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Not on Their Backs: Cap on Damages for Soft Tissue Injuries Struck Down; Court Denies Stay of Remedy Pending Appeal

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Cases Considered:

Morrow v. Zhang, 2008 ABQB 125,
Morrow v. Zhang and Pedersen v. Thournout, 2008 ABQB 98

On February 8, 2008, Associate Chief Justice Neil Wittmann of the Alberta Court of Queen's Bench struck down the $4000 cap on non-pecuniary damages for soft tissue injuries incurred in motor vehicle accidents. The cap was imposed in October 2004 via the Minor Injury Regulation, Alta. Reg. 123/2004 ("the MIR"). Justice Wittman's decision quickly became an election issue, with leaders of Alberta's major parties each staking out their territory on auto insurance. Premier Stelmach announced that the government would seek a stay of the ruling pending an appeal to the Alberta Court of Appeal. Liberal leader Kevin Taft countered that a Liberal government would not appeal the decision, and NDP leader Brian Mason used the opportunity to advocate for a public auto insurance system. On February 25, 2008, Justice Wittmann denied the stay application. This means that his original ruling, which struck down the cap without providing time for the government to amend the MIR, takes immediate effect.

The MIR was challenged by two different plaintiffs in the course of their civil actions for damages for injuries suffered in motor vehicle accidents. Their argument was that the MIR's cap on non-pecuniary damages (general damages for pain and suffering) violated their rights under sections 7 and 15 of the Canadian Charter of Rights and Freedoms. There was no issue as to the liability of the defendants in either case, and they played a minor role in the constitutional challenge, with the MIR being defended by the Alberta government and an intervener, the Insurance Bureau of Canada ("IBC").

Justice Wittman began his judgment by calculating the damages that each plaintiff would have received if not for the cap. He assessed the general damages of Peari Morrow, a 34 year old woman who sustained soft tissue injuries of the neck and upper back, at $20,000. Brea Pederson, a 32 year old woman with soft tissue injuries of the neck, shoulders and back and injury to her wrists, had her general damages assessed at $15,000. For both plaintiffs, then, the cap mattered, and so Justice Wittman was required to consider their Charter claims.

Before examining whether there were violations of sections 7 and / or 15 of the Charter, Justice Wittman undertook a lengthy overview of auto insurance in Canada, based on expert evidence and judicial notice of the legislation in various jurisdictions. He categorized Alberta's system as a "threshold no-fault" scheme, characterized by a cap on the level of damages that can be awarded in private lawsuits for particular injuries (typically minor injuries). Ontario, Newfoundland and Labrador, Nova Scotia, PEI and New Brunswick also have threshold no-fault systems with caps as low as $2500 for minor injuries (some of which are also being challenged constitutionally). Other provinces have either "pure no-fault" schemes, or "add-on no-fault" systems which permit no-fault benefits as well as the right to sue third parties for pain and suffering. The MIR was part of a package of reforms passed in 2004 in light of concerns about high premiums, along with new obligations on insurers not to refuse new contracts or renewal of existing ones (The Fair Practices Regulation), and restricting their ability to withdraw from the auto insurance business (Insurance Act, R.S.A. 1980, c. I-3, s. 661.2).

Turning to the Charter issues, the first question was whether section 6 of the MIR, which imposed the $4000 cap on damages for soft tissue injuries, violated section 7 of the Charter, which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A number of interesting arguments were considered by the Court.

First, it was alleged by the plaintiffs that the cap violated their physical and psychological integrity, contrary to their right to security of the person. Justice Wittman rejected this argument, relying on the decision of the B.C. Court of Appeal in *Whitbread v. Walley*, (1988), 51 D.L.R. (4th) 509, appeal dismissed [1990] 3 S.C.R. 1273. In that case, Justice Beverley McLachlin, before her elevation to the Supreme Court of Canada, found that limitations on liability and damages for personal injury under the Canada Shipping Act did not violate section 7. McLachlin, J. noted that the framers of the Charter had not included property rights under section 7, and thus found that they did not intend the Charter to protect purely economic interests of this kind.

