The MIG is Unconstitutional? A Surprising FSCO Decision

Alon Barda
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In *Abyan v. Sovereign General Insurance Company* (FSCO A16-003657, September 14, 2017) Arbitrator Benjamin Drory has released a surprising and unexpected decision finding that section 3 (the definition of “minor injury”) and section 18(2) of the *Statutory Accident Benefits Schedule* are unconstitutional, as the sections infringe upon section 15(1) of the *Charter of Rights and Freedoms* on the basis of physical disability. Furthermore, he finds that the infringements are not justifiable under section 1 of the *Charter*.

The substantive issues in this case are minimal and include $1,995.32 for psychological treatment and the applicability of the *Minor Injury Guideline*. The Applicant served notice of the intention to raise a constitutional argument as a preliminary issue on the Attorney General of Canada and the Attorney General of Ontario. The Attorney General of Canada did not respond and the Attorney General of Ontario simply advised the Applicant that constitutional questions should only be heard as necessary and not in a factual vacuum. The insurer surprisingly opted not to attend, simply adding its position that no other substantive issues ought to be considered.

The Arbitrator first found that he had jurisdiction to hear the constitutional argument, relying on three Supreme Court of Canada cases. In discussing the issues with the MIG under section 15 of the *Charter*, he highlights that the definition of "minor injury" in the *MIG* includes various minor injuries, such as a sprain, and also includes any “clinically associated sequelae”. He notes that this term is not defined and he accepts evidence that it means “anything that is a following sequel of”, which includes chronic pain. As

such, he opines that individuals such as the claimant with chronic pain are caught by the definition of minor injury in ways that even some with lesser injuries are not.

He therefore (confusingly) concludes that he "is satisfied that the effect of the MIG arbitrarily discriminates against MVA victims who suffer chronic pain as a clinically associated sequelae to the MVA, in ways that those who do not suffer from chronic pain resulting from an MVA do not." As a result, Arbitrator Drory finds that "clinically associated sequelae" in the definition of "minor injury" in section 3 of the *Schedule* is unconstitutional as it is interpreted to exclude individuals who suffer from chronic pain among the sequelae related to the injury.

He then goes on to agree with the claimant that the phrase "that was documented by a health practitioner before the accident" as found in the *MIG* has a discriminatory effect against individuals such as those without access to OHIP, or those that were asymptomatic prior to the accident, as these individuals did not have their conditions documented before the accident. As a result, he finds that the provision "that was documented by a health practitioner before the accident" in section 18(2) is severed.

Having found that the MIG violates section 15 of the *Charter*, Arbitrator Drory goes on to analyze section 1 and ultimately finds that the limitations on the insured's rights are not demonstrably justifiable in a free and democratic society in accordance with that section of the *Charter*.

This is a results based decision with problematic findings that are at least partially based on evidence that does not appear to have been in the evidentiary record before the Arbitrator. It can be anticipated that this decision will likely result in similar arguments being advanced at the LAT, particularly with cases involving chronic pain. Considering this decision, we anticipate that the Attorney General of Ontario will respond the next time such arguments are advanced.

Thankfully, the Arbitrator states on multiple occasions that the decision is only of application to this case and is not a declaration of general invalidity applicable to any other cases. While this is an issue for the insurer in this case, there is comfort in knowing it is currently of only limited application.