



Protecting Everyday Albertans

The Alberta Civil Trial Lawyers Association

Written Submission to the Automobile Insurance Rate Board for the 2019 Annual Review

ABOUT ACTLA

The Alberta Civil Trial Lawyers Association (ACTLA) was founded in 1986 as a province-wide Non-Profit Society. ACTLA is made up of 600+ members representing thousands of Albertans and legal professionals, including many defence lawyers. We advocate for a strong civil justice system that protects Albertans' rights, provide continuing legal education and professional development, and promote and uphold the rule of law, administration of justice, and the public good.

CONTEXT

HISTORY

Alberta has a **hybrid auto insurance system** which includes:

- A tort system that allows an injury victim to seek compensation from the negligent wrongdoer
- A no-fault system to provide disability and rehabilitation benefits to all injury victims regardless of fault

Under the common law tort system, non-pecuniary damages may be awarded to compensate a claimant for the intangibles associated with injury such as pain, suffering, and loss of enjoyment of life. While monetary compensation fails to reverse the effects of an accident, it does play a significant role in compensating individuals for the impact the accident has had on their life and recognizing the harm that has been suffered through the fault of wrongdoers.

In 1978, the Supreme Court of Canada imposed an upper monetary limit of **\$100,000** for non-pecuniary damages. Adjusted for inflation, the current limit of non-pecuniary damages is around **\$380,000**, and such damages are reserved for the most catastrophic of injuries.

Prior to 2004, Alberta courts determined compensation for pain and suffering based on precedent and factors such as the **nature of the injury**, the **severity and duration** of the injury, and the **degree of impairment** in daily activities.

OUR ROLE

Unrepresented injury claimants deal directly with sophisticated insurance representatives, therefore operating on an **uneven playing field**. When claimants feel they are being treated unfairly, they may contact a lawyer for assistance. These lawyers counteract the imbalance between insurers and unrepresented claimants by advising claimants on their rights and **hold insurance companies accountable**.

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THE MINOR INJURY CAP

INTRODUCTION

The minor injury cap was **introduced in 2004** through numerous legislative and regulatory enactments, including:

- Amendments to the **Alberta Insurance Act**, providing the government the authority to regulate insurance premiums and compensation
- The **Minor Injury Regulation**
- The Diagnostic Treatment Protocols Regulation
- The Automobile Accident Insurance Benefits Regulation
- The Automobile Insurance Premiums Regulation
- The Complaint Resolution Regulation
- The Fair Practices Regulation

When it was introduced the cap placed a maximum limit of **\$4000** on damages for pain and suffering from "minor" soft tissue injuries (sprains and strains) that did not result in "serious impairment". Adjusted for inflation, the current minor injury cap is **\$5202**.

The Minister of Finance at the time confirmed that the law's intent and application was limited to injuries that were truly "minor" and that healed quickly:

"We have always said the cap will only apply to minor injuries that heal relatively quickly... About 90 percent of people with minor injuries will recover from their injury within 12 weeks. The other 10 percent may require further treatment, which will be available to them, or their injuries may not be minor, in which case the cap would not affect them."

- Alberta Minister of Finance Patricia Nelson, June 2004

CONSEQUENCES

The regulations surrounding the interpretation and application of the minor injury cap created a convoluted, complex, and confusing entanglement of law for the courts to examine. These regulations created a number of adverse consequences, including the following:

- **Inconsistent** application and understanding of the laws among experienced insurance representatives and lawyers.
- **Ambiguity** surrounding the laws resulted in an uneven playing field, with insurers applying the cap broadly and unassuming or unrepresented claimants accepting that non-minor injuries were capped, such as: concussions, psychological injuries, jaw disorders, neurological disorders, and chronic pain, among others.
- **Risks** associated with litigating the uncertainties related to the regulations acted as a significant disincentive to claimants pursuing fair compensation, as Alberta's "loser pays" costs system meant that unsuccessfully challenging an insurance company could result in significant court costs.

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→ **Regulations** entangled the medical profession and the Superintendent of Insurance into the costs and administration of the regulatory scheme surrounding the cap, including diagnostic and treatment protocols and certification and administration of a roster of certified medical examiners who determine whether or not an injury is minor.

