

Response to the Auto Insurance Working Group's Report

Department of Justice and Attorney General

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Background

Beginning in 2000, New Brunswickers were faced with limited access to automobile insurance and rising automobile insurance premiums. Information received from the insurance industry at the time indicated that a primary factor behind rising premiums was the rising cost of settling injury claims and particularly pain and suffering awards for soft tissue injury claims.

In an attempt to resolve the cost and availability issues, New Brunswick introduced several reforms, including introducing, in 2003, a limit on awards for non-pecuniary general damages (i.e., damages for pain and suffering) for “minor personal injuries”. “Minor personal injury” was defined as follows:

“minor personal injury” means an injury that does not result in

(a) permanent serious disfigurement, or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature;

“serious impairment” means an impairment that causes substantial interference with a person’s ability to perform their usual daily activities or their regular employment.

The Regulation set the limit on non-pecuniary general damage awards at \$2500.

Under the Regulatory regime, an individual who suffers an injury that does not fall within the definition of “minor personal injury” is not subject to the cap and can receive full non-pecuniary damages. Further, the cap does not limit other damages such as loss of income or cost of future care.

In January 2011, government established the *Auto Insurance Working Group*. The Working Group was given a mandate to review the adequacy of the \$2500 cap and the current definition of “minor personal injury”. Government’s objective was to ensure that the system treats victims of motor vehicle accidents fairly, while at the same time ensuring that auto insurance remains accessible and affordable for all New Brunswickers. The Working Group held public sessions in seven communities. A total of 41 individuals spoke before the Working Group at these sessions. The Working Group also received submissions from other stakeholders. The Working Group released its report in November 2011. The Working Group made the following five recommendations:

1. The current definition of “minor personal injury” be discarded, and replaced with a new definition set out in the report;

2. The cap amount be increased to between \$4000 and \$6000 and be indexed annually to CPI;
3. Government develop an information package on the rights of persons injured in an automobile accident;
4. Government adopt a protocol to allow accident victims early access to treatment;
5. Government develop a continuing review process.

The Chair of the Working Group acknowledged that the last three of the above recommendations dealt with issues beyond the mandate provided to the Working Group.

Response to Auto Insurance Working Group's Recommendations

Recommendation # 1 - Definition of "minor personal injury"

The Working Group recommended that the existing definition of "minor personal injury" be replaced with the following definition:

A minor personal injury is a sprain or strain or whiplash-associated disorder, or a combination thereof, which results in minor consequences to a person's life. "Minor consequences" means that neither the impairments nor the limitations resulting from the injury last more than six months and a person substantially retains his or her pre-accident bodily functions, level of activities and participation in life.

The Working Group indicated that presenters appearing before it would describe injuries that were being captured by the cap that they believed surpassed what could reasonably be considered a "minor personal injury". The Working Group indicated that while such examples were not frequent, a new definition was required to prevent such injustices.

Analysis

The Department reviewed the Working Group's proposed definition and found that it raises questions of ambiguity and that it is very restrictive in that very few injuries would be classified as a "minor personal injury."

If the regulation is amended to include a definition that is vague and creates a lack of certainty, this could require a case by case determination and likely result in increased litigation, the cost of which is unknown. We also have concerns about a time period being used to determine the definition of "minor personal injury."

The Department also engaged an actuarial firm to estimate the impact on premiums of the definition proposed by the Working Group. The actuaries estimated that approximately 81% of claimants are captured by the definition. Based on these findings, the closed claim study indicated that, at most, only 22% of total claimants would be captured by the proposed definition. This represents a significant reduction in the number of claimants who would be subject to the cap. Further, after considering the limitations of the proposed definition, it is expected that the percentage of claimants who would be subject to the cap would be substantially less and perhaps as low as 1% of total claimants.

Without considering any impact on claims frequency or any adjustment of the cap amount, the proposed definition would result in an increase in bodily injury premiums of 42 to 49%. In addition, any of the following factors would lead to a greater increase in premiums:

- An increase in the cap amount beyond the current \$2500;
- An increase in the frequency of claims;
- The expected increase in litigation given the lack of clarity in the proposed definition;
- An associated increase in amounts paid for other types of damages such as loss of wages, cost of care, and accident benefits.

The Department supports the Working Group's recommendation that the current definition be discarded. We believe that the percentage of accident victims being captured by the existing definition is too large and the compensation paid for certain injuries should not be limited by the cap. However, the adoption of the Working Group's proposed definition would result in a too great of a shift to the opposite end with very few injuries being captured and move the Province very close to the pre-cap days. This would result in a significant increase in premiums and would have a negative impact on the affordability and accessibility of automobile insurance for New Brunswick consumers.

Response

The Department proposes a new draft definition of "minor personal injury" to address the issues identified with the Working Group's definition and to ensure that the system balances the need for fairness to accident victims with the goal of a stable insurance system in which all New Brunswickers can access affordable automobile insurance.

