

Landmark Alberta Court of Appeal decision upholds constitutionality of automobile insurance minor injury cap

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Stikeman Elliott Litigation Group members Alan D'Silva, Ellen Snow, Jonathan Levy and Sarah Clarke represented the appellant State Farm Mutual Automobile Insurance Company and their insureds in the case. Alan D'Silva presented the oral arguments on behalf of these appellants.

On June 12, 2009, the Alberta Court of Appeal released its landmark constitutional decision in *Morrow v. Zhang*, a case involving the appeal of a Court of Queen's Bench decision to strike down the *Minor Injury Regulation* (MIR) portion of Alberta's motor vehicle insurance regime. The MIR, a regulation under Alberta's *Insurance Act*, was part of a series of insurance reforms introduced in 2003 to regulate insurance rates and increase medical and rehabilitative care for automobile accident victims. The MIR imposes a \$4,000 cap on non-pecuniary damages for minor injuries, a limitation that the trial judge, Associate Chief Justice Wittman, found violated the equality rights provisions of section 15(1) of the *Canadian Charter of Rights and Freedoms* by discriminating against minor injury claimants.

The plaintiffs/appellants in the case were injured in separate automobile accidents and suffered soft tissue injuries that were considered minor injuries under the MIR. As such, they were not entitled to non-pecuniary damages in excess of \$4,000, notwithstanding that the trial judge assessed the plaintiffs' non-pecuniary damages as being greater than the legislative cap. In considering the constitutionality of the cap, the trial judge held that the differing treatment of those with injuries set out in the MIR and those suffering other injuries not falling within the MIR violates section 15 of the *Charter* and that the discrimination is not reasonable and demonstrably justified under section 1 of the *Charter*. In a unanimous decision, however, the Alberta Court of Appeal allowed the appeal and rejected the argument that the MIR violates section 15 of the *Charter*.

Appeal Decision

In its decision, the Court of Appeal considered whether the trial judge erred in his approach to section 15 by considering the impact of the MIR specifically, rather than the insurance scheme as a whole. In this regard, the Court of Appeal recognized that the trial judge's method of analysis was to assess only the MIR and then consider whether the other regulations offset the impact of the MIR. The Court of Appeal held that the approach adopted by the trial judge was in error and that a section 15 *Charter* analysis requires a court to assess the legislative scheme as a whole.

In considering the issue of discrimination, while the Court of Appeal accepted that the MIR distinguishes minor injury claimants from other automobile accident victims and held that this distinction is based on an enumerated section 15 ground (specifically, physical disability), it concluded that the

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distinction is not discriminatory in a substantive sense under Canadian law. The Court of Appeal deferred to the trial judge's finding that soft tissue injury claimants are the subject of stereotyping, but found that the legislation does not further or perpetuate negative stereotypes. Specifically, the Court of Appeal held that other parts of the legislative scheme, including the *Diagnostic and Treatment Protocols Regulation* (DTPR), provide for the assessment and treatment of MIR claimants. In the Court of Appeal's view, "the trial judge failed to assess the measures in the DTPR which promote and assist treatment. Legislation that provides for an individualized assessment of a claimant cannot normally be characterized as perpetuating a stereotype." The Court of Appeal found the legislative scheme as a whole provides for "an individualized process, which recognizes the reality of the claimants' injuries." Further, the Court of Appeal determined that the trial judge erred by only considering whether the MIR, rather than the legislation as a whole, considers the actual needs, capacities and circumstances of the claimants. The insurance reforms as a whole "correspond with the needs and circumstances of the claimants."

The Court of Appeal also accepted the appellants' arguments that damages for non-pecuniary losses can be limited by policy considerations as provided for by the Supreme Court of Canada's trilogy of cases on pecuniary damages (*Andrews, Arnold and Thornton*) and that the trial judge erred in concluding that non-pecuniary damages are of such social significance that to interfere with them is indicative of discrimination.

As such, the trial judge's finding that the MIR violated the equality provisions of the *Charter* was overturned by the Court of Appeal. Based on the foregoing, the Court of Appeal determined that although the trial judge did not err in finding that the MIR makes a distinction between minor injury claimants and those suffering other injuries and that this distinction is based on the enumerated ground of disability, the trial judge nonetheless erred in finding the distinction to be discriminatory. Rather, the insurance regime, when considered as a whole, responds to the needs of minor injury claimants and does not perpetuate pre-existing stereotypes or disadvantage.

The plaintiffs' cross-appeal respecting a potential infringement of section 7 of the *Charter* was also dismissed. The legislative scheme does not compel the plaintiffs to follow a certain course of action and, accordingly, there is no limit to the plaintiffs' rights under section 7 of the *Charter*. As the Court did not find a violation of section 7 or section 15 of the *Charter*, it did not need to consider section 1.

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