

STRONG DEFENCE

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Pending Decision: TMJ injuries and the Soft-tissue Injury Cap in Alberta: *Sparrowhawk v. Zplotinsky*

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I. Introduction

The *Minor Injury Regulation* came into force in Alberta on October 1, 2004. The main effect of the regulation is to limit the amount of non-pecuniary damages that a motor vehicle accident victim may recover in respect of certain types of injuries. This limit, which is referred to as the soft-tissue injury cap, specifically applies to any injury which is determined to be a minor injury within the meaning of the *Regulation*. The *Regulation* effectively defines a minor injury as a strain, sprain or whiplash associated disorder that does not result in serious impairment.

One issue which has remained outstanding since the cap's implementation is whether temporomandibular joint (TMJ) injuries fall within its scope. The joint, which is formed by the mandible and the upper temporal bone of the skull, consists of a variety of components, some of which are soft tissue in nature. **The issue of how a TMJ injury should be characterized in relation to the province's legislative scheme was before the Court in the recently heard decision of *Sparrowhawk v. Zplotinsky*.** While the judgment had yet to be released at the time of this writing, some comments can be made as to the arguments of each party and the content of the expert evidence.

II. Factual Background

In March of 2005, the Plaintiff, Mr. Sparrowhawk, was rear-ended by the Defendant, Mr. Zplotinsky, while stopped at a crosswalk in North Edmonton. Mr. Sparrowhawk subsequently sued Mr. Zplotinsky, alleging that he had sustained back, neck and jaws injuries as a result of the accident. By the time that the matter reached trial in the fall

of 2011, the parties had resolved all but one of the issues between them, that being whether or not Mr. Sparrowhawk's jaw injury was a minor injury within the meaning of the *Regulation*.

With respect to Mr. Sparrowhawk's injury, the evidence indicated that he began to experience jaw-related pain in the weeks following the accident. He noted that the pain generally worsened throughout the day and caused him to suffer frequent headaches. The pain generally prevented him from eating certain foods or engaging in physical activity. Additionally, he reported experiencing a popping or grinding sensation in the area of the joint, particularly when eating. Upon reporting these symptoms to his dentist, he was fitted with an occlusal splint in order to relieve his discomfort. While the splint was to some degree beneficial, the Plaintiff found it to be impractical and irritating. Consequently, he was less than diligent in wearing it and his jaw-related problems persisted.

III. Argument of the Plaintiff

Counsel for the Plaintiff presented several different arguments to the Court in support of his position that the jaw injury was not a minor injury within the meaning of the *Regulation*. One such argument was that a reading of the *Regulation* makes it clear that jaw injuries were never intended to be included within its scope. For example, he pointed out that a majority of the treatment protocols set out under the *Diagnostic and Treatment Protocols Regulation*, such as compression, elevation, physiotherapy, and immobilization, would serve no purpose in relation to the treatment of a jaw injury. Moreover, he noted that the legislation prevents a Dentist from serving as a Certified Examiner, a physician permitted to give an opinion as to whether a particular injury is minor or not. As jaw injuries fall within the realm of dentistry, and are diagnosed and treated by Dentists, it was submitted that this reflected a legislative intention to exclude such injuries from the scope of the Act.

Plaintiff's counsel also argued that Mr. Sparrowhawk's jaw problems were specifically caused by an injury to his TMJ, which, in contrast to an injury localized to a muscle, tendon or ligament, it was submitted, cannot be regarded as a soft-tissue injury. As demonstrated to the Court, neither the *Minor Injury Regulation* nor the *Diagnostic and Treatment Protocols Regulation* define or make reference to a joint.

In terms of establishing that Mr. Sparrowhawk had in fact injured his TMJ, his counsel relied on the expert testimony of Dr. Martyn Thomas, a practicing dentist specializing in temporomandibular disorders who had examined Mr. Sparrowhawk on several different occasions. Dr. Thomas testified that the individual components of the jaw – such as muscles, ligaments and the TMJ – form what he described as the craniomandibular complex. He explained that an injury to any single component of the complex will invariably result in corresponding injuries to its other

components, such that the entire complex can be regarded as injured. He further explained that when such an injury occurs, a condition referred to as Temporomandibular Joint Disorder develops (TMD).

