

Report of the Auto Insurance Working Group

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Note from the Chair:

The Auto Insurance Working Group is submitting this report with the expressed wish that our recommendations on the definition of “minor personal injury” and the amount of the cap for pain and suffering related to minor personal injuries be adopted at the earliest possible opportunity.

While these recommendations satisfy the mandate handed us, we have taken the liberty of adding three other recommendations that go beyond the mandate. We have done this on good faith related to issues brought before us by presenters that we feel require government attention, consistent with the government’s stated goal “to make sure the system in place for helping those people injured in motor vehicle accidents is fair, accessible and affordable for all New Brunswickers.”

We have divided this report into two sections. Section 1 deals with the mandate, and Section 2 with recommendations beyond the mandate.



*Michel C. Léger, Chair
Auto Insurance Working Group*

Section 1

Executive Summary

In 2003, the government of the day introduced the *Injury Regulation* (Regulation 2003-20) under the Insurance Act of New Brunswick. The intent was to place a \$2,500 cap on awards for pain and suffering for minor personal injuries sustained in an automobile accident. However, due to an over-reaching definition of minor personal injury that is not reflective of the government of the day's stated intent, and the restrictive application by the judiciary, some accident victims with substantial injuries found themselves subjected to the cap restriction.

This situation, combined with the modest amount of the cap, constituted unfairness in the system that the current government is determined to address. In January, 2011, the New Brunswick government appointed the Auto Insurance Working Group to fix the cap and definition by examining the issues through the eyes and experience of victims and stakeholders.

The government's stated goal was "to make sure the system in place for helping those people injured in motor vehicle accidents is fair, accessible and affordable for all New Brunswickers."

The Group was tasked specifically with reviewing the two key elements of the *Injury Regulation*:

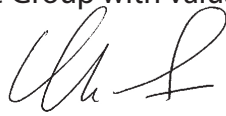
1. The definition of "minor personal injury"; and
2. The amount of the cap on minor personal injuries which was set at \$2,500 in 2003.

With public and expert input, the Working Group's ultimate task has been to formulate recommendations for government's consideration in making appropriate and needed changes to the *Injury Regulation*. Such recommendations would protect New Brunswickers from being unfairly subjected to the cap while, at the same time, capping minor injuries.

In essence, the Working Group's challenge has been to come up with the proper balance that fairly serves the competing interests of the insured – the consumers of auto insurance protection; the insurer – the insurance companies that collectively form the auto insurance industry; and accident victims who deserve compensation for their pain and suffering losses resulting from injuries.

The Auto Insurance Working Group has concluded the necessary process to complete its task. Therefore, we respectfully submit our report and recommendations to government.

We take this opportunity to express our sincere appreciation to those many New Brunswickers who took the time and energy to make presentations to our Group, in writing or in person at the seven public consultation sessions around the province. We were touched by their willingness to openly share their personal, often emotional stories that clearly demonstrated the current system must be changed. We thank them for their courage and for providing the Group with valuable insight that guided us in preparing our recommendations to government.



Michel C. Léger, Chair

On behalf of the whole committee:

Nathalie Chiasson, Richard Dumais MD, Macgregor Grant, Frances McConnachie, Viivi Riis, Stephane Viola, and Kathy Warren

Recommendations and Rationale

Recommendation #1: The definition of “minor personal injury”

Under current legislation, the legal definition of “minor personal injury” reads as follows:

“Minor personal injury” means an injury that does not result in:

- a) Permanent serious disfigurement
- b) Permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature.

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

The Working Group recommends that the current definition be discarded, and 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.

Rationale for Recommendation #1:

The definition and the amount of the cap are intrinsically linked. The wording of the proposed new definition takes into careful consideration the cap amount we have recommended, and vice versa. Any changes in either the cap or the definition must be reflected by changes to the other.

