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More 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

In her post critiquing the Alberta Court of Appeal decision in *Morrow v.* Zhang, Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries, Professor Jennifer Koshan asks, "Did the Court actually apply the new approach to section 15 of the Charter?" I would like to focus on that question and raise a few additional and related matters. I agree with Professor Koshan that the Court of Appeal seems to apply the old test from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 in its section 15(1) analysis in *Morrow v. Zhang*. However, they do so without a focus on human dignity, which seems to result in the application of the *Law* test in a very formalistic way, rather than substantively. Does it matter? I think that the use of the original *Law* test, complete with a focus on human dignity, could have rather easily resulted in an affirmation of the trial judge's decision. Alternatively, and perhaps more importantly, I think that an application of the test in *R. v. Kapp*, 2008 SCC 41, could also have resulted in an affirmation of the trial judge's decision had that application really focused on stereotyping.

As Professor Koshan notes in her post, the Court of Appeal begins its analysis of "substantive discrimination" (at para. 86) by referencing *Law* (and *Law* alone) and then proceeds to apply each of the four contextual factors from *Law*. But can a court deal with *Law*'s four contextual factors without referring to human dignity? Consider what these factors contextualize. In *Law*, Iacobucci J. noted (at para. 62) that these are "factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation has the effect of demeaning his or her dignity . . ." (emphasis added). That was their purpose in the analytical framework. It is true that in *Kapp*, the Supreme Court stated (at para. 24) that 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* – combating discrimination, defined in terms of perpetuating disadvantage and stereotyping." Paraphrasing Iacobucci' J.'s statement then, the idea seems to be that a court could use *Law*'s four contextual factors in order to demonstrate that that challenged legislation has the effect of perpetuating disadvantage or stereotyping.

Does the Court of Appeal adapt the four contextual factors from *Law* to these reformulated ends? There are two aspects of their judgment that might be an attempt to do this. The first is that *Law*'s first contextual factor — the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice against the person or group in question — has become merely "pre-existing disadvantage or stereotyping" (in the heading to para. 87 and at para. 88). This suggests a narrower understanding of discrimination. The second is that the four contextual factors from

Law have become five factors in their analysis of "substantive discrimination." After *Law*'s first contextual factor, the Court of Appeal adds (at paras. 96-103) "perpetuation of the stereotype." This might seem to acknowledge the need for more of a focus on one of the two types of discrimination recognized by *Kapp*. The Court of Appeal does not state why it added this as an additional factor to its analysis. In the circumstances of this case, it seems to be added because the court grudgingly agreed with the trial judge that what they called (at para 87) "minor injury victims" are subjected to stereotyping and prejudice. (I characterize it as grudging because the best light the Court of Appeal seems to be able to put on this finding (at para. 92) is that they "cannot say that his finding in this regard was incorrect.") They disagreed, however, with the trial judge's assessment that the *Minor Injury Regulation* (MIR) reinforced this perception by implying that sufferers of soft tissue injuries are less worthy and deserving of compensation. Perhaps the fifth factor was created merely to differentiate between the Court of Appeal's partial agreement and partial disagreement with the trial judge on *Law*'s first contextual factor. However, adding "perpetuation of the stereotype" as something to be proven by the claimant appears to either duplicate considerations usually brought up under *Law*'s second contextual factor of "correspondence between the ground claimed and the needs, capacities and circumstances of the claimants" or create an additional burden on the claimant.

The balance of the Court's application of the *Law* test does not, however, seem to have been adapted to meet the new approach from *Kapp*. For example, the Court of Appeal includes *Law*'s third contextual factor — whether the law ameliorated the position of another disadvantaged group — as part of its section 15(1) analysis. It does so despite the fact that *Kapp* indicated this factor goes to whether the purpose of the legislation is remedial within the meaning of section 15(2), not section 15(1). It is true that the Supreme Court in *Kapp* did go on to add parenthetically (at para. 23) that the third *Law* factor might be relevant to the question of whether the effect of the law or program was to perpetuate disadvantage, but the Court of Appeal does not use it that way. They discuss (at para. 127) whether the distinction was designed to improve the situation of a more disadvantaged group. This consideration no longer belongs in a section 15(1) analysis, according to *Kapp*.

