third Party Notice may be issued. If a Defendant wishes to seek contribution or indemnity from another Defendant by virtue of their negligence, a Notice to Co-Defendant may be issued.

Alberta is currently in the midst of a large scale revision of its *Rules of Court*. While the new Rules have not been finalized or enacted yet, they will likely be substantively similar to the current Rules. However, the new Rules will use new numbering and may use different specific procedures or terminology.

SERVICE

Statements of Claim and Third Party Notices must be served personally upon the Defendant or Third Party. Personal service is effected by handing the document to the individual involved. It can also be effected by way of registered mail. Personal service is effected on a corporation by forwarding the document by registered mail to its registered office. The document is deemed to have been served 7 days after it was posted. There are a variety of specific rules relating to service upon partnerships, societies, municipalities, the Provincial Crown, and the Federal Crown in the *Rules of Court*.

Pursuant to Rule 11(1) of the *Rules of Court*, a Statement of Claim must be served or renewed within one year of when it was filed. If the Statement of Claim is filed but not served or renewed, it is no longer in force after the expiry of one year and the Defendant can apply to dismiss the Plaintiff's claim. However, if the actions of the Defendant are categorized as a waiver or a "standstill" agreement, the court will not strictly enforce the one-year limitation period contained in Rule 11(1). A "standstill" agreement is an express or implied agreement between the parties that the procedural requirements of Rule 11 will be placed in abeyance.

If the party to be served lives outside Alberta, an application must be made to the Court for an Order permitting service *ex juris*. Similarly, if it appears impractical for any reason to effect prompt personal service, the party may apply to the Court for an Order for Substitutional Service, allowing alternate methods of service of the document.

DEFAULT PROCEEDINGS

If a Defendant has been properly served with a Statement of Claim and fails to file a Statement of Defence within 15 days, and if the Plaintiff has not waived the limitation period to file a Defence, the Plaintiff can pursue default proceedings. If the claim is for a debt or a liquidated (ascertainable) amount, the Plaintiff may proceed to obtain Default Judgment directly from the Clerk of the Court. Where the claim is for damages which have yet to be determined, the Plaintiff may note the Defendant in default and then apply to the Court for judgment, proving his or her claim by way of Affidavit evidence and, usually, a damage assessment in Justice Chambers.

If a Defendant has had a Default Judgment entered against him, or has simply been Noted in Default, he may make application to the Court for an Order setting aside the default proceedings. In such an application the Court generally considers:

1. why no Statement of Defence was delivered;
2. whether there has been delay in making the application and, if so, the explanation for the delay; and
3. whether there exists a possible meritorious defence to the Plaintiff's claim.

DOCUMENTS

A party to an action is obliged to disclose and produce all non-privileged documents which are, or which have been, in their possession or power and which are relevant and material. The *Rules of Court* provide that a record is relevant and material if the record could reasonably be expected to significantly help determine one or more issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more issues raised in the pleadings. After the filing of a Statement of Defence, all parties have 90 days to file and serve on all other parties an Affidavit of Records. A party may apply to the Court for an Order allowing an extension to this time period or, alternatively, the parties may agree to extend or waive the 90-day period.

The Affidavit of Records lists the documents which the party is willing to produce, as well as those documents they object to produce and label as privileged. The Affidavit of Records also sets out those relevant and material and producible documents which are no longer in the party's possession.

The *Rules of Court's* definition of "record" is broad and includes "the physical representation or record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound, or both". If a party comes into possession of any relevant and material documents after filing the Affidavit of Records, those documents must be disclosed to the other parties and an Amended Affidavit of Records may be filed. The *Rules of Court* also state that a party is not entitled to conduct an Examination for Discovery until that party has filed and served its Affidavit of Records (although the parties can agree to waive this rule).

PRIVILEGE

On grounds of public policy, the law has determined that there are certain types of documents which are privileged from production. These are documents which, even though they may be very relevant to the issues involved in the lawsuit, need not be given to the other side. While there are a number of different grounds on which privilege can be claimed, the most common are solicitor and client privilege and litigation privilege. These privileges are given to documents which are either prepared for the dominant purpose of instructing or assisting legal counsel or are created in contemplation of litigation. Reports by experts or private investigators retained by legal counsel may fall into either of these categories.

Some documents, however, often serve more than one purpose and this "grey area" can include adjuster's files and their investigations into the loss prior to notice of a claim being commenced. As such, it may be determined that some documents in the adjuster's file were not created with the dominant purpose of instructing counsel or use in litigation and may be found to be producible.

EXAMINATIONS FOR DISCOVERY

The purpose of an Examination for Discovery is:

1. to discover the other side's case and the evidence upon which he will rely at trial;
2. to obtain admissions which can be used against the other side at trial;
3. to narrow the issues to be determined at trial;
4. to assess the witnesses; and
5. to facilitate settlement.

The vast majority of lawsuits are settled before trial. From a practical perspective, the Examination for Discovery is probably the most important step in the litigation process. It allows a thorough exploration of each side's position and an assessment of the credibility of the witnesses. Consequently, counsel are in a position to provide an informed opinion on the risks of the litigation and the settlement possibilities of the file are enhanced accordingly.

All parties to a lawsuit are subject to Examination for Discovery by all other parties adverse in interest to them. As well, any officer or auditor of a corporate party, and any past or present employee of the corporation with some knowledge of the matters in issue, can be examined.

Corporate parties are required to select an officer to speak on their behalf. The officer's answers will be binding upon the corporation for the purposes of the lawsuit. Regardless of his or her position within the corporation, the officer is obliged to take all reasonable steps to inform himself or herself about the facts and matters in dispute in the lawsuit from all documents available to the corporation and from all officers, directors or employees, past or present, of the corporation, who have knowledge, direct or otherwise, of the matters in dispute.

According to the Alberta *Rules of Court*, questions asked in an Examination for Discovery must be relevant and material to the issues alleged in the pleadings. Grounds for an objection to questions include:

1. questions that are immaterial or irrelevant;
2. questions directed only toward credibility of the witness;
3. questions that relate to privileged information or documents;
4. questions of law;
5. questions that require the witness to give an opinion, (unless the witness is an expert in that area these questions are not allowed); and
6. questions that relate to communications between spouses.