LITIGATION

These uncertainties led to **substantial litigation**, both in terms of the laws' constitutionality and interpretation. The following summarizes some important cases dealing with the minor injury cap:

Morrow V. Zhang (2008/09)

Plaintiff involved in an accident in 2004 challenged the constitutionality of the minor injury cap and was successful at trial in 2008. The Alberta Court of Appeal overturned this decision and upheld the constitutionality of the law in 2009.

Sparrowhawk V. Zapoltinsky (2012)

Plaintiff involved in an accident in 2005 resulting in an injury to the mouth and temporomandibular joint dysfunction (TMD) of the jaw. The insurance company sought to cap the damages on the basis that injuries were minor. The court disagreed and confirmed that jaw injuries did not meet the definition of "minor".

"[132] There are therefore three independent bases to conclude that Mr. Sparrowhawk's jaw and mouth injuries are not minor injuries:

- 1. The tooth and cartilage injuries are not muscle, tendon, ligament, or WAD injuries,*
- 2. The jaw injury caused serious impairment, and*
- 3. All injuries treated principally by dentists, such as TMD and tooth injury, are never minor injuries."*

McLean V. Parmar (2015)

The plaintiff's vehicle was struck by a city bus that ran a red light. The plaintiff suffered from chronic pain and psychological injuries as a result of the accident. The court confirmed that chronic pain and psychological injuries can cause serious impairment and are therefore not minor injuries. Insurance companies can not impose the minor injury cap on chronic pain or psychological injuries causing serious impairment.

"... Ms. McLean suffered from a variety of injuries as a result of being hit by a bus in January 2008. They include a moderate whiplash injury to her neck and back, numbness and tingling into her right arm, a TMJ disorder and pain, PTSD and depression, and a mild concussion, all of which caused her chronic pain which lasted two and a half years. Her strains, sprains, and WAD injuries are not "minor injuries" as defined by the MIR."

Jones V. Stepanenko (2016)

The insurance company took the position that the plaintiff's chronic pain injuries were capped, and that fibromyalgia could not be caused by an accident. The court noted that in 15 years of assessing injuries, the



defence's Certified Medical Examiner had never found someone to have suffered from a "serious impairment", which is a component of whether an injury will be classified as "minor".

The court affirmed that Albertans suffering from chronic pain are entitled to compensation outside of the minor injury cap, chastised the insurance expert's lack of objectivity, and held that recognized medical conditions such as fibromyalgia can be caused by a car accident.

In 2018, further amendments were made to the Minor Injury Regulation, which **expanded the definition of minor injury to include soft tissue TMJ (jaw) injuries and physical and psychological conditions** that arise and resolve with a minor injury. These changes will inevitably result in further litigation to untangle their meaning and application.

THE ISSUES

The Minor Injury Cap **negatively impacts** injured Albertans in a myriad of ways. In particular:

- The cap creates a **complex regulatory landscape** which proves exceptionally difficult for not only victims of injury but also their lawyers to navigate. Understanding if your claim is capped is not an easy process. Lawyers require an assessment of your previous medical history, opinions from medical examiners, and **subjective reviews of your injuries** to decide whether or not to proceed with a claim. Such an extensive process can prove to be exceptionally cumbersome. Despite a minefield of regulatory hoops, claimants are often entitled to more than they assume. However, the convoluted nature of the claims process **tends to deter victims** of major and minor injury alike **from making claims**.
- The Minor Injury Cap **disproportionately harms vulnerable Albertans**. Specifically those people who are susceptible to soft-tissue injuries, such as those predisposed to chronic pain or other forms of physical and psychological injury. Furthermore, marginalized Albertans with less access to justice such as immigrants, the elderly, and those from lower socio-economic backgrounds are **unfairly affected** by the cap.
- Despite the comments made by Alberta's Finance Minister in 2004 regarding the intent of the Minor Injury cap, it is exceptionally clear that the **current regulations extend far beyond the intended scope**. The most recent amendments made in 2018 have effectively burdened injured Albertans by widening the pool of injuries that are unclaimable. Most importantly the expansion of what constitutes as a minor injury now includes **physical/psychological conditions and soft tissue TMJ** brought on by an accident. Including soft tissue TMJ injuries as a minor injury directly challenges the court's verdict in Sparrowhawk V. Zapoltinsky (2012) which determined that injuries treated by dentists **are never minor**.



