PARLEE McLAWS LLP

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An Introductory Deskbook for Insurers

Sixth Edition

Relationship focused.

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Parlee McLaws LLP
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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. Therefore, it is important 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 deskbook 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. The leaders of the practice group are listed below. More information, along with a complete and up to date list of the members of this group from both our Edmonton & Calgary Offices can be found on our website at www.parlee.com/expertise/insurance.

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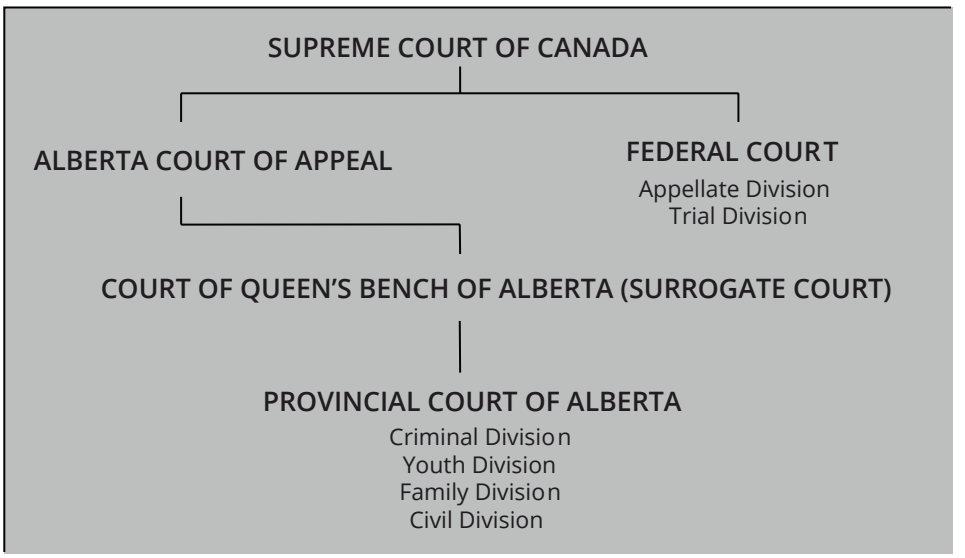
1. THE JUDICIAL FRAMEWORK: COURTS, JUDGES, JUSTICES, AND LAWYERS

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. As an appellate court there are limited circumstances where the Supreme Court would require or allow fresh evidence to be presented or witnesses to appear.

The Supreme Court is the highest court in the country. There is, however, no absolute right of appeal except in criminal cases where there is a dissenting opinion. 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".

"References" are matters within the Supreme Court's jurisdiction as well. A reference is a request of the Federal or Provincial Governments for the Supreme Court to give opinions with respect to the constitutionality of legislation.

The Federal Court of Canada

The Federal Court of Canada 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.

The Federal Court gets its jurisdiction from the *Federal Courts Act*, R.S.C. 1985, c. F-7.

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 of Alberta 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 the *Alberta Rules of Court,* Alta. Reg. 124/2010. 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 $50,000.00 (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. Pursuant to the *Judicature Act*, R.S.A. 2000, c. J-2, the Court of Queen's Bench has the jurisdiction, powers and authority that are by any law vested in or capable of being exercised by the Surrogate Court. The Surrogate Court deals 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 $50,000.00, 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. some youth matters; and
3. some family matters.

The Criminal Division of the Provincial Court hears criminal matters involving summary and indictable offences. Indictable offences are usually more serious criminal offences and have greater penalties. Being so, someone charged with an indictable offence has the right to choose the venue of the trial – either the Provincial Court or the Court of Queen's Bench.

The Civil Division of the Provincial Court is most often referred to as the "Small Claims Court". The procedural rules of the Provincial Court are 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.

Since the monetary limit of the Provincial Court was raised to $50,000.00, more insurance-related matters can be dealt with in the Provincial Court rather than in the Court of Queen's Bench.

THE DOCTRINE OF STARE DECISIS

The doctrine of *stare decisis* requires judges and justices of lower courts within a province to follow the previous decisions (the "precedents") of higher courts. If the higher court in the province has dealt with a particular issue in the past, the lower court judge or justice will be "bound" to follow that decision. Except for cases from the Supreme Court, 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 court's analysis.

The Role of Judges and Justices

Judges and justices play a passive and impartial role as arbitrator in trials and in chambers. The judges' and justices' role has been expanded to also include participation in Judicial Dispute Resolution (JDR) and in case management.

The Role of the Lawyer

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

The Law Society 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 purpose 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 Questionings, 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 Questionings 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 preauthorized 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 Application, 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 failure to take reasonable care which causes damage to 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. product liability;
7. strict liability; and
8. 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 allows the employer to sue their own employee to recover the damages for which they were 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 in motor vehicle accident files is the liability of an owner for the negligent operation of their 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

(b) 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 their loss by their own negligence is entitled to recover from the Defendant only 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 was 60% responsible for the accident, the Plaintiff would only be able to recover from the Defendant 60% of their damages. The applicable legislation in Alberta is 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 100% of the Plaintiff's 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 their 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.

The *Rules of Court* allow a Defendant to claim contribution or indemnity, or both, against a Co-Defendant under the *Tort-Feasors Act* and the *Contributory Negligence Act*. Pursuant to Rule 3.43 of the *Rules of Court*, if a party has already been named by the Plaintiff, it is essential that each Defendant file a Notice to Co-Defendant along with their Statement of Defence. A Notice to Co-Defendant preserves the filing Defendant's right to seek statutory contribution and indemnity. A Notice to Co-Defendant is not a complicated document and there is a designated form provided by the Court. Being that the Co-Defendant named in that pleading has already been identified by the Plaintiff, there is no need to file a Third Party Claim in order to preserve rights against those other potential contributing parties.

Third Party Claims

A Third Party Claim is required by a Defendant where a party who, although unnamed in the Statement of Claim, may or would, if sued by the Plaintiff, be liable in respect of the same damage being claimed against the Defendant. As the Plaintiff is the party who decides who they will sue, a Third Party Claim allows a Defendant to add a party to the action for their own benefit – the Defendant asserts a claim that the Plaintiff could have but did not.

The content of a Third Party Claim is much different than a Notice to Co-Defendant. While both pleadings identify contributing parties, a Third Party Claim alleges that the duty or obligation owed by the Third Party to the Defendant was breached and caused the Defendant to suffer damage that is related to the damage the Plaintiff claims it suffered. A Third Party Claim does not alter the claim being brought by the

Plaintiff against the Defendant. It is a separate but related pleading for the benefit of a named Defendant in the event that the Defendant is found liable to the Plaintiff.

Third Party Claims are available by virtue of the *Tort-Feasors Act* and the *Contributory Negligence Act* and are filed in accordance with the *Rules of Court*. A named Defendant must file a Third Party Claim within six months of filing its Statement of Defence.

