

“Only a Flesh Wound”:  
Response to IBC minor injury classification and recommendations for auto insurance  
Ontario Psychological Association

The IBC has submitted a proposal to the Financial Services of Ontario (FSCO) to include psychological impairments resulting from motor vehicle accidents (MVAs) in a “Minor Injury” protocol that pre-determines available benefits for treatment and rehabilitation. In this proposal, psychological impairments such as depression and post-traumatic stress disorder (PTSD) are considered as being similar to simple cuts and sprains. This very low "weighting" of psychological disorders is inconsistent with the scientific literature regarding significant disability worldwide attributed to psychological disorders.

We note that depression is the leading cause of disability according to the World Health Organization, and that Post-Traumatic Stress is associated with higher lifetime medical conditions and premature death. In their proposals, the IBC puts these conditions in the same category as producing such “minor” level of disability and treatment needs as sprains, strains, skin wounds, and non-extensive burns. Worse, all treatment and rehabilitation benefits are capped at the “minor” level, based on their inclusion in this category of injuries.

The IBC is proposing the following:

*For injuries defined as sprain and strain injuries, skin wounds and non-extensive burns and/or sequelae pain syndromes and psychological manifestations:*

*The first term of treatment for these injuries is the PAF with no additional assessment through the PAF period except on referral of a physician specialist... The basic PAF treatment envelope is enhanced by \$500 to permit examination /treatment by a social worker/ psychologist/ psychological associate, if psychological manifestations are present. Because the current PAF does not accommodate psychological support, a common trigger for referrals/ further treatment is a psychological complaint such as depression or post-trauma syndrome. Our proposal would accommodate reasonable psychological/ social work support within an enlarged PAF envelope. Post-PAF assessments and treatment by all provider types are subject to a hard cap of \$1,500.*

A pre-determined protocol for treatment benefits that considers all psychological conditions to be “minor” is inconsistent with the notion of individualized treatment and the variability in expected course and costs of treatment for different people with differing impairments. It is simply inaccurate to arbitrarily determine that all psychological disorders be classed as “minor” when in fact there is a full range of continuing impairment from the most minor to catastrophic. The impact of psychological impairments varies with the person as well as their life demands and supports; it cannot be presumed based on diagnosis or physical impairment.

The language in the IBC’s proposal makes it clear that part of the rationale to include psychological disorders within an existing program of pre-approved services for Whiplash (“Pre-Approved Framework”, or PAF) is to force accident victims with these psychological disorders to receive all of their treatment within the PAF. However, their proposal does not include realistic funding for the services that may be needed; \$500 is not sufficient to address the examination and treatment of all potential “psychological manifestations”.

The IBC's proposed hard cap of \$1500 for all post-PAF assessments and treatment by all provider types is also contrary to the restorative purposes of the SABS; inclusion of such a cap presupposes that it is possible to predict individual treatment needs and health outcomes based only on initial injury diagnosis. It is not possible to predict that an individual with these initial diagnoses will not in fact either fail to recover as anticipated for the group, or be found to have further diagnosed impairments. It further compounds the discrimination against accident victims with psychological disorders specifically, by including all "psychological manifestations" in this protocol and effectively preventing treatment to restore health and function based on their needs beyond the caps.

We are aware that when private auto insurers in Alberta tried to bring in similar programmatic caps for "minor injuries", this was found to be discriminatory. The arguments regarding the cap on tort in the Whitten decision in Alberta suggest that it is inappropriate to impose a "hard cap" on Med/Rehab benefits based only on injury diagnosis:

*...the Plaintiff's complaint is in relation to the lack of individualized assessment for Minor Injury victims in relation to non-pecuniary damages beyond the cap... the complaint is that once diagnosed as a Minor Injury, an individualized assessment of appropriate non-pecuniary damages beyond the \$4,000 cap is not available. It is the automatic application of the cap to Minor Injury victims that suggests that the pain and suffering of the claimant group is less worthy of non-pecuniary damages.*

Also,

*As stated by Barbara Billingsley, Legislative Reform and Equal Access to the Justice System: An Examination of Alberta's New Minor Injury Cap in the Context of Section 15 of the Canadian Charter of Rights and Freedoms (2005), 42 Alta. L. Rev. 711-739 at p.728...The Minor Injury cap fails to address the individual circumstances of each victim in a motor vehicle accident and instead treats all Minor Injury Claimants as a group. Accordingly, as in Martin, the legislation is "not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical"... the Minor Injury Cap by definition fails to respond to the unique circumstances of each Minor Injury Claimant... I find that this contextual factor also points towards discrimination.*

The OPA is surprised and dismayed by the aggressiveness of the IBC proposals. However, we note that it is consistent with a systemic and systematic history of trivializing mental illness and impairments and historical underfunding of care in this area.

