

Kent Sparrowhawk, Jordan Sparrowhawk a Minor by His Next Friend Kent Sparrowhawk,  
Taylor Sparrowhawk a Minor by His Next Friend Kent Sparrowhawk, and Keirra  
Sparrowhawk a Minor by Her Next Friend Kent Sparrowhawk (plaintiffs) v. Kevin Allen  
Zapoltinsky (defendant)  
(0703 02434; 2012 ABQB 34)

**Indexed As: Sparrowhawk v. Zapoltinsky**

Alberta Court of Queen's Bench  
Judicial District of Edmonton  
Shelley, J.  
January 13, 2012.

**Summary:**

Sparrowhawk suffered injuries in a motor vehicle accident. At issue was whether a jaw injury caused by the collision was a "minor injury" as defined by the Insurance Act, Minor Injury Regulation and Diagnostic and Treatment Protocols Regulation.

The Alberta Court of Queen's Bench found that the jaw injury was not a minor injury.

**Insurance - Topic 5010.2**

Automobile insurance - Compulsory government schemes (incl. no-fault schemes) - Limitation on causes of action - Exceptions - The Alberta Court of Queen's Bench discussed a "minor injury" as defined by the Minor Injury Regulation (MIR) and Diagnostic and Treatment Protocols Regulation (DTPR) - The MIR set a two-step process to evaluate whether or not an injury was minor - First, a medical professional investigated whether an injury was a sprain, strain, or WAD (whiplash associated disorder) injury (MIR, ss. 4(1) and 10(1)) - If an injury was a sprain, strain, or WAD injury then investigation continued to consider whether the injury had caused serious impairment (MIR, ss. 4(1) and 10(1)) - Any sprain, strain, or WAD injury that had not caused serious impairment was a minor injury and a basis for restricted tort damages (MIR, ss. 6 and 7) and a specific treatment regime (DTPR, ss. 8-9, 12-13, 17-18, 20-25) - See paragraphs 70 to 75.

**Insurance - Topic 5010.2**

Automobile insurance - Compulsory government schemes (incl. no-fault schemes) - Limitation on causes of action - Exceptions - The Alberta Court of Queen's Bench discussed a "minor injury" as defined by the Minor Injury Regulation (MIR) and Diagnostic and Treatment Protocols Regulation (DTPR) - Where a person was injured in a motor vehicle accident and there was a dispute as to whether an injury was a minor injury, the injured person could be examined by a "certified examiner" to determine whether the injury was or was not a minor injury (MIR, s. 8) - Assessment involved two steps: 1) whether the injury was a WAD (whiplash associated disorder) injury, sprain, or strain, and 2) whether the injury had or had not caused "serious impairment" (MIR, s. 10(a)) - The opinion of the certified examiner was prima facie evidence of whether an injury was or was not a minor injury (MIR, s. 12) - Section 16(2)(a) of the MIR stated that a certified examiner had to be an active physician, as defined by the Health Professions Act - The

DTPR indicated that a broader range of "health care professionals" could diagnose minor injuries under that regulation - The DTPR also described a class of medical professionals called "injury management consultants" - These were physicians, chiropractors, and physical therapists (DTPR, s. 27(1)) who met certain criteria, as assessed by the medical professional's college (DTPR, s. 27), and were tracked as part of the "register of injury management consultants" (DTPR, s. 26-28) - Patients were referred to injury management consultants when their injury did not resolve in 90 days (DTPR, s. 25(1)) or where patient symptoms warranted further examination (DTPR, s. 24) - Unlike a certified examiner, an injury management consultant was not required to have knowledge of the International Classification of Diseases (DTPR, s. 27(2)) - See paragraphs 76 to 79.

