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Limits on MVA Damages May Be Unconstitutional

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The Alberta Court of Queen's Bench rules that a cap on non-pecuniary damages is unconstitutional: *Morrow v. Zhang*, 2008 ABQB 98.

Summary

Enacted in 2004, Alberta's Minor Injury Regulation ("MIR") represents that Province's effort to stem the rising costs of automobile insurance. It was enacted as part of a sweeping reform of Alberta's automobile insurance scheme. The reforms included the creation of a Diagnostic and Treatment Protocol, similar to the Pre-Approved Framework Guidelines in Ontario. The Protocol was designed to streamline the treatment of certain injuries. The combined reforms have, since 2004, resulted in considerable reductions in automobile insurance premiums in Alberta.

One of the more controversial reforms was the MIR. It placed a $4,000 cap on non-pecuniary damages for "minor injuries". Such injuries were defined as sprains, strains and WAD I or II injuries caused by a motor vehicle accident, provided the injuries did not result in a "serious impairment".

Almost from its inception, it became apparent the MIR would be challenged on constitutional grounds. Academics considered the constitutional questions in scholarly journal articles. Last April the Alberta Court of Queen's Bench heard a challenge commenced by the plaintiffs. On February 8, 2008 the Court released its decision and ruled that the MIR provisions were unconstitutional, as an unjustifiable infringement of s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

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The Court concluded the MIR discriminated against persons with minor injuries and perpetuated a stereotype that such persons were malingerers. The legislation was struck down. The decision will certainly be appealed and will also certainly affect challenges currently underway in other provinces.

The following is a discussion of the case and a consideration of its impact on other insurance reform systems.

The Charter Challenge

Section 15(1) of the Charter prohibits discrimination. It states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada has, since 1985, been forced to interpret this provision in dozens of cases. A review of the law regarding a Charter examination is far too broad a mandate for this article. However, briefly speaking, in order to establish a violation of s. 15(1) a claimant must answer several questions:

- Does the law in question (a) draw a distinction between the claimant and others on the basis of personal characteristics or (b) fail to account for the claimant's already disadvantaged position in society, resulting in substantially different treatment than others, based on personal characteristics?

- Is the claimant subject to differential treatment on the basis of one of the listed grounds of discrimination (i.e. mental or physical disability)?

- Does the differential treatment discriminate in a substantive sense, such that it defeats the purpose of s. 15(1) in preventing prejudice, stereotyping and historical disadvantages?

Even though a law has a discriminatory effect, it may be permitted to stand if it is found to be a reasonable infringement on the rights of claimants.

The Court reasoned that claimants who suffered "minor injuries" and were barred from suing for more than $4,000 should be compared with those persons who suffer injuries that are not governed by the MIR. If there is differential treatment between those two groups, there is a need to consider if the law violates s. 15(1) of the Charter. The Court accepted that the basis of potential discrimination was the presence of a "physical disability".

The Court accepted the claimants' arguments that the differential treatment of persons with a "minor injury" harmed their dignity and that the MIR failed to respect them as a full and equal members of society. A critical finding of fact was the Court's acceptance that victims of a whiplash associated disorder are stereotyped as malingerers who exaggerate their injuries in order to gain a financial benefit. The Court observed that comments of this nature were made in the Alberta Legislature and by insurance industry advertisements. The Court accepted there is a widespread view that whiplash claims are frequently fraudulent. Although the industry, in fact, pays most whiplash claims without controversy, there is still a strong public stereotype of such persons. The Court therefore held:

> By limiting the amount of non-pecuniary damages available to those suffering from Minor Injuries, the legislature has effectively categorized that group of injury victims as less worthy of non-pecuniary damages. The basis of this distinction is the type of injury from which they suffer.

The Court then accepted that a reasonable person would conclude that the MIR has the effect of perpetuating the stereotype that whiplash victims are malingerers.

Once legislation is found to contravene s. 15(1) the Crown is entitled to establish that its discriminatory effect is justifiable pursuant to s. 1 of the Charter. The Alberta Court rejected the Crown's submissions in this regard. In doing so, the Court accepted that the legislative goal of reducing insurance premiums was laudable. However, before infringing rights the Crown must ensure its legislation infringes those rights in the least obtrusive manner possible. The MIR cap on damages imposed a substantial interference and was therefore prohibited. The Court accepted there were less intrusive means to achieve the objective of reducing premiums. The MIR was struck down as unconstitutional.

The Impact

Constitutional challenges to similar "minor injury" legislation are underway in New Brunswick and in Nova Scotia. The *Morrow* decision will certainly affect the outcomes in those provinces.

In Ontario, there is no cap on non-pecuniary damages. Instead, there is a threshold. If a person is unable to establish a serious and permanent injury they are precluded from suing for non-pecuniary damages. The constitutionality of such threshold provisions was addressed by the

Ontario Court of Appeal in 1992. In the *Hernandez* decision the Court concluded these provisions did not constitute a Charter violation. The Court of Appeal refused to characterize motor vehicle accident victims as suffering from a social or legal disadvantage nor the subject of stigmatization as a result of the threshold. Instead, the Court accepted the purpose of the legislation was to exchange certain rights to sue with rights to receive no-fault accident benefits. In doing so the Court of Appeal was satisfied there was no breach of s. 15(1).

The Alberta Court of Queen's Bench has directly challenged the *Hernandez* decision and questioned whether it is still good law. In particular, the Court noted the decision is now dated and does not reflect the current state of Charter analysis as set down by the Supreme Court of Canada.

The Alberta Court's comments that a damages cap is "demeaning" or that it "suggests that their pain is worth less than that of other injury sufferers" will resonate in other jurisdictions. Interestingly, though, the plaintiffs in the *Morrow* case proposed that a "deductible that reduces all damages by a prescribed percentage" would have been an acceptable alternative to the imposition of a damage cap. This is similar to Ontario's deductible scheme.

However, because of the *Morrow* decision's challenge to the *status quo* in Ontario, we can expect renewed constitutional challenges against the injury threshold and deductibles in that province. At a minimum, we can expect a challenge to the Ontario legislation that will require the Courts to apply the updated Charter analysis set out by the Supreme Court.

It may be difficult to distinguish between a cap on damages and a prohibition against suing unless a serious enough injury has been sustained. However, the Ontario threshold does not affect a particular kind of injury, such as whiplash, but considers the subjective impact on the individual. Any kind of injury, including whiplash, is capable of meeting the threshold if it has a significant enough impact on the person. There is no stigma attached to a person who sustains a minor injury. The Ontario approach removes the right to sue for injuries that are not serious, in exchange for enhanced no-fault benefits. There is no stereotype that suggests a person whose broken arm heals fully within six months of an accident is somehow a malingerer undeserving of compensation. It is certainly arguable that the threshold approach is a balanced and non-discriminatory approach to automobile insurance reform. It seems likely that there will be a new opportunity to test that theory.

Certainly the *Morrow* decision will be appealed. We will keep you advised of the outcome.

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Note: *Morrow v. Zhang*, 2008 ABQB 98, will be included in the April 2008 issue of the CANADIAN INSURANCE LAW REPORTER.