Court of Queen's Bench of Alberta

Citation: Kubel v. Alberta (Minister of Justice), 2005 ABQB 836

Date: 20051121
Docket: 0501 08777 & 0501 02339
Registry: Calgary

2005 ABQB 836 (CanLII)

Between:

Eric Kubel

Applicant

\- and -

The Minister of Justice and Attorney General of Alberta

Respondent

Reasons for Judgment
of the
Associate Chief Justice
Neil Wittmann

Introduction

[1] The Applicant, Eric Kubel, seeks a declaration that subsections 1(h) and 1(j) of the *Minor Injury Regulation*, Alta. Reg. 123/2004 ("MIR"), promulgated under section 650.1 of the *Insurance Act*, R.S.A. 2000, c. I-3 ("the Act") are *ultra vires* the Lieutenant Governor in Council.

Facts

[2] On December 6, 2004 the Applicant, a pedestrian, crossing 37th Street, S.W. in Calgary, was struck by a 2001 Volkswagen Beetle. As a result, he sustained a number of injuries including: a strain of the medial collateral ligament of the right knee; a bone contusion of the tibia; and probable mild fraying of the anterior horn of the medial meniscus. The insurance adjuster for the driver of the Volkswagen has taken the position that the Applicant is suffering from a "minor soft tissue injury".

[3] Pursuant to section 650.1 of the Act, the Legislature delegated the power to define "minor injury" to the Lieutenant Governor in Council. Section 650.1 was enacted as part of the *Insurance Amendment Act*, 2003 (No. 2), S.A. 2003 c.40, amending R.S.A. 2000, c. I-3.

Legislation

[4] Section 650.1 of the Act is found in Part 5, Subpart 5 which deals with Automobile Insurance and claims for injuries arising from the operation and use of automobiles. Section 650.1 of the Act reads:

> Minor Injury
> 650.1(1) In this section, "minor injury" means an injury as defined or otherwise described by regulation as a minor injury.
>
> (2) In an accident claim, the amount recoverable as damages for non-pecuniary loss of the plaintiff for a minor injury must be calculated or otherwise determined in accordance with the regulations.
>
> (3) The Lieutenant Governor in Council may make regulations
>
> > (a) defining minor injury or otherwise describing what constitutes a minor injury;
> >
> > (b) providing for the classification of or categories of minor injuries;
> >
> > (c) providing for the assessment of injuries, including, without limitation, regulations establishing or adopting guidelines, best practices or other methods for assessing whether an injury is or is not a minor injury;
> >
> > (d) governing damages, including the amounts of or limits on damages, for non-pecuniary loss for minor injuries;
> >
> > (e) governing deductible amounts or limits and the application of those amounts or limits in respect of damages for non-pecuniary loss for minor injuries;
> >
> > (f) providing for or otherwise setting out circumstances under which a minor injury to which this section would otherwise apply is exempt from the operation of this section;
> >
> > (g) governing the application of this section in respect of injuries arising out of an accident where

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(i) it is unclear as to whether or not this section applies to those injuries, or

(ii) the injuries consist of a combination of minor injuries to which this section applies and injuries to which this section does not apply;

(h) establishing and governing a system or process under which a person or a committee, panel or other body may review any injury to a person and give an opinion as to whether or not the injury is a minor injury;

(i) providing for the appointment or designation of persons or of members of committees, panels or other bodies for the purposes of a system or process established under clause (h);

(j) governing the payment of any fees, levies and other assessments in respect of a system or process established under clause (h), including, without limitation, regulations respecting

(i) the amount of the fees, levies or other assessments or the manner in which and by whom any of those amounts are to be determined, and

(ii) by whom and to whom the fees, levies or other assessments are to be paid;

(k) governing any transitional matter concerning the application of this section in respect of matters dealt with under this section;

(l) providing for any matter that the Lieutenant Governor in Council considers advisable for carrying out the purpose and intent of this section.

(4) This section does not apply to any accident claim that arose in respect of an accident that occurred before the coming into force of this section.

[5] Subsection 1(h) of the MIR provides:

(h) "minor injury", in respect of an accident, means

(i) a sprain,

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(ii) a strain, or

(iii) a WAD injury

caused by that accident that does not result in a serious impairment;

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[6] A "sprain" is defined in subsection 1(k) of the MIR as "an injury to one or more tendons or ligaments or both". Subsection 11(2) of the *Diagnostic and Treatment Protocols Regulation*, Alta. Reg. 122/2004 ("DTPR") states that "sprain" ranges from a few fibres of ligament torn, to a complete tear of all ligament fibres with a complete opening of the joint resulting in minor to major disability and a loss of function.

