

## The Minor Injury Cap - 3 Years Later

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In 2003, the Nova Scotia government enacted Bill 1, the *Automobile Insurance Reform Act* ("AIRA"), accompanying *Automobile Insurance Tort Recovery Regulations* ("Tort Regs") and several related pieces of legislation, collectively known as the insurance reforms.

The AIRA introduced a number of statutory and regulatory changes and was designed to counter increasing automobile insurance premium rates. The most notable change was the \$2,500 minor injury cap. This and other changes generally apply only to motor vehicle accidents that happened on or after November 1, 2003 and apply to both non-fatal and fatal injuries.

Three years later, the cap has received plenty of press coverage yet has not been addressed in a reported court decision. However, with time, the AIRA will certainly come to the forefront. In fact, there is at least one Charter challenge moving through the system, alleging the legislation is discriminatory and unconstitutional.

The following is therefore a refresher on some of the highlights and notable points to keep in mind when dealing with this legislation.

### "Minor Injury" definition

This term is defined in the AIRA as a personal injury that does not result in:

- permanent serious disfigurement, or
- permanent **serious impairment** of an important bodily function caused by continuing injury that is physical in nature, and
- **resolves** within 12 months of accident.

The AIRA then defines a "**serious impairment**" as one that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.

It appears the AIRA leaves it open to interpretation whether a serious impairment means only a purely physical injury and not a psychological one, as there is no discussion as to whether mental or psychological injuries are included. Based on the wording, it appears that if the permanent serious injury was psychological, it would be considered a minor injury unless it falls within the definition of "chronic pain".

### "Minor Injury" refined

The original minor injury definition in the AIRA included the phrase "resolves within 12 months" but did not define it. The term "resolves" was then defined 20 days later in the November 20, 2003 amendment to the Tort Regs.

"Resolves" within 12 months means:

- does not cause or ceases to cause serious impairment of an important bodily function, resulting from a continuing injury of a physical nature, that produces a **substantial interference** with the person's ability to perform their **usual daily activities** or **regular employment**; or
- causes a serious impairment, but the claimant has failed to seek and comply with all reasonable recommendations of a trained and experienced "medical practitioner"
- "important bodily function", "medical practitioner" were not defined
- "**substantial interference**" in terms of regular employment, means interference after reasonable accommodation by the employer *and* reasonable efforts by the injured person to adjust to the accommodation
- "**regular employment**" means the "essential elements" of pre-accident employment
- "**usual daily activities**" means the essential elements of personal care, based on an apparent objective standard of what is necessary and important to people of similar age etc.

This amendment appears to have broadened the manner in which the term "minor injury" would be interpreted, thus resulting in the possibility that more injuries would be considered minor and become subject to the \$2,500 cap. This definition would also indicate that some symptoms may continue beyond 12 months and the injury still be considered "minor".

It is safe to say that it will be difficult to determine whether or not any particular injury is in fact a "minor injury". This use of "resolve" in the context of cap legislation also appears to be unique to Nova Scotia.

### Other definitions

The Tort Regs exempt "chronic pain" from the

definition of "minor injury", provided that:

- it is diagnosed by a "medical specialist" and
- results in "continuous serious impairment of an important bodily function" and
- is a least moderately severe (as per the AMA Guidelines to the Evaluations of Permanent Impairment, 5<sup>th</sup> ed)

Also exempted from the definition of "minor injury" are comas, serious burns and amputations.

### "Net Income" Changes

The AIRA has changed how loss of income claims are to be calculated. The "net" income approach, different from the prior gross annual income approach, is as follows:

A defendant is *not* liable for

- income loss before trial in excess of "**net income loss**"; or
- damages for loss of earning capacity before trial in excess of "**net loss of earning capacity**"

The Tort Regs define "**net income loss**" as the total income loss less income tax, EI and CPP contributions etc. Similarly, "**net loss of earning capacity**" means the total loss of earning capacity or loss of future income less probable income tax, EI and CPP contributions etc.

While the net approach to past income loss should be easy, it is more difficult to say how future loss will be calculated or rather how it will be determined what portion of probable income would go to taxes, contributions etc. Based on the definition above, a defendant would be liable only for that part of the future loss that is net of what the claimant would have otherwise have paid in taxes and so on.

### Limitation Period

The 2 year limitation period for motor vehicle accidents has increased to 3 years.

### Statutory Limits and Priority of Payments

One smaller change that came with the AIRA is that Nova Scotia no longer has a statutory priority of payments scheme for combined property and personal injury claims that exceed the statutory limit of liability.

The minimum liability under the standard auto policy

was increased from \$200,000 to \$500,000. However, the former statutory priority of payments provision (ie. property loss or damage claims previously had priority to the extent of the first \$10,000 of the \$200,000 minimum liability) was repealed.

Applying the old proportion to the new minimum liability, a priority of \$25,000 would be given to property loss or damage and \$475,000 to bodily injury or death claims. Nova Scotia courts have yet to address this issue.

### Discount Rate

The Tort Regs increased the discount rate used in calculating loss or damage from bodily injury or death from 2.5% to 3.5%.

### Seatbelt Deduction

Introduced at the same time as the AIRA were the *Automobile Insurance Contract Mandatory Conditions Regulations* which provided for a minimum 25% reduction for a plaintiff's failure to wear a seatbelt. They also removed the need to establish any causal connection between the injury and the failure to wear a seatbelt.

However, the condition is a term of the insured's or defendant's contract, which the plaintiff is not bound to. Even though the plaintiff would have a similar provision in his or her own policy, the defendant is not a party to the contract and therefore can not take advantage of it. It will be interesting to see in the future how this condition plays out as it is possible this legislated deduction will have no legal effect.

### Section B Benefits

An insured has the option now to enhance their Section B benefits. If he or she elects to, the limit for medical and rehabilitative benefits increases to \$50,000 (as opposed to \$25,000) and the weekly indemnity benefits go up to \$250/week (as opposed to \$140).

### Structures

These changes affect any claim for future pecuniary loss, whether income or expense, arising out of personal injury. A Court "may" now order that future pecuniary damages be paid by "periodic payment" or effectively, by means of a structure.

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