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, governs the majority of limitation periods. The *Limitations Act* applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on, or after March 1, 1999. If a claimant knew or ought to have known of a claim before March 1, 1999, and the claimant did not seek a remedial order either before the time provided by the *Limitation of Actions Act*, R.S.A. 1980 c. L-15, or two years after the *Limitations Act*, S.A. 1996 c. L-15.1, which came into force on March 1, 1999, 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 based on a judgement or order must be brought no later than 10 years after the claim arose; and
2. Section 3(1): Subject to Sections 3(1.1), 3(1.2), 3.1, and 11, all other actions have the following limitation periods, depending on which period expires first:

    (a) Two 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". Per section 3(1)(a), the discovery limitation period is two years from the date on which the claimant first knew or, in the circumstances, ought to have known, that the injury for which the claimant seeks a remedial order had occurred, that the injury was attributable to conduct of the Defendant, and that the injury warrants bringing a proceeding. Per section 3(1)(b), the ultimate limitation period 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 legistlation 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 *Municipal Government Act,* R.S.A. 2000, c. M-26
Damage claim against municipality occasioned by failure to repair roads, highways, etc.	Notice within 30 days after accident.	s. 532(9) of the *Municipal Government Act*
Defamation	Three 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 seven days, if the publication is in a daily newspaper, or 14 days, in the case of any other newspaper or broadcast.	s. 13(1) of the *Defamation Act,* 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 one month after accident, unless the court is of the opinion that there is reasonable excuse for missing the limitation period and that the Crown would not be prejudiced in its defence by reason of the missed limitation period.	s. 38(8) of the *Public Highways Development Act,* R.S.A. 2000, c. P-38

Statutory Limitation Periods within the Insurance Act

The *Insurance Act*, R.S.A. 2000, c. I-3, contains limitation periods which must be adhered to alongside those in the *Limitations Act* and the *Rules of Court.* With respect to insurance contracts, an action or proceeding under an insurance contract must be commenced no later than two years after the date the insured knew or ought to have known of the loss or damage in cases involving an insured property. In any case, an action or proceeding against an insurer under a contract must be commenced no later than two years after the date the cause of action against the insurer arose. This limitation excludes automobile and hail insurance actions or proceedings.

The Effect of COVID-19 on Limitation Periods and Filing Deadlines

During the COVID-19 pandemic, the following legislative instruments, orders, and notices were issued affecting statutory limitation periods and Court filing deadlines under the *Rules of Court*.

A. Ministerial Order 27/2020

Ministerial Order 27/2020, issued by the Ministry of Justice and Solicitor General, suspended the limitation periods and "any period of time within which any step must be taken" of a number of Alberta enactments from March 17, 2020 to June 1, 2020. Included in the list of enactments in the Ministerial Order's Schedule affected by this suspension were the *Limitations Act* and the *Judicature Act*, which is the enabling statue of the *Rules of Court*.

As the *Limitations Act* was an enactment listed as affected by Ministerial Order 27/2020, any insurance claim limitation periods or deadlines that were directed by the *Limitations Act* were subject to the suspension.

Other enactments affected by the suspension include the *Contributory Negligence Act*, the *Fatal Accidents Act*, R.S.A. 2000, c. F-8, the *Tort-feasors Act*, the *Motor Vehicle Accident Claims Act*, R.S.A. 2000, c. M-22, and the *Provincial Court Act*, which is the enabling statute of the *Provincial Court Civil Procedure Regulation*, which dictates periods of time in which steps must be taken in a civil clam in the Provincial Court. The list of enactments effected by Ministerial Order 27/2020 include those enactments under the portfolio of the Minister of Justice and Solicitor General. The *Insurance Act* is an enactment under the portfolio of the Ministry of Finance. Notably, the *Insurance Act* was excluded from the list of enactments in Ministerial Order 27/2020. It may be said that limitations under Part 5 of the *Insurance Act* continued to run during COVID-19.

B. Court of Queen's Bench Master Orders and Court of Appeal Notice to the Profession

Alberta Courts, specifically the Court of Queen's Bench, issued a series of Master Orders suspending the filing deadlines under the *Rules of Court*. The suspension of filing deadlines was first put in place by Master Order No. 2 which was issued on March 20, 2020. The filing deadline suspension was continued by Master Order No. 3, issued on April 21, 2020, and Master Order No. 4, issued on May 13, 2020. The suspension of filing deadlines under the *Rules of Court* was in place from March 20, 2020 to June 26, 2020, after which the timelines reverted to normal. It is important to note that neither Ministerial Order 27/2020 nor the Court of Queen's Bench Master Orders suspended any deadline set by Court Order.

The Court of Appeal issued a Notice to the Profession & Public regarding the Court's response to the COVID-19 pandemic on March 23, 2020. The Notice to the Profession extended procedural time limits at the Court of Appeal at a limited capacity. The Notice to the Profession stated that, effective March 25, 2020, unless otherwise directed by a case management officer, judge, or justice, where an appeal (fast track, standard or criminal appeal) had not yet been set for hearing, and the deadline to order or commence preparation of the appeal record and transcripts or for the filing of appeal records, transcripts, factums, extracts of key evidence and books of authorities fell on or prior to May 4, 2020, the deadline would be extended by two months. The Notice to the Profession also stated that all time limits would remain in effect for deadlines falling after May 4, 2020 (i.e., on May 5, 2020 and onwards).

3. PROCEDURAL STEPS IN A LAWSUIT

VENUES FOR THE LAWSUIT

While matters up to $50,000.00 can be dealt with at the Provincial Court level, the majority of lawsuits in insurance law originate at the Court of Queen's Bench. The procedural steps in a lawsuit are different depending on the venue and once an action is filed with the Court it continues under the procedure of that Court until resolution, discontinuance or appeal.

The *Provincial Court Act* contains the procedure for lawsuits in the Provincial Court. The *Rules of Court* outline the steps and obligations when litigating in the Court of Queen's Bench and the Court of Appeal. The procedural steps in a lawsuit commenced at the Court of Queen's Bench and Court of Appeal levels are discussed below.

THE RULES OF COURT

The *Rules of Court* are designed to assist parties in identifying the issues in dispute, maintaining honesty and transparency in communication, facilitating quick and cost-effective resolution of claims, and encouraging out-of-court settlement. Overall, the *Rules of Court* impose positive obligations on litigating parties to take responsibility for the management and resolution of their disputes.

