AUTOMOBILE ACCIDENT CLAIMS IN BRITISH COLUMBIA: A MANUAL FOR U.S. CLAIMS EXAMINERS

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1. INTRODUCTION

The province of British Columbia ("BC") poses unique challenges for insurance claims handlers located in the United States. While generally speaking, the Canadian and American court systems operate in a similar fashion, there are many facets of BC insurance and tort law that may come as a surprise to those handling BC claims for the first time.

This manual assumes a general knowledge of the auto claims and litigation processes. It is not meant to answer every possible question that might arise, but rather, the intention is to provide an easy reference to assist examiners in dealing with the issues that distinguish BC from most U.S. jurisdictions.

2. BRITISH COLUMBIA AUTO INSURANCE: WHERE DO WE FIND IT?

Unlike most jurisdictions in the United States, there is only one primary auto insurer in BC. Since 1974, the province has operated a universal compulsory automobile insurance scheme known as "Autoplan", which is administered by the Insurance Corporation of British Columbia ("ICBC"). As part of the vehicle registration procedure in BC, every owner of a licensed motor vehicle is required to purchase basic Autoplan insurance from ICBC. Licensed private insurers are also permitted to sell auto insurance, but are only allowed to write policies for optional coverages such as excess liability, collision, etc.

Autoplan coverage is governed entirely by statute. There is no policy wording in a form recognizable to those operating in private insurance jurisdictions. The two key statutes governing auto insurance in BC are the *Insurance (Vehicle) Act*, which covers both ICBC and private insurers who write auto policies inside and outside BC, and the *Insurance (Vehicle) Regulation*, which contains the details of coverage established by the Act. Nearly all auto insurance issues in BC flow from these two pieces of legislation. Insurers writing non-auto policies are governed by the more general *Insurance Act*.

3. BRITISH COLUMBIA AUTO INSURANCE: WHY DO WE CARE?

Most auto claims examiners will know that when one of their insured drivers is involved in an accident outside their home jurisdiction, that driver's policy will be "reformed", "rolled up" or "extended" and the limits will be increased to at least the minimum third party limits of the jurisdiction where the accident occurred. For example, if a Washington insured carrying a $25,000 per claimant/$50,000 per accident limit is involved in an accident in BC, that limit will be increased to BC's minimum aggregate limit of $200,000 (CDN) + interest and costs.

However, the third party limits are only the starting point in considering how coverage is affected when the insured crosses the border. Further, examiners handling claims in BC will also find a number of procedural and substantive issues that must be considered, many of which are rarely if ever seen in the United States.

Many of the principles encountered will be contrary to standard policy wordings or the standard procedures in the jurisdiction where the policy was issued, and will affect both coverage and the defence of tort claims. To further complicate matters, not every policy will be reformed in the same way. As a result, it is essential that claims examiners to understand not only how, but why the policy must be reformed, so that the appropriate rules can be followed.

4. BASES FOR REFORM

4.1 THE PAU

Most North American auto insurers have filed a Power of Attorney and Undertaking (the "PAU") with the Canadian Council of Insurance Regulators. The PAU regime was introduced in 1964 in recognition of the fact that different jurisdictions have different minimum requirements for auto insurance. In order to allow drivers to cross international and interprovincial borders without violating any insurance laws, the industry came up with a reciprocal system to ensure that the mandatory minimum requirements for a given jurisdiction are met when drivers cross the border. Since 1964, the wording of the PAU has been changed twice, in 1988 and 1998. The 1988 revision resulted in a very significant change in the scope of the undertaking, which is discussed below.

As its name suggests, the PAU is made up of two parts, a power of attorney and an undertaking. Each of these significantly impacts the way in which claims must be handled.

4.1.1 The Power of Attorney

The power of attorney reads as follows:

> "Name of Insurance company", the head office of which is in the City of _____, in the State of _____, in the United States of America, hereby, with respect to an action or proceeding against it or its insured, or its insured and another or others, arising out of a motor-vehicle accident in any of the respective Provinces or Territories, appoints severally the Superintendents of Insurance of British Columbia, Alberta, Saskatchewan, and Manitoba, the Registrars of Motor Vehicles of Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland, the Director of the Motor Vehicle Bureau of Quebec, the Commissioners of Yukon Territory and the Northwest Territories, or such official as may from time to time be designated by the Provinces or Territories concerned, to do and execute all or any of the following acts, deeds, and things, that is to say: To accept service of notice or process on its behalf.

The effect of the power of attorney section of the PAU is to relieve injured plaintiffs from the need to personally serve defendants with court proceedings. Instead, where a PAU has been filed by the defendant's insurer, the plaintiff can deliver their pleadings to the Superintendent of Insurance. The Superintendent will then forward the claim to the insurer by registered mail, and this will constitute service on the insured.

As a result, when insurers receive letters from BC's Financial Institutions Commission purporting to serve an insured, it is important to recognize that the insured is deemed to have been served at that point, and responsive pleadings will be required to avoid default proceedings.

4.1.2 The Undertaking

The undertaking section of the PAU is the agreement that causes the policy to be reformed. The original form of PAU, which was standard from 1964 to 1988, contained the following undertakings "with respect to an action or proceeding against it or its insured" (emphasis added):

> C. Not to set up any defence to any claim, action, or proceeding, under a motor vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the law relating to motor vehicle liability insurance contracts of the province or territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a court in such province or territory, in the claim, action, or proceeding, up to
>
> (1) the limit or limits of liability provided in the contract; but
>
> (2) in any event an amount not less than the limit or limits fixed as the minimum for which a contract of motor vehicle liability insurance may be entered into in such province or territory of Canada exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum limit or limits as may be fixed by the province or territory.

In 1988, the PAU form was revised, and insurers filing the new form undertook as follows (emphasis added):

> C. Not to set up any defence to any claim, action, or proceeding, under a motor vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the laws relating to motor vehicle liability insurance contracts or plan of automobile insurance of the province or territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a court in such province or territory, in the claim, action, or proceeding, in respect of any kind of class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such province or territory of Canada up to the greater of:
>
> (a) the amounts and limits for that kind of class of coverage or coverages provided in the contract or plan, or
>
> (b) the minimum for that kind or class of coverage or coverages required by law to be provided under the plan or contracts of automobile insurance entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum amounts and limits as may be required by the laws of the Province or Territory.