THE INSURANCE INDUSTRY

The insurance industry in Alberta is **healthy and competitive**, with over **70 auto insurance companies currently operating in the province**¹. The following is a brief examination of insurance industry facts, beginning with their profits.

FINANCES

As a cyclical industry, insurance undergoes periods of financial highs and lows influenced by various factors including interest rates, investments, and claims particularly in the non-auto property and casualty sectors.

Insurance Industry Profits 2002 - 2018 (1)

2018	\$ 2,284,050,000
2017	\$ 3,532,668,000
2016	\$ 2,055,913,000
2015	\$ 5,074,427,000
2014	\$ 4,457,799,000
2013	\$ 2,924,686,000
2012	\$ 4,414,345,000
2011	\$ 3,555,610,000
2010	\$ 2,439,606,000
2009	\$ 2,524,490,000
2008	\$ 2,485,011,000
2007	\$ 4,949,025,000
2006	\$ 5,534,018,000
2005	\$ 4,043,037,000
2004	\$ 4,084,050,000
2003	\$ 2,198,844,000
2002	\$ 242,255,000

Source: Office of the Superintendent of Financial Institutions, Government of Canada

Chart (1) demonstrates²:

- The insurance industry was in a **financial low** in 2002
- The industry **recovered** in 2003
- The industry now enjoys **multi-billion dollar profits**

¹ AIRB. 2018.

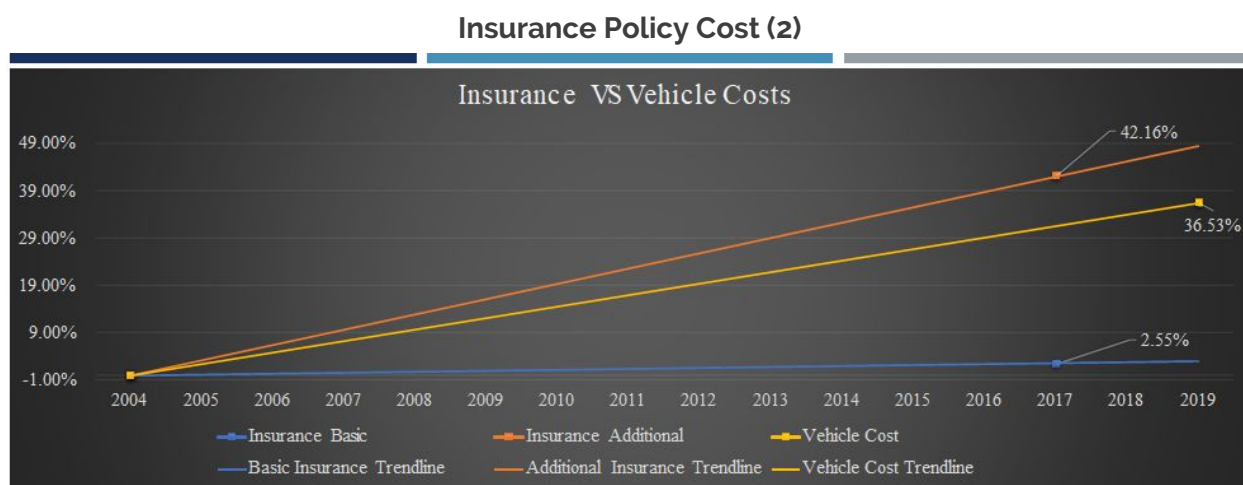
² Office of the Superintendent of Financial Institutions, Government of Canada



INSURANCE POLICIES

There are three main auto insurance policies related to the minor injury cap.

