Minor Injury? I Don't Think So!

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"The more corrupt the state, the more numerous the laws."
- Tacitus

Introduction

The aim of this paper is to provide an overview of Alberta's *Minor Injury Regulation* and a comparison with the parallel legislative schemes in New Brunswick, Nova Scotia and Prince Edward Island. The purpose of the *Minor Injury Regulation* is to limit the recovery of a plaintiff for pain and suffering relating to "minor injuries" sustained in a motor vehicle accident. In effect, this has limited the discretion of the judiciary in assessing damages and seems to fly in the fact of the core principle underpinning tort law, *restitutio in integrum*.

After a brief review of the legislation, the paper will canvas the three seminal decisions which inform the application of the *Minor Injury Regulation* in Alberta today. Following this, a comparison of the Alberta legislation with that of the Maritime Provinces will allow for a better understanding of where the régimes differ and the possibilities for cross jurisdictional application. Finally, lessons and strategies learned in Alberta for getting outside of the cap will be discussed with the hope that they will aide in maximizing recovery for Atlantic claimants.

As Newfoundland and Labrador does not currently have regulations in place which restrict minor injury damages in motor vehicle accidents (though, there is a $2,500 deductible), the legislation

in Newfoundland and Labrador will not be discussed. However, the popularity of insurance reform amongst insurers make the implementation of minor injury legislation in Newfoundland and Labrador a distinct possibility.

Insurance Reform in Alberta

On October 1, 2004 the Alberta legislature passed new legislation which, amongst other things, set a $4,000 cap on the general damages for pain and suffering that could be recovered by a Plaintiff for "minor injuries" arising from a motor vehicle accident.

This legislation came as part of a series of statutorily imposed insurance reforms which consisted of the *Minor Injury Regulation*, Alta Reg 123/2004 ("MIR"), the *Automobile Insurance Premiums Regulation*, Alta Reg 124/2004 and the *Diagnostic and Treatment Protocols Regulation*, Alta Reg 122/2004 ("DTPR"), all of which are enabled under the *Insurance Act*, RSA 2000, c I-3 (the "Act"). The intent was to lower mandatory automobile insurance premiums by 1) reducing compensation for most soft tissue injuries; and 2) reducing the number of soft tissue claims by getting injured plaintiffs into earlier treatment.

These reforms were significant as they created, for the first time in Alberta, a cap on soft tissue and other minor injuries arising from a motor vehicle accident. Since their inception in 2004 and subsequent confirmation by the Alberta Court of Appeal in 2009, the reforms have created a hurdle for plaintiff's lawyers trying to avoid the limitations on the plaintiff's compensation. As well, the reforms have created a challenge for the judiciary as it applies an often vague piece of legislation that has the ultimate effect of curtailing their judicial discretion to award damages for pain and suffering.

The most important element of the MIR is the limit it places on "minor injuries", which are defined in the regulations as;

> "Minor Injury" in respect of an accident means:
> i. a sprain;
> ii. a strain; or
> iii. a WAD injury;
> caused by that accident that does not result in a serious impairment.[1]

Essentially, the limits to recovery set by the MIR apply to soft tissue related injuries[2] that do not result in a serious impairment. Additionally, WAD injuries are not capped if the plaintiff has a fractured spine, dislocated spine or "objective, demonstrable and clinically relevant neurological signs."[3] Minor injuries that result in a serious impairment are not subject to the MIR and therefore the damage awards are not limited by the cap. A "serious impairment" is later defined as

> "serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function
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> (i) that results in a substantial inability to perform the
>
> (A) essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,
>
> (B) essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or

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[1] Minor Injury Regulation, Alta Reg 123/2004, s.1 (h)
[2] Ibid, s.1 (k), s.1 (l)
[3] Ibid, s.1(n)

(C) normal activities of the claimant's daily living,

(ii) that has been ongoing since the accident, and

(iii) that is expected not to improve substantially;[4]

The maximum recovery allotted under the MIR for minor injuries is $4,000[5], adjusted annually to account for inflation.[6] For motor vehicle accidents occurring on or after January 1, 2013 the maximum amount that can be recovered in Alberta for a minor injury is $4,725.

