Court of Queen's Bench of Alberta

Citation: Morrow v. Zhang, 2008 ABQB 98

Date: 20080208
Docket: 0401 17808
Registry: Calgary

Between:

Peari Morrow

Plaintiff

- and -

Jian Yue Zhang and Xiao Fei Wei

Defendants

- and -

Insurance Bureau of Canada

Intervener

- and -

Her Majesty The Queen in Right of Alberta

Statutory Intervener

Docket: 0503 14244
Registry: Edmonton

Between:

Brea Pedersen

Plaintiff

- and -

Darin James Van Thournout and Robert Van Thournout

Defendants

- and -

Insurance Bureau of Canada

Intervener

- and -

Her Majesty The Queen in Right of Alberta

Statutory Intervener

Reasons for Judgment
of the
Associate Chief Justice
Neil Wittmann

INTRODUCTION

[1] Peari Morrow and Brea Pedersen (collectively "the Plaintiffs") suffered soft tissue injuries arising out of two separate automobile accidents. The Plaintiffs seek an assessment of their damages resulting from the accidents.

[2] Additionally, the Plaintiffs challenge the constitutionality of the *Minor Injury Regulation,* Alta. Reg. 123/2004 ("the MIR") which imposes a $4,000 cap on non-pecuniary damages with respect to Minor Injuries (as defined under the MIR) that are caused by an accident arising from the use or operation of a motor vehicle and that do not result in serious impairment. Specifically, they submit that their rights under s. 7 and s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 ("the Charter") have been violated as a result of the MIR. The Plaintiffs originally sought a declaration that s. 650.1 of the *Insurance Act*, R.S.A. 2000, c. I-3, s. 5 ("the Insurance Act") , the *Automobile Accident Insurance Benefits Amendment Regulation*, Alta. Reg. 121/2004, the *Diagnostic and Treatment Protocols Regulation*, Alta. Reg.122/2004 ("the DTPR") and the MIR are all contrary to s. 7 and s. 15(1) of the Charter. By the time the trial was heard, however, they had narrowed the scope of the challenge to the MIR. The Plaintiffs do not challenge the constitutionality of the DTPR, unless it is held that it is not possible to challenge the MIR without challenging the DTPR.

[3] Her Majesty the Queen in Right of Alberta ("the Crown"), as a statutory intervener, and the Insurance Bureau of Canada ("IBC"), which has been granted intervener status by Order (collectively "the Interveners"), have both made submissions and led evidence in relation to the constitutional issues.

[4] As a result of the issues raised by the Plaintiffs, I will first determine the appropriate damage awards for each Plaintiff individually as though the MIR did not apply. Because I have found, and indeed the Defendants agreed, that each Plaintiff would be entitled to non-pecuniary damages in excess of the cap, I will then go on to consider the constitutional challenges raised by the Plaintiffs to determine whether those awards can stand.

DAMAGE ASSESSMENTS

[5] The only issue that arises in relation to this portion of the judgment is the determination of the Plaintiffs' damages in the absence of the cap. Accordingly, I will examine that issue in relation to each of the Plaintiffs separately.

I Morrow Action

[6] On October 21, 2004, the Plaintiff, Peari Morrow, who is now 34 years old, was driving through a green light at about 50 km/h when her vehicle was struck on the passenger side by a vehicle owned by Xiao Fei Wei and operated by Jian Yue Zhang. As a result of the motor vehicle accident, she suffered soft tissue injuries of the neck and upper back. Ms. Morrow experienced tingling and numbness in her arm for approximately 6 months, but those symptoms have now resolved. Liability is admitted by the Defendants and Ms. Morrow claims general damages for pain and suffering. The only issues are causation of Ms. Morrow's injuries and damages for them.

[7] Ms. Morrow's vehicle was written off and she received payment of $1,750 from her insurer: Agreed Exhibit Book, Exhibit 1, Tab 30. At the time of the accident, Ms. Morrow was wearing her seatbelt. Special damages are agreed in an amount of $1,000. Ms. Morrow was the only witness who testified in regards to the assessment of damages. The parties have agreed on the admission into evidence of several records contained in the Agreed Exhibit Book, including medical records: Exhibit 1.

1. Evidence

(a) Medical, Physiotherapy, Chiropractic and Massage Therapy History

[8] Ms. Morrow has a history of back and neck pain that predates the accident. She has consulted several doctors at walk-in clinics because she is relatively new to Calgary and did not have a family doctor until recently. Since August 2005, her family doctor has been Dr. Surani. Ms. Morrow gave her evidence in a sincere and credible manner.

[9] Before October 21, 2004, Ms. Morrow was involved in two motor vehicle accidents. The first one occurred when she was 19 years old. The collision was not serious. She was not liable. Ms. Morrow indicated that she was stiff the next day, but that the day after that she was fine. In 2001, she was involved in a second accident in Calgary in which she was at fault. She went through a red light and her vehicle was struck by another vehicle. As a result of the 2001 accident, she had some stiffness in her upper back.

[10] In the past, Ms. Morrow has had some stress, anxiety and depression related problems. The medical records show that medication was prescribed from 2001 to 2006: Exhibit 1, Tabs 1, 2, 4, 5 and 21. In 2004, Ms. Morrow consulted Dr. Anderson regarding recurrent shingles that may have been caused by stress: Exhibit 1, Tab 5. During that visit, the record shows that the range of motion of her neck was also assessed, but Ms. Morrow testified that she does not recall what led to such an assessment. Ms. Morrow has had a history of migraine headaches which predate the accident and continued after the accident, for which she was prescribed Imitrex. She testified that her headaches are more frequent since the accident, but she was not certain if the

change was linked to the accident. At trial, she acknowledged that several factors, such as being around smoke, alcohol consumption, lack of sleep and stress could contribute to the aggravation of her condition. She testified that, for instance, her involvement in the lawsuit may have increased her level of stress, which in turn may have contributed to more frequent headaches.

[11] Prior to the accident, Ms. Morrow suffered from temporomandibular joint ("TMJ") symptoms, which included clicking in her jaw, neck pain and headaches. Dr. Goldstein's clinical notes show that in February 2002, Ms. Morrow had symptoms such as headaches, muscle pain, neck aches and sore teeth: Exhibit 1, Tab 25. A splint was recommended by Dr. Wolk. Ms. Morrow was supposed to wear it all the time. She did not comply with that recommendation and the symptoms still persisted at the date of trial.

[12] Ms. Morrow had some back problems that predate the accident. She received chiropractic care from Dr. Woo a few times in August, 2004 before the accident: Exhibit 1, Tab 7. Dr.Woo's notes show that one time she had a headache and another time, she felt stiff while vacuuming. At trial, Ms. Morrow indicated that her visits to Dr. Woo were related to upper back and neck pain. Ms. Morrow testified that she stopped going because she was starting to feel better and enjoyed temporary relief. She testified that when she worked at Telus she saw a chiropractor, which seemed to have helped her back pain, but that her symptoms continued after her last visit with Dr. Woo. She testified that the pain had probably ceased as a result of her ceasing employment at Telus. I infer from the facts that her treatments with Dr. Woo, and her employment with Telus ended so shortly before the accident that she had likely not completely recovered from the pain she suffered as a result of the nature of her employment. However, her testimony convinces me that she had likely recovered almost totally at that time.

[13] On October 23, 2004, Ms. Morrow saw Dr. Gash who diagnosed a grade 2 whiplash associated disorder (WAD-II). Dr. Gash prescribed an anti-inflammatory and recommended massage as well as physiotherapy: Exhibit 1, Tab 12. He referred Ms. Morrow to Mr. Westaway, a physiotherapist, the primary health care practitioner, who completed the appropriate forms, which were sent to Ms. Morrow's insurer: Exhibit 1, Tabs 13 and 30. The Form AB-1, the Notice of Loss and Proof of Claim, includes information with respect to the primary health care practitioner (chiropractor, physician or physical therapist). Ms. Morrow's Form AB- 1 contains the details of her Minor Injury as well as the details of her accident. The Form AB-1 is a notice to the insurer that leads to the pre-authorization of a certain number of treatment sessions under the DTPR without seeking approval of the insurer. The Form AB-2, the Treatment Plan, includes the primary health care practitioner's diagnosis, the treatment provided, as well as the expected number of visits. The Form AB-2 also requires a patient to elect whether he or she wishes to be treated under the DTPR or outside of it. The Form AB-4, the Concluding Report, reiterates the diagnosis, notes the finding at the last visit and includes the reason for discharge or need for ongoing treatment: Ohlhauser Affidavit, para. 77 and Exhibit KK. In a letter dated November 2, 2004, Ms. Morrow's insurer, The Co-operators General Insurance Company, confirmed the authorization of 21 physiotherapy treatments: Exhibit 1, Tab 30. At a subsequent visit, on November 5, 2004, Dr. Gash confirmed the WAD-II diagnosis and added that she also had a mild lumbar strain: Exhibit 1, Tab 12.

[14] From October 26, 2004 to March 15, 2005 Ms. Morrow visited Mr. Westaway approximately 13 times: Exhibit 1, Tab 13. She stopped the treatments because she did not feel that her condition was improving. Ms. Morrow sought other types of treatments. She received several massage therapy treatments from Ms. Amanda Humbke from September 2005 to March 2006. Ms. Morrow stopped going because she felt that the treatments were not that helpful.

[15] From October 2005 to September 2006, Ms. Morrow attended 15 chiropractic sessions. The treatments were active release therapy and she indicated that it was helpful. The records show that she also attended 21 additional chiropractic treatments of active release therapy with Dr. Scarborough from June 2006 to January 2007 (Exhibit 1, Tab 27) which she also found beneficial. She stopped the treatments for personal reasons. Despite all of these treatments, at trial, her pain had not totally disappeared. Ms. Morrow's efforts in addressing her pain and injuries show clearly she mitigated her damages.

[16] Although, at trial, she did not remember Dr. Cummings, the medical records show that Ms. Morrow visited Dr. Cummings in February of 2005: Exhibit 1, Tab 14. In a report dated April 2005, Dr. Cummings indicated a diagnosis of WAD-II. The report indicated lumbar back pain as well as pain in the shoulder girdle. Massage, physiotherapy and an anti-inflammatory were prescribed. As well, Dr. Stewart's notes indicate that she visited him in May of 2005 and that she suffered left upper back pain, neck pain and stiffness. Dr. Stewart diagnosed an ongoing sprain/strain for which she was prescribed Flexeril and Tylenol no. 3.

[17] Ms. Morrow consulted Dr. Surani on 5 occasions from August 2005 to May 2006. In a report dated May 9, 2006 (Exhibit 1, Tab 28), Dr. Surani concluded:

> In summary, the above patient has had moderate soft tissue injury of the neck, trapezium and upper neck. The patient has attended physiotherapy and massage therapy with gradual improvement and she plans to follow up with the chiropractor and see if he can keep treating her. She will require further therapy on as needed basis.

[18] On September 15, 2005, Ms. Morrow was seen by Dr. Chiu for a certified examination under ss. 8 and 10 of the MIR which state:

> 8(1) If a claimant and a defendant disagree as to whether an injury sustained by the claimant as a result of an accident is or is not a minor injury, either party may give notice to the other party in the prescribed form
>
> > (a) stating that the party giving notice desires to have a certified examiner assess the claimant for the purpose of giving an opinion as to whether the injury is or is not a minor injury, and
> >
> > (b) specifying the name of the proposed certified examiner.

(2) If, on receipt of a notice under subsection (1), the other party

(a) accepts the certified examiner proposed under subsection (1)(b), that party must, within 14 days, so notify the party giving notice under subsection (1), or

(b) does not accept the certified examiner proposed under subsection (1)(b), that party must, within 14 days, so notify the party giving notice under subsection (1) and provide the name of a certified examiner that the party is willing to accept.

(3) If a party fails to provide notice under subsection (2), that party is considered to have accepted the certified examiner proposed under subsection (1)(b).

(4) If the parties cannot agree on a certified examiner to assess the claimant, either party may apply to the Superintendent in the prescribed form to select a certified examiner to assess the claimant.

(5) The Superintendent must, within 5 business days after receiving an application under subsection (4), select a certified examiner from the certified examiners register.

(6) The Superintendent may not select a certified examiner who was proposed by either party under this section.

(7) Notwithstanding anything in this section,

(a) neither the claimant nor the defendant may give notice under subsection (1) until at least 90 days have passed since the accident;

(b) only one assessment of the claimant in respect of the accident may be carried out under this section;

(c) a certified examiner is not eligible to assess a claimant under this section if the certified examiner

(i) has diagnosed or treated the claimant, or

(ii) has been consulted with respect to the diagnosis or treatment of the claimant

in respect of any injury arising from the accident.

10(1) For the purpose of giving an opinion as to whether the claimant's injury is or is not a minor injury, the certified examiner must assess the claimant to determine in accordance with section 4

(a) whether the claimant's injury is a sprain, strain or WAD injury, and

(b) if the claimant's injury is determined to be a sprain, strain or WAD injury, whether the sprain, strain or WAD injury results in a serious impairment.

(2) For the purpose of conducting an assessment of the claimant, the certified examiner may

(a) request the claimant to authorize in writing the release of any relevant diagnostic, treatment or care information in respect of the claimant that is in the possession of a physician or other person, including a regional health authority, and

(b) receive from the claimant or the defendant any information that either party considers relevant to the assessment.

(3) If the claimant, without reasonable excuse,

(a) fails to attend an assessment for which notice has been given under section 9 or 11(3),

(b) refuses to answer any relevant questions of the certified examiner about

(i) the claimant's medical condition or medical history, or

(ii) matters referred to in section 1(j)(i) that relate to the claimant,

(c) fails to authorize the release of any relevant diagnostic, treatment or care information in respect of the claimant pursuant to subsection (2)(a), or

(d) in any other way obstructs the certified examiner's assessment, the claimant's injury shall be considered to be a minor injury.

[19] Dr. Chiu was appointed by the Superintendent of Insurance because the parties could not agree on an appointee: Exhibit 1, Tab 33. Dr. Chiu examined Ms. Morrow and reviewed some of her medical records. He concluded that the WAD-II and upper back strain, 2nd degree strain were likely caused by the motor vehicle accident of October 21, 2004:

> Based on the information available to me, to a reasonable degree of certainty, there is a probable causal relationship between Miss Morrow's symptoms (diagnoses 1 [WAD-II] and 2 [upper back strain, 2nd degree strain]) and the car accident of October 21, 2004. As mentioned above, there is no causal relationship between the cracks in her teeth and the car accident; as for the TMJ pain, it is questionable if there is an aggravation of this condition as a result of the car accident.

[20] Dr. Chiu concluded that Ms. Morrow's current symptoms that were due to the injuries were pains in the back of her neck and upper back. He wrote that in light of the clinical notes that he had consulted, Ms. Morrow's symptoms had improved and that further treatment such as physical therapy in the form of acupuncture, physiotherapy and massage was recommended. He was of the opinion that her condition caused discomfort and some inconvenience in her everyday life activities, but that it did not adversely affect her health. Dr. Chiu came to the conclusion that Ms. Morrow still suffered significant pain and would likely continue having pain. However, he was confident that her condition would improve and may eventually subside.

(b) Work History and Effect of Injuries

[21] At the time of trial, Ms. Morrow was enrolled part-time in the early childhood program at Mount Royal College and was about to start a new position at the preschool of the college, helping a child with a speech impediment.

[22] From September 2000 to September 2004, Ms. Morrow worked in a call centre environment at Telus. She indicated that her work was quite stressful. She had migraine headaches from anxiety and back pain from sitting down. In September of 2004, Ms. Morrow started training for a flight attendant position at Skyservice Airlines. Her duties included putting bags in the overhead bins, cleaning the aircraft, closing and opening doors, as well as pushing and pulling carts. She worked as a seasonal flight attendant until April 2005, which was the end of the season. She then worked as an administrative assistant at A-1 Cement Contractors for a few months and then went back to Skyservice Airlines for a new season.

[23] In April 2006, Ms. Morrow returned to Telus in the department of business clients, as she had been dealing with residential clients in the past and was under the impression that it would be less stressful with business clients. Unfortunately, however, the new position turned out to be very stressful. She worked at Telus until October 2006 and then returned to Skyservice Airlines.

[24] Except for one occasion in the summer of 2005, Ms. Morrow has not missed work because of the accident. However, she was in pain while working and she feels that the accident has affected her work. Following the accident, when she was working as a flight attendant, she said that there were a few times when she had been sitting in her jump seat and could hardly tolerate the stiffness in her back. She had to stretch on a regular basis during work, which made her feel unprofessional. She mentioned that on one particular occasion, she felt embarrassed because some passengers thought she was falling asleep due to the fact that she was stretching.

Ms. Morrow's injuries have also affected other aspects of her employment. For instance, she has asked other employees to help her with some tasks. In addition, Ms. Morrow changed her way of performing her work in order to not strain her back.

(c) Social Life, Everyday Life and Hobbies

[25] Ms. Morrow testified that the accident and her injuries have affected every aspect of her life. She indicated that she is in pain probably five to six days a week, and that when she is sitting, her injuries bother her most of the time. She testified that the events have made her a nervous driver. Every time she goes through an intersection, she tenses up and makes sure that it is clear. Since the accident, Ms. Morrow cannot sleep on her left side, because it is too painful and she finds it difficult to get comfortable. In addition, she goes to bed every night with a heating pad and a muscle rub in order to help with the pain. At trial, Ms. Morrow indicated that vacuuming and washing the floor remained difficult, as well as doing laundry when it is heavy. She said that she did not go to the gym as frequently as she used to, but expressed that she tried to go when she did not feel too sore. At the gym she uses the treadmill, the bikes and the elliptical trainer, but she tries not to be on any machine for too long. The gym was, and remains, a very important activity in her life. Her social life has also been affected. For example, on a few occasions, she has had to decline her friends' invitations to spend time together because her back was sore.

2. Positions of the Parties

[26] Ms. Morrow acknowledged that prior to the accident she had pain in her upper back and neck, but at trial she indicated that the pain suffered post-accident was different than before. She testified that after the accident, the pain was stronger and constantly present. Counsel for Ms. Morrow presented case law where general damages varied from approximately $19,000 to $28,000 (adjusted to the dollar value in 2007).

[27] Counsel for the Defendants conceded in argument that there was no known pre-existing tingling and numbness in Ms. Morrow's arm, but submitted that Ms. Morrow's back and neck pain were not caused by the accident. Thus, he submitted the award should be substantially lower than what would be awarded absent the pre-existing medical history. He submitted that the symptoms and treatment outcomes that existed before the accident are very similar to what is described following the accident. For instance, Dr. Woo's notes indicate that during one visit, Ms. Morrow reported that she felt stiff while vacuuming. Counsel submitted that the injury was a five-month injury and submitted that damages from $7,500 to $12,000 would be appropriate.

3. General Damages

[28] Ms. Morrow gave her evidence in a forthright and candid manner. She did not appear to exaggerate, and at times, she seemed to minimize her situation. Indeed, she indicated that it was uncertain if her TMJ condition was aggravated by the accident and stated candidly that it was only a mere possibility. She said this despite the fact that there was some evidence that that

condition could be associated with or have been aggravated by the accident: Exhibit 1, Dr. Chiu, Tab 20 and Dr. Goldstein, Tab 25. Moreover, she testified that since the accident she had more migraine headaches than she did before the accident, but that she was not sure if it was related in any manner to the accident. She also indicated that she had a slip and fall in January 2006 which caused her lower back pain. No general damages are claimed for the pain suffered with respect to the TMJ, lower back pain or migraine headaches.

[29] It is trite to observe that each case is unique and a proper assessment of damages is required in the particular context of each case. I have reviewed the authorities cited by Counsel which include the following cases.

[30] In *Hanson* v. *Heuchert* (1997), 197 A.R. 46 (Q.B.), the plaintiff, who had no pre-existing conditions suffered a mild to moderate whiplash injury as a result of a motor vehicle accident which occurred on October 30, 1992. The Court found that the plaintiff did not exaggerate her injuries. The plaintiff did not take any time off work due to her injuries. The Court concluded that by 1995 much of her pain and discomfort had diminished. The headaches that she suffered had ceased by that year. Any numbness in her arm had ceased and her lower back was no longer an issue. However, she still periodically experienced neck pain. General damages were assessed at $18,000.

[31] In *Ly* v. *Gilbert*, 2001 Carswell Alta 1524, the plaintiffs suffered soft tissue injuries in a motor vehicle accident. They both had previously existing asymptomatic congenital deformities, but the Court held that no reduction in the award was warranted, since the conditions were latent and non-symptomatic. The Court held further that none of the ongoing symptoms were caused by the abnormalities.

[32] The female plaintiff in *Ly* was diagnosed with a grade 2 whiplash injury of the spine. Immediately after the accident, she developed dizziness, headaches, swelling in her right face and ear area, swelling in her upper arm, pain in her neck and pain in her upper and lower back. She missed three weeks of work. From the accident to trial, she saw a chiropractor 86 times, received 27 massage treatments and used a heat pad. She took Tylenol no.3 and did some home exercises. The Court did not believe her testimony regarding the frequency and occurrence of the pain suffered. Her testimony was at odds with the treating physicians' records. The Court found that her symptoms were acute for about one year. She had occasional back pain, but it was determined that her function was not limited. Her condition was not assessed as permanent. As well, the Court found that her prognosis was optimistic. Her non-pecuniary damages were assessed at $20,000.

[33] The male plaintiff suffered pain in his head, neck, shoulders and lower back. He was given Tylenol no.3 and was told to do home stretches and exercises. He was also referred for massage therapy. He saw a chiropractor 86 times and attended 24 massage treatments. The Court held that his injuries were more serious than his wife's. He was off work for a period of one week. The Court concluded that his symptoms were acute at the outset, but that they were substantially resolved one year after the accident. He continued to have some ongoing back

symptoms that were likely caused by his work. His non-pecuniary damages were assessed at $25,000.

[34] In *Krawchuk* v. *Mellor,* 2003 ABQB 163, [2003] 7 W.W.R. 323, the plaintiff, a 24-year-old student, experienced pain in her neck, upper back and shoulders as a result of a motor vehicle accident. She was prescribed anti-inflammatory medications. The plaintiff had pre-existing conditions of mood swings and insomnia, as well as a history of knee problems and lower back pain. After the accident, she suffered from insomnia that was partly attributed to the pain she suffered. Her lifestyle was affected by her injuries. As well, she was unable to do some of her housekeeping. She missed over twenty classes and 39 hours of work due to her injuries. Approximately one month after the accident, she returned to the university, but was unable to carry her textbooks and could not sit comfortably through her classes. The Court found that the acute phase of physical injury lasted approximately two months and that intermittent flare-ups lasted for seventeen months. Moreover, a mildly correlated depression as well as insomnia lasted for almost two years. The Court found that her physical symptoms were largely resolved approximately five months after the accident and that after six months she was virtually performing all the duties of her part time job. All of her symptoms were resolved two years after the accident. General damages were assessed at $18,000.

[35] In *Johnson* v. *Tan*, 2004 ABQB 470, [2004] A.J. No. 1309, the plaintiff, a young female athlete suffered a three-percent impairment of the whole person, including a temporomandibular injury, back and neck pain and a permanent shoulder injury. The Court found that her pre-existing jaw condition had almost completely resolved at the time of the accident. She suffered pain for up to two years after the accident. The Court concluded that her ability to enjoy training, boxing, and her active life style was disrupted and lessened. She was awarded general damages of $18,000.

[36] In *Faltous* v. *McKinley*, 2005 ABQB 725, [2005] A.J. No. 1414, the plaintiffs, husband and wife, were injured in a motor vehicle accident. Following the accident, the plaintiff husband felt dizziness and neck pain. He did not seek immediate medical attention, because he thought that the pain would go away. Two months after the accident, he experienced severe pain, which led him to see a doctor. As a result of the accident, he suffered a mild soft tissue injury of his left side involving his shoulder, neck and the index finger of his left hand, which had some persistent numbness. The Court found that his injuries were almost completely resolved within two to two and a half years. He was awarded general damages in the amount of $18,000. No award was made in relation to his lower back pain, because the Court found that it was not materially contributed to by the accident.

[37] The plaintiff wife, experienced immediate pain in her neck, shoulder, and arms all the way to her right thumb, accompanied by headaches. She suffered a mild to moderate musculo-skeletal soft tissue injury and she continued to have lingering effects. The treatment required was extensive during the first two years after the accident. The injury caused her pain at work, but she did not lose any time from work. Her quality of life was greatly affected by her injuries. The pain was aggravated by tennis and long hours sitting at the computer. It was held

that the pain she suffered prevented her and would continue to prevent her from participating in some recreational activities. The prognosis was that she would require intermittent chiropractic, acupuncture and massage treatments for the next one to two years. She was awarded general damages in the amount of $24,000.

4. Conclusion

[38] In light of the evidence, I cannot conclude that Ms. Morrow's pre-accident symptoms are the same as her post-accident symptoms. The award in this case must include consideration of the facts that Ms. Morrow was diagnosed with moderate whiplash and that her pre-accident pain was not totally resolved at the time of the accident. Ms. Morrow suffered back, shoulder and neck pain prior to the accident, but that never prevented her from going to the gym or socializing with her friends. She said at trial that her pre-accident symptoms were likely caused by her stressful job and after she quit, everything seemed better. Based on Ms. Morrow's testimony, I find that she had probably not entirely recovered from the symptoms that she attributed to her stressful job, but I believe that those symptoms had almost totally resolved by October 21, 2004. Thus, I believe that her pre-accident condition has had a minor impact on her post-accident symptoms as described and I will take this into account in devising an appropriate award.

