

DISCUSSION PAPER



# Concerning the Cap on Pain and Suffering Awards for Minor Injuries

Office of the Superintendent of Insurance

JANUARY, 2010

## Introduction

The Province of Nova Scotia regulates automobile insurance to ensure that Nova Scotians have access to appropriate coverage at premiums that are affordable and stable, while providing fair compensation to victims of automobile accidents.

Every automobile used on Nova Scotia's public roadways must be insured. In the event of an automobile accident, insurance benefits are available to help insured parties defray vehicle repair and medical and rehabilitation costs.

Regulations define mandatory benefits that must be included in all standard automobile insurance policies, such as coverage for medical and rehabilitation expenses for people who are injured in automobile accidents.

Injured parties may also claim compensation from the at-fault party for certain losses that occur as a result of their accident, including loss of income, loss of earning capacity, loss of housekeeping capacity, out-of-pocket expenses and future medical expenses.

Injured parties may also make claims for "pain and suffering" awards, which are not based on a quantifiable loss of income or expense.

Since 2003, awards for pain and suffering related to injuries that are defined as "minor" have been subject to a cap of \$2,500. Limiting the value of awards for this category of injury was intended to contribute to lower automobile insurance premiums for most Nova Scotia drivers.

There is no government-imposed limitation on awards for pain and suffering for injuries that are not defined as "minor".

The government has decided to develop and analyze alternatives to the cap in response to concerns raised about its fairness. The review will assess how to provide an appropriate balance between fair compensation while ensuring that premiums are affordable and provide recommendations to government.

The Office of the Superintendent of Insurance will conduct the review over the next few months with a target completion date of spring 2010. In addition to internal study and analysis of the cap, public input is being sought through this Discussion Paper.

## History of the Cap

During 2000 to 2003, consumers experienced rapidly rising automobile insurance premiums and many had difficulty finding appropriate coverage. The industry argued that an increase in the number of claims and associated awards for “pain and suffering” was a key reason for rising insurance premiums.

In response, provinces in Canada that permit tort awards for pain and suffering for injuries from automobile accidents introduced limitations on such awards. In general, limitations took the form of a cap on award amounts or a deductible from award amounts for certain types of injuries. The nature and amount of limitations vary significantly by province, but a common goal at the time was to facilitate premium reductions by reducing costs for insurers. Currently, all provinces that permit tort claims for pain and suffering, except British Columbia, have some form of cap or deductible for pain and suffering awards.

In Nova Scotia, a cap on pain and suffering awards for minor injuries was one of several reforms introduced in October 2003. The objective of the cap, as stated by the government of the day, was to stabilize pain and suffering award costs, making it financially viable for insurers to reduce premiums by 20 percent and to allow other reforms to be implemented.

**The authority for the cap is derived from the *Automobile Insurance Tort Recovery Limitation Regulations* under Section 113B of the *Insurance Act*. The regulations set the limit of the “total amount recoverable as damages for non-monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as a result of an incident” at \$2,500. See Appendix One for the full text of Section 113B and the regulations.**

## Awards Not Subject To the Cap

Anyone injured in an automobile accident, regardless of who is at fault, is eligible to receive certain mandatory accident benefits contained in Section B of the standard automobile insurance policy. Benefits include reimbursement for medical, rehabilitation expenses and funeral expenses, a death benefit and an indemnity for loss of income as defined in the *Automobile Insurance Contract Mandatory Conditions Regulations*.

Section B benefits provide compensation for specific losses up to the limits prescribed. However, victims of an automobile accident may also make an injury claim to the at-fault party for compensation beyond that provided by the mandatory benefits. These injury claims may include several categories of awards including loss of income, loss of earning capacity, loss of housekeeping capacity, out of pocket and future medical expenses and “pain and suffering”.

A resolution to an injury claim may be negotiated with the relevant insurer, or if a dispute cannot be resolved through negotiation, claimants may begin legal action through the courts.

A claim for “pain and suffering” is referred to as a “non-economic loss” because the claim is not based on a quantifiable loss of income or expense. Those who have a minor injury, as defined by the legislation/regulations, as a result of an automobile accident are entitled to an award of up to \$2,500 for “pain and suffering”.

The cap applies only to “pain and suffering” awards and does not apply to the other types of awards for which the claimant may sue. A person who sustains a minor injury may still receive an award in excess of \$2,500 for actual or estimated future expenses, loss of income, and other verifiable economic losses.

## Minor Injury Definition

The definition of “minor injury” and the authority for the cap can be found in section 113B of the *Insurance Act*:

113B (1) In this Section,

- (a) “minor injury” means a personal injury that
  - (i) does not result in a permanent serious disfigurement,
  - (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
  - (iii) resolves within twelve months following the accident;

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

- (4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.

The full definition of “minor injury” and related requirements are presented in Appendix One.

### Minor Injury Definition Implications

There is no cap on pain and suffering awards for permanent serious injuries or serious injuries that take more than 12 months to “resolve”. The onus is on the injured party to prove that an injury does not fit the definition of “minor.”

