The Honourable T. Alex Hickman, O.C., Q.C.

February 4, 2005

Board of Commissioners of
Public Utilities
St. John's, NL

Attention: Robert Noseworthy, Esq., Chair

Dear Sirs:

Re: Automobile Insurance Review

I have been asked by Mr. Thomas Johnson, Consumer Advocate, to review and comment upon certain aspects of automobile insurance which is the subject matter of consideration by the Board of Commissioners of Public Utilities in accordance with s. 3.1 of the Insurance Companies Act, R.S.N.L, 1990 c. 1-10, as amended.

In compliance with such request, I have examined and considered the concept of awards for non-pecuniary damages and the impact the suggested caps and deductibles on non-pecuniary damages may have on certain classes of claimants. Specifically, I have examined the effect of such proposals, if implemented by government, on the quantity and extent of litigation and their impact on the ability of various groups of claimants to assert their claims for loss compensation generally, with particular consideration of the question of access to the courts.

The Minister of Government Services, in her letter of December 7, 2004, requested the Board to review the impact on rates for automobile insurance on the use of monetary caps of various amounts on claims for non-economic loss for minor/mild injuries and the implications of such a cap for claimants and to review as well the implications of the use of a deductible of various amounts on claims for non-economic loss.

The Minister furnished the following definitions with respect to the Board's review of particular aspects of automobile insurance, namely:

"Definition 1

(1) A person shall not recover in an action in the province in relation to a minor personal injury caused to the person as a result of the use or operation of an automobile an amount of non-pecuniary damages in excess of $XXX.

(2) "Minor personal injury" means any transitory or temporary neck or back strain or sprain caused to a person which does not reduce the person's enjoyment of life or cause an interference with the person's ability to perform his or her day to day activities or work-related activities.

(3) "Interference" shall mean that the person is:

(a) with respect to the person's day to day activities, unable to perform any one or more of the essential elements of one or more of those activities;

(b) with respect to the person's ability to perform his or her work-related activities that the person is unable to perform any one or more of the essential elements of one or more of the activities required in the person's pre-accident employment which he or she had a reasonable possibility of carrying on but for the injury.

(4) "Work related activities" means the activities required by the person's pre-accident employment, including self-employment, and includes those activities which he or she had a reasonable possibility of carrying on but for the injury.

(5) "Day to day activities" shall mean any one or more of the essential elements of the activities that are reasonably important to persons similarly capable and similarly active.

(6) Any injury that has not resolved within 6 months from the

date of the initial injury shall not be a "minor personal injury".

Definition 2

(1) A person shall not recover in an action in relation to a minor personal injury caused to the person as a result of the use or operation of an automobile in the province an amount of non-pecuniary damages in excess of $XXX.

(2) "Minor personal injury" means an injury, including a neck or back strain or sprain, caused to a person which does not cause substantial interference to the person's enjoyment of life or the person's ability to perform his or her day to day activities or work-related activities.

(3) "Substantial interference" means that the person is still, 12 months after the occurrence of the event giving rise to the cause of action,

- **(i) suffering a reduction in his or her enjoyment of life,**
- **(ii) unable to perform any one or more of the essential elements of the person's day to day activities, or**
- **(iii) unable to perform any one or more of the essential elements of the person's work-related activities.**

(4) "Work-related activities" means the activities that are required by the person's pre-accident employment, including self-employment, and includes those activities which he or she had a reasonable possibility of carrying on but for the injury.

(5) "Day to day activities" means the activities that are reasonably important to persons who are similarly capable and similarly active.

Definition 3

(1) A person shall not recover in an action in relation to a minor

personal injury caused to the person as a result of the use or operation of an automobile in the province an amount of non-pecuniary damages in excess of $XXX.

(2) **"Minor personal injury" means an injury that does not result in:**

- **(a) permanent serious disfigurement, or**
- **(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.**

(3) **"Serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.**

My comments will deal primarily with non-pecuniary damages, a categorization of damage awards which continues to challenge the courts when called upon to prescribe an accurate definition or approach which should be used in making awards under such head of damages.

The three definitions, which are the subject of your review, will, in my opinion, generate considerable litigation as the courts attempt to give legal interpretation to the meaning and intent of such definitions which will be governed to a large extent by the facts in each particular case. In so doing, judges will be required, to a large extent, to apply such definitions to the facts of each particular case, which can only mean that a large percentage of injured claimants will look to the courts for redress.

There has been some jurisprudence in Ontario where the courts are being called upon to interpret the meaning of somewhat similar legislation designed to preclude plaintiffs claiming damages arising out of the use or operation of an automobile from escaping the broad umbrella of no-fault insurance which the Ontario legislation prescribes.

Section 266 of the Insurance Act, RSO 1990, c. 1.8 which applied to accidents occurring between January 21, 1990 until December 1, 1993, provided:

"s. 266 (1) **In respect of loss or damage arising directly or indirectly from the use or operation, after the 21st day of June, 1990, of an automobile and despite any other Act, none of the owners of an automobile, the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation in Canada, the United States of America or any other jurisdiction designated in the No-Fault Benefits Schedule involving the automobile unless, as a result of such use or operation, the injured person has died or has sustained,**

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature."

While some of the language of the Ontario legislation is compatible, if not similar, to that used in definition 3 furnished by the Minister, it must be borne in mind that the intent of the Ontario legislation is somewhat different from that proposed for the Province of Newfoundland and Labrador. The Ontario no-fault scheme is deemed to apply and protect the interests of all citizens of that province whereas the suggested legislation under review for this province is designed to restrict the right of recovery of non-pecuniary damages to injured plaintiffs and/or claimants who fall within the definitions provided therein. The constitutionality of the Ontario legislation has not been successfully challenged primarily on the grounds that it prescribes reasonable limits that are demonstrably justified in a free and democratic society, which applies to all citizens. The purpose of the proposed Newfoundland legislation may not be afforded such constitutional protection.

