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# Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries

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**Cases Considered:**

*Morrow v. Zhang*, 2009 ABCA 215, overturning 2008 ABQB 98

Last February, Associate Chief Justice Neil Wittmann of the Alberta Court of Queen's Bench found that the $4000 cap on non-pecuniary damages for soft tissue injuries violated the equality rights of motor vehicle accident victims, and could not be justified as a reasonable limit under section 1 of the *Charter* (see my earlier post on this case: Not on Their Backs: Cap on Damages for Soft Tissue Injuries Struck Down; Court Denies Stay of Remedy Pending Appeal). This decision was overturned by the Alberta Court of Appeal on June 12, 2009. Writing for a unanimous Court, Justice Patricia Rowbotham (with Justices Elizabeth McFadyen and Clifton O'Brien concurring) held that when viewed in the context of the overall scheme of insurance reforms, the cap did not violate section 15 *Charter* equality rights. In addition to its significance for the auto insurance industry and Alberta drivers, this decision is of interest as the first judgment of the Alberta Court of Appeal to consider section 15 since the Supreme Court of Canada set out a new approach to equality rights in *R. v. Kapp*, 2008 SCC 41.

Our faculty will hold a roundtable discussion of the Court of Appeal decision on June 30, and ABlawg will post a thorough review of the case after that. In the meantime, I have a couple of questions about the Court of Appeal's judgment: (1) Did the Court actually apply the new approach to section 15 of the *Charter*?, and (2) Was it appropriate for the Court to look at the legislative scheme more broadly in its *Charter* analysis?

## 1. Did the Court actually apply the new approach to section 15 of the *Charter*?

In the *Kapp* case, the Supreme Court of Canada acknowledged the critique that had been levelled against the governing case on equality rights from 1999 to 2008, *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. *Law* focused the section 15(1) inquiry on whether the government action in question violated the equality claimant's essential human dignity, to be determined by reference to four contextual factors: (1) the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice against the person or group in question; (2) the correspondence between the ground of discrimination and the affected person's actual needs, capacities and circumstances; (3) whether the law ameliorated the position of another disadvantaged group; (4) the nature and scope of the interest affected. In *Kapp*, the Supreme Court reflected on *Law* as follows:

> … [S]everal difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by

> the *Charter*has as its lodestar the promotion of human dignity. …But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.The analysis in a particular case, as*Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in*Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in*Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* - combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping (at paras 21-24, emphasis in original).

This passage from *Kapp* is reproduced in *Morrow v. Zhang* at para. 51. The Court of Appeal then refers to Peter Hogg's *Constitutional Law of Canada*, vol. 2, 5th ed., looseleaf (Scarborough, Ont.: Thomson Carswell, 2007) as authority for the proposition that:

> since *Kapp*, for a section 15 challenge to succeed, it is still necessary for a claimant to establish *something in addition to disadvantage based on an enumerated or analogous ground*. The additional something (discrimination) is no longer an impairment of human dignity, but rather the perpetuation of disadvantage or stereotyping (at para. 52, emphasis added).

I would suggest that the Court meant to say that "something in addition to *a distinction* based on an enumerated or analogous ground" is required, as disadvantage is itself suggestive of discrimination. That aside, the Court goes on to note that this approach was recently confirmed in *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9. Taking *Kapp* and *Ermineskin* into account, the Court of Appeal states as follows:

> I acknowledge that in light of *Kapp* and *Ermineskin* and the academic commentary on these cases, the focus of the discrimination analysis should be directed to two concepts: (1) the perpetuation of prejudice and disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds, and (2) stereotyping on the basis of these grounds that do not correspond to a claimant's or group's actual circumstances and characteristics (at para. 53).

In spite of this acknowledgement, however, the Court of Appeal seems to apply the old *Law v. Canada* test in its section 15(1) analysis in *Morrow v. Zhang*. At para. 86 the Court begins its

analysis of "substantive discrimination" by referencing *Law* (and *Law* alone), and then it proceeds to apply each of the four contextual factors from *Law*. This does not appear to be simply a review of Justice Wittman's findings on the various stages of the *Law* test, which was the governing test at the time of trial. The Court of Appeal uses headings that mirror the four contextual factors from *Law*, and does not relate all of those factors to the notions of prejudice, disadvantage and stereotyping that are now to be "the focus of the discrimination analysis."

This approach is puzzling in light of the fact that the Court of Appeal appears to share the critique of the *Law* test articulated in *Kapp*:

> I am compelled to observe that much of the analysis which might logically form part of the section 1 analysis has become an important part of the analysis of the four contextual factors in *Law*, particularly, the second and fourth contextual factors (at para. 134; see also para. 148).