[7] A "strain" is defined in subsection 1(l) of the MIR as "an injury to one or more muscles". Subsection 7(2) of the DTPR states that a "strain" ranges from a few fibres of muscle torn, to all muscle fibres torn with major disability, spasms and swelling.

[8] A WAD injury is defined in subsection 1(n) of the MIR as "a whiplash associated disorder other than one that exhibits . . . objective, demonstrable, definable and clinically relevant neurological signs" or "a fracture or dislocation of the spine".

[9] Subsection 1(j) of the MIR defines "serious impairment":

(j) "serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function

(i) that results in a substantial inability to perform the

(A) essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(B) essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or

(C) normal activities of the claimant's daily living,

(ii) that has been ongoing since the accident, and

(iii) that is expected not to improve substantially;

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[10] Section 3 of the MIR provides that, in order for a strain, sprain or WAD injury to be considered to have resulted in "serious impairment", the injury must be the primary factor contributing to the impairment.

[11] Subsection 5(1) of the MIR states that if the strain, sprain or WAD injury is not diagnosed in accordance with the DTPR, and the injury results in serious impairment, it will be considered a minor injury unless the claimant establishes that it would have resulted in serious impairment even if the claimant had been diagnosed and treated in accordance with the DTPR.

[12] Section 6 of the MIR limits the total amount recoverable as damages for non-pecuniary loss for all minor injuries arising out of a motor vehicle accident to $4000.

Applicant's Position

[13] The Applicant submits that a regulation is *ultra vires* if it goes beyond the legislative power which is conferred by the enabling legislation or is repugnant to the express provisions of the enabling legislation. He points out that the Legislature has chosen to qualify the word "injury" by the adjective "minor". He submits that the Legislature has thereby limited the delegate's discretion in defining the term and, specifically, he argues the qualifier "minor" signals the Legislature's intent to regulate only "truly minor injuries".

[14] The Applicant cites *Szmuilowicz v. Ontario (Minister of Health)* (1995), 24 O.R. (3d) 204 (Ont. Div. Ct.) for the proposition that the authority granted to a statutory delegate to define a term is limited by the common meaning of the term. Although the Applicant concedes that the delegate need not adopt a definition that mirrors the dictionary definition of the term, he argues that the further the definition strays from the term's common meaning, the more likely it is to be *ultra vires*. He submits that "minor" is defined in various dictionaries as "comparatively unimportant" or "insignificant".

[15] The Applicant argues that because the definition ascribed by the Lieutenant Governor in Council to "minor injury" fails to consider the severity or duration of the pain associated with the injury or the length of any resulting non-permanent disability, it captures injuries that are moderate or severe. He also notes that serious injuries will be subject to the application of the non-pecuniary damages cap when they are not diagnosed in accordance with the DTPR. Accordingly, he submits that subsections 1(h) and (j) of the MIR are contrary to the intention of the Legislature and are repugnant to, or operate to amend, the Act. Had the Legislature intended to limit non-pecuniary damages for other or more severe forms of injuries, the Applicant suggests that it would have used some other phrase, such as "regulated injuries".

[16] To illustrate the alleged over-breadth of the definition of “minor injury” in the MIR, the Applicant notes that the *Manual for Courts-Martial,* Part IV, paragraph 54c(4)(a)(iii) (1995), states that “grievous bodily harm” does not include “minor injuries such as a black eye or a bloody nose”: *United States v. Miller* 1996 CCA Lexis 367 (A.F.C.C.A). He also cites *Hartwick v. Simser*, [2004] O.T.C. 917 (Ont. S.C.) where the Court defined “serious impairment” to include a number of injuries that the Applicant submits would fall within the impugned definition of “minor injury”. He argues that the definition of “minor injury” adopted under the MIR is analogous to defining a “foot injury” as including a hand injury.

[17] The Applicant also objects to section 3 of the MIR which states that in order for the injury to result in “serious impairment”, the injury must be the primary factor contributing to the impairment. The Applicant submits that this is contrary to the Supreme Court of Canada’s decision in *Athey v. Leonati*, [1996] 3 S.C.R. 458.