- **Liability/Basic Insurance** is the mandatory vehicle insurance coverage. It protects others from damage that might be done by a driver while operating a vehicle, which includes injury and property damage. **This is the policy which covers bodily injury claims.**
- Additional Insurance includes **collision** coverage that provides financial compensation for damages that occur to the vehicle due to a collision or accident, and **comprehensive** coverage protects vehicles from events that aren't directly related to the operation of the vehicle or the driver's actions.



*Graph does not take into account annual fluctuations. Source: AIRB 2018 Annual Review Report – Alberta Private Passenger Vehicles & Statistics Canada, Table 20-10-0001-01, New motor vehicle sales.

Chart (2) demonstrates³:

- Basic auto insurance premiums have increased only **2.5%**
- Additional insurance premiums have increased **42.16%**
- Premium increases cannot be a reflection of higher bodily injury payouts, as it is the basic auto insurance policy which covers these claims

³ AIRB, 2018.



INSURANCE CLAIMS & COST

The two major claim types covered by auto insurance are bodily injury claims and collision claims. The chart below examines the frequency of these claims and the average payout by insurance companies.

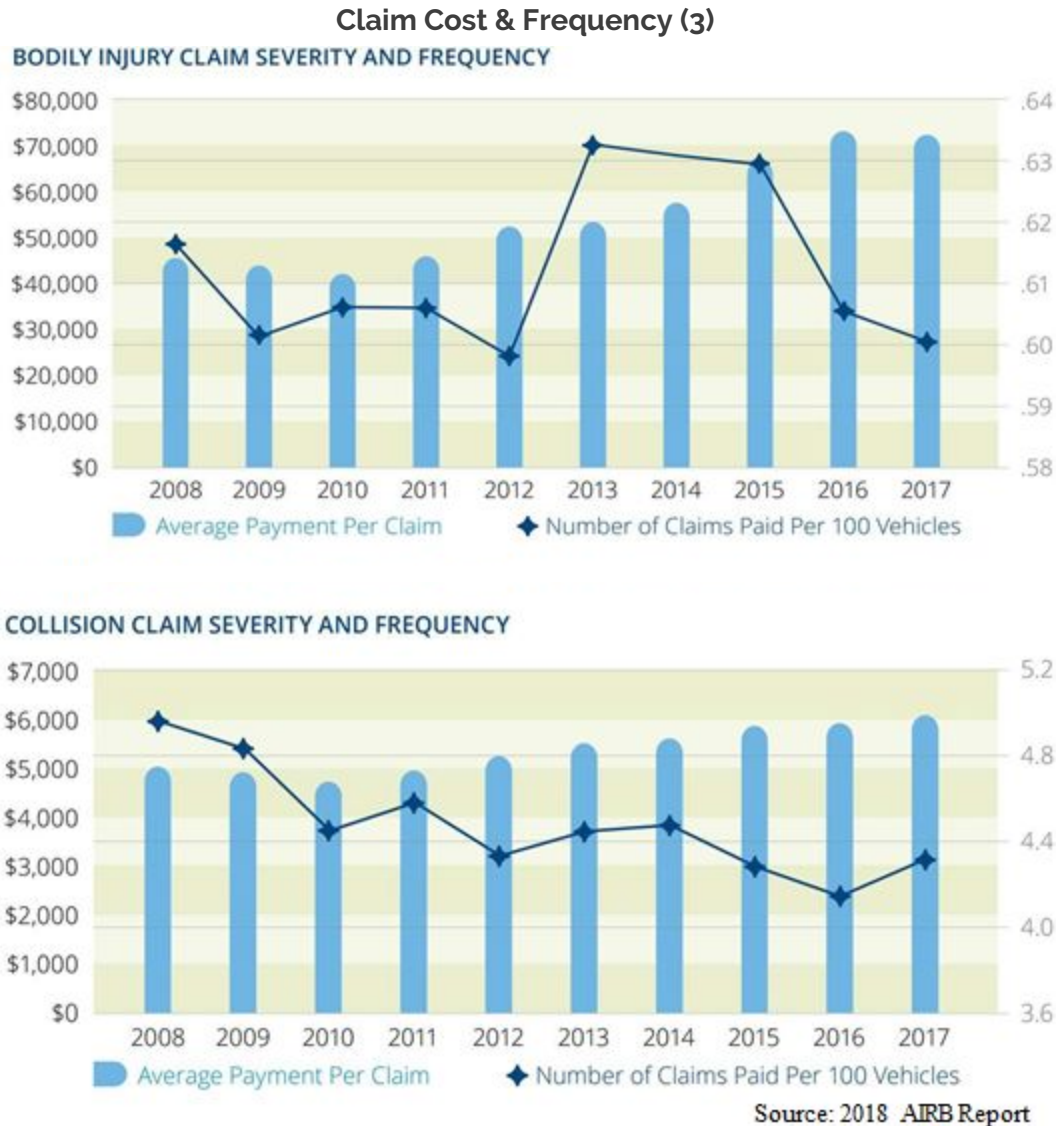


Chart (3) demonstrates⁴:

- The number of bodily injury claims is **dropping**
- Average payment per claim is **rising only slightly**
- Insurance companies are **paying out less** for bodily injury claims today than in 2015

These facts demonstrate that the insurance industry in Alberta is **profitable** and that **expenses are manageable**, and thus companies are not likely to leave the province. Additionally, insurance companies

⁴ AIRB Report, 2018, Pg. 15



are keeping premiums low in an effort to maintain market share in response to the competitive marketplace.⁵

INSURANCE LOBBY

The **Insurance Bureau of Canada (IBC)** is the national industry association for Canada's private home, auto, and business insurers, representing 90% of the property and casualty insurance market in Canada. It is a sophisticated organization that engages experienced lobbyists to advocate for insurance companies best interests. **They do not represent everyday Albertans.**

Despite representations that the minor injury cap would improve profits and stabilize the insurance industry, and despite further amendments to the Minor Injury Regulation in 2018, the insurance lobby continues to push for a never-ending expansion of the minor injury cap. More specifically, they wish to **expand the definition** of minor injury beyond what was originally enacted, beyond what the government of the day promised, and beyond the application of the law as interpreted by the courts.