UNDERTAKINGS

Occasionally at an Examination for Discovery, a witness will not know the answer to the question but will be able to obtain that answer at a later date or after reviewing certain documents. In such circumstances, the witness is asked to undertake to obtain and produce the information or documentation in question. Once the answers to the undertakings have been supplied, counsel is permitted to re-attend and examine the witness on those answers. If a witness does not respond to the undertakings or if the answers are considered to be inadequate, then counsel is at liberty to bring forward an application to the Court for an Order requiring the undertakings to be answered in a proper and timely fashion.

INTERLOCUTORY APPLICATIONS

During the course of a lawsuit, it will likely be necessary for one or more applications to be made to the Court to enforce procedural rights or to accelerate the proceedings. Examples of such applications in insurance litigation would include applications:

- to serve pleadings "ex juris" or substitutionally;
- to set aside a default judgment or a noting in default;
- for an order requiring a party to provide further and better particulars;
- to strike out or amend pleadings;
- for judgment after noting a Defendant in default;
- to compel attendance at or answers on an Examination for Discovery;
- for a further and better Affidavit of Records;
- to consolidate actions/have actions tried together;
- to order security for costs;
- to dismiss the action for want of prosecution;
- to set the action down for trial; and
- to preserve property.

Some of the above applications can be made "ex parte" (without notice to the other side). Some applications are consented to by the other side. In this instance the lawyer will prepare a Consent Order for signature by the Court. Where the two sides are unable to agree, however, the application will be heard by the Court in Chambers.

Depending on the subject matter of the remedy being sought, applications in Chambers are heard before a Court of Queen's Bench Justice ("Justice Chambers") or a procedural referee formally called a Master of the Court of Queen's Bench ("Masters Chambers"). In most applications, the Applicant will file a Notice of Motion (setting out the relief being sought) and a supporting Affidavit (setting out the evidence relied upon in connection with the application). Opposing parties are entitled to conduct a cross-examination on the Affidavit. In such circumstances, the person who swore the Affidavit can be required to attend before a court reporter to be examined. The transcript of the cross-examination will be given to the Justice or Master hearing the application. If the application is to be contested, and it is anticipated that it will require longer than 20 minutes to argue, the matter must be heard as a scheduled special Chambers application.

EXPERT WITNESSES AND INDEPENDENT MEDICAL EXAMINATIONS

Opinion evidence can only be presented at trial by a duly qualified expert witness (with some exceptions for matters relating to intoxication, distances, speed, etc.). The *Rules of Court* require pre-trial disclosure of the qualifications and opinions of an expert witness intending to testify at trial. Such disclosure of expert opinion is required to ensure that no party is taken by surprise at trial. As a collateral effect, the disclosure of expert reports will often encourage settlement of claims.

Under Rule 218.1, a party intending to adduce expert evidence at trial shall, not less than 120 days before the day the trial commences or at such other time as may be ordered by the court, serve on other parties to the action a statement of the substance of the evidence of the expert signed by the expert including the opinion, the expert's name and qualifications, a statement of counsel setting out the proposed area of expertise, and a copy of the expert report on which the party intends to rely. Where a party intends to call an expert witness in rebuttal, that party must serve all parties to the action with a similar statement of rebuttal evidence and a copy of any rebuttal report on which they intend to rely within 60 days of receiving the opposing party's Rule 218.1 disclosure.

The majority of expert reports will attract solicitor-client privilege as they are usually prepared at the instruction of, or for the benefit of, legal counsel handling the claim. Accordingly, production of the reports cannot be compelled by the other side. As noted, the *Rules of Court* do provide for disclosure if the reports are to be relied upon at trial. This disclosure, however, comes when a file is nearing its end.

One exception to the above rule relates to the use of independent medical experts. The Alberta *Rules of Court* provide that, in a personal injury action, the Defendant is entitled to have the injured Plaintiff examined by a doctor of the Defendant's choice (the "independent medical examination"). Following the examination, the Defendant must deliver to the Plaintiff a copy of the independent medical report when received and, thereafter, the Defendant is entitled to receive from the Plaintiff a medical report of every examination previously or thereafter made of the physical or mental condition of the Plaintiff resulting from the injuries sustained.

At trial, an expert is put on the witness stand and will relate to the Court his or her qualifications in the given area of expertise. Those qualifications are subject to cross-examination by the opposing counsel. Thereafter, an application is made to the Court for a ruling that the expert is qualified to express opinion evidence in the particular area in question. Once such a ruling is obtained, the expert then goes on to testify in the usual manner regarding his or her expert opinion.

THE SETTLEMENT PROCESS

The vast majority of lawsuits are resolved by way of settlement, usually following Examinations for Discovery. Through a series of offers and counter-offers, the parties move towards a mutually acceptable resolution of the claim. Although there are variations on the theme, the settlement almost always involves the payment of money by one party to the other in exchange for an executed Release and Discontinuance of the lawsuit.

It should be noted that the *Insurance Act*, R.S.A. 2000, c. I-3, now requires that an insured be advised of the insurer's settlement of a claim against that insured person.

FORMAL SETTLEMENT RULES

In an effort to promote settlement of claims, the Alberta *Rules of Court* provide for certain formal settlement procedures which carry with them the threat of increased exposure to costs. For a Plaintiff, the *Rules of Court* provide that, at any time before the commencement of trial, the Plaintiff may serve on the Defendant a Formal Offer specifying the terms on which he is willing to settle the claim. The Formal Offer is usually expressed in terms of the payment of money, pre-

judgment interest and taxable costs. The Formal Offer must remain open for a period of at least 45 days but may be formally withdrawn thereafter. In the event that the award at trial is equal to or greater than the amount specified in the Formal Offer, the Court has the discretion to award double the usual taxable costs against the Defendant for all steps in relation to the claim after service of the Formal Offer.

