CANADIAN BAR ASSOCIATION: PERSONAL INJURY

CASE COMMENT AND UPDATES

JANUARY 2012 – MAY 2012

Sparrowhawk v. Zapoltinsky, 2012 ABQB 34

***Note*: At the time of preparation of this summary, this decision has not yet been judicially considered or applied.**

Jaw – Temporomandibular joint – Minor injury – Sprain – Strain

In *Sparrowhawk v. Zapoltinsky*, 2012 ABQB 34, Justice Shelley tackled the interpretation of the *MIR* in the context of determining whether a jaw injury is a "minor injury". The plaintiff was injured in an accident and suffered injury to his jaw and mouth. At trial, there was significant debate about whether the jaw injury, referred to as a temporomandibular joint disorder (TMD), was a sprain, strain or WAD such that it fell into the category of a minor injury. The interpretation of "serious impairment" also arose in the decision as the plaintiff continued to have daily jaw pain six years after the accident. At the time of trial, the plaintiff was no longer eating hard or chewy foods and experienced pain with yawning. He stated that he no longer participated in some sporting activities that he formerly enjoyed and that his speech was less distinct.

Justice Shelley heard from both physicians and dentists regarding the injury, and from dentists specifically regarding the nature of the injury and whether the temporomandibular joint, which is made up of bone, cartilage and ligament components, is a single integrated unit or not. There was also testimony about the appropriate treatment for TMD injuries. Based on this testimony, Justice Shelley concluded at para. 46 that:

- TMD injuries are not WAD injuries;
- dentists are experts who assess, evaluate and treat TMD injuries;

- the terms sprain and strain are not used by dentists in relation to TMD injuries; and
- some of the treatments for sprains and strains in the *DTPF* have no application to TMD and mouth injuries.

Justice Shelley also concluded that based on the evidence the plaintiff had suffered temporomandibular cartilage damage.

In terms of the interpretation of the *MIR*, Justice Shelley found that letters from the Minister of Finance relating to the operation of the *MIR* carried no weight in interpreting legislative intent. Justice Shelley then turned to the legislative scheme set out in the *Insurance Act*, *MIR* and *DTPR* to interpret the proper meaning to be given to various terms in the legislation.

Justice Shelley determined that the plaintiff's TMD injury was not a minor injury on three bases: 1) that the injury was not a sprain, strain or WAD, 2) that the injury caused serious impairment, and, 3) that the minor injury scheme does not include dental injuries. Each finding will be discussed in turn.

Not a Sprain Strain or WAD

Justice Shelley found that as cartilage is not a muscle, tendon or ligament, injury to the cartilage is therefore not a sprain or strain according to the *MIR*, s.1 and *DTPR* s.1. The experts agreed that a TMD is not a facet of a WAD injury, so that was not seriously in dispute, but it was noted that jaw pain was not described as a symptom of a WAD I or II injury in the *DTPR*.

Injury Caused Serious Impairment

Justice Shelley found that there are five steps involved in determining whether an injury causes serious impairment, at para. 96:

1. whether a physical or cognitive function is impaired;
2. whether a sprain, strain or WAD injury is the "primary factor contributing to the impairment";
3. does the impairment cause substantial inability to perform:
    a. essential work tasks,
    b. essential facets of training or education, or
    c. "normal activities of the claimant's daily living;
4. whether the impairment has been "ongoing since the accident", and
5. whether the impairment is not expected to "improve substantially"

Justice Shelley found that points one and two were met as there was physical impairment of the jaw and no evidence of a pre-existing condition.

On point three, Justice Shelley turned to case law from Ontario to help define "substantial inability", though it was noted that the language in the schemes is slightly different. Justice Shelley found that a "substantial inability" requires "something more than trivial interference and something less than a complete disability", at para. 107. Justice Shelley also agreed with Ontario's contextual approach to the issue and that "injury should be evaluated broadly when evaluated for its effects on commonplace, day-to-day activities", at para. 111. Further, the evaluation of "an activity of daily living" is interpreted broadly, but in the context of the particular injured person. The subjective component relates to the fact that people do not all carry on the same daily activities. "Activity" was also clarified to include social activities, intimacy and recreational pursuits, and is not limited to physical actions. Justice Shelley concluded her discussion on the point at para. 113 by finding that "substantial inability" exists where an injury:

1. prevents an injured person from engaging in a "normal activity of daily living",
2. impedes an injured person's engaging in a "normal activity of daily living" to a degree that is non-trivial for that person,
3. does not impede an injured person from engaging in a "normal activity of daily living" but that activity is associated with pain or other discomforting effects such that engaging in the activity diminishes the injured person's enjoyment of life.