As another example (at paras. 134 and 148), although the Court of Appeal is quite critical of the way that section 1 justifications have slipped into the section 15(1) rights violation analysis, and particularly the analysis of the second and fourth contextual factors in *Law*, the Court's use of these two factors from *Law* perpetuates this problem. Its analysis of the correspondence between the ground claimed and the needs, capacities and circumstances of the claimants — *Law*'s second contextual factor — is all about rising insurance premiums and the purpose of the legal reforms (at paras. 107 – 111 especially). There is nothing in *Kapp* that states that the purpose of the legislation is relevant to a section 15(1) analysis (as opposed to a section 15(2) analysis) or that the focus should be on intent and not impact.

I also want to consider what difference it might have made had the Court of Appeal either used the *Law* test as it was formulated or, more importantly, had they used the approach set out in *Kapp*.

Although I am not a big fan of the focus on human dignity in the *Law* test because it is subjective and difficult to apply, in the *Morrow v. Zhang* case a consideration of the human dignity of the claimants does make clear the discriminatory impact of the MIR. Alberta insurers and the public were concerned about the rising cost of motor vehicle insurance premiums (at para. 1). Increases in bodily injury costs on automobile insurance premiums were blamed on increasing awards for non-pecuniary damages, a significant proportion of which appeared to be minor soft tissue

injuries (at para. 12) The insurance law reforms, including the MIR, reduced automobile insurance premiums by singling out those who suffered from particular types of minor injuries — soft tissue injuries or whiplash — and capping their damages for pain and suffering at $4,000. Not everyone suffering a minor injury in a motor vehicle accident had their non-pecuniary damages capped, but doing so would have reduced insurance premiums for all of us. Not everyone suffering an injury in a motor vehicle accident had their pain and suffering damages capped, but doing that would have also reduced insurance premiums for all of us. By singling out only those suffering minor soft tissue injuries in motor vehicle accidents, only this one group of people paid for reduced insurance premiums for all of us. What kind of message does that send to those suffering minor soft tissue injuries in motor vehicle accidents when their government makes them, and them alone, bear the cost of reducing insurance premiums?

What might the result have been had the *Kapp* approach — the approach mandated and used by the Supreme Court of Canada — been used? Once it is found that the law creates a distinction based on an enumerated or analogous ground, the *Kapp* approach asks (at para. 17) whether "the distinction creates a disadvantage by perpetuating prejudice or stereotyping?" The focus on perpetuating prejudice or stereotyping seems to narrow the concept of discrimination, but in this particular case, with stereotyping the type of discrimination at issue, that narrowing is of less concern.

Why were those suffering minor soft tissue injuries in motor vehicle accidents singled out? The trial judge found (2008 ABQB 98 at para. 205) that they "are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially" and (at para. 219) that they are stereotyped as "malingerers and fraudsters or that their pain is not real." Unlike other minor injuries caused by motor vehicle accidents which can be seen on an x-ray or other image, those suffering minor soft tissue injuries suffered from "invisible disabilities" (at para. 209). Thus, the trial judge concluded (at para. 255) that "discrimination results from the apparent message that Minor Injury victims' pain is worth less or is not 'real'."

The Court of Appeal, as already noted, did not disagree with the trial judge that soft tissue injury claimants were subjected to stereotyping enough to overturn him on this finding of fact. They did not discuss the stereotyping in much detail, merely noting (at para. 88) that the trial judge found that these claimants "are often viewed as malingerers who exaggerate their injuries or the effects of those injuries in an effort to gain financially." Otherwise the talk was all about "the" stereotype. And because the Court of Appeal held (at para. 102) that a different regulation (the DTPR) recognized that these soft tissue injuries were "real," the impugned MIR was "the antithesis of the perpetuation of the stereotypical soft-tissue victim who fakes or malingers his or her injury." In summary, the Court of Appeal seems to be saying that the stereotype is that the claimants are faking their injuries, but a regulation related to the challenged legislation acknowledges their injuries are real, and therefore the legislation not only does not perpetuate the stereotype but it fights against it and cannot be discriminatory.