A similar formal procedure is available to a Defendant. At any time before the commencement of trial, a Defendant may serve upon the Plaintiff a Formal Offer, specifying the terms upon which the Defendant is willing to settle the claim. The Defendant's offer must also be left open for a 45-day period, following which it can be formally withdrawn. The Formal Offer is accepted by the Plaintiff filing with the Clerk of the Court both the Formal Offer together with an Acceptance. The Plaintiff then applies to the Court for judgment in accordance with the Formal Offer. It is quite common for the parties to take a more "informal" approach than that set out by the *Rules of Court* regarding formal offers. That is, it is common for the Plaintiff to simply write to the Defendant's counsel to accept the Formal Offer and not apply to the Court for judgment. If the Plaintiff does not accept the Formal Offer and the matter proceeds to trial and the award at trial is equal to or less than the amount specified in the Defendant's Formal Offer, then the Defendant is entitled to taxable costs against the Plaintiff for all steps in relation to the defence after service of the Formal Offer.

Further, if the Plaintiff does not accept the Formal Offer and their claim is dismissed entirely, the Court had the discretion to award the Defendant double their taxable costs against the Plaintiff for all steps taken after the Formal Offer was served.

One other Rule relating to settlement, and which is available to a Defendant, is the formal payment into Court. Here, the Defendant simply pays into Court a sum of money in satisfaction of the Plaintiff's claim. The payment may be withdrawn from Court after 45 days.

MULTIPLE CLAIMS

Settlement of multiple liability claims arising out of the same accident requires a word of caution. If the multiple claims are all for small amounts without any possibility of their aggregate value approaching the policy limits, then each claim can be safely settled on a separate basis. However, if there is even the remotest possibility that the multiple claims will have an aggregate value either close to or in excess of the policy limits, then settlement of all of the claims must be made at the same time. Failure to settle in this manner may expose the insurer to liability in excess of the policy limits.

STRUCTURED SETTLEMENTS

Damages received in a personal injury action are not subject to income tax. Any interest generated from investment of those damages, however, is indeed subject to tax. A structured settlement is one whereby the Defendant's liability insurer purchases an annuity which will generate income for the Plaintiff in the agreed amounts over the agreed period of time in the future. As such payments constitute periodic payments of general damages, they are not taxable in the hands of the Plaintiff.

Structured settlements are advantageous to a Plaintiff because of the tax free status of the payments received under the annuity. The settlements are also attractive to insurers because the insurers can often extract a discount on the Plaintiff's claim in exchange for the annuity.

While, generally speaking, structured settlements are voluntary arrangements, Section 19-1 of the *Judicature Act*, R.S.A. 2000, c.J-2, gives the Court the discretion to order that damages are to be paid by periodic payments and order that an annuity be purchased.

TRIALS AND APPEALS

SETTING THE MATTER DOWN FOR TRIAL

When all pleadings, discoveries, admissions, undertakings and interlocutory proceedings have been finalized by all parties, the lawsuit is ready to be set down for trial. A Certificate of Readiness is signed by all counsel and is filed with the Clerk of the Court and a trial date is set.

PRE-TRIAL CONFERENCE

A pre-trial conference must be held before a Judge where the trial is proposed to last 3 days or more. The purpose of the pre-trial conference is:

1. to simplify issues;
2. to consider the necessity, or desirability of amendments to pleadings;
3. to consider the possibility of obtaining any admissions that will facilitate the trial;
4. to consider the possibility of settling a claim; and
5. to consider any other matters which may facilitate the disposition of the lawsuit.

Generally, the Judge presiding over the pre-trial conference will not hear the case at trial. The tenor of the pre-trial conference depends on the particular Judge and counsel involved. Some Judges simply ask whether the question of settlement has been fully canvassed. Others assume a more active role and are not at all hesitant to express their preliminary views on the merits of the case.

SECURING ATTENDANCE OF WITNESSES

Trial witnesses residing in Alberta are served with a Notice to Attend, which must be accompanied by Conduct Money in the prescribed amount. If a witness who has been properly served with a Notice to Attend and Conduct Money refuses or is unable to attend the trial, the Court will be more inclined to grant an adjournment.

A Notice to Attend, issued by the Alberta Courts has no force outside the Province of Alberta. Therefore, if it is necessary to compel the attendance of a witness outside the Province, but not outside Canada, counsel must follow the procedure set out in the Alberta *Interprovincial Subpoena Act*, R.S.A. 2000, c. I-9, and the equivalent statute in the Province where the witness resides. If a witness resides outside of Canada, then the only means of enforcing a Subpoena is through the issuance of Letters of Request.

JURY TRIAL

Jury trials tend to be longer and more expensive than trials before a Judge alone. Recently in Alberta, there has been an increase in Jury Trial applications being made to the Court. That said, in Alberta, the Courts are very reluctant to allow an application for a jury trial and, as such, jury trials on civil matters in Alberta are relatively rare.

By statute, a party is entitled to have the lawsuit tried before a jury for matters involving more than \$75,000.00 with only a few exceptions. The Courts, however, will refuse an application for a jury trial if it is shown that, the trial will involve:

- (a) a prolonged examination of documents or accounts, or
- (b) a scientific or long investigation that will be difficult for jury members.

CONDUCT OF THE TRIAL

The following is the normal sequence that will be followed in a trial in the Alberta Court of Queen's Bench:

1. Opening motions and other preliminary matters
2. Plaintiff's case:
 - (a) opening statement;
 - (b) witnesses (examinations, cross-examinations, re-examinations);
 - (c) reading Defendant's Examination for Discovery testimony into evidence;
 - (d) closing of Plaintiff's case "in chief";
3. Non-suit applications (if applicable);
4. Defendant's case (same procedure as above);
5. Plaintiff's reply evidence (if any);
6. Plaintiff's closing argument;
7. Defendant's closing argument; and
8. Plaintiff's closing argument in reply.

The judgment of the Court can be immediate or can be reserved to a later date. It can also be either written or oral. Once the Reasons for Judgment have been given, counsel for the successful party will prepare a formal Judgment embodying the terms of the judgment granted. Upon the filing of the formal Judgment with the Clerk of the Court and the service of the filed Judgment, the period for appealing the Judgment starts to run.

