

**Spinal Cord Injury Newfoundland and Labrador**  
**Written Submission to Public Utilities Board**  
**2017 Automobile Insurance Review**

Date: October 12, 2018

Spinal Cord Injury Newfoundland and Labrador Inc. (SCINL) is a not-for-profit organization directed at assisting persons with spinal cord injuries and other disabilities to achieve independence, self-reliance and full community participation. As a group with a focus on advocacy, SCINL is concerned with all aspects of injury on behalf of their membership. Persons with disabilities, specifically the mobility impaired (but also the rest of the general public) are always at the risk of suffering injury (“minor” or otherwise) in a motor vehicle accident. Such an injury for a person with a spinal cord injury or other mobility impairment could adversely affect their lives and impair their quality of life.

**Non-Pecuniary Loss:**

The definition proposed by the IBC in its submission proposes a minor injury definition to include: “*sprains, strains and whiplash injuries, including any clinically associated sequelae, whether physical or psychological in nature that does not result in serious impairment*”, with a \$5,000.00 cap on non-pecuniary damages for “minor” injury.

A “minor injury cap” would profoundly affect injured persons. People who are victims, who are injured through no fault of their own. The damages head that the proposed cap will reduce is non-pecuniary loss. Non-pecuniary loss is awarded to compensate for those losses that are not easily quantified. The following are two excerpts for cases considering purpose of non-pecuniary damage awards:

*"Pecuniary damages are generally assessed on the basis of calculable losses for items such as the **plaintiff's** prospective loss of earnings and profits and costs of future care, as well as other expenses.*

*"In contrast, **non-pecuniary damages** cannot be arithmetically calculated because they compensate the **plaintiff** for intangible losses arising from physical and psychological **pain and suffering** as well as from any loss of amenities or expectations of life. ...*

*"(T)he components of non-pecuniary damages necessarily overlap and merge at the edges and in practice, making it appropriate to arrive at a composite award for all non-pecuniary losses." - **McIntyre v. Docherty**, 2009 ONCA 448*

*"The in-exhaustive list of common factors ... that influence an award of non-pecuniary damages includes: (a) age of the plaintiff; (b) nature of the injury; (c) severity and duration of pain; (d) disability; (e) emotional suffering; and (f) loss or impairment of life.*

*"I would add the following factors, although they may arguably be subsumed in the above list: (g) impairment of family, marital and social relationships; (h) impairment of physical and mental abilities; (i) loss of lifestyle; and (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the **plaintiff**)."*

**Stapley v. Hejslet**, 2006 BCCA 34

### **Vulnerable Persons:**

A cap on non-pecuniary loss specifically targets vulnerable groups of people. These groups of people include disabled persons, senior citizens, the poor and single parents. People whose loss is not easily quantifiable, but is a profound loss nonetheless. These people may not be able to show a loss of income but their ability to do the things they need to do is impacted and that has a value. That value is often compensated through non-pecuniary loss. For instance, a single mother who has no choice but to continue to care for her children in pain and unable to do the things with her children that she once did. A person with a mobility impairment, who can no longer engage in community activities as they once did, but cannot display a loss of income has lost quality of life. Finally, a senior citizen, who while retired does not lose income, loses precious time in treatment and recovering, that could have been spent with their family or living an active life. These are the people who will lose the most should a minor injury cap be implemented.

### **Burden on WorkplaceNL and Employers:**

Further, as referenced in the Submission of WorkplaceNL, a minor injury cap will likely put an increased burden on the Workers Compensation system in this province. When a worker is injured in a car accident while doing their job, they have the option of either using Workers Compensation or pursuing their own claim. Should a minor injury cap be introduced, those injured workers will likely elect to just use the Workers Compensation system because they would effectively be unable to realize on their loss because there would be no benefit to pursuing their own claim. Further, WorkplaceNL has the right to recoup their costs when they have paid out benefits to a worker by pursuing the claim against the party that injured the worker. If the injury suffered falls into the minor injury definition then Workplace NL is significantly limited in their ability to do this. The result will be an increased burden on WorkplaceNL that will have to be covered, which will result in increased premiums to employers across the province.

### **Classes of Injured Persons:**

Another potential problem with a minor injury cap is the creation of classes of injured persons. The first differentiation is the obvious divide: those whose injuries would be caught by a minor injury definition and therefore capped; and those whose injuries would not be considered “minor” and therefore could have their non-pecuniary loss negotiated or judicially considered. The other less obvious classes of injured persons created are those who have “minor” injuries from an automobile accident versus those who sustain the same types of injuries from other causes (i.e. slip and falls). Those not injured from automobile accidents, while they may have the same injuries, symptoms and quality of life, are entitled to non-pecuniary loss that would be based on the impact on their life and not an arbitrary definition. Why does their loss have more value? Why is the loss of a person injured in an automobile accident worth less? There will be an inherent unfairness created in the system towards automobile accident victims, simply by virtue of the fact that they were injured in a car accident.

### **Access to Justice:**

Should a minor injury cap be implemented access to justice will become a major issue for accident victims. Those with “minor” injuries will more often be unrepresented and have to deal with the insurance industry themselves, both in relation to their claim against the Defendant (Section A) and with their own Section B insurer. The ability to effectively communicate with even their own insurer is a persistent problem and can provide a barrier to treatment. If these people have no representation because their claims have been arbitrarily made worthless (especially if they are a senior, disabled person, or single parent), these injured persons are at risk of “falling through the cracks” or not being taken care of because they don’t have the knowledge to effectively protect themselves. These injured persons are at risk of being revictimized by the insurance industry. Further, a minor injury cap gives the insurance industry a weapon in negotiation that automatically places the injured person at a disadvantage.

### **Risk Management:**

A minor injury cap in no way reduces accidents or the number of injured persons, it simply reduces the amount of loss a person can claim. Throughout the hearings there have been various risk management practices that have been discussed as a way to reduce loss from automobile accidents. Some of these risk management measures include: mandatory winter tires, a system for reporting cancelled insurance policies, digital proof of insurance, safer cars, traffic control measures (i.e. roundabouts, speed humps) and increased road safety campaigns by the police. Risk management will make roads safer and result in less injured people. The incidence of accidents has been decreasing in this province and can continue to decrease with a focus on risk management. This

would decrease the amount of money being paid to injured persons by preventing their injuries in the first place, rather than taking away their rights.

**Mandatory Section B Benefits:**

SCINL agrees with mandatory and improved Section B benefits, however there is no relation between a minor injury cap and improving Section B benefits. Any improvement to treatment and access is of benefit to the injured and future injured persons in this province.

**Conclusions:**

As a group that advocates for injured persons, Spinal Cord Injury Newfoundland and Labrador Inc. is against any erosion of victims' rights. Any person, at any time, whether they are mobility impaired or have never had any health issues, can be injured in an automobile accident. Taking away the rights of injured persons does not reduce accidents or make our roads safer. The people of this province need to know that they will be taken care of if injured in an accident, a minor injury cap achieves the opposite result. Pain, suffering and quality of life cannot be assigned an arbitrary value because it is economically beneficial to the insurance industry.

Yours Truly,

Sheilagh Byrne

Board Chair

Spinal Cord Injury Newfoundland and Labrador Inc.