



THE CANADIAN  
BAR ASSOCIATION  
Nova Scotia Branch

February 15, 2010

**BY COURIER**

Hon. Graham Steele  
Minister of Finance

Mr. Doug Murphy  
Superintendent of Insurance

4th Floor, Provincial Finance Building  
1723 Hollis Street  
Halifax, NS B3J 3C8

Dear Mr. Steele and Mr. Murphy:

**Re: Cap on General Damage Awards for “Minor Injuries”**

Please accept this correspondence as the Canadian Bar Association Nova Scotia Branch’s response to the department’s January 2010 discussion paper, “Concerning the Cap on Pain and Suffering Awards for Minor Injuries.” I write as Branch President.

The right of an individual to recover general damages from the wrong-doer in a motor vehicle case, and to have such rights adjudicated in the courts, is a vital hallmark of the Canadian system of justice. The Canadian Bar Association has advanced this position since 1974. We oppose all compensation schemes that prejudice an innocent accident victim’s right to seek redress before an independent judiciary.

Accordingly we applaud your initiative to do away with 2003’s discriminatory and unfair legislation limiting general damages for so-called “minor injuries” in motor vehicle cases.

The CBA proposes a return to the system whereby judges hear evidence and determine both responsibility for negligence and the appropriate redress to ameliorate it.

Nova Scotia’s cap came into being in 2003 at the urging of insurers, in order to meet allegedly increasing or unstable claims costs. In exchange insurers promised decreased premiums.

Your January 2009 discussion paper seems to accept the notion that the goals at which the cap was aimed were illusory, or at least invalid. The CBA can produce evidence taken from such sources as the Insurance Bureau of Canada's own data showing, for instance, that claims costs were relatively stable from 1996 to 2003; in fact claims costs *decreased* between 2000 and 2002, leading up to the cap. Meanwhile during the same period, 1996 to 2003, insurers had increases in both premiums and profits. I attach a paper prepared by CBA member Richard Halpern addressing these points in some detail, and the fallacy of attempting to address market instability with restrictions on tort rights.

For present purposes, however, we take such evidence to be unnecessary. The department is looking for alternatives to the cap rather than arguments for its removal.

We will note, though, that at its heart our cap was designed to place the burden of car insurance cost-control on victims, rather than at-fault drivers. Even if claim cost stability measures were necessary at the time, the cap is not a fair or equitable solution. As lawyers we see this first-hand: real people, injured in accidents through no fault of their own, facing enormous impacts on their daily lives yet by virtue of the cap being unfairly undercompensated.

The CBA promotes the rule of law, including the tort system. Nova Scotia should not replace the cap with a no-fault regime or other largely arbitrary restrictions on the tort rights of accident victims.

Victims deserve compensation. Unfettered by the cap, our well-established tort system allows independent judges to determine fair compensation for the losses suffered by accident victims. However tort law also serves the goal of establishing and balancing societal duties and standards of care in an elegant, self-moderating system. Legislative restrictions on compensation in favour of tortfeasors undercut the larger benefits of our tort regime.

The tort system places responsibility for a collision where it ought to lie – with the at-fault driver. It punishes a drunk, reckless, negligent or careless driver by making that person responsible for all harm caused to innocent accident victims and by not compensating the driver for his or her losses. It also allows an innocent victim of negligence to seek to be made whole by the responsible party. No-fault systems, including our cap, reduce the incentive to be a good driver.

Under the tort system drivers who chronically cause accidents should see their insurance premiums increasing to such an extent that they may not be able to afford to drive. High insurance premiums for high-risk drivers keep the worst drivers off the road. The cap, like other no-fault hybrids, compromises this objective.

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The basic philosophical argument on the deterrent value of tort law is put forward in a paper by M. Trebilcock:

With respect to no-fault automobile insurance, it is important to appreciate the different incentive structures of third- and first-party insurance. In a pure third-party tort-insurance regime, motorists' incentives to exercise care towards others are influenced by third-party liability insurance premiums and uninsured excess liability, and they are motivated to take self-protective measures by the fact that their own losses are uninsured. In a pure first-party regime that does not recognize third-party claims (that is, first party no-fault), motorists have no direct incentives to exercise care toward third parties.

("Incentive Issues in the Design of No-Fault Compensation Systems", University of Toronto Law Journal, (39), 1989).

The court system is criticized for the speed with which it deals with claims and the cost of trials. However not all cases go to court even in a tort-based system. Usually claims are settled without resort to the courts. Those cases that do go to court, however, offer certainty and direction for all similar cases, further facilitating out of court resolutions.

In response to your discussion paper, the Nova Scotia branch of the CBA is against limitations on pain and suffering awards. We do not accept the premise that fairness should be compromised in favour of insurance company profits, or that a return to the tort system will necessarily make premiums unaffordable.

Please contact me should you wish to meet with the CBA to discuss these issues in more detail.

Yours truly,

Canadian Bar Association – Nova Scotia Branch

Helen Foote, President