APPEALS

Any judgment or Order of a Judge of the Alberta Court of Queen's Bench can be appealed to the Alberta Court of Appeal. The Notice of Appeal must be filed within 20 days after the judgment or Order has been signed, entered and served. The Notice of Appeal is filed with the Clerk of the Court and served on the other side. The party filing the appeal is known as the Appellant. The party answering the appeal is called the Respondent.

After filing the Notice of Appeal, the Appellant must then prepare and file an Appeal Record containing a transcript of the trial proceedings, copies of all relevant documents marked as Exhibits at the trial, and any other material relevant to the Appeal. As well, both the Appellant and the Respondent must file Factums containing a concise statement of the facts, the legal issues raised by the appeal, and the legal argument on the point(s) in question.

The Alberta Court of Appeal sits four or five times a year alternating between Edmonton and Calgary. The Alberta Court of Appeal has approximately 13 Judges and customarily divides itself into two Courts of three Judges each; one Court deals with criminal appeals, the other Court deals with civil appeals. Occasionally, a civil appeal of unusual importance will be heard by five Judges.

At the conclusion of the appeal process, the Court may either allow or dismiss the appeal immediately, with or without reasons, or the Court may reserve judgment for further study and consideration. The Court's decision need not be unanimous. Where all Judges sitting on a particular appeal agree on the result, reasons for Judgment are usually written by one Judge. Each Judge, however, is entitled to write separate and completely different reasons for Judgment.

Judgments from the Alberta Court of Appeal can theoretically be appealed to the Supreme Court of Canada in Ottawa. An appeal necessitates an application before the Supreme Court of Canada for leave to appeal. Leave is only granted in matters that the Court considers of "national importance". Less than twenty percent of all such applications are successful. It is extremely rare for leave to be granted with respect to insurance litigation. Thus, for all practical purposes, the Alberta Court of Appeal is the Court of last resort for such claims in the Province of Alberta.

4. THE AWARD: DAMAGES, INTEREST AND TAXABLE COSTS

DAMAGES

Damages can be broadly classified into 4 categories.

1. Nominal Damages

Nominal damages are awarded by the Court where the Plaintiff's legal rights have been breached but no actual damage has been sustained.

2. Punitive or Exemplary Damages

Punitive or exemplary damages can be awarded by the Court where the Defendant has behaved with arrogance, high-handedness and a callous disregard for the Plaintiff's rights. Theoretically, these damages are intended to deter the Defendant and others from wrongdoing. Such damages have been awarded in cases of false imprisonment of shoppers wrongfully accused of theft or deliberate and malicious assaults. Punitive or exemplary damages are not normally awarded in an action for breach of contract, even where fraud has been established.

3. Aggravated Damages

Aggravated damages are quite distinct from punitive or exemplary damages, although the terminology is sometimes confused by the Courts. Aggravated damages are meant to be

compensatory in nature, whereas punitive or exemplary damages are designed to punish and deter. Aggravated damages are awarded where the damage to the Plaintiff was aggravated by the manner in which the wrongful act was committed and they are usually designed to compensate for injured dignity and pride.

4. Compensatory Damages

There is a broad theoretical distinction to be drawn between the award of damages for breach of contract and the award of damages in tort cases. The measure of damages for breach of contract is the amount sufficient to place the Plaintiff in the same position he would have been in had the contract been properly performed. Damages in tort are designed to provide compensation for the losses arising out of the tortious activity.

In a personal injury action, the following damages may be plead:

1. general damages for pain, suffering, loss of amenities, loss of enjoyment of life and loss of expectation of life;
2. special damages for quantifiable pecuniary loss to date of trial;
3. general damages for loss of future income or diminished earning capacity;
4. general damages for cost of future care;
5. loss of consortium by the spouse;
6. amounts respecting services rendered to the injured Plaintiff by family members or others ("valuable services"); and
7. loss sustained by the injured Plaintiff's employer (these claims are allowed in only very specific cases and awards of this nature are rare).

In fatal accident cases, damage claims can also include:

1. special damages for pecuniary loss sustained by deceased to time of death;
2. claims by family members for loss of guidance, care and companionship;
3. claims by family members for loss of pecuniary benefit (the deceased's financial support);
4. claims for statutory bereavement damages; and
5. claims for reasonable funeral and burial costs.

(A) General Damages for Non-Pecuniary Loss

General damages for non-pecuniary losses have traditionally included compensation for pain and suffering, loss of amenities, loss of enjoyment of life and loss of expectation of life. The quantification of such damages can be extremely difficult. Since 1978, the Supreme Court of Canada has affirmed repeatedly the "functional" approach to assessing damages for non-pecuniary loss in personal injury cases.

When assessing non-pecuniary loss, the Supreme Court of Canada has stressed the following points:

1. non-pecuniary awards should be fair and reasonable;
2. the Courts must have regard to the individual situation of the victim; and
3. only one global amount is awarded for all non-pecuniary loss (pain, suffering, loss of amenities, etc.).

(B) Special Damages for Pecuniary Loss to Date of Trial

Damages under this heading are usually easy to calculate. Actual expenses incurred as a result of the accident and injury can often be agreed upon by both sides to the lawsuit before trial. Past loss of income claims can become complicated, however, if one is dealing with a Plaintiff with a sporadic work history or one who is unemployed or self-employed. The best the Court can do in such circumstances is attempt to assess what the Plaintiff would have earned to the date of trial having regard to all of the relevant factors. Very often, the assistance of an actuary, economist or forensic accountant may be required in this regard.

(C) General Damages for Future Pecuniary Loss

Whether the claim be for loss of future income, cost of future care or, in fatal accident claims, loss of future financial support, claims for future pecuniary loss are calculated on an “actuarial” basis, requiring the Court to determine the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process. This methodology requires the use of statistical data and other expert evidence to produce the premises from which the mathematical calculation can proceed. Expert evidence is often utilized with respect to matters such as inflation and investment interest rates, productivity, contingencies, and the proportion of earnings a deceased would likely have spent on his dependents.