PLEADINGS

Pleadings include Statements of Claim, Statements of Defence, Counterclaims, Defences to Counterclaims, Replies to Statements of Defence, Replies to Defences to Counterclaims, Third Party Claims, Defences to Third Party Claims, Replies to a Third Party's Statements of Defence, Responses to Requests for Particulars, and Responses to Orders for Particulars. Each pleading is required to contain in summary form the material facts upon which the party relies for their claim or defence. The *Rules of Court* set out a number of formal requirements that must be complied with in each pleading. For example, a Statement of Claim must be served within one year after it was issued or filed. A Statement of Defence must be filed within 20 days of the Statement of Claim being served upon that Defendant if the service was effected in Alberta, or within one month of the Statement of Claim being served upon the Defendant if the service was effected outside of Alberta but in Canada. The parties can agree to a waiver of the timelines for filing, otherwise the deadlines imposed by the *Rules of Court* are strict.

To avoid a multiplicity of lawsuits, Defendants are entitled to issue contribution proceedings against other parties whom those 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 Claim may be issued. If a Defendant wishes to seek contribution or indemnity from another Defendant by virtue of that other Defendant's negligence, a Notice to Co-Defendant may be issued.

SERVICE

Statements of Claim and Third Party Claims can be served personally upon the Defendant or Third Party by being left with that individual, or by being sent by recorded mail addressed to that individual. The concept of recorded mail permits pleadings to be sent by registered mail or any other method (i.e., courier) that requires a signature from the recipient and provides the sender with a receipt indicating that the correct individual signed for the delivery. Service is deemed to be effected on the date the acknowledgment of receipt is signed by that individual. The same is true for service of Statements of Claim and Third Party Claims on trustees, personal representatives, and litigation representatives.

Service of a Statement of Claim or Third Party Claim on a corporation is effected by leaving the pleadings with an officer of the corporation who appears to have management or control responsibilities for that corporation; by leaving the pleadings with an individual in a management or control capacity for the corporation at its principal place of business or the corporation's place of business in Alberta; or by sending the pleadings by recorded mail to the corporation's principal place of business, or its principal place of business in Alberta.

Part 11 of the *Rules of Court* contains a host of rules relating specifically to the service of commencement documents on limited partnerships, other types of partnerships, missing persons, persons or corporations using alternate names, statutory and other entities, lawyers, and self-represented parties. There are even further service rules for societies, municipalities, the Provincial Crown, and the Federal Crown as well.

Pursuant to Rule 3.26 of the *Rules of Court*, a Statement of Claim must be served or renewed within one year of when it was filed with the Court. If a Statement of Claim is not served on a Defendant within the time or extended time for service, no further proceeding may be taken in the action against a Defendant who was not served in time. However, a Statement of Claim served on any Defendant in time is unaffected by the failure to serve any other Defendant in time.

If a document is to be served outside Alberta under the *Rules of Court*, the document must be served using a method provided by the Rules for service of documents within in Alberta or in accordance with the law of the jurisdiction in which the party to be served is located. Where a document is to be served in an international jurisdiction to which the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* applies, the document must be served in accordance with Division 8 of the *Rules of Court*.

Should an alternate form of service be required, in the event that it is impractical to effect prompt personal service or service via recorded mail, the serving party may still apply to the Court for an order for substitutional service allowing the document to be served by a different method if it is likely that the method proposed will bring the document to the attention of the person to be served.

Unless the Court otherwise orders, or the *Rules of Court* or an enactment otherwise provides, every document other than a commencement document that is to be served in Alberta may be served by electronic mail, recorded mail, or in a method agreed

upon by the parties under Rule 11.3. A document other than a commencement document may be served by electronic mail on a party who has specifically provided an address to which information or data in respect of an action may be transmitted.

DEFAULT PROCEEDINGS

If a Defendant has been properly served with a Statement of Claim and fails to file a Statement of Defence within the applicable time period discussed above (20 days, one month or two months, depending on where the Statement of Claim is served), and if the Plaintiff has not waived the limitation period to file a Statement of Defence, the Plaintiff can pursue default proceedings. If the claim is for a debt or a liquidated (ascertainable) amount, the Plaintiff may enter judgment for a sum not exceeding the amount in respect of which no defence is filed and the interest payable, if the interest calculation is based on a set rate, either under an agreement or an enactment. The Plaintiff is also entitled to a costs award. Where the claim is unliquidated (damages have yet to be determined), the Plaintiff may note the Defendant in default and then apply to the Court for judgment, proving the Plaintiff's claim by way of Affidavit evidence and, usually, obtaining a damage assessment in Justice Chambers. The justice hearing the matter may direct judgment in favour of the Plaintiff, make any necessary order, direct a determination of damages, or direct that the claim proceed to trial and that notice be served on the other Defendants, if any. With respect to claims for non-liquidated damages, the Court may grant a costs award.

If a Defendant has had a Default Judgment entered against them, or has been Noted in Default, they may apply 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.

RECORDS

A party to an action is obliged to disclose the existence of, and produce all, non-privileged documents which are, or which have been, in their power and which are relevant and material. The *Rules of Court* provide that a record is relevant and material if the record could significantly help determine, or ascertain evidence for, one or more of the issues raised in the pleadings.

After the Statement of Defence is filed, the Plaintiff has three months from the date of service of that defence to serve its Affidavit of Records upon the Defendant. The Defendant, upon being served with the Plaintiff's Affidavit of Records then has two months to serve its own Affidavit of Records upon the Plaintiff. Alternatively, if these timelines are too tight, the parties may agree to an alternate timeline, or a party may apply to the Court for an extension of time. It should be noted that the Affidavits of Records need only be served; there is no requirement for the filing of this record.

The Affidavit of Records itself lists the records that the party is willing to produce, as well as those records that they object to producing and label as privileged. The party must also list relevant and material documents that it once had in its power and possession, but no longer does.

A "record" is defined by the *Rules of Court* as including "the record of any information, data, or other thing that is or is capable of being reproduced visually or by sound, or both". This is therefore a very broad definition and includes information that goes beyond that which is on paper.

If a party comes into possession of any relevant or material records after serving its Affidavit of Records, those records must also be disclosed to the other parties to the action via an Amended Affidavit of Records.

Although the *Rules of Court* require that the parties exchange their respective Affidavits of Records prior to commencing Questioning, the parties may waive this requirement by agreement.

QUESTIONING

The purpose of a Questioning is:

1. to discover the other side's case and the evidence upon which they 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, Questioning is probably the most important step in the litigation process. It allows a thorough exploration of each sides' 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 Questioning 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 questioned.

Corporate parties are required to select an officer to speak on their behalf and whose answers will be binding upon the corporation for the purposes of the lawsuit. Regardless of their position within the corporation, the officer is obliged to take all reasonable steps to inform themselves 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 *Rules of Court,* questions asked in Questioning must be relevant and material to the issues alleged in the pleadings. Grounds for objecting to questions include:

(a) questions that are immaterial or irrelevant;

(b) questions that are unreasonable or unnecessary;

(c) questions that relate to privileged information or documents; and

(d) any other ground recognized at law, which include questions directed only toward the credibility of the witness, questions of law, questions that require the giving of an opinion, and questions that relate to communications between spouses.