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Respondent’s Position

[18] The Respondent states that the Legislature’s intention in passing the *Insurance Amendment Act*, *2003 (No. 2)* was to create a scheme restricting non-pecuniary damages recoverable by plaintiffs who suffer a “minor injury” in a motor vehicle accident. It argues that in enacting subsections 1(h) and 1(j) of the MIR, the Lieutenant Governor in Council has done what it was specifically authorized to do, namely define what constitutes a minor injury.

[19] The Respondent submits that there is no obligation on the Lieutenant Governor in Council to adopt a definition of minor injury that conforms with common parlance. It relies on *Johnson v. Federated Mutual Insurance Co.* (1989), 96 A.R. 266 (C.A.), reversing (1988), 86 A.R. 32 (Q.B.), as authority for the proposition that a statutory delegate may make regulations defining particular terms that are at variance with their ordinary and plain meaning. The Respondent concedes, however, that the discretion of a statutory delegate is restricted to adopting definitions that are consistent with the Legislative intent and the purpose of the statute. In this case it submits that the definitions were within the authority granted to the Lieutenant Governor in Council.

[20] The Respondent argues further that “minor” is a relative term and when compared to quadrapelegia and injuries of that magnitude, strains, sprains and WAD injuries that do not result in serious impairment are minor. In any event, the Respondent submits that it would be inappropriate for the court to draw a rigid dividing line between “minor” injuries and those that may be described as moderate or severe. It relies on *Re: Metropolitan School Board and Minister of Education* (1986), 54 O.R. (2d) 458 (Div. Ct) in that regard.

[21] Finally, in response to the Applicant’s submission concerning section 3 of the MIR, the Respondent notes that *Athey v. Leonati* was a case about liability, not injuries. It also suggests that because the Applicant is not seeking a declaration that section 3 is *ulra vires*, this issue is not properly before the Court.

Analysis

[22] The central issue on this application is whether the definitions of "minor injury" and "serious impairment" in the MIR exceed the scope of the power conferred on the Lieutenant Governor in Council in section 650.1 of the Act.

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[23] The jurisprudence in this area has established a number of guiding principles in relation to this issue:

(a) Delegated authority must be exercised strictly in accordance with enabling legislation and can not amend or conflict with the specific provisions of the enabling statute: *The King v. National Fish Co Ltd.*, [1931] Ex. C.R. 75 (Can. Ex. Ct.); *Heppner v. Alberta (Minister of Environment)* (1977), 6 A.R. 154 (C.A.);

(b) In determining the *vires* of subordinate legislation the court must ascertain the purpose and intent of the enabling statute in order to identify the scope of the regulation making power: *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.* (2001), 286 A.R. 146 (C.A.); *Brown v. Dental Association (Alberta)* (2002), 299 A.R. 60 (C.A.);

(c) A statutory delegate must not exceed the express terms of the delegating provisions and is confined by the object, purpose and terms of the enabling statute: *Johnson*;

(d) When considering the validity of subordinate legislation, a court must proceed on the assumption that such legislation is within the authority conferred by the parent statute and will not declare it invalid unless there is clear evidence to support such a finding: *Heppner*;

(e) If there is doubt as to the meaning of the words used, the court should prefer a construction which will promote the intention of the Legislature as opposed to one that would defeat it: *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), per Viscount Maughan as quoted in *Reference re: Regulations (Chemical) under War Measures Act (Canada)*, [1943] S.C.R. 1 at p.17;

(f) Enabling legislation may grant the statutory delegate the requisite authority to define terms in a manner that is at variance with the plain and ordinary meaning normally attributed to such terms: *Johnson*

(g) A definition that amounts to a colourable attempt to amend the legislation or is adopted in an effort to satisfy some other collateral purpose is *ultras vires*: *Szmuilowicz*; *Trans Canada Pipelines Ltd. v. Saskatchewan (Treasurer)* (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.).

[24] Accordingly, I must determine the purpose and intent of the enabling statute in order to identify the scope of the regulation making power granted to the delegate.