The key to understanding the operation of the PAU is found in the words “not to set up any defence to any claim, action, or proceeding…” The most common such defence relates to limits; however, the scope of the PAU extends far beyond that issue, and it is therefore essential that examiners are aware of the mandatory coverages required in BC, to avoid raising any policy based defences that are precluded by the PAU.

4.1.3 Effect of the Undertaking: Third Party Liability

Regardless of the form of PAU filed, the most common and often most significant impact of the PAU will be on the limits of third party liability coverage in the insured's policy. While many U.S. jurisdictions have legislated minimum third party liability limits of $25,000 per claimant or less, the minimum limit of coverage for third party liability in BC is $200,000 (CDN) for a private vehicle. Higher limits exist for commercial vehicles, including taxis, buses and commercial trucks ($1 Million) and trucks licensed to carry dangerous goods ($2 Million). Therefore, if a U.S. insurer has filed a PAU and its insured driver crosses the border into BC, the insured's policy will automatically be "reformed" to comply with the minimum limits provided in the BC legislation (assuming the limits of coverage in that policy are less than $200,000 (CDN); if they are higher than that amount, the limits will remain as set out in the policy).

4.1.4 Effect of the Undertaking: First Party Coverage

While the PAU has always been clear in its effect on third party liability coverage, the form in effect from 1964 to 1988 was silent with respect to the first party coverages, including accident benefits coverage, wage loss and underinsured motorist coverage. That issue was settled by the BC Court of Appeal in 2004.

In *Batchelder v. Filewich*, the BC Court of Appeal considered different wordings in the two PAU forms. It noted that the old form simply referred to a "motor vehicle liability insurance policy" while the new form refers to a "plan of automobile insurance" and any "kind or class of coverage". The court rejected the notion that an insurer which undertook to provide liability coverage in the old form could be taken to have agreed to provide the additional and entirely different forms of coverage required by the new form. Therefore, the *Batchelder* case establishes that only insurers who have filed the new form must reform their first party coverages, while insurers who have filed the old form must only reform their third party liability limits.

Where a new form PAU has been filed, the low or non-existent limits applicable to the PIP coverages found in most U.S. policies must now be reformed to BC's much higher limits. *This will be the case even where the insured has signed a PIP waiver and would have no coverage at all in their home jurisdiction.* For the reasons discussed below, this will impact not only on first party claims but also third party claims; therefore, it is important for examiners on both the PIP and tort sides of a claim to be aware of the first party coverages available in BC.

4.1.4.1 Mandatory First Party Coverages

The *Insurance (Vehicle) Regulation* establishes four mandatory first party coverages, as follows:

1) total disability benefits for insured income earners and homemakers who are "substantially and continuously" disabled (ss.80 and 84);

2) medical and rehabilitation expenses (s.88);

3) death and survivor benefits (ss.91-93); and

4) underinsured Motorist Protection (s.148.1).

The first three types of benefits are found in Part 7 of the *Insurance (Vehicle) Regulation*, and are commonly referred to as "Part 7 Benefits" or alternatively, "no-fault benefits" as they apply regardless of fault for the accident. The definition of "insured" under Part 7 includes an occupant of a vehicle involved in an accident, as well as a cyclist or pedestrian.

Underinsured Motorist Protection is found in Part 10 of the *Insurance (Vehicle) Regulation* and is frequently referred to as “UMP”. The definition of “insured” includes all occupants of a vehicle involved in an accident with an underinsured motorist.

4.1.4.2 Disability Benefits

Under Part 7, an "employed person" includes a person who was employed on the date of the accident as well as an unemployed person who was employed for any six months during the 12 month period immediately preceding the accident. The benefit payable is the lesser of $300 per week or 75% of the insured's average gross weekly earnings in the 12 month period preceding the accident.

The benefit is subject to a seven day waiting period and is thereafter payable for the duration of the total disability or for 104 weeks, whichever is shorter. However, this limit is somewhat illusory, and if the claimant remains "totally disabled from engaging in employment or an occupation for which he is reasonably suited by education, training or experience" beyond the two year period, then disability benefits continue to be payable *for as long as the disability continues*. In catastrophic cases, this may be the balance of the claimant's working lifetime.

In such cases, the amounts payable are reduced by the amounts of Canada Pension Plan, Old Age Pension or "other disability payments" payable to the claimant. Finally, where the insured does return to work but, because of the injuries suffered in the accident is incapable of earning as much as they were receiving from ICBC's disability benefits, the claimant can recover the difference.

The entitlement to disability benefits is not completely unlimited, however. The benefits can be terminated on the advice of the insurer's medical advisor, or if the claimant refuses to undergo the treatment or training required by the insurer where such treatment or training is, in the opinion of the insurer's medical/vocational advisor and the insured's medical practitioner, "likely to relieve in whole or part the disability" or "likely to assist in the insured's rehabilitation".

Homemakers who are "substantially" and "continuously" disabled are entitled to recover reasonable expenses up to a maximum of $145 per week to hire a person to perform household tasks on the claimant's behalf. No benefits are payable in respect of household tasks performed by a member of the claimant's family (although such "losses" may be compensable in the tort claim).

4.1.4.3 Medical and Rehabilitation Benefits

Medical and rehabilitation benefits in BC fall into two categories, mandatory and permissive.

Mandatory benefits include all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance, professional nursing services, physical therapy, chiropractic treatment, occupational therapy, speech therapy or for prosthesis or orthosis. “Physical therapy” has been held by the courts to include massage therapy.

There is no liability to pay for more than 12 physical therapy treatments unless a medical practitioner certifies in writing that further treatment is necessary.

Permissive benefits may be available to an insured who is injured in an accident where, in the opinion of the insurer’s medical advisors, the provision of such benefits is likely to promote the rehabilitation of the insured. Permissive benefits usually come into play in catastrophic cases, and include the following:

- funds to purchase a specially equipped motor vehicle;
- funds to alter the insured's residence to make it accessible;
- reimbursements for certain costs of attendant care;
- equipment such as a wheelchair, medically prescribed bed or respirator ; and
- funds for the insured to undergo vocational training.

