

# Tipping the balance

*An Alberta trial decision could shake the foundation of no-fault insurance legislation.*

By Ann Macaulay

**T**he decision earlier this year by the Alberta Court of Queen's Bench that the province's \$4,000 cap on soft-tissue injury claims violates the Charter rights of injured Albertans is a setback for the insurance industry, for which this and similar legislation helps keep damages awards under control. But it's a huge victory for trial lawyers, who have opposed the law on the grounds it denies fair compensation to victims of automobile accidents.

"The Canadian Bar Association commends the decision," says Edmonton lawyer Tom Achtymichuk, a past president of the CBA's Alberta branch and a member of the CBA's Working Group on No-Fault Compensation. "We strongly believe that it is every Albertan's right to access the justice system to determine fair compensation for their injuries." The Alberta government has announced that it is appealing the decision.

In his lengthy February decision *Morrow v. Zhang*, 2008 ABQB 98, Associate Chief Justice Neil Wittmann ruled that Alberta's Minor Injury Regulation (MIR), which has capped non-pecuniary damages for minor injuries at \$4,000 since October 2004, is unconstitutional.

The judge calculated the damages that plaintiffs Peari Morrow and Brea Pedersen would have received if the MIR did not apply. The two women had been in separate car accidents in 2004 and 2005, respectively, and each suffered several soft-tissue injuries, including neck and upper-back injuries. Justice Wittmann awarded Morrow damages of \$20,000 and Pedersen \$15,000.

The judge then wrote an overview of auto insurance in Canada and examined the context of the automobile industry in Alberta before reforms took place. He subsequently delved into the Charter issues under ss. 7 and 15, and found that the plaintiffs' rights under s. 7 were not violated as a result of the MIR.

But Justice Wittman did find that the MIR violates s. 15(1): "a reasonable and dispassionate person...would conclude that the MIR is demeaning to the dignity of that group and would make them feel less worthy as human beings, or less worthy of full participation or protection in Canadian society."

He wrote that 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 evidence strongly suggests that "minor injury" victims, those with a whiplash-associated disorder, are subjected to stereotyping and prejudice, said the judge. "In sum, they are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially.

"[T]he deleterious effect of furthering a prejudice against a defined group on the basis of a disability and burdening that group with the lion's share of reducing mandatory insurance premiums, outweighs the reduced premiums that have resulted for Alberta drivers."

**"The MIR sacrifices the dignity of minor injury victims at the altar of reducing insurance premiums."**

— Associate Chief Justice Neil Wittman

## en assurance sans égard à la responsabilité?

### *Justice rendue!*

#### Une décision rendue par l'Alberta ébranle la législation sur l'assurance sans égard à la responsabilité.

La décision récente rendue par la Cour du Banc de la Reine de l'Alberta, selon laquelle la limite de 4 000 \$ sur les réclamations portant sur les lésions des tissus mous, violent la Charte des droits des Albertains blessés, constitue un recul considérable pour l'industrie de l'assurance. Désormais, celle-ci ne pourra plus compter sur cette restriction pour garder les dommages-intérêts sous contrôle. Mais pour les avocats, il s'agit d'une immense victoire!

« L'ABC se réjouit d'une telle décision », indique Me Tom Achtymichuk, avocat à Edmonton, ancien président de l'Association et membre du Groupe de travail sur l'indemnisation sans égard à la responsabilité de l'ABC. « Nous sommes convaincus que chaque Albertain a le droit d'avoir accès à un système de justice qui déterminera une juste compensation pour ses blessures ».

Dans *Morrow c. Zhang ABFQ 98*, rendue en février, le juge en chef adjoint Neil Wittmann a statué que

la réglementation restrictive en matière de blessures mineures était inconstitutionnelle.

Une compensation a été accordée rétroactivement à deux victimes de lésions des tissus mous, touchées au cou et au bas du dos. Les deux femmes ont obtenu respectivement 20 000 \$ et 15 000 \$.