The award made by the Court for future pecuniary loss must account for future inflation (which will increase the computed figure) as well as for the fact that the amounts are to be invested to produce the required periodic sum (which will reduce the computed figure). As the investment interest rate is almost always higher than the inflation rate, the usual result is a reduction in the damages by applying a “capitalization” or “discount” rate. Some jurisdictions, such as Ontario, have legislated the applicable discount rate. No such legislation exists in Alberta and, accordingly, expert evidence must be led on this issue.

(D) Income Tax

Damage awards in personal injury cases do not attract income tax. Nevertheless, income tax does figure into the quantum calculations in both cost of future care claims and fatal accident claims.

A Plaintiff’s claim for loss of income is calculated on a gross basis. As no deduction is made in the award to account for income tax that the Plaintiff would otherwise have had to pay on his earnings, there is no increase to the award to account for tax that will be payable on income generated by the award. However, loss of financial support claims in fatal accident cases are calculated on the basis of net income that the deceased would have contributed to the support of his family. Accordingly, if the calculation of damages fails to take account of any tax payable on the income generated by the award, then to that extent the dependents may be under-compensated.

A similar analysis applies to cost of future care awards. If the purpose of the award is to generate income sufficient to pay for future care costs, then failure to account for tax payable on income generated by the award will mean that the Plaintiff will have less net monies to pay the required costs. Accordingly, cost of future care awards must be “grossed-up” to account for income tax considerations.

(E) Claims by Persons Other Than the Injured Plaintiff

A spouse of an injured Plaintiff is entitled to claim damages for “loss of consortium” under the provisions of section 2.1 of the *Tort-Feasors Act*, R.S.A. 2000, c. T-5. The Act talks of deprivation of “the society and comfort” of the injured spouse, which basically comprises loss of the sexual relationship, loss of services in the household, and the interruption of social activities. The Court also has jurisdiction to make awards with respect to valuable services rendered to the injured Plaintiff or on his or her behalf. Such services generally involve nursing and caring for the injured Plaintiff.

(F) Fatal Accidents

In Alberta, as in other provinces, both the deceased’s estate and the deceased’s dependents are entitled to sue for damages following a fatal accident. The relevant legislation in this province is the *Fatal Accidents Act*, R.S.A. 2000, c. F-8 and the *Survival of Actions Act*, R.S.A. 2000, c. S-27. The estate is entitled to claim all expenses and other pecuniary loss incurred between the accident and the date of death. In addition to claims by the estate, the *Fatal Accidents Act* allows an action to be brought on behalf of the wife, husband, parent, child, brother or sister of the deceased. The action is to be brought in the name of the executor or administrator of the deceased. Each claimant is entitled to receive damages appropriate to his or her “reasonable expectation of pecuniary benefit, as of right or otherwise, had the deceased not been killed”. This is basically an analysis of the financial support that would have been rendered to the claimant by the deceased. It involves assessment of net income that would have been enjoyed by the deceased, a deduction for personal consumption, a deduction for other contingencies, a gross-up for income tax purposes and a division of the remaining monies between the various claimants. The *Fatal Accidents Act* also has a specific provision for recovery of reasonable expenses for the funeral and disposal of the body of the deceased. As well, the *Fatal Accidents Act* provides for “damages for bereavement”. The amounts for bereavement are set by the legislation.

(G) Contingencies

Claims for future pecuniary loss must inevitably factor a variety of contingencies (positive and negative) into the equation. For example, a positive contingency in loss of future income claims is an allowance for the value of fringe benefits that the injured party would have received from his employer in addition to actual salary, such as pensions and health plans. Negative contingencies include probabilities of unemployment, major illness or disabling injury, early death, loss of work time due to strikes, and re-marriage (in fatal accident cases). In most cases, the setoff of the contingency factors will usually result in a discount being applied to the future pecuniary loss claim.

PRE-JUDGMENT INTEREST

For damages accruing after April 1, 1984, pre-judgment interest is payable in Alberta in accordance with the provisions of the *Judgment Interest Act*, R.S.A. 2000, c. J-1. The scheme set forth under this Act is as follows:

1. No interest is awarded
 - (a) on claims for future pecuniary loss;
 - (b) on interest awarded under the *Judgment Interest Act*;
 - (c) on exemplary or punitive damages;
 - (d) on an award of costs in the action;
 - (e) on money borrowed by a party to pay for expenses which are claimed as special damages;
 - (f) on money that is:
 - (ii) paid into court and accepted or;
 - (iii) contained in an offer of judgment or an offer to settle made and accepted;
 - (g) on a consent judgment, unless agreed to by the parties;
 - (h) where there is an agreement between the parties respecting interest; or
 - (i) where payment of pre-judgment interest is otherwise provided by law;
2. Interest is awarded at a rate of 4% per annum on awards of non-pecuniary damages (i.e. general damages for pain and suffering); and
3. Interest on pecuniary (special) damages is awarded at a rate prescribed annually in the regulations.

It should be noted that the *Judgment Interest Act* does provide the Court discretion to depart from the “usual” interest awards in certain circumstances.

POST-JUDGMENT INTEREST

Once the judgment has been granted, it bears interest from the day on which it is payable by or under the judgment until it is satisfied. The rate or rates are prescribed before the beginning of each year by the Lieutenant Governor in council.

TAXABLE COSTS

Taxable costs are those costs that the successful litigant is entitled to recover against the unsuccessful party to the lawsuit. While the Court has an absolute discretion with respect to both the award and quantum of costs, it usually directs that the successful party is entitled to recover costs on a party-party basis. Such costs are determined in accordance with a tariff set forth in Schedule C of the *Alberta Rules of Court*.

Costs recovered on a party-party basis usually constitute only a portion of the actual out-of-pocket legal expenses incurred by the client in pursuing the action.

Once the litigation has been concluded, the successful party prepares a Bill of Costs and forwards it to the other side for review. If the other side takes no objection to the same, the document is then

“taxed” by the Clerk of the Court as a matter of course. If, however, the unsuccessful party disputes any portion of the Bill of Costs, then both parties appear before a taxing officer who will review the respective positions and determine the appropriate award of costs in the circumstances. The taxed Bill of Costs is then entered with the Clerk of the Court and forms part of the judgment granted. As with any other judgment, an award of costs, and the taxation of the same, can be appealed to a higher Court. Leave is required to appeal to the Court of Appeal on an issue that relates solely to costs.