[39] Ms. Morrow has made reasonable efforts to mitigate her damages. She saw several specialists and tried different treatments when she felt the initial ones were not as beneficial as she had hoped. Moreover, she remains positive about her future. She said that the pain she suffered was different and is almost always present, which differs from her situation in September of 2004 or in the years that preceded the October 21, 2004 accident. Dr. Chiu believed that to a reasonable degree of certainty, there is a probable causal relationship between Ms. Morrow's WAD-II, upper back strain and the accident. I believe Ms. Morrow when she described her pain as being unlike that which she felt before. She indicated that it was more acute and that it was there on a quasi-permanent basis. Her medical records show that her symptoms have not resolved, but that they are improving and will likely subside. I reject the Defendants' position that Ms. Morrow only suffered for 5 months; it is not established on the evidence.

[40] When she visited Dr. Chiu, it had been over 10 months since the accident and Ms. Morrow was still experiencing pain, although she testified that the tingling and numbness in her arm had resolved. In May of 2006, a year and a half following the accident, Dr. Surani's report (Exhibit 1, Tab 28) indicated that Ms. Morrow had suffered moderate soft tissue injury of the neck, trapezium and upper neck. It was noted that gradual improvement occurred, but that further therapy was required on an as needed basis. In light of the evidence, her general damages for pain and suffering are assessed in the sum of $20,000.

II Pedersen Action

[41] On the afternoon of March 22, 2005, the Plaintiff Brea Pedersen, who is now 32 years old, was stopped at the corner of 103rd Avenue and 79th or 80th Street in Edmonton, when a vehicle owned by Defendant Robert Van Thournout and operated by Defendant Darin James Van

Thournout rear-ended the vehicle she was operating. She had brought the vehicle to a halt to allow some pedestrians to cross the road. As a result of the collision, the vehicle moved through the intersection and ended up part way onto the sidewalk. Following the accident, she remembers peeling her hands off the steering wheel because she was gripping it so tightly.

[42] As a result of the accident, Ms. Pedersen suffered soft tissue injuries of the neck, shoulders, back and injury to the wrists for which she claims general damages. Her neck, shoulder and back pain resolved a month after the accident and the only pain that remained at the time of trial was in her wrist area. When the accident occurred, both Ms. Pedersen and her father, who was a passenger, were wearing their seatbelts and her headrest was properly positioned for her head. The frame of the vehicle that was owned by the company for which Ms. Pedersen worked at the time of the accident, Fournier Pharma, was cracked as a result of the accident and the value of damage caused to the vehicle was assessed at approximately $2,500: Agreed Exhibit Book, Exhibit 2, Tabs 5 and 6. Ms. Pedersen was the only witness who testified in regards to the assessment of damages. The parties have agreed to the admission into evidence of several records contained in the Agreed Exhibit Book, which consists of medical charts of her general practitioner, her chiropractor, a certified examination report and an Alberta Health Care statement of benefits paid, all of which have been admitted for the proof of their content. As well, photographs of the vehicle driven by her as well as invoices from an auto body repair shop have been admitted as authentic: Exhibit 2. Liability was admitted in argument. No special damages are claimed. The only issue to be determined is the quantum of general damages.

1. Evidence

(a) Medical and Chiropractic History

[43] Ms. Pedersen consulted Dr. Brox and Dr. Redpath about her wrists. She did not have any concern about the pain in her back, neck and shoulders because those areas resolved after a month. She still experienced pain in her wrists at the time of trial. She indicated that at the time of the accident she did not notice the pain in her wrists, but noticed the pain in her back. However, following the accident the pain in her wrists appeared gradually and got worse with time. Ms. Pedersen did not have any pre-existing condition with respect to her wrists. She did have a prior TMJ condition which has not been affected by the accident.

[44] In May, 2005, following her insurer's advice, Ms. Pedersen visited her general practitioner, Dr. Brox, with respect to the motor vehicle accident. Dr. Brox's clinical notes indicate that Ms. Pedersen's neck and back were better, but that both of her wrists hurt: Exhibit 2, Tab 1. The Form AB-2 indicated a grade I bilateral wrist strain diagnosis. Ms. Pedersen is right-arm dominant and plays tennis with her right hand. Dr. Brox noted that sometimes just holding a pen may trigger pain for Ms. Pedersen. Dr. Brox was of the opinion that there was a full range of motion in her wrists and fingers and that her grip was good. Ms. Pedersen said that Dr. Brox never mentioned that she should stop playing tennis. Dr. Brox did not mention anything about the necessity of physiotherapy or x-rays. During that visit, Dr. Brox also noted some discomfort in the wrist area:

> Tender over ulnar (fifth finger side) aspect of both wrists. Ulnar deviation (moving wrists outward with the palms of hands facing down) of hands is painful.

[45] Dr. Brox prescribed Diclo gel which is an anti-inflammatory for rubbing onto painful areas. Dr. Brox also suggested that she use a big (soft) grip for her tennis racket and to use machines rather than free weights in training until her grip was secure. On August 20, 2005 Ms. Pedersen went back to see Dr. Brox to get another prescription of the gel. Dr. Brox's clinical notes indicated that the prescription was lost. Ms. Pedersen said that Dr. Brox used the word tendinitis to describe her condition. Despite the fact that Ms. Pedersen followed her advice, she was still in pain. She added that she felt Dr. Brox did not really help with or treat her wrist pain. Ms. Pedersen testified that she mentioned concern regarding her wrists to Dr. Brox, but that nothing more was done about it. She then sought help from a chiropractor.

[46] Dr. Redpath, a family friend who provides Ms. Pedersen with free chiropractic care, was, before the accident treating her for her TMJ condition as well as for routine treatment sessions: Exhibit 2, Tab 2. She indicated that her TMJ condition has not been affected by the accident. In July of 2005, Ms. Pedersen saw Dr. Redpath with respect to the pain felt in her wrists as a result of the motor vehicle accident. She said that, like Dr. Brox, he also referred to her condition as tendinitis. He recommended the same kind of exercise that her personal trainer had previously suggested in order to strengthen her wrists. Dr. Redpath did an ultrasound treatment on the wrist area. This treatment lasted from 5 to 10 minutes. She saw him about 4 times in July of 2005 for the same type of treatment. Her chart indicates that she received 5 ultrasound treatments in August, 3 in September, 2 in October and 2 in November. She saw him a few times in 2006 and 2007 for laser treatments as well as active release treatments. She found that the treatments were helpful and that Dr. Redpath was very diligent with the treatment of her wrist condition. Ms. Pedersen testified that she stopped attending on Dr. Redpath as frequently not only because she was feeling better, but because it was very time consuming, since Dr. Redpath's office was on the other side of town.

[47] On March 21, 2007, Ms. Pedersen was seen by Dr. Greenhill for a certified examination pursuant to ss. 8 and 10 of the MIR: Exhibit 2, Tab 3. He believed that she suffered a grade II soft tissue injury to the neck and upper back as well as "some type of injury to both wrists" which were probably linked to the March 22, 2005 accident. His clinical notes indicate that Ms. Pedersen mentioned that the symptoms in her neck and back had resolved and that the symptoms in her wrists had continued. The report contains a note regarding Ms. Pedersen's wrist pain occurring every few weeks and her difficulty doing some heavier activity such as picking up four grocery bags at the same time. Ms. Pedersen testified that sometimes she can pick up heavy things and she is fine, but that at other times she is not. Dr. Greenhill's report provides only for a provisional diagnosis of chronic wrist flexor tendonitis. Dr. Greenhill wrote that Ms. Pedersen's wrist symptoms should be investigated since they had persisted for two years from the time of the accident. He indicated that x-rays of both wrists and, possibly, MRIs should be performed after Ms. Pedersen's pregnancy. In his report, he qualified Ms. Pedersen's disability to be mild and was satisfied that the treatments and exercises already undertaken should be continued.

(b) Work History

[48] Ms. Pedersen obtained a Bachelor of Science degree from the University of Alberta in 1999. At the time of the accident, she was employed at Fournier Pharma as a pharmaceutical representative. In the context of that employment, she was required to travel to north Edmonton and to northern Alberta generally. Fournier Pharma was subsequently bought by another company, which led to her being laid off at the end of September 2005. From November 2005, she has worked at Cooper Vision as a contact lens salesperson. Her current employment requires her to travel to northern Alberta, northeast BC and Yellowknife. Ms. Pedersen testified that her injury has not had any effect on her work performance.

(c) Social Life, Everyday Life and Hobbies

[49] Ms. Pedersen was pregnant at the time of trial. She testified that her activities are a bit different now than they were before her pregnancy, especially regarding the frequency and intensity of her physical activities. Generally, she works out, skis, runs, paints and plays tennis. Since the accident she still skis, but if her wrists bother her, she said that she deals with the situation by not using her poles as much. She has altered her workout routine since the accident. She does not do pushups anymore. She changed her grip when she lifts weights.

[50] Tennis is probably the most important activity in Ms. Pedersen's life. She has been playing tennis since she was about 5 years old. She indicated that because of her pregnancy she only played at a recreational level, but that before her pregnancy she played at a competitive level. She usually played in provincial tournaments, but she also participated in the World Masters held in Edmonton in July of 2005 during which she had difficulty playing, because her wrists hurt. She said that she had to take Advil, although she usually does not take Tylenol or Advil. She also applied gel before, during and after playing. There were times where she had to stop playing because the pain in her wrists was too acute. After the accident, she would drop her racket quite frequently, but this has now decreased. Her condition has improved since the accident.

[51] Generally, the accident and the injuries had no repercussions on relationships with her friends, family members or co-workers. However, it has had an impact on her everyday life and household chores. Indeed, she testified that just lifting a pen or a light box could sometimes lead her to experience sharp pain in her wrists that could last for a few days. Moreover, when squeezing a dishrag she feels pain, but copes with this situation by pressing it against the bathtub or the sink. She said that the pain suffered does not affect her driving, although when she drives over a long period of time, she needs to change her driving position.

2. Positions of the Parties

[52] Both the Defendants and the Plaintiff provided me with a number of cases on the issue of general damages. Counsel for Ms. Pedersen suggested that the general damage award should

range from $15,000 to $20,000 and counsel for the Defendants suggested that an award ranging from $8,000 to $12,000 would be appropriate.

[53] In a case from British Columbia, *Bush* v. *Lundstrom*, 2001 BCSC 170, [2001] B.C.J. No. 197, the plaintiff, a respite care worker, suffered soft tissue injuries to her neck, back and right shoulder and had ongoing problems with her right wrist. Her injuries to her neck, back and shoulder improved through the first year following the accident. Her wrist injury affected her activities on her hobby farm as well as her participation as a percussionist in two community bands. In addition, she lost three weeks of work. The Court found that three and one half years after the collision, she had substantially recovered, but was left with the prospect of intermittent flare-ups of pains as a result of her soft tissue injuries as well as some weakness in her right wrist. She was awarded $25,000.

[54] In *Cozicar* v. *Oliverio*, 2004 ABQB 426, [2004] A.J. No. 727, the plaintiff suffered soft tissue injuries to her right hand, wrist, shoulder and neck in a motor vehicle accident. She was restricted for one year in her work at a dental lab which required day long fine manual labour with her hands. In addition, she was restricted in her household work for five months. At the time of trial, seven years post accident, she was still in pain. The Court concluded that, even in the absence of the accident, it was more likely than not that the plaintiff would have suffered hand, wrist as well as arm pain because of the nature of her work. The Court also found that she had pre-existing shoulder discomfort. Thus, not all of her symptoms resulted from the accident. She was awarded $25,000.

[55] In another case from British Columbia, *Shen* v. *Buchanan*, 2006 BCSC 432, [2006] B.C.J. No. 557, the plaintiff suffered neck pain, bilateral wrist pain, left knee pain as well as lower back pain as a result of a motor vehicle accident. The knee and lower back pain resolved within two to three months and the neck pain improved within six months. The plaintiff testified that his wrists still bothered him, but the Court concluded that his condition was not very serious because he had not consistently reported the pain to his doctors. The Court awarded $15,000.

3. Conclusion

[56] I do not believe that Ms. Pedersen exaggerated her pain in her evidence. She was honest and very credible. I have no doubt that she accurately depicted the effects of the accident on her life. I conclude that Ms. Pedersen suffered soft tissue injury to the neck and back which resolved within a month. Dr. Greenhill's report indicates a provisional diagnosis of chronic wrist flexor tendonitis. He was of the opinion that if her pain persists, and he believed that she was in pain, it would be necessary to investigate further in order to ensure that the diagnosis is not erroneous. No evidence was provided as to whether the symptoms will resolve or continue for a determined period of time. Thus, general damages in this case are assessed on the basis that the injury to the wrists has lasted for an approximate 2-year period. The evidence shows that Ms. Pedersen's injury has affected several aspects of her life, but she copes by doing things differently. She sought treatment and her condition has improved. Her relationships with friends, family members

and co-workers have not suffered and her work performance has not been affected. Considering the evidence, I conclude that an award of general damages in the amount $15,000 is appropriate.

CHARTER CHALLENGE

I Issues

[57] The issues before this Court in relation to the Charter challenge advanced by the Plaintiffs are:

> 1. Is the cap provided under s. 6 of the MIR, which restricts the right to sue a tortfeasor for the recovery of damages for pain and suffering to $4,000, in violation of s. 7 of the Charter? If so, is the violation in accordance with the principles of fundamental justice?
>
> 2. If the cap provided under s. 6 of the MIR is in violation of s. 7 of the Charter, can the violation be justified in a free and democratic society in accordance with s. 1 of the Charter?
>
> 3. Is the cap provided under s. 6 of the MIR contrary to s. 15(1) of the Charter?
>
> 4. If the cap provided under s. 6 of the MIR violates s. 15(1) of the Charter, can the violation be justified in a free and democratic society in accordance with s. 1 of the Charter?

II Background

1. Overview of the Canadian and American Insurance Industry and Non-Pecuniary Damages

[58] In Canada, the provinces have different systems with respect to the automobile insurance industry. Professor Michael John Trebilcock, qualified to give opinion evidence in comparative Canadian-United States accident compensation law, segregates the different systems into two categories: the supplementation of the tort system, and its replacement. The first category includes the add-on no-fault schemes under which an insured driver is entitled to some first-party no-fault benefits, but under which the right to sue negligent third parties is preserved. The second category includes threshold and pure no-fault schemes. Under threshold schemes, there is total exclusion or a limitation of tort actions below some defined threshold, either verbal or monetary. A verbal threshold relates to the type or severity of the injury. Thus, when there is a verbal threshold, the injury must meet certain criteria in order to trigger the right to sue. Finally, in pure no-fault schemes, in return for first-party benefits, the right to sue in tort is extinguished: Statement of Substance of Opinion and Expert Report of Michael Trebilcock, Exhibit 34, at para. 15.

[59] I take judicial notice of the applicable insurance legislation with respect to motor vehicles in Alberta, other Canadian provinces and territories: *Evidence Act*, R.S.A. 2000, c. A-18, s. 32.

[60] The provinces of Manitoba, Quebec and Saskatchewan have a publicly run pure no-fault regime. For these provinces, in return for relatively generous first party no-fault benefits, the motor vehicle accident victims forego the right to sue negligent drivers for their injuries. The Quebec regime includes scheduled no-fault impairment benefits, to which claimants are entitled, in addition to economic losses: *The Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215; *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35; *Automobile Insurance Act*, R.S.Q., c. A-25. It is interesting to note that in Saskatchewan, residents can also opt out of the regime and choose the tort coverage instead of the no-fault coverage, but, in fact, less than 1% of the population has chosen this option.

[61] The provinces of Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Ontario and Alberta have adopted a threshold no-fault system of automobile accident insurance.

[62] In Newfoundland and Labrador, the regime is *sui generis* in the sense that there is no threshold, but there is a $2,500 deductible for pain and suffering which does not fit comfortably into either of the two categories identified by Professor Trebilcock. Nonetheless, he testified that he would classify it within the threshold category: *Automobile Insurance Act*, R.S.N.L. 1990, c. A-22, s. 39.1; *Automobile Insurance Regulations*, N.L.R. 81/04, s. 6.

[63] The provinces of Nova Scotia, New Brunswick and Prince Edward Island have $2,500 caps on recovery for non-pecuniary losses that are tied to a definition of minor injury. In other words, recovery through the tort systems for pain and suffering damages is restricted to a cap: *Insurance Act*, R.S.N.S. 1989, c. 231, ss. 5(na) and 113B; *Automobile Insurance Tort Recovery Limitation Regulations*, N.S. Reg. 182/2003, s. 3; *Insurance Act,* R.S.N.B. 1973, c. I-12, s. 265.21 and 267.9; *Injury Regulation - - Insurance Act*, N.B. Reg. 2003-20, s. 4; *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 254.1.

[64] In Ontario, the right to sue for pain and suffering is permitted only if the verbal threshold is met. That is, in instances where the injured person dies or sustains permanent and serious disfigurement or if the injured person sustains an impairment of important physical, mental or psychological function. In these cases, the right to sue is subject to a $30,000 deductible ($15,000 if a *Family Law Act*, R.S.O. 1990, c. F-3 claim): *Insurance Act*, R.S.O. 1990, c. I-8, ss. 267.1-267.5 ff.; *Court Proceedings for Automobile Accidents that Occur on or after November 1*, 1996, O. Reg. 461/96.

[65] In Alberta, since October 1, 2004, there is a $4,000 cap on the recovery of non-pecuniary damages in relation to defined minor injuries: MIR, s. 6.

[66] In British Columbia and the three territories, the regime in place is an add-on no-fault system which provides for a range of first-party no-fault benefits and an unconstrained right to sue negligent third parties for pain and suffering: *Insurance (Vehicle) Act*, R.S.B.C. 1996 c. 231; *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83; *Insurance Act*, R.S.Y. 2002, c. 119; *Schedule of Benefits*, Y. O.I.C. 1988/90; *Insurance Act*, R.S.N.W.T. 1988, c. I-4; *Insurance Act (Nunavut)*, R.S.N.W.T. 1988, c. I-4, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c.28.

[67] Professor Trebilcock also described the automobile insurance industry in the United States of America, including the District of Columbia, and Puerto Rico, for a total of 52 jurisdictions. He testified that 13 jurisdictions have adopted the threshold regime, which precludes tort actions for non-pecuniary losses below some monetary or verbal threshold in return for no-fault benefits. In addition, 11 jurisdictions have adopted an add-on no-fault regime and 28 states have a traditional tort third-party liability regime: Statement of Substance of Opinion and Expert Report of Michael Trebilcock, Exhibit 34, at paras. 9 and 10. Professor Trebilcock testified that no states have adopted a pure no-fault system. In Canada and the U.S., Professor Trebilcock said 13 jurisdictions (including Puerto Rico) as well as 9 provinces, when including the no-fault jurisdictions, have adopted special treatment with respect to non-pecuniary losses.

2. Context of the Automobile Insurance Industry in Alberta before the Insurance Reforms

[68] In recent years, the private passenger (excluding farmers) class of automobile insurance for all coverages has represented about 75% to 80% of the total automobile insurance in Alberta as measured by premium volume: Ronald R. Miller, Review and Analysis of Alberta Private Passenger Automobile (excluding farmers) Recent Experience to 31/12/2005, Exhibit 29, at p. 2 ("Miller Report"). In Alberta, automobile insurance has been compulsory since 1972. Each vehicle is required to carry a basic coverage of a minimum of $200,000 third party liability coverage, no-fault accident or Section B coverage for medical, funeral expense and death, total disability benefits, as well as uninsured motorist coverage: *Insurance Act*, ss. 608, 627, 629 and 640. As stated in Mr. Dennis Gartner's affidavit ("Gartner Affidavit"), the Alberta Superintendent of Insurance for the Department of Finance, mandatory automobile insurance coverage is provided by private insurance companies. Premiums for compulsory coverage are determined by the Alberta Automobile Insurance Rate Board ("AIRB"), formerly the Alberta Automobile Insurance Board ("AIB"): *Insurance Act*, s. 656.

[69] Before October 1, 2004, drivers who were unable to obtain insurance with private insurers could nonetheless be insured through the Facility Association, which is an entity established by the automobile insurance industry to ensure that compulsory automobile insurance is available to all owners and licensed drivers of motor vehicles. The Facility Association is an insurer of last resort. Its premiums are high-priced as compared to private insurers: Barb Addie, Alberta Closed Claims Study, May 2006, Exhibit 30, at p. 3 ("2006 Closed Claim Study" the sample in this 2006 report was from April 4, 2004 to May 7, 2004).

[70] Since the insurance reforms of October 1, 2004, the Facility Association residual market mechanism has been replaced with a Risk Sharing Pool (the "RSP") which is administered by the Facility Association. The RSP consists of a grid pool that allows insurers to cede an unlimited number of policies that are on the grid, and a non-grid pool that allows insurers to cede a limited number of policies that are below the grid. Any profit or loss generated by the RSP is shared by all insurers doing business in Alberta in accordance with their respective market shares. A driver whose policy is ceded to the RSP is unaware of this, and continues to deal directly with the insurer who issued the policy. There continues to be a residual market mechanism for individuals who have poor driving records. The criteria for placing an individual in the residual market are clearly defined. It is worth noting that only drivers who meet the criteria can be placed in the residual market: Gartner Affidavit, at para. 17.

[71] Mr. Theodore J. Zubulake, an expert in actuarial science, was qualified to provide an opinion with respect to the property and casualty insurance environment in Canada and the private passenger automobile insurance environment in Alberta. He described the cyclical nature of the insurance industry, which is characterized by periods of "soft markets" and "hard markets". Typically, these cycles last from six to ten years, with the soft market lasting longer than the hard market. The passage from a soft to a hard market is gradual. A soft market is a period of strong competition among insurance companies. During soft markets, underwriting standards are relaxed and insurers keep premiums relatively stable or reduced in order to increase the volume of their market share. Generally, insurers earn revenue from two sources: premiums and investment income. During soft markets, insurers will often not fully recover their expenses and will rely on their investment income to be profitable. The effect is that profitability inevitably worsens, and when profitability reaches an unacceptable level, the hard market cycle begins, bringing with it higher premiums.

[72] In addition, during hard markets, insurers seek to increase their profitability by being more selective about who they insure. Premiums often increase sharply during hard markets as the insurers clamour to recover their underwriting expenses.

[73] Mr. Zubulake testified that since the 1970s, when mandatory insurance was introduced in Alberta, there have been several insurance cycles. In the late 1980s to the mid 1990s, Alberta experienced a hard market. From the mid 1990s through 2001, the property casualty insurance market in Canada, including Alberta, was in a period of soft market. From that time, markets in Canada, including Alberta, entered into a hard market period, which peaked approximately in 2003. During that period, private passenger automobile insurance premiums rose quite sharply in Alberta: Report of Theodore J. (Ted) Zubulake, Exhibit 12, at p. 8 ("Zubulake Report"); See also Miller Report, Exhibit 29, at p. 19. Automobile insurance became less available as the insurance markets tightened, and property casualty insurance profitability significantly improved. After peaking in 2003, the industry entered into a new soft market. The average written premiums declined. Mr. Zubulake, in his report, is of the opinion that the decrease was largely attributed to the rate freeze which was announced by Premier Klein in 2003 and reductions in basic coverage premiums ordered by the Government of Alberta and the AIRB, as well as the introduction of the premium grid which sets the maximum amount for premiums based on driving record: Zubulake

Report, Exhibit 12 at pp. 18 and 19. Mr. Zubulake testified that, at the time of trial, the market was a soft market: See also Miller Report, Exhibit 29, at p. 11.

[74] The evidence presented by Mr. Gartner and Mr. Cheng, the latter who was qualified in the area of property and casualty actuarial science, indicates that the average earned premium, all coverages combined, in private passenger vehicles increased somewhere between 11% and 16% in 2002 and between 12% and 15% in 2003: Gartner Affidavit, at para. 28, Exhibit C, at p. 4 and Exhibit D; Joe S. Cheng, Report on the Review of Insurance Reform - Premium and Claim Analysis by Gordon G. Smith and Theresa K. Reichert of Deloitte & Touche LLP, Exhibit 44, at p. 9 ("Cheng Report"). Newly licenced drivers, including young drivers, drivers recently reinsured after a lapse in coverage, as well as drivers who were categorized by insurance companies as being high risk were particularly affected in terms of affordability of premiums: Gartner Affidavit, at paras. 29, 31 and 33.For instance, between 1995 and 2003 the cumulative increase in average third party liability premium for principal drivers under age 21 was 90% ($1,050 on an absolute dollar basis), when compared to 67 % ($252 on an absolute dollar basis) for all other principal drivers. In 2003, 11.9% of young drivers found insurance in the Facility Association when compared to 3.7% of other drivers: Zubulake Report, Exhibit 12 at pp. 21-23.

[75] Additionally, many Albertans who had previously been insured through the conventional markets were now being denied coverage and had no choice but to turn to non-standard insurance market insurance companies, which have better rates than the Facility Association but which are more costly than the standard market, or turn to the Facility Association, the insurer of last resort. In April 2003, the monthly written premium in the Facility Association rose to over $21 million, compared to $10.5 million in January of that year and $3.7 million in December 2000. In September 2003, monthly premiums increased again to over $36 million. The Facility Association's share by vehicle of the total private passenger vehicle market more than tripled over three years, going from less than 1% in 2000 to 3.4% in 2003. When combining the Facility Association with the two leading non-standard insurance market insurance companies in Alberta, their market share reached 14% in 2003: Gartner Affidavit, at para. 49; Zubulake Report, Exhibit 12, at pp. 19 and 20. Moreover, it was very concerning that the increase of written vehicles in the Facility Association did not vary according to the driving record. Indeed, some drivers had 3 years or more of claims-free experience and were still outside of the standard insurance market: Gartner Affidavit, at para. 51; Gartner Affidavit, Exhibit C.

