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18th FLOOR – 609 GRANVILLE ST  
**VANCOUVER, BC. V7Y 1G5**  
Tel: 604.689.3222  
Fax: 604.689.3777  
E-mail: [info@dolden.com](mailto:info@dolden.com)

302-590 KLO RD,  
**KELOWNA, BC. V1Y 7S2**  
Tel: 1.855.980.5580  
Fax: 604.689.3777  
E-mail: [info@dolden.com](mailto:info@dolden.com)

850 – 355 4th AVE SW  
**CALGARY, AB. T2P 0H9**  
Tel: 1.587.480.4000  
Fax: 1.587.475.2083  
E-mail: [info@dolden.com](mailto:info@dolden.com)

14<sup>th</sup> FLOOR – 20 ADELAIDE ST E  
**TORONTO, ON. M5C 2T6**  
Tel: 1.416.360.8331  
Fax: 1.416.360.0146  
Toll Free: 1.855.360.8331  
E-mail: [info@dolden.com](mailto:info@dolden.com)

## Application of BC No-Fault Auto Regime to Commercial Liquor Licensees

By [Lorne Folick](#) and [Ouran Li](#)

### Commercial Hosts' Liability Significantly Reduced Under BC's New No-Fault Auto Insurance Regime

By Lorne Folick, DWF Vancouver, Email: [Lorne.Folick](mailto:Lorne.Folick@dolden.com), and Ouran Li, Articled Student, DWF Vancouver, Email: [oli@dolden.com](mailto:oli@dolden.com)

#### *Background*

The biggest overhaul of British Columbia's auto insurance scheme in decades will likely benefit commercial hosts – and their liability insurers – by significantly reducing their liability exposure to impaired driving claims.

On May 1, 2021, amendments to the *Insurance (Vehicle) Act*, RSBC 1996, c. 231 (the "Act"), came into effect, creating a "no-fault" compensation scheme for people injured in motor vehicle accidents. The new scheme grants accident victims "enhanced" injury benefits, while effectively removing their right to sue the parties responsible, in most cases. While the Act, s. 116(2), preserves the right to sue commercial hosts (*i.e.*, bars, taverns, nightclubs, etc., licensed to serve alcohol), it limits that right in two key respects:

- First, commercial hosts' liability will be *several*, not joint and several. This means they can only be held liable to the extent of their own actual fault for any injuries they cause.

- Second, plaintiffs can only claim against commercial hosts non-pecuniary (*i.e.*, “pain and suffering”) and punitive damages. They cannot claim pecuniary damages, such as lost income or earning capacity (although ICBC might subrogate for such damages).

These changes are discussed in greater detail below.

## Liability



Historically, and until these recent amendments to the *Act*, commercial host liability was governed by the *Negligence Act* and the principle of contributory negligence.<sup>1</sup> If a plaintiff was partly at fault for his or her own accident, then he or she could only recover from each tortfeasor damages proportionate to that tortfeasor’s fault.<sup>2</sup>

If a plaintiff was *not* contributorily negligent, then all tortfeasors were jointly and severally liable for the entire amount of his or her damages; he or she could collect the entire claim against some or any of the tortfeasors (who could then claim against each other for any “overpayment”).<sup>3</sup>

However, under the new amendments, the commercial host is *severally* liable to the injured party regardless of any contributory negligence. For example, if the commercial host is found to be 1% responsible for a motor vehicle accident, it will not be responsible for any damages caused by any other at-fault parties. Furthermore, it will not be liable for contribution or indemnity if another defendant is unable to financially satisfy a court award.

This change, in itself, will dramatically reduce commercial hosts’ liability exposure, and ensure that they (and their insurers) only have to indemnify plaintiffs in proportion with the hosts’ actual share of responsibility for plaintiffs’ losses.

## Damages

The second major change that will benefit commercial hosts is that plaintiffs can no longer sue them directly for pecuniary damages. Under

<sup>1</sup> *Negligence Act*, RSBC 1996, c. 333.

<sup>2</sup> *Ibid*, s. 1, 2(c).

<sup>3</sup> *Ibid*, s. 4.

the new amendments, commercial hosts may still be held liable for “non-pecuniary damages and punitive, exemplary or other similar non-compensatory damages” arising out of a motor vehicle accident.<sup>4</sup>

In recent years, non-pecuniary damages in many catastrophic loss cases have been dwarfed by pecuniary damages awards, such as past and future wage losses, reduced earning capacity, and care costs. The Supreme Court of Canada long ago capped non-pecuniary damages (to about \$400,000, accounting for inflation), and “conduct-based” damages, based on egregious conduct of the defendant, are rarely awarded; meanwhile, pecuniary losses can run into the millions of dollars.

As s. 116(2) of the *Act* does not impose liability for income loss, future care costs, and other traditional heads of damages typically awarded in motor vehicle injury cases, the injured party’s only recourse is to access other available insurance and ICBC’s enhanced care-based benefits.

### ***Subrogation***

However, commercial hosts might still be exposed *indirectly* to pecuniary claims (at least to the extent of their several liability)...

Under s. 168(1)(a) of the *Act*, ICBC has a right of subrogation against the at-fault commercial host for any Part 10 Enhanced Benefits it has paid to the injured party. The commercial host is only responsible to ICBC for an amount of benefits paid in relation to the degree in which the former is liable for the accident.

It is unclear at this time how ICBC intends to make use of this new right of subrogation.

It is also unclear which limitation periods would apply to an ICBC subrogated claim, given that Part 10 Enhanced Benefits claims may remain open for an indeterminate amount of time.

### ***Takeaway for Insurers of Commercial Hosts and Liquor Establishments***

The new no fault auto regime in British Columbia is good news for insurers of commercial hosts. Their insureds will only be liable for their several share of non-pecuniary damages, up to the current cap of about \$400,000.

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<sup>4</sup> *Insurance Act*, s. 116 (2).

The typical range of fault for an at fault commercial liquor provider is between 5-25%. That being the case, the incentive to sue a commercial liquor establishment for over service has been greatly diminished. Commercial hosts will no longer automatically face claims for pecuniary damages – though ICBC might subrogate against commercial hosts for a portion of the benefits it pays in lieu of such damages, especially in catastrophic loss cases.