Although the payment of "permissive" benefits involves the exercise of discretion on the part of the insurer, the case law establishes that this discretion is not unfettered. The insurer is obliged to consider the request and its decision must be "rationally connected to relevant factors governing an objective assessment of the disablement and the resulting requirement" for the benefits claimed. In appropriate cases, the insurer can be compelled to pay the so called "permissive" benefits.

4.1.4.4 Death Benefits

The available no-fault death benefits in BC include funeral expenses, lump sum payments and certain supplemental survivor benefits. The amount of lump sum payments available is based on the age and status of the deceased, as set out in the Regulations. The amount ranges from $500 for the death of a dependent child under five years old to $5,000 for the head of a household. The lump sum benefits are payable to the "first survivor" i.e. the spouse or, if there is no spouse, the eldest dependant.

Supplemental survivor benefits are payable where the deceased insured is survived by a spouse or by more than one dependant. In such event, an additional $1,000 lump sum payment is available to each survivor other than the first survivor. Additionally, weekly benefits are payable for a period of two years following the death in the amount of $145 to the first survivor and $35 to each other survivor (section 93(2)).

4.1.4.5 Limits and Exclusions

The limit of coverage with respect to medical and rehabilitation benefits is $150,000 (CND). However, there is no coverage for amounts payable by another insurer or which are recoverable under a medical, surgical, dental or hospital plan or law. Thus, if an insured is eligible for benefits under workers compensation statutes, employment insurance or any private plan, the amount of benefits received or receivable will be taken into account when determining the Part 7 benefits payable by the insurer.

Further, the maximum amount payable with respect to most medical/rehabilitation services is not to exceed the amount that would be paid for the same service under the tariff of fees approved by the Medical Services Commission (BC's universal health care provider). Any disputes between the claimant and the insurer as to whether or not an expense is "reasonable" must be submitted to arbitration under the *Commercial Arbitration Act*.

4.1.4.6 UMP

In addition to the above, the UIM coverage often found in U.S. policies, which generally matches the third party liability limits, must also be reformed under the new PAU to comply with BC's mandatory UMP coverage. Further, like Part 7 benefits, UMP will apply even if the insured has not purchased UIM. It may come as a shock to some that in BC, every driver must carry UMP coverage with a minimum limit of $1 Million (CDN) *per occupant of the vehicle*.

UMP is not technically payable until after a judgment has been obtained against the underinsured driver, although in cases where entitlement is obvious, it will often be paid as part of a global settlement of the tort and UMP claims. Further, it is subject to certain deductions such that the actual limit will rarely if ever actually reach $1 Million. These deductions are found in s.148.1 of the *Insurance (Vehicle) Regulation* and include not only the underinsured driver's policy limits, but also various government benefits, other insurance and the underinsured driver's exigible assets. Therefore, it is open to an insurer to require an affidavit of assets of the underinsured driver, and to require enforcement proceedings to be brought before UMP is paid. If the insured defendant refuses to provide an affidavit of assets, ICBC will often refuse to pay UMP, making it difficult to settle tort claims even where it is clear that the primary limits will be exhausted.

4.1.5 Other Requirements of the PAU

In addition to reforming its limits, and in the case of a newer form PAU, first party coverages, an insurer who has filed a PAU must:

- appear in an action against it or its insured of which it has knowledge (note the absence of any reference to service);
- personally serve its own insured with the claim; and
- refrain from settling up any defence to any "claim, action, or proceeding" which might not be set up if the contract had been entered into in, and in accordance with the law of the province where the proceeding is instituted.

While insurers often tell plaintiff's counsel to personally serve the insured, knowledgeable plaintiff's counsel will be able to point to the PAU and demand acceptance of service by the insurer. If this occurs, there is no basis for a refusal.

Finally, the PAU is retroactive and will apply from the moment it is filed to any ongoing claim. Therefore, where an insurer files or re-files a new form PAU after the accident, it may become liable for first party benefits even though it was not liable at the time of the loss. See *Diotte v. ICBC.*

4.1.6 Interplay between the PAU and the Policy

It is essential to understand that the PAU does not say anywhere that one policy is replaced by another. The basic rule of thumb in PAU cases is that where the legislation described above does not allow a certain defence, the insurer cannot raise it. However, it must not be forgotten that regardless of whether a PAU has been filed, the insurer continues to have a contract with its insured. As a result, where the policy provides the insured with certain rights that are more beneficial than those contained in the legislation, the policy will continue to govern.

A simple example is a standard U.S. policy providing disability benefits of 85% of the insured's earnings to a maximum of $200 per week. The *Insurance (Vehicle) Regulation* provides for 75% of earnings to a maximum of $300 per week. In this case, the insurer is contractually bound to pay 85%; it cannot pay less. However, the PAU will preclude it from limiting the benefit to $200, because a BC insurer would be required to pay $300 (CND). Therefore, the reformed policy is a hybrid of the two forms, and the insured is entitled to the best of both worlds: 85% of earnings to a maximum of $300 (CND) per week (subject to exchange rates).

A similar issue arises in relation to the limitation of Part 7 payments to Medical Services Commission rates. Depending on the policy in question, a U.S. insurer required to pay Part 7 benefits under the PAU may be required to pay the full amount of any U.S. treatment which is not subject to the Medical Services Commission tariff, depending on the policy wordings.

For this reason, it is essential that examiners apply their minds to both their own policy and the BC statutes when assessing a claim.

4.1.7 Conclusions Regarding the PAU

Based on the above, is essential that any insurer involved in a case where the insured is making a first party claim under either the PIP or UIM be aware of whether they have filed a PAU, and if one has been filed, the date on which the filing took place. A repository of PAUs is maintained by the Canadian Council of Insurance Regulators ("CCIR"), and can be accessed on the internet at www.ccir-ccrra.org/pau/NEW%20PAU/index_en.htm.

In the event that the PAU was filed in the old form (i.e. prior to 1988), only the third party liability limits must be reformed, while the limits of any first party coverages remain as set out in the policy. In catastrophic cases, this can result in a difference of hundreds of thousands of dollars. The Schedule to the *Insurance (Vehicle) Regulation* setting out all the first and third party limits is reproduced as Appendix "A".

