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Supreme Court denies equality claimants leave to appeal insurance cap

By Jennifer Koshan

Cases Considered:

Morrow v. Zhang, 2009 ABCA 215, leave to appeal dismissed by S.C.C. December 17, 2009

The Supreme Court has denied Peari Morrow and Brea Pederson leave to appeal the Alberta Court of Appeal ruling that upheld the province's cap on non-pecuniary damages for soft tissue injuries incurred in motor vehicle accidents. Previous posts on ABlawg critiqued the Court of Appeal decision for (1) failing to apply the new approach to equality rights set down in *R. v. Kapp*, 2008 SCC 41, (2) improperly applying the old approach to equality rights from *Law v. Canada, Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, (3) giving insufficient weight to evidence of stereotyping in relation to victims of minor tissue injuries, and (4) giving too much weight to the purpose of the law at the expense of its effects on those victims (see Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries and More Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries).

Leave to appeal was dismissed by Chief Justice Beverly McLachlin, Justice Rosalie Abella, and Justice Marshall Rothstein, with costs to the respondent drivers and the province of Alberta. As usual, no reasons were given for the leave decision.

The Supreme Court has missed out on an important opportunity to clarify the application of the test for discrimination under section 15(1) of the *Charter*. Lower courts are struggling with how to approach equality rights claims, and Supreme Court decisions since *Kapp* have failed to provide adequate guidance (see *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37).

The decision to deny leave to appeal is surprising in light of the composition of the panel. Chief Justice McLachlin and Justice Abella took markedly different approaches in their majority and dissenting judgments, respectively, in the *Hutterian Brethren* case. While that case focused on freedom of religion rather than equality, it still gives some indication of their orientation towards issues such as stereotyping and accommodation. I will not speculate on why leave was denied in *Morrow v. Zhang*, but it is interesting to see the two judges in agreement here.