However, in their consideration of *Law*'s fourth contextual factor — the nature and scope of the interest affected — the Court of Appeal found (at para. 133) that "the nature of the interest affected here is not of 'fundamental' societal or constitutional importance." The fourth contextual factor (according to *Law* at para. 74) recognizes that the more severe and localized the consequences of the distinction drawn by the law are on the claimants, the more likely it is that the distinction is discriminatory. The consequences of saying that only those suffering minor soft tissue injuries in motor vehicle accidents will have their non-pecuniary damages capped is

certainly localized. But the Court of Appeal held the consequences were not severe because they were not of fundamental societal or constitutional importance.

Why weren't they that important? The Court of Appeal gave two types of reasons. First, the Court said that this was not a case where the claimants were deprived of all types of compensation; they still could get damages for loss of income, cost of care and other pecuniary damages. With full costs of care covered, it is apparently alright to "moderate" non-pecuniary damages which are the law's mechanism for acknowledging the injured person's lost ability to enjoy activities important to them such as lifting a child (at para. 131). They hold (at para. 137) that the trial judge erred in concluding that damages for pain and suffering are of such fundamental societal significance that to interfere with them is indicative of discrimination. Why it is acceptable to cap damages for some people who can no longer lift their children up but not others is not stated. The use of one or more comparator groups here might have been helpful.

The second reason proffered was that there is a constitutionally valid cap on all non-pecuniary damages and because other partial caps in other provinces have been found constitutional. For the "other partial caps are constitutional" point, the court relied upon *Hernandez v. Palmer* (1992), 15 C.C.L.I. (2d) 187 and *Hartling v. Nova Scotia (Attorney General*), 2009 NSSC 2. However, the cap challenged in *Hernandez v. Palmer* was one that precluded all claims for all types of damages (pecuniary and non-pecuniary) where the nature of the injuries were not serious enough to pass the threshold, and in *Hartling* the statutory cap applied to all minor injuries and was not restricted solely to soft tissue injuries. Just because some caps on some types of damages have been found constitutional, does that really mean that no cap can raise an issue of fundamental societal or constitutional importance?

The Court does not consider whether the stereotyping suffered by those with soft tissue injuries might be at work in concluding that the nature of the interest affected by the cap was just not that important. Had they taken *Kapp*'s focus on stereotyping more seriously, the result might have been different. Is the only stereotype at work a stereotype that these injuries are not "real" and the person claiming to suffer them is therefore faking? Doesn't the stereotype of faking and malingering go towards exaggeration of injuries as well as pretending to have an injury? Isn't that sort of stereotype what allows people to trivialize soft tissue injuries?

Both the stereotype that soft tissue injuries are "not real" and that they are "exaggerated" can be seen in the excerpt from *Alberta Hansard* of April 7, 2004, where MLA Masyk stated, in the context of a debate concerning Bill 204 Insurance (*Accident Insurance Benefits Amendment Act, 2003*) (quoted in the trial judgment, 2008 ABQB 98 at para. 206):

> Mr. Speaker, it's noted at some point that when somebody gets in an accident, they open the glove box and there is already an inflatable collar. We have to discourage these things. This law suit based system for compensating auto injuries allows claimants to seek payment for uneconomic damages such as pain and suffering. So the rule of thumb is for lawyers and the claimant to calculate these losses at two or three times the claimant's economic losses. Economic losses are things like lost wages and medical expenses. Since pain and suffering awards are measured as a multiple of medical and wage losses, there's a powerful incentive to inflate one's claim of economic damages and pursue legal action. This should give all members a better idea of why insurance premiums have been going through the roof of late.

The first sentence relies on the "faking" stereotype. The second last sentence relies on the exaggeration stereotype. Is it possible that the Court of Appeal itself applied such stereotypes in finding (at para. 137) that damages for pain and suffering are not of such fundamental societal or constitutional significance that they cannot be capped for one particular, easily singled out group of persons injured in motor vehicle accidents?

It therefore seems to me that the claimants in this case could have won under the *Law* test (as they did in the Court of Queen's Bench) and they could have won under the approach set out in *Kapp*, but they could not win under a *Law*-lite test that jettisons human dignity and considers all of the factors normally included in a section 1 analysis.