UNDERTAKINGS

Occasionally at Questioning, 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 question 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 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 any lawsuit, it will probably be necessary for one or more applications to be made to the Court with a view to enforcing procedural rights or accelerating the proceedings. Examples of such applications in insurance litigation would include applications:

- to serve pleadings 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 Questioning;
- for a further and better Affidavit of Records;
- to consolidate actions/have actions tried together;
- to compel answers to undertakings given at Questioning;
- to order security for costs;
- to dismiss the action for want of prosecution; 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 which event the lawyer will prepare a Consent Order for signature by the Court. However, where the two sides are unable to agree, 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 either 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 document called an Application 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.

In response to the COVID-19 pandemic and pandemic operations transitioning the judicial system online, as of 2021, the *Rules of Court* permit applications to be heard electronically. An application, proceeding, summary trial, or trial may be conducted, in whole or in part, by electronic means. An electronic hearing may be held if the parties agree and the Court so permits, on successful application to the Court, or if, on the Court's own motion, it orders an electronic hearing.

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 the settlement of claims.

Under the *Rules of Court*, there is no required timeline for the disclosure of expert reports to be relied upon at trial by the parties. The *Rules of Court* state that the reports must be in the correct format as required by the *Rules of Court*, and that the experts' reports must be produced sequentially. The sequence of disclosure is started by the party with the onus of proof of a particular fact or issue, whose expert report is then rebutted by the other party. The party initially producing the report has the opportunity to produce a surrebuttal report. Therefore, no particular party is required to tip off the sequence, as it is based on the onus of proof of a particular fact or issue. Further, as there may be several facts or issues in any given matter, the *Rules of Court* provide for a cascade of production of reports for each individual fact or issue. The production of a comprehensive, all-inclusive report by a party is not required. Expert reports will often 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.

The *Rules of Court* require disclosure if the reports are to be relied upon at trial, however, unless and until a matter is set down for trial, expert reports are not necessarily producible documents. The *Rules of Court* provide that if the Plaintiff has been the subject of a medical examination by a health care professional of the Plaintiff's choice who will or may be proffered as an expert, the Court may order that the Plaintiff be subject to a medical examination by one or more health care professionals of the Defendant's choice refered to under the *Rules of Court* as an Independent Medical Examination (IME). 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 their 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 their expert opinion.

THE SETTLEMENT PROCESS

The vast majority of lawsuits are resolved by way of settlement, usually following Questioning. 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.

Settlements involving third parties may need to be disclosed to insureds. Further to the *Fair Practices Regulation*, Alta. Reg. 128/2001, a regulation created under the *Insurance Act*, where there is a claim against the insured under a contract of automobile insurance, and in the insurer's opinion the insured is liable, the insurer who settles the claim must disclose to the insured the dollar amount of any claim paid to a third party, the date of settlement, the name of the third party, and the nature or purpose of the settlement.

Formal Settlement Rules

In an effort to promote settlement of claims, the *Rules of Court* provide certain formal settlement rules that carry with them the possibility of increased exposure to costs should the party receiving the formal offer not accept the offer.

The *Rules of Court* provide that, at any time up to 10 days before the commencement of trial (or 10 days before an application is scheduled to be heard), one party may serve on the other a Formal Offer to Settle specifying the terms on which the party is willing to settle the claim. The Offer is usually expressed in terms of the payment of money, pre-judgment interest, and taxable costs. The Offer must remain open for a period of at least two months, unless the Court grants permission to withdraw the offer or at the starting of the hearing of an application or trial. In the event that the Offer is not accepted and the result at trial is more favourable to the offeror than the amount specified in the Formal Offer to Settle, the Court has the discretion to award double the usual taxable costs against the offeree for all steps in relation to the claim after service of the Formal Offer to Settle.

It is quite common for the parties to take a more "informal" approach than that set out by the *Rules of Court* regarding these Formal Offers. For example, 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.

One other Rule from the *Rules of Court* 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.

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 a remote 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, the payments constitute periodic payments of general damages and 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*, gives the Court the discretion to order that damages are to be paid by periodic payments and order that an annuity be purchased.

4. TRIALS AND APPEALS

SETTING THE MATTER DOWN FOR TRIAL

In order to schedule a matter for trial, Rule 8.4 of the *Rules of Court* states that the parties must provide to the Clerk of the Court a fully completed Form 37, a Request to Schedule a Trial Date (found in Schedule A to the *Rules of Court*). In Form 37, the parties must certify that they have participated in a dispute resolution process as required under Rule 4.16, that questioning is complete, that expert reports have been exchanged, that any Independent Medical Examination (IME) reports have been exchanged, that all undertakings given by each party have been fully answered, that all pleadings are complete, that all interlocutory applications are complete, and that the parties will be ready to proceed to trial. In addition to this, the parties must suggest an estimate of the number of witnesses to be called, the anticipated length of the trial, and any administrative requirements at the proposed trial.

Under Rule 8.5 of the *Rules of Court*, if all of the above steps have not yet been completed by the parties, but it is anticipated that these will be completed well in advance of the proposed trial date, the parties can provide the Clerk of the Court with certification that the outstanding items will be complete in order to obtain a trial date and prevent further delay in the matter. The scheduling of a trial date is at the Clerk's discretion - they must be satisfied that the items will be completed in time or the desired amount of trial time is reasonable. The Clerk may, and in some circumstances where there is concern about the timelines proposed by the parties must, refer the matter of setting a trial date to a judge or justice for directions or a decision. Setting a trial date is done via an application in Form 38, an Application for Court to Set a Trial Date (found in Schedule A to the *Rules of Court*).

It is the responsibility of the Clerk of the Court to notify the parties of the scheduled trial date, and these dates may only be changed with the permission of the Court.

Once a trial date has been scheduled, at least three months before the scheduled date for trial each party must confirm that it is ready to proceed by providing the Clerk of the Court with a completed Form 39, Confirmation of Trial Date (also found in Schedule A to the *Rules of Court*). Form 39 allows the parties to definitively state how many witnesses will be attending and how much trial time is actually required. If none of the parties provides a completed Form 39 to the Court, the trial date(s) will be cancelled and the parties will have to reapply to the Clerk of the Court for trial dates. Failure of one party to confirm trial readiness will not result in cancellation of the trial date. So long as one party confirms its trail readiness in Form 39, the trial date will be preserved.

PRE-TRIAL DISPUTE RESOLUTION PROCESSES

The *Rules of Court* require parties to attempt to sort out matters together and without the need for intervention by the Court. Litigation is an adversarial process and the procedures can be complicated, lengthy and costly. For this reason, participation in a form of Alternative Dispute Resolution (ADR) is mandatory in order to obtain trial dates. It is hoped that, even if the parties are not able to entirely resolve all of the issues between them, that a mutual understanding of the case, or a streamlining of the issues moving forward, will be more likely if the parties are forced to come together and discuss the matter. The ADR method chosen by the parties must include a neutral third party. The most popular form of ADR is generally mediation, where the parties can either hire a private third-party mediator, or judicial mediation, also known as Judicial Dispute Resolution (JDR).

