

Alberta Court of Appeal Upholds *Minor Injury Regulation* Cap of \$4,000 on Non-Pecuniary Damages for Minor Injuries

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On June 12, 2009, the Alberta Court of Appeal released its decision in *Morrow v. Zhang*, upholding the *Minor Injury Regulation*, A.R. 123/2004 (“MIR”), which, among other things, imposes a \$4,000 cap on non pecuniary damages for minor injuries, as defined by the MIR. The Appeal decision overturned the earlier trial court decision of Associate Chief Justice Wittman.

The Plaintiffs (Respondents on Appeal/Appellants by Cross-Appeal), Morrow and Pedersen, had suffered personal injury in an automobile accident. The injuries suffered by Morrow and Pedersen fell within the scope of the MIR and, consequently, their claims for non-pecuniary damages were subject to the \$4,000 cap. At trial, Justice Wittman quantified the non-pecuniary damages suffered by Morrow and Pedersen and determined that their respective non-pecuniary damages exceeded the \$4,000 cap set by the MIR. The trial judge considered the provisions of the MIR and concluded that such legislation was discriminatory to persons suffering minor injuries and, therefore, held that such regulations violated the rights of Morrow and Petersen pursuant to Section 15(1) of the Canadian *Charter of Rights and Freedoms*.

In its unanimous decision, penned by

Justice Rowbotham, and concurred with by Justices McFadyen and O’Brien, the Court of Appeal allowed the appeals brought by the Defendants at trial and by the Interveners, the Alberta Government and the Insurance Bureau of Canada, and set aside the decision of the trial judge.

The Court of Appeal concluded that the trial judge failed to analyze the insurance reforms as a whole and erred in concluding that the insurance reforms as a whole perpetuated the stereotype of individuals suffering minor soft tissue injuries. Upon considering the entire scheme of insurance reforms enacted in 2004 by the Alberta Government, which included protocols for diagnosing and treating minor injuries, increases in Schedule B medical benefits and caps on automobile insurance premiums for all Albertans, the Court of Appeal concluded that the legislation as a whole responded to the needs and circumstances of those suffering from minor soft tissue injuries.

The Court of Appeal acknowledged that the provisions of the MIR make a distinction on the basis of disability, however it held that the distinction between the minor injury claimants and those suffering other injuries from motor vehicle accidents was not discriminatory. The trial judge failed to assess the medical benefits provided to minor injury claimants in exchange for their reduced damages for pain and suffering. The Court of Appeal also held that the trial judge erred in concluding that damages for pain and suffering are of such a fundamental societal

significance that to interfere with them was indicative of discrimination. Accordingly, the Court of Appeal concluded that a reasonable person in the position of the minor injury claimant would not conclude that the distinction drawn by the cap on non pecuniary damages is discriminatory. As such, the Court of Appeal concluded that the MIR was not discriminatory and did not infringe Section 15 of the *Charter*.

The Court of Appeal also rejected the cross-appeal by Morrow and Pedersen and upheld the trial judge's decision that the MIR did not infringe Section 7 of the *Charter*, being the right to security of the person. The Court of Appeal agreed that the MIR was neither coercive of a minor injury victim to accept a certain treatment, nor did it remove or restrict the health care practitioners' discretion, as it allows claimants to be assessed and treated on an individual basis. Moreover, there was no evidence that the cross appellants were compelled to follow a certain course of action.

As a result of the Appeal decision, the cap under the MIR is in immediate effect and the minor injury cap has been adjusted to \$4,504 to account for inflation.

Of note, R.B. Davison Q.C. and David C. Rolf of Parlee McLaws LLP successfully represented the Intervener, Insurance Bureau of Canada in this Appeal.

For more information on the Court of Appeal decision and its impact, please contact Susan E. Remmer (sremmer@parlee.com) or any member of our Insurance Litigation Practice Group.

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