

Minor Injury Regulation



In the recent decision of *McLean v. Parmar*, released February 23, Justice Eidsvik of the Court of Queen's Bench made a number of noteworthy comments concerning the Minor Injury Regulation ("*MIR*"), and claims for loss of earning capacity. Justice Eidsvik formerly practiced as defence counsel in the area of personal injury and it is possible that her comments will be followed in future decisions.

Findings re Minor Injury Regulation

The Plaintiff was diagnosed with a WAD II injury, a TMJ injury, a concussion, depression, and PTSD as a result of a motor vehicle accident, and claimed she experienced chronic pain for 2.5 years. She admitted for the purpose of trial that she "recovered" from her injuries 2.5 years following the accident, although the Court interpreted this to mean that she was "maximally recovered", but had not returned to her pre-accident level of health and fitness.

In assessing general damages, the Court considered the definition of "minor injury" as well as the definition of "serious impairment" under the *MIR*. In spite of the Plaintiff's admission that she had recovered 2.5 years following the accident, the Court held that the soft-tissue injuries suffered by the Plaintiff were not minor injuries because she experienced pain that was ongoing for more than three to six months, and had plateaued in her recovery without returning to her pre-accident level of function. The Court noted that the Plaintiff did not recover her ability to return to her second position as a server or participate in activities such as softball, and that her condition was not expected to improve substantially.

The Court suggested that claims of chronic pain were not intended to be treated as "minor injuries". The Court also commented that there are instances where soft-tissue injuries may be capped despite the fact that a claimant experiences pain lasting more than three to six months, but only where the claimant has recovered or has a favourable prognosis for a full recovery.

This decision raises the possibility that claimants who experience soft-tissue injuries with ongoing symptoms of pain for more than three to six months, and are not expected to fully recover, will not be considered to have suffered “minor injuries” as contemplated by the MIR.

Findings re Loss of Earning Capacity

The Plaintiff worked as a full-time accountant as well as a server prior to the accident, and was in the process of obtaining her accreditation as a Chartered General Accountant (“CGA”) when the accident occurred. She claimed a loss of opportunity because she was delayed in completing her CGA courses, which she finished approximately two years later than expected. She claimed that she will forever be delayed in terms of experience and earnings as a result.

The Court accepted that the Plaintiff would suffer an economic loss due to this delay. In assessing the Plaintiff’s claim for future loss of earning capacity, the Court stated that:

- It was necessary to introduce a contingency for the possibility that the plaintiff would relocate from Saskatchewan to Alberta or British Columbia. The Court heard evidence that the couple was considering relocating, and noted that the income accountants earned in each province varied considerably.
- It was inappropriate to rely solely on information relating to female accountants because the average earning pattern of female accountants was significantly lower than that for males. The Court stated that blending the average earnings of male and female accountants, or exclusively relying on male levels of earnings, provided a more realistic approach to determining her future levels of income.
- Reliance on general CGA statistics to determine the Plaintiff’s average level of income was more appropriate than using her actual salary because she earned significantly less than the average CGA in her current position, and it was unrealistic to assume that the Plaintiff would continue to work for one employer for the rest of her career.
- It would be preferable for the legislature to legislate the applicable discount rate for determining the present value of future losses as this would avoid the significant expense of litigating the issue and would avoid the need for experts to opine on the proper discount rate to be used.

The Court’s comments are noteworthy in that they suggest that an element of gender-neutrality should be introduced to the economic analysis of future earnings and that industry statistics may be preferable to actual evidence of the Plaintiff’s past income history. The Court’s comments about the use of gender neutral statistics in determining loss of future earnings are difficult to reconcile with previous comments from the Court which support the use of gender specific statistics, such as the decision in *A.T.-B. v. Mah*. Noting that the Court has followed different approaches in these decisions, we expect this issue will be before the Court again in the near future.

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