A key criterion in determining whether an injury is “minor” is the length of time an injury takes to “resolve” – and not solely the severity of the injury. An injury could be quite severe and painful immediately following an accident. However, if it “resolves” within 12 months, it will be considered “minor” unless it results in a serious permanent disfigurement or a permanent serious impairment of an important bodily function caused by continuing injury that is physical in nature – or is one of four types of excluded injuries listed in the regulations.

The determination of whether an injury “resolves” and whether the injury otherwise meets the legal definition for a “minor injury” can be complex. Expert opinions (insurance, legal, medical) may be required for a determination.

If an insurer and an injured party cannot agree on whether an injury is minor and thus cannot agree on an appropriate award for pain and suffering, the matter can be referred to the courts. The courts will look at the specific circumstances of the injury and the injured party, expert testimony, legal definitions and case law to make a determination.

## Issues with the Cap

In 2003, the government of the day introduced the cap on pain and suffering awards for minor injuries as part of a package of reforms, primarily to allow a 20 percent reduction in insurance premiums.

Since the introduction of the cap, there has been a measurable decrease in average premiums for private passenger vehicles. Premiums have also been relatively stable. The percentage of consumers insured through Facility Association, the high risk insurer, is also lower. However, there are many factors that may have contributed to lower average premiums since 2003. The precise impact of the cap, if any, is difficult to determine. Some insurance consumers favour continuing the cap because (they argue) it keeps insurance costs low and contributes to affordable premiums.

Fortunately, most Nova Scotia automobile insurance consumers have not been involved in an automobile accident or sustained injuries where pain and suffering awards were limited by the cap.

However, over the past six years, some automobile accident victims who have been injured and subject to the cap on pain and suffering awards have expressed concerns about fairness.

These concerns relate to the broad range of injuries that are considered “minor”, the cap amount (considered by some to be too low) and the insensitivity of the cap to the severity of the injury and the pain and suffering endured at the time of the accident and over the following 12 months.

Some have expressed the view that the cap is discriminatory against people with injuries where it is difficult to substantiate a continuing impairment, such as whiplash. Some suggest that the financial arguments in favour of the cap are not valid because industry financial results are cyclical in nature and profits of automobile insurers have increased substantially in recent years.

Some are of the view that the prospect of an award for pain and suffering being subject to a \$2,500 cap is a deterrent to accessing expert professional advice.

In addition, some are of the view that, in the general interest of fairness, all disputes regarding injury claims should be subject to negotiation and, if necessary, settled by the courts. The courts, if necessary, should be the final arbiter of what awards are appropriate in a given set of circumstances and awards, so determined, should not be subject to artificial limits to reduce insurance costs and premiums.

These issues have prompted the decision to proceed with this focused review to develop and analyze alternatives to the cap.

## Discussion Questions

The Superintendent of Insurance invites comments from interested stakeholders and members of the public on the question of the cap on pain and suffering awards for minor injuries. The following questions are of particular interest:

1. **Should there be limitations placed on pain and suffering awards?**
2. **If so, what alternatives should be considered regarding the existing cap on pain and suffering awards that are fair to victims of automobile accidents and maintain affordable insurance premiums?**
3. **Should alternatives to the existing cap on pain and suffering awards be applied retroactively?**

## Submissions

Submissions should be made in writing and delivered by mail, email or in person no later than **February 15, 2010** to:

**Office of the Superintendent of Insurance**

PO Box 2271

4th floor Provincial Finance Building

1723 Hollis Street

Halifax, NS B3J 3C8

Email: [fininst@gov.ns.ca](mailto:fininst@gov.ns.ca)

**Please note that submissions may be made public, including posting on the Province of Nova Scotia website, unless instructions to the contrary are expressly provided.**

**If you wish your submission to remain confidential, please clearly state this in your submission.**

## Appendix One:

### Section 113B of the *Insurance Act* and the *Automobile Insurance Tort Recovery Limitation Regulations*

#### Part A: Section 113B of the *Insurance Act*:

##### Limitation on liability

113B (1) In this Section,

- (a) “minor injury” means a personal injury that
    - (i) does not result in a permanent serious disfigurement,
    - (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
    - (iii) resolves within twelve months following the accident;
  - (b) “serious impairment” means an impairment that causes substantial interference with a person’s ability to perform their usual daily activities or their regular employment.
- (2) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are not liable in an action in the Province for the following damages for income loss and loss of earning capacity from bodily injury or death arising directly or indirectly from the use or operation of the automobile:
- (a) damages for income loss suffered before the trial of the action in excess of the net income loss, as determined by regulation, suffered during that period;
  - (b) damages for loss of earning capacity suffered after the incident and before the trial of the action in excess of the net loss of earning capacity, as determined by regulation, suffered during that period.
- (3) Subsection (2) applies to all actions, including actions under the Fatal Injuries Act and similar legislation.
- (4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.
- (5) Subsections (2) and (4) do not protect a person from liability if the person is defended in the action by an insurer that is not licensed to undertake automobile insurance in the Province, unless the insurer has filed an undertaking to become licensed to undertake automobile insurance in the Province.
- (6) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before trial with the consent of the parties or in accordance with an order of a judge who conducts a pre-trial conference, determine, for the purpose of subsection (4), whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury.
- (7) The determination of a judge on a motion under subsection (6) is binding on the parties at the trial.
- (8) Where no motion is made under subsection (6), the judge shall determine for the purpose of this Section whether, as a result of the use or operation of the automobile, the injured person has suffered a minor injury. 2003 (2nd Sess.), c. 1, s. 12.