The plaintiff's difficulty and significant pain in chewing food and yawning were found to be normal activities of daily living and the threshold of a substantial inability was met.

On point four, the meaning to be given to an "ongoing" impairment was interpreted again in light of the Ontario law. The impairment must not be continual to be "ongoing", but may also be intermittent but persistent over time. The plaintiff again met this criteria.

On point five, Justice Shelley interpreted "substantial improvement" to mean that "the dysfunction cannot be expected to improve to such a degree that the 'substantial inability' will cease', at para. 102. Therefore, an injury can improve, or be expected to improve, but not to the point where it would no longer meet the definition of a 'substantial inability' as discussed in point four. The plaintiff was also able to meet this test on the facts as at best his injury may stabilize, but he would always experience jaw pain and difficulty with tasks such as eating, yawning and speaking.

Minor Injury Scheme Does Not Include Dental Injury

Justice Shelley concluded that the minor injury scheme does not include dental injuries as the *MIR* and *DTPR* have no provision for dentists to act as certified examiners, health care professionals or injury management consultants. These positions are required for the diagnosis and treatment of minor injuries, suggesting dental injury is not meant to be part of the scheme as only dentists are able to diagnose and treat dental injuries appropriately.

Although these findings were sufficient to conclude the issue at trial, Justice Shelley also commented on an argument from counsel that the legislation lacked clarity and was too vague, to the point that its constitutionality could be in question. Although Justice Shelley found that expert evidence would be needed to determine such an issue, a number of comments were made to suggest that there are significant deficiencies in the definitions and references to medical classification given to "sprain" and "strain" in the legislation. It was also noted that the inter-related nature of many injuries will make it difficult to apply the definitions. In the end, Justice Shelley made the following observations on these points, at para. 187:

1. the scope of "sprains" and "strains" is potentially extremely broad, and the relevance of the terms "sprain" and "strain" is uncertain in evaluating what kinds of injuries are potentially minor injuries;

2. the relevance and application of the International Classification of Diseases is not clear and obvious;

3. the *DTPR*, s. 11(2) table to evaluate sprain severity does not apparently address tendon injuries;

4. the *DTPR* ss. 7(2) and 11(2) tables, to evaluate sprain and strain severity, may omit certain injury mechanisms, and the implication of those omissions is uncertain; and

5. there may be circumstances where an injury to a muscle, tendon, or ligament cannot be viewed in isolation:

    a. due to the close integration of the muscle, tendon or ligament in a larger anatomical structure, or
    b. as the injury occurs at an interface between the muscle, tendon or ligament, and a different kind of body tissue.

This decision will clearly be of importance in future decisions relating to the interpretation of "minor injury".

***Chisholm v. Lindsay*, 2012 ABQB 81; supplementary reasons, 2012 ABQB 349**

Head injuries – Jaw – Brain damage – Leg injuries – Knee – Psychological injuries – Post-traumatic stress disorder

In 2005, Chisholm, a teacher of children with special needs, suffered injuries when her stationary vehicle was struck from behind. The force of the collision drove her vehicle into two other vehicles. Liability was admitted.

In the accident, Chisholm sustained injuries to her temporal mandibular joint, neck and spine. She suffered a meniscus injury to her knee, a nerve root compression and a strained wrist.

Chisholm was involved in another accident in January 2010 and this aggravated her knee injury.

Upon a review of the medical and other professional evidence, the Court confirmed that Chisholm developed TMJ dysfunction as a result of the 2005 accident. The symptoms persisted to the present. Chisholm was also found to have suffered a mild traumatic brain injury and post-traumatic stress disorder from the accident.

According to the Court, there was nothing in her history to indicate that Chisholm was a crumbling skull plaintiff. She was, however, less capable as a result of the 2005 accident.

The Court also stressed that the 2010 accident aggravated the pre-existing injuries from the 2005 accident. It was not the cause of Chisholm's current symptoms.

Chisholm was awarded general damages in the amount of $90,000, as well as $125,000 for loss of future earning capacity, $45,000 for cost of future care, and $35,000 for future loss of housekeeping capacity.