Without exception, presenters during the public consultation process commenting on the cap and definition said there must be change. Injuries described by some of the accident victims clearly surpassed what could reasonably be considered a “minor personal injury.” Yet, these individuals often were told by adjustors and/or insurers that their injuries fell within the definition and, therefore, would not qualify for any more than the \$2,500 cap for pain and suffering. Such examples, thankfully, are not frequent, but the goal of the Working Group was to develop a definition that would prevent such injustices. Specific complaints by presenters about the definition included:

- Too vague, too complex
- Confusing for all those who must make decisions as to how to apply it (adjustors, medical and legal professionals)
- Does not address injuries of a continuing nature
- Needs to be broad enough to consider the mental, emotional and psychological impacts of an injury, and it must include the long-term impact on personal living—not just as an employee in the workforce, but in all aspects of living.
- Assessment of the injury impact on an individual’s long-term earning capability does not include putting a value on the significant unpaid work of volunteers in communities.
- The current definition states what a personal injury isn’t rather than what it is.

In developing the recommended wordage for a new definition, the Working Group referenced, among other sources:

1. World Health Organization’s report: The Bone and Joint Decade 2000-2010 Task Force on Neck Pain and its Association Disorders. ¹
2. World Health Organization’s International Classification of Function, Disability and Health ² (ICF)

Recommendation #2: The amount of the cap

The Group vigorously debated the amount of the cap, and while the committee could not determine a final amount, it is felt that:

- The cap amount should be increased to between \$4,000 and \$6,000
- There should be annual indexing to CPI

Rationale for Recommendation #2:

The Working Group could not make an informed recommendation on a specific cap amount because it did not have the benefit of a closed-claim study or an actuary report. This is why our recommendation references a range rather than a specific dollar amount.

Based on all of the available information and the examples presented during the consultation process, the Working Group agreed that the current amount of the cap—\$2,500—is too low. The Group looked at Nova Scotia which recently increased its cap to \$7,500 and includes an indexing clause. However, Nova Scotia’s

¹ http://journals.lww.com/spinejournal/fulltext/2008/02151/the_bone_and_joint_decade_2000_2010_task_force_on.4.aspx

² <http://www.who.int/classifications/icf/en/>

definition of minor personal injury differs from what we are recommending for New Brunswick, and there are other differences in the two provinces' systems. The Working Group found no other provincial system that would give helpful guidance in setting a new cap for New Brunswick.

After in-depth discussion, it was agreed that the cap should fall within the reasonable range of \$4,000 and \$6,000, with the final figure set by government, guided by a closed-claim study and actuarial analysis. As noted earlier, the committee did not have access to either.

Of those who made presentations to the Working Group during the public consultation process, slightly more than half recommended that the cap be increased and the definition improved. Slightly fewer than half of the presenters recommended the cap and definition be abolished. Of this group, a dozen suggested a deductible system be used in New Brunswick, as is used in Newfoundland and Labrador.

The Working Group was specifically instructed to review the amount of the cap and the wording of the definition. The mandate did not include consideration of eliminating the current system and replacing it with something such as a deductible system. Therefore, the Group focused on the two key tasks under the mandate—determining a fair amount for the cap, and developing a properly-worded, effective definition.

Section 2

Executive Summary

The Working Group's mandate was clear and specific; to review and recommend on the definition of minor personal injury and the amount of the cap for pain and suffering on minor personal injuries. However, it must be noted that the public and stakeholders strongly objected to being limited to the two mandated topics in their presentations.

In the spirit of openness and trust, the Working Group agreed that presenters should be permitted to speak freely on any aspect of auto insurance as it relates to accident victims in New Brunswick. This broadened the discussions and information brought forward, particularly during the public consultation sessions across the province. Presenters cast light on a variety of problems being experienced by motor vehicle accident victims and claimants.

The result was that the Working Group came away with a number of issues beyond the mandate but which comfortably fell within the object of ensuring the system is fair and equitable for all concerned. We found these issues to be of significant importance and value in the continuing work of government to improve the regulations and systems that impact auto insurance and accident victims in New Brunswick.

Therefore, after serious discussion among members of the Working Group, it was agreed that recommendations must be brought forward in this report which also address the broader, difficult issues raised during our consultations. The Working Group stresses however, that these additional recommendations should not detract the government from the prompt implementation of Recommendations #1 and #2. Immediacy on these recommendations is required in order to prevent further unintended prejudice to accident victims.

