

Recent Decision re: Operation of the Minor Injury “Cap”

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On July 27, 2009, Mr. Justice Mahoney of the Alberta Court of Queen’s Bench issued his Reasons for Judgment in *Park v. Jordan* in Court of Queen’s Bench Action No. 0801-00138. One of the issues that Justice Mahoney needed to decide in this 49 page decision was the operation of the Minor Injury Cap in respect of the Plaintiff’s neck and back injuries.

The Plaintiff suffered from a level 1 low back sprain that aggravated a pre-existing condition. The Plaintiff also suffered from some form of neck sprain, the extent of which is not dealt with in the Judgment. It appears that the back problem had 90% resolved by December 2006, approximately 11 months post-accident.

Justice Mahoney indicated that Mr. Park’s non-pecuniary damages for his neck and aggravated back injuries were capped at \$4,000.00 in accordance with the Minor Injury Regulation, Alberta Regulation 123/2004.

Justice Mahoney went on to make some very interesting comments with respect to the operation of the Cap at pages 31 and 32 of the decision as follows:

The Plaintiff is seeking some direction from the court because I am told some insurance companies take the position that the cap is similar to the cap in the trilogy cases. In other words, the \$4,000

cap is a maximum that can be achieved for the most seriously injured person sustaining minor injuries as defined in the regulation. Therefore, so the argument goes, the \$4,000 cap is not always awarded in each case.

In reading the legislation I do not find any language that would have the cap work that way. The cap works on the basis that if general damages under the old regime would have been assessed at \$4001 based on decided case law, then that amount of damages is reduced to \$4,000. If general damages for a minor injury would have been assessed at \$10,000, that amount is reduced to \$4,000. If general damages are assessed any higher, they are all reduced to \$4,000.

All damages for minor injury above \$4,000 are reduced to \$4,000, but any claim that previously would have been worth \$4,000 or more is not somehow assessed and prorated on the basis of how it measures against the worst possible minor injury. If the legislature wanted that approach, it would have made its intention unambiguously clear.

In my view, Mr. Park’s aggravated back injury and minor neck injury were at the low end of the moderate soft tissue injury worth \$7,500 in damages, which is capped at \$4,000.

Of course, this decision is not binding on the other Justices of the Court of Queen’s Bench and it is not clear at this point how the Court

of Appeal might interpret this issue. We understand that this decision is not under appeal.

Mr. Justice Mahoney also found 10% contributory negligence on the Plaintiff for failing to wear his seatbelt. He, therefore, reduced the claim for general damages for the minor injury aspect of the Plaintiff's claim by 10% to \$3,600.00.

We will continue to monitor and report on the decisions concerning the application of the Minor Injury Cap.

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

This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.