For example, existing within the present Statutory Accident Benefits Schedule (SABS) regulations are provisions that allow for those with the greatest impairments ("catastrophic") to access a higher level of benefits based on ratings of "Whole Person Impairment" (WPI). The historical method of determining such impairment had been interpreted by judges and arbitrators as discriminating against victims with psychological disorders, since it precluded

combining these with other bodily impairments when calculating the Whole Person Impairment rating, even though bodily impairments could be combined.

This discrimination was based on a fundamental misunderstanding of the ability to measure psychological impairments. In fact, it has been noted that ratings for psychological impairments are determined with the same or greater precision than are those for many physical impairments. As a result, case law in arbitration decisions had reversed this discrimination and associated failure to consider the whole person, by allowing assessors to combine all impairments when arriving at a final, determinative WPI.

Unfortunately, in their current submission for the 5-year review of auto insurance, the IBC has recommended reversing the corrective effects of these judicial and arbitration decisions. They are suggesting that brain injuries and psychological impairments specifically be excluded from combining with physical impairments when considering Whole Person Impairments, and that arbitrators be prevented from modifying this going forward.

The OPA believes that this not only contravenes existing case law in this area, but also appears to be based on prejudice and skepticism against those reporting psychological symptoms. This offends our fundamental views of human rights and equal access to goods and services for those with psychological impairments and disabilities. We believe that it is entirely inappropriate to reinforce prejudice against accident victims with “non-visible” psychological disorders who already face stigma and disadvantages in society.

According to the Ontario Human Rights Code R.S.O. 1990, CHAPTER H.19,

*1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (1).*

We believe that this requires equal access to treatment and rehabilitation services for those with mental impairments as a result of an auto injury, since, as defined in the Code, “disability” means,

*(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,*

*(b) a condition of mental impairment or a developmental disability,*

*(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,*

*(d) a mental disorder, or*

*(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; (“handicap”)*

We note that this interpretation is entirely consistent with the Supreme Court of Canada decision in *Gibbs v. Battlefords and Dist. Co-operative Ltd.* (1996), 27 C.H.R.R. D/87 (S.C.C.) to uphold a Board of Inquiry ruling that the Co-operative discriminated against Betty-Lu Clara Gibbs on the ground of mental disability because of the terms of an employment-related insurance plan. In his decision, Sopinka J found that

*“the insurance plan provided a significant benefit to employees after the risk of disability materialized and this benefit was not distributed equally. Those with mental disabilities received less than those with physical disabilities... Discrimination against a sub-set of the group, in this case those with a mental disability, can be considered discrimination against persons with disabilities... The benefits for those with mental disabilities and those with physical disabilities were designed for the same purpose... The true character or under-lying rationale of the insurance plan was to provide income replacement for those unable to work because of disability, and consequently limiting benefits on the basis of mental disability are discriminatory”.*

In her judgment on the same case, McLachlin J agreed that *“Discrimination will exist if benefits received for the same purpose differ on the basis of a characteristic not relevant to the purpose of the insurance scheme. In the instant case, the defined purpose of the scheme is to insure employees against the income-related consequences of becoming disabled and unable to work. When the purpose is framed broadly with reference to the need which the plan seeks to address and without reference to specific injuries or specific groups of people, the nature of the disability becomes an irrelevant characteristic. Therefore, to distinguish benefits on the basis of disability constitutes discrimination”.*

We also note that the Supreme Court of Canada heard the charter challenge regarding the Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur, [2003] 2 S.C.R. 504, 2003 SCC 54 that a programmatic capping of benefits for those with an unseen (chronic pain) disability infringed s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The program in question specifically excluded chronic pain from the purview of the regular workers’ compensation system and provided, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits were available.