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 the arbitrator assessing both sides of the dispute and making a decision that is binding on the disputing parties.

In JDR, a Court of Queen's Bench justice may act as mediator and will often give their opinion about the issues to the parties. It is useful to have a justice'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 80% 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 a potential trial of the matter.

SECURING ATTENDANCE OF WITNESSES

Trial witnesses residing in Alberta are served with Form 40, a Notice to Attend (also found in Schedule A to the *Rules of Court*), which must be accompanied by an allowance in the prescribed amount 20 days or more in advance of the trial date. If a witness who has been properly served with Form 40 and an allowance refuses or is unable to attend the trial, the Court will be more inclined to grant an adjournment.

Form 40 has no force outside of the Province of Alberta. Therefore, if it is necessary to compel the attendance of a witness outside of Alberta, 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 Rogatory, which is a formal request from the Court to a foreign court for judicial assistance in the taking of evidence.

JURY TRIAL

Jury trials can be longer and more expensive than trials before a judge or justice alone. In Alberta, litigants in civil matters can apply for a jury trial, however the Courts are reluctant to allow such applications and jury trials in civil matters are relatively rare in this province.

Based on the *Jury Act Regulation*, Alta. Reg. 68/1983, a party is entitled to have the lawsuit tried before a jury for matters involving amounts in excess of $75,000.00, with only a few exceptions, and if the action was commenced on or after March 1, 2003. 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 to decipher.

CONDUCT OF THE TRIAL

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

1. Opening motions and other preliminary matters;
2. Plaintiff's case:
    (i) opening statement;
    (ii) witnesses (examinations, cross-examinations, re-examinations);
    (iii) reading of the Defendant's Questioning testimony into evidence;
    (iv) 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 either be immediate or reserved to a later date and can 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 justice of the Court of Queen's Bench can be appealed to the Court of Appeal. An appeal must be filed within one month from the day of the judgment unless a statute or act that applies to the case (for example, the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)) provides otherwise. 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 a 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 materials relevant to the appeal. As well, both the Appellant and the Respondent 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 Court of Appeal sits four or five times a year alternating between Edmonton and Calgary. The Court of Appeal has 17 justices, and customarily divides itself into two Courts of three justices each; one of which deals with criminal appeals, the other of which deals with civil appeals. Occasionally, a civil appeal of specific importance will be heard by five justices.

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

Judgments from the Court of Appeal can be appealed to the Supreme Court. An appeal necessitates an application before the Supreme Court for leave to appeal and leave is granted in limited circumstances. Less than 20% 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 Court of Appeal is the Court of last resort for insurance claims in Alberta.

5. THE AWARD: DAMAGES, INTEREST, AND TAXABLE COSTS

DAMAGES

Damages can be broadly classified into four 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 they 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 pled:

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. pecuniary damages for loss of future income or diminished earning capacity;
4. pecuniary 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 include:

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

(A) General Damages for Non-Pecuniary Loss

Non-pecuniary losses are losses that cannot be measured in money, but nevertheless are compensated for with money. 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 has repeatedly affirmed the "functional" approach to assessing damages for nonpecuniary loss in personal injury cases.

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

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.

(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 who has 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) 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 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 their 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 their 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 maybe 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 for the required care. 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*. The *Tort-Feasors Act* discusses deprivation of "the society and comfort" of the injured spouse, which 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 their behalf. Such services generally involve nursing and caring for the injured Plaintiff.

A Plaintiff may also seek damages to be "held in trust" for friends and family who may render future care services relating to the injuries being compensated for in a settlement or at trial. The concept of "held in trust" establishes a reserve of funds to compensate a friend or family member for helping the injured Plaintiff. Pleading damages to be held in trust for persons other than the injured Plaintiff is one way to compensate someone connected to the Plaintiff who would otherwise not have standing to sue.

(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 Alberta 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 for 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 spouse, adult interdependent partner, 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 their "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", which 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 their 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

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 the *Judgment Interest 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:
      (i) paid into court and accepted; or
      (ii) 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). Note that a recent legislative amendment changed the pre-judgment interest rate for general damages of automobile accidents to the rate prescribed annually by regulations. See Bill 41: The Insurance (Enhancing Driver Affordability and Care) Amendment Act discussion below; and
3. Interest on pecuniary 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.

ASSESSABLE COSTS

Assessable costs are those costs that the successful litigant is entitled to recover against the unsuccessful party to the lawsuit. While the Court has 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 *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 party 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 "assessed" 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 an Assessment Officer who will review the respective positions and determine the appropriate award of costs in the circumstances. The 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 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;

(b) punitive or exemplary damages have been awarded; or

(c) where the parties in question have been guilty of bad faith.

6. 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 Part 7 of the *Insurance Act*.

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

the *Contributory Negligence Act*, the *Judgment Interest Act,* the *Limitations Act*, the *Minors' Property Act*, S.A. 2004, c. M-18.1, the *Motor Vehicle Accidents Claims Act*, the *Survival of Actions Act*, the *Fatal Accidents Act*, the *Tort-Feasors Act*, the *Traffic Safety Act*, the *Dangerous Goods Transportation and Handling Act*, R.S.A. 2000, c. D-4, and the *Workers' Compensation Act,* R.S.A. 2000, c. W-15, 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 the *Insurance Act* to issue a standard form automobile policy, S.P.F. No. 1. This policy is divided into three 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 including medical payments, death, grief counselling, funeral, total disability benefits, and accidents occurring outside of Alberta or involving an uninsured motorist; and Section C, with respect to claims by an insured against their 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. The most recent S.P.F. No. 1 was approved by the Superintendent of Insurance as of May 1, 2021.

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. However, owners can purchase additional coverage. 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. Under the *Fair Practices Regulation*, insurers are required to disclose the issuance of a motor vehicle liability policy and the liability limits under the policy following receipt of a notice that a Plaintiff has retained legal counsel.

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 their own insurer. Claims for items that are otherwise insured by Section B may instead be made by the injured party against the tort-feasor and their 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 as a result of the accident. The tort-feasor and their 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 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. There are two main types of Section C coverage: Collision and Comprehensive. Collision provides coverage for damage resulting from a motor vehicle accident, and Comprehensive provides compensation for physical damage arising from theft, vandalism, or other events.

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 tort-feasor.

As of January 1, 2022, new amendments to the *Insurance Act* establish a direct compensation scheme for property damage. The new regime, facilitated by Section 585.1 of the *Insurance Act* and the *Direct Compensation for Property Damage Regulation*, Alta Reg 132/2021 will allow an insured party to recover for damages to their automobile, contents, or loss of use caused by an at-fault driver directly from their insurer. The insured party will no longer be required to contact the tort-feasor's insurer for compensation. The insured party is then prohibited from initiating a claim against anyone other than their insurer, except where the regulations permit.