A second section 7 argument was that the cap restricts plaintiffs' ability to afford legal counsel, thereby denying them access to justice. Here, Justice Wittman referred to the recent and "unequivocal" ruling of the Supreme Court of Canada in *British Columbia v. Christie*, 2007 SCC 21, where the Court held that the rule of law does not confer a "general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations" (at para. 123). While Christie was not a section 7 case, Wittman A.C.J. used it as support for his conclusion that "the sole fact that a right will lead to a damage award, which will not cover or only partly cover legal representation is certainly not sufficient to conclude that there was a denial of access to justice" (at para. 124). There was also no evidence that the plaintiffs had been denied access to justice in the circumstances of the case, as both were represented by counsel.

The final section 7 argument dealt with another aspect of the insurance reforms, the Diagnostic and Treatment Protocols Regulation, Alta. Reg.122/2004 ("DTPR"), which requires a particular treatment protocol to be followed to avoid the application of the MIR. The plaintiffs argued that the DTPR deprived them of the ability to choose their own medical care, contrary to their right to

security of the person. Justice Wittman distinguished a number of other cases, including *R. v. Morgentaler*, [1988] 1 S.C.R. 30, *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519, and *Chaoulli v. Quebec*, 2005 SCC 35, finding that the plaintiffs were still free to choose their own medical treatment, subject only to a potential penalty of having their damages capped. Again, this was found to be the sort of purely economic interest that was beyond the reach of section 7. Because there was no finding of a violation of the right to life, liberty or security of the person, Justice Wittman did not have to consider the principles of fundamental justice.

It is difficult to disagree with Justice Wittman's analysis of section 7 on the basis of the existing precedents. While there has been much criticism of the Supreme Court's failure to allow claims of social and economic rights under section 7, this critique has typically been mounted in response to cases such as *Gosselin v. Quebec (A.G.)*, 2002 SCC 84, where a majority of the Supreme Court failed to find a positive obligation to provide adequate welfare benefits under section 7. Justice Wittman's application of Christie in the section 7 context is somewhat more worrying, given recent efforts to advocate a right to civil legal aid under section 7 (see *Canadian Bar Association v. HMTQ et al*, 2006 BCSC 1342, on appeal to the BCCA). However, the denial of the claims of Morrow and Pederson do not perpetuate a disregard for the interests of impoverished persons as in Gosselin and Christie, and are less open to criticism on that basis.

Justice Wittman then turned to the arguments under section 15 of the Charter. Section 15 provides for equality without discrimination on the basis of a number of protected grounds, including disability. As noted by Wittman, J., the leading section 15 case is *Law v. Canada*, [1999] 1 S.C.R. 497. Applying the framework from Law, Justice Wittman confirmed that discrimination analysis is comparative, and found the appropriate comparator group in this case to be "accident victims who suffer injuries other than those set out in the MIR" (at para. 181). Compared to this group, the plaintiffs were subject to differential treatment – i.e. to a cap on general damages that would not fully compensate their pain and suffering (to the extent that damages can ever do so). This was found to be a distinction based on physical disability, a protected ground under the Charter. Here, Wittman, A.C.J. rejected the IBC's argument that disability requires "obvious physical impairment", stating that "[t]he requirement that one's disability needs to be obvious in order to access the protection provided by s. 15(1) would significantly reduce its purpose" (at para. 193).