The purpose of the DTPR is to inform treatment providers on the diagnosis, evaluation and treatment standards that are to be applied to claimants suffering from minor injuries. It also creates an obligation on the plaintiff's automobile insurer to fund the initial treatments.

Key Alberta Decisions

Morrow v. *Zhang*, 2009 ABCA 215 ("*Morrow*")

Perhaps the most significant decision in relation to the MIR is the Alberta Court of Appeal ruling in *Morrow*. On June 12, 2009, the Alberta Court of Appeal overturned the February 2008 Court of Queen's Bench decision of Chief Justice Wittmann. Chief Justice Wittmann had struck down the MIR on the basis of a Constitutional challenge. This Court of Appeal decision, and the subsequent December 2009 refusal of the Supreme Court of Canada to hear the appeal, cemented the MIR in Alberta law. Since the decision in *Morrow*, judges have done their best to interpret the legislation, and plaintiff's lawyers their best to circumvent it.

[4] Ibid, s.1 (j)
[5] Minor Injury Regulation, Alta Reg 123/2004, s.6(2)
[6] Ibid, s.6(3)

In *Morrow* v. *Zhang*, 2008 ABQB 125, Plaintiff's counsel had successfully argued that the MIR violated section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms (*"Charter").[7] The Court of Appeal disagreed, stating that while the new reforms did make a distinction on the basis of an enumerated ground (disability), this distinction was not discriminatory and therefore did not violate individual *Charter* rights.[8] The Court in *Morrow* concluded that while assessing the constitutionality of the MIR on its own might lead one to the conclusion that its provision limiting recovery was discriminatory against individuals with soft tissue related disabilities, the MIR does not stand alone.[9] In order to properly assess the constitutionality of the MIR it must be considered in context with its sister legislation, the DTPR.[10]

Based on the Court's reasoning, while the MIR taken alone may seem to perpetuate a negative stereotype that strains, sprains and WAD injuries as not real or not deserving of judicial consideration,[11] the DTPR specifically demonstrated an acknowledgement of the reality of such injuries, and their need for individualized assessment and treatment. As a result, when the reforms are considered together as a whole, there was no discriminatory effect.[12]

The Court did state that while the award of $4,000 for pain and suffering was "virtually unknown" in Alberta and unlikely to compensate each individual circumstance[13], that when

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[7] *Morrow* v. *Zhang*, 2008 ABQB 125 at paragraph 1
[8] *Morrow* v. *Zhang*, 2009 ABCA 215 at paragraph 136
[9] Ibid at paragraph 137
[10] Ibid at paragraph 137
[11] Ibid at paragraph 97
[12] Ibid at paragraph 137
[13] Ibid at paragraph 118

paired with the allotted protocol treatment in the DTPR, the reform régime was responsive to a claimants needs and did not cause harm.[14]

Consequently, the Alberta Court of Appeal reversed the trial judge's decision and upheld the MIR. At the same time the Alberta Courts were reinstating the MIR, the Supreme Court of Nova Scotia decision, *Hartling v. Nova Scotia (Attorney General)*, 2009 NSSC 2 upheld Nova Scotia's *Automobile Insurance Tort Recovery Limitation Regulations*, NS Reg 182/2003 on a similar section 15 challenge, finding the legislatively imposed caps were not discriminatory.[15]

Park v. *Jordan* 2009 CarswellAlta 2233, [2010] A.W.L.D. 2892 ("*Park*")

The Alberta Court's first attempt at interpreting the MIR post *Morrow* was the Court of Queen's Bench decision in *Park*. The key issue being addressed in this decision was how the Court was to apply the cap to general damages. The Court faced two primary issues, how to quantify damages when the constellation of injuries included both capped and non-capped injuries and whether or not the maximum recovery allowed under the MIR was reserved for the most severe minor injuries.