[76] It appears that a significant number of drivers were driving without insurance. The evidence indicates that convictions for uninsured driving offences and claims under the Motor Vehicle Accident Claims Fund for accidents involving uninsured drivers (including failure to produce a valid pink card and driving or being on the road without insurance) increased by 18%, from 2000 to 2003 but has fallen by 10% in the two years following 2003: Gartner Affidavit, at paras. 34, 35 and 182; Gartner Affidavit, Exhibits H, I and GGGG.

[77] In late 2002 and early 2003, the Department of Finance began receiving expressions of public concern relating to high premiums: Gartner Affidavit, at paras. 25 and 26; Gartner Affidavit, Exhibit B. In March 2003, Bill 33 was tabled. It would have implemented tort reforms

to address, among other things, basing loss of income awards on net, rather than gross income in the calculation of damages for lost income. The Government decided to conduct further consultations on a broader range of possible options to address problems in the mandatory automobile insurance regime, rather than to proceed with Bill 33. The options it considered included: not making any changes to the existing system, a no-fault insurance scheme, caps on claims, deductibles, public delivery (either tort, no-fault or both), increased accident benefit limits and caps on premiums. An analysis of insurance systems of other provinces was completed at this time: Gartner Affidavit, at paras. 62-76.

[78] In Alberta, in the mid 1990s up to approximately 1999, bodily injury costs were increasing. From 1999 to 2001 there was a decrease, and then, from 2001 to 2002 there was another increase. The evidence indicates that the bodily injury costs decreased from 2002 to 2005: Miller Report, Exhibit 29, at p. 8. It became a concern as to how bodily injury costs impacted the rising underwriting costs for automobile insurance and premium increases, especially when hard markets prevailed. In fact, between 1986 and 2004, bodily injury liability accounted for 88% of the total increase in third party liability claims and claims expense costs: Zubulake Report, Exhibit 12, at p. 14. The escalation in bodily injury costs in Alberta as well as in other provinces was due to increasing amounts awarded for non-pecuniary damages. As well, the proportion of claims that were specifically for minor soft tissue injuries appeared to be significant.

[79] The Federal Office of the Superintendent of Financial Institutions ("OSFI") regulates the capital adequacy of federally incorporated and foreign property and casualty insurance companies. Solvency and capital adequacy deteriorated in the insurance business between 2002 and 2003. For instance, in 2002, the Co-operators General Insurance Company stopped writing new automobile insurance coverage in Alberta. Since insurers need capital to backstop policies and write new risks, a reduction in capital translated into declining coverage as well as accessibility issues for consumers. Information received by IBC in 2002 showed that return on equity for the property and casualty insurance industry in Canada in 2000 was the worst on record at any time over the course of the previous 25 years. There was a concern that capital adequacy had fallen generally and that a number of companies were approaching OSFI's minimal capital target thresholds. OSFI issued a report on the solvency of federally regulated property and casualty insurers indicating that their financial position had been deteriorating for several years. The report also found that the profits had fallen primarily because of rising claim costs, especially in automobile insurance, and that these were not matched by increases in premium revenue: Gartner Affidavit, at paras. 44-47; Gartner Affidavit, Exhibit P; Gartner Affidavit, Exhibit Q.

[80] Immediately before the reforms, commencing in the latter part of 2003 and into 2004 and forward, loss ratios declined and insurance companies were very profitable: Miller, transcript, at pp. 468 and 469; See also Miller Report, Exhibit 29, at pp. 12 and 16. In 2003 and 2004, the bodily injury costs were decreasing: Miller Report, Exhibit 29, at p. 8. At trial, Dr. Miller speculated that the 2003 decrease may have been due to the fact that premiums were going up and, consequently, people may have been more hesitant to report their accidents for fear of

further increases. Dr. Miller was of the opinion that there were less claims, but that the size of claims was not affected: See also Miller Report, Exhibit 29, at p. 18.

[81] In 1991, the AIB undertook a study in order to determine whether there was a problem with premium instability and, if there was, whether the cure was to modify its tort and no-fault features: *A Study of Premium Stability in Compulsory Automobile Insurance by the Alberta Automobile Insurance Board for the Minister of Consumer and Corporate Affairs of the Government of Alberta*, September 1991("1991 Closed Claim Study"), Gartner Affidavit, Exhibit J, at p. 8.

[82] The 1991 Closed Claim Study outlined problems related to the rise in awards for non-pecuniary damages. It found that 47.7% of compensation for third party liability claims consisted of non-pecuniary damages, and that this figure rose to 83.1% for claims under $10,000, 57.1% for claims over $10,000 up to $75,000 and 18.2% for claims over $75,000: Gartner Affidavit, Exhibit J, at pp. 48-53. In addition, the survey revealed an annual injury claims inflation of approximately 12.9%, which was more than twice the rate of inflation measured by the Consumer Price Index: Gartner Affidavit, Exhibit J, at pp. 56 and 57. Mr. Zubulake concluded that the average cost for pain and suffering for the claims under $10,000 in the 1991 Closed Claim Study was approximately $2,700: Gartner Affidavit, Exhibit J, at p. 279.

[83] The AIB noted that, historically, there had not been stability of automobile insurance premiums in Alberta and that, in constant dollars, the cost of automobile insurance had declined steadily from 1977 to 1989. It concluded that in 1989, Alberta motorists received a more extensive insurance product when compared to what was offered in 1972. The AIB observed that since 1985, loss costs had increased dramatically and concluded that "the main reason for the increase in claims costs was the increase in bodily injury loss costs"[...] and that "[m]ost of these costs resulted from non-pecuniary damage claims": Gartner Affidavit, Exhibit J, at p. 66. The AIB opined that when compared to other traffic accident claims, minor injury victims were over compensated on the tort side of the system and that claimants with catastrophic injuries were under compensated. It noted that, in light of the circumstances, premium increases would have been justified since 1985, but that due to the competition in the market place, insurers did not seek necessary increases until 1989, which led to the conclusion that for the period of 1985 to 1990, Alberta motorists actually paid less for insurance than its actual cost: Gartner Affidavit, Exhibit J, at pp. 65-67.

[84] The AIB expected that despite the increases that were granted in 1989 and 1990 for third party liability premiums, upward pressure on premiums would continue due to the growth of injury claims. The AIB examined two methods that could flatten or reduce future premium costs. The first method was a series of government measures, which would reduce severity and frequency of accident costs. The second method was a mechanism to adjust the amount of monetary compensation, which would control premium increases. The AIB recommended the implementation of tort reforms, which could include a limitation upon the right of recovery for non-pecuniary damage claims under a deductible of $10,000 or a restriction of tort rights to only

the most serious injury claims. It also suggested that the Government consider the possibility of a full no-fault system: Gartner Affidavit, Exhibit J, at pp. 127 ff.

[85] The concern regarding the increase of non-pecuniary damages was also shared by other provinces. In fact, non-pecuniary damages appear to have been a significant part of bodily injury loss costs in New Brunswick, Nova Scotia and Newfoundland. Studies conducted by the IBC in New Brunswick and Nova Scotia, with a sample of claims closed in 2001, showed that for claims of $20,000 or less, about 80% of total settlement amounts were for pain and suffering. These results appear to be very similar to the Alberta situation when compared to the 1991 or 2006 Closed Claim Study: 2006 Closed Claim Study, Exhibit 30, at p. 12. In New Brunswick, soft tissue injury claims only, with no other injuries, represented 61% of all bodily injury and 39% of the money paid out. Also, when considering all claims, 61% of the total settlement amount was for pain and suffering. The closed claim study conducted in Nova Scotia concludes that 67% of all claims settlement amounts were for pain and suffering. In addition, soft tissue injury claims accounted for 70% of all bodily injury insurance claims as well as 56% of the money paid out.

[86] The 2001 Closed Claim Survey conducted in Newfoundland and Labrador indicated that 67% of claimants only made claims for soft tissue strains and sprains of the neck, back, or other body parts and received 59% of total settlement amounts. Moreover, 57% of total settlement amounts were for pain and suffering. More recently, a 2005 update to the Newfoundland Closed Claim Study indicated that 60.4% of all settlement amounts were for pain and suffering: Zubulake Report, at pp. 16 and 17; 2006 Closed Claim Study, Exhibit 30.

[87] The analysis of Alberta claims closed in April and May of 2004 shows that non-pecuniary damages were even more significant in Alberta, when compared to the 1991 Closed Claim Study. Indeed, the 2006 Closed Claim Study revealed that 70.8% of the total settlement amounts were for pain and suffering. It also indicated that 62% of the claimants made claims only for soft tissue strains or sprains of the neck back or other body parts and received 43% of the total settlement amounts.

[88] In the 2006 Closed Claim Study, Barb Addie concluded at p. 16 that, with respect to third party liability bodily injury claims cost, the trend in claims costs per vehicle was similar across the jurisdictions where a survey was conducted:

> In all jurisdictions, private passenger vehicle TPL-BI claims cost per vehicle, rose consistently through the 1985-2002 period. Across the four jurisdictions, these costs rose from trough-to-peak by an average of 300%, an average annual increase of 8.5%. The consumer price index increased by 59% over the same time frame, an average annual increase of 2.8%.

[89] Prior to the insurance reforms, there was also concern with respect to motor vehicle accident victims who suffered soft tissue injuries who were treated inappropriately or did not receive treatment for different reasons including a lack of financial means: Ferrari Report, Exhibit 16, at p. 3; Gartner Affidavit, at paras. 53-57; Ohlhauser Affidavit, at paras. 20, 26, 29

and 34. In fact, a survey which was meant to compare pre reform and post reform periods indicated that in the first 12 weeks, 24% of injury claimants had not received health services which were compensable by auto insurers and almost 10% of injury claimants had not received any treatment: Report on the First Alberta Post Reform AB Costs Study: the First 12 weeks, Exhibit 37, at p. 4; Report on the Second Alberta Post Reform AB Cost Study: the First 26 weeks, Exhibit 37, at p. 5. It was a concern because early diagnosis and treatment following an accident appears beneficial to injury victims: Ohlhauser Affidavit; Ferrari Report, Exhibit 16 p. 4; Burton Report, Exhibit 41, at p. 18; Gartner Affidavit, at para. 56, Gross report, Exhibit 6, at p. 4; Report on the Second Alberta Post Reform AB Cost Study: the First 26 weeks, Exhibit 37, at p. 1.

3. Overview of the Insurance Reforms

[90] In November 2003, Bill 53, which was the enabling legislation for the Alberta insurance reforms was introduced and received Royal Assent on December 4, 2003: *Insurance Amendment Act*, *2003 (No. 2),* S.A. 2003, c. 40. The reforms include the following regulations: the MIR, the DTPR, the *Automobile Accident Insurance Benefits Amendment Regulation*, Alta. Reg. 121/2004, the *Automobile Insurance Premiums Regulation*, the *Complaint Resolution Regulation,* Alta. Reg. 259/2004 and the *Fair Practices Regulation*, Alta. Reg. 382/2003 (collectively with the *Insurance Amendment Act*, *2003 (No. 2*), the "Insurance Reforms"). Except for the *Complaint Resolution Regulation* and the *Fair Practices Regulation* which respectively came into force November 23, 2004 and December 17, 2003, these regulations came into force on October 1, 2004.[1]

[91] The *Fair Practices Regulation* prohibited insurers from refusing to issue new contracts, from terminating existing contracts and refusing to renew existing contracts solely on enumerated grounds including age, gender or marital status.[2]

[92] On June 21, 2004, s. 661.2 of the *Insurance Act* was proclaimed. This section restricts the right of insurers to withdraw from the business of automobile insurance. It requires the insurer to give the Superintendent of Insurance at least 180 days' notice of its intention to withdraw from the Alberta automobile insurance business and permits the Superintendent to prohibit the insurer from withdrawing for up to 90 days from the date of the notice.

[93] Under the MIR, general damages for pain and suffering are capped at $4,000 with respect to Minor Injuries which are defined under the MIR as sprains, strains and WAD I or II injuries caused by an accident arising from the use or operation of a motor vehicle, that does not result in

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[1] The *Automobile Insurance Premiums Regulation* came into force on October 1, 2004 except for section 21, which came into force on June 21, 2004.

[2] Alta. Reg. 382/2003 was repealed by the *Market Amendment Regulation,* Alta. Reg. 96/2006.

"serious impairment" as also defined under the MIR. The MIR does not limit the pecuniary damages incurred following a motor vehicle accident.

[94] In the first 90 days, the DTPR allows for pre-authorization payment for the treatment of Minor Injuries for up to 10 or 21 treatment sessions without needing to seek approval from the insurance companies or without paying up-front. The insurer should, however, be notified of the claim (Form AB-1): DTPR, s. 32. When the maximum number of treatment sessions or pre-authorized coverage is reached or when there is a need for services which are not covered by the DTPR, a person who is still in need of treatment may apply for Section B coverage for a maximum of $50,000: *Automobile Accident Insurance Benefits Regulation*.

[95] Before the Insurance Reforms, there were no protocols with respect to Minor Injuries, and the maximum under Section B was set at $10,000. Dr. Ferrari is of the opinion that the increase under Section B is a very positive change: Ferrari Report, Exhibit 16 at pp. 3, 4, 7, 11, 15 and 16. Dr. Ferrari testified that, before the Insurance Reforms, several patients had in fact reached the $10,000 limit: Ferrari, transcript, at pp. 383 and 384. However, it is worth noting that the benchmark study conducted pre reform in anticipation of the introduction of reforms to Section B, as well as the post reform studies, specifically show that Minor Injury victims generally claimed or received significantly less than $10,000 for medical and rehabilitation loss costs: Report on Alberta Pre-Reform AB Costs Study, Exhibit 37, at p. 7; Report on the Second Alberta Post Reform AB Cost Study: the First 26 weeks, Exhibit 37, at pp. 6 and 7. Ms. Sulzenko-Laurie was qualified to give opinion evidence in the area of developing and working with surveys and studies designed to measure and evaluate policy initiatives and proposals with particular reference to health care. She noted that, in the first 12 weeks post reform, the cost per treatment rose, which, in her opinion, was to be expected considering that some providers may have seen an opportunity to raise their rate pay: Report on the First Alberta Post Reform AB Costs Study: the First 12 weeks, Exhibit 37, at pp. 4 and 5; Sulzenko-Laurie, transcript, at pp. 597-599. The second post reform study shows that this situation has since moderated, probably because fee guidelines were introduced: Report on the Second Alberta Post Reform AB Cost Study: the First 26 weeks, Exhibit 37, at p. 7

[96] Another new feature that resulted from the Insurance Reforms is the AIRB, which was established to set premium levels for mandatory automobile insurance coverages, to monitor premiums for optional coverages and to balance premiums and costs in the system. The grid premium system established under the *Automobile Insurance Premiums Regulation* places a cap on the premiums insurers may charge for mandatory automobile insurance coverages. Age, gender and marital status are not taken into consideration in the calculation of the premium amount.

[97] The Insurance Reforms include an "all-comers" rule: *Insurance Act*, s. 613.1. This rule provides that all Albertans, subject to some exceptions, will have access to insurance at a cost less than or equal to a premium capped under the premium grid: See also *Adverse Contractual Action Regulation*, Alta. Reg. 98/2005.

[98] Other aspects of the Alberta insurance system that were affected by the Insurance Reforms include the assessment of the replacement of income which is now based on net income rather than gross income: *Insurance Act*, s. 626.1. Additionally, a dispute resolution mechanism for disputes concerning premiums was established. Such a mechanism was not in place prior to the Insurance Reforms: *Insurance Act*, s. 661.3; *Automobile Insurance Premiums Regulation*; *Complaint Resolution Regulation*.

[99] As previously mentioned, on October 30th 2003, Premier Klein announced the freeze on automobile insurance premiums. The freeze was implemented subsequently: Gartner Affidavit, at para. 60; *Insurance Act*, s. 661.1.

[100] Following the implementation of the regulations, the DTPR was subject to review and follow up studies. It was found that the portion of claimants not receiving health services in the first 12 weeks following their injury declined from almost 10% (in the benchmark study conducted pre reform) to 2.6% in the second post reform study. Similarly, for the first 26 weeks following the injury the two studies indicated a decline from 5.9% in the benchmark study to 2.1% in the second post reform study. The average medical rehabilitation cost for the first 12 weeks for those claimants who received care was $841 in the second post reform study, representing a 15% increase from the benchmark study. The average number of healthcare visits in the first 12 weeks following injury increased for each successive study, from 11.5 in the benchmark study to 13.5 in the second post reform study. Finally, the costs per treatment decreased by more than 13.5%. The number of claims that remained open following 26 weeks decreased from 71% in the benchmark study compared with 41.5% in the second post reform study.

[101] Insurance premiums have been reduced since the implementation of the Insurance Reforms through the premium freeze, mandated reductions and the impact of the premium grid system. To date, mandated reductions have decreased compulsory automobile insurance rates by 18%: Gartner Affidavit, at para. 181; Zubulake Report, Exhibit 12, at p. 30 and Zubulake, transcript, at p. 254.

[102] It is clear from the evidence that, in the years preceding the Insurance Reforms, the Government of Alberta had good reason to be concerned about the significance of non-pecuniary damages with respect to bodily injury costs. However, it is also clear that premiums do not vary solely as a function of bodily injury costs. There are other significant factors that influence the rates, including the cyclical nature of the insurance market which, if not regulated, will affect premiums differently depending on whether the period is a soft market or a hard market.

II Section 7

[103] Section 7 of the Charter provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

1. Positions of the Parties

[104] The Plaintiffs assert that their s. 7 rights have been violated as a result of the MIR and that this deprivation is not in accordance with the principles of fundamental justice. They submit that the MIR and the DTPR are independent and they do not challenge the DTPR's constitutionality, unless it is held that they are incorrect about the relationship between these regulations. In other words, they take the position that, standing alone, without the MIR, the DTPR is "likely constitutional". Further, the Plaintiffs submit that the MIR does not become constitutional when looked at as a set of broad reforms.

[105] The Plaintiffs argue that the MIR affects people who suffer soft tissue injuries in two ways. First, they allege that the MIR removes their right to sue tortfeasors for damages for pain and suffering exceeding $4,000. Furthermore, the Plaintiffs argue that the cap has a practical negative effect on the claimant's ability to retain legal counsel and pursue a claim considering that much of the soft tissue injury litigation proceeds on a contingency-fee basis. Thus, the Plaintiffs submit that the MIR curtails claimants' access to justice.

[106] Second, by directing certain medical treatment, the MIR removes the claimants' right to choose, in an unfettered manner, what medical treatment is appropriate following a motor vehicle collision. They contend that this contravenes s. 7 of the Charter. The Plaintiffs take the further position that, in effect, the MIR compels them to follow the DTPR which, the Plaintiffs submit, suffers from serious flaws, is controversial and represents an unproven and untested model of care.

[107] Claimants, who fail to comply with the DTPR without a "reasonable excuse", and are later diagnosed as "seriously impaired", as defined in the MIR, may suffer financial consequences. The Plaintiffs suggest that this feature of the MIR interferes with soft tissue injury victims' physical integrity and their ability to control their own body, and removes the physicians' discretion. In other words, the Plaintiffs argue that the MIR cannot coerce injury victims into medical treatment by imposing a "potential financial penalty" without infringing s. 7 of the Charter.

[108] Additionally, the Plaintiffs submit that the election to follow the DTPR must be made within 10 days of the collision, at a time when victims may be in a fragile physical and psychological state. The Plaintiffs argue that the MIR violates the physical and psychological security of the person, and this deprivation is not in accordance with the principles of fundamental justice. The Plaintiffs state further that the limitation on the Plaintiffs' ability to choose medical treatment is arbitrary and, accordingly, cannot be in accordance with the principles of fundamental justice.

[109] The Crown and IBC submit that s. 7 is not engaged, because it does not protect pure economic interests. They state that the ability to bring an action for damages has been held to be purely proprietary and not subject to Charter protection. In addition, it is submitted that the right to sue for non-pecuniary damages in excess of $4,000 is not a fundamental personal choice. In any event, through the increased Section B benefits and the existing pre-approved treatment programs, the fundamental choices available to a person injured in a motor vehicle accident are actually increased rather than limited. With respect to the right to retain counsel, they argue that the evidence does not show that the Plaintiffs' specific rights were infringed, and in any event, *British Columbia (A.G.)* v. *Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 has clearly held that there is no free-standing right to legal representation.

[110] Generally, with respect to the right to security of the person, the Crown and IBC argue that the Plaintiffs have led no evidence which would support that the Plaintiffs suffered psychological harm sufficient to engage s. 7. Referring to *Rodriguez* v. *British Columbia (A. G.)*, [1993] 3 S.C.R. 519, it is submitted that in order to engage the security of the person, the Plaintiffs must demonstrate physical interference by the state, engendering the loss of "personal autonomy", at least with respect to the right to make personal choices concerning one's own body, and control over one's physical and psychological integrity. They contend that, under the challenged legislation, a person's ability to make his or her own medical decisions is at all times preserved. They argue that participation in the DTPR is entirely voluntary which is demonstrated by the fact that injury victims must elect to follow it.

[111] Similarly, IBC and the Crown state that physicians and other health care practitioners retain the discretion to treat a patient other than under the DTPR. Although encouraged to apply the DTPR in their practices, there is no requirement that a health care practitioner follow the DTPR. In addition, they submit that the rebuttable presumption in s. 5 of the MIR, which allows Minor Injury victims the opportunity to raise a "reasonable excuse" for not following the DTPR, would likely be engaged if a health care practitioner declined to follow the DTPR.

[112] Regarding the 10-day period, the Crown and IBC highlight s. 32 of the DTPR which provides "or, if that is not reasonable, as soon as practicable after that", thus there is no obligation to make a final decision within 10 days. They submit that the purpose of the 10-day period is to attempt to encourage persons with sprains, strains or WADs suffered in a motor vehicle accident to notify their insurer of a claim and preserve the ability to obtain benefits under the DTPR and the *Automobile Accident Insurance Benefits Regulation*. They argue that the 10-day-period applies only to the AB-1 Notice of Claim and Proof of Loss form. The election to follow the DTPR is ultimately made in the AB-2 Treatment Plan form.

[113] The Crown argues that while s. 5 of the MIR may result in a person following the DTPR, it does not force anyone to do so. Further, it submits that the evidence establishes that the DTPR does not promote experimental and medically controversial treatments which would engage the right to security of the person. Indeed, it points out that under the DTPR there is a wide range of treatments and services for which pre-authorized payment is available. The Crown submits that in any event, s. 5 of the MIR does not dictate or restrict the patients' treatment. Specifically, after

the earlier of the first 90 days or, depending on the Minor Injury diagnosis, the use of the 10 or 21 treatments provided for following an accident, application may be made for reimbursement for further treatments. This provision is in accordance with the Section B procedure, which was in place pre reform, except that the Section B limit has now been increased from $10,000 to $50,000.

[114] Alternatively, it is submitted that if the Court concludes that the Plaintiffs were deprived of their right to security of the person, that deprivation complies with the principles of fundamental justice. In light of *Rodriguez*, it is submitted that human dignity is not a principle of fundamental justice and the fact that the Plaintiffs felt that their human dignity has been demeaned has no relevance at this stage of the s. 7 test. Finally, the Crown states that the DTPR is not arbitrary, rather, the DTPR seeks to apply best medical practices to injured persons suffering from sprains, strains or WADs, and is subject to regular review**.**

2. Analysis

[115] Section 7 of the Charter guarantees that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In order for the Plaintiffs' challenge to succeed under s. 7 of the Charter, they must first prove that there has been a deprivation of the right to life, liberty or security of the person. Second, they must demonstrate that the deprivation was contrary to the principles of fundamental justice: *Rodriguez,* at p. 584. The onus to prove the infringement is on the Plaintiffs: *Canadian Foundation for Children, Youth and the Law* v. *Canada (A.G.)*, 2004 SCC 4, [2004] 1 S.C.R. 76 at para. 3.

(a) Right to Non-Pecuniary Damages Exceeding the Cap

[116] Section 6 of the MIR provides that the "total amount recoverable as damages for non-pecuniary loss for all minor injuries sustained by a claimant as a result of an accident is $4000". The Plaintiffs who, pursuant to the MIR definition, suffered Minor Injuries submit that the legislation removes their right to sue for damages for pain and suffering exceeding $4,000. As the law stands in Canada, the cap on non-pecuniary damages cannot, in isolation, lead to a restriction of the physical or psychological integrity of the Plaintiffs. Section 7 does not protect purely economic interests: *Siemens* v. *Manitoba (Attorney General),* 2003 SCC 3, [2003] 1 S.C.R. 6 at paras. 45 and 46.