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### **Insurance - Topic 5010.2**

Automobile insurance - Compulsory government schemes (incl. no-fault schemes) - Limitation on causes of action - Exceptions - Sparrowhawk suffered injuries in a motor vehicle accident, including a jaw injury which caused temporomandibular joint disorder (TMD) - At issue was whether the jaw injury caused by the collision was a "minor injury" as defined by the Insurance Act, Minor Injury Regulation and Diagnostic and Treatment Protocols Regulation - The Alberta Court of Queen's Bench concluded that Sparrowhawk's TMD injury was not a minor injury on three bases - First, Sparrowhawk's injury was not a sprain, strain or WAD (whiplash associated disorder) - It more likely than not involved damages to the cartilage - Second, the injury caused serious impairment, where the injury impaired a physical function, the injury was the primary factor contributing to the impairment, the injury created substantial inability to perform a normal activity of daily living and the injury had been ongoing - Finally all injuries treated principally by dentists, such as TMD and tooth injury, were never minor injuries - See paragraphs 89 to 132.

### **Insurance - Topic 5010.2**

Automobile insurance - Compulsory government schemes (incl. no-fault schemes) - Limitation on causes of action - Exceptions - Sparrowhawk suffered injuries in a motor vehicle accident, including a jaw injury which caused temporomandibular joint disorder (TMD) - At issue was whether the jaw injury caused by the collision was a "minor injury"

as defined by the Insurance Act, Minor Injury Regulation (MIR) and Diagnostic and Treatment Protocols Regulation (DTPR) - The parties offered detailed arguments concerning several facets of the minor injury legislative scheme - Much of that argument attempted to interpret the meaning and limits of the injuries that fell in or outside the MIR and DTPR scheme - The Alberta Court of Queen's Bench held that it did not have the proper evidence to make findings with respect to the parties' argument - However, a "review of the legislation and the referenced documents allows me to make some observations. In response to the submissions of the parties, I draw certain conclusions: 1. the scope of 'sprains' and 'strains' is potentially extremely broad, and the relevance of the terms 'sprain' and 'strain' is 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." - See paragraphs 133 to 190.

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### **Statutes - Topic 1658**

Interpretation - Extrinsic aids - Legislative history - Ministerial comments - Sparrowhawk suffered injuries in a motor vehicle accident - At issue was whether a jaw injury caused by the collision was a "minor injury" as defined by the Insurance Act, Minor Injury Regulation and Diagnostic and Treatment Protocols Regulation - A preliminary issue was the relevance of non-Hansard government communications - The plaintiffs asked the court to interpret the legislative scheme in light of a number of letters sent by the Minister of Finance - These letters responded to inquiries and concerns about the operation of the minor injury legislative scheme - The Alberta Court of Queen's Bench concluded that the four letters by the Minister were not useful or admissible interpretative tools - These were

analogous to the materials considered and rejected by the Ontario Court of Appeal in *Kennedy v. Leeds, Grenville and Lanark District Health Unit* (2009), and *R. v. Banks (D.)* (2007), and far different from a document formally prepared to inform the public or a part of the public, as in *Reference re Upper Churchill Water Rights Reversion Act* (1984 SCC) - The letters were therefore irrelevant to the analysis - See paragraphs 53 to 62.