In the *Park* decision, the Plaintiff was a 41 year old passenger in a pick-up truck which went over a twenty to thirty foot cliff and into a riverbank.[16] As a result of this motor vehicle accident, the Court found that the Plaintiff suffered the following injuries:

- Fractured right humerus with butterfly fragment and radial nerve damage
- Lower back strain injury[17]

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[14] Ibid at paragraph 139 and paragraph 140

[15] *Hartling* v. *Nova Scotia (Attorney General)*, 2009 NSSC 2 at paragraph 25

[16] *Park* v. *Jordan* 2009 CarswellAlta 2233, [2010] A.W.L.D. 2892 at paragraph 2

[17] Ibid at paragraph 43

In determining the general damage award, Justice Mahoney looked to section 7(2)(b) of the MIR which requires that injuries deemed "minor" in nature must be assessed and quantified separately from the "non-minor" injuries. The non-minor injury in this case was the Plaintiff's fractured arm for which $75,000 was awarded. Justice Mahoney then awarded $4,000 for the minor injuries for a total general damages award of $79,000.

In arriving at his decision, Justice Mahoney compared the damage calculations from the pre-MIR case law and discussed how those decisions were to be considered given the new legislation. Counsel for the defendant argued that he MIR cap put in place by the legislature was similar in nature to the cap put in place by the Supreme Court in the trilogy cases.[18] Damages should be calculated then, the defence argued, with the most severe minor injuries receiving an award of $4,000 with the less severe cases being prorated on that scale. On this point, Justice Mahoney stated;

> The cap works on the basis that if general damages under the old regime would have been assessed at $4,100.00 based on decided case law, then that amount of damages is reduced to $4,000.00. If general damages for a minor injury would have been assessed at $10,000.00, that amount is reduced to $4,000.00. If general damages are assessed any higher, they are all reduced to $4,000.00[19]

Justice Mahoney was unambiguous when he ruled that if the legislature has intended for minor injury claims to be pro-rated against a hard cap, with only most severe cases receiving the $4,000 maximum, the legislature would have stated that.[20] As is stands, any injury that based on pre-

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[18] *Andrews* v. *Grand & Toy Alberta Ltd*., [1978] 2 SCR 229, *Arnold* v. *Teno (Next friend of)*, [1978] 2 S.C.R. 287, *Thornton* v. *School Dist. No. 57 (Prince George) et al*., [1978] 2 SCR 267

[19] Ibid at paragraph 84

[20] Ibid at paragraph 85

MIR case law would have been assessed at $4,000 or greater is now capped at $4,000, regardless of relative severity.

In interpreting Justice Mahoney's decision, it becomes evident that when quantifying general damages they are to be assessed on the "old régime" and reduced to a maximum recovery of what the MIR permits. It is also evident that minor and non-minor injuries are to be assessed separately.

Sparrowhawk v. *Zapoltinsky*, 2012 ABQB 34 ("*Sparrowhawk*")

The Court's ruling in *Sparrowhawk* remains one of the few decisions reached on the MIR and one of the fewer still that directly addresses the issue of what constitutes a minor injury. Perhaps more importantly, *Sparrowhawk* considers what injuries are, by their very nature, not considered minor and therefore not subject to any legislatively imposed cap.

Mr. Sparrowhawk's injuries arose from a standard rear-end impact which occurred March 1, 2005.[21] At the time of trial there remained only one unresolved issue between the parties; whether or not the jaw injury Mr. Sparrowhawk sustained in the motor vehicle accident was considered a "minor injury" as defined in the MIR.[22]

Following the accident, Mr. Sparrowhawk experienced jaw pain several times a week and had no previous history of jaw injury.[23] In 2010, Mr. Sparrowhawk attended the offices of a dentist who diagnosed him with a temporomandibular joint disorder ("TMD"). The court heard from several

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[21] *Sparrowhawk* v. *Zapoltinsky*, 2012 ABQB 34 at paragraph 1

[22] Ibid at paragraph 2

[23] Ibid at paragraph 6

dental experts who testified that TMD injuries were separate and apart from the whiplash associated disorders ("WAD"), sprains and strains governed under the MIR.