The heart of a section 15 claim is whether there is substantive discrimination, which will be found where the purpose or effect of a law is to impair the claimant's essential human dignity. In Law, the Supreme Court set out a number of contextual factors that are supposed to assist courts in resolving this question, and Justice Wittman easily concluded that the factors supported a finding of substantive discrimination in this case. First, minor injury victims such as the plaintiffs were said to be subject to pre-existing disadvantage, stereotyping and prejudice. The Court referred to an excerpt from Hansard, a video on the IBC website, media reports, and expert evidence as support for the proposition that soft tissue injury victims "are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially" (at para. 205). The MIR was found to reinforce this perception by implying that sufferers of soft tissue injuries are less worthy and deserving of compensation, a finding "suggestive of discrimination"

even though the government did not intentionally perpetuate the stereotype. Second, Justice Wittman held that the cap did not align with the needs, capacities and circumstances of the plaintiffs in light of the fact that their damages would have been higher but for the cap, and because the government sought to finance the perceived insurance crisis "on the backs of a discrete group of injury victims" (at para. 240). Third, the MIR was not found to ameliorate the circumstances of a vulnerable group, as young and senior drivers were rejected as being more disadvantaged than soft tissue injury victims. Lastly, Wittman, A.C.J. decided that the nature of the interest affected was sufficiently serious. The issue here was not the quantum of damages themselves, but the message the cap sent to victims of soft tissue injuries. Relying on the Alberta Court of Appeal decision in Ferraiuolo Estate v. Olson, 2004 ABCA 281, where limitation of damages for grief and loss of care in the Fatal Accidents Act were struck down under the Charter, Justice Wittman concluded that "the deprivation of an equal share of resources, benefits or rights on the basis of an enumerated ground, goes to the heart of human dignity" (at para 255). Overall, then, a section 15 violation was made out in the circumstances.

Commentators have been highly critical of the Law case, arguing that the contextual factors are subjective and capable of being applied to achieve whatever outcome the judge supports. Since Law, the Supreme Court has denied section 15 claims involving survivor and spousal benefits, welfare entitlements, and access to medical treatment, to name just a few cases. Why was the section 15 claim in Morrow seemingly so straightforward by comparison? Perhaps it was because the case does not involve the expenditure of public funds. Or perhaps it is easier for judges to put themselves in the shoes of those who suffer motor vehicle accidents than those who are poor, autistic, or dependent females. Wittman's section 15 judgment is replete with language that shows empathy for the plaintiffs, but it also supports a generous approach to section 15 more broadly. For example, he notes the importance of avoiding an interpretation of section 15 that renders equality rights "illusory" or "curtailed" (at para. 185), and rejects the contention that the MIR should be considered in light of the other insurance reforms, as this might "shield [the MIR] from effective review" (at para. 163). Justice Wittman thus distances himself from another discredited aspect of Law, its tendency to internally limit equality rights based on considerations of important government objectives.

It is at the section 1 stage of analysis that government objectives are to be examined, and Wittman, J. turns to this question next. Section 1 of the Charter requires that the government show the limits it imposed on Charter rights are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 1 is to be considered using the criteria from *R. v. Oakes*, [1986] 1 S.C.R. 103.

The first criterion is a pressing and substantial government objective. Here, Justice Wittman again rejected the government's argument that the cap should be examined in light of the other insurance reforms. As noted by the Court, only the cap was being challenged by the plaintiffs, and so the objective of section 6 of the MIR was the only relevant consideration. According to Justice Wittman, the evidence led to the conclusion that the objective of the cap was to reduce insurance premiums in light of a perceived "insurance crisis". Noting that other courts had expressed concerns about permitting financial considerations alone to warrant violations of

Charter rights, Justice Wittman nevertheless found the objective to be pressing and substantial in this case. He referred to the fact that at the time of the reforms, premiums had increased to offset higher claims costs (caused in large part by soft tissue injuries), and the number of uninsured drivers had risen (along with the number of convictions for driving without insurance, given that auto insurance is mandatory in Alberta). The government had received many letters and telephone calls from Albertans expressing concerns about high premiums, and auto insurance companies were declining to provide new coverage and threatening to move out of the province. Although Wittman, A.C.J. found that "burdens that may accompany the implementation of social policy legislation should not be concentrated on a few, as opposed to the many", this was a matter "best addressed under the proportionality branch of the s. 1 analysis" (at para. 299).