The following definition is proposed:

"Minor personal injury" means any of the following injuries, including any clinically associated sequelae, that do not result in serious impairment or in permanent serious disfigurement:

- (a) a contusion
- (b) an abrasion
- (c) a laceration
- (d) a sprain
- (e) a strain
- (f) a subluxation
- (g) a whiplash associated disorder, and
- (h) a fracture of a bone that is not weight-bearing.

The Department also proposes the following definition for serious impairment:

“serious impairment”, in respect of a claimant, means an impairment of a physical or cognitive function that meets all of the following:

(i) the impairment results in a substantial inability to perform any or all of the following:

(A) the essential tasks of the claimant’s regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant’s impairment and the claimant’s reasonable efforts to use the accommodation to allow the claimant to continue the claimant’s employment, occupation or profession,

(B) the 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 the claimant’s impairment and the claimant’s reasonable efforts to use the accommodation to allow the claimant to continue the claimant’s training or education,

(C) the normal activities of the claimant’s daily living,

(ii) the impairment has been ongoing since the accident, and

(iii) the impairment is expected not to improve substantially,

Our actuaries have assessed the cost implications of the new definition and estimate that the percentage of claimants subject to the cap would reduce from 81% under the current definition to 71% under the proposed definition, resulting in 10% fewer claimants being subjected to the minor injury cap than are currently captured. They estimate that if the cap was to remain at \$2500 and there was no change in frequency of claims, there would be approximately a 13% increase in bodily injury premiums.

Recommendation #2 - The amount of the cap

As stated, the current cap for non-pecuniary general damages is \$2500. Based on its review, the Working Group concluded that the current \$2500 cap is too low. The Working Group did not make a definitive recommendation on a specific cap amount. The Working Group considered the Nova Scotia cap of \$7500, but noted that the definition of “minor personal injury” in Nova Scotia differed from its recommended definition. It also indicated that there were other differences in the two provinces’ systems. In the end, the Working Group recommended that the cap amount be increased to an amount between \$4000 and \$6000.

Impact of Department’s definition and the amount of Cap

Our actuaries analyzed the impact on premiums of the definition of “minor personal injury” as proposed by the Department. They also analyzed the impact of increasing the cap amount to \$4000, \$6000 and \$7500, respectively. They estimate that if the cap was to increase to \$7500 with the Department’s proposed definition and there was no change in frequency of claims, there would be a 28% increase in bodily injury premiums. The estimated increase to bodily injury claims costs for each amount is as follows:

Cap Amount

\$ 2500	13.1%
\$ 4000	18.2%
\$ 6000	24.4%
\$ 7500	28.4%

Frequency of Claims

One of the most contentious issues is the effect of any reform on the frequency of claims. Our actuaries looked at 15 years of claims frequency data starting with 1996. Claims frequency hit its peak in 1999 and has been declining since then. The introduction of the 2003 reforms led to a sharp decline in the second half of 2003. Our actuaries are of the opinion that it is unlikely that a change in the definition, alone, would impact the claim frequency, but an increase in the cap amount could cause the frequency rate to increase. However, Nova Scotia increased its cap to \$7500 from \$2500 in 2010 and to date the aggregated industry data through to the first half of 2011 does not indicate an increase in the bodily injury coverage frequency rate.

The required premium represents what insurance companies must charge to cover expected average claim costs and loss adjustment expenses, operating expenses and after-tax Return on Equity (ROE). Under the current regime, the estimated required premium is approximately \$691. The required premium is expected to increase if a new definition is adopted and/or if the cap amount is increased. The following estimations again account for frequency:

Estimated ALL Coverages Required Average Premium (Including changes to Medical/Rehab & Uninsured Motorists) Proposed Definition

CAP	Change in Frequency of Claims			
	<u>0%</u>	<u>5%</u>	<u>10%</u>	<u>20%</u>
\$ 2500	716	723	730	745
\$ 4000	723	730	737	752
\$ 6000	730	738	746	762
\$ 7500	735	743	752	768

The average street premium represents what insurers are actually charging. Our actuaries analyzed the average written premium per private passenger vehicle for the first half of 2011 and estimated the average street premium for 2012 to be \$782. Based on this information, the average street premium exceeds the average required premium by \$92.

The average street premium also exceeds the required average premium for the proposed definition at various cap amounts, even when factoring in an increase in frequency of claims. Therefore, any increase in the required average premium with the proposed definition together with an increase in the cap amount could be absorbed by insurers, resulting in no increase in premiums charged to consumers.

Response

The Department recommends that the cap for non-pecuniary general damages be increased to \$7500. The Working Group’s recommendation of a cap between \$4000 and \$6000 was based on its proposed definition of “minor personal injury”. As indicated, the Working Group’s proposed definition of “minor personal injury” is very limiting in that it does not capture many injuries and risks a return to the pre-definition or pre-cap era. The definition proposed by the Department will capture more injuries. Therefore, in recognition of that fact, it recommends a \$7500 cap.

