

Capping damages

Non-pecuniary damage caps are widely used across Canada, but personal injury lawyers say accident victims are paying the price

By Elizabeth Raymer



It's been 40 years since the Supreme Court of Canada released its trilogy of rulings that affected the way non-pecuniary damages have been awarded in Canada. Fearing an escalation in damages awards, those rulings limited the maximum amount of non-pecuniary damages a plaintiff could receive in a civil action.

Most jurisdictions in Canada have seen caps placed on claims in motor vehicle accidents, through provincial or territorial insurance legislation. British Columbia has been the last remaining

jurisdiction in Canada to operate on a pure tort system, with no caps set on damages except for what the Supreme Court set in its trilogy in 1978, says Ron Nairne, a partner at personal injury firm Giusti Nairne in Vancouver and vice president of the Trial Lawyers Association of British Columbia.

But in February, the B.C. government announced it would cap pain and suffering claims for minor injuries in motor vehicle accidents at \$5,500, which members of the personal injury plaintiffs' bar in the province oppose. In

Ontario, changes to the Insurance Act in 2016 saw benefits paid to accident victims reduced "dramatically," says Patrick Brown, a partner at McLeish Orlando LLP in Toronto.

And elsewhere in Canada, plaintiff-side lawyers agree that caps on minor injury claims can place undue hardship on plaintiffs and may not consider the effects of minor injuries over time.

In British Columbia, the new NDP government's announcement that it will introduce a cap on minor injury claims in automobile accidents was a result of a financial crisis at the Insurance Corporation of British Columbia, a provincial Crown corporation that provides basic auto insurance for British Columbians. In 2014 and 2015, Nairne says, there was a 23-per-cent spike in the motor vehicle accident rate in B.C., which had a negative impact on the bottom line of insurers. The ICBC's loss for this fiscal year is now expected to be \$2.2 billion "when only months earlier they had announced an [anticipated] loss of \$300 million," says Nairne.

The Trial Lawyers Association of B.C. and about 70 health-care providers and individuals opposing the proposed cap have banded together in a coalition called ROAD BC — or Rights Over Arbitrary Decisions for British Columbians.

"We're saying have an independent review," Nairne says. The B.C. government has benefited from the ICBC's revenues, and, he adds, "one of ICBC's more dubious assumptions is that accident rates will continue to increase.

"Our fundamental philosophical opposition to what the government has announced is [that] the effect is to

shift financial burdens to people who are injured rather than the bad drivers who caused the accident,” Nairne says. “That’s fundamentally wrong and at odds with the tort system and with what the government says it wants to do — reduce bad driving.”

In Ontario, McLeish Orlando’s Patrick Brown says that fatality rates due to motor vehicle accidents reached a record high in 2017, at least in part due to the increase in pedestrians and bicyclists in cities such as Toronto and the speed of vehicles. “Toronto is less car-free in its urban core than other cities,” he notes.

Last September, NDP MPP Cheri DiNovo introduced a private member’s bill designed to prevent injuries and deaths among vulnerable road users including cyclists, pedestrians, people in wheelchairs, emergency responders on the road and road construction workers. The bill was supported by a coalition of citizens’ and bicyclists’ groups. Days earlier, Brown, a member of the coalition, had spoken at a press conference, calling on the attorney general to follow several U.S. jurisdictions in implementing a vulnerable road user law. The initiative did not meet with success.

“If you kill a pedestrian with your car, there’s a huge likelihood that you won’t be charged; though if you are, [you] will walk away with a \$500 fine,” says Brown.

Injuries from motor vehicle accidents in Ontario are classified as minor, non-catastrophic and catastrophic, and 85 per cent of claims are for minor injuries, Brown says. In 2010, minor injuries were capped at \$3,500, but in 2016, insurers said, “we want to lower the benefits available for serious injuries” as well, Brown says.

“Before 2016, a person who was catastrophically injured . . . had \$2 million worth of benefits to pay for medical rehabilitation and attendant care” and loss of income. That cap was then lowered to \$1 million. The cap for non-catastrophic injuries, which had been \$100,000, was reduced to \$65,000, he says.