After evaluating all of the expert evidence, Justice Shelley came to the following conclusions;

1. TMD injuries are not WAD injuries;

2. Dentists are the experts who assess, evaluate and treat TMD injuries;

3. The terms "sprain" and "strain" are not used by dentists when they diagnose and treat TMD injuries, and

4. Some of the treatments for sprains and strain identified in the Diagnostic Treatment Protocol Regulations have no application to TMD and mouth injuries.[24]

When considering whether or not a TMD injury is a minor injury in nature, Justice Shelley interpreted the minor injury definition within the regulation. In order to determine if an injury is minor under the MIR, a two-step analysis is required. First one must consider whether the injury is a sprain, strain or WAD injury, next one must to consider whether or not injury resulted in a serious impairment.[25] Though Justice Shelley had concluded that TMD injuries were not sprains, strains, or associated with WADs, she still considered whether or not Mr. Sparrowhawk's TMD injury had resulted in a serious impairment.

In Justice Shelley's determination, she concluded that Mr. Sparrowhawk's TMD did in fact result in a serious impairment as he had impaired physical functions such as chewing, yawning and speech.[26]

Plaintiff's counsel further argued that, per the legislation, Mr. Sparrowhawk's injury could not be considered minor because it is the sort of injury only treated and evaluated by dentists. The MIR

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[24] Ibid at paragraph 46

[25] *Sparrowhawk* v. *Zapoltinsky*, 2012 ABQB 34 at paragraph 22

[26] Ibid at paragraph 27

and the DTPR protocols used to diagnose and categorize injuries as minor or not minor have no provision for dentists to act as certified examiners, healthcare professionals or injury management consultants. Nor does the MIR nor the DTPR make any reference to dental or mandible injuries. The Certified Examiner Register is updated regularly and still contains no dentists as of March 5, 2013.[27]

After Justice Shelley's exhaustive review of the MIR and DTPR, she concluded the logical implication was that the omission of dentists was intentional by the legislature.[28] As the legislation provided no foundation to establish that dental expertise was required to evaluate minor injuries, Justice Shelley concluded that any injury which fell exclusively into that domain such as TMD and tooth damage cannot be a minor injury.

Sparrowhawk's interpretation of the MIR has been treated with approval by the Alberta Court of Appeal, albeit in *obiter dictum*.[29]

Comparing Alberta's Legislation

Alberta's experience with legislatively imposed recovery limits on minor injuries is certainly not unique. Insurance reform has become a reality in most Canadian jurisdictions and given the similarities between reform régimes, there are lessons, both legal and practical that can be applied from Alberta to the Atlantic Provinces.

Prince Edward Island[30] has a system that shares certain features with the Alberta approach, but with several significant differences. Most importantly, the definition of "minor injury" is

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[27] http://www.finance.alberta.ca/publications/insurance/injury_management_certified_examiners.pdf, accessed June 3, 2013

[28] Ibid at paragraph 59

[29] *Benc* v. *Parker*, 2012 ABCA 249 at paragraph 27

different. The definition of "minor injury" in P.E.I is significantly broader and does not refer to any specific diagnostic features. As a result, the nature of the injury itself does not matter in these provinces. For example, it makes no difference whether the injury is a sprain, strain, WAD injury, fractured bone or facial scar. This definition has more in common with Ontario's no-fault régime[31] than Alberta's MIR.

In contrast, Nova Scotia's revised legislation[32] [33] is closely modelled after Alberta's MIR. Nova Scotia's *Insurance Act*, RSNS 1989, c 231 and the companion *Automobile Accident Minor Injury Regulations*, NS Reg 94/2010 specifically enumerate sprains, strains and WADs in relation to identifying a minor injury and states that multiple injuries must be assessed separately. Unique to Nova Scotia's legislation are provisions which specifically exclude chronic pain[34] and injuries lasting for more than 12 months[35] from being classified as minor injuries as well as a specific exclusion for loss of housekeeping capacity being included within the general damage award.[36]