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 tort-feasor's vehicle 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

A motor vehicle accident may be caused or contributed to by a motorist who is not, through inadvertence or otherwise, insured at all. The *Motor Vehicle Accident Claims Act*, creates a motor vehicle accident 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 tort-feasor causing damage to the injured party or parties. If another tort-feasor is jointly and severally liable with the uninsured motorist, even to a degree of liability as small as one per cent, the Fund is not required to pay an injured party's claim. The other tort-feasor and their 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.

7. ALBERTA INSURANCE REFORM LEGISLATION

In October 2020, Bill 41: *The Insurance (Enhancing Driver Affordability and Care) Amendment Act* was first introduced. Bill 41 received Royal Assent on December 9, 2020, and the amendments will come into force on varying dates until early 2022.

EXPERT WITNESSES

The number of expert witnesses in motor vehicles is now limited, depending on the claim value. In a proceeding where the motor vehicle injury damages are $100,000.00 or more, a party may tender a maximum of three experts with a limit of one report per expert. If the claim for motor vehicle injury damages is less than $100,000.00, each party may tender only one expert and one expert report. These limitations are subject to a number of exceptions, including:

- The number of experts and the corresponding number of expert reports can exceed the proposed limits if all parties consent.
- The limit will not apply to evidence or reports from a joint expert, if all parties consent.
- The limit will not apply if the court grants additional experts or additional reports, upon application of one of the parties.

- The courts retain discretion to appoint their own experts on disputed matters.

The amendments apply to every motor vehicle injury proceeding commenced on or after January 1, 2021.

PRE-JUDGMENT INTEREST

Pursuant to Bill 41, pre-judgment interest in an action for loss or damage from a motor vehicle injury may only be awarded after i) the date on which the Statement of Claim is served on the Defendant or ii) the date on which the Plaintiff provides written notice of their intention to make a claim for loss or damage to the Defendant's insurer.

The amendments also provide that calculation of interest for non-pecuniary damages is calculated in the same manner as interest awarded for pecuniary damages – in accordance with the *Judgment Interest Act*. The interest rate from January 1, 2021, to December 31, 2021, is 0.2% per year.

Note: It is unclear yet whether the new pre-judgment interest rules apply only to proceedings initiated after a certain date. A recent Interpretation Bulletin from the Superintendent of Insurance (04-1010) indicates:

> "Regardless of whether a cause of action arose before, on or after the coming into force date of the amendment to the rate of pre-judgment interest, for judgments given on or after the coming into force date, the pre-judgment interest on non-pecuniary damages or losses arising from an automobile collision will be calculated in accordance with section 4(2) of the *Judgment Interest Act*."

In addition to the Bill 41 amendments, the Alberta government released three new Orders in Council in October 2020 to amend three regulatory regimes. All of the amendments went into effect on November 1, 2020.

AUTOMOBILE ACCIDENT INSURANCE BENEFITS REGULATION

The *Automobile Accident Insurance Benefits Regulation*, Alta Reg. 352/1972, was also amended in November 2020 to increase certain expense limits and provide additional access to medical equipment as follows:

- Adds medically necessary equipment, home modifications or vehicle modifications to the list of reasonable expenses incurred under Subsection 1 – Medical Payments;
- Increasing expense limits on chiropractic services from $750.00 to $1,000.00;
- Increasing expense limits on massage therapy and acupuncture services from $250.00 to $350.00;
- Increasing funeral expense limits from $5,000.00 to $6,150.00;
- Increasing grief counselling expenses from $400.00 to $500.00;
- Increasing weekly disability benefits from $400.00 per week to the lesser of $600.00 per week or 80% of the average gross weekly earnings;

- Increasing the length of disability benefits from 26 weeks to 104 weeks; and
- Increasing limits on psychological, physical therapy and occupational therapy services from $600.00 to $750.00.

THE DIAGNOSTIC TREATMENT AND PROTOCOLS REGULATION

The *Diagnostic Treatment and Protocols Regulation,* Alta Reg. 116/2014 (DTPR) provides information for insurers, lawyers and primary health care practitioners. The DTPR was amended in November 2020 as follows:

- Expanding the scope of "adjunct therapy" to include therapy provided by a dentist, occupational therapist and psychologist;
- Treatments by dentists, occupational therapists or psychologists do not count toward the number of total physical therapy, chiropractic or adjunct therapy visits permitted under sections 9(2) or 9(5);
- Limiting the expenses payable for adjunct therapy provided by a dentists, occupational therapist or psychologist to $1,000.00; and
- Amending section 16(2) to require health care practitioners to reassess sprains and strains as well as WAD I or WAD II injuries and allowing health care practitioners to authorize visits to injury management consultants for those persons with sprains and strains.

The DTPR 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; and

(d) no fractures to or dislocation of the spine.

Diagnosis - WAD II

A WAD II injury will be diagnosed when there are:

(a) complaints of pain, stiffness or tenderness;

(b) 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;

(c) no objective, demonstrable, definable and clinically relevant neurological signs of injury; and

(d) no fractures to or dislocation of the spine.

MINOR INJURY REGULATION

The *Minor Injury Regulation*, Alta. Reg. 123/2004 (MIR) sets a cap of $4,000.00, adjusted for inflation, for non-pecuniary losses for minor injuries. Each year, the Superintendent of Insurance announces the annual maximum amount. The 2021 minor injury maximum is $5,365.00 and applies to minor injuries resulting from automobile accidents that occur in Alberta on or after January 1, 2021.

The "minor injury" definition was amended in 2020 to include the following:

- A "sprain" – an injury to one or more tendons or ligaments, or both;
- 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:
    - Objective, demonstrable, definable and clinically relevant neurological signs;
    - A fracture to or dislocation of the spine.

caused by the accident that does not result in a serious impairment and includes, in respect of a sprain, strain or WAD injury that occurs on or after November 1, 2020, any clinically associated sequelae of the sprain, strain or WAD injury, whether physical or psychological in nature, caused by the accident that does not result in serious impairment.

In addition to the foregoing, an injury involving or surrounding the temporomandibular joints is a sprain, strain or WAD injury unless the injury involves

- Damage to bone or teeth, or
- Damage to or displacement of the articular disc.

For further clarity, the MIR provides that a reference to a sprain, strain or WAD injury also includes reference to any clinically associated sequelae of the sprain, strain or WAD injury, whether physical or psychological in nature.