4.2 OTHER BASES FOR POLICY REFORMATION

While the PAU is the most common basis for policy reform, there are three other circumstances in which an out-of-province insurer will be required to reform its coverage and policy limits to accord with the mandatory minimums in BC. These are as follows:

4.2.1 Out-of-State Coverage Provision in the Policy

Most U.S. auto policies contain a provision such as the following:

If the state or province has:

1. A financial responsibility or similar law specifying limits of liability for bodily injury or property damage higher than the limit shown in the Declarations, your policy will provide the higher specified limit.

2. A compulsory insurance or similar law requiring a non-resident to maintain insurance whenever the non-resident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.

This clause has been interpreted in BC to apply only to third party liability limits and not to first party coverages. Where such a clause exists, the third party limits must be extended, regardless of whether a PAU has been filed.

4.2.2 "Reciprocal" or "Matching" Legislation

Matching legislation is legislation in the jurisdiction in which the insurer is licensed which requires auto insurers to reform their policies. Matching legislation is standard in Canada. It is not common in the United States, though auto claims examiners must always be aware of the possibility of such requirements in their home jurisdiction, particularly if there is no other basis for reforming a policy. Further, certain U.S. auto insurers write policies in the private insurance jurisdictions of Canada, and a company licensed in one of those provinces may be subject to that province's matching legislation.

4.2.3 Insurer has a Business Authorization in BC

Insurers licensed in BC are subject to the *Insurance Company Vehicle Liability Regulation* enacted pursuant to the *Financial Institutions Act*. The conditions imposed are substantially the same as those found in the PAU, and have been interpreted to require that both first and third party coverages be reformed.

While most U.S. companies do not write auto insurance in BC, some are licensed to write other forms of coverage, and are therefore subject to the Regulation, which applies universally to all insurers, regardless of their actual lines of business.

The practical result is that where there is no PAU, auto claims examiners must always be aware of whether or not their company is licensed to carry on business in BC under the terms of a Business Authorization issued by the BC Financial Institutions Commission ("FICOM"). A list of companies holding Business Authorizations can be found on FICOM's website at www.fic.gov.bc.ca.

5. COMMON COVERAGE ISSUES

5.1 PRIORITY OF COVERAGE

In BC, insurance "follows the car" such that the owner's policy provides primary coverage, and any policy held by the driver provides excess coverage only.

Most auto insurance policies, however, contain a "Temporary Vehicle" or similar provision which will govern in situations where the insured is the driver of a rental car. In such cases, where an accident occurs, the first issue for any claims examiner will be to determine whether the insured's own policy or that of the rental company will provide primary coverage.

In BC, the standard owner's policy covers not only the owner, but also persons driving the insured vehicle with the owner's consent. The policy contains a waiver of subrogation as against the person driving with consent, and where the driver is covered by more than one policy, the statute makes the owner's policy primary. Therefore, if a non-resident insured, for example, travels to BC on vacation, borrows a friend's car and is involved in an accident, the friend's insurance will be primary, and the insured's policy will be secondary.

In the case of a vehicle rented in BC, the same general rules would apply. Self insurance for vehicles is not allowed in BC, and therefore, the rental company's insurance would provide primary coverage. However, where the vehicle is rented in a jurisdiction in which the rental company is self-insured, the vehicle may not be "insured" for the purpose of the overlapping coverage analysis. Such a situation might result in the insured's own policy being primary.

Therefore, when presented with a claim involving a rental vehicle, it is essential to review the rental contract as well as both the insured's and the rental company's insurance coverage in order to determine which insurer will be primary, and thus obligated to defend the claim in the first

instance. The BC Supreme Court Rules require the production of all insurance policies that may provide coverage, and therefore, it is prudent to make the relevant inquiries of the rental company rather than blindly accepting that the driver's policy must respond on a primary basis.

5.2 CASES INVOLVING MULTIPLE CLAIMANTS

In BC, allocation of insurance monies in auto cases is governed by the "proportionality principle" such that where multiple claimants have claims which in the aggregate exceed the policy limit, each claimant is entitled to their proportional share of the insurance proceeds.

The courts in BC have held that the proper proportions can only be determined after all the claims have proceeded to judgment. It has been held that if an insurer settles with one claimant and the second obtains a judgment in excess of the remaining limits, the limits will be "recharged" to the original amount. Therefore, it is often not possible to settle one of several claims early, even where one claim is more straightforward than the others. To do so is to run the risk of the remaining claims exceeding the remaining limits, in which case those limits will be extended by the amount of the first settlement. This can cause delays and be frustrating for claimants and insurers alike.

It is essential for insurers faced with multiple claimants to be aware of this rule, and if one claimant forces their matter to trial and a judgment is granted before the others, it may be necessary to pay the limits into court, where the successful claimant can apply for payment of the judgment from the funds in court on notice to the other claimants. In that situation, the limits will not extend, and the insurer will have no further obligation.

5.3 LIMITED SUBROGATION RIGHTS

In BC, s.83 of the *Insurance (Vehicle) Act* provides for a deemed release by the insured for benefits received or to which the insured was entitled to receive. While the statute also provides for a general right of subrogation for monies paid, it is a general principle of insurance law that a subrogating insurer can have no greater rights than its insured. Therefore, where the tort claimant is deemed to have released the Part 7 benefits under s.83, that release can be enforced against the insurer which paid those benefits, and an insurer cannot succeed in a subrogated action for benefits paid. The effect of this provision is that PIP subrogation is not available in BC.

Note, however, that subrogated claims are allowed for other types of payments, such as collision damage payments.

5.4 DIRECT RECOURSE ACTIONS

In BC (and the rest of Canada) auto insurance legislation permits judgment creditors to pursue recovery of their MVA judgment directly from the defendant's auto insurer. These provisions become relevant in coverage denial situations, as the direct recourse provisions specifically state that the claimant's action *is not defensible on the basis of a policy breach*. Therefore, if an injured party sues the insured, and coverage is denied, the claimant can sue the insurer to collect the judgment, and the insurer will have no defence.

The effect of these provisions is that insurer who has denied coverage is ill advised to simply walk away from the claim. The *Insurance (Vehicle) Act* provides a mechanism which allows insurers to limit their exposure by adding themselves to the action against the insured as a statutory third party, and defending (and settling) the claim in that manner.