### **Cases Noticed:**

- R. v. Morgentaler*, [1993] 3 S.C.R. 463; 157 N.R. 97; 125 N.S.R.(2d) 81; 349 A.P.R. 81, refd to. [para. 55].
- Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*, [1998] 1 S.C.R. 27; 221 N.R. 241; 106 O.A.C. 1, refd to. [para. 56].
- Kennedy v. Leeds, Grenville and Lanark District Health Unit* (2009), 254 O.A.C. 133; 99 O.R.(3d) 215; 2009 ONCA 685, refd to. [para. 57].
- R. v. Banks (D.) et al.* (2007), 220 O.A.C. 211; 2007 ONCA 19, leave to appeal denied (2007), 376 N.R. 394; 245 O.A.C. 400 (S.C.C.), refd to. [para. 59].
- Reference Re Upper Churchill Water Rights Reversion Act* - see *Upper Churchill Water Rights Reversion Act, 1980, Re*.
- Upper Churchill Water Rights Reversion Act, 1980, Re, Churchill Falls (Labrador Corp. Ltd. et al. v. Newfoundland (Attorney General) et al.*, [1984] 1 S.C.R. 297; 53 N.R. 268; 47 Nfld. & P.E.I.R. 125; 139 A.P.R. 125; 8 D.L.R.(4th) 1, refd to. [para. 60].
- Ontario Teachers' Federation et al. v. Ontario (Attorney General)* (1998), 53 O.T.C. 69; 39 O.R.(3d) 140 (Gen. Div.), refd to. [para. 61].
- Canada (Attorney General) v. Mowat*, [2011] 3 S.C.R. 471; 422 N.R. 248; 2011 SCC 53, refd to. [para. 64].
- Morrow et al. v. Zhang et al.* (2009), 454 A.R. 221; 455 W.A.C. 221; 2009 ABCA 215, refd to. [para. 65].
- Abbas v. Menhem* (2010), 514 A.R. 379; 2010 ABQB 527, refd to. [para. 67].
- Forth v. Mather* (2011), 520 A.R. 14; 2011 I.L.R. I-5145; 2011 ABQB 303, refd to. [para. 67].
- Kubel v. Alberta (Minister of Justice)* (2005), 58 Alta. L.R.(4th) 254; 2005 ABQB 836, refd to. [para. 68].
- Hanke v. Resurfsice Corp. et al.*, [2007] 1 S.C.R. 333; 357 N.R. 175; 404 A.R. 333; 394 W.A.C. 333; 2007 SCC 7, refd to. [para. 100].
- Meyer et al. v. Bright et al.* (1993), 67 O.A.C. 134; 15 O.R.(3d) 129 (C.A.), refd to. [para. 26].
- May v. Casola*, [1998] O.J. No. 2475 (C.A.), refd to. [para. 108].
- Brak et al. v. Walsh* (2008), 234 O.A.C. 229; 90 O.R.(3d) 34; 2008 ONCA 221, refd to. [para. 109].
- MacPherson v. Webber*, [1996] O.J. No. 1343 (Gen. Div.), refd to. [para. 110].
- Nissan v. Mcnamee* (2008), 62 C.C.L.I. (4th) 135; 167 A.C.W.S.(3d) 990 (S.C.), refd to. [para. 117].
- Antinozzi v. Andrews*, [2011] O.T.C. Uned. 3296; 2011 ONSC 3296, refd to. [para. 117].
- R. v. Nova Scotia Pharmaceutical Society (No. 2)*, [1992] 2 S.C.R. 606; 139 N.R. 241; 114 N.S.R.(2d) 91; 313 A.P.R. 91; 93 D.L.R.(4th) 36, refd to. [para. 136].
- Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; 183 N.R. 325; 82 O.A.C. 243; 125 D.L.R.(4th) 385, refd to. [para. 137].

**Statutes Noticed:**

Diagnostic and Treatment Protocols Regulation, Alta. Reg. 122/2004, sect. 8, sect. 9, sect. 12, sect. 13, sect. 17, sect. 18, sect. 20, sect. 25 [para. 72 et seq.].

Minor Injury Regulation, Alta. Reg. 123/2004, sect. 4(1), sect. 6, sect. 7, sect. 10(1) [para. 72 et seq.].

**Authors and Works Noticed:**

Butler, Andrew S., A Presumption of Statutory Conformity with the Charter (1993), 19 Queen's L.J. 209, pp. 225 to 227 [para. 138].

Magee, David J., Orthopaedic Physical Assessment (3rd Ed. 1997), p. 19 [para. 155].

**Counsel:**

Norm Assiff (Chadi & Company), for the plaintiffs;

Damian Shepherd (Chatwin LLP), for the defendant.

This case was heard on October 31, 2011, by Shelley, J., of the Alberta Court of Queen's Bench, Judicial District of Edmonton, who delivered the following reasons for judgment on January 13, 2012.

Order accordingly.

Editor: Anick Ouellette-Levesque