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No Fault & the Insurance Industry in
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The Horrors of No Fault Insurance in British Columbia

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Over the past five years, the BC government has introduced various pieces of legislation such as the no fault insurance scheme which have eroded the rights of British Columbians. As a plaintiff personal injury lawyer, I have represented clients from across BC who have been seriously injured as a result of motor vehicle accidents (occurring prior to May 2021), assaults, slips & falls, and occupiers' negligence claims. In 2023, serving as President of the Trial Lawyers Association of British Columbia (TLABC), I have been part of the struggle to protect the rights of British Columbians from the effect of no fault insurance.

"Minor Injury" Caps

Unlike Alberta, BC has a government-run monopoly auto insurance company called the Insurance Corporation of British Columbia (ICBC). The government insists that it was forced to bring in reforms to address ICBC's increasing debt. Although "minor injury" caps, like those in Alberta, have been introduced, the government's long-held intention appears to be to legislate no fault insurance regardless of earlier reforms.

David Eby, the BC Attorney General at the time and current BC Premier, is said to have planned the implementation of no fault legislation in BC as far back as November 2018.¹ Just one year after announcing "minor injury" caps (up to \$5,500), he stated the government would be creating a definition for minor injuries that would likely include sprains, aches and pains, mild whiplash, cuts and bruises, anxiety, and stress. He indicated that concussions, broken bones, and other serious injuries would not be classified as "minor."

On May 2, 2018, Eby issued a press release that expanded the definition of "minor injury":

"We anticipate that the regulations will include temporomandibular joint disorder (TMJ) – pain in your jaw joint and in the muscles that control jaw movement – as well

as the more minor whiplash associated disorders (WAD) 1 and 2 in the definition. The most serious of whiplash-associated disorders will not be included in the definition, nor will third-degree sprains, strains, broken bones, or brain injuries."²

He also said that mental health conditions lasting longer than 12 months would not be considered "minor."

Six months later, on November 9, 2018, the *Insurance (Vehicle) Act*, R.S.B.C., c. 231 (the "*Insurance (Vehicle) Act*")³ was amended and *Insurance (Vehicle) Act*, Minor Injury Regulation, B.C. Reg. 234/2018 (the "Minor Injury Regulation")⁴ was introduced. The legislation resulted in a further broadening of the "minor injury" definition to also include brain injuries (i.e., concussion) and imposed the "serious impairment" criteria that mirrors the definition of "incapacity" for psychological/psychiatric and brain injury conditions.

By the Attorney General's own admission, the "minor injury" definition went from "sprains and aches," excluding brain injuries/concussions, to injuries "whether or not chronic" that now also included psychological/psychiatric and brain injuries. As it stands in BC, "minor injury" caps are still applicable for injured British Columbians who were involved in motor vehicle accidents from April 1, 2019 to May 1, 2021, after which time the no fault insurance took over.

No Fault

The hypocrisy of the "minor injury" caps must be highlighted as it proved to be a smokescreen for what was to come – the

² "Further transparency on regulations planned for ICBC reforms," Ministry of Attorney General, May 2, 2018 https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2018AG0028-000810.htm

³ Insurance (Vehicle) Act, [RSBC 1996] CHAPTER 231, www.bclaws.ca/civix/document/id/complete/statreg/96231_01

⁴ Insurance (Vehicle) Act, Minor Injury Regulation, B.C. Reg. 234/2018 http://www.bclaws.ca/civix/document/id/crbccrbcc/234_2018

¹ Vancouver Sun, "From no-fault hater to no-fault lover: The inside story on David Eby's decision to revamp ICBC" <https://vancouversun.com/news/politics/from-no-fault-hater-to-no-fault-lover-the-inside-story-on-david-eby-s-decision-to-revamp-icbc>



eventual full implementation of no fault insurance. On February 6, 2020, then-Premier of BC, John Horgan, alongside Attorney General Eby, announced plans to implement no fault insurance in BC.⁵ At the same time, ICBC auto insurance premiums were cut by 20% for British Columbians.⁶

As a simple definition, no fault insurance restricts the rights of British Columbians to sue for damages if they have been injured in a motor vehicle accident in BC unless the defendant is criminally charged and convicted. The no fault system resembles workers' compensation claims, in that the body "WorkSafe BC" (like ICBC in its current form) directs the claimant's medical care with little recourse for the injured individual.