SERIOUS IMPAIRMENT

Serious impairment is defined in the MIR 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 have been ongoing since the accident and that are 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 Certified Examiner (CE) assess the claimant for an opinion as to whether the injury is, or is not, "minor". A CE can be a physician or a dentist. In assessing whether the injury is minor, the CE may compel the claimant to produce any records they consider 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, they may require the claimant to re-attend on a specific date not later than six 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 maybe. The cost of the CE shall be paid by the party requesting the assessment.

TEST FOR DETERMINING IF THE MIR CLAIMS CAP APPLIES:

1. Is the alleged injury confined to a strain, sprain, or WAD injury, or any clinically associated sequelae?
    - 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 DTPR.

NUMBER OF TREATMENTS

Under the DTPR, and without approval by the insurer, a health care practitioner may authorize up to a total of one assessment and up to 10 "medical, physical therapy, chiropractic and adjunct therapy" visits in total for a first or second degree strain or sprain, or WAD I injury together with certain diagnostic tests and medications and supplies. The combined 11 visits are for the total of "medical, physical therapy, chiropractic and adjustment therapy" visits. For a third degree strain or sprain, or WAD II injury, no more than 22 visits in total are to be authorized, including the initial assessment.

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

Pursuant to section 22 of the DTPR, within 10 business days of a motor vehicle accident, or as soon as is practicable, the client or their health care practitioner must provide to the insurer a completed claim form detailing the accident and injuries.

Pursuant to section 23 of the DTPR, 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.

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*, applies, then the *Workers' Compensation Act* specifically prohibits any legal proceedings between the parties in question. The rationale is that the *Workers' Compensation Act* 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*, 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. CROWN'S RIGHT OF RECOVERY ACT

Under section 2(1) of the *Crown's Right of Recovery Act*, R.S.A. 2009, c. C-35, the Crown is entitled to recover the cost of health services incurred by a person for personal injuries they suffered as a result of a wrongdoer's wrongful act or omission. Costs for health services include physician's fees, drug services, and ambulance services. If the Plaintiff is found to be contributorily negligent, the Crown is entitled to recover its costs for health services from the wrongdoer but the amount of recovery will be deducted based on the Plaintiff's contributory negligence. However, as outlined in section 2(3), the Crown is not entitled to recover its health services costs if the Plaintiff was injured by a wrongdoer in a motor vehicle accident. Thus, the Crown's right of recovery will primarily be relevant for incidents such as slip and falls.

The limitation period in section 7 provides that the Crown must commence an action to recover its health services costs six months after the expiration of the Plaintiff's limitation period to commence an action against the wrongdoer, or, 10 years after the date the Crown's right of recovery arises, whichever is earlier.

11. MINORS' SETTLEMENT

Special consideration needs to be given to the procedural requirements for the settlement of an action for injuries sustained by a minor. The *Minors' Property Act* outlines the role of the Public Trustee of Alberta with respect to personal injury settlements for minors.

To ensure that a settlement cannot be repudiated when the minor turns 18 years old, section 4 of the *Minors' Property Act*, requires formal Court approval of the minor's settlement in the form of an Order. The *Minors' Property Act* does not give the Public Trustee authority to approve or confirm a minor's settlement. This authority rests exclusively with the Court of Queen's Bench.

The Public Trustee is charged by law to protect the rights and interests of those people who are incapable of asserting their legal rights because they are not adults. In respect of a minor's settlement, the role of the Public Trustee is to provide input that may assist the Court in evaluating settlements of minors' claims. Therefore, the Public Trustee will review settlements of minors' claims only when given notice of an application to the Court to confirm the settlement. The Public Trustee must be given at least 10 days' notice of the application (section 15). If the minor is 14 years of age or older, the application can only be made with the minor's consent, unless the Court otherwise allows (section 14 (3)).

Where an action for injuries sustained by a minor is settled, the litigation guardian of the minor, or the person against whom the claim or action is brought, on 10 days' notice to the opposite party and to the Public Trustee, may apply to the Court of Queen's Bench for an Order confirming the settlement. The Court may, on application, confirm the settlement if in the Court's opinion it is in the minor's best interest to do so.

The Court will review the following factors when determining whether a settlement is in the best interest of the minor: the nature and seriousness of the injuries; the adequacy of the proposed damages; the enforceability of the claim; the security offered or provided; evidence of the minor, if old enough, respecting the benefit to the minor of accepting the settlement; opinions of the minor's litigation guardian and of experts; and whether the award bears a proper relationship to other Court awards in conventional personal injury cases.

When the settlement is confirmed by Court Order, the person against whom the claim was made or the action brought, is discharged from all further claims arising out of and in respect of the injuries sustained by the minor. On the application for confirmation of the settlement, the justice may order that the settlement money be paid to the Public Trustee, to a trustee appointed by the Court under section 10 of the *Minors' Property Act*, or, if the settlement amount is $25,000.00 or less, as the Court directs.

12. FILE ADVANCEMENT - WHAT CAN AN INSURER DO?

INTRODUCTION

A common issue for insurers is managing a file that is not being advanced. Insurers' investigative efforts on such files may be thwarted by a lack of information and co-operation and by an apparent absence of remedies for addressing the problem. The results are files that are difficult to reserve, take longer to settle and are an aggravation to adjusters. There are, however, some options which are available to insurers which may help to move problem files forward and increase the likelihood of accurate assessment and early closure.

WHY DOES DELAY OCCUR?

There are a number of explanations for delays in file handling. In some cases, a delay may be strategic. Some files require greater substantiation of medical conditions. As well, a claim may be settled at a higher value as time goes on due to an insurer's interest in closing the file and in recognition of the expense of litigation.

While both parties are responsible for moving a matter along, at many stages of the process, the ball is in the Plaintiff's court. Unless the Plaintiff takes positive steps to move a matter along, it may be difficult to advance a file. There are a number of remedies available to an insurer to assist in moving files along.

PRE-LITIGATION ADVANCEMENT STRATEGY

Before the lawsuit is commenced with the filing of the Statement of Claim, there are no options available to an insurer to compel the production of documentation or the disclosure of evidence. Insurers are instead left to gather what information they can through use of investigative processes such as surveillance, witness interviews, and background checks. The following is a list of some specific pre-litigation advancement techniques which may be effective (some of which are in common use in adjuster file handling).

1. Advance Payments

Section 581 of the *Insurance Act* sets out a mechanism whereby an insurer can make without prejudice advance payments to a claimant. In the appropriate file this mechanism can be a useful device to establish goodwill with the claimant and to abridge pre-judgment interest. A section 581 payment can also provide an opportunity to obtain documentary production by making the payment in exchange for the provision of specified material of value to the investigative process.

In some circumstances, an insurer will make advance payments absent a request by a claimant. However, in cases where there are likely significant injuries, a request can be made on behalf of the claimant for an advance payment under the *Insurance Act*. Such a request will typically be made by the claimant's legal counsel. The application for advance payments would be by Originating Application or in an action that has

already been commenced. In the majority of cases, advance payments by an insurer will occur only after a claimant has retained legal counsel. It is relatively uncommon for such requests to be made absent the involvement of counsel.