The Ontario courts have placed great emphasis on the word "serious" when defining whether a plaintiff has suffered permanent disfigurement or impairment. The opinion advanced by several Ontario judges is that the word "serious" relates not to the type

of injury sustained by a plaintiff but rather the nature of the impairment which flows therefrom. The Ontario Court of Appeal in Meyer et al. v. Bright et al. (1993), 110 D.L.R. (4th) 354, when dealing with the application of three claimants to be excluded from the Ontario no-fault insurance scheme, said at page 365:

> **"We stress that the word "serious" relates to impairment and not to injury and great care must be taken that the courts do not attach meanings to words which were not placed upon them by the legislature. . .**
>
> **. . . It is simply not possible to provide an absolute formula which will guide the court in all cases in determining what is "serious". This issue will have to be resolved on a case-to-case basis. However, generally speaking, a serious impairment is one which causes substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment."**

In my view the observations of the Ontario courts, while persuasive in some instances, will not be particularly helpful in deciding the true intent of the Newfoundland legislature should any of the definitions be converted into statutory law. It is worthy to note that the Ontario courts, despite their obvious attempt to lay down certain ground rules in the interpretation of the Ontario Act, emphasize the fact that each claim has to be dealt with on a case by case basis. Such observation is particularly applicable to the proposed definitions as submitted to the Board.

The definition suggested of "minor personal injury" is sufficiently broad that the courts will most likely be called upon to spend considerable time dealing with the nature of injuries sustained as they relate to the ability of a particular claimant to perform his or her duties in a manner described in the regulations. The same demand as to what constitutes "work related activities" will provide troublesome challenges to the courts in the discharge of their responsibility to deal with each individual as his or her injury militates against their ability to perform the activities encompassed in the proposed regulation. I find the definition of "minor personal injury" as contained in definition 3 to be particularly troublesome. "Minor" is defined in Random College Dictionary as "smaller, secondary, petty, unimportant, small". The attempt to particularize such "minor personal injury" in the subparagraphs of that definition is

in my view at odds with and in contradiction of the accepted meaning of "minor" as it relates to "personal injury".

It is necessary to bear in mind when dealing with non-pecuniary damages that such category covers compensation for pain and suffering, enjoyment of life, the loss of amenities and expectation of life as well as aggravated damages related to the manner in which the wrong was committed. In my view, non-pecuniary damages should be regarded as an umbrella designed to ensure that an injured plaintiff, who has been the victim of the tort of another, be compensated by way of damages for whatever reasonable loss he or she sustains. One author suggested that the assessment of non-pecuniary damages is, amongst other things, designed to provide "solace for that what has been lost". While the courts have laid down some guidelines with respect to the assessment of non-pecuniary damages, it is abundantly clear that the discretion still used in such exercise requires the courts to be extremely careful to protect the right of the injured claimant vis à vis the tortfeasor.

In my view, the clear intent of the proposed regulations to limit the amount of non-pecuniary damages to be awarded to claimants by way of a cap will generate increased demands upon the courts as counsel for such claimants in the discharge of their professional responsibility will turn to the courts for guidance and adjudication on a case by case basis.

It also appears to me that the imposition of the proposed caps or deductibles on non-pecuniary damages will impact adversely on certain classes of claimants, such as students, seniors, homemakers, children and unemployed. Claimants falling into such classes will, most likely, be entitled to smaller pecuniary awards and as a consequence, their entitlement to damages for their losses under the caps and deductibles proposed will be proportionally less. By reason of their bearing an undue share of the costs of the proposals, they will be the victims of unacceptable discrimination.

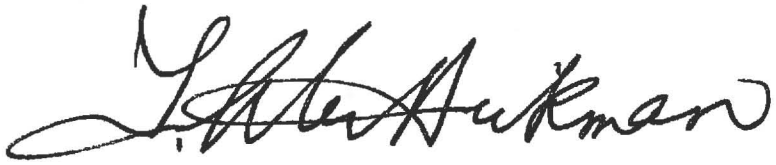
It is difficult at this time to predict with any degree of certainty the impact such caps or deductibles may have on the commendable and necessary practice of lawyers acting for impecunious claimants or those of modest means on a contingency fee basis.

It is also quite possible that the imposition of caps or deductibles will seriously affect

the ability of claimants to have access to the justice system. Lawyers will in addition to assisting their clients in deciding whether litigation can be justified will also have to advise their clients as to whether they will be adversely affected by the restrictions imposed under the regulations that are presently under review. For instance, under the Rules of Court, solicitors for a defendant are entitled to make an offer in writing which is filed under seal in court and should the award to the plaintiff be less than that offered, then the plaintiff will be responsible for the court costs which costs may be particularly high because of the length of trials involving the assessment of damages. In deciding whether it is prudent to accept such written offer, the plaintiff and/or his or her counsel will have to take into account the added effect of the claim for non-pecuniary damages being deemed to fall within the protection and ambit of the suggested caps and deductibles. Once again the impact will militate against the injured claimant to the benefit of the tortfeasor.

In summary, the suggested limitations on the right of injured claimants to recover their full entitlement to non-pecuniary damages will increase litigation and its resultant increased costs to litigants. Such a change may delight the litigious lawyer but will further mystify an already overburdened public. The injured claimants will bear the full brunt of such draconian measures and I seriously doubt if any significant benefit will accrue to the tortfeasor or his or her insurers.

Yours very truly,



HON. T. ALEX HICKMAN, O.C., Q.C.

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