Sparrowhawk v. Zapoltinsky

Written By Tore Purdy
(Student-at-Law)

I. Introduction

The much-anticipated decision in the case of *Sparrowhawk v. Zapoltinsky* was released in late January. Readers of our October bulletin may recall that the primary issue in *Sparrowhawk* was whether the Plaintiff's temporomandibular joint (TMJ) injury was subject to the small tissue injury cap. While the case judgment had yet to be released at the time of our initial publication, we indicated that we would publish a follow up article upon its release. We would encourage readers to refer to our initial article in order to gain an appreciation of the facts as well as the evidence relied on by each party.

The brief facts were as follows: the Plaintiff, Mr. Sparrowhawk, was injured when his motor vehicle was rear-ended by a vehicle driven by the Defendant. One of the injuries sustained by Mr. Sparrowhawk was damage to his jaw, causing him to experience chronic pain and discomfort. Mr. Sparrowhawk was diagnosed as suffering from TMJ disorder. **At trial, the only issue before the Court was whether the Mr. Sparrowhawk's TMJ injury was a minor injury within the meaning of Alberta's *Minor Injury Regulation* (the "*MIR*").**

II. The Decision

Mr. Sparrowhawk was ultimately successful at trial. **In her judgment, Justice Shelley found that Mr. Sparrowhawk's jaw injury was outside of the cap for the following reasons:**

1. **The injury caused Mr. Sparrowhawk serious impairment;**
2. **Any injury treated principally by dentists, such as an injury to the jaw, cannot be a minor injury;**

3. Some of the specific injuries sustained by Mr. Sparrowhawk are not soft-tissue in nature.

1. <u>The injury resulted in "serious impairment"</u>

With respect to the first reason, the *MIR* stipulates that any injury that causes a serious impairment cannot be a "minor injury". An injury must satisfy certain criteria in order to be meet the definition of "serious impairment", all of which were found to be satisfied with respect to Mr. Sparrowhawk's injury. In making this factual determination, Justice Shelley considered the provisions relating to three of these criteria. This aspect of the judgment is significant as it provides some judicial consideration on matters that have lead to some of the uncertainty inherent in the legislation. Justice Shelley reasoned that the *MIR* provides that an injury cannot be seriously impairing unless it results in a "substantial inability" to perform essential work tasks, essential facets of training or education, or normal activities of daily living. This statement seems to suggest that the decision was heading towards a definition of "substantial inability" that might be stronger than the "substantial interference" definition that exists in Ontario. However, in considering the meaning of "substantial inability", **Justice Shelley held that there exists a "substantial inability" when the performance of an activity is associated with pain or discomfort.** This definition negates any impact from the Alberta legislature's choice to define the threshold in terms of inability as opposed to interference.

The Ontario Court of Appeal considered their legislative definition of "serious impairment" in the 2008 decision in *Brak v. Walsh.* In that case, the Court stated that an impairment may be considered serious even in cases where a claimant, "through determination", has resumed employment and household responsibilities but continued to experience pain. **It was enough that the pain interfered with the ability to do so, albeit on only a partial basis falling short of rendering the Plaintiff unable to perform the tasks**. The Court stated that relevant factors include whether the ongoing pain "seriously affects the claimant's enjoyment of life, their ability to socialize with others, have intimate relations, enjoy their children and engage in recreational pursuits". Given that definition, it is clear that the Ontario legislation allows for subjectivity and is, therefore, vulnerable to exploitation by a Plaintiff who is prepared to fraudulently exaggerate the extent to which asserted pain interferes in their life.

Unless *Sparrowhawk* is overturned on this point at the Court of Appeal, we recommend proceeding on the basis that Alberta's legislation will likely also be interpreted as allowing for a finding of "serious impairment" on the same "interference/seriously affects" threshold employed in Ontario. Surveillance in the early stages of a claim may prove useful in identifying fraudulent claims by those who may look to take advantage of this subjective definition of serious impairment.

a) The *MIR* also provides that an injury is not seriously impairing if it is expected to "improve substantially." Justice Shelley held that the improvement must be expected to remedy any substantial inability resultant from the injury in order to be considered "substantial".

b) Finally, the legislation states that a serious impairment must have been ongoing since the time of the accident. **Justice Shelley, in resolving this point, held that an impairment that results in intermittent yet persistent dysfunction is nevertheless "ongoing"**. This finding means that "ongoing" as used in the legislation does not equate to to ongoing and continuous. It is conceivable on this reasoning that an injury may be deemed "ongoing" even where the Plaintiff may have gone for days, weeks or months at time without a recurrence of discomfort or dysfunction. In short, the *Sparrowhawk* decision gives the word the broadest possible definition, such that unless an injury has completely resolved with no recurrence at all, it may be deemed "ongoing".

2. <u>Any injury treated principally by dentists, such as an injury to the jaw, cannot be a minor injury</u>

The second basis for Justice Shelley's decision was her conclusion that jaw and tooth-related injuries are by definition external to the cap's legislative scheme. In reviewing the relevant legislation, she noted that there are three groups of medical professionals who are statutorily qualified to identify and treat minor injuries: "certified examiners," "health care professionals," and "injury management consultants." She noted that dentists do not hold membership in any of those three groups and that they are the medical professionals who treat and diagnose tooth and jaw related injuries. She concluded that this reflected a legislative intention to exclude such injuries from the scope of the cap.

3. <u>Some of the specific injuries sustained by Mr. Sparrowhawk are not soft-tissue in nature.</u>

In addition to holding that the type of injury suffered was not governed by the cap, Justice Shelley held that some of the specific injuries sustained by Mr. Sparrowhawk were not soft-tissue in nature and were excluded in any event. For example, the evidence disclosed that Mr. Sparrowhawk had sustained an injury to his TMJ. While there was some dispute as to which of the joint's components were affected, the finding of fact reached on this point was that the injury was specific to the cartilage. As an injury to cartilage cannot be considered a "sprain or strain" – as cartilage is distinct from muscles, ligaments and tendons and is not in the nature of a WAD (whiplash associated disorder) injury - it was concluded that the injury was not governed by the cap.

III. Conclusion

Subject to a reversal on appeal, it is reasonable to assume that *Sparrowhawk* will constitute persuasive precedent in future cases.

Justice Shelley's interpretation of the *MIR* with regard to what constitutes a seriously impairing injury should provide helpful guidance to both judges and practitioners alike in terms of how TMJ and other injuries are to be legally categorized in Alberta. *Sparrowhawk* clearly stands for the proposition that TMJ injuries are not subject to the minor injury cap, and that may very well be the rule which eventually emerges at Appeal or as further cases reach the QB Court. However, it is still arguable that the case may not extend that far. For example, does a non-seriously impairing injury involving damage to the muscles and ligaments of the TMJ, but not any of its other components, also fall outside of the cap? *Sparrowhawk* holds that the answer is yes and that any jaw injury, by definition falls outside the cap but until further courts or the Court of Appeal rule on the issue, it remains arguable.