[117] In *Whitbread* v. *Walley* (1988), 51 D.L.R. (4th) 509, McLachlin J.A. (as she then was), writing for the British Columbia Court of Appeal, considered provisions of the *Canada Shipping Act*, R.S.C. 1970, c. S-9 that limited liability with respect to both pecuniary and non-pecuniary damages available to persons injured while aboard a ship. It was argued that the plaintiff who was physically injured should not be deprived from the right to be indemnified for his physical and psychological loss. It was also argued that the deprivation caused by the legislation curtailed his ability to acquire aids and amenities to the improvement of his life, liberty and security of the

person. McLachlin J.A. wrote that since the framers of the Charter did not use the words “life, liberty and security of the person or such economic benefit as the law may award in their stead” [emphasis added], economic interests were not contemplated by the framers. Moreover, considering the fact that most economic interests may affect a person’s life, liberty or security of the person, she held that to accept the plaintiff’s argument would mean that all property interests would be protected under s. 7 of the Charter. Finally, at pp. 520 ff., McLachlin J.A. found that the legislation did not cause the plaintiff’s physical loss of liberty or security, but it caused a limitation with respect to how much money was recoverable:

> Thus, it appears clear that legislation or state action directly affecting the life, liberty or security of the person falls within s. 7 of the Charter. On the other hand, legislation or state action which is entirely economic falls outside the scope of s. 7. The difficult question, which remains to some extent unresolved, concerns the situation which falls between these two extremes -- the case where the measure complained of, while it has an economic aspect, arguably is connected to or affects the life, liberty or security of the person.
>
> This appeal requires us to enter on this difficult middle ground. The plaintiff's case, reduced to its essence, is that the limitations of liability imposed by ss. 647 and 649 of the *Canada Shipping Act*, while on their face economic, are so directly connected to the physical and psychological liberty and security of his person that s. 7 of the Charter applies.
>
> ....
>
> The matter may be viewed in another way. The deprivation of life, liberty and security of person which the plaintiff has suffered is not caused by ss. 647 and 649 of the *Canada Shipping Act*. Rather, it was caused by the accident. The plaintiff's physical and psychological loss arose independently of the impugned provisions and will, in large part, continue, regardless of whether those provisions apply or not. What the limitations on liability in ss. 647 and 649 cause is not the plaintiff's physical loss of liberty and security, but his inability to recover more than a stipulated amount of money from the persons legally responsible for the accident. While money, as already noted, may almost always be argued to affect a person's liberty and security, that is an indirect and incidental effect not contemplated by s. 7 of the Charter. [Emphasis added]

In *Whitbread*, it was held that there was no violation of s. 7. The appeal to the Supreme Court of Canada with respect to s. 7 of the Charter was dismissed from the bench: *Whitbread* v. *Walley*, [1990] 3 S.C.R. 1273 at p. 1279.

[118] In *Hernandez* v. *Palmer* (1992), 15 C.C.L.I. (2d) 187, the Ontario *Insurance Act*, R.S.O. 1990, c. I-8 was constitutionally challenged on the grounds that it violated the plaintiff’s rights pursuant to ss. 7 and 15. The plaintiff, who suffered post-traumatic stress disorder as a result of a

motorcycle accident, was prevented from bringing a civil action against the defendant tortfeasor. Section 266 of the Ontario *Insurance Act,* required the injury be physical in nature:

> 266. (1) In respect of loss or damage arising directly or indirectly from the use or operation, after the 21st day of June, 1990, of an automobile and despite any other Act, none of the owner of an automobile, the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation in Canada, the United States of America or any other jurisdiction designated in the No-Fault Benefits Schedule involving the automobile unless, as a result of such use or operation, the injured person has died or has sustained,
>
> (a) permanent serious disfigurement; or
>
> (b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

[119] The application was dismissed. The Court found that the right to sue in tort was proprietary in nature and economic in reality and, as such, was excluded from the protection of s. 7 of the Charter. Alternatively, the Court held that if the right to sue in tort were protected under s. 7, it would not be in violation of the principles of fundamental justice. The Court held that in establishing programs as replacement for the right to sue, trade-offs are necessarily involved. It added at p. 224:"A court should not frustrate a scheme considered and designed by a Legislature to rectify a serious problem. Where trade-offs are involved, there must be a reallocation of resources and this, of course, would affect some rights". The Court concluded that the issue as to whether the right to sue in tort should be restricted in the public interest is an issue of public policy within the exclusive domain of elected representatives and not the judiciary.

[120] In light of the case law, it is clear that s. 7 does not protect the civil right to bring an action for damages for personal injury beyond the statutory $4,000 cap: *Budge* v. *Calgary (City)* (1991), 111 A.R. 228 (C.A.).

[121] Further, the Plaintiffs submit that the cap on non-pecuniary damages provided by the MIR creates restrictions on the claimant's *de facto* ability to sue in that it restricts the financial ability to retain legal counsel, which in turn, adversely affects the claimants' access to justice. The Plaintiffs argue that a great deal of soft tissue injury litigation proceeds on a contingency-fee basis and the fact that there is a cap makes it practically impossible for a claimant to retain a lawyer. In response, IBC and the Crown submit that the right to legal counsel has only been broadened in the context of procedural fairness and, referring to *Christie*, that there is no broad general right to legal counsel as an aspect of, or precondition to, the rule of law. In any event, they submit that the MIR does not, either expressly or implicitly, restrict the right of anyone suffering from a Minor Injury to engage legal counsel.

[122] Very recently, in *Christie*, the *Social Service Tax Amendment Act* (No. 2), 1993, S.B.C. 1993, c. 24, which imposed a 7 percent tax on the purchase price of legal services was constitutionally challenged by a litigation lawyer, Mr. Christie, who worked with low income clients. He submitted that the net effect of the tax was to make it impossible for some of his clients to retain him to pursue their claims. Affidavits from some of his clients and Mr. Christie himself were filed in support of his submission. Mr. Christie asserted that legal services were necessary for effective access to the courts. He contended that where rights and obligations were at stake before a court or tribunal, the constitution mandated access to justice aided by a lawyer. The discussion focused on the principle of the rule of law, but the Supreme Court of Canada also discussed the s. 7 protection. It rejected the general protection argument at paras. 24-26:

> The text of the Charter negates the postulate of the general constitutional right to legal assistance contended for here. It provides for a right to legal services in one specific situation. Section 10(b) of the Charter provides that everyone has the right to retain and instruct counsel, and to be informed of that right "on arrest or detention". If the reference to the rule of law implied the right to counsel in relation to all proceedings where rights and obligations are at stake, s. 10(b) would be redundant.
>
> Section 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the Charter, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see *Dehghani* v. *Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in *New Brunswick*, the Court was at pains to state that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry (see para. 86).
>
> Nor has the rule of law historically been understood to encompass a general right to have a lawyer in court or tribunal proceedings affecting rights and obligations. The right to counsel was historically understood to be a limited right that extended only, if at all, to representation in the criminal context: M. Finkelstein, *The Right to Counsel* (1988), at pp. 1-4 - 1-6; W. S. Tarnopolsky, "The Lacuna in North American Civil Liberties - The Right to Counsel in Canada" (1967), 17 Buff. L. Rev. 145; Comment, "An Historical Argument for the Right to Counsel During Police Interrogation" (1964), 73 Yale L.J. 1000, at p. 1018. [Emphasis added]

[123] The Court concluded that the rule of law does not preclude the recognition of a right to counsel in specific and varied situations. However there is no general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.

[124] The Supreme Court of Canada was unequivocal: there is no broad general right to legal counsel as an aspect of, or precondition to, the rule of law. In order to ensure that guaranteed rights are in fact protected, the courts will occasionally, in the context of s. 7, order that legal counsel be provided, after taking financial circumstances into account. However, in light of *Christie*, the sole fact that a right will lead to a damage award, which will not cover or only partly cover legal representation is certainly not sufficient to conclude that there was a denial of access to justice.

[125] I acknowledge that in some instances, state intervention will be necessary to facilitate access to justice by providing legal counsel to individuals who cannot afford to retain legal counsel and who would be deprived of a fair hearing considering the seriousness of the interests at stake, the level of complexity of the proceedings and the capacities of the person: *New Brunswick (Minister of Health and Community Services* v. *G. (J.)*, [1999] 3 S.C.R. 46 at para. 75. For instance, in *G. (J.)*, the government sought to extend an order which granted the Minister of Health and Community Services custody of the indigent appellant's three children. It was held that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction was a "serious interference with the psychological integrity of the parent" which threatened to restrict the right to security of the person: *G. (J.)* at paras.56 ff. The restriction would not have been in accordance with the principles of fundamental justice if the appellant were unrepresented by counsel at the hearing. Although this type of argument may succeed in other circumstances, in the Plaintiffs' case, the alleged rights are purely economic in nature, and, as illustrated in *Whitbread*, even if economic interests are likely to affect a person's life, liberty or security, s. 7 does not purport to afford protection to purely economic rights.

[126] In any event, if the right to retain counsel and access to justice could be infringed as a result of the $4,000 cap provided by the MIR, there is not enough evidence to prove that the Plaintiffs' rights were violated in this specific case. At trial, Ms. Sulzenko-Laurie commented on a study requested by IBC which compared Alberta pre reform and post reform data, such as costs and time taken for claim closure and predictors such as age, time to first visit, and presence of legal representation. In fact, the studies revealed that Minor Injury victims represented by legal counsel went from 34.1% pre reform to 15.5% post reform. However, at trial Ms. Sulzenko-Laurie admitted that she did not have an opinion as to why such a decrease had occurred. Dr. Miller commented on the Plausible Scenario Post-Reform section of his expert report entitled "Review and Analysis of Recent Experience up to the Valuation Date 31/12/2005 for Alberta Private Passenger (excluding Farmers) Automobile Insurance": Miller Report, Exhibit 29. Dr. Miller testified:

> Q. Why do you speculate that relatively minor whiplash victims would not be entering the system at all, not worth pursuing?
> A. Well, one view might be they say, well, gee, maybe I could have got 10 or 15,000 or 20,000 in pain and suffering under the old system. If it's only 4,000, maybe it's not a big enough thing to really worry about. I don't know. And maybe under these treatment protocols, some people are going through those protocols

> and recovering because the protocols work rather quickly and, you know, don't feel, don't really feel the need or whatever to pursue a tort remedy on top of that.
>
> Q. That's not really in your field of expertise, is it?
> A. No, it isn't.

Miller transcript, at p. 476.

[127] Thus the cap may be one reason which explains the decrease of legal representation, but other reasons may also explain such a decrease. Some people may feel that they cannot retain counsel or some may freely choose not to retain counsel. A decrease of legal representation is not conclusive as to whether access to justice has been curtailed. In this case, it is clear that the Plaintiffs, Ms. Morrow and Ms. Pedersen, were in fact represented and no specific evidence was led that would have shown that their access to justice was, in any way, restricted. Thus, there is no violation of s. 7 of the Charter on this ground.

(b) Does the MIR Violate the Plaintiffs' Right to Security of the Person?

[128] Section 5 of the MIR provides that if a claimant does not follow the DTPR and later suffers from a serious impairment, the serious impairment will be considered to be a Minor Injury, unless the claimant shows that there was a reasonable excuse which justifies not being diagnosed and treated in accordance with the DTPR or that, even if the DTPR was followed, the diagnosis of serious impairment would have remained unaltered. The consequence of the Minor Injury characterization is the imposition of the $4,000 cap.

[129] The Plaintiffs argue that the MIR violates their rights to security of the person which is not in accordance with the principles of fundamental justice, insofar as it coerces claimants to follow certain treatment. The Plaintiffs contend that the financial consequences that soft tissue injury victims may suffer if they do not undergo the DTPR which, it is submitted, represent a controversial and unproven model of care, curtails the victims' right to security of their person and, in effect, fetters their right to choose what medical treatment is appropriate. In addition, they contend that this choice needs to be made within 10 days. Relying on s. 5 of the MIR, the Plaintiffs submit that the right to choose is fettered because claimants face a "potential financial penalty" if they fail to comply with the DTPR. It is further argued that the DTPR removes a physician's discretion in providing appropriate medical treatment.

[130] The Plaintiffs submit that the violation is not in accordance with the principles of fundamental justice, because there is no valid state interest being pursued and because state mandated medical treatment is not a principle found in the basic tenets of our legal system. Moreover, it is submitted that the limitation in the MIR on claimants' ability to choose medical treatment is arbitrary, which is not in accordance with the principles of fundamental justice. The Crown submits that by arguing that the protection of security of the person extends to the effects of s. 5 of the MIR, the Plaintiffs are making a novel argument which is not supported by any authority.

[131] The Plaintiffs contend that the "potential financial penalty" coerces the claimants to follow the DTPR, thus eliminating the right to choose treatment. This submission encompasses an economic aspect. However, the mere fact that a right claimed contains an economic component may not necessarily exclude the s. 7 Charter protection: *Irwin Toy Ltd.* v. *Quebec (A.G.),* [1989] 1 S.C.R. 927 at 1003 and 1004; *Doe* v. *Alberta*, 2007 ABCA 50, 404 A.R. 153 at para. 27, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 211; See also *Gosselin* v. *Quebec (A.G.)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at paras. 79-82; *Chaoulli* v. *Quebec (A.G.)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 106. It is therefore necessary to determine if the circumstances of this case warrant the application of s. 7 of the Charter: *Gosselin*, at para. 79.

[132] In *Whitbread*, the legislation under scrutiny placed a cap on both pecuniary and non-pecuniary damages available to persons injured while aboard a ship. It was argued that the cap reduced the ability of the injury victims to acquire aids and amenities to improve their lives, liberty or security of the person, and was thus, within the ambit of s. 7 of the *Charter*. McLachlin J.A. (as she then was), at pp. 521 and 522, rejected this argument:

> The second argument, that economic interests which may affect a person's life, liberty or security of person fall under s. 7, raises the same difficulty. Arguably, it requires reading into s. 7, after the declaration that a person has the right to "life, liberty and security of person", the additional phrase that he has the right to "any benefit which may enhance life, liberty or security of person". This argument, however, is undermined by an even more serious problem. It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of person. Liberty and security of person are flexible and expansive concepts, and the degree to which they can expand is intimately tied with the amount of money one has at his or her disposal. For example, a person who is barred by legislation from raising a claim for breach of contract or whose corporation is denied a licence, might claim that the resultant financial loss has affected his liberty and security of person because without money he cannot go where he wants to go, pursue the activities he wishes to pursue, or provide adequately for his future. To accept the plaintiff's second argument would be to make s. 7 applicable to virtually all property interests. Given the scheme of the Charter and the absence of any reference to the right to property, I cannot accept that this was the intention of its framers. [Emphasis added]

[133] In *R.* v. *Morgentaler,* [1988] 1 S.C.R. 30, Dickson C.J.C. (Lamer J., as he then was, concurring) held, at pp. 56 and 57, that the criminal legislation which regulated abortion curtailed the right to security of the person: "Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person." [Emphasis added] Three of the five majority judges, Wilson J., Dickson C.J.C. and Lamer J., also found that there was a deprivation of security of the person in the loss of control over the termination of pregnancy: *Morgentaler,* at pp. 56, 57, 173 and 174. Under s. 251 of the *Criminal*

Code, mandatory procedures were in place pursuant to which abortions needed to be approved to be considered legal. The evidence showed that, because of s. 251 of the *Criminal Code*, unnecessary delays were caused to women who successfully met the criteria. Chief Justice Dickson concluded at p. 57 that any unnecessary delay, in the context of abortion, could have important consequences on women's physical and emotional well-being. The system which regulated access to therapeutic abortions contained so many possible barriers to its own operation that the defence it created would, in many circumstances, be largely unavailable to women who would *prima facie* qualify for it: Per Dickson C.J. at pp. 72 and 73. Some women whose life and health were in danger did not have a real choice. They could only "choose" between the following options: violating the law in order to obtain effective and timely medical treatment, getting inadequate treatment or no treatment at all: *Morgentaler,* at pp. 81 and 90 per Beetz and Estey JJ. who also concluded that the right to security of the person was violated. It was held that the procedures created in s. 251 for obtaining a therapeutic abortion were not in accordance with the principles of fundamental justice.

[134] In *Rodriguez*, Ms. Rodriguez, who suffered from amyotrophic lateral sclerosis, an incurable, progressive disease, applied for an order that s. 241(b) of the *Criminal Code* which prohibits assisted suicide be declared invalid on the ground that it violated ss. 7, 12 and 15(1) of the Charter. With respect to s. 7, Sopinka J., for the majority of the Court, held that the prohibition provided by s. 241(b) of the *Criminal Code* infringed the appellant's right to security of the person under s. 7 of the Charter. Specifically, the criminal legislation deprived her of the right to terminate her life at the time she felt was appropriate. Justice Sopinka held that security of the person under s. 7 encompasses "personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress". The majority found at pp. 588 and 589, that the right to make choices with respect to one's own body exists even in cases where treatment may be beneficial:

> Although palliative care may be available to ease the pain and other physical discomfort which she will experience, the appellant fears the sedating effects of such drugs and argues, in any event, that they will not prevent the psychological and emotional distress which will result from being in a situation of utter dependence and loss of dignity. That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. In my view, these considerations lead to the conclusion that the prohibition in s. 241(b) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.

However, the majority of the Court found that the deprivation was not contrary to the principles of fundamental justice.

[135] In *Blencoe* v. *British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, Mr. Blencoe, who was a politician, suffered both personally and professionally after allegations of sexual harassment were made against him. Mr. Blencoe submitted that the state-caused delay in processing the human rights proceedings against him violated his rights to liberty and security. Bastarache J. for the majority of the Court, assumed, without deciding the issue, that the outstanding complaints had contributed to the stigma to a certain extent. The right to security of the person protects individuals from state interference with their physical and psychological integrity. He found that in order for state interference with psychological integrity to be qualified as an infringement of the security of the person, the individual interest at stake must be of fundamental importance. At para. 83 he stated:

> It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

[136] Bastarache J. concluded that the stigma suffered by Mr. Blencoe while awaiting trial did not engage his rights to liberty and security of the person protected under s. 7 of the Charter. In the context of the right to security of the person, he concluded, at para. 86, that there was no interference with the respondent or his family with respect to their essential life choices:

> Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. <u>The state has not interfered with the respondent's right to make decisions that affect his fundamental being</u>. The prejudice to the respondent in this case .... is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. <u>However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right</u>. [Emphasis added]

[137] In *Gosselin*, s. 29 (a) of the *Regulation Respecting Social Aid*, R.R.Q. 1981, c. A-16, r.1 required unemployed individuals under 30 years of age to participate in a selected work activity or education program as a condition for receiving a similar level of social assistance payment available to unemployed persons aged 30 and over. The aim of the legislation was to encourage young people to obtain training and education so that they could find employment and avoid long-term dependency on social assistance. The plaintiff, Ms. Gosselin, was a welfare recipient and was under 30 years old. She participated in a few programs, but abandoned them each time because of personal problems and personality traits. She brought a class action on behalf of all welfare recipients under the age of 30 claiming the inferior base amount payable to recipients under 30 violated ss. 7 and 15 of the Charter as well as s. 45 of the Quebec *Charter of Human Rights and Freedoms* R.S.Q., c. C-12 ("Quebec Charter").

[138] In *Gosselin*, it was submitted that s. 7 should be interpreted to include a positive obligation upon the state to provide welfare benefits to those who were without other sources of income. Ms. Gosselin contended that the s. 7 right to security of the person includes the right to receive a certain level of social assistance from the state which is adequate to meet individuals' basic needs. She argued that by providing inadequate welfare benefits, the state deprived her of this right in a way that contravened the principles of fundamental justice. The majority of the Court concluded that there was no violation of the right to security of the person. After noting, at para. 77, that "the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those 'that occur as a result of an individual's interaction with the justice system and its administration' …", McLachlin C.J., for the majority, declined to define the concept of administration of justice. She found that the administration of justice was not implicated and that the issue before her was whether the Court ought to apply s. 7 despite that fact. The majority of the Court also chose not to decide whether s. 7 could only afford a protection when a right relates to the administration of justice. McLachlin, C.J. stated at para. 80:

> Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. In *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, at p. 56, Dickson C.J., for himself and Lamer J. entertained (without deciding on) the possibility that the right to security of the person extends "to protect either interests central to personal autonomy, such as a right to privacy". Similarly, in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1003, Dickson C.J., for the majority, left open the question of whether s. 7 could operate to protect "economic rights fundamental to human ... survival". Some cases, while on their facts involving the administration of justice, have described the rights protected by s. 7 without explicitly linking them to the administration of justice: *B.(R.)*, supra; *G. (D.F.)*, *supra*.

[139] McLachlin C.J. found that even if s. 7 protected economic rights, the language used in s. 7 refers to a right not to be deprived as opposed to a positive obligation. However, she noted that, in the future, s. 7 could be interpreted to encompass positive obligations. Since there was no deprivation in this case, the Court had to decide whether the circumstances warranted a novel

application of s. 7 for a positive state obligation to guarantee adequate living standards. The majority of the Court held that the evidence was insufficient to support the suggested application of s. 7 of the Charter. However, in special circumstances it is possible that a positive obligation to sustain life, liberty or security of the person can be made out.

[140] In *Chaoulli*, the issue was whether the legislation which prohibited private insurance for health care offered through the public system was unconstitutional and invalid. The appellants argued that the delays resulting from the waiting lists violated their rights to life and security under s. 1 of the Quebec Charter and s. 7 of the Charter. Deschamps J. found that the prohibition infringed s. 1 of the Quebec Charter, a provision similar to s. 7 of the Charter, except that it refers to the concept of "inviolability" which is broader, but includes the concept of security. However, s. 1 of the Quebec Charter does not provide a reference to the principles of fundamental justice: "Every human being has a right to life, and to personal security, inviolability and freedom. ....". In light of the conclusion reached with respect to the Quebec Charter, she did not think that it was necessary to consider the Canadian Charter argument. McLachlin C.J., Major J. and Bastarache J. (three of seven judges) agreed with Deschamps J., but also found that the prohibition infringed s. 7 of the Charter. They found that the effect of the legislation was that, even if it did not prohibit private health care *per se*, it took away the ability to contract for private health care insurance to cover the same services offered in the public insurance context. The practical effect was that only the very rich could afford private care. Most Quebeckers did not have a choice, they had to accept delays as well as the adverse physical and psychological consequences. Thus, McLachlin C.J., Major J. and Bastarache J. found, at para. 106, that the first stage of the s. 7 analysis was satisfied:

> This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law in our view, fails to do so.

[141] Comparing *Chaoulli* with *Morgentaler*, McLachlin C.J. and Major J. noted at para. 121 that the possibility of a sanction or its nature is not necessarily key to the finding of a violation:

> The issue in *Morgentaler* was whether a system for obtaining approval for abortions (as an exception to a prohibition) that in practice imposed significant delays in obtaining medical treatment unjustifiably violated s. 7 of the *Charter*. Parliament had established a mandatory system for obtaining medical care in the termination of pregnancy. The sanction by which the mandatory public system was maintained differed: criminal in *Morgentaler*, "administrative" in the case at bar. Yet the consequences for the individual in both cases are serious. In *Morgentaler*, as here, the system left the individual facing a lack of critical care with no choice but to travel outside the country to obtain the required medical care at her own expense. It was this constraint on s. 7 security, taken from the perspective of the woman facing the health care system, and not the criminal

> sanction, that drove the majority analysis in *Morgentaler* . We therefore conclude that the decision provides guidance in the case at bar. [Emphasis added]

[142] In light of the case law, I conclude that the Plaintiffs' rights under s. 7 of the Charter are not violated as a result of the MIR. The Plaintiffs' claims constitute an attempt to assert pure economic rights which are outside of the ambit of s. 7 of the Charter. This is not an appropriate case to extend the scope of the protection afforded by s. 7: *Gosselin*.

[143] Clearly, the security of the person includes the individual's personal autonomy such as their ability to make choices about their body and medical treatments: *Rodriguez,* at pp. 587-589. However, a person who fails to comply with the DTPR, but who is later diagnosed with a serious impairment, will suffer only economic consequences in that his or her right to sue for non-pecuniary damages will be limited to a maximum of $4,000. As was stated in *Whitbread* at p. 522, "[w]hile money, as already noted, may almost always be argued to affect a person's liberty and security, that is an indirect and incidental effect not contemplated by s. 7 of the Charter".

[144] It is important to reiterate that the Plaintiffs do not challenge the DTPR, but argue instead that the MIR compels them to follow the DTPR. In *Whitbread*, McLachlin J.A. (as she then was), distinguished *Morgentaler* by observing, at p. 522:

> The plaintiff cites *R.* v. *Morgentaler et al.*, January 28, 1988, (S.C.C.), in support of his contention that ss. 647 and 649 infringe s. 7 of the Charter. That case holds that the constitutional rights of an individual under s. 7 include a pregnant woman's right to be protected against procedural delays and difficulties in obtaining an abortion. The minority reasons of Wilson, J. suggest that the rights conferred by s. 7 extend to protect against state interference with bodily integrity and serious state-imposed psychological stress. However, the proposition which the plaintiff in this case must establish is quite different. He must establish that legislation which has no direct effect upon life, liberty and security of person, but deals only with the amount of money to which he is entitled, falls under s. 7. *Morgentaler* does not stand for that proposition. There is a critical difference between legislation which directly tells a woman what she can and cannot do with her body on pain of criminal sanction and legislation which affects monetary recovery. [Emphasis added.]