British Columbians are eligible to receive a lump sum for compensation if ICBC determines that the claimant has sustained a permanent impairment as a result of a "catastrophic injury". A value-chart then applies. No fault applies to claims for British Columbians who are injured in motor vehicle accidents from May 1, 2021 onward. Thus, British Columbians are no longer entitled to awards or settlements for pain and suffering, future income capacity, or other damages that might be capped and limited (such as treatment costs, income replacement, etc.).

When no fault was announced, the BC government also announced up to \$7.5 million in medical and rehabilitation benefits compared to the \$300,000 that existed at the time.⁷ These changes were ultimately put into place at the same time as no fault on May 1, 2021. However, these changes, which were allegedly intended to support more British Columbians, in fact caused fewer injured people to have access to care.⁸

A new report by the Insurance Bureau of Canada ("IBC") investigated the first year of ICBC's new "enhanced care model", which was summarized by *Insurance Business*:

According to the report, ICBC's operating expenses exceeded what it had provided in injury claims by \$173 million. The insurer's operating expenses in 2021/22 stood at \$1.62 billion, but it paid \$1.48 billion in injury claims during the same period. By comparison, ICBC paid out \$2.11 billion in injury claims in 2020/21, before the no-fault regime was implemented.

ICBC's year-end financials indicated that the switch to a pure no-fault system allowed it to reduce what it provides to accident victims by 30%. But it was also noted that the number of collisions during the same period were

⁵ Vancouver Sun, "B.C. to cut ICBC rates 20 per cent and switch to 'no-fault' insurance" <https://vancouversun.com/news/local-news/live-b-c-to-switch-to-no-fault-auto-insurance-trim-rates-20-per-cent-in-2021>

⁶ Vancouver Sun, "B.C. to cut ICBC rates 20 per cent and switch to 'no-fault' insurance" <https://vancouversun.com/news/local-news/live-b-c-to-switch-to-no-fault-auto-insurance-trim-rates-20-per-cent-in-2021>

⁷ Global News, "B.C. government axing lawyer, legal costs to create no-fault style insurance at ICBC" <https://globalnews.ca/news/6516071/icbc-changes/>

⁸ Insurance Business Magazine, "ICBC's no-fault regime led to 'dramatic reduction' in recovery benefits – IBC" <https://www.insurancebusinessmag.com/ca/news/auto-motor/ic-bcs-nofault-regime-led-to-dramatic-reduction-in-recovery-benefits--ibc-426430.aspx>

significantly up; there was a 15% increase in collisions from 2020's 225,000 to 2021's 260,000.

"The purpose of auto insurance is to ensure that people get the benefits they need to recover from injuries sustained in an accident," said IBC Pacific and Western Vice-President Aaron Sutherland. "ICBC's dramatic reduction in claims costs calls that key tenet of insurance into question."

Despite the increased number of motor vehicle accidents, benefits to British Columbians have decreased. Sutherland echoes this point, "We think this shows that, rather than looking inward to find savings ICBC is balancing its books on the back of accident victims."

"...the fear that the most vulnerable are being increasingly victimized is proving true..."

Anecdotally, a number of rehabilitation clinics are seeing a rapid decline in their clients. Many clients are simply "giving up" on treatment due to the complications and complexities of securing funding for their care on their own while managing their ongoing injuries. Some find it difficult to reach their insurance adjuster, and some report that their adjusters have failed to renew their treatments, and so on.

Additional Efforts by Government beyond "Minor Injury" Caps and No Fault

Despite the presumable significant cost savings with no fault, the government has continued their efforts against injured British Columbians. For example, an amendment to section 5 of the *Evidence Act*, Disbursements and Expert Evidence Regulation, essentially "capped" disbursements to 6% of a settlement or judgment amount.⁹ In other words, a plaintiff, unaware of how much their claim might be worth, would be limited to spending \$6,000 if they eventually received a settlement or judgment of \$100,000. As most personal injury lawyers know, the cost of expert reports, clinical records, court reporters, and other expenses can add up and easily exceed a few thousand dollars. The Trial Lawyers Association of BC ultimately challenged the government on this legislation and on July 8, 2022, Justice Smith of the Supreme Court of BC struck down the regulation that limited a successful plaintiff's disbursement recovery to 6% of the settlement or judgment. Justice Smith concluded that the regulation was both invalid and unconstitutional. An appeal was brought by the government in the BC Court of Appeal and Justices Harris and Voith noted that they would dismiss the appeal on the administrative law ground with Justice Newbury

concurring on this ground but further noting that the appeal would also be dismissed on the constitutional law ground. She noted, "...one of the effects of s.5 is to force plaintiffs in motor vehicle accident cases to decide they simply cannot afford to proceed with their claims, or parts of their claims...I conclude it is inconsistent with the 'basic judicial function' of superior courts and infringes their core jurisdiction."¹⁰