As of July 1, 2013 New Brunswick will be introducing new regulations[37] which will bring the Province's legislative scheme more in line with Alberta's MIR. The new changes include specifically enumerating areas of injury covered under the "minor injury" definition, including sprains, strains and whiplash associated disorders[38] as well as bringing the definition of a

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[30] *Insurance Act*, R.S.P.E.I. 1988, c. I-4
[31] *Insurance Act*, RSO 1990, c I.8
[32] *Insurance Act*, R.S.N.S. 1989, c. 231
[33] *Automobile Accident Minor Injury Regulations*, N.S. Reg. 94/2010
[34] Ibid, s.4(1)(ii)
[35] *Insurance Act*, R.S.N.S. 1989, c. 231, s. 113B(1)(a)(ii)
[36] *Automobile Accident Minor Injury Regulations*, N.S. Reg. 94/2010 s.4(1)
[37] *New Brunswick Regulation* 2013-37
[38] Ibid s.4.2(2)

"serious impairment"[39] in more of an alignment with Alberta's. Given the timing of when the legislation is coming into force, and for the purpose of analysis and comparison, the new regulations will be discussed rather than the current New Brunswick *Insurance Act* cap.

Based on the Provincial definitions[40] of what constitutes a "minor injury" or a "serious impairment" it becomes clear that while there may be significant overlap between the various régimes, there is not one cohesive interpretation. However, that should not discourage cross provincial application, as the Court in *Sparrowhawk* stated when discussing extra-jurisdictional minor injury regulations;

> Each legislative scheme uses unique language to set the types of automobile collision injuries that are the subject of restricted recovery. As a consequence, jurisprudence from other jurisdictions has a restricted application for interpretation of the *MIR* and *DTPR*. However, the courts in other provinces have confronted analogous interpretation issues and, as a consequence, I will, in certain instances, refer to judgments from these other provinces. When I do so, I do not use the non-Alberta cases as precedents but, rather, as useful indications of how a court may approach interpretation of legislation with the same general purpose as the Alberta *Insurance Act*, *MIR*, and *DTPR*.

Of note, all of the definitions of "serious impairment" involve some reference to the claimant's "activities of daily living" and are used to provide an exception to the definition of a minor injury. Based on that, injuries that have been deemed to be significant impairments in one jurisdiction could be used in other jurisdictions to take an injury that is either not contemplated by the legislation, or is contemplated by the legislation but would otherwise be considered minor, and take it outside of the cap.

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[39] Ibid s.4.2(1)

[40] See Appendix "A"

Practical and Legal Approaches to Avoiding the Legislative Cap

In the four years since the MIR was confirmed by the Court of Appeal in *Morrow,* plaintiff's counsel in Alberta have taken various approaches to try and avoid its restrictions. The clearest example of this is the ruling in *Sparrowhawk*. Dental injuries are not specifically contemplated in the MIR and therefore are outside the cap. As dental injuries are not contemplated in any of the Maritime Acts and Regulations, the cross application here is obvious.

The Courts ruling in *Sparrowhawk* should not be applied narrowly to dental injuries either. The logic underpinning the decision can be applied across a whole host of accident related injuries. If an injury is not specifically enumerated within the governing legislation and if the injury's objective symptoms are not subsumed within the medical terminology of sprain, strain or WAD, than *Sparrowhawk* would suggest the injury is not subject to the cap.

We have had significant success in getting general damage awards above the cap by obtaining evidence of psychological injuries such as Anxiety Disorder, Post-Traumatic Stress Disorder and Depression. These psychological symptoms have always co-existed with soft tissue injuries, but now need to be specifically addressed with expert evidence in order to document these non-minor injuries. Similarly, chronic pain, even when it has been initially diagnosed as a sprain or strain, is a new medical diagnosis which arguably takes the injury outside of the "minor" categorization even if it does not cause a serious impairment. Finally, many sprains and strains also involve damage to cartilage or to bursa such that, medically, they would not be classified as a sprain or strain. For example, shoulder impingement syndrome would not be a pure sprain or strain if the source of pain originates in the subacromial bursa sac.