In certain circumstances, the Court may be prepared to award costs on a solicitor-client basis. Such an award entitles the successful party to recover the actual legal fees and disbursements reasonably incurred in prosecuting or defending the action. Such awards are relatively rare and tend to be limited to situations where:

- (a) the parties have specifically contracted for solicitor-client costs;
- (a) punitive or exemplary damages have been awarded; or
- (a) where the parties in question have been guilty of bad faith.

5. MOTOR VEHICLE ACCIDENT INSURANCE: THE BASICS

GENERALLY

Alberta’s motor vehicle accident compensation is based on a common-law tort system. Motor vehicle insurance in Alberta is governed by Alberta’s *Insurance Act*, R.S.A. 2000, c. I-3, Part 7.

Other Alberta statutes contain provisions relevant to motor vehicle accident litigation in Alberta including:

Contributory Negligence Act, Judgment Interest Act, Limitations Act, Married Women’s Act, Minors’ Property Act, Motor Vehicle Accidents Claims Act, Survival of Actions Act, Fatal Accidents Act, Tort-Feasors Act, Traffic Safety Act, Dangerous Goods Transportation and Handling Act, and Workers’ Compensation Act, as well as the regulations to these acts.

STANDARD FORM AUTOMOBILE INSURANCE POLICY – S.P.F. NO. 1

Motor vehicle insurers doing business in the Province of Alberta are required by Alberta’s *Insurance Act* to issue a standard form automobile policy, S.P.F. No. 1. This policy is divided into 3 sections, namely: Section A, with respect to bodily injury, death, or property damage claims by third parties against an insurer’s insured; Section B, with respect to “No Fault” accident benefits (medical payments and funeral benefits, death and total disability benefits) payable by an insurer to its insureds, as defined; and Section C, with respect to claims by an insured against his own insurer with respect to loss or damage to an insured automobile, as defined. The standard form automobile policy, S.P.F. No. 1, also has general provisions, definitions, exclusions, and statutory conditions.

Section A

The owner of every motor vehicle in the Province of Alberta is required to be insured by Alberta's standard automobile policy, S.P.F. No. 1. A motor vehicle insurer is required to issue the S.P.F. No. 1 with minimum \$200,000.00 limits with respect to payment of third party claims against its insured. Individual owners are typically insured for amounts from \$200,000.00 up to \$1,000,000.00 and, less often, up to \$2,000,000.00 or more. Corporations can be insured for limits of \$5,000,000.00 or more. Motor vehicle insurers are not required, at any time prior to the pronouncement of judgment by a court, to disclose the limits of their policy. They can do so, if they so choose, in the course of settlement negotiations.

Section B

Section B coverage is not personal coverage but rather is coverage which attaches to the insured vehicle and insureds, as defined (usually occupants of that vehicle or pedestrians). Section B benefits are modest amounts of money which provide immediate access to medical treatment and related expenses and are paid to insureds regardless of fault with respect to the motor vehicle accident. There is no obligation on an injured party to claim these benefits from his insurer. Claims for items that are otherwise insured by Section B may instead be made by the injured party against the tortfeasor and his motor vehicle insurer. Section B benefits for income loss sustained by an injured party may not fully indemnify the injured party who may advance a tort action and claim for indemnification for all income lost. The tortfeasor and his insurer can deduct the amount of Section B benefits obtained by the injured party from the income amounts claimed in the tort action.

Section C

Section C coverage is coverage for loss or damage arising to an insured automobile. Unlike Section A and B coverage, Section C coverage is not mandatory under the S.P.F. No. 1. Rather, an insured has the option of purchasing Section C coverage for an additional premium.

When an insurer makes a Section C payment to its insured, the insurer has a right of subrogation to recover the amount of the payment from the third party who was responsible for the property loss, i.e. the tortfeasor.

S.E.F. 44 – Family Protection Endorsement

Motor vehicle insurers in Alberta will, for an additional premium, issue what is referred to as an S.E.F. 44 Family Protection Endorsement. This coverage is personal coverage (i.e. the insured vehicle is not required to be involved in a motor vehicle accident in order for an S.E.F. 44 insured to claim compensation under the S.E.F. 44 endorsement). An S.E.F. 44 insured need only be involved in a collision with an underinsured or uninsured motorist. The S.E.F. 44 insurer is required to indemnify its insured, as defined, for damages sustained by the S.E.F. 44 insured in excess of the insurance limits of the tortfeasor vehicle's insurer. The S.E.F. 44 coverage does not duplicate coverage and the S.E.F. 44 insurer is only required to pay to the extent that the limits of its S.E.F. 44 endorsement exceed the limits of the tort-feasor's policy's Section A third party liability limits.

The S.E.F. 44 insurer has a right of subrogation through its insured against any tort-feasors who are, to any extent, jointly or severally liable to the S.E.F. 44 insured.

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Another situation that may arise is a motor vehicle accident that is caused or contributed to by a motorist who is not, through inadvertence or otherwise, insured at all. In these circumstances, the *Motor Vehicle Accident Claims Act*, R.S.A. 2000, c. M-22, creates a motor vehicle accidents claim fund which, essentially, will serve, as the uninsured motorist's *de facto* insurer. In Alberta, the administrator of the *Motor Vehicle Accident Claims Act* is routinely referred to as "the Fund". The Fund is able to defend and settle claims on behalf of an uninsured motorist. It is required to compensate injured third parties for all claims to a total limit of \$200,000.00. The Fund is not, however, required to compensate injured third parties in circumstances where the uninsured motorist is not the sole tortfeasor causing damage to the injured party or parties. If another tortfeasor is jointly and severally liable with the uninsured motorist, even to a degree of liability as small as 1%, the Fund is not required to pay an injured party's claim. This is referred to as the "1% rule". The other tortfeasor and his insurer in these circumstances are required to pay the whole of the injured party's claim, up to the amount of the third party liability limits.