Indexing of the Cap

In addition to proposing a new amount for the cap, the Working Group also recommended that the cap amount be indexed annually to the Consumer Price Index (CPI).

Response

Both Alberta and Nova Scotia require that the cap amount be adjusted annually, based on CPI. The Department recommends accepting the Working Group's recommendation to have the cap amount indexed annually in relation to CPI. This allows the amount of damages to increase with the cost of living and avoids having to revisit the cap on a regular basis. There should be a provision that provides for an annual increase in the cap based on the annual average percentage change for the all-items Consumer Price Index for New Brunswick, not seasonally adjusted, published by Statistics Canada, for the previous calendar year. Further, there should be a provision that provides that negative changes do not change the cap amount.

Recommendation #3 - Educating claimants injured in a motor vehicle accident

The Working Group recommended that the government develop an information package on the rights of persons injured in an automobile accident. The Working Group recommends that this information package be provided to claimants by an insurance adjuster within 30 days of an accident or the reporting of an accident. The Working Group noted that several consumers indicated that they were stressed and frustrated by their experience post-accident, “trying to navigate the complex, confusing and often unfriendly systems they must overcome if they hope to get a fair settlement for their pain and suffering”. Many victims were unclear as to their rights and the process they would need to go through to seek fair settlement.

Analysis

The Department agrees that an information package should be created as educational material is a significant tool in assisting consumers. Development of such a package should wait until the new definition for “minor personal injury” is finalized. We further recommend that this information should be made widely available through government websites and offices as well as through the offices of those responsible for consumer protection and advocacy rather than specifically relying on adjusters to deliver the package.

The educational materials should have input from:

- The legal community, specifically the plaintiff bar
- Medical professionals
- The insurance industry, including insurance adjusters

Response

The Office of the Consumer Advocate for Insurance has a mandate that includes developing and conducting educational programs for consumers with respect to insurance.

We recommend that the Consumer Advocate be requested to coordinate the development of a comprehensive information package to include input from all relevant stakeholders.

Recommendation #4 - Access to early care and assessment

The Working Group recommended that government mandate the Superintendent of Insurance to adopt a protocol to make funds available to allow accident victims early access to treatment.

Analysis

The Department agrees with the conclusions drawn by the Working Group that victims need access to treatment early to make a positive difference in final recovery.

Alberta has adopted diagnostic and treatment protocols and it has established a process to promote quicker recovery through earlier access to treatment. In place is a group of health practitioners (physicians, physiotherapists and chiropractors) who can authorize treatment without insurer approval. Patients who are being helped through this treatment process do not need prior approval from insurance companies to begin treatment, and they do not pay out-of-pocket for the treatments. The treatments are pre-approved, and care-providers directly bill the insurance companies.

Nova Scotia has reviewed reforms with respect to early access to treatment as well, and is proposing to adopt diagnostic and treatment protocols for minor injuries, based on Alberta's model. The introduction of diagnostic treatment protocols for minor injuries will mean Nova Scotians who are injured in an automobile collision will have direct access to physiotherapy and chiropractic treatment without waiting for approval from an insurer or a physician's referral. In order to implement diagnostic and treatment protocols for minor injuries, the Nova Scotia government will have to develop new regulations as well as introduce changes for the insurance industry and medical professionals involved in treatment.

Response

The Department will research in more depth the systems in place in Alberta and Nova Scotia when established and determine whether such a system is appropriate for New Brunswick and, if so, develop a proposal for how best to advance the establishment of protocols in New Brunswick. Significant input from key stakeholders in the medical, legal and insurance communities will be required. It should be noted that the process will not develop overnight. The work has been underway for three years in Nova Scotia.

Recommendation #5 - Continuing Review Process

The Working Group has recommended an independent review process of auto insurance at least every five years, conducted by an independent group comprising representatives of the Insurance Bureau of Canada, Insurance Broker Association, Canadian Bar Association, Atlantic Provinces Trial Lawyers Association – New Brunswick Division, New Brunswick Medical Society, New Brunswick Physiotherapist Association, a representative from consumer advocate groups and a representative from an accident victims group. Their rationale for recommending this was that such a review will ensure New Brunswick's system is working as it should, specifically the cap amount and definition. Further, the Working Group believes that a mandatory review process will ensure that any problems with the minor injury cap will come to light much quicker and the independent representatives will provide recommendations for improvements.

Analysis

The Department agrees with the need to have a regular review process. This type of review should be transparent and should include feedback from stakeholders as well as a mechanism for consumers to report their experience.

Response

The Department will develop a review process that provides for regular review of the minor injury regime and which allows for all stakeholders to provide input.