**Part B: Automobile Insurance Tort Recovery Limitation Regulations:**

## Citation

1 These regulations may be cited as the *Automobile Insurance Tort Recovery Limitation Regulations*.

## Definitions for purposes of Section 113B of Insurance Act

- 2 (1) For the purposes of Section 113B of the Insurance Act and these regulations,
- (a) “net loss of earning capacity” means total loss of earning capacity or loss of future income less that portion of probable future income that would be paid by a plaintiff in
    - (i) income and payroll taxes,
    - (ii) employment insurance or similar costs,
    - (iii) union or professional dues, and
    - (iv) pension contributions, including Canada Pension Plan contributions;
  - (b) “net income loss” means total income lost less that part of total income that would have been paid by a plaintiff in
    - (i) income and payroll taxes,
    - (ii) employment insurance or similar costs,
    - (iii) union or professional dues, and
    - (iv) pension contributions, including Canada Pension Plan contributions;
  - (c) “non-monetary loss” means any loss for which compensation would be payable, but for the Insurance Act, that is not an award for
    - (i) lost past or future income,
    - (ii) diminution or loss of earning capacity, and
    - (iii) past or future expenses incurred or that may be incurred as a result of an incident, and for greater certainty excludes valuable services such as housekeeping services;
  - (d) “personal injury” does not include
    - (i) a coma resulting in a continuing serious impairment of an important bodily function,
    - (ii) chronic pain that
      - (A) is diagnosed and established as chronic pain by a medical specialist appropriately trained in the diagnosis and management of pain disorders,
      - (B) is a direct result of a physical injury sustained in the motor vehicle accident
      - (C) results in a continuous serious-impairment of an important bodily function, and
      - (D) is moderately severe or severe pain, as classified in the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th edition,
    - (iii) a burn resulting in serious disfigurement,
    - (iv) an amputation of a major limb;

Clause 2(1)(d) added: O.I.C. 2003-486, N.S. Reg. 196/2003.
  - (e) “regular employment” means the essential elements of the activities required by the person’s pre-accident employment;
 

Clause 2(1)(e) added: O.I.C. 2003-486, N.S. Reg. 196/2003.
  - (f) “resolves” means
    - (i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person’s ability to perform their usual daily activities or their regular employment, or
    - (ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with a person’s ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury;

Clause 2(1)(f) added: O.I.C. 2003-486, N.S. Reg. 196/2003.

(g) “substantial interference” means, with respect to a person’s ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person’s employer for the personal injury and reasonable efforts by the injured person to adjust to the accommodation, the essential elements of the activities required by the person’s pre-accident employment;  
 Clause 2(1)(g) added: O.I.C. 2003-486, N.S. Reg. 196/2003.

(h) “usual daily activities” means the essential elements of the activities that are necessary for the person’s provision of their own care and are important to people who are similarly situated considering, among other things, the injured person’s age.  
 Clause 2(1)(h) added: O.I.C. 2003-486, N.S. Reg. 196/2003.  
 Section 2 renumbered subsection 2(1) and amended: O.I.C. 2003-486, N.S. Reg. 196/2003.

(2) For the purposes of subsection (1), “employment” includes self-employment.  
 Subsection 2(2) added: O.I.C. 2003-486, N.S. Reg. 196/2003.

Total amount recoverable for non-monetary losses

3 For the purpose of subsection 113B(4) of the Insurance Act, the total amount recoverable as damages for non-monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as a result of an incident must not exceed \$2,500.

Section 3 amended: O.I.C. 2006-551, N.S. Reg. 230/2006.

Subsection 3(1) renumbered 3 and subsection 3(2) repealed: O.I.C. 2003-486, N.S. Reg. 196/2003.

Discount rate for calculating loss or damage from bodily injury or death

4 (1) For the purpose of Section 113C, the discount rate for calculating loss or damage from bodily injury or death is 3.5%.

(2) Effective January 1, 2005, the discount rate for each calendar year may be based on the difference between the rate set for Government of Canada bonds and the consumer price index for the previous 12 months.

Onus to prove injury not minor injury

5 On a determination of whether an injury is a minor injury under subsection 113B(6) or (8) of the Act, the onus is on the injured party to prove, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, that the injury is not a minor injury.

Section 5 added: O.I.C. 2003-486, N.S. Reg. 196/2003.