With the Alberta Rules of Court enforcing mandatory mediation in all civil actions[41] and the practical considerations discouraging trial, this particular approach has not yet been attempted before, or adopted by, an Alberta court. However, this strategy has been routinely successful in pre-trial settlements with both insurance adjusters and defence counsel. As well, many Alberta judges have, at least in an informal mediation forum, commented favourably on this interpretation of the MIR.

By using *Sparrowhawk* for the proposition that "if it doesn't say it's capped, than it's not capped", physical injuries such as permanent scarring, chronic pain, disc bulging, degenerative disc disease, ocular injuries as well as psychological injuries including depression, anxiety, fear of driving and post-traumatic stress have been consistently relied on in pre-trial settlement negotiations to increase damages beyond the cap.

Of course, unlike in Alberta, the provincial legislatures in New Brunswick, Nova Scotia and Prince Edward Island have made specific allowances and exceptions for disfigurement[42] [43] [44], chronic pain[45], cognitive impairment[46] [47] and injuries lasting more than 12 months.[48] When assessing damages in a motor vehicle accident claim, we always consider whether or not there is an aspect of any of the injuries that is not specifically enumerated by the legislation's definition

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[41] *Alberta Rules of Court*, Alta Reg 124/2010 s.4.16
[42] *Insurance Act*, R.S.N.S. 1989, c. 231, s. 113B(1)(a)(i)
[43] *New Brunswick Regulation* 2013-37, s 4.2(2)
[44] *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s.254.1(1)(b)
[45] *Automobile Accident Minor Injury Regulations*, N.S. Reg. 94/2010 s.4(1)(ii)
[46] Ibid, s.8(2)
[47] *New Brunswick Regulation* 2013-37, s 4.2(1)
[48] *Insurance Act*, R.S.N.S. 1989, c. 231, s. 113B(1)(a)(iii)

of a “minor injury”. If there is, our default position is that the injury is not subject to the cap and must be assessed separately.

If an injury does fall within the definition of a minor injury, all of the provincial régimes allow for the “serious impairment” exception. While all worded somewhat differently, Alberta, New Brunswick, Nova Scotia and Prince Edward Island all provide that if an injury is otherwise minor, but substantially interferes with a claimants ability to work, train, educate, or live a normal life than that injury is not subject to the cap.

As a claimants capacity to work, train and educate is difficult to evaluate objectively through the production of employment files or school transcripts it can often be more difficult to establish a serious impairment in these areas. We are making greater use of occupational therapists, as they document objective evidence of decreased employment or education capacity by way of functional capacity evaluations of the injured Plaintiff.

In the absence of expert evidence of decreased capacity, relying on lay witness testimony, including the testimony of the Plaintiff, of an impairment of the normal activities of daily living is another method of taking an otherwise “minor injury” and placing it outside the cap.

The normal activities of daily living are often subjective and rely on the claimant’s assessment of their pre- and post-accident martial relations, domestic responsibilities, social obligations, personal care and recreational activities. By relying on the “normal activities of daily living” exception, we have successfully argued for general damages outside the cap for the purpose of settlement. This occurs in instances where claimants were unable perform yard work, house work, personal grooming, drive properly or participate in sport and social clubs for two years post-accident.

Of course, there are instances where the injuries arising out of the accident are entirely minor and do not cause serious impairment. In these cases, the task of maximizing recovery for the claimant shifts to the other heads of damage. Loss of income and special damages are usually particularized through objective numbers that are awarded in addition to the general damages award. In Alberta, maximizing recovery on minor injuries also involves maximizing a loss of housekeeping claim. The seminal Saskatchewan Court of Appeal housekeeping decision in *Fobel* v. *Dean*, 1991 CanLII 3965 (SK CA) has been adopted in Alberta.[49] Recent Alberta case law places the replacement value of housekeeping services at over $15 per hour[50] as well as confirming that financial outlay by the plaintiff is not necessary to make a recovery.[51] Because of this, it is possible at settlement to recover upwards of $2,500 in lost housekeeping for a standard whiplash case in Alberta. Similarly, we are often able to obtain cost of future care awards for ongoing treatment expenses, despite the underlying injury being classified as "minor". By advocating strongly and taking a firm position on other heads of damage, it is possible to increase total damages well beyond the legislative limits even on claims that strictly involve minor injuries.