[145] The MIR does not render the DTPR mandatory. The Plaintiffs refer to provisions found under the MIR and the DTPR to support their submission. However, the language found in the DTPR does not support their assertion since it denotes that there is a choice for a patient or the health care practitioner: See also Ferrari Report, Exhibit 16, at pp. 6-7; Ohlhauser Affidavit, Exhibit KK. Section 2 of the DTPR provides:

> 2. This Regulation applies only in cases where

> (a) a client wishes to be diagnosed and treated in accordance with the protocols for a sprain, strain or WAD injury caused by an accident arising from the use or operation of an automobile, and
>
> (b) a health care practitioner chooses to diagnose and treat the client's sprain, strain or WAD injury in accordance with the protocols. [Emphasis added]

[146] Similarly, I cannot conclude that the election must absolutely be made within 10 days. Section 32 of the DTPR provides:

> 32. A client or health care practitioner who wishes to make a claim under this Part must send to the insurer a completed prescribed claim form, which must include
>
> (a) details of the injury, and
>
> (b) details of the accident that are within the personal knowledge of the client, within 10 business days of the date of an accident or, if that is not reasonable, as soon as practicable after that. [Emphasis added]

[147] The DTPR applies when the patient elects to be diagnosed and treated in accordance with the protocols and when a health care practitioner chooses to diagnose and treat the injuries in accordance with the protocols. This is illustrated by the Plaintiffs' experience. Ms. Morrow opted to follow the DTPR (Exhibit 1, Tab 30), and testified at trial that she chose to stop the pre-approved treatment plan because she felt that it was not helping. She then sought help by way of other sorts of treatment. Ms. Pedersen testified that, upon her insurer's recommendation, she visited her medical doctor over one month following the accident. She testified that she was not aware of the protocols, although she did receive a form to bring to her doctor. The form was filled out by Dr. Brox (Exhibit 2, Tab 1), but it does not indicate if Ms. Pedersen chose to be treated under the DTPR. She said at trial that she did not remember her doctor mentioning the protocols. She then consulted her chiropractor with respect to her pain. In this case, the legislation does not prevent claimants from choosing whether they want to undergo the DTPR or not, nor does it force anyone to follow it. The legislation limits the right to recover non-pecuniary damages under certain circumstances.

[148] I cannot conclude that the cap is the same as a criminal or administrative penalty as in *Morgentaler*, *Rodriguez* or *Chaoulli* which impacted the plaintiffs in those cases so severely that the practical effect was that no choice or control were possible. In this case, the claimants may choose to follow the DTPR or refuse to do so. In the event that claimants who chose to refrain from following the DTPR without a reasonable excuse are later diagnosed with a serious impairment, they will be prevented from recovering more than $4,000 in non-pecuniary damages. However, the potential financial impact does not prevent claimants from refusing medical treatment. The DTPR is an option that will allow them to receive treatment without paying for what is pre-approved. Moreover, the Alberta universal health care system may complement the DTPR protocols or be used on its own: Gross, transcript, at pp. 112-114. This fact situation is

very different than in *Chaoulli* where the ban on insurance resulted in that most Quebeckers had no choice but to accept delays in the medical system. In this case, before the implementation of the Insurance Reforms, some injury victims could not afford treatment: Ferrari Report, Exhibit 16, at p. 3; Gartner Affidavit, at para. 54. Now there is a choice available.

[149] The effects of the MIR in this case must be distinguished from *Morgentaler* in which the prohibition was coupled with a criminal sanction. In fact, in some cases, women who could not afford to travel had no choice but to accept the delays. Thus, they could "choose" to engage in criminally sanctioned behaviour or "choose" to get no treatment: in effect, there was no choice or control with respect to their own health and body.

[150] The Plaintiffs' case must also be distinguished from *Rodriguez* where the state interference, the prohibition against assisted suicide, deprived Ms. Rodriguez of autonomy over her person and caused her physical pain and psychological stress in a way which violated the security of her person. In this case, there is no state intervention prohibiting a claimant from making personal choices with respect to their body and health that would impact their right to life, liberty or security of the person. I agree that the choice to refuse to undergo the DTPR is likely at the core of what it means to control "one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress". However, this choice and control are not taken away and the impact is purely economical. Hence, it falls outside of the ambit of s. 7.

[151] Because I have concluded that there has been no deprivation of the Plaintiffs' right to security of the person, it is not necessary for me to determine whether the alleged infringement is in accordance with the principles of fundamental justice.

III Section 15

1. The Scope of the s. 15(1) Charter Challenge

(a) Positions of the Parties

[152] The Plaintiffs submit that the MIR and the DTPR are independent from each other and from the other regulations that were part of the Insurance Reforms. The Plaintiffs argue that the MIR is unconstitutional and that it cannot be justified by other regulations with different objectives or by labelling it as part of a scheme. In this regard, they rely on *McIvor* v. *Canada (Registrar Indian and Northern Affairs)*, 2007 BCSC 827.

[153] The Interveners submit that, although the Plaintiffs have narrowed their constitutional challenge to the MIR, the Insurance Reforms as a group are "inextricably connected parts of a comprehensive and balanced package". Accordingly, they argue that the Court should evaluate the constitutionality and any potential remedy on an analysis of the entire legislative scheme. This would include the DTPR, the *Automobile Accident Insurance Benefits Amendment*

Regulation, the *Automobile Insurance Premiums Regulation,* the *Complaint Resolution Regulation* and the *Fair Practices Regulation* (collectively "the Other Regulations").

[154] In support of a broader legislative analysis, IBC cites P.W. Hogg, *Constitutional Law of Canada*, Vol. 2 looseleaf (Scarborough: Thomson, 1977) p. 15 - 21, *Alberta (A.G.)* v. *Canada (A.G.)*, [1947] A.C. 503, 4 D.L.R. 1 (P.C.) at p. 518-519; and *Texada Mines Ltd.* v. *British Columbia (A.G.)*, [1960] S.C.R. 713 at p. 718; *Reference Re: Workers' Compensation Act, 1983 (Nfld.), ss. 32, 34* (1987), 44 D.L.R. (4th) 501, 36 C.R.R. 112 (C.A.) 523, aff'd [1989] 1 S.C.R. 922 at p. 526; *Schacter* v. *Canada*, [1992] 2 S.C.R. 679 at paras. 29-31, 37-38; *Nova Scotia (W.C.B.)* v. *Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 94; and *Hernandez*.

[155] As further justification for considering the Insurance Reforms as a whole, the Interveners argue that the MIR has funded a large portion of the Other Regulations. They also point out that the DTPR and the MIR are connected because the MIR promotes participation in the DTPR.

[156] In their submissions, the Interveners routinely rely on the benefits provided by the DTPR and the *Automobile Accident Insurance Benefits Amendment Regulation* to demonstrate that the cap does not violate s. 15(1) of the Charter and, if it does, that it is demonstrably justified in a free and democratic society, in accordance with s. 1.

[157] Specifically, the Interveners point out that the DTPR establishes protocols for the diagnosis and treatment of sprains, strains and WADs grade I and II that are evidence-based and in accordance with best practices. They also note that the DTPR provides for pre-authorized payment for the treatment of Minor Injuries, dispensing with the need to seek approval from the insurance companies or to pay out-of-pocket up-front. Accordingly, no authorization is required for the first 90 days following an accident in relation to pre-approved treatments and services set out under the DTPR. If an injury has not resolved, or is not resolving as expected, after these resources are exhausted, a health care practitioner can refer the claimant to an Injury Management Consultant ("IMC"). The IMC can complete an individualized report on the claimant which could lead to further treatments and assessments, including a referral for a multi-disciplinary assessment. The Interveners also note that the *Automobile Accident Insurance Benefits Amendment Regulation* has increased Section B benefits from $10,000 to $50,000. They submit that these advances are of great benefit to Minor Injury victims when compared with the state of care pre reform, at which time inconsistent and non-evidence based techniques were used to diagnose and treat sprains, strains and WADs.

[158] The Interveners called evidence to demonstrate that the rate of closure of claims by insurers in the weeks following an accident has been on the rise since the implementation of the Insurance Reforms. They also demonstrated that early diagnosis and treatment following an accident, which are facilitated by the DTPR, appear beneficial to injury victims: Ohlhauser Affidavit; Ferrari Report, Exhibit 16, at p. 4; Burton Report, Exhibit 41, at p. 18; Gartner Affidavit, at para. 56, Gross Report, Exhibit 6, at p. 4; Report on the Second Alberta Post Reform AB Cost Study: the First 26 weeks, Exhibit 37, at p. 1.

[159] They submit that this makes clear the beneficial results that the Insurance Reforms as a package are having in terms of improving the circumstances of Minor Injury victims.

(b) Analysis

[160] The Interveners have confused the focus of the Plaintiffs' constitutional challenge with the proper role of the Other Regulations in the analysis to be applied in the s. 15(1) assessment and under the s. 1 analysis. Specifically, although the Other Regulations form part of the context against which the distinction drawn under the MIR must be evaluated, it is only the MIR that is being challenged. In other words, I have constitutionally assessed only the MIR and have had regard to the Other Regulations and the benefits they provide as part of the contextual analysis prescribed in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 in relation to s. 15(1), and in *R.* v. *Oakes,* [1986] 1 S.C.R. 103 regarding s. 1.

[161] In relation to s. 15(1), I have considered the effects of the Other Regulations in determining whether a reasonable person in the position of the claimant would view the distinction drawn in the MIR as treating him or her with less dignity. Specifically, I have assessed the distinction drawn by the MIR in the context of the overall legislative scheme. As set out by the majority, by McLachlin C.J. in *Gosselin*, at para. 26:

> The scheme here is not facially neutral: we are dealing with an explicit distinction. The purpose of the distinction, in the context of the overall legislative scheme, is a factor that a reasonable person in the position of the complainant would take into account in determining whether the legislator was treating him or her as less worthy and less deserving of concern, respect and consideration than others.

[162] Similarly, Gonthier J., writing for a unanimous Court in *Martin*, explained at para. 85:

> .... the goal of the analysis in each case being to determine whether a reasonable and dispassionate person, fully apprised of all of the circumstances and possessed of similar attributes to the claimant, would conclude that his or her essential dignity has been adversely effected by the law.

[163] Nonetheless, it is the distinction in the MIR that is the subject of the Plaintiff's constitutional challenge and that is, therefore, the focus of my analysis. In my view, a discriminatory provision or regulation cannot be shielded from effective review by labelling it as part of a larger scheme.

[164] In oral argument, the Plaintiffs refer to *McIvor* v. *Canada* in support of their position. In that case, it was argued that s. 6 of the *Indian Act*, R.S.C., 1985, c. I-5 could not be constitutionally assessed in isolation or separated from the package of amendments made to the *Indian Act*. The Court disagreed, finding that the issue raised should not be considered as part of a package because there was no competing interest involved in adopting non-discriminatory

criteria for eligibility for registration as a status Indian. Rather, Ross J. found that the competing interests related to the issue of band membership.

[165] The Plaintiffs argue that the evidence demonstrates that the MIR and the DTPR are directed at different considerations. Specifically, the goal of the DTPR is to improve health outcomes and the MIR is directed at costs savings. The Plaintiffs submit that, the only competing interest involved in the MIR was reducing insurance premiums for Alberta drivers, principally those drivers formerly in the Facility Association.

[166] I agree that the DTPR and the MIR have different focuses. The former is concerned with the diagnosis and treatment of sprains, strains and WADs I and II, and the latter, with the restriction on non-pecuniary damage awards and the affordability of mandatory automobile insurance premiums. There were competing interests in relation to the MIR, namely reducing mandatory automobile insurance premiums for drivers generally. Although this factor distinguishes the present case from *McIvor*, it does not, for the reasons stated above, persuade me that I am obliged to assess the Insurance Reforms as a package, rather than the MIR on its own, in terms of whether s. 15(1) of the Charter has been breached.

[167] As above, IBC relies on a number of authorities for the proposition that statutes should be constitutionally reviewed as a scheme. Two of these authorities, *Alberta (A.G.)* v. *Canada (A.G.)* and *Texada Mines*, were decided well before the enactment of the Charter, in 1947 and 1966 respectively. Moreover, those cases were concerned with the availability of severance in the context of *ultra vires* claims. The reference to Hogg also relates to *ultra vires* claims. In my view these references are distinguishable on that basis. *Schacter* will be discussed in the Remedy section later in the judgment.

[168] IBC also cites *Hernande*z and *Reference Re: Workers Compensation Act* as authority for the proposition that I should constitutionally assess the Insurance Reforms as a package.

[169] The majority of` the Newfoundland Court of Appeal in *Reference Re: Workers Compensation Act* determined that the displacement of the right to sue one's employer, under s. 32 of the *Workers Compensation Act*, 1983 (Nfld.), c. 48, was not unfair or unreasonable in light of the compensation provided under that Act. The concurring decision, per Morgan J.A., also concluded that taking away the right of action for work related injuries was more than off set by the benefits provided by the Act.

[170] Similarly, in *Hernande*z, the plaintiff was challenging s. 266 of the Ontario *Insurance Act*. Section 266 comprised part of Ontario's no-fault motor vehicle accident scheme that prohibited an action being brought for losses from bodily injury except in limited circumstances. In that case, Stayshyn J. of the Ontario Court of Justice evaluated the plaintiff's constitutional challenge against the legislative scheme. He concluded that the right to sue for motor vehicle accident damages was offset by the overall benefits provided by the rest of the scheme.

[171] The distinguishing features between *Hernandez* and the present case are discussed in greater detail elsewhere in this judgment. For the purposes of this argument, it is sufficient to note that both *Hernandez* and *Reference Re: Workers Compensation Act* are distinguishable from the present case on the basis of the analyses that were employed by the Courts in those decisions. Specifically, both were decided without the benefit of the Supreme Court of Canada's judgment in *Law*, wherein the proper approach to a section 15(1) analysis was set out. That interpretation has since been applied and interpreted in a number of cases, including *Gosselin, Martin* and *Ferraiuolo Estate* v. *Olson*, 2004 ABCA 281, 357 A.R. 68. It is that analysis which I have applied here. In particular, those cases highlight that it is the view of the reasonable claimant, having regard to all of the circumstances, that is determinative as to whether the claimant's dignity has been demeaned. The overall scheme of the legislation in my view is more appropriately considered as part of the context within which that evaluation is made. That analysis was not conducted in the earlier jurisprudence cited by IBC.

[172] Finally, IBC submits that *Martin* is distinguishable from this case. In *Martin,* the Supreme Court of Canada unanimously concluded that s. 10B of the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c.10, violated s. 15(1) of the Charter. Specifically, the Court found that the exclusion of chronic pain sufferers from the application of the general compensation provisions in the Act constituted a discriminatory distinction. IBC argues that the circumstances in *Martin* are distinguishable because in that case, the Court was only concerned with the distinction drawn under s. 10B of the *Nova Scotia Workers' Compensation Act*, and related regulations, that excluded chronic pain sufferers from the purview of the general worker's compensation benefits and instead provided them with more limited compensation. In my view it is those circumstances that make the decision in *Martin* particularly applicable to the within analysis.

[173] In any event, IBC specifically references Gonthier J.'s statements, at para. 94 of *Martin*, where he states: "Another vital consideration in a case such as this one is the overall purpose of the legislative scheme at issue". That statement was made in the context of assessing whether the impugned provision corresponds with the needs, capacities and circumstances of the claimant group. I have considered the legislative scheme in relation to that criterion.

[174] Regarding my analysis under s. 1, I have also assessed the distinction drawn under the MIR and have only had regard to the Other Regulations and the consequences of those reforms in weighing the various factors in the *Oakes* analysis. These considerations are essential to the s. 1 analysis which focuses on the particular context of the impugned law: *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27 at para. 139.

2. S. 15(1) Analysis

[175] As stated, the proper analysis to be applied to a constitutional challenge concerning s. 15(1) was prescribed in *Law* and refined in a number of cases that have since followed:

1. Does the impugned law

(a) Draw a formal distinction between the claimant and others in purpose and effect on the basis of personal characteristics?

(b) Fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others on the basis of personal characteristics?

2. Was the claimant subject to differential treatment on the basis of one or more enumerated or analogous grounds?

3. Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) in remedying such ills as prejudice, stereotyping and historical disadvantage? In other words, does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee?

(a) Formal Distinction

(i) *Comparator Group*

Positions of the Parties

[176] The Plaintiffs submit that the appropriate comparator group here is motor vehicle accident victims who suffer injuries other than those set out in the MIR. The Crown agrees that this is an appropriate comparator group, but points out that those who suffer injuries in automobile accidents which are not Minor Injuries, but are similar in severity, would also be an appropriate comparator group.

[177] IBC argues that the comparator group proposed by the Plaintiffs is inappropriate because the distinction is based on the nature and severity of the injury and not on an enumerated ground. It also objects that the proposed comparator group is vague and too broadly defined. It argues further that the proposed comparator group does not mirror the characteristics of the claimant group in every way relevant to the benefit or advantage sought, except for the personal characteristic upon which the alleged discrimination is based.

[178] IBC suggests that the appropriate comparator group would be those who suffer a strain, sprain or WAD injury that results in serious impairment and who are not subject to the cap. It states that in this scenario, the claimant and comparator group are alike in every way except for the personal characteristic upon which the distinction is based. Additionally, it submits that persons with a Minor Injury who are subject to the $4,000 cap are not being treated differently from the comparator group, because by definition they are not "seriously impaired" and, therefore, not disabled.

Analysis

[179] In determining whether a formal distinction has been drawn and the grounds upon which that distinction is based, it is necessary to identify the relevant comparator group because the analysis prescribed in *Law* compels a comparison with a relevant group or groups: *Lovelace* v. *Ontario*, 2000 SCC 37, [2001] 1 S.C.R. 950 at para. 62. The appropriate comparator group will be that group which mirrors the characteristics of the claimant group in relation to the benefit sought, except that the statutory definition includes a personal characteristic that is offensive to the Charter: *Minister of Human Resources* v. *Hodge*, 2004 SCC 65, [2004] 3 S.C.R. 357 at para. 23. The claimant's own submission as to the appropriate comparator group is the starting point in this regard: *Law,* at para. 58. The purpose and effect of the impugned legislation must be considered in determining the appropriate comparator group: *Law*, at para. 57.

[180] The "universe of people potentially entitled to equal treatment in relation to the subject matter of the claim must be identified": *Hodge*, at para. 25. Here, that group is all persons injured in motor vehicle accidents. There has been a distinction drawn within that group on the basis of a personal characteristic, the type of injuries defined in the MIR. Disability is an enumerated ground. The benefit which is sought is the ability to sue for non-pecuniary damages in excess of $4,000.

[181] In my view, the appropriate comparator group is accident victims who suffer injuries other than those set out in the MIR. It is the nature of those injuries upon which the distinction is based. This will allow for a comparison of the complainant group on the one hand and, on the other, those who are permitted to access greater non-pecuniary damages as a result of the nature of the disabilities that they have suffered. Accordingly, this comparator group allows for an alignment between the benefit sought, the universe of people potentially entitled to it and the prohibited ground of discrimination: *Auton (Guardian ad litem of)* v. *British Columbia (A.G.)*, [2004] 3 S.C.R. 657 at para. 53. In other words, the claimant group is within the universe of people potentially entitled to claim in excess of $4,000 of non-pecuniary damages but for the cap in the MIR relating to Minor Injuries: *McIvor*, at para 8.

[182] IBC suggests that a distinction that is based on the nature and severity of an injury is not a distinction based on a personal characteristic and, as such, is not protected by s. 15(1). Complainants relying on personal characteristics related to a disability are entitled to invite comparison with the treatment of those suffering a different type of disability or a disability of greater severity: *Auton*, at para. 54.

[183] In *Lee* v. *Dawson*, 2006 BCCA 159, the British Columbia Court of Appeal concluded that the cap on non-pecuniary damages established by the trilogy, *Arnold* v. *Teno (Next Friend of),* [1978] 2 S.C.R. 287; *Andrews* v. *Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229 and *Thornton* v. *Board of School Trustees of School District No. 57*, [1978] 2 S.C.R. 267, was not inconsistent with s. 15(1) Charter values. Specifically, the Court rejected the comparator group proposed by the plaintiff, namely "less severely disabled plaintiffs who are entitled to full compensation for their non-pecuniary damages by virtue of the fact that the cap does not curtail their full recovery

of these damages": *Lee,* at para. 67. Rowles J.A., speaking for the Court stated at paras. 75 and 76:

> These passages underscore the importance of the correlation between the benefit sought by the claimant and the personal characteristics of the comparator group. In my view, the nature and purpose of non pecuniary damage awards undermines the plaintiff's proposal for the comparator group in this case.
>
> In *Lindal* v. *Lindal*, *supra*, the Court defined the nature of non-pecuniary damage awards. The Court clearly indicated that non-pecuniary awards are not solely dependent upon the gravity of the injury. Their purpose is not compensatory; rather, the objective is to provide a substitute for lost amenities in an effort to improve the victim's condition and to make the plaintiff's life more bearable.

[184] The Court concluded at para. 80:

> In focusing on the relative severity of the injuries of these groups, the benefit sought (unlimited access to non-pecuniary damages) is misaligned with the ground of discrimination alleged (the severity of the injury). Stated differently, the choice of comparator group ignores the basis of the benefit sought, i.e. unlimited non-pecuniary damages.

[185] In my view, the benefit here is the ability to sue for non-pecuniary damages in excess of $4,000 in order to "ameliorate the condition of the victim considering his or her particular situation": *Lindal* v. *Lindal*, [1981] 2 S.C.R. 629 at 673. The amount of a non-pecuniary damages award is not determined alone by the nature of the injuries. A consideration of the loss to the particular injury victim is also required in each case. Nonetheless, the amount required to provide solace is related to the nature of the injuries suffered by the motor vehicle accident injury victim, which in turn influences the kind of pain and limitations the victim faces. Determining the appropriate amount of payments to be made to plaintiffs in relation to various legal claims will almost always require a consideration of the specific circumstances in each case. This remains true whether the issue is compensatory damages, spousal support awards or payments pursuant to legislated benefit schemes. That does not, however, immunize the procedure for determining the appropriate amount from constitutional scrutiny. In my view, a challenge under s. 15(1) does not require the applicant to locate a comparator group that offers perfect alignment in every case. Were that so, the rights provided for under s. 15(1) would be illusory or, at a minimum, curtailed in many cases.

[186] IBC's objection that the comparator group suggested by the Plaintiffs and adopted by me, is vaguely defined, is in my view unsupportable. Simply put, the comparator group consists of those accident injury victims whose injuries are not within the definition of Minor Injury.

[187] In relation to another of IBC's objections, I would note that because one's injuries fall within the definition of Minor Injury it does not follow that their injuries do not constitute

disabilities. Dr. Lyle Gross, who was qualified as an expert in relation to rehabilitative medicine with special expertise in neck and soft tissue injuries, testified that those who have suffered serious impairment and fractures have in some cases returned to greater function and suffered less pain than those who suffer from WAD I and WAD II injuries: Gross, transcript, at pp. 91 and 92.

[188] Dr. Mandel, who was qualified as an expert to give evidence in the field of rehabilitative psychology and chronic pain, supported this position, stating:

> In my experience a number of the WAD, sprain and strain sufferers are just as seriously affected by pain as are victims of other injuries such as minor brain injuries and uncomplicated bone fractures.

Mandel Affidavit, at para. 16.

(ii) *Differential Treatment*

[189] All of the parties agree that the MIR treats Minor Injury victims differently. Specifically, motor vehicle accident victims who are diagnosed with Minor Injuries are prevented by the MIR from claiming in excess of $4,000 for non-pecuniary damages.

2. Differential Treatment on the Basis of Enumerated or Analogous Grounds

(a) Positions of the Parties

[190] The Plaintiffs submit, and the Crown concedes, that the differential treatment at issue is based on a physical disability, which is an enumerated ground under the Charter.

[191] IBC, however, argues that having a Minor Injury is not an analogous or enumerated ground. It takes the position that one need suffer from "obvious physical impairment" before he or she will be entitled to protection under s. 15 on the basis of a physical disability. Otherwise, the argument goes, those members of society are not "obviously vulnerable to the problems of stereotypical decisions based on immutable personal characteristics". It relies on *Eldridge* v. *British Columbia* v. *(Attorney General)*, [1997] 3 S.C.R. 624*; Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241; and *Rodriguez* as authority for this proposition.

[192] IBC acknowledges that the disabilities at issue in *Granovsky* v. *Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2001] 1 S.C.R. 703 and *Martin* were less obvious. However, it distinguishes those cases on the basis that they concerned income replacement benefits, such that "employability was the yardstick of disability".

[193] In my view, the cases cited by IBC in this regard do not support the proposition that s. 15 of the Charter protects only obvious physical impairments. Nor is the argument compelling on its own merit. The requirement that one's disability needs to be obvious in order to access the

protection provided by s. 15(1) would significantly reduce its purpose which, as stated in *Law* at para. 51, is to:

> .... prevent the violation of essential human dignity through the imposition of disadvantage, stereotyping or political and social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or members of Canadian society, equally capable and equally deserving of concern respect and consideration.

[194] In many cases, discrimination arises as the result of the inequitable application of legislation, which occurs without regard to how the subject of the legislation may appear. The fact that the basis of the discrimination is not obvious does not lessen the right of the individual to be treated with human dignity. Taken to its logical conclusion, this argument could be made in the context of other enumerated or analogous grounds, many of which are not generally "obvious", such as religious beliefs or sexual orientation.

3. Substantive Discrimination

[195] The question at issue here is whether the distinction in the MIR has "in purpose or effect resulted in substantive inequality contrary to s. 15(1)'s purpose of ensuring that governments treat all individuals as equally worthy of concern, respect and consideration.": *Gosselin,* at para. 28 . This factor is to be examined from the perspective of the reasonable claimant, specifically their experience of the impugned law: *Ferraiuolo*, at para. 82. An unequal distribution of benefits, here financial benefits, is to be treated the same as any other form of discrimination under s. 15: *Ferraiuolo*, at paras. 89 and 90.

