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What Constitutes a “Minor Injury”? Definitions under the New Legislation

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New legislation, which came in force on April 1, 2019 and applies to any motor vehicle accident occurring on or after that date, caps non-pecuniary damages for all "minor injuries" at \$5,500.

The definition of what constitutes a "minor injury" can be found in the *Insurance (Vehicle) Act*, RSBC 1996, c 231 at Part 7 – Minor Injuries, as well as in the new *Minor Injury Regulation*, BC Reg 234/2018.

The legislation creates a multi-step test for classifying an injury as "minor", as follows:

1. Is there a permanent serious disfigurement or a serious impairment?

To start, a minor injury is defined as a physical or mental injury, whether or not chronic, that **does not** result in a serious impairment or a permanent serious disfigurement of the claimant.

A "permanent serious disfigurement" is defined as a permanent disfigurement that significantly detracts from the claimant's physical appearance.

A "serious impairment" has a more involved definition. It is defined as a physical or mental impairment that:

- is not resolved within 12 months after the date of the accident;
- is primarily caused by the accident and is ongoing since the accident;
- is not expected to improve substantially; and
- results in a substantial inability of the claimant to perform
 - the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,
 - the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or
 - the claimant's activities of daily living, which are defined as the following activities:
 - preparing own meals,
 - managing personal finances,
 - shopping for personal needs,
 - using public or personal transportation,

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- performing housework to maintain a place of residence in acceptable sanitary condition,
- performing personal hygiene and self-care,
- managing personal medication.

If an injury qualifies as either a permanent serious disfigurement or a serious impairment, **it is not a minor injury.**

2. Does the injury fall under one of the enumerated categories?

Per the new legislation, those categories are:

- an abrasion, a contusion, or a laceration;
- a sprain (defined as an injury to one or more ligaments unless all of the fibres of at least one of the injured ligaments are torn);
- a strain (defined as an injury to one or more muscles unless all the fibres of at least one of the injured muscles are torn);
- a pain syndrome (defined as a syndrome, disorder, or other clinical condition associates with pain, including pain that is not resolved within three months);
- a psychological or psychiatric condition that does not result in an incapacity;
- a prescribed injury or an injury in a prescribed type or class of injury, which includes:
 - a concussion that does not result in an incapacity;
 - a TMJ disorder (defined as an injury that involves or surrounds the temporomandibular joint);
 - a WAD injury (defined as a whiplash injury other than one involving decreased or absent deep tendon reflexes, deep tendon weakness or sensory deficits, or other demonstrable and clinically relevant neurological symptoms, AND/OR a fracture to or dislocation of the spine).

An "incapacity", in reference to psychological/psychiatric conditions and concussions, is defined as a mental or physical incapacity that:

- is not resolved within 16 weeks after the date the incapacity arises, and
 - is the primary cause of a substantial inability of the claimant to perform

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- essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's incapacity and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,
- the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's incapacity and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or
- the claimant's activities of daily living (as defined above).

If an injury falls under one of the above enumerated categories, **it is a minor injury**.

3. Did the claimant fail to mitigate?

Even if the injury involves a permanent serious disfigurement or a serious impairment, or if it falls outside one of the enumerated categories, **it will still be considered a minor injury** if the claimant, without reasonable excuse, fails to seek a diagnosis or comply with treatment in accordance with a diagnostic and treatment protocol prescribed for the injury.

4. Prescribed Criteria

The *Insurance (Vehicle) Act* also includes a provision, at s. 104, which provides the Lieutenant Governor in Council the power to make further regulations under Part 7 respecting the examination and assessment of injuries, the determination of whether an injury is a minor injury, and the onus of proof on such a determination, among other powers. Many of the definitions discussed above include references to "any other prescribed criteria" which can and already have been amended by regulation.

Effectively, the definitions of "minor injuries" as discussed above can be amended at any time by Order in Council making a regulation at the directive of the Lieutenant Governor. This differs procedurally from the creation of new law, which is subject to three readings before the legislative assembly before receiving royal assent. This means that changes can be made to the definition of "minor injuries" much more quickly and without the same consultation with stakeholders.