Where an insurer is forced to pay under the direct recourse provisions, it may seek to recover the amounts paid out from its insured. However, this is often cold comfort to examiners, as the insured's lack of funds will often preclude recovery.

5.5 LIMITATION PERIODS APPLICABLE TO PART 7 CLAIMS

Under the *Insurance (Vehicle) Regulation*, an action by a claimant in respect of no-fault benefits payable in BC must be commenced within two years from the date of the accident or, where benefits have been paid, within two years from the date the last benefit payment under Part 7 was received. It is also a condition precedent to such an action that the claimant has "substantially complied" with their obligations respecting giving notice of the claim, providing requested medical certificates and submitting to requested medical examinations.

The *Insurance (Vehicle) Regulation* also provides for an extension of the limitation period in cases where, within two years of the accident, an insured who has made a claim has not been paid in accordance with the regulation. In such cases, a claimant is permitted to issue a notice to ICBC within two years after the accident, indicating that the insured intends to commence an action. If a notice is given, the limitation period is extended for a further two years after the date notice is given.

In BC, some plaintiffs' counsel will file an action for Part 7 benefits at the same time that they issue the tort action against the other persons responsible for the accident. These are entirely separate proceedings and the Part 7 claim cannot be joined with the tort action. Case law suggests that such an action is premature and should be stayed or dismissed. Nevertheless, plaintiffs' counsel will often commence the action anyway, banking on the fact that defendants will generally not be willing to incur the expense of applying to have the claim dismissed at an early stage.

The most recent pronouncement of the BC Court of Appeal is that the two year limitation period applies to claims against out-of-province auto insurers as well as ICBC.

5.6 STATUTORY ALLOCATION OF LIMITS TO PROPERTY DAMAGE AND INJURY DAMAGES

Where a claim involves substantial property damage as well as serious injuries, the *Insurance (Vehicle) Regulation* establishes priorities for dealing with the two heads of damage. Where the injuries, property damage or both are significant, damages arising out of injury or death have priority over claims arising from loss or damage to property to the extent of 90% of the policy limit, and claims arising out of loss or damage to property have priority over claims arising out of injury or death to the extent of 10% of the limit.

Thus where a plaintiff suffers injuries valued at (e.g.) $200,000 and property damage valued at $50,000, the $200,000 primary limit will be allocated $180,000 to the injury claim and $20,000 to the property claim. This can be a significant issue where there are multiple claimants.

The priority rules for dealing with competing property and injury claims provide a partial exception to the general rule that claims involving multiple claimants must be settled together. Where the property damage claims are clearly worth less than 10% of the policy limit, those claims can be settled at an early stage (often with a subrogating insurer), leaving the full amount allocated to injury claims available. If the property claim is valued at more than 10% of the limits, insurers can still pay up to 10% of the limits to settle the property claim, but must be aware of the proportionality principles that can extend their policy limits if they are not followed.

6. DEFENDING A BC TORT CLAIM

It is essential that examiners have a general familiarity with the coverage framework described above in order to properly handle BC claims. However, the BC tort system also contains some unique aspects which also arise on a regular basis.

6.1 LIMITATION PERIODS

In BC, the *Limitation Act* provides a two year limitation period for bodily injury and property damage claims caused by a readily identifiable external event. This period will apply to the vast majority of auto claims.

However, there are certain exceptions to the standard limitation period. For example, the limitation period applicable to minors is two years after they reach the age of majority, which in BC is 19 years of age. Therefore the limitation date for a claim involving a minor is the claimant's 21st birthday.

Limitation periods can also be extended if the plaintiff is rendered incompetent for a period of time. For example, if the claimant is in a coma for several months and then recovers, the limitation period will not begin to run until the claimant is mentally competent.

Another way in which limitation periods can be extended is where a cause of action is "confirmed" in writing within the two years. Confirmation can be made by either the defendant or the insurer. It can be done expressly, but this rarely occurs. More commonly, an insurer will inadvertently confirm the cause of action by representing that the claim will be settled, making an advance payment, paying for a medical report obtained by the plaintiff, or by otherwise implicitly accepting liability for the claim. Therefore, where an insurer intends to do any of these things, it is essential that the accompanying correspondence makes it clear that the contemplated action is without prejudice to the insurer's reliance on any limitation period.

Finally, the courts in BC are forgiving in certain circumstances where the limitation date is missed. After filing, plaintiffs in BC have one year to serve their pleadings. In cases where the claim is filed outside the two year limitation period but served within one year of the limitation date, the courts routinely hold that the claim can proceed. The rationale for such rulings is that in theory, the claimant could have filed on the limitation date, waited a year and then served. Therefore, a defendant served less than a year after the limitation date is no worse off than one served a full year after the limitation date, even though the claim in the former case was filed out of time. This ignores the fact that the court registries are searchable and defendants can search online the day after the limitation period expires, and organize their lives accordingly. However, if actual prejudice exists, it may be possible to uphold the limitation date.

6.2 THE COURT SYSTEM IN BC

The court system in BC is divided into three levels.

6.2.1 Provincial (Small Claims) Court

The Provincial Court is the Small Claims Court for BC and has jurisdiction to hear claims involving $25,000 or less (exclusive of interest and costs). Claimants whose claims exceed $25,000 may abandon the excess and restrict their claim to $25,000 if they wish the matter to proceed in the Small Claims Court. Small Claims procedure is governed by the Small Claims Rules, which are designed for lay persons, and discovery rights are severely restricted.

6.2.2 The Supreme Court of British Columbia

The Supreme Court is the superior trial court of the province. All motor vehicle accident cases involving damages greater than $25,000 and many claiming less are brought in Supreme Court.

Proceedings in Supreme Court are commenced by filing a Notice of Civil Claim and are governed by the Supreme Court Civil Rules. Discovery rights are similar to those found in most U.S. jurisdictions, although generally only parties may be examined for discovery (deposed).

Jury trials are available in motor vehicle accident cases, but the majority of civil trials are by judge alone.

6.2.3 Court of Appeal of British Columbia

Plaintiffs and defendants who are unsuccessful at trial are allowed to appeal to the Court of Appeal as of right. Interlocutory orders may be appealed, but only with leave. It is extremely rare for the types of procedural orders made in automobile accident cases to be appealed.