[196] The onus in relation to this branch of the test is on the Plaintiffs to show on a civil standard of proof that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society: *Gosselin* at para. 18. They must also demonstrate a rational foundation for their claim that their dignity has been violated. Four contextual factors that may be of assistance in determining whether the impugned legislation has a discriminatory effect were identified in *Law*:

> (a) Is there the presence of a pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at the person or group?
>
> (b) Is there a correspondence or a lack thereof between the ground upon which the differential treatment is based and the actual needs, characteristics and circumstances of the effected person or group?
>
> (c) What is the ameliorative purpose or effect of the legislation upon a more disadvantaged group?

(d) What is the nature and scope of the interest affected by the legislation?

[197] In applying these contextual considerations, the court must be mindful that they should not be applied rigidly or as discrete tests. All four of these factors may not be relevant in every case, there may be others that are, and in some circumstances they may overlap: *Ferraiuolo* at para. 91.

(a) Pre-existing Disadvantage

(i) Positions of the Parties

[198] The Plaintiffs state that whiplash victims have historically been the subject of prejudice. Specifically, they claim that as a group they are accused of exaggerating their injuries or malingering in order to acquire a financial benefit. They suggest that this stereotype results from the fact that whiplash injuries are invisible in the sense that they are not objectively verifiable.

[199] The Crown denies that such a stereotype exists and argues that the evidence indicates that general lay opinion evidence is not reflective of the view that malingering is common among the claimant group. It also points out that the evidence of one of the Plaintiffs, Peari Morrow, was that she has not experienced any such prejudice personally.

[200] The Crown also states that there is no evidence that it believes that Minor Injuries are not real or that they do not cause the victims to suffer pain. Thus, they argue that there is no suggestion that the legislative objective in implementing the MIR was to avoid fraudulent claims. It states instead that the Insurance Reforms, and in particular the DTPR and the *Automobile Accident Insurance Benefits Amendment Regulation* were designed to overcome any pre-existing misconceptions and stereotypes relating to Minor Injury victims. For example, compulsory pre-authorization of payments for the treatment of Minor Injuries sends the message that these injuries are legitimate.

[201] IBC also denies that such a stereotype exists. Among other things, it points to the first survey it conducted to track the cost and time to claim closures among accident injury victims. The survey was commenced on April 1st, 2003. It studied 52 weeks of experience of 600 motor vehicle accident victims who suffered WAD I, WAD II, sprain or strain injuries. IBC states that the results indicated that insurers did not dispute 85.3% of the soft tissue injury claims submitted to them in the first 12 weeks following the date of loss or collision, 79.5% after 26 weeks, and even at the one year mark, insurers were only seeking Independent Medical Examinations on 26% of such claims: Benchmark Survey, Schedule B, Exhibit 37. It states further that the Insurance Reforms as a package offer greater recognition of Minor Injuries by offering greater treatment.

[202] The Interveners submit that the Plaintiffs have failed to present sufficient evidence in support of their claim that they suffer from a pre-existing disadvantage or stereotype. IBC states that the only evidence in support of the Plaintiffs' claims of prejudice is from Donald Christal

and Marianne Panenka who allude to an insurance industry bias against claimants suffering from soft tissue injuries. It argues that this evidence is based on hearsay and, in any event, is not indicative of a pre-existing disadvantage.

[203] On those bases, the Interveners submit that the claimant group has not been subjected to historical disadvantages or stereotyping as a result of a shared characteristic.

(ii) Analysis

[204] The issue of whether or not there is a pre-existing disadvantage is often recognized as the most compelling of the four contextual factors: *Law* at para. 63. The existence of a pre-existing disadvantage, vulnerability, stereotyping or prejudice has been a key marker of discrimination since *Andrews*: *Ferraiuolo*, at para. 97. In *Law*, Iacobucci J. explained the prominence that this factor commands in the s. 15(1) assessment, at para. 63:

> [Pre-existing disadvantage, vulnerability, stereotyping or prejudice] are relevant because to the extent that the claimant is already subject to unfair circumstances and treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern respect and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

[205] The evidence before me suggests strongly that Minor Injury victims, particularly those suffering from a whiplash associated disorder, are subjected to stereotyping and prejudice. In sum, they are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially. The fact that these injuries are often not objectively verifiable may contribute to this perception.

[206] The existence of this stereotype was aptly demonstrated in an excerpt from *Alberta Hansard*, April 7, 2004, where MLA Masyk stated, in the context of a debate concerning Bill 204 Insurance (*Accident Insurance Benefits Amendment Act, 2003*):

> Mr. Speaker, it's noted at some point that when somebody gets in an accident, they open the glove box and there is already an inflatable collar. We have to discourage these things. This law suit based system for compensating auto injuries allows claimants to seek payment for uneconomic damages such as pain and suffering. So the rule of thumb is for lawyers and the claimant to calculate these losses at two or three times the claimant's economic losses. Economic losses are things like lost wages and medical expenses. Since pain and suffering awards are measured as a multiple of medical and wage losses, there's a powerful incentive to inflate one's claim of economic damages and pursue legal action. This should

> give all members a better idea of why insurance premiums have been going through the roof of late.

[207] Further evidence of the stereotype alleged by the Plaintiffs was also demonstrated in a video, that was available on IBC's website: Supplementary Affidavit of Don Christal, Exhibit D. The subject of the video is a man who has been involved in a motor vehicle accident and is faking a whiplash type injury. The video shows the man telling a friend that he is malingering in order to take time off to do work around his house. In the video, the man also explains to his friend that he "is wearing the neck brace, so no one can tell if [he] is injured or not, so he is injured". He also states that he is "on an extended vacation paid for by [his] car insurance".

[208] Additionally, Dr. Mandel opined that:

> .... its my view that many patients with chronic pain conditions feel that they are unbelieved, mistreated, not given adequate credence for their pain condition. And I believe that these regulations reinforce this pattern by providing over stringent definitions of what it means to have a non-minor injury.

Mandel, transcript, at p. 10.

[209] Later in his testimony, Dr. Mandel gave the following evidence:

> Q. Do all soft tissue injuries show up on x-rays or MRIs?
> A. Well, no. By definition, mostly they don't.
>
> Q. In your experience how does that affect soft tissue injury victims?
> A. It makes it more difficult for them to be believed. And I have certainly seen cases where a person has had the same family doctor all of their life. And after a soft tissue injury, nothing shows up on an x-ray or an MRI, and they'll say, "Well we can't find anything wrong with you".
>
> So, I think the message there is one of disbelief and incredulity. We can't find a medical explanation for your symptoms, so suck it up and get out of my office basically.
>
> Q. Do soft tissue injury victims face any other challenges in your clinical experience?
> A. Well, this whole issue of having an invisible disability, one that's not obvious to others can cause negative reactions from those close – even the closest to them.

Mandel, transcript, at p. 24.

[210] Dr. Mayou, a witness for the Crown, was qualified to give opinion evidence with respect to the psychological consequences and complications, including medically unexplained

symptoms of whiplash-associated disorders and other soft tissue injuries suffered by automobile accident victims and the preferred care and management of such consequences and complications. He referred to the "long theme" in some of the medical literature of malingering among soft tissue injury victims for the sake of compensation: Mayou, transcript, at p. 157. He also confirmed that there is a "widespread view" in medical literature that malingering among whiplash victims is common and that they often exaggerate their symptoms for financial gain. He clarified that he himself, does not accept that view and described it as "outdated and profoundly wrong". Mayou, transcript, at p. 157

[211] Dr. Mayou elaborated on this theme in his cross examination:

> Q. I am focused on the words "the widespread view", is that in the literature, or is it –
> A. The widespread view is the one in the literature that malingering is common and that people who have whiplash injury are exaggerating their symptoms for financial gain.
>
> Q. But its not only in the literature. It's in the public domain as well in the sense that its reported in media reports?
> A. Well, individual cases reported in the media. I mean, I think that general lay beliefs are probably more sympathetic to whiplash victims in that a very high proportion of us have been in road accidents and have had acute neck pain and recognize it as a rather nasty experience. So, I think general lay opinion would be more sympathetic. But certainly publicity is given to some rather remarkable extraordinary cases of claims and video tapes and so on, yes, that's also true.

Mayou, transcript, at p. 191.

[212] Some of the media claims that have referenced soft tissue injury fraud were outlined in the Affidavit of Donald Christal, at para. 4 and include the following:

> (a) In CBC News online, Wednesday October 17, 2001, how the researchers had found that 26% of personal injury claims had "elements of fraud", that between 7% and 12% of personal injury claims paid in Alberta are fraudulent and how this study gave credence to what the auto insurance industry had suspected for some time;
>
> ....
>
> (c) In the Calgary Herald December 28, 2001, how Albertans would have to pay more for car insurance because of "steep increases in fraudulent injury claims" and how Jim Rivait, on behalf of IBC said that such claims had cost the industry up to $500 million per year;

> (d) In the Edmonton Journal, November 3, 2002, how auto insurance rates were "headed for the stratosphere" and how the insurance industry (Jim Rivait) blamed lawyers and "generous judges" more than bad drivers. In this article,. Jim Rivait is quoted as saying that 25% of the value of accident claims in Alberta comes from "soft fraud", exaggerated claims for soft tissue injuries, such as whiplash;
>
> (e) In the Edmonton Journal, November 12, 2002, how Jim Rivait "suggests that insurance companies often are bilked through soft fraud by accident victims who exaggerate their reports of whiplash and other soft tissue injuries".

[213] IBC argues that the evidence of the media report summaries is inadmissible as hearsay. This evidence is not admitted for the truth of its contents, only to demonstrate that these reports appeared in the noted publications. By definition, media reports can be relevant to stereotyping.

[214] At para 18 of his report, Professor Trebilcock quotes from Jerry J. Phillips and Stephen Chippendale, *Who Pays for Accidents? The Fault Versus No-Fault Insurance Debate* (Georgetown University Press, Washington, D.C., 2002):

> Tort awards are a magnet for these soft-tissue claims. By adding these allegations, claimants (and their lawyers) in no fault states seek to inflate their claim value above threshold limits and thereby "double dip" from no-fault and fault benefits.

Statement of Substance of Opinion and Expert Report of Michael Trebilcock, Exhibit 34, at para. 18.

Although this is not strictly applicable to stereotypical views in Canada, it offers some insight into the American perception in relation to this issue.

[215] By limiting the amount of non-pecuniary damages available to those suffering from Minor Injuries, the legislature has effectively categorized that group of injury victims as less worthy of non-pecuniary damages. The basis of this distinction is the type of injury from which they suffer. In limiting non-pecuniary damages in relation to the complainant group, the MIR effectively signals that the pain and suffering resulting from these medically unverifiable injuries are less deserving of damages than that caused by other injuries. As a result, the MIR perpetuates the unfortunate stereotype that I find exists in relation to Minor Injury victims.

[216] IBC noted that there was a second video from its website that showed an honest soft tissue injury victim who is taken aback by the suggestion that she could receive a free year of therapy if she signs an insurance form stating that she is not healed. It also cited the evidence of Ms. Sulzenko-Laurie and Dr. Ferrari to the effect that they take soft tissue injuries very seriously. In answer to these submissions, I would simply note that the existence of a stereotype does not require that it be universally accepted.

[217] The Crown submits that its actions in implementing the MIR clearly indicate that the cap was not based on any such stereotype and that it agrees that the vast majority of soft tissue injuries arising from motor vehicle accidents are not fraudulent. I agree that there is no evidence suggesting that the Crown was intentionally acting in furtherance of the stereotype. However, such a finding is not required in order to establish that a provision is unconstitutional: *Ferraiuolo*, at para. 94. It is relevant to the inquiry of whether a reasonable person in the claimant's position would conclude that the distinction harmed his or her dignity, but it is not determinative: *Gosselin,* at para. 27.

[218] The Crown argues that the DTPR and the *Automobile Accident Insurance Benefits Amendment Regulation* work towards the elimination of any pre-existing stereotype by improving diagnosis and treatment options. Specifically, the enhancement of pre-approved treatments and the adoption of what is believed to be the best diagnosis practice model clearly signals the Crown's belief that Minor Injuries are legitimate.

[219] The effect of the Other Regulations is relevant to the extent that it would impact whether a reasonable person in the claimants' position would conclude that his or her essential dignity has been adversely effected by the MIR. In my view, the reasonable claimant would conclude that the MIR has the effect of perpetuating the stereotype that soft tissue injury victims are malingerers and fraudsters or that their pain is not real. This view is based on the knowledge that they are limited to compensation of $4,000, whereas those that suffer from objectively verifiable injuries that may suffer less pain, would be entitled to pursue greater non-pecuniary damages. This conclusion is not overcome by an awareness of the benefits provided under the *Automobile Accident Insurance Benefits Amendment Regulation*, because few soft tissue injury victims require treatment costing in excess of $10,000: Report on Alberta Pre-Reform AB Costs Study, Exhibit 37, at p. 7; Report on the Second Alberta Post Reform AB Cost Study: the First 26 weeks, Exhibit 37, at pp. 6 and 7. Additionally, these benefits are provided to all automobile accident injury victims. Although the DTPR provides for preauthorized treatments and other benefits to Minor Injury victims which have been referenced above, those benefits would, from the perspective of the reasonable claimant, be insufficient to neutralize the effect of the cap on their dignity.

[220] The Interveners also argue that the Plaintiffs themselves did not provide evidence that they had personally experienced prejudice as a result of their injuries. If this is a further criticism of a lack of evidence, I have dealt with that objection above. If it is a submission to the effect that the Plaintiffs must prove that they themselves have been subjected to such prejudice, I would note the comments of La Forest J. in *Eldridge* at para. 83:

> Finally, I note that it is not in strictness necessary to decide whether ... the appellant's s. 15(1) rights were breached. This court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights.

[221] In summary, I find that this contextual factor is suggestive of discrimination.

(b) Correspondence with the Claimants' Needs, Capacities and Circumstances

[222] The issue here is whether the MIR considers the actual needs, capacities and circumstances of the claimants in a manner that respects their value as human beings and as members of Canadian society: *Martin,* at para. 92. Legislation that accommodates the claimants' needs capacities and circumstances will not easily amount to discrimination. In *Gosselin,* the majority, per McLachlin C.J., at para. 37, explained it thus:

> A law that is closely tailored to the reality of the affected group is unlikely to discriminate within the meaning of s. 15(1). By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory. Both purpose and effect are relevant here, insofar as they would affect the perception of a reasonable person in the claimant's position.

[223] To determine the correspondence between the needs of the claimant group and the MIR, a consideration of the relationship between the basis for the distinction and the actual needs capacities and circumstances of the claimant group is required: *Martin,* at para. 92. The basis for the distinction here is the existence of a Minor Injury. As noted earlier, Minor Injuries, despite what the label may imply, can be more painful and more enduring than other types of injuries which can arise from motor vehicle accidents and which do not fall under the cap. Dr. Gross explained that some fractures, lacerations and bruises have less serious consequences that WAD I and WAD II injuries. He stated further:

> I have had patients who have had catastrophic events and impairment, serious impairment, that have returned to full function, returned to work faster than patients with soft tissue injury.

Gross, transcript, at p. 92.

[224] Additionally, Dr. Mandel testified that, although the figures varied, in his view 5% to 10% of individuals who suffer from soft tissue injuries following a motor vehicle accident go on to suffer chronic pain: Mandel, transcript, at p.34.

[225] Legislation that prevents Minor Injury victims from obtaining a fair assessment of adequate non-pecuniary damages cannot be said to correspond with their needs. In fact, the MIR is more likely to frustrate the needs of the claimant group in its efforts to obtain appropriate solace and a reasonable substitute for lost amenities, and thereby make their lives more bearable, than it is to satisfy those needs or circumstances.

[226] The Interveners, submit that Minor Injury victims are individually assessed when they are examined to determine if they are "seriously impaired" and, if so, if they are excluded from the application of the cap.

[227] Individualized medical assessments are provided for under the DTPR. However, the Plaintiffs' complaint is in relation to the lack of individualized assessment for Minor Injury victims in relation to non-pecuniary damages beyond the cap. In other words, the objection is not the presumption that all soft tissue injuries constitute Minor Injuries. The medical assessments provided will determine whether they fall within the statutory definition or not. Rather, the complaint is that once diagnosed as a Minor Injury, an individualized assessment of appropriate non-pecuniary damages beyond the $4,000 cap is not available. It is the automatic application of the cap to Minor Injury victims that suggests that the pain and suffering of the claimant group is less worthy of non-pecuniary damages.

[228] The overall purpose of the legislative scheme must also be considered in the context of this factor: *Martin*, para. 94. At this stage of the analysis the legislative purpose may be broader than the legislative objective assessed under s. 1 scrutiny: *Ferraiuolo*, at para. 111.

[229] In *Agreed* v. *Guardian Insurance Co. of Canada*, [1995] N.L.R. 1-3218, A.J. No. 1267 (Ont. Gen. Ct.)(F.L.), Jarvis J. found, at para. 3 that the:

> .... purpose of automobile insurance legislation, found in Part VI of the *Insurance Act*, R.S.O. 1990, c. 1.8, is to regulate the relations between insured motor vehicle owners and drivers and insurance companies, and to provide a scheme governing liability and compensation under insurance.

[230] This passage is equally applicable to the broad purpose of Part 5, Sub Part 5 of the Alberta *Insurance Act.* In my view, the MIR neither supports, nor detracts from this broad purpose, but instead adds a new dimension to the relationship.

[231] More narrowly, the purpose of the Insurance Reforms, including the MIR, is to reduce automobile insurance premiums. As I stated in *Hubel* v. *Alberta Minister of Justice,* 2005 ABQB 836 at para. 27, the purpose is to:

> .... address rising automobile insurance rates in Alberta. More specifically, the Legislature's overriding objective was to reform the Act to respond to "skyrocketing" rate increases so as to ensure that mandatory automobile insurance remained accessible to Albertans.

[232] This purpose had nothing to do with the needs of the claimant group, but "everything to do with concerns about insurance premiums for those not suffering any loss": *Ferraiuolo*, at para 112. Moreover, to effect this purpose through the imposition of the MIR the Government chose to target a group of individuals suffering from a specific disability and to limit their ability to recover damages in tort. In my view, 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. These circumstances are

not dissimilar from those in *Ferraiuolo*. In that case, Fraser C.J. remarked, at para. 116, that the denial of legitimate damages for grief to avoid an increase in insurance premiums was itself a discriminatory purpose and a "classic example of self-interest trumping Charter values". I agree.

[233] The Interveners submit that this case is distinguishable from *Ferraiuolo,* wherein the claimants were denied *any* compensation. The Crown submits that it is also distinguishable from *Martin* in that there is not a complete cut off from benefits and that individualized assessments are provided. Specifically, no one is identified as having suffered from a Minor Injury until an individualized assessment has been completed by a health care practitioner. If the person is diagnosed at any point after their injury as suffering from a "serious impairment" the MIR ceases to apply. IBC also points out that it is open to the injury victim to challenge the Minor Injury designation in court. Additionally, the Crown submits that it is only the opportunity to collect non-pecuniary damages that has been capped which further distinguishes this case from *Martin*. On these bases the Crown states that this case is also distinguishable from *Shulman* v. *College of Audiologists and Speech Language Pathologists of Ontario* (2001), 155 O.I.C. 171, 90 C.R.R. (2d) 82; and *Wink* v. *British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625.

[234] It is unreasonable to conclude that the cap on non-pecuniary damages for Minor Injury victims is tailored to their needs when it does little to take into account their personal and individual circumstances. It does allow for "serious impairments" to be excluded, but that is no comfort to those who suffer Minor Injuries and whose non-pecuniary damages are capped as a result.

[235] The Crown also argues that the Plaintiffs have failed to demonstrate that general damages above $4,000 conform to the actual needs, capacities and circumstances of Minor Injury victims. The fact that the Plaintiffs here have both proven general damages in excess of the $4,000 that they would have otherwise been entitled to under the cap is indicative of the fact that the cap fails to correspond to their needs. I would also echo the comments of Fraser C.J. in *Ferraiuolo*, at para. 121:

> A reasonable person would recognize that the principle of compensatory damages constitutes a central foundation of our tort system and that financial compensation is the general measure used to value "losses" suffered by the victim. That is why the reasonable person would be offended by the proposition that the grief they suffer essentially counts for nothing; they will not be compensated for their loss on the same basis as [the cooperator group]. The harm caused to the dignity of those in the claimant group is exacerbated by the knowledge that the motivation for the absence of compensation - for preventing them from suing a wrongdoer for the harm inflicted on them- is unvarnished self interest.

[236] The Crown also points to Dr. Mayou's evidence, that motor vehicle accident victims are generally more desirous of the legal system showing awareness of their suffering and recovering from their injuries than they are of compensation from the legal system. The implication is that more money will not meet their needs, capacities and circumstances. However, this begs the

question, why Minor Injury victims should not be entitled to both - awareness of, and compensation for, their injuries. This is, after all, what the members of the cooperator group are entitled to expect and do receive.

[237] The Interveners made a number of submissions regarding the correspondence of the Other Regulations to the needs, capacities and circumstances of Minor Injury victims. As stated above, I have rejected their argument that the MIR cannot be constitutionally assessed on its own merit. Nonetheless, a reasonable claimant would be aware of the benefits provided by the Other Regulations and I have considered the Interveners' submissions in that context.

[238] The reasonable claimant would be aware that the DTPR incorporates the biopsychosocial model and evidence-based practices for treatment of Minor Injuries. The introduction of these procedures has introduced consistency in diagnosis and treatment practices and, the Interveners submit, has individualized the treatment of soft tissue injuries and thereby reduced the incidents of chronic symptoms. The DTPR also provides pre-approved treatments for sprains, strains and WADs I and II victims, which was not available before the implementation of the Insurance Reforms.

[239] The reasonable claimant would also know that the *Automobile Accident Insurance Benefits Amendment Regulation* has increased Section B benefits from $10,000 to $50,000 for the benefit of all automobile injury victims. This is also of benefit to Minor Injury victims whose treatment costs exceed $10,000.

[240] Although there appears to be a tight correspondence between the needs, capacities and circumstances of the claimant group and the DTPR and, to a lesser extent, the *Automobile Accident Insurance Benefits Amendment Regulation*, no such correspondence exists between that group and the MIR. Bastarache J., in dissent, stated in *Gosselin* at 250:

> Groups that are the subject of inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are "for their own good". If the purpose and effect of the distinction really are to help the group in question, the government should be able to show a tight correspondence between the grounds upon which the distinction is being made and the actual needs of the group.

[241] In assessing whether the MIR meets the needs, capacities and circumstances of the claimant group, the reasonable person in the shoes of the claimant would be aware that, in effect, the Government has attempted to finance the resolution of what it perceived to be a crisis, on the backs of a discrete group of injury victims who are disabled as the result of a particular type of injury. The reasonable person standing in the place of the claimant would not, in my view, be persuaded that the benefits provided under the Other Regulations offset or otherwise address the fact that the claimant group is excluded from claiming non-pecuniary damages in excess of $4,000, particularly given the knowledge that some Minor Injury sufferers go on to suffer long term, chronic pain. Put another way, motor vehicle accident injury victims who suffer less pain

but from different injuries are entitled to greater non-pecuniary damages than Minor Injury victims. As stated by Barbara Billingsley, *Legislative Reform and Equal Access to the Justice System: An Examination of Alberta's New Minor Injury Cap in the Context of Section 15 of the Canadian Charter of Rights and Freedoms* (2005), 42 Alta. L. Rev. 711-739 at p. 728:

> ....The Minor Injury cap fails to address the individual circumstances of each victim in a motor vehicle accident and instead treats all Minor Injury Claimants as a group, Accordingly, as in *Martin*, the legislation is "not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical." Since the objective of the Minor Injury cap is to forestall the need for an individualized general damages assessment of Minor Injury Claimants, the Minor Injury Cap by definition fails to respond to the unique circumstances of each Minor Injury Claimant.

I agree. In the result, I find that this contextual factor also points towards discrimination.

(c) Ameliorative Purposes and Effects

[242] The third contextual factor prescribes a consideration of whether the "challenged distinction was designed to improve the situation of a more disadvantaged group.": *Gosselin*, at para. 59.

[243] IBC "does not strenuously contend" that the legislation is designed to ameliorate the condition of a more disadvantaged group. However, it cites *Ferraiuolo* for the proposition that this factor is only relevant in cases involving competition for scarce state resources.

[244] The Crown argues that the Insurance Reforms are ameliorative of the circumstances of Minor Injury victims as a result of the *Automobile Accident Insurance Benefits Amendment Regulation* and the DTPR. I have had regard to the advantages that these regulations provide to the claimant group in determining whether a reasonable person in the position of the claimant would view the MIR as treating the claimant group as less worthy of respect and consideration than those not within the claimant group, specifically the comparator group: *Gosselin*, at para 62.

[245] The Crown argues further that the Insurance Reforms are ameliorative of younger drivers, in particular young male drivers, who were paying disproportionately higher premiums and were "unjustly" relegated to the Facility Association prior to the Insurance Reforms. In the context of automobile insurance, the Crown argues, young drivers are an historically disadvantaged group. It relies on *Zurich Insurance* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 in this regard.

[246] Finally, the Crown points to seniors as an historically disadvantaged group generally, and specifically in this context. In that regard it relies on *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229; *Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483; and *Tetreault-Gadoury* v. *Canada (Employment and Immigration Commission*), [1991] 2 S.C.R. 22.