6. ALBERTA INSURANCE REFORM LEGISLATION

The *Insurance Amendment Act*, S.A. 2003, c. 40, came into effect on October 1, 2004 and applies to all motor vehicle accidents occurring on or after this date.

MINOR INJURY REGULATION

One of the most significant changes is the cap on damages awards for minor injuries. The new Minor Injury Regulation, Alta. Reg. 123/2004, sets a cap of \$4,000.00 for non-pecuniary loss for minor injuries.

Minor injury, in respect of an accident, means a

- "sprain" – an injury to one or more of the tendons of ligaments, or both; or a
- "strain" – an injury to one or more muscles; or a
- "WAD injury" – a Whiplash Associated Disorder other than one that exhibits one or both of the following:
 - (a) objective, demonstrable, definable and clinically relevant neurological signs;
 - (b) a fracture to or a dislocation of the spine caused by that accident that does not result in a serious impairment.

CHARTER CHALLENGE

In 2008, the Alberta Court of Queen's Bench struck down the Minor Injury Regulation as a violation of the *Canadian Charter of Rights and Freedoms*. A suspension (or 'stay') of this judgment was subsequently denied. The Minor Injury Regulation is, therefore, presently not in force, although the decision to strike it down has been appealed to the Alberta Court of Appeal. No decision has been rendered at date of printing.

THE DIAGNOSTIC TREATMENT AND PROTOCOLS REGULATION (DTPR)

Although this Regulation was challenged along with the Minor Injury Regulation, the DTPR was found not to be a violation of the *Canadian Charter of Rights and Freedoms* and remains in force. This Regulation specifies how a diagnosis of strain, sprain, or whiplash-associated disorder is to be made and (generally) how each of these injuries is to be treated.

DIAGNOSIS – WAD I

A WAD I injury will be diagnosed when there are:

- (a) complaints of spinal pain, stiffness or tenderness;
- (b) no demonstrable, definable and clinically relevant physical signs of injury;
- (c) no objective, demonstrable, definable and clinically relevant neurological signs of injury;
- (d) no fractures to, or dislocation of the spine.

DIAGNOSIS – WAD II

A WAD II injury will be diagnosed when there are:

- (a) demonstrable, definable and clinically relevant physical signs of injury, including
 - (i) musculoskeletal signs of decreased range of motion of the spine, and
 - (ii) point tenderness of spinal structures affected by the injury;

SERIOUS IMPAIRMENT

Serious impairment is defined as an impairment of a physical or cognitive function that results in a substantial inability to perform the

- essential tasks of the claimant’s regular employment, occupation, profession, despite reasonable efforts to accommodate;
- 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; or
- normal activities of the claimant’s daily living, that has been ongoing since the accident and that is not expected to improve substantially.

CERTIFIED EXAMINER (CE)

No attempt can be made to characterize an injury as “minor” or otherwise under the MIR until at least 90 days post-accident. After 90 days, any party can give notice of their intention to have a CE assess the claimant for an opinion as to whether the injury is, or is not, “minor”. In assessing whether the injury is minor, the CE may compel the claimant to produce any records he considers relevant to the inquiry, including any relevant diagnostic, treatment or care information, and may receive from the claimant or the insurer any information that either party considers relevant to the assessment.

If the CE cannot provide an injury opinion in the first instance, he may require the claimant to re-attend on a specific date not later than 6 months after the first assessment. The claimant’s injury will be deemed to be “minor” if without reasonable excuse the claimant in any way obstructs the CE’s assessment. The opinion of the CE is *prima facie* evidence that the claimant’s injury is, or is not, a minor injury, as the case may be. The cost of the CE shall be paid by the party requesting the assessment.

TEST FOR DETERMINING IF CLAIMS CAP APPLIES:

1. Is the alleged injury confined to a strain, sprain or WAD injury?
 - The cap will not apply if the injury is a fracture, dislocation, neurological impairment or other injury.
2. If yes, is it a minor injury?
 - The cap will not apply if the injury has produced a “substantial inability” to perform the “essential tasks” of a claimant’s employment, training, or education, or their “normal” daily activities.

The determination as to whether an injury is a sprain, strain or WAD injury must be based on an individual assessment of the claimant in accordance with the diagnostic protocols established under the Diagnostic and Treatment Protocols Regulation.

NUMBER OF TREATMENTS

Under the DTPR, and without approval by the insurer, a health care practitioner may authorize up to a total of 11 “medical, physical therapy, chiropractic and adjunct therapy” visits in total for a 1st or 2nd degree strain or sprain, or WAD I injury together with certain diagnostic tests and medications and supplies. The 11 visits are for the total of “medical, physical therapy, chiropractic and adjustment therapy” visits. For a 3rd degree strain or sprain, or WAD II injury, no more than 22 visits in total are to be authorized.

INJURIES UNRESOLVED AFTER 90 DAYS

If, after 90 days post-accident, a sprain, strain, or WAD I/II injury has not resolved, or is not satisfactorily resolving, then (with the insurer's approval) the health care practitioner may refer the client to an injury management consultant (IMC). The IMC may report on the diagnosis or treatment of the client, recommend a further assessment or a multi-disciplinary assessment of the injury, and also recommend the persons who should be included in the assessment.

CLAIMS AND PAYMENT OF CLAIMS

Within 10 business days of a motor vehicle accident, or as soon as is practicable, the client or his health care practitioner must provide to the insurer a completed claim form detailing the accident and injuries.

Within five business days of receiving a completed form, the insurer must send to the applicant a decision notice either approving or refusing the claim. The notice must give reasons for any refusal. Reasons for refusal are limited, i.e. the claimant is not an insured person; there is no contract of insurance; or the injury was not caused by the accident arising from the use or operation of an automobile.

If the insurer fails to respond to the claim within five business days, it is deemed to have approved the claim, and is liable to pay the claim unless reasons exist for a subsequent denial of the claim.

An insurer may subsequently deny a claim in writing for essentially the same reasons set out above.