[25] Reading the *Insurance Amendment Act*, *2003 (No. 2)* as a whole demonstrates its various purposes which include: limiting the circumstances in which insurers can refuse to issue automobile insurance contracts; providing a method for the calculation of pecuniary damages in certain circumstances so as to reduce automobile accident claim awards by accounting for income tax, Canadian Pension Plan contributions and Employment Insurance contributions; providing for structured judgment awards; establishing and outlining the duties and powers of the Automobile Insurance Rate Board; and limiting the amount payable as general damages for minor injuries (as defined), arising from motor vehicle accidents.

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[26] The language used in the enabling statute is informed by the legislative debates relating thereto. In the present case I have had resort to the relevant legislative debates relating to Bill 53, the *Insurance Amendment Act*, *2003 (No. 2)* which discuss the proposed reforms to the Act and, more specifically, the minor injury, non-pecuniary damages cap. I have considered these Hansard excerpts only in relation to the background and purpose of the the *Insurance Amendment Act*, *2003 (No. 2)* and the Act, while remaining mindful that the reliability of this evidence is limited: *Giant Grosmont Petroleums* at para. 8.

[27] A review of the relevant legislative debates relating to Bill 53, the *Insurance Amendment Act*, *2003 (No. 2)*, readily reveals the purpose of the legislation - 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. At some level of increase, accessibility would be thwarted by the cost of automobile insurance. The purpose of the reforms was succinctly set out by the member for Edmonton-Mill Creek:

> The issue of having unacceptable increases coming at us as they were in the spring was quickly recognized by the government. It was time to do something about that. In fact, that's what Bill 53 [the *Insurance Amendment Act*, *2003 (No. 2)*] will do.
>
> (Alberta, Legislative Assembly, *Hansard* (December 3, 2003) at 2100 (Mr. Zwozdesky).)

[28] All of the purposes set out in the *Insurance Amendment Act*, 2003 (No. 2) theoretically advance the legislative objective in specific ways. For example, the establishment of the Automobile Insurance Rate Board provides a body to set benchmark insurance rates, thereby providing the provincial government with direct control over rate increases. 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.

[29] In addition to the Legislature's express intent to counter rising insurance rates, was a recognition that cheaper insurance rates were sustainable only with significant tort reform resulting in lower payouts by automobile insurers to victims. The issue of what would constitute a minor injury was specifically debated in this context. Thus, the Act and the Regulations were intended to strike a balance between the competing interests of providing affordable insurance rates and maintaining adequate insurance coverage. Reference was made to this balance in *Hansard*:

> Essentially, the legislation proposes changes to two parts of the auto insurance system: the premium side, which is what we've been talking about, the reduction of premiums and ensuring that all Albertans have access to affordable, accessible insurance, and at the same time reflecting that we're dealing with a balance. If we're going to make significant reductions on the premium side, we'll also have to find appropriate savings on the benefit side.
>
> (Alberta, Legislative Assembly, Hansard (November 25, 2003) at 1852 (Mr. Renner).)

[30] Section 650.1 of the Act grants the Lieutenant Governor in Council broad discretion to delineate the application of the minor injury cap. Specifically, it was provided with the authority to define, categorize and classify "minor injuries" and to set out circumstances under which a minor injury is exempt from the operation of the section. The Applicant does not quarrel with the delegate's entitlement to define the terms "minor injury" and "serious impairment". Rather, he argues that the Lieutenant Governor in Council has exceeded its jurisdiction by adopting definitions that effectively apply the non-pecuniary damages cap to injuries that are not minor and has thereby amended the Act and acted contrary to the intention of the Legislature.

[31] As in *Johnson*, the discretion granted to the Lieutenant Governor in Council by section 650.1 of the Act is sufficiently broad to allow the delegate to craft a definition of "minor injury" that is at variance with the plain and ordinary meaning of that phrase. The Applicant, however, seeks to distinguish *Johnson* on the basis that, in that case the delegate limited the common meaning of the defined term, whereas here the Lieutenant Governor in Council has expanded the meaning of "minor injury" beyond the natural meaning of the words. In that regard he notes that synonyms for "minor" include "inconsequential" and "immaterial".

[32] The definition of "minor injury" adopted by the Lieutenant Governor in Council does not so much expand on the ordinary meaning of that phrase, as much as it identifies a formula defining what, for the purposes of the Act, will constitute a "minor injury" as opposed to a non-regulated injury. In selecting a point on the continuum of injuries past which they will not fall within the cap, the Lieutenant Governor in Council has effected a balance between the competing interests that the Legislature intended to accommodate. Whether this is a balance or cut off that the Applicant or this Court would have selected is immaterial to the *vires* of the MIR. Simply put, it is not the function of the courts to assess the merits of subordinate legislation in a consideration of the *vires* of the that legislation: *S.G.E.U. v. Saskatchewan* (1997), 145 D.L.R.

