

Supreme Court of Canada Closes the Door on Minor Injury Cap

Canada's top Court weighed in December 17, 2009, on Alberta's legislated limit for recovery for soft tissue injuries by denying the Plaintiffs leave to appeal in *Morrow v. Zhang*. This decision marks the end of the road for Constitutional challenges to the troubled *Minor Injury Regulation* ("MIR") by individuals with soft tissue injuries from motor vehicle accidents.

The constitutional challenge was initially successful before Associate Chief Justice Wittmann (now Chief Justice Wittmann) at the Alberta Court of Queen's Bench. Justice Wittmann found that the MIR violated an injured plaintiff's right to equality under Section 15 of the Charter. Justice Wittmann held that the distinction between victims who sustained soft tissue injuries and those who sustained other injuries was discriminatory and that such a limit reinforced the stereotype that individuals so afflicted are malingerers. The Crown appealed on the grounds that Justice Wittman failed to consider the MIR in relation to the rest of the legislative scheme when conducting his Constitutional analysis. The MIR and related legislation were introduced in 2004 as a control mechanism for rising insurance premiums. The scheme also included the *Diagnostic and Treatment Protocols Regulation* ("DTPR"), which was intended to compliment the MIR by providing for individualized victim assessments and preauthorization for treatment. Justice Rowbotham for a unanimous Court of Appeal held that there was a clear

relationship between the MIR and the DTPR. As such, the cap on non-pecuniary damages was a justifiable concession and the regime would ensure immediate access to care without any interference from an insurer. Both Justice Wittmann and the Court of Appeal dismissed various arguments that the MIR violated the Plaintiffs' "life, liberty and security of person" rights under Section 7 of the Charter.

The MIR defines a "Minor Injury" as a sprain, a strain, or a Whiplash Associated Disorder ("WAD") injury caused by an accident that does not result in a serious impairment. Damages for such injuries are limited to the legislative amount, plus an allowance for inflation. The adjusted cap amount for general damages in 2009 was \$4,504.00; however, it should be noted that other heads of damages (lost wages, out of pocket expenses, etc.) are not affected by the MIR. With the final approval by the Supreme Court of Canada, the issue that arises now is establishing clearer criteria for what should be considered a "serious impairment" for the purposes of the MIR.

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