Recommendations and Rationale

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

The Working Group recommends that the government develop an information package on the rights of persons injured in an automobile accident. This package would include the processes and assistance available to the claimant. It would be mandatory that the information package be provided to the claimant by the insurance adjuster within 30 days of the accident or the reporting by the claimant of the accident. This package would include, but not be limited to the following information:

1. The cap amount and what it is for—compensation for pain and suffering.
2. The revised definition of “minor personal injury” as it relates to automobile accident.
3. Sections A (Third Party Insurance) and B (Accident Benefits) of the Insurance Act, written for this package in such a way as to be easily understood by the average person.
4. The rights of the claimant. Claimants also must be aware of key milestones and crucial dates.
5. Guidance on dealing with adjusters, insurers, lawyers and other parties who may become involved in the case.
6. What to do if there is a dispute in your claim.
7. Information about New Brunswick’s insurance advocate—the role and what services it provides to accident victims. Also, how to contact the advocate.
8. Any other topics deemed important for inclusion in this booklet.

It is further recommended that a reasonable amount of time, minimum 15 days from receipt of the information package, be provided to the claimant as a cooling-off period before signing off on any claim.

Rationale for Recommendation #3:

At the public consultation sessions, we saw victims break down in tears. It was not the relating of their accident and injuries that brought on the emotion. It was the stress and frustration they said they’d endured 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.

From their first encounter with an adjuster, many victims were unclear as to their rights and the process they would need to go through to seek fair settlement. Victims described being bounced around from adjuster to adjuster, company to company, and feeling like nobody was representing their interests—not even their own insurer to which they’d paid money each year. Some described being told by adjusters that their injuries fell within the cap and they should just settle for the cap amount, this often within weeks of their accident and without the benefit of proper medical evidence. In short, they didn’t know their rights or where to turn to challenge this pressure.

For those New Brunswickers who do not have a family doctor and must rely on community clinics for care, the situation following an auto accident injury is especially confusing and demoralizing. They do not know where to turn to get the necessary continuity of care for recovery. They do not know where to turn to get the necessary medical reports to proceed with a claim.

One woman accident victim reported being caught in a situation where her insurance company refused to accept her doctor's injury report. The insurer took the position that the woman's injury had occurred before the accident. Not knowing where to turn to solve the dispute, the woman settled for the cap.

In summary, Recommendation #3 is intended to help accident victims by providing the information and guidance they need, thereby reducing their stress. (Please also see "Observations: Medical Profession" for more information relative to this point.)

Recommendation #4: Access to early care and assessment

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

Rationale for Recommendation #4:

The Working Group repeatedly heard in the public sessions of difficulty accident victims experienced in accessing appropriate medical care in a timely fashion. The committee's position is that accident victims need fair access to reasonable treatment early, particularly given the tight definition of minor personal injury recommended herein. This means government needs to explore claimant-driven early access to care that supports recovery in the acute stage. A system that makes early access to treatment available to victims is crucial to the final recovery outcome.

The Working Group witnessed some sad and unfortunate situations where accident victims had no family doctor and lacked the financial means and additional medical insurance to fight for access to treatment that could have made a significant, positive difference in their recovery. The situation worsens when the individual also lacks the support and guidance of friends and family.

The Working Group heard firsthand from victims whose difficulties getting permission from their insurer/adjustor to access tests and treatment made it extremely difficult to achieve any continuity of care toward recovery and instead, began to suffer emotional and psychological problems, compounding their original injury.

The committee heard repeatedly of accident victims experiencing difficulty and time lapse in accessing specialists and treatment, and of confusion and complexity in the system. It will be challenging to come up with a creative, workable solution to ensure early access to treatment. One possible solution could be a pre-approved sum of money from the insured's Section B benefits. Currently, access to Section B funds requires a physician's or specialist's prescription and approval of the adjustor/insurer. The pre-approved funds for the purpose of early diagnostics and treatment could be accessed by simple approval from any professional in a small, protocol group, recognized by all parties. So, for example, a victim could access services from a physiotherapist without a referral from a family doctor—some of which do not have in the first place. This system is used in Alberta where a group of health practitioners (physicians, physiotherapists and chiropractors) can authorize treatment without insurer approval. The committee feels the Superintendent of Insurance is the appropriate person to oversee the development of the necessary protocols.