Conclusion

Unfortunately for plaintiff's counsel and their clients, legislative limits on recovery for minor injuries are a permanent reality. As the legislative schemes in each province continue to be amended and refined they are becoming more and more reflective of each other. This has the benefit of making the lessons learned, strategies implemented and decisions reached in each province increasingly applicable cross jurisdictionally. It is heartening to see the Maritime

[49] *Benstead* v. *Murphy*, 1994 ABCA 272 (CanLII)
[50] *Williams v. Oleary*, 2011 ABQB 229 at paragraph 111
[51] *Bebyck v. Ray*, [2005] A.J. no. 850 at paragraph 115

Provincial Legislatures adjust their insurance reform efforts to model the Alberta MIR as it at least ensures that fewer plaintiffs are undercompensated compared to a no-fault régime.

Alberta's experience with the *Minor Injury Regulation* has been one of reluctant acceptance from the plaintiff's side of the bar. Since our constitutional defeat in *Morrow* we have won victories of application in *Park* and interpretation in *Sparrowhawk.* We continue to advocate to the Alberta Government for changes to the MIR similar to Nova Scotia's recent amendments. Despite the dearth of cases interpreting the *Minor Injury Regulation* since 2004, we have been taking the lessons learned and applying them to the negotiation table in a never ending effort to maximize recovery for our clients.

Since *Sparrowhawk*, we have focused on taking any aspect of an injury not specifically covered by the legislation and using it to take the injury outside the cap. In addition, we have been relying extensively on the "serious impairment" exception, specifically as it applies to activities of daily living. Finally we are trying to maximize other heads of damage, notably housekeeping.

Given the growing similarities between the Alberta and Atlantic legislation, these Alberta approaches will be effective in maximizing recovery for Maritime claimants as well. We also look forward to applying the lessons and strategies emerging from Atlantic Canada in Alberta.

APPENDIX "A"

Definitions

New Brunswick

"minor personal injury"

any of the following injuries, including any clinically associated sequelae, that do not result in serious impairment or in permanent serious disfigurement:

(a) a contusion;
(b) an abrasion;
(c) a laceration;
(d) a sprain;
(e) a strain; and
(f) a whiplash associated disorder

"serious impairment"

means, in respect of a plaintiff, an impairment of a physical or cognitive function that

(a) results in a substantial inability to perform
    (i) the essential tasks of the plaintiff's regular employment, occupation or profession, despite the plaintiff's reasonable efforts to use any accommodation provided to assist the plaintiff in performing those tasks,
    (ii) the essential tasks of the plaintiff's training or education in a program or course in which the plaintiff was enrolled or had been accepted for enrolment at the time of the accident, despite the plaintiff's reasonable efforts to use any accommodation provided to assist the plaintiff in performing those tasks, or
    (iii) the plaintiff's normal activities of daily living,
(b) has been ongoing since the accident, and
(c) is not expected to improve substantially.

Nova Scotia

"minor injury"

a personal injury that

(i) does not result in a permanent serious disfigurement,
(ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
(iii) resolves within twelve months following the accident;

"serious impairment"

means an impairment of a physical or cognitive function that meets all of the following:

(i) the impairment results in a substantial inability to perform any or all of the following:

(A) the essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(B) the essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education,

(C) the normal activities of the claimant's daily living,

(ii) the impairment has been ongoing since the accident, and

(iii) the impairment is expected not to improve substantially.

Prince Edward Island

"minor personal injury"

an injury that does not result in

(i) permanent serious disfigurement, or

(ii) permanent serious impairment of an important bodily function

(ii) permanent serious impairment of an important bodily function

caused by continuing injury that is physical in nature;

"serious impairment"

means an impairment that causes

substantial interference with a person's ability to perform his or her usual daily activities or his or her regular employment.