6.3 SERVICE AND FILING REQUIREMENTS

The time available for filing Response to Civil Claim in a Supreme Court action depends on where the defendant resides, rather than where the defendant was served. The response periods are as follows:

Place of residence of person served	Number of days to file Appearance
In Canada	21 days
In U.S.A.	35 days
Elsewhere in the world	49 days

If a response is not filed within the time required, the plaintiff is entitled to take default judgment against the insured. It can sometimes be difficult to set aside the default process and it will invariably involve legal costs that could easily have been avoided. This has serious implications for insurers, in light of the direct recourse and breach of policy issues described above.

6.4 OWNER VICARIOUS LIABILITY

Section 86 of the *Motor Vehicle Act* governs the liability of those driving a vehicle with the owner's consent, including lessees. When dealing with BC auto claims, it is essential that claims handlers be aware of the rules established by s.86, which include the following:

1. the owner of a vehicle is vicariously liable for the negligence of a family member or other person driving with the owner's consent;

2. the lessor of a vehicle is vicariously liable for the negligence the lessee or a family member of the lessee, or other person driving with the lessee's consent.

It should be noted that a "lessor" includes not only a vehicle leasing company in the traditional sense (e.g. Ford Credit), but also rental companies such as Hertz and Enterprise.

For this reason, where the owner and driver of a vehicle are different people, both are always named as defendants. As noted above, the owner's policy will provide primary coverage in such situations.

6.5 CONTRIBUTORY NEGLIGENCE AND JOINT TORTFEASORS

In BC, defendants whose negligence jointly caused the plaintiff's loss are jointly and severally liable to the plaintiff. Where the plaintiff is contributorily negligent, the judgment will be reduced by the percentage of the plaintiff's fault on a pure comparative basis.

A unique feature of BC law, however, is that joint and several liability applies only where the plaintiff is not at fault. Where the plaintiff is partially at fault, liability is severed pursuant to section 2 of BC's *Negligence Act*, and the plaintiff can only recover from a joint tortfeasor that percentage

of the judgment attributable to that tortfeasor's fault. This can have serious implications where only one of several tortfeasors is insured.

6.6 STATUTORY CAP ON LIABILITY OF LESSORS, INCLUDING RENTAL COMPANIES

While lessors of vehicles are vicariously liable for the negligence of their lessees, s. 86 of the *Motor Vehicle Act* establishes a $1 Million cap on lessor liability. Individuals who lend their vehicle to drivers are vicariously liable for the full amount of the claim.

6.7 DEDUCTIBILITY OF PART 7 BENEFITS

As discussed above, accident benefits are dealt with under Part 7 of the *Insurance (Vehicle) Regulation*, and are generally referred to as either Part 7 benefits or “no fault” benefits, as they are payable regardless of fault.

Section 83 of the *Insurance (Vehicle) Act*, also discussed above, provides for a “deemed release” of all benefits to which the plaintiff receives *or was entitled to receive*. The deemed release applies regardless of whether the plaintiff actually received the benefits, or even applies for them. The effect of this provision is that a defendant in an automobile accident case is entitled to deduct from the tort award any amounts that the plaintiff received by way of statutory accident benefits. Further, future no-fault benefits to which the plaintiff is entitled must also be deducted from the judgment awarded in the tort action. However, the onus is on the defendant to prove the amount of the benefits that the plaintiff received or was entitled to receive and to match those benefits to a specific category of loss claimed in the tort action.

As a result, it is essential that claims examiners have a basic understanding of the available benefits in BC, which are described above.

6.8 WORKERS' COMPENSATION CONSIDERATIONS

Where a claimant is acting in the course and scope of employment at the time of the accident, and the alleged tortfeasor is either a “worker” or “employer” as defined in the *Workers Compensation Act*, the claimant loses the right to sue in court for damages. In such circumstances, the defendant can apply to the Workers Compensation Appeal Tribunal for a declaration that the Act applies, following which the court will stay the proceeding.

In the event that the claimant is a worker in the course of employment but the defendant is not a worker or employer, the claimant can elect to proceed in tort or with a WCB claim. If the claimant proceeds with a WCB claim in that situation, the WCB is entitled to subrogate.

Finally, in multi-party cases where the claim is barred as against one of several defendants, the plaintiff can only recover that percentage of damages attributable to the non-worker/employer.

The so called “worker-worker bar” may allow insurers to escape from or limit their exposure in claims involving buses, trucks or taxis, or other situations where it appears that the claimant was working at the time of the accident.

6.9 FATAL ACCIDENTS

Fatal accidents in BC are governed by the *Family Compensation Act*, which authorizes claims to be brought for the benefit of a surviving spouse (including common law), parent, grandparent or child of the deceased.

Family compensation claims are allowed for pecuniary losses only, including loss of past and future financial support, loss of household assistance, loss of guidance and companionship, loss or acceleration of inheritance, etc.

The *Family Compensation Act* does not allow damages for bereavement, nor is the deceased person's pain and suffering compensable, as it is in many U.S. jurisdictions.

6.10 INFANT CLAIMS

As discussed in the section dealing with limitation periods above, where an infant, defined as a person under the age of 19 years, is injured in a motor vehicle accident, the limitation period is postponed to their 21st birthday.

However, under the *Limitation Act*, a defendant can issue a "Notice to Proceed", which can be served on both the infant's guardian and the Public Trustee. Where a Notice to Proceed is served in accordance with the rules, the two year limitation period starts to run from the date of service.

Settlements of claims involving minors are also governed by the *Infants Act*. All proposed settlements must be presented to the Public Trustee for review, whether an action has been commenced or not. Where an action has been started, the only method of settlement is by court order.

If the settlement is under $50,000 and no action has been started, a formal settlement agreement can be finalized with either the guardian (with the consent of the Public Trustee) or the Public Trustee directly. If, however, the Public Trustee refuses to give consent, then an application can be made to the court for approval of the arrangement on 10 days written notice to the Public Trustee.

If the proposed settlement amount inclusive of interest and costs, exceeds $50,000, or an action has been commenced, a court order approving the settlement is required.