The Working Group discussed solutions to this need and would be pleased to share our thinking as government moves forward on Recommendation 4.

Recommendation #5: Continuing Review Process

The Working Group recommends 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 victim's group. Further, the Working Group recommends that this review committee report to the Provincial Legislature.

Rationale for Recommendation #5:

The Working Group believes a regular review process, connected with the legislative changes this report is anticipated to prompt, will ensure New Brunswick's system is working as it should, specifically the cap and definition. The committee believes the review committee should report to the Provincial Legislature, exposing any issues that it feels requires attention and providing recommendations for improvements. With this mechanism, any problems will come to light much quicker. We would only caution that the review group be made up of appropriate stakeholders and include victim representation.

Observations

Industry Conduct

Members of the working group heard troubling stories from accident victims about the behaviour of some adjustors and, in some cases, by the victims' own insurance company. Many presenters at the public consultation sessions expressed dissatisfaction with the way they were treated by some adjustors, relating stories of intimidation and emotional abuse during an already-difficult time.

Victims told of feeling confused and uncertain as to what to do—they were overwhelmed by a system they had always believed was there to help them following an accident, after paying insurance premiums for years. For example, one presenter talked of getting the run-around from her own agency and dealing with an adjustor who would not accept her doctor's report of her injuries.

Procedures and processes within the adjustor and insurance worlds are not commonly known or understood by victims, and such lack of knowledge opens the door to abuses and intimidation. Further, there was the sense that some adjustors themselves don't know their own systems and policies enough to be of help.

The Working Group heard enough such stories as to raise concern for us in terms of what constitutes common practice among adjustors in New Brunswick—both independent adjustors and those working as employees of insurance companies.

This is an industry matter, however, government policy and legislation regarding insurance in New Brunswick is intended to protect consumers. The Working Group believes the treatment of accident victims falls within the realm of consumer protection in this instance. Therefore, government has an obligation to ensure the insurance industry is managing itself appropriately and has systems in place to prevent consumer abuses.

Hence, the Working Group strongly suggests an open examination of this situation and, possibly, an industry-driven initiative to improve, monitor and manage adjustor conduct. Perhaps such a system would include standardized training, licensing, and an industry-run monitoring program with disciplinary authority for handling complaints. The province should be a participant in the exercise that investigates this problem and, hopefully, comes up with solutions.

The committee is aware that a government review of government agencies and officers including the Insurance Advocate is underway. The committee feels this review should include ensuring the Insurance Advocate is equipped with mechanisms to make sure insurance industry obligations to accident victims are met.

The Medical Profession

When someone who doesn't have a family doctor is involved in an accident, there are often additional problems. It also makes things difficult for medical professionals themselves.

Dr. Mary Jarrett, Family Physician and Chair of General Practice for the New Brunswick Medical Society, described a myriad of problems in her presentation to the Working Group at the Saint John public consultation session. Below are the highlights of her remarks.

- Providing the multitude of varied reports related to a motor vehicle injury victim is problematic for New Brunswick's physicians, and this is ultimately impacting the victim.
- Many victims are first seen in acute care settings, such as the hospital emergency room, but the on-going care is generally provided or coordinated by the family doctor who works with allied professionals.
- 10% of New Brunswickers do not have a family physician³. Those among this group who have an accident have to turn to clinics and emergency rooms that are not designed to provide the follow-up services needed by an accident victim, including the paperwork and referrals to specialists.
- The treatment approach and interactions between physicians and the insurance companies and lawyers are very challenging.
- The family physician, if the victim has one, is the gate keeper and spends much time and effort defending the need and expense of treatment.
- Provision of information/reports is time consuming for general practitioners.
- Some documentation to insurance companies must be paid for up-front which is a hardship for victims, and documentation is often repetitive.
- Physicians may get a number of different forms for a single accident victim, and different insurance companies cover different parts of care. For example, does an insurer cover a functional capacity assessment which is a useful tool in determining injury and longer-term treatment? It can cost \$1,000 or more out-of-pocket for the victim.
- Access to specialized treatment is variable and inconsistent for New Brunswick accident victims. This is a separate issue beyond the scope of this Working Group, but it needs to be addressed. For example, there may be a way to streamline chronic pain services around the province. According to some of the presenters who appeared before the committee, it can take a year or more to see a chronic pain specialist.