*The court held that “by entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits... the Act and the Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the Charter... Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. ...It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on*

*their presumed characteristics as a group ... the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions... A reasonable person... would conclude that the challenged provisions have the effect of demeaning the dignity of chronic pain sufferers... They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program.*

*Decision:*

*In the Martin appeal, decided on January 31, 2000, the Appeals Tribunal concluded that the FRP Regulations violated s. 15(1) of the Charter. It found that workers suffering from chronic pain were subjected to differential treatment, in that the benefits to which they were entitled were significantly restricted and their cases were not determined having regard to their individual circumstances. The Appeals Tribunal also found that such differential treatment was founded on disability caused by chronic pain, and that that disability constitutes either a physical or a mental disability under s. 15(1). Finally, it held that the operation of the FRP Regulations was discriminatory in that it stereotyped workers with chronic pain and determined their cases without reference to their individual circumstances, thus impacting their dignity by implying that their claims were less valid than those of injured workers without chronic pain.*

We note that those with psychological impairments historically have been subject to stigma and discrimination. Indeed, our members indicate that many of their patients still are loathe to identify themselves as having a psychological impairment, even to seek treatment. We find that the IBC proposal frankly targets individuals with psychological conditions for further discrimination that is contrary to mental health parity movements worldwide that aim to recognize and reverse historical discrimination against those with mental health impairments.

We find that the following decision of Associate Chief Justice Neil Wittmann Court of Queen's Bench of Alberta Citation: *Morrow v. Zhang*, 2008 ABQB 98 Date: 20080208 Docket: 0401 17808 Registry: Calgary is very relevant to any discussion of discrimination based on type of diagnosis as well as discriminatory caps.

*[Pre-existing disadvantage, vulnerability, stereotyping or prejudice] are relevant because to the extent that the claimant is already subject to unfair circumstances and treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern respect and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.*

Finally, we note that in their current proposal, the IBC recommendations actually suggest that FSCO revise the definition of who qualifies for access to accident benefits, again targeting specifically those with psychological vulnerabilities and impairments. They state particular concern regarding "relatively minor sprain/ strain injury, which subsequently evolves into a psychological diagnosis such as depression or chronic pain for which extensive med/rehab and ancillary support benefits are claimed. The new wording of the

*qualification test that we are proposing will allow inquiry into whether such diagnoses are true sequelae of the collision injury or whether they constitute re-statement of an individual's condition that existed prior to the collision”.*

We note that this, too, is expressly against the stated intent of the Human Rights Code:

**Past and presumed disabilities**

*(3) The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability. 2001, c. 32, s. 27 (4).*

We must note that the present language of the SABS already requires that for those patients with pre-existing conditions (including depression or chronic pain), a determination is made that the present impairments are a result of the MVA. Clearly, the IBC is proposing this change simply to reduce access to accident benefits for those with psychological impairments. It would be unsound and unfair to preclude access to benefits for treatment of a condition that was a result of an accident, just because the person had suffered from that same condition in the past, if it can be determined that the condition was indeed caused, in whole or in part, by the precipitating MVA. We note that the IBC is not proposing exclusions for people who have sustained previous physical injuries.

Again, as the treaters of those with mental health impairments and disabilities, we are especially offended by the flagrant discriminatory nature of the IBC proposals for changes to auto insurance in Ontario. We believe that these proposals would be of significant concern to national associations such as the CMHA and the Mental Health Commission. We note that the Mental Health Commission has recently initiated a national campaign against stigmatizing mental health impairments. We also believe that they are contrary to Ontario's Human Rights Code that specifically includes the requirement of non-discrimination in access to goods and services based on disability, including non-evident disabilities. Given the aggressiveness of these proposals and the existing legal challenges in several provinces on this issue, we believe that such proposals, if supported, will lead to similar legal and legislative challenges in Ontario.

The OPA does not want such discriminatory practices to become enshrined in legislation. Nor do we want to wait for the kind of charter challenges that have occurred in other provinces to reverse current and proposed discrimination in Ontario. It is our express wish to be included in any discussion regarding these proposals. We will work with all interested parties and stakeholders to ensure workable solutions that do not discriminate against those with brain injuries and psychological impairments.