In the supplementary reasons Kenny J. dismissed the defence argument that any medical benefits the plaintiff was entitled to, as they related to the award of future care cost, must be deducted from the cost of future care pursuant to s. 626.1(4)(b) of the *Insurance Act*. She held that the legal obligation to make the payments or provide the benefits must be established or acknowledged before the award. Further, even if established, the defendant would have to establish that there was a legal obligation to provide the benefits in the future regardless of whether a benefit plan was in existence at the time the costs of care were incurred. The cost of premiums would also have to be addressed. [Kenny J.]

***Paniccia Estate v. Toal*, 2012 ABQB 11**

Civil procedure – Judgments and orders – Amendment, rescission and variation before judgment entered – Costs – Solicitor and client or substantial indemnity — For improper conduct

Here, the deceased patient developed and died from stomach cancer ten months after diagnosis. The patient, and later his estate, and family successfully brought action against the physician.

The trial judge held that the physician's negligence caused the patient to die of stomach cancer six months earlier than if he had received timely diagnosis. However, paragraph 47 of the trial decision stated that the *Fatal Accidents Act* did not operate where there was negligence and as result a person dies for certain cause, but at earlier rather than later date.

As a result, after release of the trial decision the defendant physician refused to pay the defendants bereavement damages under the Act and certain special damages related to alternative therapies the patient underwent.

In a post-trial application, the parties made submissions as to whether the trial decision required revision or clarification and the Court concluded that paragraph 47 of the

decision was to be deleted. The Court further ruled that the physician was responsible to pay the agreed upon sum of damages.

The defendant's challenge to special damages was not entertained as, according to the Court, it constituted impermissible litigation by installment. In fact, the Court went on to rule that the timing and nature of the defendant's raising of the special damages issue justified an award of elevated costs on a solicitor and client basis in respect of the issue. [Shelley J.]

***Bridge v. Fournier*, 2012 ABPC 106**

Damages – Limiting Factors – Contributory Negligence – Physical injuries – Massage

While driving her vehicle on a snow-covered road, the plaintiff signaled her intention to turn left. She then pulled out to the right because she believed the defendant was intending to pass her on the left. The plaintiff was struck by the defendant, who had quickly closed the gap between the two vehicles after the plaintiff signaled left.

As it was impossible to quantify what portion of blame each party should bear, liability was apportioned equally. The defendant was ordered to pay damages of $2381 for car repairs and massages taken to limit the physical effects of the accident. [Barley Prov. Ct. J.]

***Cory v. Bass*, 2012 ABCA 136**

Appeals – Health care professionals – Liability (malpractice) – Negligence – Duty to warn regarding risks of treatment and products – Informed consent – Gallstones – Perforated bowel

This was an appeal by the defendant surgeon from an award of damages for personal injury resulting from medical negligence. The appellant was a gastroenterologist who

had practiced in Alberta since 1982. The respondent had a history of epigastric pain that ultimately led to the removal of her gallbladder.

In August 2005, the respondent met with the appellant after experiencing abdominal and chest pain. Based on the respondent's history, the appellant diagnosed gallstones in the common bile duct and arranged for an Endoscopic Retrograde Cholangiopancreatography Procedure ("ERCP") on an urgent basis.

The appellant performed the ERCP on September 19, 2005. During the procedure however, the respondent's duodenum was perforated. She developed severe and necrotizing pancreatitis and sepsis which required several surgeries and lengthy hospital stays. She continued to suffer from biliary colic attacks like those she suffered before the surgery.

The respondent commenced an action against the appellant alleging that he was negligent in failing to perform less invasive diagnostic tests prior to recommending the ERCP and that he did not obtain the respondent's proper and informed consent prior to the ERCP.

The trial judge (2011 ABQB 360) allowed the action in part, finding that it was possible that the appellant's diagnosis was incorrect and that his conduct fell below the standard of care as he failed to fully explain the material risks and alternative options of the procedure. The trial judge further found that the respondent would have opted for one of the two alternative diagnostic tests and, but for the appellant's failure to properly outline the material facts and risks involved in the ERCP procedure, the respondent would not have proceeded with the ERCP without further diagnostic testing.

Ultimately, the trial judge concluded that the lack of informed consent was a cause of the injury as, with informed consent, the injury could have been avoided. Non-pecuniary damages of $100,000 were awarded, but reduced to $90,000 for failure to mitigate. The plaintiff was also awarded $20,912 for past loss of earnings, but the claim for future loss of income was denied as there was no evidence of any impediment to future employment.