Brown says the push to lower caps, driven by the insurance industry and supported by the government, is due

to most of the driving public wanting low insurance premiums and insurers’ concern for their bottom lines. But an insurer’s profitability is also dependent on how efficiently the company is run, Brown says. “A lot of people feel that before you start attacking benefits, why not look at the efficient companies, which are operating at a profit,” by effectively employing new technologies, for example.

“The easy solution is to cut benefits, but it’s not the right solution.”

In Alberta, the last tort reform was implemented in 2004 and the cap for minor injury claims set at \$4,000, says James Cuming, managing partner of Cuming & Gillespie in Calgary. With annual increases for inflation, the cap is now \$5,080, he says. Prior to 2004, Alberta had an open tort system with “no restrictions whatsoever,” consistent with other jurisdictions, Cuming says.

Following the implementation of the cap for minor injuries, “approximately 85 per cent of claims fell into the cap and were removed from the system without any litigation being pursued,” says Cuming, owing to the cost of litigation. Accidents benefits have given individual plaintiffs direct access to treatment and payment for minor injuries, he says.

Alberta is currently reviewing its minor injury regulations in a process that began a few years ago, and “there is extreme pressure from insurers to modify the cap and make it more restrictive by definition, as opposed to financially,” Cuming says. “It appears the goal of the insurers would be to exclude the psychiatric injuries, TMJ [temporomandibular joint] injuries and chronic pain arising from soft-tissue whiplash-type injuries.” He anticipates the province’s regulations will be amended in the not-distant future.

Raymond Wagner’s law firm, Wagners, handles personal injury cases in Nova Scotia as well as Prince Edward Island and New Brunswick. The Maritime provinces have seen two sets of caps for minor injury claims, the first in 2003. A “more liberal regime” was introduced in Nova Scotia in 2010, in New Brunswick in 2013 and in P.E.I. in 2014, Wagner says, with the minor injury claim cap set at \$7,500 (now higher with inflation).

Few of these minor injury cases

make it to court, Wagner adds, and they are usually settled through settlement conferences, mediations and straight negotiations with insurance adjusters.

Although it’s not a big jump distance-wise from Prince Edward Island to Newfoundland, that province has a rather different insurance scheme for motor vehicle accidents than do its Atlantic neighbours. But while there are currently no caps on claims in Newfoundland and Labrador, that may be about to change.

The government there has reportedly asked its Public Utilities Board to review all aspects of its motor vehicles insurance program, says Ernest Gittens, senior partner in Gittens & Associates in St. John’s. “Are the rates appropriate? Do we need to rein in the payment of injury awards to collision victims?” Gittens says these questions appear to have been prompted by the taxi industry, which claims its premiums have gone up substantially.

Back in 2004-2005, he says, when these same questions arose, the insurance industry could convince the other Atlantic provinces that it was necessary for them to put caps on claims for the survival of the industry. What followed in those provinces was the cap of \$7,500 for a minor injury. But in Newfoundland and Labrador, during the premiership of Danny Williams, the government decided to instead go with a \$2,500 car insurance deductible.

Benefits paid in motor vehicle accidents have ranged from \$5,000 to \$10,000 of compensation for minor injuries to \$30,000 to \$40,000 for injuries that require more medical treatment and last for years. “They’ll be the ones most affected by the proposed cap,” Gittens says.

Like other plaintiff-side personal injury lawyers interviewed for this report, Gittens is concerned about the impact of caps on plaintiffs, and the profit margins of insurance companies.

In 2015, he says, there were about 50 insurers in Newfoundland and Labrador, and the premiums they charged drivers amounted to \$417 million to \$418 million. About 16 insurers cover most of the premiums, he says, “but it’s really only four companies providing 84 per cent of the coverage in the province.

. . . Seventy-seven per cent of the premiums paid was what it took to cover the claims that were made. You end up with the industry making about 23 per cent on the \$400-plus million for the industry.”

On the flip side, he says, there is no

organized movement of injured people, and he wonders who will give the Public Utilities Board information on the impacts on individual claims of capping or increasing the deductible.

In Nova Scotia, Wagner notes, the under- and unemployed — “the people

on the financial margins of society” — have been most affected by the caps on claims. “They don’t have disability [benefit] plans. . . . This is one of those so-called tort reforms that really impact people who can least afford to be further marginalized.” **CL**