³ The 10 % figure comes from a report released in February of 2010 by the New Brunswick Health Council.

The Working Group was most appreciative to have this input from the medical profession. The role of the medical sector in the assessment and recovery of accident victims is obviously considerable, and therefore the committee felt it appropriate to include in this report the concerns raised by this sector. However to go further would be beyond the scope of the committee.

The Process

During the provincial election campaign of 2010, some New Brunswickers began telling candidates that the cap and definition of 2003 were causing serious problems for some accident victims, and something needed to be done. After being installed in the fall of 2010, the new government committed to setting up a review of the auto insurance injury cap and definition aimed at rectifying the problems that had come to light.

In January, 2011, the Minister of Justice and Consumer Affairs announced the appointment of the Auto Insurance Working Group. The Working Group would carry out its review and conduct consultations in two specific areas:

- The appropriateness of \$2500 as the cap; and
- The current definition of “minor personal injury” as a measure of when the cap should be applied.

The strong anecdotal evidence that had prompted government to launch this review was the impetus for making the process very much a public forum. Justice and Consumer Affairs Minister Marie-Claude Blais appointed a group that included expertise in the various disciplines that are, in some way, connected with auto insurance as it relates to accident victims/claimants.

Michel C. Léger, an experienced lawyer, was named chair of the group. Others appointed were: Frances McConnachie, New Brunswick Consumers for Insurance Fairness; Bill Adams, Atlantic Vice-President of the Insurance Bureau of Canada; Macgregor Grant, Insurance Brokers Association of New Brunswick; Nathalie Chiasson, trial lawyer and member of the Atlantic Trial Lawyers Association; Stephane Viola, lawyer and member of the Canadian Bar Association; Dr. Richard Dumais, a pain specialist from Moncton; and Kathy Warren, a physiotherapist from Fredericton. Mr. Adams’ position was filled by Viivi Riis, BScPT, MSc, consultant to the IBC.

New Brunswick’s consumer advocate for insurance, Ronald Godin, was also asked to participate with the working group in his role as advocate.

As a first step in gathering crucial and relative information, the Working Group invited key stakeholders to meet with them and make presentations on the cap and definition. This occurred in May, 2011. These presentations were made available to all on the New Brunswick government’s web site for the Auto Insurance Review.

The group then turned to the public for input, inviting written submissions and scheduling seven public consultation sessions during June around the province at Edmundston, Belledune, Tracadie-Sheila, Miramichi, Dieppe/Moncton, Saint John and Fredericton. These sessions were advertised in the local media and on the government’s web site. A total of 41 individuals spoke before the Working Group at the consultation sessions.

A comprehensive report on all the presentations was prepared for the Working Group, including an executive summary. As well, each member of the Group received a binder containing all materials for future

reference. These materials, along with the key stakeholder input, became the foundation for two days of in-depth discussion by the group to come up with recommendations related to their mandate.

Early on, during the public consultation sessions, the group recognized that issues beyond the mandate were being raised again and again by presenters. It was decided that these reasonable and important non-mandate issues should be dealt with in some way. Therefore, it was agreed that recommendations should be formulated for some of these issues while others should be pointed out to government in the group's observations section of this report in hopes that some action may result.

While discussions were expectedly subjective at some times in this process, it should be stated here that in the end, every member of the group was able to feel comfortable with and supportive of all the recommendations. During August/September, the group focused on preparing this final report for presentation to government in the fall.

Conclusion

The two recommendations contained herein specific to the mandate to look at the definition of "minor personal injuries" and amount of the cap on pain and suffering for minor personal injuries, as well as the three recommendations that go beyond the mandate, were the result of intensive discussion on each related topic. Members of the Working Group brought a high level of education, knowledge, experience, professional diversity and commitment for improvement to the table. This made for passionate and informed debate.

The Working Group thanks the government and the Minister for the opportunity to work on this important issue on behalf of the people of New Brunswick. We also thank all who provided input into this process.

We look forward to seeing the government act on our recommendations.