[247] The relevant issue to be considered under this contextual factor is whether the distinction drawn in the MIR, whereby Minor Injury victims are prohibited from suing for non-pecuniary damages in excess of $4,000 and those in the comparator group are not, is aimed at improving the circumstances of a more disadvantaged group. The ameliorative affects that result from the distinction made by the MIR are said to be reduced insurance premiums for Alberta drivers at large, and more specifically for high risk drivers.

[248] First, I cannot accept, on the basis of the evidence before me, that young drivers are a more disadvantaged group than Minor Injury victims in a "relative sense": *Law*, at para. 72. Accordingly, I do not find the within circumstances to be akin to those in *Law* and *Gosselin.*

[249] Second, when viewing the ameliorative benefits arising from the MIR, I find that the reasonable claimant would conclude that his or her dignity has been violated by the distinction. Specifically, lowering insurance premiums for other drivers by reducing non-pecuniary awards for soft tissue injuries sends the message that theses injuries are not as deserving as others. Otherwise, one would expect that the burden of lowering premiums would not be shouldered by one group suffering from a common injury.

[250] Finally, I would note that this case is not about state funded social programs. As observed by Fraser C.J. at para. 126 of *Ferraiuolo*:

> This is not a case of a competition for state funding in which the state can only afford benefits for one group. As such, it stands in stark contrast to *Law* and *Gosselin*. Those cases dealt with government funded social programs under which government decided that certain groups were more in need of public funding than others.

[251] In sum, I find that the MIR is not aimed at improving the circumstances of other more disdvantaged groups.

(d) Nature of the Interest Affected

[252] The interest that is affected is the ability of Minor Injury victims to recover damages in tort for their pain and suffering in an amount greater than $4,000.

[253] In *Law*, Iacobucci J. stated at 74:

> A further contextual factor which may be relevant in appropriate cases in determining whether the claimant's dignity has been violated will be the nature and scope of the interest affected by the legislation. This point was well explained by L'Heureux-Dubé J. in *Egan, supra* at paras. 63-64. As she noted at para. 63, "[i]f all other things are equal, the more severe and localized the . . . . consequences on the affected group, the more likely that the distinction

> responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter." L'Heureux-Dubé J. explained at para. 64, that the discriminatory calibre of differential treatment can not be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society" or "constitutes a complete non-recognition of a particular group."

See also, *Ferraiuolo,* at para. 133.

[254] The Interveners submit that the right to recover non-pecuniary damages in excess of $4,000 is not an interest of fundamental constitutional or societal significance. The Crown states that the claimant group has been provided with rights and opportunities that it did not enjoy prior to the Insurance Reforms and that this could be characterized as compensation for any quantifiable monetary loss they may have suffered. It submits further that the Plaintiffs have not tendered any evidence as to how severe and localized the consequences have been to the claimant group. They also note that the claimant group is still entitled to claim for pecuniary damages. Additionally, IBC argues that before economic deprivation by itself can result in a loss of dignity, it must be more than trivial.

[255] The difficulty with these arguments is that they equate the claimant group's interest with the financial consequences of the cap alone. Economic disadvantage and human dignity are not presumed to be mutually exclusive: *Martin,* at para. 103. The deprivation of an equal share of resources, benefits or rights on the basis of an enumerated ground, goes to the heart of human dignity: *Ferraiuolo* at para 88. The restricted availability of non-pecuniary damages results in a diminished recognition of the claimant group's pain and suffering relative to that of motor vehicle accident victims that have suffered other kinds of injuries. Thus, discrimination results from the apparent message that Minor Injury victims' pain is worth less or is not "real": *Martin,* at para. 105. As stated by Professor Billingsley, at p. 729, "human dignity is correspondingly reduced by the law's suggestion that particular injuries do not necessitate such recognition, validation or compensation."

[256] In this case, however, the perception that the claimant group's pain and suffering is worthy of less recognition is tempered by the benefits provided under the DTPR and the *Automobile Accident Insurance Benefits Amendment Regulation*. The Insurance Reforms as a whole and in particular these regulations do recognize the pain of the claimant group by providing immediate and consistent treatment. A reasonable claimant would be aware of this.

[257] In my view, a reasonable person in the circumstances of the claimant group, would conclude that the distinction created by the cap is demeaning to the dignity of those in the claimant group. Specifically, the reduced recognition that these individuals receive for their pain

and suffering would not be overcome by the awareness of benefits provided under the Other Regulations.

[258] There is also evidence that without the ability to sue for non-pecuniary general damages beyond the cap, the claimant group may have a reduced ability to retain legal counsel, as lawyers are often retained on a contingency basis. In response, the Crown notes that there is no free standing right to counsel and that there may be other reasons that litigants have not hired legal counsel at the same rates. For example, they suggest that Minor Injury victims may not feel the need to hire counsel because they are healing as a result of the DTPR.

[259] I agree that there may be many reasons why the rate of hiring counsel has declined. However, a reasonable person in the position of the claimants would be aware that in personal injury cases lawyers are often retained on the basis of contingency agreements and that reduced claims resulting from the cap may make the retention of legal counsel more difficult.

[260] I would also note that the economic consequences that flow from the cap to Minor Injury victims are not necessarily "trivial". As observed by Professor Billingsley at 729: "the difference between receiving a $4,000 general damage award or an award that accurately reflects the degree of his or her pain and suffering may be financially significant to the individual involved."

[261] IBC and the Crown also refer to the trilogy of cases: *Arnold*, *Andrews* and *Thornton,* which placed a cap on non-pecuniary damages awards generally. They state that the cap under the MIR is similarly appropriate in the within circumstances because of the consequences that rising damages costs could have on society. IBC also cites *Lee* v. *Dawson* for the proposition that the cap on non-pecuniary damages imposed by the trilogy does not conflict with s. 15(1) and that caps on non-pecuniary damages should be left to the legislature and not the courts.

[262] The distinction between the trilogy judgments and this case is that in the former, the damages were not capped on the basis of the classification of the injury suffered. Because the cap imposed by the trilogy applies to all non-pecuniary damages in relation to all injuries, it does not suffer from the same defect as that imposed by the MIR. In other words, the objection is not to capping damages, as policy choices of this nature are permitted, so long as they are executed in a manner that impairs Charter rights no more than necessary. The same might be said of a deductible applicable to all serious injuries such as that imposed by the Ontario *Insurance Act*, R.S.O. 1990, c.I-8 at ss. 267.1-267.5.

[263] The Interveners submit further that many writers, including Chief Justice McLachlin in *What Price Disability? A Perspective on the Law of Damages for Personal Injury* (1981), 59 Can. Bar Rev. 1, have criticized the notion of full compensation as it relates to non-pecuniary losses on the basis that it is unattainable. In other words, the primary purpose of damages assessments in the personal injury context must be pecuniary loss compensation. Accordingly, the Interveners argue that the $4,000 cap does not relate to the primary purpose of damages in personal injury cases and, therefore, is not a fundamental interest within the fourth contextual factor.

[264] In response to this argument I would again refer to the judgment in *Ferraiuolo* and the importance of recognition of intangible losses as a result of wrongful or negligent acts and the sense of injustice that it can engender when it is denied in a manner that is inconsistent with the treatment of others.

[265] I find that the severity of the consequences of the cap on the claimant group tend to indicate that the MIR is discriminatory.

(e) Conclusion

[266] Having assessed the cap against the four contextual factors set out in *Law*, I am of the view that a reasonable and dispassionate person, fully apprised of all of the circumstances and possessed of similar attributes as the claimant 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. The cap represents more than a simple disappointment to the claimant group, as suggested by the Interveners. It is demeaning to them because it suggests that their pain is worth less than that of other injury sufferers, in particular members of the comparator group. It also confirms prejudices that soft tissue injuries are generally faked or exaggerated. The impact of the discrimination cannot be viewed as trivial when the impugned legislation reinforces prejudicial stereotypes: *Egan,* at para. 180.

[267] The reasonable person in the position of the claimant would know that some automobile injury victims suffer less pain than some Minor Injury victims, and that they are nonetheless able to access more non-pecuniary damages. The reasonable person would also be aware of the legislative state prior to the Insurance Reforms and the improved benefits provided to Minor Injury victims under the Other Regulations. However, those measures do not address the underlying assumption that the pain suffered by Minor Injury victims is worth less, particularly in the face of the existing stereotype that I have found exists. The reasonable claimant would not accept that it is appropriate to deny them individually assessed damages for their pain and suffering, when such assessments are made available to all other automobile accident injury victims, in exchange for adequate treatment. In fact, adequate treatment for Minor Injuries also benefits insurers and indirectly the Crown, as proper treatment and faster healing can be expected to result in reduced claims quantum and less reliance on health care resources. This is evidenced by the fact that one of the purposes of the DTPR is to reduce the incidence of long term or chronic pain injury and, as a result, reduce loss costs to insurers: Gartner Affidavit, at para. 152.

[268] The reasonable person in the position of the claimant would also be aware of the rapidly rising premiums for mandatory automobile insurance prior to the imposition of the cap under the MIR. However, in my view they would feel less worthy as a result of having been the group selected to forgo individually assessed non-pecuniary damages to subsidize those premiums for Alberta drivers generally.

[269] I am also in agreement with the Crown that the reasonable person standing in the shoes of the claimant group would be aware that other Canadian jurisdictions had enacted caps in response to what they similarly perceived to be a problem with rising premiums resulting from the increasing claim costs from automobile accidents. However, the reasonable person in the position of the claimant would also know that other jurisdictions that have adopted definitions of "minor injury", such as Nova Scotia, New Brunswick and Prince Edward Island, have not imposed caps that apply exclusively to soft tissue injuries (see: Injury Regulation - Insurance Act, N.B. Reg. 2003-20; *Insurance Act*, R.S.N.S. 1989, c. 231 s. 113B(1); *Insurance Act*, R.S.P.E.I. 1988, c. I-4). All three of the definitions of "minor injury" are very similar.

[270] I would note, however, that constitutional challenges under 7 and 15 of the Charter have been launched in relation to the insurance cap on damages for "minor injuries" in Nova Scotia and New Brunswick. Although preliminary motions have been advanced in those cases, they have not yet gone to trial. See: *Flood* v. *Ouelette,* 2007 NBCA 38, 314 N.B.R. (2d) 107 and *Hartling* v. *Nova Scotia (Attorney General),* 2006 NSSC 225, 247 N.S.R. (2d) 154.

[271] Before leaving the s. 15 analysis I feel compelled to address *Hernandez*. As above, the provision that was being challenged in *Hernandez*, disallowed motor vehicle accident victims from bringing an action for loss or damages from bodily injury arising from a motor vehicle accident unless the injured person died, sustained permanent serious disfigurement or permanent serious physical impairment of an important bodily function. There, Stayshyn J. found that any loss associated with the loss of the right of action for those below the "serious injury" threshold was offset by the overall benefit provided by the scheme.

[272] I find that *Hernandez* is distinguishable from the case at Bar for a number of reasons.

[273] First, I have found that soft tissue injury victims are subjected to prejudice and are stereotyped on the basis of the type of injury from which they suffer. In *Hernandez*, Stayshyn J. concluded that "automobile accident victims are not a 'discrete and insular minority' that has suffered political, social or legal disadvantage in Canadian society" and that they had not been the subject of "stigmatizing judgments".

[274] Second, *Hernandez* was decided in 1992, prior to the appropriate analysis being prescribed by the Supreme Court of Canada in *Law* and did not undertake the analysis from the perspective of a reasonable person in the position of the claimant.

III Section 1

[275] As I have found that the MIR violates s. 15(1), I must now turn to s. 1 of the Charter to determine if the violation is reasonable and demonstrably justified. Specifically, s. 1 provides:

Guarantee of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[276] The s. 1 analysis, or the *Oakes* test, consists of the following four branches:

1. Is the objective of the legislation pressing and substantial?

2. Is there a rational connection between the government's legislation and its objective?

3. Does the legislation minimally impair the Charter right or the freedom at stake?

4. Is the deleterious effect of the Charter breach outweighed by the salutary effect of the legislation?

[277] The burden of proof is on the Crown in relation to each branch of the s. 1 analysis. If the legislation fails on any one of the above four branches it cannot be justified: *Canada (Attorney General)* v. *Hislop*, 2007 SCC 10. The Crown is not required to prove each branch of the test with scientific certainty and it is permitted to rely on common sense propositions: *R.J.R. MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 137. In applying the forgoing analysis I am also mindful of the fact that the legislature is often better positioned to make policy choices than the courts, and that courts must be "cautious not to overstep the bounds of their institutional competence.": *M.* v. *H.*, [1999] 3 S.C.R. 199, at para. 79.

1. Pressing and Substantial Objective

(a) Positions of the Parties

[278] The Interveners submit that courts are reluctant to declare a government objective invalid. They state that there were multiple objectives behind the Insurance Reforms, namely:

1. Increasing accessibility and affordability of mandatory automobile insurance;

2. Creating a fairer system of setting premiums for mandatory automobile insurance;

3. Addressing problems identified with the diagnosis, treatment and no-fault benefits for sprain, strain and WAD injuries;

4. Seeking to control rising claim costs attributable to sprain, strain and WAD injuries to stabilize premiums in Alberta over the long term;

> 5. Ensuring certain persons with sprains, strains and WADs who had functional limitations that were not expected to improve substantially, resulting in the inability to perform essential activities of employment and education and normal activities of daily living would be exempted from the new scheme;
>
> 6. Strengthening the role of and increasing regulatory control of the AAIB; and
>
> 7. Addressing solvency concerns of insurance companies.

[279] The Crown argues that controlling non-pecuniary damage awards arising out of motor vehicle accidents is also a valid, pressing and substantial objective. In this regard, it relies on *Arnold,* at p. 333:

> One may and should have regard for the social impact of very large, and as I have said, non-compensatory awards for non-pecuniary damages. The very real and serious social burden of these exorbitant awards has been illustrated graphically in the United States in cases concerning medical malpractice. We have a right to fear a situation where none but the very wealthy could own or drive automobiles because none but the very wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards.

[280] The Interveners state that, prior to the Insurance Reforms, the state of automobile insurance in Alberta had become critical. They argue that insurance premiums were not only unaffordable, they had become inaccessible, and that this affected the ability of Albertans to participate fully in society. There was also, they submit, an increasing concern with uninsured drivers. Thus, they take the position that unaffordable mandatory insurance was not just a financial problem, but also a societal problem.

[281] The Interveners submit further that it was necessary to implement the Insurance Reforms because the pre reform practices discriminated on the basis of gender, age and marital status. In this regard they rely on *Zurich Insurance*.

[282] The Plaintiffs submit that the Crown's objective in implementing the MIR was to reduce insurance premiums. They argue that this does not constitute a pressing and substantial objective for the purposes of s. 1 of the Charter.

[283] The Plaintiffs contend that there was no insurance crisis as alleged by the Crown. Rather, they point out that the insurance industry is subject to cyclical changes in profitability and that the loss ratios were steadily improving on automobile insurance from 2000 to the time that the Insurance Reforms were implemented. The Plaintiffs cite the evidence of Dr. Miller where he confirmed that Alberta automobile insurers were making record profits in 2004 and 2005 and perhaps in 2006 as well: Miller, transcript, at p. 472.

(b) Analysis

[284] The Crown urged me to consider the objectives of the DTPR with that of the MIR and stated that the cap would not likely have been approved by the Standing Policy Committee on Economic Development and Finance, or cabinet, absent the enactment of the DTPR. It states that they were developed together and that they are integral parts of the Insurance Reforms.

[285] It may be that the Other Regulations were intended to advance many of the objectives enumerated in the Crown's submission. However, the MIR cap on non-pecuniary damages is the only provision that is being attacked on the basis of s. 15(1). Additionally, as noted by Bastarache J., in his dissent in *Gosselin*, at para. 264, it is the objective of the distinction that should be analyzed in terms of whether the objective was pressing and substantial:

> While the s. 1 analysis must not take place in a contextual vacuum, when a specific legislative provision has been found to infringe a Charter right, the s. 1 analysis must focus on the objective of that particular provision...The s. 1 analysis must therefore focus on the distinction it creates. If too much weight is given to the objective of the legislation as a whole, this will lead the court into an inquiry of what would be the best way to formulate an entire piece of legislation. That is the province of the legislature.

[286] Similarly, in *Ferraiuolo*, at para. 140:

> What then is the legislative objective of s. 8(2)(c)? The focus must be on the limits themselves - age and marital status - since Alberta must demonstrate that the exclusion of married or older children from the recovery of damages for grief under the *FAA* is justified under s. 1. As explained by McLachlin J. (as she then was) in *RJR MacDonald Inc. c. Canada (Procureur general)*, [1995] 3 S.C.R. 199 (S.C.C.) at para. 144:
>
> > The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. [Emphasis in original.]

[287] Accordingly, it is the objective of the cap that is the proper focus of the analysis here.

[288] Consistent with my decision in *Kubel*, I find that the objective of the cap was to reduce insurance premiums. Specifically, the Crown was responding to what it perceived as an "insurance crisis". As I stated at para. 28 in *Kubel*:

> Capping non-pecuniary awards for minor injuries is also an initiative designed to ensure that insurance rates remain affordable. The theory is that by limiting non-pecuniary damage claims in cases of minor injury, the quantum of insurance payouts will be reduced and thereby result in lower insurance rates.

[289] As noted previously, the average earned premium, all coverages combined, in private passenger vehicles increased between 11% and 16% in 2002 and between 12% and 15% in 2003: Gartner Affidavit, at para. 28, Exhibit C, at p. 4 and Exhibit D; Cheng Report, at p. 9. This was accompanied by a rapid increase in drivers having to obtain insurance through the Facility Association. These factors resulted in mandatory automobile insurance that was financially out of reach for newly licenced drivers, drivers that were re-accessing insurance following a gap in coverage and other high risk drivers. There is also evidence that, at this time there was an increase in the number of uninsured drivers in Alberta. Convictions for uninsured driving and claims under the Motor Vehicle Accident Claims Fund for accidents involving uninsured drivers increased by 11% and 14% respectively from 2000 to 2002: Gartner Affidavit, at para. 35. Further, during the reform process, the Independent Insurance Brokers Association of Alberta estimated that up to 10,000 Albertans were driving without insurance: Gartner Affidavit, at para. 34.

[290] That the objective of the cap was to reduce insurance premiums is also supported by the evidence of Dr. Miller. Dr. Miller projected that, if the Insurance Reforms under Bill 53 and "related initiatives" were struck down, there would be a one time aggregate additional all-industry claims costs to insurers for private passenger (excluding farmers) class of business not contemplated or funded by premiums earned": Miller Report, at p. 29. This, he opined, would lead to an average increase in rates for basic coverage of approximately 15% to 20%: Miller Report, at p. 29. However, Dr. Miller's predictions were premised on the demise of all of the Insurance Reforms, not just the MIR.

[291] In relation to the savings generated by the cap alone, Mr. Gartner agreed that the majority of the savings generated by the reforms were intended to be generated by the cap: Gartner, cross-examination on affidavit, at p. 329. He also agreed that the definition of Minor Injury was essential to deliver the savings that were being projected: Gartner, cross-examination transcript, at p. 364.

[292] Ms. Addie's evidence was that the comparative savings estimates associated with imposing a $4,000 cap on the payments for pain and suffering for minor injuries was 15.5% for total third party liability bodily injury settlement amounts and 44.3% in relation to third party liability bodily injury for minor injuries only: Addie, transcript, at p. 517, Cheng Report, Exhibit 44, at p. 6, Alberta Closed Claim Study, May 2006, Exhibit 30, at p. 15.

[293] I have rejected the Crown's submission that seeking to control rising claim costs related to soft tissue injuries was an objective of the MIR. Instead, controlling these claims costs was one of the avenues chosen by the Crown to reduce insurance premiums, which I find was the true objective behind the cap. As above, non-pecuniary damages with respect to bodily injury costs were a legitimate cause for concern to the Crown in the years before the Insurance Reforms were implemented. They were not, however, the only factor that caused the increase in premium rates. This is evidenced by the fact, that although claims costs had been rising for some time, the insurance industry continued to be profitable.

[294] The Supreme Court of Canada has expressed reservations about the extent that purely financial considerations can constitute pressing and substantial objectives that override Charter rights. In *Martin*, the Supreme Court, per Gonthier J. stated at para. 109:

> Budgetary considerations in and of themselves cannot normally be invoked as a free standing pressing and substantial objective for the purposes of s. 1 of the Charter. [Cites omitted.] It has been suggested, however, that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective.

The Court concluded there was insufficient evidence upon which to decide if budgetary controls in that case constituted a pressing and substantial concern.

[295] A year later, in *Newfoundland (Treasury Board)* v. *N.A.P.E.,* 2004 SCC 66, [2004] 3 S.C.R. 381, the Court, per Binnie J. stated at para. 64:

> At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a Charter right, subject of course to the measures being proportional both to the fiscal crisis and to their impact on the effected Charter interests.

Binnie J. went on to state at para. 72:

> Courts will continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints. To do otherwise would devalue the Charter because there are *always* budgetary constraints and there are *always* other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through crisis. [Emphasis in original.]

[296] A lack of evidence also kept the Court of Appeal of Alberta from finally determining this issue in *Ferraiuolo*. The Court did, however, comment at para. 152:

> I turn now to consider whether avoiding unacceptable insurance premium increases constitutes a pressing and substantial objective. I have considerable reservations whether a limitation on a Charter right for some can be justified because of concerns about rising insurance premiums for others. The Supreme Court has made it clear that budgetary considerations by themselves cannot ordinarily be relied on as a free-standing pressing and substantial objective in their own right for the purposes of s. 1. [Cites omitted.] It may be that this same reasoning applies all the more so when government seeks to rely on the fact that state action will have financial implications, not for the state itself, but for third

> parties, such as for example, insurers and the insurance rates charged to the public generally. In these circumstances, the state action does not involve allocating scarce public resources amongst different disadvantaged groups but rather denying victims of a private cause of action for compensation for injuries suffered by them.

See also: *Health Services and Support,* at para. 147.

[297] The Crown argues that *Ferraiuolo* assumed, without deciding, that avoiding unacceptable insurance premium increases was not a valid objective. It also points out that, in that case, the lack of evidence presented justifying the interference with the Charter right was fatal and states that in this case, there has been evidence presented to establish that it was necessary for the Government to act to ensure affordable mandatory insurance was available and thereby allow citizens to participate fully in society.

[298] I acknowledge that the Court of Appeal did not finally decide whether increased insurance premiums could justify violating the constitutional rights of a defined group. I also share the doubts expressed by Fraser C.J. in *Ferraiuolo*. However, the financial implications at issue here were not only burdening insurers, they were also affecting Albertans who drive, acutely so, in the case of high risk drivers. This was because insurers were free to continue to raise premiums or, alternatively, to refuse to insure drivers and refer them to the Facility Association. Additionally, the mandatory nature of automobile insurance in the province meant that, if insurance premiums became unaffordable, people could not lawfully continue to drive. It was, therefore, legitimate for the Government to be concerned about the ability of Albertans to access automobile insurance and to look for ways to lower claim costs.

[299] Thus, for the purpose of this branch of the analysis, I find that maintaining affordable mandatory automobile insurance was a pressing and substantial objective. I echo Fraser C.J.'s observations in *Ferraiuolo* that the burdens that may accompany the implementation of social policy legislation should not be concentrated on a few, as opposed to the many. However, I find these considerations are best addressed under the proportionality branch of the s. 1 analysis.

[300] The next issue is whether the Crown was justified in perceiving that insurance was becoming inaccessible to many Albertans given the information that was available at the time that the Insurance Reforms were implemented.

[301] In this regard, Dr. Miller's evidence was that by 2003 the partial loss ratios for third party liability bodily injury had improved from 74.7% in 2002 to 57.8% in 2003: Miller Report, Exhibit 29, at p. 17. Loss ratios are claim amounts divided by earned premiums expressed as percentages. These data provided by Dr. Miller are referred to as "partial loss ratios" because the claim amounts in the numerator relate only to subcoverage, while the earned premium amounts in the denominator are for the entire coverage. Mr. Gartner's evidence was that earned incurred loss ratios for third party liability fell from 99.94% in 2001 to 90.84% in 2002. According to his evidence those loss ratios had been in excess of 100% since 1998: Gartner Affidavit, Exhibit M.

[302] Additionally, claim costs per car for third party liability bodily injury had dropped from $435.86 in 2002 to $397.67 in 2003: Miller Report, Exhibit 29, at p. 17. The claim frequency for those years in relation to third party liability - bodily injury had also decreased from 0.957% to 0.867%: Miller Report, Exhibit 29, at p. 17. Dr. Miller conceded on cross examination that this information would have been available by May/June, 2004, before the Insurance Reforms were implemented in October 2004.

[303] As stated earlier, Dr. Miller also testified that the 2003 data may have been influenced by a number of factors. For instance, he stated that the decrease in bodily injury costs may have resulted from the reduced frequency of claims which may have been a reflection of drivers' reluctance to report claims due to rapidly increasing premium rates. He also speculated that, although the product Insurance Reforms were not implemented until 2004, a number of initiatives related to Bill 53 had been implemented in 2003. Dr. Miller concluded that "the ultimate experience for the 2003 accident year is very likely not what it would have been in the absence of Bill 53": Miller Report, Exhibit 29, at pp. 16 and 21. On the other hand, Dr. Miller also testified that it was reasonable to project a modest decrease in bodily injury claim costs absent the Insurance Reforms for the "next couple of years" following 2003.