The insurance industry's primary **interest is financial**. Ultimately, insurance companies want to increase their profits even if it is at the **expense of injured Albertans.**

MOVING FORWARD

PROTECTING ALBERTANS

The minor injury cap is rooted in a confusing, convoluted, and complex regulatory environment that hampers injured Albertans from receiving fair compensation for their injuries. Expanding the cap further will impose increased strain on injured Albertans, medical professionals, insurance adjusters, courts and lawyers.

Advances in collision avoidance technology will begin to reduce accidents, claims, and costs without impacting minor injury regulation. These include:

- Forward collision avoidance systems
- Automatic emergency braking systems
- Self-driving vehicles
- New technology to reduce the prevalence and incidence of distracted driving
- New technology to monitor driving behaviour

There is little to no evidence that shows that the minor injury cap has resulted in reduced insurance premiums for consumers, but rather it has increased profits for insurers by reducing costs. Changes to the minor injury cap lead to more litigation and constitutional challenges.

⁵ Ibid.



THE **ACTLA** OPPOSES MINOR INJURY CAPS AS THEY IMPEDE ACCESS TO JUSTICE AND DEPRIVE INJURY VICTIMS OF THEIR COMMON LAW TORT RIGHTS.

RECOMMENDATIONS

In order to protect everyday Albertans and ensure that victims are compensated fairly, the ACTLA recommends:

- I. Making no further changes to the existing minor injury regulation
To protect the rights of Albertans suffering from minor injuries and ensure they receive the support they need to heal.
- II. Maintaining the current system as interpreted by the courts and the original intention of the legislature to limit the cap to true “minor injuries”
Will safeguard Albertans from unjust changes to the regulation and maintain the current process for lawyers, insurance adjusters, and medical professionals.
- III. Accelerating the universal adoption of collision avoidance systems
To reduce the number of bodily injury claims and ultimately contribute to a safer and healthier Alberta.
- IV. Public marketing and education campaigns to encourage safe driving
Are vital for equipping new and experienced drivers with the information they need to protect themselves and others on Alberta’s roads.