Then, as recently as November 2023, the BC government brought in an Order in Council that amended the Disbursements and Expert Evidence Regulation under the *Evidence Act* in direct response to the judgment by the BC Court of Appeal.¹¹ The amendments essentially reinstated the "6% cap". Presently, the Trial Lawyers Association of BC is reviewing its options.

The Aftermath

From the perspective of plaintiff personal injury lawyers, who are inundated daily with calls and emails from injured British Columbians, after more than 2½ years, most people are still unclear about the implications of no fault insurance and how it can affect individuals and families. Internal studies by the Trial Lawyers Association of BC show that British Columbians do not fully understand "minor injury" caps or no fault insurance unless they have been injured in a motor vehicle accident.

Unfortunately, the number of people who are injured is growing exponentially. And the fear that the most vulnerable are being increasingly victimized is proving true – individuals with serious brain injuries without advocates, as well as immigrants, senior citizens, and young people with undefined futures are all scrambling to navigate the legal system with few available options and a lack of fair compensation by the tortfeasor. The same is true for self-employed business owners who may have an inconsistent income or high-income earners who have a ceiling on their benefits if totally disabled. Thousands of British Columbians are falling through the cracks, and as advocates, we feel helpless in our efforts to support them.

Many plaintiff personal injury lawyers are busy with existing file loads under the old system, which could continue for three years or more. We try our best to listen to those who contact us about claims under the no fault regime, even if we cannot represent them. As advocates, we feel it is incumbent on us to educate individuals about the changes in this currently broken system.

The next election in BC has yet to be called, though some

9 Evidence Act, R.S.B.C. 1996, c. 124, ss. 12.1 and 12.2, Disbursements and Expert Evidence Regulation [BC Reg. 31/2021], https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/210_2020

10 British Columbia (Attorney General) v. Le, 2023 BCCA 200 <https://www.canlii.org/en/bc/bcca/doc/2023/2023bccca200/2023bccca200.pdf>

11 Evidence Act, R.S.B.C. 1996, c. 124, ss. 12.1 and 12.2, Disbursements and Expert Evidence Regulation (OIC 468/2020) https://bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0628_2023

speculate it will happen next spring. (The BC government has stated it will happen close to the October 2024 deadline.) The NDP, which is currently in power, is aware of the no fault horror stories, but still supports the system. The other two parties, the BC United (formerly the BC Liberals) and the Conservative Party of BC have both stated that they will reverse the no fault system and bring in a broader definition of the “minor injury” caps.

Final Thoughts

Where does Alberta go from here? I would encourage Alberta litigators to educate clients, colleagues, staff, and members of their healthcare network about the horrors of no fault. In every community, the brain injury groups, cycling groups, and other likeminded groups will undoubtedly be affected by no fault reforms. Education and awareness is the first step to navigating this important issue and understanding what the true impact might be on Albertans and civil justice more broadly.

The Trial Lawyers Association of BC has and continues to apply a multi-pronged approach with a pending constitutional challenge, regular meetings with MLAs from the main political parties, and media engagement to encourage British Columbians to speak up about their own horror stories. If no fault insurance is the ultimate reality, there are virtually no options available to protect individuals. We have encouraged people to be proactive as best they can under the current regime, for example, high-income earners can look into additional (self-insured) disability insurance since the coverage from ICBC are generally inadequate (and for wage loss benefits depends on a total disability, nothing less). However, often it is too late for those who have already been injured in motor vehicle accidents. We have heard of some cases where individuals have no choice but to sell their homes and make drastic changes in their lives if they are left without adequate income replacement. There are clearly countless shortfalls to the no fault regime, and it has only been 2 ½ years...

I would stress that this is not the end of BC’s fight against no fault by any means. British Columbians are not going down without a fight, and we encourage Albertans to do the same!

(The Personal opinions set out in this article are the Author's, and not those of the TLABC.)