Section 581(5) of the *Insurance Act* provides that the Lieutenant Governor in Council may make regulations authorizing the Court to make an order requiring an insurer to make an advanced payment to a claimant. Accordingly, section 5.6(3) of the *Fair Practices Regulation* outlines the circumstances in which the Court may make such an order. The Court must be satisfied that:

(a) As a result of the injuries of the claimant, the claimant is unable to pay for the necessities of life; or

(b) The payment is otherwise appropriate.

Advance payments may be necessary in circumstances where the claimant is rendered destitute as a result of a motor vehicle accident. The claimant may be unable to continue with their lawsuit or meet the necessities of life as a result of financial constraints.

The Test (Shannon v 1610635, 2014 ABCA 393)

The current test that the Court will apply in determining whether an advance payment should be ordered was laid out in *Shannon v 1610635*, 2014 ABCA 393. The following criteria must be met:

1. The Defendant is probably liable to the claimant for the amount requested (or more) – i.e., there must be at least a 51% chance that the Defendant will be found liable.
2. Without an advance payment, the claimant will likely go without the necessities of life or be unable to pursue their claim. However, note that the claimant has a duty to mitigate the extent their damages.
3. If 1 and 2 are satisfied, the Court must weigh approximately the claimant's likely loss without receiving an advance payment against the Defendant's likelihood of overpaying. The Court will consider both the probabilities of each scenario and the monetary amounts.
4. The Court should flexibly consider imposing terms and conditions on one of the parties, to mitigate the risk to one or both parties.

Given that the *Insurance Act* and the *Fair Practices Regulation* do not speak to the manner of payment, the Courts have concluded that there is broad discretion to order advance payments in whatever manner is most appropriate (i.e., lump sum or installments).

Additionally, insurers should be aware that claimants are permitted to reapply for additional advance payments if the advance was initially refused, the advance needs to be revised or the advance was exhausted.

2. Offers Referable For Costs Purposes

After litigation has commenced a Defendant is able to serve a Formal Offer to Settle to protect their position with respect to costs. The Formal Offer to Settle is a valuable tool in advancing files as a Plaintiff must consider the risk of paying additional costs if he or she does not realistically assess the value of the claim.

Prior to litigation there is no mechanism for issuing a Formal Offer to Settle. During this period no assessable legal costs are being incurred. However, often significant medical and other disbursements arise prior to litigation as Plaintiff's counsel works on substantiating the quantum case. Typically, if any liability finding is made those costs are ultimately recoverable against a Defendant. Prior to litigation "without prejudice" offers are often exchanged. However, those offers cannot be raised before a Court when speaking to costs. The result is that even if a Defendant betters an informal offer at trial, he or she still pays for disbursements during this stage.

An under-utilized mechanism for addressing the above scenario is for an insurer to forward an offer which expressly reserves the right to raise that offer when speaking to costs. Such offers are still "without prejudice" for all purposes—except for speaking to costs. The appropriate wording for such offers (sometimes called "Calderbank Offers" after a British decision which recognized them) is along the following lines:

> "This Offer is without prejudice but we hereby reserve the right to refer to the fact that this offer was made at the time when the question of costs is spoken to at any trial held respecting this matter."

This type of offer may put pressure on the Plaintiff (who is responsible for any disbursements which are not recovered) and on Plaintiff's Counsel (who is often paying for those disbursements).

3. Vigorous Defence Of Section B Files

The Section B insurer has an opportunity not available to a Section A insurer, namely the entitlement to become involved as of right in the full investigation of a personal injury claim in the immediate aftermath of the accident. The Section B insurer is entitled to an independent medical examination, to production of medical records and to obtain limited information directly from a claimant. The entitlement to this information arises at the crucial period shortly after the accident when a claim is still developing, and good information gathering at that stage can make the difference between quantum being contained, or growing into a large claim. For that reason, the Section B file, which is largely producible in the subsequent tort action, provides a valuable potential source of early information to the insurer defending that claim.

The Section B insurer passes the advantage of a thorough file onto the Section A insurer. Section B insurers must, however, be mindful at all times of their good faith obligations to their insureds, and their file handling cannot exceed that which is reasonably necessary to the handling of the Section B file.

POST-LITIGATION ADVANCEMENT STRATEGY

After the Statement of Claim is issued there is typically a continuation, or an initiation, of the settlement discussion process as each side attempts to avoid the expense of active litigation. Some disclosure may occur on the part of Plaintiff counsel at this stage, although the incentive to delay can continue, and the insurer's investigative and assessment role can still be frustrated. Often insurers continue to adopt a tentative approach during this period and to await production of documents at the pleasure of Plaintiff counsel. However, on post-litigation files the insurer does have other options. Once the Statement of Claim is issued the *Rules of Court* can be utilized.

In most cases, it is necessary for a Statement of Defence to be filed before the *Rules of Court* can be utilized. Filing a Statement of Defence involves incurring a relatively small litigation expense. Filing a Statement of Defence can usually be accomplished expeditiously and without a commitment to continued legal handling. There is no reason why an insurer cannot retain counsel to perform the limited role of filing a Statement of Defence, and for the insurer to still continue with direct file handling. This step can be taken short of formal service by simply obtaining a copy of the Statement of Claim from the Court of Queen's Bench and filing a Statement of Defence in response. This approach has several advantages:

- It establishes a willingness to proceed to active litigation, if necessary;
- It provides an entitlement to access some of the procedural provisions of the *Rules of Court* which operate to the advantage of Defendants (discussed below);
- It takes away the ability of Plaintiff counsel to threaten to Note in Default;
- By filing a Statement of Defence the costs of service can be avoided, which costs are ultimately payable by the insurer in the ordinary course; and
- If need be, the insurer is in a position to proceed to Questioning expeditiously without waiting for service and a demand to defend (in an extreme case a Statement of Defence could be issued, together with an appointment for Questioning, all immediately following the filing of the Statement of Claim - thereby examining the Plaintiff much sooner than would otherwise be the case).

It should be emphasized that an insurer's good faith obligations require that an insured be put on notice of the fact that an insurer proposes to accept service and enter a defence to an action. The insured should be provided with a copy of the Statement of Claim and the approval of the insured to the filing of the Statement of Defence short of service should be secured in each case. If there is any prospect of the claim exceeding policy limits, it is advisable to insist on service of the Statement of Claim directly upon the insured.

By "taking charge" and filing a Statement of Defence, an insurer can access several mechanisms in the *Rules of Court*, which may be of assistance in moving a file forward, including, as discussed, exercising the entitlement to have the Plaintiff submit to an Independent Medical Examination (IME), exchanging Affidavits of Records and advancing Formal Offers to Settle.

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 this 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 deskbook or regarding any other inquiries that you may have.

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