Le juge Wittmann a conclu que le règlement portait « atteinte à la dignité des victimes de blessures mineures en les sacrifiant sur l'autel de la réduction des primes d'assurance. » Il a ainsi rejeté le message selon lequel la douleur, même difficile à supporter, ne mérite pas d'être dédommée en raison de la nature de telles blessures.

Le juge renchérit que ces victimes subissent un préjudice et qu'elles sont jugées à tort comme des faux-malades qui exagèrent leurs maux sous prétexte d'obtenir des gains financiers.

#### Un impact à l'échelle nationale

La décision a retenu l'attention des avocats d'autres provinces canadiennes, surtout que le Nouveau-Brunswick, l'Île du Prince-Édouard et la Nouvelle-Écosse permettent tous l'imposition d'un plafond de 2 500 \$ de compensation. Au Nouveau-Brunswick, dans plus de 250 cas, on conteste la constitutionnalité de cette restriction.

Me Richard Halpern, président de l'*Ontario Trial Lawyers Association*, croit pour sa part que la limite imposée dans sa province de l'Ontario ne sera pas maintenue.

Selon lui, il serait préférable de chercher un compromis sur la question en négociant avec le gouvernement, et en faisant participer l'industrie de l'assurance et les avocats qui représentent les victimes d'accidents.

Me Achtymichuk a hâte que la restriction de 2004 disparaisse au Canada. Il ajoute: « Nous pensons que l'ABC a un rôle à jouer en tant que porte-parole des victimes dont les droits fondamentaux sont violés ». ■

— Yasmina El Jamaï

#### National impact

Lawyers in provinces with similar caps on soft-tissue injuries are watching the Alberta decision with great interest. New Brunswick, Prince Edward Island and Nova Scotia all have \$2,500 caps on recovery for non-pecuniary losses.

In New Brunswick, there are more than 250 cases before the courts challenging the constitutionality of the 2003 cap on soft-tissue injuries, says personal injury lawyer Stéphane Viola of Bossé Viola LeBlanc in Moncton. He says the province's attorney general will ask the court to stay the proceedings for all past and future cases that raise constitutionality, and will choose a few test cases to challenge the legislation.

But Viola disagrees with that approach, saying that the government of New Brunswick should act now, since the challenge could drag out for a long time if it ends up going all the way to the Supreme Court of Canada. "Putting your head in the sand and waiting for the court to decide it can take years," he says, which will "prolong the possible prejudice to the population."

*Morrow's* impact is also being felt in other jurisdictions across the country. Richard Halpern, a partner at Thomson Rogers in Toronto and president of the Ontario Trial Lawyers Association, believes that the reasoning in the Alberta decision could apply to other provinces, and says that if the Alberta cap is unconstitutional, then the Ontario

threshold and deductible is as well.

Foreseeing multiple decisions across Canada that will challenge the constitutionality of these provisions, Halpern says that "we will have to launch our own constitutional challenge in Ontario to challenge the legislation." He believes the best solution will lie in a negotiated outcome with government, and with cooperation between the insurance industry and lawyers who represent accident victims.

Halpern is a member of several lawyers' groups that are working on insurance reform and is involved in discussions at both the national and provincial levels in pursuit of legislative change. In Ontario, "we're trying to make the Liberal government understand that the appropriate thing here for the insurance industry, for the public, is to reform auto insurance and to do it now," he says.

"What the Alberta decision tells us is that if you have to control premiums, if you want to control costs, it isn't off the backs of innocent accident victims, because that's discriminatory, and there has to be a better way."

Achtymichuk adds: "We think there is a role for the CBA to play: somebody has to speak out for injury victims who are having their fundamental rights and freedoms infringed." ■

**Ann Macaulay** is a Toronto freelance writer. Her previous article for *National*, on class actions, appeared in our March 2008 issue.