[304] The Department of Finance had received a large number of letters expressing concern about high automobile insurance premiums and calling for government action: Gartner Affidavit, at para. 25; Gartner Affidavit, Exhibit B. In addition to the written correspondence, the Department also received numerous telephone calls complaining about high automobile insurance premiums. The dramatic increase in premiums may also have been reflected in the increased convictions for uninsured driving in the province and the increase in claims involving uninsured drivers.

[305] Mr. Gartner also noted that concerns had started to increase in relation to the impact of the insurance market on insurers in the province, namely deteriorating profitability and the capital adequacy of some insurers. He specifically cites the fact that the Co-operators General Insurance Company stopped writing new auto insurance coverage in Alberta in 2002 and some insurance companies were talking about moving out of Alberta: Gartner Affidavit, at para. 44. A Report on the Property and Casualty Insurance Industry in Canada, dated September 19, 2003 indicated that the financial position of the property and casualty industry had been deteriorating for several years: Gartner Affidavit, Exhibit Q, at p. 20. Capital adequacy among insurers had fallen and more were approaching OSFI's minimal capital target thresholds: Gartner Affidavit, at para. 47. The return on equity by the automobile insurance industry in Alberta ranged from 4.5% to 8.8% between 1998 and 2002: Cheng Report, Exhibit 44, at p. 5. Mr. Cheng testified that these figures were significantly lower than the 12.5% that was approved as reasonable by the Ontario Auto Insurance Board: Cheng, transcript, at pp. 707-709.

[306] The evidence indicates that this pressure on the insurers led to an increased frequency of referrals to the Facility Association. For example, in April of 2003 the monthly written premium in the Facility Association rose to over $21 million from $10.5 million in January of that year,

and a previous low of $3.7 million in December, 2000. By 2003 the Facility Association's share by vehicle of the total private passenger vehicle market had more than tripled in the previous three years: Gartner Affidavit, at para. 49. In cross-examination on his affidavit, Mr. Gartner stated that there were approximately 60,000 vehicles in the Facility Association during the time of the reforms and that the number continued to increase until October, 2004 when the Insurance Reforms were implemented: Gartner, cross-examination on affidavit, at p. 73. Statistical Plans exhibits also indicated that drivers were being sent to the Facility Association regardless of their driving record: Gartner Affidavit, at para 51.

[307] When asked on cross-examination whether it occurred to the Implementation Team that this was just an evolution of the insurance cycle, Mr. Gartner stated:

> .... of course we knew about the insurance cycle, and eventually we had no--it probably would have worked itself out. How many cycles do you want to go through? How much-- how many times do you want people all of these people to end up in the Facility Association? How often do you want the problems Section B that we heard about in this cycle....to occur?

Gartner, cross-examination on affidavit, at p. 262

[308] Later during cross examination on his undertakings, Mr. Gartner added that he was advised by insurance brokers and representatives from insurance companies that the period immediately prior to the Insurance Reforms was the hardest market they had seen to that point: Gartner, cross-examination on undertakings transcript, at p. 427.

[309] The actuarial evidence presented at trial indicated that the hard market conditions peaked and began to abate in late 2003: Zubulake, transcript, at p. 233. Nonetheless, the Crown cannot, in my view, be faulted for proceeding with constitutional insurance reforms in the face of the data that would have been available when the reforms were implemented. Prior to that point, the third party loss bodily injury claims cost had risen annually by an average of 4.6% between 1996 and 2002. In fact, the rising third party liability claims cost per vehicle in Alberta had risen consistently from 1985 to 2002: Alberta Closed Claim Study, May 2006, Exhibit 30, at p. 16. Although the third party liability bodily injury claims frequency peaked in 1998 and the third party bodily injury loss ratio and the third party liability loss ratio peaked in 1999 and 2000 respectively, the claim severity continued to rise until 2002: Miller Report, Exhibit 29, at p. 17. In Mr. Zubulake's opinion it was the large rate increases that were the source of the improved loss ratios in 2001, 2002 and 2003. Further, as pointed out by Dr. Miller, there may have been a number of explanations for the drop in the claims cost in 2003. Additionally, this data would have done nothing to quell the public dissatisfaction, and in some cases outrage, in response to the high automobile insurance premiums being demanded at the time.

[310] In sum, I find that it was reasonable for the Crown to perceive that an insurance crisis existed or was imminent and that mandatory automobile insurance was becoming inaccessible to many Albertans at the time that the Insurance Reforms were implemented.

2. Proportionality

(a) Rational Connection

[311] The issue here is whether the $4,000 cap is rationally connected to the objective of reducing insurance premiums for the majority of Albertans. The Plaintiffs concede this point however, they take issue with whether that objective has been met.

[312] The evidence before me demonstrates that insurance premiums have been reduced since the implementation of the Insurance Reforms through the premium freeze, mandated reductions and the impact of the grid premium system. The evidence discloses that mandated reductions have decreased compulsory automobile insurance rates by 18%.

(b) Minimum Impairment

(i) Positions of the Parties

[313] The Plaintiffs argue that there are less drastic means that the Crown could have chosen in pursuing its objective. They state that there were many non-discriminatory options available, the most obvious being to apply a cap to all injuries. They also point out that it was open to the Crown to:

> a. use budget surpluses accruing to the government to implement automobile reforms;
>
> b. adopt a definition of Minor Injury that applied to all injuries arising from motor vehicle accidents that resolve within a certain time frame or injuries of any nature that did not result in permanent or measurable disability or impairment or that otherwise spread costs fairly among all policy holders in Alberta;
>
> c. adopt a system allowing consumers to purchase optional insurance to cover the injuries regulated by the cap;
>
> d. enact a statutory deductible for motor vehicle accident victims who fail to use their seatbelt or a deductible that reduces all damages by a prescribed percentage;
>
> e. consider an insurance system such as that in British Columbia which has a full tort system and remedies for all injury victims or an insurance system which offers a choice between a full tort system and a no fault system;
>
> f. adopt an insurance regime such as the *Motor Accidents Compensation Act 1999*, (N.S.W.) that was implemented in New South Wales, and which adopts a number of restrictions in awarding damages in a non-discriminatory fashion;

> g. failing to consider, study or analyze any measures that would spread costs fairly among all policy holders in Alberta.

[314] The Plaintiffs concede that the Crown was permitted to reform automobile insurance and to adopt any non-discriminatory structure it deemed fit. However, they argue that the cap leaves Minor Injury victims without access to the mechanism employed by the common law system to recognize the pain and suffering of injury victims.

[315] Finally, the Plaintiffs submit that the cap does not minimally impair soft tissue injury victims' rights to equality because there is no consideration of their actual needs and circumstances. They rely on *Martin* in this regard. They note specifically that soft tissue injury victims who experience pain but continue to work will never qualify under the definition of "serious impairment" and that, in any event, the term "serious impairment" is vague, confusing and subject to interpretation.

[316] The Crown and IBC submit that legislation is not to be struck where the Court can imagine a slightly less impairing scheme. The Crown states that it considered but rejected, for various reasons, legislative schemes adopted in other jurisdictions to meet similar objectives:

> 1. The ICBC system, where the tort system is largely preserved, but administered by a government body, required high start up costs; runs economic risks that could result in the displacement of jobs and insurers; is not necessarily a cost effective system and in fact may be the most expensive alternative (Trebilcock, transcript, at pp. 554 and 557); and was not an objectively better system. It also would not have addressed the rising claim costs and damage awards attributable to soft tissue injury victims and ultimately may not have done anything to avoid the cap on non-pecuniary damages for soft tissue injuries. It also cites potential NAFTA and GATT expropriation consequences as a reason that this alternative was not adopted.
>
> 2. The adoption of a no-fault scheme wherein the ability to obtain non-pecuniary damages is severely restricted or abolished was also considered by the Crown. The Crown rejected this option on the basis that it did not recognize that the problem of rising non-pecuniary damages was not present in every injury category and that it wanted to preserve higher non-pecuniary damages for more serious injury victims. In any event, the Crown submits that this would have left the claimant group in the same position in relation to their ability to sue for non-pecuniary damages.
>
> 3. The imposition of deductibles, such as that adopted in Ontario, was also considered and rejected because it would affect persons with the most serious and permanent injuries. It was considered as an alternative to the cap in relation to Minor Injuries, but was rejected because of its questionable effectiveness at

controlling damage awards. Specifically, there is a perception that, over time, courts tend to increased awards to absorb the costs of the deductible.

4. Defining minor injuries by the duration of the injury was also considered by the Crown. However, the medical evidence suggested that a temporal focus would be inappropriate and that functional limitation was more appropriate. The Crown also states that a temporal limitation would amount to a categorization not based on actual circumstances.

5. Contributing public funds to the insurance system was an option, but it would have done nothing to address the problem of the disproportionate rise in bodily injury claim costs, specifically for Minor Injuries. It also submits that simply instituting an All Comers Rule would not have addressed the spiraling costs of automobile insurance premiums.

6. Adopting a definition of minor injury that applied to all non-permanent or measurable disabilities was not considered because it was specifically soft tissue injuries that were resulting in the rising bodily injury costs.

7. The option of purchasing additional insurance to cover lower injury awards for soft tissue injury victims was not adopted because the evidence indicated that this type of coverage would not be utilized.

8. The Crown did consider a system such as the one adopted in New South Wales. However, that legislation is not a panacea. It is a complex scheme that adopts a number of practices, including: not awarding non-economic loss unless the degree of permanent impairment of the injured person is greater than 10%; regulating lawyers' fees; and limiting access to courts and economic damage awards. The Crown also notes that this legislation has been criticized in Australia.

9. The Crown did consider an insurance scheme that offers a choice between a full tort system and a no-fault system for all automobile accident victims, but rejected it on the basis that running parallel systems would be inefficient. There was also evidence from other jurisdictions indicating that few chose the tort system.

[317] The Interveners argue that in drafting the Insurance Reforms the Crown was required to balance finite resources and the economic interests of many groups. They point out that, although the insurance system is not funded by tax payers, it is mandatory and is, therefore, required to be funded by essentially the same population of Albertans, namely, tax payers. The Plaintiffs disagree, saying that the imposition of the cap did not involve a polycentric or scientific analysis, nor a weighing of the allocation of public resources. As a result, they submit that the Crown is not entitled to the degree of deference it would be afforded had such considerations been at play.

(ii) Analysis

[318] The majority in *Health Services and Support*, per McLachlin C.J., summarized the approach to be taken under the minimal impairment branch of the analysis as follows, at para. 150:

> At the third stage of the *Oakes* test, the court is directed to inquire whether the impugned law minimally impairs the Charter right....The government need not pursue the least drastic means of achieving its objective. Rather the law will meet the requirements of the third stage of the *Oakes* test so long as the legislation "falls within a range of reasonable alternatives" which could be used to pursue the pressing and substantial objective.

[319] In *Baier* v. *Alberta*, 2007 SCC 31, Fish J. elaborated, at para. 120:

> Legislatures are not bound to adopt the "least impairing" means of furthering pressing and substantial objectives. They cannot, however, interfere with or limit constitutionally protected rights or freedoms in a manner that plainly overshoots the mark.

Although these observations were made in the context of a dissenting opinion, there was no need for the majority to comment on s. 1, as it found that there was no Charter violation.

[320] I accept that the government should be provided considerable deference and that it was entitled to choose among a range of reasonable options. In my view, devising the MIR required a consideration of the interests of several groups including injury victims, Alberta drivers and insurers. Additionally, it required the review of considerable actuarial and medical evidence. However, the Crown is not entitled to the deference that is properly accorded when the issues concern the allocation of scarce public resources, as that is not the case here.

[321] It is clear from the evidence that the Crown considered a range of options in seeking to address the rising mandatory automobile insurance premiums. It is also evident that the Crown engaged many of the affected parties in consultation in developing the Insurance Reforms.

[322] The difficulty is that the option selected by the Crown places the burden of funding the Insurance Reforms primarily on the shoulders of Minor Injury victims. In doing so, it discriminates against individuals who suffer from a particular type of disability. In assessing whether the MIR impairs the s. 15(1) rights of the claimant group no more than was necessary, I must focus on whether the Crown could have pursued its purpose of making mandatory automobile insurance premiums more affordable without discriminating or in a manner that minimized the discrimination.

[323] The Crown argues that the DTPR is an offset to the cap under the MIR. It contends that this evidences the Crown's intention not to impair the rights of the claimant group any more than

reasonably necessary to obtain the legislative objective. The Crown submits further that it chose to reduce the non-pecuniary awards for Minor Injuries because it was precisely awards in relation to those injuries that were spiraling out of control and causing the unacceptable rise in premiums. It submits further that the scope of the MIR was least impairing because it did not impose a blanket cap and instead provided for an exception in relation to those individuals deemed to have suffered "serious impairment".

[324] Although a blanket cap on all sprains, strains and WADs grade I and II may have been problematic on the basis that it would have entirely excluded a particular group from benefits, as was the case in *Martin* and *Ferraiuolo*, the nature of the discrimination here is that the MIR has targeted a group of people who suffer from a particular type of injury and who are the subject of pejorative stereotyping. The exceptions carved out for those who are no longer able to perform the essential tasks of their occupation, or education, or the normal activities of their daily living, does little to relieve against this discrimination.

[325] The Crown has attempted to justify its imposition of the cap against only Minor Injury sufferers on the basis that it was soft tissue injuries that were causing the increasing bodily injury costs. Specifically, that bodily injury costs in Alberta were the primary contributor to rising insurance premiums and that such costs were driven by the costs for non-pecuniary damages for minor soft tissue injuries.

[326] In this regard the Crown relies on the evidence of Ms. Addie who found that 62% of the claimants in Alberta suffered soft tissue injury only, receiving 43% of the settlement amounts. An additional 29% had soft tissue as well as other injuries, such that 91% of all claimants suffered from some form of soft tissue injury: Addie, transcript, at p. 513. Additionally, a Study of Premium Stability in Compulsory Automobile Insurance, part of which was a closed claim study, indicated that 47.7% of compensation for third party liability claims consisted of non-pecuniary damages and that figure rose to 83.1% for smaller claims of less than $10,000: Gartner Affidavit, at para. 37.

[327] Mr. Renner noted in his affidavit at para 8:

> The message I received from these meetings [with government and insurance representatives across Canada] was universal, even from provinces where there was a no fault insurance regime or where the province provided government insurance: unless non-pecuniary damages for soft tissue injuries were controlled it would be impossible to get insurance costs and, therefore insurance premiums, under control.

[328] A document prepared by Gordon Smith on behalf of Deloitte Touche suggests otherwise: Christal Affidavit, Exhibit F. Specifically, that report concludes that the increasing premiums for third party liability coverage in 2002 and 2003 were not being driven by bodily injury claims in these years as claim costs had been falling since 1999 (on a per vehicle basis, removing general price inflation increases). I have not accepted the conclusions in the Smith Report for a number

of reasons. First, the report was withdrawn within two days of its release and its author was not called to give evidence or to be cross-examined at trial. Second, Mr. Cheng criticized the Smith Report on a number of bases, including that the Smith Report had used profitability as the basis for its conclusions, rather than return on equity which is the key determinant of profitability in the insurance industry: Cheng Report, Exhibit 44. I have preferred the evidence of Mr. Cheng to that of the Smith Report where the two conflict.

[329] As above, I have found that the Crown's objective was to reduce mandatory automobile insurance premiums, and that controlling rising bodily injury claims related to Minor Injuries was one way of achieving that objective. This was not, however, the only way of reducing premiums.

[330] Mr. Zubulake testified that the Newfoundland and Labrador Closed Claim Studies indicated that 67% of the claimants made claims for soft tissue injuries alone and another 16% made claims for soft tissue injuries together with other injuries. It also reported that 57% of the total settlement amount was for pain and suffering. The 2005 update to this study found that 60.4% of all settlements were for pain and suffering: Zubulake, transcript, at p. 237 and 238. Additionally, the New Brunswick Closed Claim Study in 2002 found that soft tissue injury claims alone represented 61% of all bodily injury insurance claims: Zubulake, transcript, at p. 237. It found further that 61% of the total settlement amounts was for pain and suffering.

[331] Mr. Zubulake also testified that the Nova Scotia Closed Claim Study, issued in March, 2002, concluded that soft tissue injuries alone accounted for 70% of all bodily injury insurance claims, and that 67% of all claim settlement amounts was for pain and suffering.

[332] Despite these figures, and as referenced above, none of these jurisdictions adopted definitions for "minor injury" that applied only to soft tissue injuries.

[333] Additionally, social policy initiatives are often geared towards assisting the most vulnerable members of our society. This does not mean that they should be singled out to fund those costs for which they may be primarily responsible. This is particularly so when the defining characteristic of that group is personal in nature and is an enumerated or analogous ground.

[334] Finally, the Crown submits that Minor Injury victims, who have had their right to claim non-pecuniary damages capped, have been provided with enhanced medical benefits under the DTPR and *Automobile Accident Insurance Benefits Amendment Regulation* in return. They describe this as an "offset to the cap".

[335] The evidence tends to indicate that the DTPR has been beneficial to Minor Injury victims. As laudable as the DTPR and its effects may be, it does not make the discriminatory distinction imposed by the MIR less impairing.

[336] In assessing the available alternatives, the point is not simply to find something less intrusive, but an alternative that would fulfill the objective underlying the legislation: *Lavoie* v. *Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769 at para. 67. I find the Crown has failed to satisfy its

onus in terms of demonstrating that the cap on Minor Injuries was a reasonable alternative. In other words, the MIR "plainly overshoots the mark" in terms of the interference it entails in relation to the rights of the claimant group.

(c) Deleterious and Salutary Effects

[337] As the Crown has not met its burden in relation to the second branch of the *Oakes* test, it is not strictly necessary for me to weigh the salutary and deleterious effects of the MIR. Nonetheless, I will do so for the sake of completeness.

(i) Positions of the Parties

[338] The Plaintiffs submit that in making its assessment, this Court is limited to looking at the salutary effects of the MIR, not the Insurance Reforms as a whole. In that regard, they state that the only salutary effect of the impugned provision is the fact that bodily injury costs have been reduced which has had the effect of reducing insurance premiums for the majority of Albertans.

[339] The Plaintiffs argue that the resulting deleterious effects outweigh these salutary gains. They reference three deleterious results. First, they state that all soft tissue injury victims of motor vehicle accidents are limited in the amount of non-pecuniary damages that they can recover, unless they are able to fit themselves under the vague definition of "seriously impaired".

[340] Second, the Plaintiffs state that injury victims who are subject to the cap are less likely to be able to retain legal representation, as many personal injury cases are taken on a contingency fee basis. In this regard, they note that the number of legally represented soft tissue injury victims has fallen by 50%, from 34.1% to 15.5%, since the MIR came into force.

[341] Third, the Plaintiffs point out that because women suffer more soft tissue injuries than men and suffer longer, the legislation is disproportionately disadvantaging women.

[342] The Interveners point to the DTPR and the improvements to Section B benefits as salutary effects provided by the Insurance Reforms. The focus, however, of my assessment under this branch of the *Oakes* test is the benefits and detriments that flow from the distinction in the MIR. Accordingly, although these regulations may indeed provide salutary benefits, they are not the proper focus of the analysis before me.

[343] The Crown also submits that the Insurance Reforms, including the MIR have allowed for several mandatory roll backs on automobile insurance premiums. This it says has allowed insurance to become more available to young drivers and seniors, groups that have been victims of historical discrimination with respect to mandatory insurance. The Crown submits that these developments have, in turn, led to a reduction in citations for uninsured driving. The legislation has also financed increased Section B no-fault benefits for all injuries sustained in automobile accidents. In sum, the Crown submits that any deleterious effects of the MIR are outweighed by the numerous salutary effects.

[344] Finally, the Crown cites *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, for the proposition that the Court should consider not simply whether the objective of the challenged legislation outweighs the deleterious effects thereof, but also whether its salutary effects as a whole outweigh its deleterious effects.

(ii) Analysis

[345] As stated by the majority, per Gonthier J. in *Lavoie,* at para. 70:

> The final stage [of the *Oakes* test] should not be conflated with the first three stages. If the first three relate to reasonableness of the legislation itself, the fourth examines the nature of the infringement and asks whether its costs outweigh its benefits. The implication of finding a violation at the fourth stage is that even a minimum level of impairment is too much: the costs to the claimants so outweigh the benefits that no solace can be found in the fact that the legislation violates the Charter "as little as reasonably possible".

[346] In my view the 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 Other Regulations, such as the DTPR and the *Automobile Accident Insurance Benefits Amendment Regulation* have provided benefits to Minor Injury victims, but these do not flow from the MIR. Accordingly, I find that the Crown has failed to meet its burden in relation to this branch of the s. 1 analysis.

S. 1 Conclusion

[347] I find that the breach of s. 15 (1) of Charter resulting from the cap under the MIR is not saved by s. 1.

CONCLUSIONS AND REMEDY

[348] My answers to the constitutional questions are as follows:

> 1. Is the cap provided under s. 6 of the MIR, which restricts the right to sue a tortfeasor for the recovery of damages for pain and suffering to $4,000, in violation of s. 7 of the Charter? If so, is the violation in accordance with the principles of fundamental justice?

The restriction of the right to sue a tortfeasor for the recovery of damages for pain and suffering does not violate s. 7 in this case.

> 2. If the cap provided under s. 6 of the MIR is in violation of s. 7 of the Charter, can the violation be justified in a free and democratic society in accordance with s. 1 of the Charter?

It is not necessary to answer this question.

> 3. Is the cap provided under s. 6 of the MIR contrary to s. 15(1) of the Charter?

Yes.

> 4. If the cap provided under s. 6 of the MIR violates s. 15(1) of the Charter, can the violation be justified in a free and democratic society in accordance with s. 1 of the Charter?

No.

[349] Having found that s. 6 of the MIR, which limits the total amount recoverable as damages for non-pecuniary loss for all Minor Injuries to $4,000, constitutes an unjustified breach of the s. 15(1) equality rights of Minor Injury victims based on the enumerated ground of disability, the appropriate remedy for this case is the nullification of the MIR: *Constitution Act, 1982,* s. 52 (1), being schedule B to the *Canada Act 1982* (U.K.). 1982, c.11.

[350] In this case, the remedy of severance is not appropriate because without s. 6, the remaining portion of the MIR is meaningless in that the other sections of the MIR are all related to the defined term "Minor Injury": *Schachter,* at pp. 710 and 711. The latter term is only defined for the determination of whether the right to sue for non-pecuniary damages is subject to the $4,000 cap provided under s. 6 of the MIR. In addition, the term Minor Injury is used only under the MIR. In other words, without s. 6, the MIR cannot independently survive: *Schachter,* at pp. 695-697; P.W. Hogg, at p. 40-11.

[351] IBC has suggested that a prospective remedy be ordered. Such a remedy would affect only the rights of Minor Injury victims as of the date of judgment. This would not be appropriate in this case. The majority of the Court in *Hislop*, wrote the following at para. 86

> ... In instances where courts apply pre-existing legal doctrine to a new set of facts, Blackstone's declaratory approach remains appropriate and remedies are necessarily retroactive. Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling ... There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than retroactive remedy. The question then becomes what kind of change and which conditions will justify the crafting of judicial prospective remedies. (emphasis in original)

[352] Disability is an enumerated ground under s. 15 of the Charter. With this decision, no substantial change in the law has occurred. A retroactive relief should thus be granted: *Hislop,* at paras. 93-99.

[353] I therefore allow this constitutional challenge and order that the *Minor Injury Regulation*, Alta. Reg. 123/2004 be struck down. I declare that the *Minor Injury Regulation*, Alta. Reg. 123/2004 is inconsistent with the *Constitution Act, 1982* and is of no force or effect.

[354] In oral and written argument, the Crown argued against a temporary suspension of the MIR were an adverse decision rendered. It argued that if the MIR was held unconstitutional, there would be an appeal, and at that point, they would apply for a stay pending appeal. IBC did not, however, agree with the Crown on this point and submitted that a temporary suspension of at least one year would be appropriate. In *Schachter,* Lamer C.J. clearly stated that a temporary suspension of a declaration of invalidity should be the exception, not the rule. This was recently reiterated by the majority of the Court in *Hislop* at para. 121:

> ... As Lamer C.J. noted, at p. 716, such suspensions are "serious matter[s] from the point of view of the enforcement of the Charter" because they allow an unconstitutional state of affairs to persist. Suspensions should only be used where striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in the deprivation of benefits from deserving persons without benefiting the rights claimant (p. 719). None of these factors are present in the case at bar.

[355] Since none of these factors are present in this case, a suspended declaration of invalidity is not appropriate.

[356] As a result of this declaration of invalidity, the Plaintiff Peari Morrow is awarded non-pecuniary damages of $20,000 together with the agreed $1,000 for special damages, for a total of $21,000. The Plaintiff Brea Pedersen is awarded non-pecuniary damages of $15,000.

[357] Costs may be spoken to, if necessary.

Heard from April 10 to May 2, 2007 and on June 25, 2007.
Dated at the City of Calgary, Alberta this 8th day of February, 2007.

Neil Wittmann
A.C.J.C.Q.B.A.

Appearances:

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for the Defendants Zhang and Wei

W.E. Remondini
for the Defendants Van Thournout and Van Thournout

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F.R. Foran, Q.C.
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M.G. Massicotte
R.J.D. Gilborn
for the Statutory Interveners