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(4th) 300 (Sask. Q.B.), aff'd (1997), 149 D.L.R. (4th) 190 (Sask. C.A.). Had the Lieutenant Governor in Council chosen a cut off point whereby the cap was applicable only to immaterial or inconsequential injuries, it would arguably have frustrated the purpose and intent of the Act as it would not have effectively assisted in reducing automobile insurance rates.

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[33] The Applicant argues further that as a result of the broad definitions adopted under the MIR, the non-pecuniary damages cap is no longer applicable only to minor injuries as the statute intended. Put another way, the regulation has effectively amended the Act and is, therefore, *ultra vires*.

[34] "Minor" is a relative term that can only be defined by degree or in relation to comparators. The term "minor injury" signals that the Act intended to regulate less serious injuries, but less serious than what? I agree with the Applicant that there was a limit implied in the discretion granted to the Lieutenant Governor in Council by the qualification of the term "injury" with the word "minor". However, in my view the definitions adopted in subsection 1(h) and 1(j) do not exceed that implied limit. In this regard I note the observations of D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 looseleaf (Toronto: Canvasback Publishing, 1998) at para. 14:3352:

> In any event, the law seems to be that subordinate legislation enacted by a Cabinet will be found to be *ultra vires* on the ground that it is inconsistent with the purposes of the enabling legislation only in an egregious case.

This is not such a case.

[35] Generally, the definitions adopted by the Lieutenant Governor in Council will capture what, on the scale of injuries, may be described as less serious or minor, such as non-permanent injuries or whiplash injuries that do not exhibit objective signs. As the Respondent points out, sprains, strains and WAD injuries that do not result in serious impairment are minor when compared to injuries such as quadrapelegia. Indeed, fashioning a definition incapable of including within its breadth an injury that may be considered moderate by some standards may be impossible given the infinite varieties of injuries that could be sustained in a motor vehicle accident.

[36] I would also note that the broad discretion given to the Lieutenant Governor in Council in defining "minor injury" clearly demonstrates that it was not confined by interpretations given to similar terms in other jurisdictions.

[37] The Applicant's argument concerning section 3 of the MIR *vis a vis* the Supreme Court of Canada's decision in *Athey v. Leonati* bears on the definition of "serious impairment" which is specifically at issue here. First, I agree with the Respondent that *Athey v. Leonati* is distinguishable on the basis that that case dealt with issues of causation and liability. Specifically, the Court, per Major J., found that a defendant is not excused from liability because other factors contributed to the harm. He stated at para. 20:

> This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[38] This application is concerned with statutory definitions and the application of a non-pecuniary damages cap under insurance legislation. Restoring the plaintiff to his or her original position is not the purpose of this legislation.

[39] Secondly, there is no principle of which I am aware, nor has there been any authority submitted to the effect that subordinate legislation must be consistent with or not be at variance with jurisprudence in order to be *intra vires*. Indeed, I note that legislation is often enacted to counter the effects of specific judicial decisions. In the context of the quantum of general damages awarded by Courts in Alberta for soft tissue injuries arising from automobile accidents in Alberta prior to the enactment of the *Insurance Amendment Act*, 2003 (No. 2) this is precisely what happened here.

[40] Lastly, the Applicant has submitted that the application of the definitions could result in disproportionate deleterious effects on women, children and the elderly. The argument in this regard was not developed nor raised during the oral hearing of this application. Therefore, I decline to rule on this issue.

Conclusion

[41] The impugned provisions do not conflict with or exceed the object, purpose or intent of the Act. Nor is there any suggestion by the Applicant that the definition was drafted to satisfy some collateral purpose. Accordingly, I find that subsections 1(h) and 1(j) of the MIR are *intra vires* the Lieutenant Governor in Council. The application is dismissed.

Heard on the 28th day of September, 2005.
Dated at the City of Calgary, Alberta this 21st day of November, 2005.

N.C. Wittmann
A.C.J.C.Q.B.A.

Appearances:

Walter M. Kubitz
for the Applicant

Frank R. Foran, Q.C.
Michael G. Massicotte
for the Respondent

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