6.11 MANDATORY MEDIATION

In BC, either a plaintiff or a defendant in a Supreme Court action can force the other parties to mediate, by delivering a Notice to Mediate pursuant to the *Notice to Mediate Regulation*, enacted pursuant to the *Insurance (Vehicle) Act*. This can be a useful tool when a plaintiff is being uncooperative, or when there are multiple actions which must be settled together. If the opposing party still refuses to cooperate, the court can order attendance at mediation and make other directions, including the choice of mediator.

7. ASSESSMENT OF DAMAGES IN BRITISH COLUMBIA

While the basic heads of damage are similar to those found in other common law jurisdictions, the method of assessment can differ significantly.

7.1 GENERAL DAMAGES

Unlike U.S. residents, BC residents do not pay for health care (other than their monthly Medical Services Plan premiums) and never see a medical bill for non-elective care. Therefore, the practice used in many U.S. jurisdictions of assessing general damages by reference to a claimant's medical bills is not workable in BC. Rather, because the majority of bodily injury cases are decided by judge alone and reasons for judgment are issued, damages are assessed by reference to case law precedents involving plaintiffs with similar injuries.

In the 1970's, the Supreme Court of Canada established a general damages cap of $100,000, which has been in place since that time. The amount is subject to annual increases for inflation, and the present value of the cap is close to $350,000 in 2012. This amount will only be awarded in "total loss" cases involving catastrophic injuries such as quadriplegia or severe brain injury. Judges are well aware of the cap and enforce it; if a jury awards more than the cap, the award will be reduced automatically.

While the cap amount may be lower than examiners see in catastrophic cases in the U.S., in less severe cases, it may come as a surprise to learn that damages for soft tissue injuries tend to be much higher in BC than in most of the United States. For example, a plaintiff with a soft tissue injury who is fully recovered in 9-12 months might receive a damage award in the range of $15,000.

7.2 PAST WAGE LOSS

Past wage loss is a self-explanatory head of damage based on the plaintiff's actual loss of income from the date of the accident through trial. However, in a break with the common law, past income losses in BC auto claims are assessed on the basis of net (after tax) income only.

7.3 LOSS OF FUTURE INCOME AND EARNING CAPACITY

Unlike many U.S. jurisdictions, it is not necessary in BC to prove on a balance of probabilities that the plaintiff will incur a future loss of income in order for compensation to be awarded. Rather, the plaintiff must only prove that there is a "real and substantial possibility" of a future event leading to an income loss.

If the plaintiff establishes such a possibility, then the damages will be assessed by one of two methods. The "earnings" approach will be used where the loss is easily measurable, such as in catastrophic case where the plaintiff will clearly not be able to work in the future. Where the plaintiff is working at the time of trial and the damages are less easy to measure, the courts will use the "capital asset" approach, in which the court will treat the body as a "capital asset" rendered less able to perform certain jobs.

A plaintiff may be able to prove that there is a substantial possibility of a future loss of income despite having returned to their usual employment. However, the inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss. Therefore, an office worker who is incapable of doing heavy labour will not be entitled to compensation when labouring jobs were not realistic to begin with.

7.4 COST OF FUTURE CARE

In order to be awarded damages for future care costs, the plaintiff must establish that there is a real and substantial risk of pecuniary loss. Further, the claims must be medically justified and reasonable. It is not enough that an occupational therapist makes a recommendation, and the courts have disallowed certain "comfort items" such as special chairs and kitchen equipment, holding that such items are more appropriately purchased out of general damages funds.

7.5 GOVERNMENT HEALTH CARE LIENS

On April 1, 2009, the *Health Care Costs Recovery Act* came into force in BC.

The Act requires defendants and their insurers to reimburse essentially all health care services paid for by the government as a result of personal injury accidents, and the government is afforded the power to collect these costs against the offending tortfeasors and their insurers. The

Act applies to both past and future medical costs, and in catastrophic cases, these can amount to hundreds of thousands of dollars in additional exposure.

Auto claims involving defendants insured within BC are exempt from the Act, but auto claims against out-of-province drivers are not. The Act applies retroactively, and claims and lawsuits commenced before April 1, 2009 are exempt from some, but not all, of the Act's requirements. The government has a separate statutory cause of action against the alleged wrongdoer, and the limitation period for bringing such an action expires on the later of two years and six months after the accident, or six months after the government receives notice in one of the prescribed forms.

The essential characteristic of the Act is that it requires notice to the government before any personal injury claim involving a BC resident entitled provincial health care coverage is settled. For lawsuits commenced after April 1, 2009, the court is not permitted to enter a consent dismissal order without the government's consent. In all cases, failure to give notice before settlement exposes insurers to penalty provisions contained in s.13 of the Act, which can potentially result in a defendant and their insurer being exposed to the full value of the health care services claim regardless of their degree of fault or other available defences, including the expiry of a limitation period.

Notice of settlement must be given in a specific form, and because of the potential consequences, it is essential that any settlement with a BC claimant be entered into conditional on government approval under the *Health Care Costs Recovery Act*.

7.6 PRE-JUDGMENT INTEREST

Pre-judgment interest (as well as post-judgment interest) in BC is governed by the *Court Order Interest Act*. Pre-judgment interest is payable on all past pecuniary losses, such as past wage loss and special damages. Unlike many jurisdictions, however, no interest is payable on awards for general damages. The effect of this provision is that interest is almost never raised as an issue in bodily injury claims, as the past pecuniary heads of damage are generally the smallest part of any award (the largest often being future loss of income and future care).

However, where a case goes to trial and judgment is rendered, pre-judgment interest is added to all past pecuniary damages from the date on which the cause of action arose to the date of the order (except for past income loss paid from a collateral source). The court does *not* have any discretion to refuse to award interest to a successful litigant. It does, however, have discretion as to the rate of pre-judgment interest to be awarded.

It must also be kept in mind that the *Insurance (Vehicle) Regulation* requires ICBC to pay costs and interest (pre- *and* post-judgment) *in addition to* the applicable policy limits.

7.7 COSTS

Supreme Court cases are subject to the “loser pays” system standard across Canada’s common law jurisdictions, such that a successful party is entitled to costs and disbursements from the unsuccessful party at the conclusion of the case. Costs are subject to proportional reduction where the plaintiff is guilty of contributory negligence.

