

## PUBLICATION

### Sparrowhawk Decision - Minor Injury Update

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The Court of Queen's Bench of Alberta has recently rendered a trial decision that, after more than 7 years of ambiguity, finally provides some judicial guidance respecting the applicability of the Minor Injury Regulation to dental and chronic pain injuries. In the decision of *Sparrowhawk v. Zapoltinsky*, 2012 ABQB 34, the main issue was whether a jaw/tooth injury caused by a motor vehicle accident was a "minor injury" as defined by Minor Injury Regulation (MIR) and Diagnostic Treatment Protocol Regulation (DTPR). In addressing that issue, the Court also provided insight as to what constitutes a "significant impairment" for the purposes of the MIR.

#### BACKGROUND

The plaintiff was involved in a car accident in March of 2005 where his vehicle was totalled. He was diagnosed with temporomandibular joint disorder (TMD) arising from the accident. As part of his TMD he had grinding problems which caused wear and damage to his teeth (bruxofaceting), daily jaw pain, less distinct speech, and had to restrict his diet, and his physical activities. Though he was given a splint to address his jaw symptoms, he did not use it because he found it painful. The quantum of damages was agreed upon before trial, so the only issue for the Court to decide was whether a TMD injury fell within the definition of a "minor injury".

#### DECISION

Justice Shelley of the Court of Queen's Bench, concluded the plaintiff's TMD injury was not a minor injury for three separate reasons:

1. The injuries were not sprain, strains or WAD injuries The Court determined that a minor injury as defined by the MIR and the DTPR is any sprain or strain injury to a muscle, ligament or tendon, or any grade I or II whiplash associated disorder (WAD) injury, which does not cause "serious impairment". The structures of the jaw which were injured or damaged in this case were cartilage and teeth, which were not muscles, ligaments or tendons as contemplated by these regulations.

2. The injuries caused serious impairment The MIR and DTPR have always provided that even if an injury otherwise falls into the definition of a minor injury at its initial diagnosis, it will not be considered a minor injury if it ultimately causes "serious impairment". A serious impairment exists where the injury is the primary factor in causing a "substantial inability" to perform the essential tasks of the claimant's employment, education or normal activities of daily living, and is not expected to improve substantially. Justice Shelley concluded that a

"substantial inability" exists wherever an injury:

- i. Prevents an injured person from engaging in a normal activity of daily living, or
- ii. Impedes an injured person's engaging in a normal activity of daily living to a degree that is non-trivial for that person, or
- iii. 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.

With respect to not improving substantially, Justice Shelley found that it need not be shown that there will be no improvement at all, only that any improvement will not be enough to negate the substantial inability.

### 3. The Minor Injury scheme does not include dental injuries

The Court took note of the fact that the relevant legislation made no provision for dental experts to evaluate minor injuries, or to complete the AB forms associated with the minor injury protocol, or to act as certified examiners, health care professionals or injury management consultants within the definitions contemplated by these regulations. Accordingly, Justice Shelley concluded that any injury that is principally treated by a dentist, such as TMD or tooth injuries, is never a minor injury.

This case is an important development in the way the MIR and DTPR are interpreted and applied in Alberta. It makes the clear point that dental and jaw injuries are not caught by the compensation limits set out in those regulations. It also very probably excludes those who suffer from any kind of chronic or long-term pain syndrome. Therefore, it is now more important than ever to put your patients who are suffering from symptoms like this in touch with informed legal counsel to properly address their legal position. Injuries which were once thought to be caught by the MIR and DTPR may no longer be so restricted, and it takes the knowledge of experienced legal counsel to determine when an individual's claim is viable to proceed.

This decision also re-enforces the importance of timely diagnosis and the on-going engagement of qualified caregivers in the recovery process. The Personal Injury Group at McLeod Law is among the largest Plaintiff oriented personal injury practices in southern Alberta, and we are eager to work with you to produce the best result for your patients and our clients.

For more information on the Sparrowhawk decision, or if you have any other questions about the Minor Injury Regulation or Diagnostic and Treatment Protocol Regulation, please feel free to contact any member of the Personal Injury Group at McLeod Law