In Dr. Thomas' opinion, one of the conditions that Mr. Sparrowhawk suffered from was TMD. While Dr. Thomas was not able to explain precisely how the disorder developed, or which part of the craniomandibular complex was first injured, he was clear that the injury affected the entire complex and each of the components contained therein. According to his testimony, while the Plaintiff clearly suffered injuries to the soft tissues of the jaw, such as its ligaments and muscles, he also suffered an injury to his TMJ, which is composed of both hard and soft tissue. Mr. Sparrowhawk presented several clinical signs which allowed Dr. Thomas to conclude that the injury extended to the joint itself. Firstly, he observed that the Plaintiff's jaw failed to open in a smooth, straight and uninterrupted fashion, which is suggestive of an incongruity between the joints on the left and right side. Secondly, he indicated that the popping and grinding noises reported by Mr. Sparrowhawk cannot be caused by an injury to the jaw muscles or ligaments themselves, thereby implicating an injured joint. Lastly, he noted that Mr. Sparrowhawk's teeth showed evidence of grinding or clenching, which can be caused by either an injury to the TMJ or stress. As there was no indication that the Plaintiff was experiencing stress, Dr. Thomas deduced that the grinding or clenching was caused by an injury to his TMJ.

IV. Argument of the Defendant

Not surprisingly, the evidence of Dr. Thomas was disputed by Dr. Dean Kolbinson, a Professor of Dentistry at the University of Saskatchewan who testified on behalf of the Defendant. Dr. Kolbinson characterized TMD as a catchall diagnosis which failed to specifically identify the Plaintiff's injury. Moreover, he noted that the testing to which the Plaintiff had been subject was insufficient and that this precluded any definitive diagnosis. In his opinion, an MRI of the Plaintiff's jaw was necessary in order to identify any particular problems.

He also disagreed with Dr. Thomas' assertion that an injury to any one component of the craniomandibular complex will necessarily cause injuries to the other components of the complex. For example, when cross-examined on this point, he indicated that an injury to the soft tissues of the jaw will not invariably result in an injury to the joint.

While Dr. Kolbinson conceded that there was a chance that Mr. Sparrowhawk had injured his joint, he regarded this possibility as unlikely, and that it was more probable than not that the Plaintiff's injuries were solely muscular and ligamentous in nature. In contrast to Dr. Thomas, Dr. Kolbinson found that all of the Plaintiff's symptoms could be explained by muscular or ligamentous injuries alone. Moreover, he noted that his conclusion was supported by the Plaintiff's X-ray results, which were normal and failed to indicate any bony or degenerative condition.

Dr. Kolbinson's evidence formed the basis of the Defendant's submissions during argument. Counsel for the Defendant reiterated Dr. Kolbinson's opinion that TMD amounted to an overly vague and non-specific diagnosis and that an MRI ought to have been performed in order to confirm or rule out various possibilities. He argued that the failure to perform an MRI effectively deprived the Court of information relating to the specifics of the Plaintiff's injury. Given that the burden of proof in a civil trial ultimately rests with the Plaintiff, the Court was urged to treat the absence of such necessary information as fatal to the Plaintiff's case.

He further argued that even if it was accepted that an injury had been sustained to the jaw joint specifically, this did not assist the Plaintiff. For one, he submitted that, as a general matter, an injury to a joint may nevertheless constitute a minor injury within the meaning of the *Regulation* and that this position was supported by the caselaw. Secondly, he noted that the jaw joint is itself made up of both hard and soft tissue components and that there was no clear evidence as to which components, if any, were affected in the Plaintiff's case.

With respect to the Plaintiff's initial argument regarding the content of the *Diagnostic and Treatment Protocols Regulation* and the intention of the legislature, Defendant's counsel argued that there is a disconnect between the "diagnosis" and "treatment" provisions of the legislation and that some minor injuries may nevertheless require modes of treatment neither contemplated by nor referred to therein. Furthermore, on the issue of the inability of Dentists to serve as Certified Examiners, he submitted that this can be accounted for by the fact that the examination performed by a Certified Examiner relates to the entire body and that the ineligibility of Dentists to perform such examinations says nothing about which injuries ought or ought not to be subject to the cap.

V. Conclusion

While it is not yet known how the case will ultimately be decided, both the expert evidence and the statutory interpretation will be critical. Will the Court accept Dr. Kolbinson's evidence that the Plaintiff's injuries are exclusively muscular and ligamentous or will it agree with Dr. Thomas' conclusion that the Plaintiff injured his TMJ? If the Court agrees with Dr. Thomas, will it nevertheless characterize the TMJ injury as soft tissue in nature and, therefore, subject to the Cap? Whatever the case, subject to an appeal, the decision will carry significant precedential weight with respect to how TMJ disorders are classified by Alberta Courts in future and will impact on pre-trial settlement negotiations where there remains uncertainty about how the Courts are likely to characterize such injuries in relation to the *Minor Injury Regulations* and the soft-tissue injury Cap. We will keep you posted on the Judgement (and any appeals) in future issues of Strong Defence.