

January 13, 2012

Today the Honourable Madam Justice D.L. Shelley released her Reasons for Judgment in [Sparrowhawk v. Zapoltinsky](#), 2012 ABQB 34. The decision was restricted to the narrow issue of whether the Plaintiff's jaw injury resulting from a car accident was a "minor injury" as defined by the Insurance Act, R.S.A. 2000, c. I-3, Minor Injury Regulation, Alta. Reg. 123/2004 and Diagnostic Treatment Protocols Regulation, Alta. Reg. 122.2004 ("DTPR"). This is the first decision in Alberta specifically addressing this issue.

The facts of this case are that the Plaintiff was involved in a significant collision on March 2005 that totaled his vehicle. Immediately after the accident he experienced jaw pain and developed popping and grinding sounds. Following the accident, his pain became more frequent and increased in intensity. Initially, he was referred to a physician that advised the injury would heal without treatment. In 2007 he was prescribed a splint and diagnosed with temporomandibular joint disorder ("TMD"). The Plaintiff was not diligent in using his splint as he found it uncomfortable and painful.

Justice Shelley came to the following conclusions:

- a) The Plaintiff's descriptions of his mouth and jaw dysfunction were accurate;
- b) The Plaintiff suffered some kind of temporomandibular cartilage damage;
- c) The Plaintiff's jaw followed an aberrant movement path as it opened and closed;
- d) The Plaintiff's teeth suffered from bruxofaceting (permanent tooth damage);
- e) TMD injuries are not WAD injuries;
- f) Dentists are experts who assess, evaluate and treat TMD injuries;
- g) The terms "sprain" and "strain" are not used by dentists when they diagnose and treat TMD injuries; and
- h) Some of the treatments of sprains and strains in the DTPR have no application to TMD and mouth injuries.

The Defendant argued that there was no MRI evidence and therefore, the Plaintiff could not prove the nature of injury to his temporomandibular joints. This was rejected by Justice Shelley because she accepted the expert's conclusion that there was injury to bone or cartilage based on the abnormal symptoms (in this case, abnormal jaw movement and crepitation sounds from the joint).

Justice Shelley went on to interpret the MIR and the DTPR, which together, set diagnostic procedures and treatment and tort recovery limits for certain categories of injuries resulting from motor vehicle accidents. She pointed out that the courts have a

limited role in evaluating whether an injury is classified as a sprain, strain or WAD and that the Legislature intended the Court to rely on the evidence of one or more “health care practitioners” to make this determination. However, the Court does have authority to determine whether an injury causes a serious impairment and an obligation to take into account the claimants pre-existing medical history.

Justice Shelley concluded that the Plaintiff’s TMD injury was not a minor injury on three bases:

(i) The Injury is not a Sprain, Strain or WAD

First, the injury was not a sprain, strain or WAD because it involved damage to cartilage and cartilage is not a muscle, tendon, or ligament. Therefore, an injury to cartilage cannot be a sprain, strain or WAD. Further, as the DTPR excluded “jaw pain” from WAD I and WAD II symptoms, it follows that WAD injuries do not include the jaw. Further, the TMD resulted in damage to the Plaintiff’s teeth, and as teeth are not a muscle, tendon or ligament, this injury is not a “sprain”, “strain” or WAD injury.

(ii) The Injury Caused Serious Impairment

Second, she concluded that even if the injury was a “minor injury”, it met the test for whether it caused a serious impairment. The test for serious impairment is set out by the MIR as follows:

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

Justice Shelley found that all aspects of the test were met. She concluded that the TMD caused difficulty with chewing, yawning and speech and it opened in an abnormal manner. This dysfunction and pain resulted in an impairment of physical function.

Further, as there were no pre-existing injuries, the jaw problems could only have been caused by the injuries sustained in the accident. She specifically rejected the argument that the Plaintiff’s failure to use the splint properly may have contributed to the

problems because she found that the injury became permanent well before the splint was provided to the Plaintiff. She did not comment on whether the Plaintiff had a duty to pursue more aggressive treatment sooner than several years post-accident.

As for the third component of the test, Justice Shelley rejected the Defendant's argument that a "substantial inability" should be more than a mere difficulty and interpreted the term to mean something more than trivial interference but less than a complete disability. She concluded that the injury should be evaluated broadly when examined for its effects on commonplace, day-to-day activities, much like the Ontario Court of Appeal's contextual approach to evaluating whether an injury causes a "substantial inability" under their minor injury legislation. She found that a "substantial inability" exists where an injury:

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

Chewing, yawning and speaking were indisputably 'normal activities' of daily living and thus, the substantial inability criterion was met.

In regards to the requirement that an injury be ongoing, Justice Shelley indicated that "ongoing" did not mean "continual" or "uniform", but "rather that the impairment persists over time". Further, the degree of dysfunction may be variable.

Finally, she concluded that "substantial improvement" did not mean "any improvement", but rather, that the dysfunction cannot be expected to improve to such a degree that the "substantial inability" will cease. This improvement is to be evaluated on a subjective basis.

### (iii) The Minor Injury Scheme Does Not Include Dental Injury

Justice Shelley concluded that the MIR does not authorize dentists to act as Certified Examiners, and therefore, because only dentists can diagnose TMD, it cannot be a minor injury. In support for this conclusion, she noted that the legislation clearly identifies specific health care professionals, but omits dentists and further concluded that the Legislature must have carefully evaluated what kinds of health professionals were appropriate and intentionally omitted dentists.

In the course of argument, further issues were raised. Although Justice Shelley refrained from deciding anything further, as she did not have specific expert evidence on those further issues, she did come to certain conclusions:

1. The scope of “sprains” and “strains” is potentially extremely broad, and the relevance of the terms are uncertain in evaluating what kinds of injuries are potentially minor injuries;
2. The relevance and application of the International Classification of Diseases is not clear and obvious;
3. The DTPR, s. 11(2) table to evaluate sprain severity does not apparently address tendon injuries;
4. The DTPR, ss. 7(2) and 11(2) tables to evaluate sprain and strain severity, may omit certain injury mechanisms, and the implication of those omissions is uncertain; and
5. There may be circumstances where an injury to a muscle, tendon, or ligament cannot be viewed in isolation:
  - a. Due to the close integration of the muscle, tendon, or ligament in a larger anatomical structure, or
  - b. As the injury occurs at an interface between the muscle, tendon, or ligament and a different kind of body tissue.

In conclusion, this decision provides some guidance for claims involving jaw injuries. While it is expected that this decision will be appealed, for the time being, it certainly will have significant impact on how these claims are approached by both Plaintiff and Defence counsel.

J. Faye Armfield