The amount of costs in the majority of cases is governed by a tariff which forms part of the Rules of Court, and is broadly based on the steps taken in the proceeding. In fast track cases involving trials of three days or less, costs are limited to a fixed amount depending on whether and for how long the case goes to trial. Disbursements include all reasonable expenditures by counsel in advancing the case. The most significant disbursement in most auto cases is plaintiff’s counsel’s collection of medical evidence, including treatment records and expert reports.

Costs are not available in Small Claims Court, and pursuant to the Supreme Court Rules, a plaintiff in a Supreme Court action who recovers judgment for less than $25,000 (the financial limit of the Small Claims Court) is not entitled to recover any costs (but can still recover disbursements). This Rule is obviously designed to discourage the institution of small claims in Supreme Court. However, costs are subject to the discretion of the court, and it has been held in some cases that the existence of a foreign defendant and insurer is a compelling reason for bringing the proceeding in the Supreme Court. Therefore, it can be exceptionally difficult to avoid costs in a Supreme Court action.

Under the Rules of Court, costs "follow the event". The "event" is defined as the proceeding, and plaintiffs are presumptively entitled to costs even where the claim is settled before trial. Where liability issues exist, a plaintiff's entitlement to costs or the amount of costs can be negotiated, and many cases are settled on an "all-inclusive" basis. However, it is not open to a defendant to argue that no costs should be payable simply because a claim is settled.

7.8 OFFERS TO SETTLE

Pursuant to Rule 9-1 of the BC *Rules of Court*, either a plaintiff or a defendant may deliver a formal offer to settle. There is no specific form which the offer must take, but it must meet the following requirements:

(i) it must be made in writing by a party to a proceeding,

(ii) it must be delivered to all parties of record, and

(iii) it must contain the following sentence: "The ….*[name of party making the offer]*…. reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding."

If these requirements are met, the court is entitled to take the offer into account, along with any other factors it considers appropriate, and either deprive a party of costs or award double costs, if it deems that the offer should reasonably have been accepted.

8. CONCLUSION

It is hoped that the above will assist examiners in navigating the unfamiliar waters of BC's auto insurance regime. It should be kept in mind that the discussion above is by necessity a general overview, and the effect of a given principle will depend on the facts of a given case. Readers with any questions about the information in this manual or a specific claim are encouraged to contact the author, as follows:

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APPENDIX "A"
LIMITS OF COVERAGE
(INSURANCE (VEHICLE) REGULATION, SCHEDULE 3)

A. **Third Party Liability**

1 (1) …

[Driver's Certificate]

(1.1) ... the amount by which the liability of the corporation is limited is $200 000.

[Owner's Policy]

(2) … the amount by which the liability of the corporation is limited for payment of indemnity to an insured …is,

(a) …

(b) …

(c) … $200 000.

(3) …

(4) Notwithstanding subsection (2)(c)…, the amount by which the liability of the corporation is limited for payment of indemnity to an insured in respect of claims arising out of an accident occurring on or after January 1, 1994, is,

(a) where the claims are made in respect of an extra-provincial truck undertaking other than as described in paragraph (b), $1 million, or

(b) where the claims are made in respect of an extra-provincial truck undertaking used for the transport of dangerous goods as described in section 4 (1) (b) of the Extra-Provincial Truck Undertaking Licencing Regulations made under the *Motor Vehicle Transport Act, 1987* (Canada), $2 million.

(5) … notwithstanding subsections (2) and (4)…, the amount by which the liability of the corporation is limited for payment of indemnity to an insured in respect of claims arising out of an accident occurring on or after January 1, 1995, is,

(a) where the claims are made in respect of a bus, $1 million, including the personal baggage of passengers but not including any other freight,

(b) where the claims are made in respect of a taxi or limousine use vehicle, $1 million, including the personal baggage of passengers but not including any other freight,

(c) $1 million, where the claims are made in respect of a commercial motor vehicle in excess of 5 000 kg gross vehicle weight, or a trailer, other than one described in paragraph (d), used for commercial purposes and required to be registered and licensed under the *Commercial Transport Act*, or

(d) $2 million, where the claims are made in respect of a commercial motor vehicle in excess of 5 000 kg gross vehicle weight, or a trailer that is used for

(i) commercial purposes and required to be registered and licensed under the *Commercial Transport Act*, and

(ii) the transportation of dangerous goods as described in Schedule XII of the Transportation of Dangerous Goods Regulation under the *Transportation of Dangerous Goods Act* (Canada).

B. Disability benefits

2 The amount of any disability benefits

(a) payable under section 80 in respect of an accident is $300 a week, or

(b) payable under section 84 in respect of an accident occurring on or after January 1, 1987 is $145 a week.

C. Medical or rehabilitation benefits

3 (1) For the purpose of section 88, the amount by which the liability of the corporation is limited is the amount set out in

(a) the certificate providing coverage for the accident, or

(b) if more than one certificate provides coverage, in the certificate providing the higher or highest limit or coverage.

(2) Notwithstanding subsection (1), the amount by which the liability of the corporation is limited in respect of each insured injured on or after January 1, 1990 in the same occurrence shall not exceed $150 000.

D. Funeral expenses

4 The maximum amount of funeral expenses that may be reimbursed under section 91 in respect of an accident occurring on or after January 1, 1996 is $2 500.

E. Death benefits

5 Where an insured at the date of death resulting from a motor vehicle accident comes within an age group set out in column A of the following Table and the insured has the status set out in column B, C or D, the amount of death benefit payable under section 92 is the amount set out below that status and opposite that age group.

Column A	Column B	Column C	Column D
Age of Deceased	Head of Household	Spouse in Household	Dependent Child
	$	$	$
Less than 5 years	—	—	500
5 to 9 years	—	—	1 000
10 to 18 years	5 000	2 500	1 500
19 and over	5 000	2 500	1 000

F. **Supplemental death benefits**

6 The amount of a supplemental death benefit payable under section 93 is $1 000.

G. **Additional death benefits**

7 The amount of an additional death benefit payable under section 93 (2) (a) in respect of an accident occurring on or after January 1, 1987 is $145 a week.

H. **Survivor's benefits**

8 The amount of a survivor's death benefit payable under section 93 (2) (b) in respect of an accident occurring on or after January 1, 1987 is $35 a week.