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## **Does MIR Infringe on a Respondents' Rights Under Section 15(1) of the Canadian Charter of Rights and Freedoms?**

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| <b>Reported Case:</b>           | <i>Morrow v. Zhang</i>   |
| <b>Citation:</b>                | 2009 ABCA 215  |
| <b>At Issue:</b>                | Did the trial judge err in finding that the Motor Injury Regulation (MIR) violates section 15(1) of the <i>Charter</i> ?<br>If the MIR is found not to have breached section 15(1), did the trial judge err by finding that the MIR does not violate section 7 of the <i>Charter</i> ?   |
| <b>The Court:</b>               | Alberta Court of Appeal  |
| <b>Judgment Rendered:</b>       | June 12, 2009  |
| <b>Factual Summary:</b>         | <p>The Motor Injury Regulation (MIR) imposed a \$4,000 cap on non-pecuniary damages for minor injuries caused by a motor vehicle accident. The insurance law reforms in Alberta were developed and implemented as a package. This was particularly true of the MIR and the Diagnostic and Treatment Protocols Regulation (DTPR), which were interrelated and interdependent.</p> <p>Morrow and Pedersen were injured in two separate automobile accidents. Zhang and Wei were, respectively, the driver and owner of the vehicle that struck Morrow. Morrow suffered soft tissue injuries to her neck and upper back as a result of an automobile accident in October 2004. Pedersen also suffered soft tissue injuries to her neck, shoulders, back and wrists from an automobile accident in March 2005.</p> |
| <b>Disposition Lower Court:</b> | <p>The trial judge found that were it not for the cap, the respondents would each be entitled to non-pecuniary damages in excess of \$4000. After considering the evidence of Morrow's and Pedersen's injuries, their effect on each woman's circumstance and the case law, the trial judge assessed general damages for pain and suffering for Morrow, in the amount of \$20,000, and for Pedersen, \$15,000. He then considered the constitutional challenge.</p> <p>The trial judge found that the MIR infringed the respondents' rights under section 15(1) of the <i>Canadian Charter of Rights and Freedoms</i>, and was not justified under section 1. The trial judge also found that the MIR did not infringe section 7 of the <i>Charter</i>.</p>  |
| <b>Appellate Decision:</b>      | Appeal by the defendants, Zhang and Wei, from the trial judge's finding that the Motor Injury Regulation (MIR) infringed the plaintiffs' rights under section 15(1) of the Charter allowed. Cross-appeal by the plaintiffs, Morrow and Pedersen, from the trial judge's finding that the MIR did not infringe section 7 of the Charter dismissed.  |

The MIR, when considered with the entire scheme of insurance reforms, did not infringe section 7 or 15(1) of the Charter. While the legislation did make a distinction on the basis of disability, it was not discriminatory. The legislative scheme, as a whole, responded to the needs and circumstances of those suffering minor soft tissue injuries.

Based on the decisions of the Supreme Court of Canada in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, the Alberta Court of Appeal held that when the Court considered a section 15(1) challenge to a section or to one part of a legislative scheme, it was required to consider the whole scheme. The trial judge therefore erred when he constitutionally assessed only the MIR.

Although the trial judge did not err in finding that the MIR made a distinction between minor injury claimants and those suffering other injuries from motor vehicle accidents, and that this distinction was based on the enumerated ground of disability, he erred in finding that this distinction was discriminatory.

In answering the question of whether the legislation met the needs and circumstances of the plaintiffs, the trial judge failed to assess the medical benefits provided to minor injury claimants in exchange for their reduced damages for pain and suffering.

The Court agreed with the Crown that the package of insurance reforms had a number of purposes borne from a legitimate concern with the affordability of insurance, the potential increase in uninsured drivers, and the failure of those who suffered soft tissue injuries to access the treatment they needed. The legislative regime met the needs of claimants by enabling treatment by a personal physician and removing the requirement to pay up front.

The trial judge also erred in concluding that damages for pain and suffering were of such fundamental societal significance that to interfere with them was indicative of discrimination. Given that full costs of care are awarded, damages for pain and suffering can be moderated by policy considerations.

The trial judge did not err in finding that the plaintiffs' claim constituted an attempt to assert an economic right which was outside the ambit of the protections afforded by section 7 of the Charter. The MIR was not coercive, did not prevent claimants from refusing medical treatment, it did not restrict a health care practitioner's discretion and it allowed claimants to choose treatments outside of the legislative regime.