An amount of $18,238 was also awarded for special damages related to medical and other miscellaneous expenses.

On appeal, the appellant argued that the trial judge erred in failing to determine the standard of care applicable to the diagnosis of common bile duct stones, erred in finding that the appellant had an obligation to inform the respondent of other diagnostic tests, and made several errors of fact.

In dismissing the appeal, the Court opined that while the trial judge's analysis of the duty to diagnose could have been more clearly expressed, his ultimate conclusion was not flawed. Furthermore, while his reasons did not include a clear finding of whether the appellant breached the duty to diagnose, it was not fatal given that the trial judge ultimately based his decision on the appellant's failure to obtain the respondent's informed consent to treatment.

The fact that additional information might have been obtainable through diagnostic testing was material information that should have been provided to the respondent to enable her to make a fully informed decision as to treatment. The trial judge's conclusions that the respondent would have postponed the ERCP to seek further information had she been properly advised of the potentially serious risks of the ERCP and the alternative tests were grounded in the evidence and were wholly within the purview of the trier of fact.

Moreover, the trial judge made no palpable or overriding errors of fact that warranted intervention, or any errors made were not factual matters that would have affected his conclusions on informed consent. [Côté, Paperny and O'Ferrall JJ.A.]

***Malinowski v. Schneider*, 2012 ABCA 125**

Appeals – Health care professionals – Liability (malpractice) – Negligence – Duty to warn regarding risks of treatment and products – Informed consent – Spine – Disc injury – Neurological conditions (Cauda Equine Syndrome)

The appellant, a chiropractor, appealed a trial decision (2010 ABQB 734, supplementary reasons at 2011 ABQB 260) finding him liable in negligence for damages suffered by his patient, Malinowski. The trial judge held that the appellant's chiropractic adjustments to the respondent while he was suffering a disc injury caused the respondent to develop Cauda Equina Syndrome, an extremely serious, albeit rare, neurological condition which often results in permanent nerve impairment in the lower abdomen and legs.

The trial judge further found the appellant did not obtain the informed consent of the respondent. She found that he had failed to advise Mr. Malinowski of the limited but serious risk of CES that could result from spinal manipulation where disc damage was involved. She also found that the appellant breached the requisite standard of care in undertaking a more limited examination of Mr. Malinowski in the early days of the injury.

Upon a review of the trial judge's reasons, the Court of Appeal ruled that appellant had failed to establish any error on her part that would warrant appellate intervention. The original damages award was thus not disturbed. That award included non-pecuniary damages of $158,000.00; damages for past and future income losses; past loss of housekeeping capacity of $38,130.00 between June 1, 2002 and December 31, 2006, and $96.54 per month between January 1, 2007 and the trial; future loss of housekeeping capacity; future cost of care costs; and, WCB costs of $126,500. [Berger, Paperny and Rowbotham JJ.A.]

***Dares v. Newman*, 2012 ABQB 328**

This matter involved the entitlement to damages for grief and loss of the guidance, care and companionship of a deceased person under the *Fatal Accidents Act*, R.S.A. 2000, c. F-8, as amended by S.A. 2000, c. 6.

The Applicants – who were the children of the deceased driver's common law partner – sought to clarify the class of people who are eligible to claim bereavement damages under section 8 of the *Fatal Accidents Act*. Specifically, the Court was asked to determine whether the reference to "child" under section 8 entitles stepchildren, or children to whom a deceased stands *in loco parentis*, to receive bereavement damages and whether, in the event it does not, the current provision is unconstitutional on the basis that it unfairly discriminates between a biological child and a stepchild, contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

Upon a detailed analysis of the history, intention and effect of section 8 of the Act, the Court concluded that the provision does not include "stepchildren" in the class of recipients entitled to receive compensation under the Act. According to the Court, bereavement damages under the Act are not intended to perfectly and proportionately compensate everyone who experiences a loss. Rather, because it would be impossible to compensate all who might grieve, section 8 must (and does) strike a balance between compensation, efficiency, and proof of damages.

The Court then went on to conclude that failure to include stepchildren or children for whom the deceased stood *in loco parentis* in the definition of "child" under the Act was not discriminatory under section 15(1) of the *Charter*. This was due to the fact that the Applicant failed to establish that the characteristic of being a stepchild gave rise to the denial of equal treatment. The application was thus dismissed.

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