ALBERTA CIVIL TRIAL LAWYERS ASSOCIATION

#550, 10055 - 106 Street, Edmonton, Alberta T5J 2Y2
Phone: (780) 429-1133 Toll Free: 1-800-665-7248 Fax: (780) 429-1199
Website: www.actla.com email: admin@actla.com

A Written Submission to the
Automobile Insurance Rate Board

Alberta Civil Trial Lawyers Association
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The Alberta Civil Trial Lawyers Association (ACTLA) was formed in 1986 and is a province-wide organization comprising over 600 members. ACTLA members are lawyers who advocate for Albertans who have suffered injury or loss due to fault of others.

ACTLA members also include insurance defence lawyers, family law lawyers, law students and non-lawyers who provide litigation support services, (i.e. physiotherapists, accountants, engineers). ACTLA is uniquely positioned to speak on behalf of injured Albertans; its members guide many thousands through the complicated and often difficult process of obtaining insurance benefits and compensation. ACTLA members interact regularly and frequently with insurance defence lawyers, insurance adjusters, medical professionals and other experts, all in an effort to ensure Albertans receive appropriate care and compensation for their injuries or losses.

ACTLA remains opposed to the Minor Injury Regulation *and the cap on damages as it is a barrier to access to justice.*

The AIRB, in the 02-15 Notice to all Stakeholders, has indicated one of the areas of focus in the current review is,

- Causes for increasing severity of bodily injury claims resulting from increased incidence of claims being settled outside the Minor Injury Cap

The *Minor Injury Regulation (*MIR) and the associated 'cap' came into effect on October 1, 2004. The MIR applied to specified soft tissue injuries. Soft tissue injuries encompass the vast majority of injury claims arising from motor vehicle accidents. The immediate result of the MIR was to eliminate and reduce damage awards/settlement amounts for a significant portion of injury claims associated with soft tissue injuries. This result still strongly exists today.

As the legal community and the insurance community settled into the new benefits and compensation environment, disputes and disagreements arose over what constituted a 'minor' injury and how the legislation was to be interpreted. Between 2004 and 2012 there was little comment from the Alberta courts because the value of many claims made it uneconomical to pursue court action. Further, Alberta courts employ a 'loser pays' system which means that an unsuccessful litigant could be required to pay significant court costs. This creates a substantial and often unfair financial advantage to a corporate litigant, i.e. an insurance company, over a private citizen.

During the development and introduction of the MIR, the Government of Alberta, represented by then Minister of Finance, the Honourable Pat Nelson repeatedly stated:

> *"We have always said the cap will only apply to minor injuries that heal relatively quickly. The reasoning behind the regulation is based on medical science showing that with fast, effective treatment, about 90 per cent of people with minor injuries will recover from their injury within 12 weeks. The other 10 per cent 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."*
>
> *- June 7, 2004*

In 2012 the *Sparrowhawk v. Zaplotinsky* 2012 ABQB 34 decision came down from the Alberta Court of Queen's Bench. This decision provided much needed judicial interpretation as to what constitutes (or does *not* constitute) a minor injury. The *Sparrowhawk* decision dealt primarily with temporomandibular joint disorder (TMD), confirming that these TMD injuries do not fall under the cap as they are dental injuries involving cartilage and not simple "sprains, strains and WAD". However the decision also provided an analysis of the MIR, discussing the key language and criteria in the regulation used to define a 'minor injury'. In the end, *Sparrowhawk* affirmed that soft tissue injuries that persist for long periods of time and substantially impact daily living activities are not minor injuries. The MIR was further analyzed in the decision of *McLean v. Parmar* 2015 ABQB 62, in a manner consistent with *Sparrowhawk*.

The *Sparrowhawk* and *McLean* decisions provide the judicial interpretation which has previously been lacking and provide greater clarity on the nature of compensation under the MIR and on the MIR itself. They do not re-invent the definition of minor injury. With the definition of a 'minor injury' more clearly interpreted, victims of auto collisions are now being compensated at a level to which they are entitled and to which the Government of Alberta had no intentions of capping.

ACTLA members indicate they continue to consult with Albertans suffering soft tissue injuries, advising them to follow medical advice and to come back for legal representation only if those injuries persist.

The Preliminary Review of Industry Experience as of December 31, 2014, prepared by Oliver Wyman, indicates the increased rate of TPL BI claims is well short of the increased rate of collisions claims. The estimated increased severity of the claims that *are* ultimately incurred, together with the reduced frequency supports ACTLA's position that many smaller BI claims are not pursued, either because they are 'minor' injuries or the insured *believes* they are 'minor' and does not pursue compensation. The claims that are pursued by insureds, typically involve litigation due to the severity and persistence of injuries and to the higher rate of compensation due.

While the focus of the AIRB suggests there is an "…increased incidence of claims being settled outside of the Minor Injury Cap", no data has been publicly produced to confirm this 'increased incidence' of claims being settled outside of the Minor Injury Cap. No data has been publicly produced to show the incidence of claims settled within the Minor Injury Cap versus claims settled outside of the Minor Injury Cap. ACTLA has seen no data to show where the rate of claims severity is actually coming from and the role, if any, non-capped injuries (catastrophic injuries, fractures, fatalities, brain injuries, head injuries, neurological injuries, etc) are playing in influencing severity. ACTLA further notes the insurance industry has produced no data showing how it classifies injuries and claims, particularly in light of the

Sparrowhawk and *McLean* decisions. In addition, no industry data or evidence has been produced to show how a Cap claim is defined and calculated and whether it is defined and calculated by factors such as the set yearly statutory amount of the pain and suffering portion of the Minor Injury Cap. Are claims with both capped and non-capped injuries defined as capped claims for the purpose of calculating and determining severity? Are TMD/TMJ injuries classified by the industry as injuries captured within the Minor Injury Cap? If so, then every Cap claim with a TMD/TMJ injury will be settled for an amount outside of the statutory Minor Injury Cap amount, thus contributing to the claim of increased severity. Furthermore, even purely capped claims can be settled for an amount higher than the statutory Cap amount because of payment under other heads of damages such as for loss of income, loss of housekeeping and special damages as well as the payment of prejudgment interest and costs. The industry has provided no breakdown of data to address these issues.

ACTLA notes that insurers are allowed to directly contact potential claimants to directly negotiate settlement while lawyers have ethical and other restrictions preventing them from doing so. Since the Cap, this has resulted in a large percentage of injury claims settled directly between insurers and claimants. Many of these claims are settled based on, for and within the statutory amounts of the Cap.

SUMMARY

The rates of frequency and severity of TPL BI claims are due to the proper and intended application of the MIR, only to those soft tissue injuries that heal without permanent impairment. Fewer claims are being pursued through litigation, but those claims are of a more serious nature.

If a modest increase in basic insurance rates is required to protect the rights of injured Albertans, ACTLA supports such an increase. However, ACTLA encourages the Government of Alberta and the Automobile Insurance Rate Board to carefully examine the GISA data, including reserving practices, to ensure insurance company profit levels are reasonable and not at the expense of curbing benefits to which innocent victims of auto collisions are entitled.