7. THE MEDIATION PROCESS: AN EFFECTIVE ALTERNATIVE?

Litigation is an adversarial process. The procedures can be complicated, lengthy and costly. One alternative to litigation is mediation. Mediation processes are becoming increasingly popular in Alberta.

Mediation is a process where a neutral third party (the mediator) facilitates a negotiation process involving both counsel and their respective clients with a view to arriving at a mutually acceptable settlement of the claim. The process is entirely voluntary and confidential. It differs from arbitration inasmuch as it is the parties who forge the settlement agreement as opposed to a third party (the arbitrator) assessing both sides of the dispute and making a decision that is binding on the disputing parties.

Mediations can be either judicial or private. In a Judicial Mediation (often called a mini-trial or judicial dispute resolution), a Court of Queen's Bench judge may act as mediator and will often give his or her opinions about the issues to the parties. It is useful to have a judge's opinion on a matter to determine whether or not to proceed to trial. There are also many private mediation companies. Private mediators are often chosen for their areas of expertise, especially when a complex issue is disputed.

A successful mediation can substantially reduce legal, expert, administration and other costs usually incurred in resolving a claim through the trial process. Also, the vast majority of cases which proceed to mediation are settled either during the mediation or very shortly thereafter. Mediation brokers cite an eighty percent success rate in this regard.

Finally, mediation is a low-risk exercise. It is non-binding and nothing which is said or which occurs during the mediation is admissible in evidence during any subsequent trial.

8. THE WORKERS' COMPENSATION BOARD

If a Plaintiff is injured "on the job" and both the Plaintiff and the potential Defendants (the people responsible for the injuries) constitute persons or industries to which the *Workers' Compensation Act*, R.S.A. 2000, c. W-15, applies, then the *Workers' Compensation Act* specifically prohibits any legal proceedings between the parties in question. The rationale, of course, is that Workers' Compensation legislation is essentially a no-fault scheme of insurance.

If the Plaintiff is entitled to receive Workers' Compensation benefits as a result of an accident, then the *Workers' Compensation Act* provides that the Workers' Compensation Board is subrogated to all of the Plaintiff's rights of action, including the right to sue the negligent Defendant for damages.

9. SUBROGATION

The right of subrogation allows one party (the insurer), who has made an indemnity payment to another (the insured), to step into that other person's shoes for the purposes of recovery from a third party (the party who has caused the loss). In Alberta, this right is specifically provided for in the *Insurance Act*, R.S.A. 2000, c. I-3, both for auto insurance and fire insurance. The right also exists at common law.

The law, however, will only permit one lawsuit to be brought by the insured as a result of the loss giving rise to the claim. Accordingly, when the insurer proposes to bring a lawsuit in the name of the insured (by virtue of its subrogation rights), it is essential that the insurer contact the insured to ascertain whether there are any uninsured claims to be included in the lawsuit.

10. HOSPITALS ACT

Under the *Hospitals Act*, R.S.A. 2000, c. H-12, the Alberta Government is entitled, through its third party liability program, to recover, on behalf of taxpayers, the costs associated with "health services" incurred as a result of the negligence of a third party. Costs for health services include physicians fees, drug services and ambulance services, to name a few. Under the *Hospitals Act*, the Government does not have a right to recover the cost of health services when the person's injuries were caused by the negligent use or operation of an automobile by any person insured under an Alberta motor vehicle liability policy. This exclusion does not apply to other personal injuries involving non-motor vehicle insurance issues. The motor vehicle exclusion also does not apply to insurers who are not registered in Alberta.

2. Affidavits of Records

The *Rules of Court* provide that the time limit for filing and serving an Affidavit of Records in most actions is for the Plaintiff and Defendant to file and serve their respective Affidavits of Records within 90 days of service of the Statement of Defence. The *Rules of Court* have recently been amended to describe a record as the physical representation or a record of any information, data, or other thing that is, or is capable of, being represented or reproduced visually or by sound, or both. Unless an Order is sought from the Court permitting late filing of the Affidavit of Records, or all parties' consent is obtained, the *Rules of Court* provide costs and other sanctions for failing to file an Affidavit of Records in accordance with the time frames provided. Any costs imposed under the *Rules of Court* are payable forthwith. This provision assists in obtaining timely document production from the Plaintiff.

3. Formal Offers of Judgment

Part 12 of the *Rules of Court* entitles a Defendant to serve a Formal Offer. The Formal Offer must remain open for 45 days from the date of service. If it is not accepted, then the Formal Offer may be withdrawn. The Defendant is then in a position, pursuant to Rule 174, to recover taxable costs and disbursements incurred from the date of service of the Formal Offer onward, in the event that the Plaintiff does not better the Formal Offer at trial.

The Formal Offer mechanism is significant in that not only does a successful Defendant become entitled to recovery of its costs and disbursements from service onward, but that Defendant also escapes having to pay the costs and disbursements of the Plaintiff which it would otherwise be obligated to pay. Forwarding a "low ball" Formal Offer is rarely productive (except possibly for posturing). By forwarding an early and realistic Formal Offer, a Defendant exerts pressure on a Plaintiff who must then face the prospect of having a large deduction from his or her claim in respect of costs.

13. CONCLUSION

The foregoing discussion is intended to provide a general overview of the litigation process in Alberta and is not intended to be exhaustive or to provide legal advice in respect of any particular situation. Parlee McLaws LLP hopes that the material will be of assistance to insurers in management of their files and would be pleased to respond to inquiries about matters raised in this handbook or regarding any other inquiries that you may have.

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Client partnerships are at the heart of our business and are based on the philosophy we hold above all others; our clients' needs come first. That means that we listen, ask questions and use our knowledge and experience to give our clients advice that they can use for strategic advantage in their business or area of endeavour.

At Parlee McLaws LLP, our focus is on providing superior counsel by putting relationships at the forefront of what we do. That is something that we believe in and have put into practice for over one hundred years.

Our History.

- First Calgary office opened in 1883
- First Edmonton office opened in 1889
- In 1986, the firm became Parlee McLaws LLP after an uninterrupted succession of partnerships
- Today, Parlee McLaws LLP comprises over 100 skilled lawyers and more than 150 support, administrative and secretarial staff



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