The cap was ultimately found to fail at the minimum impairment stage of Oakes, where the government must show that the adopted measures were a reasonable way of implementing their objective. While the Court agreed with the government that it was entitled to "considerable deference" given that it was balancing the interests of multiple groups and relying upon complex actuarial and medical evidence, the level of deference did not reach that which would be appropriate in a case involving the allocation of scarce government resources, as this was not a case about government expenditures. And while the government showed that it had considered and rejected a number of alternative approaches, Justice Wittman still found that the cap on soft tissue injuries was unreasonable, as it "place[d] the burden of funding the Insurance Reforms primarily on the shoulders of Minor Injury Victims" (at para. 322). As stated by the Court,

> social policy initiatives are often geared towards assisting the most vulnerable members of our society. This does not mean that they should be singled out to fund those costs for which they may be primarily responsible. This is particularly so when the defining characteristic of that group is personal in nature and is an enumerated or analogous ground (at para. 333).

This is a significant holding. It stands in sharp contrast to *Newfoundland v. N.A.P.E.*, 2004 SCC 66, where the Supreme Court permitted the Newfoundland and Labrador government to reduce its deficit on the backs of women workers by reneging on its pay equity obligations. Justice Wittman's decision got it right – governments should not be able to implement cost cutting measures in the public or private sector in a way that discriminates against groups protected under section 15 of the Charter.

The last issue was that of remedy. The Court found that it was not appropriate to sever section 6 of the MIR, as the rest of the MIR could not survive without it. Accordingly, it struck down the MIR in its entirety pursuant to section 52 of the Constitution Act, 1982, which provides that any law inconsistent with the Constitution is of no force or effect. Interestingly, the government did not seek a temporary suspension of the remedy, stating that it would appeal and seek a stay in the event of a loss. The IBC did argue for a temporary suspension, but this was denied by Justice Wittman because the circumstances for this exceptional remedy (public danger, threat to the rule of law or deprival of benefits) were not present. The plaintiffs were thus awarded full damages for pain and suffering.

The government's stay application was heard by Justice Wittman on February 25 (*Morrow v. Zhang*, 2008 ABQB 125). Under Rule 508(1) of the Alberta Rules of Court, "an appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from unless the Court of Queen's Bench stays enforcement or proceedings of the decision pending appeal." A stay will only be granted if the following questions are answered in the affirmative:

1. Is there a serious issue arising on the appeal?
2. Will irreparable harm result if the stay is not granted?
3. Does the balance of convenience favour granting the stay?

The first factor was not contentious – it was agreed that given the complexity of the factual context and legal issues, there were serious issues to be determined on appeal. The second and third factors were considered together, as both involve questions of potential harm to the applicant and the public interest. Because the government conceded that it would not sustain harm if the stay was denied, only the public interest was relevant here. Justice Wittman found that the government's concerns - increased insurance premiums – were speculative. He noted the unlikelihood that plaintiffs would proceed with their claims until the future of the cap had been clarified on appeal, particularly because most hire their lawyers on a contingency basis. In the end, he held that the government had failed to satisfy its burden of demonstrating irreparable harm to the public interest if a stay was not granted, and that the balance of convenience did not favour granting a stay. However, Justice Wittman did grant the stay application of the Defendants in the Morrow action, and ordered that the damage award over and above the $4000 should be held in trust pending the outcome of the appeal. There was no application for a similar stay in Pederson, but it is likely that the judgment in Morrow 2 would be determinative of any such action.

Given the outcome of the provincial election on March 3, the appeal will now proceed. Justice Wittman's judgment on the constitutionality of the MIR provides the Court of Appeal with an excellent starting point – it is a well organized, thorough and compelling decision, and it will serve as an important benchmark in future equality rights cases both inside and outside the insurance context.