However, the Court finds that *Kapp* and *Ermineskin* have not changed this reality (at para. 134). Is the Court correct on this point? Recall that in *Kapp* the Supreme Court acknowledged the "additional burden" imposed by *Law*, and stated that the four contextual factors "should not be read literally as if they were legislative dispositions." In fairness to the Court of Appeal, the Supreme Court did not give any guidance as to how section 15(1) should be applied in *Kapp*, as that case turned on the application of section 15(2), the affirmative action provision. In *Ermineskin*, though, which post-dates *Kapp*, there is no reference to *Law* whatsoever in the Supreme Court's section 15(1) analysis (see Jonnette Watson Hamilton's and my post on *Ermineskin*, The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges).

At the trial level in *Morrow v. Zhang*, Justice Wittman rejected the contention that the cap on damages should be considered in light of the other insurance reforms, as this might "shield [it] from effective review" (2008 ABQB 125 at para. 163). Justice Wittman thereby distanced himself from *Law*'s tendency to internally limit equality rights based on the consideration of government objectives that are more properly examined under section 1. The critique of *Law* in *Kapp* opened the door for the Court of Appeal to support this aspect of Justice Wittman's decision, and it arguably missed a golden opportunity to do so.

**2. Was it appropriate for the Court to look at the legislative scheme more broadly?**

The cap is found in the *Minor Injury Regulation*, AR 123/2004 (*MIR*). Importantly, the *MIR* creates a $4000 cap on non-pecuniary damages, damages that are intended to compensate for general pain and suffering. Minor injuries are defined as sprains, strains and whiplash "that does not result in serious impairment" (*MIR*, section 1(h)).

The cap was enacted in 2004 as part of a package on insurance reforms, which also included a *Diagnostic and Treatment Protocols Regulation*, Alta Reg. 121/2004 (*DTPR*). The *DTPR* provides pre-authorized payments for treatment for accident victims without the need to seek the insurer's approval. Also noted by the Court of Appeal are several other regulations which set and cap auto insurance premium levels, and govern auto insurance coverage and disputes about coverage more broadly (see paras. 17-23).

The Court of Appeal holds that Justice Wittman erred when he failed to give sufficient weight to the other reforms beyond the cap. In particular, the Court puts a fair amount of weight on the

treatment options provided by the *DTPR*, which "promote and assist treatment" and provide for "an individualized assessment of a claimant [that] cannot normally be characterized as perpetuating a stereotype" (at para. 98).

The *DTPR*, however, provides relief for accident victims' costs of care. This is a form of pecuniary damages that differs from the non-pecuniary damages for pain and suffering that are capped at $4000 (now $4500 as adjusted for inflation). How can legislation that deals with a different head of damages that claimants would be entitled to in any event be relevant to whether the cap on general damages is discriminatory? While the claimants do get something, isn't it the case that all other accident victims also get individualized damages for their out of pocket expenses for the costs of care? That this is in fact the case seems to be acknowledged by the Court of Appeal at para. 132. Given this fact, minor injury victims are still being treated differently than other accident victims when it comes to pain and suffering, which is assumed across the board to be worth no more than $4000. Their actual needs and circumstances as they pertain to general damages are not being taken into account, arguably constituting stereotyping on the basis of their category of injury. This is a categorization that Justice Wittman found to amount to differential treatment based on disability, a finding not disturbed by the Court of Appeal (at paras. 79-85). While there are other statutes and case law that limit or extinguish claims to non-pecuniary damages (listed by the Court of Appeal at paras. 132 and 133), they do not appear to do so on the basis of grounds protected under section 15 of the *Charter*, and can therefore be distinguished.

The Court of Appeal finds the *DTPR* to be significant on the basis that it provides pre-authorized payment for treatment that the plaintiff would previously pay for up front and seek reimbursement for from the insurer. There was evidence at trial that the *DTPR* had a positive impact: "more injured claimants were receiving health services in the first 12 weeks following their injuries, the costs per treatment had decreased, and fewer claims were unresolved after 26 weeks than had been the situation prior to the reforms" (at para 23). If the argument is that this somehow reduces pain and suffering and the need for general damages, this point is not made explicitly by the Court.

This discussion illustrates the problem with importing too much of the section 1 analysis into the test for section 15(1) of the *Charter*. Under section 1 the burden is on the government to justify its reasons for violating *Charter* rights, and the means it used to do so. Where the law's objective becomes the focus of determining whether there is a violation of *Charter* rights, this shifts the burden to the claimant, who is not in as good a position to speak to the objectives of the law as the government. It should be sufficient under section 15(1) for a claimant to show differential treatment based on a protected ground that has the effect of causing harm to them, whether through stereotyping, prejudice, disadvantage, oppression, or the like. As for all other *Charter* rights, this should be a contextual analysis that considers the claimant's harms in broader social and political context. And, as for all other *Charter* rights, unconstitutional *effects* of a law should be sufficient to establish a breach, rather than requiring an unconstitutional *purpose* as the Court of Appeal seems to do. It should then be up to the government to justify its objectives, which would include establishing the relevance of the *DTPR* and its objectives in this case.

I am sure there are many more questions that arise in relation to this case, and I am looking forward to discussing these during the roundtable.