

**The Charter and Insurance Law –
The Implications of the Striking Down of Alberta’s Personal Injury Cap**

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In October of 2004 Alberta enacted amendments to its *Insurance Act* and a number of Regulations that collectively instituted a \$4000 cap on the amount of non-pecuniary damages an injured claimant could recover for minor whiplash injuries arising out of a motor vehicle accident (“the cap”). The cap’s constitutionality was challenged by two nominal Plaintiffs in a trial held in the Spring of 2007 in Calgary.

The Alberta Court of Queen’s Bench struck down the *Minor Injury Regulation* (“MIR”) on February 8, 2008 in a lengthy decision cited as *Morrow v. Zhang*, 2008 ABQB 98. The *Minor Injury Regulation* was found not to offend Section 7 of the Canadian *Charter* but it did offend section 15. This section of the *Charter* is frequently termed the “equality provision”. Justice Wittmann concluded that the MIR treated those with minor injuries as defined by the Regulation differently than those with other injuries arising out of motor vehicle accidents. In so doing, he stated:

“The evidence before me suggests strongly that Minor Injury victims, particularly those suffering from a whiplash associated disorder, are subjected to stereotyping and prejudice. In sum, they are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially. The fact that these injuries are often not objectively verifiable may contribute to this perception.” (at para. 205)

...

“By limiting the amount of non-pecuniary damages available to those suffering from Minor Injuries, the legislature has effectively categorized that group of injury victims as less worthy of non-pecuniary damages. The basis of this distinction is the type of injury from which they suffer ... As a result, the MIR perpetuates the unfortunate stereotype that I find exists in relation to Minor Injury victims.” (at para. 215)

In coming to his conclusion, Justice Wittmann did acknowledge the increase in Section B no fault benefits which came into place at the same time the MIR came into force. However, this was not sufficient to save the MIR.

Justice Wittmann had some rather harsh words about the Regulation and the insurance industry as a whole. For example, he stated:

“In my view, the MIR sacrifices the dignity of Minor Injury victims at the altar of reducing insurance premiums. Specifically, the message is that their pain is not as worthy of conventional non-pecuniary damages because of the nature of their injuries, despite that their injuries may be more painful and enduring than other types of injuries.”

The Alberta government has announced that it will appeal the decision and it remains to be seen what the Alberta Court of Appeal will say about the province’s experiment with a cap on minor injuries.

And at para. 241,

“In assessing whether the MIR meets the needs, capacities and circumstances of the claimant group, the reasonable person in the shoes of the claimant would be aware that, in effect, the Government has attempted to finance the resolution of what it perceived to be a[n insurance premium] crisis, on the backs of a discreet group of injury victims who are disabled as a result of a particular type of injury.”

Justice Wittmann also found that the MIR could not be saved by Section 1 of the Charter. In that analysis, Justice Wittmann did look at the other options the Government considered when enacting the MIR including that of adopting a definition of minor injury that applied to all injuries arising from motor vehicle accidents rather than limiting its application to whiplash associated disorders and the like.

He held that the appropriate remedy was nullification of the MIR as a whole. He declared it to be inconsistent with the Charter and of no force and effect. He declined to suspend the application of his decision as was requested by the IBC and instead, struck the MIR down immediately.

Justice Wittman’s decision has been appealed and the appeal is to be heard on September 12, 2008. The Crown and IBC applied to Justice Wittmann to stay the enforcement of his Judgment pending Appeal. His written reasons for not granting the stay can be found at *Morrow v. Zhang*, 2008 ABQB 125.

On the stay application, Justice Wittmann made some interesting comments with respect to his expectation as to what insurers would do with pending injury settlements that were affected by the Appeal of his decision. He stated that (at para. 35):

“The concern that settlements and damage awards by way of judgment, that exceed the cap, will occur prior to the disposition of the Appeal is really more of a theoretical, than practical, concern. First, it is up to the insurers and the Plaintiffs to decide whether to settle or not. Either party can just say no. Additionally, any settlement amount agreed upon in excess of \$4,000.00 could be paid into trust pending the outcome of the appeal. Or, a final settlement may occur in contemplation of the ultimate result of the Appeal. The point is, settlements are only made upon the consent of all concerned.”

He also felt it was unlikely that Plaintiffs would be inclined to press on with their claims in the face of the uncertainty regarding the future of the cap. He did not believe that Plaintiffs’ counsel would insist upon a Trial in the face of this uncertainty and he therefore expected that a stay, whether formal or informal, would be agreed upon in most outstanding cases.

Traditionally insurers need not be concerned with the Charter because in most instances policies of insurance are private contracts between insurers and their insureds that are drafted without government involvement. In those circumstances the Charter does not

apply. However, when a provincial government steps into the foray of drafting insurance legislation that insurers are then required to comply with, they must ensure that the Charter is not offended. The Alberta cap challenge case illustrates what can then occur if the Charter is not adhered to when the government drafts its legislation. Alberta auto insurers are now forced into a holding pattern awaiting the appeal and potentially, further appeal to the Supreme Court of Canada.

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