TOO BIG FOR ITS BRITCHES?
FITTING CHRONIC PAIN INTO THE MINOR INJURY GUIDELINE OF ONTARIO'S ACCIDENT BENEFITS SCHEME

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Introduction

This article explores the interaction between chronic pain and the Minor Injury Guideline ("MIG"), which came into force in Ontario in 2010. It begins with an overview of the MIG, which is then followed by an analysis of the judicial consideration of chronic pain. It then elaborates on the arbitration and appeal of *Belair v. Scarlett*, which has considered the interaction between chronic pain and the MIG.[1] It then concludes with overall thoughts.

The Minor Injury Guideline ("MIG")

The MIG itself is fairly new; it was introduced into Ontario's no-fault insurance system in the 2010 round of reforms,[2] and now applies to all accidents which occur on or after September 1, 2010. The MIG is a legislative scheme, but also includes an interpretative guideline issued by the Superintendent of Financial Services pursuant to section 268.3 of the *Insurance Act*.[3] It contains several moving parts for dealing with less serious injuries, including a feature for treatment without approval of the insurer in certain circumstances.[4]

The MIG's most notable quality, however, is the limit it places on available benefits: if an injury can be classified as minor, then recovery is limited. More specifically, subsections 3(1) and 18(1) of the *Schedule* state that any injury that is predominantly a "sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae" will only be eligible for $3,500 in medical and rehabilitation benefits as opposed to $50,000.[5]

The MIG is based on the underlying idea that most people who are injured in motor vehicle accidents do not sustain significant injuries and should have access to immediate routes of

[1] [2013] OFSCD No 42, FSCO A12-001079 *per* Arbitrator Wilson, new arbitration ordered, [2013] OFSCD No 227, Appeal No. P13-00014 *per* Evans, Director's Delegate.
[2] *Schedule*, *supra* note 5.
[3] RSO 1990, c I.8, s 268.
[4] This is similar to FSCO's "Pre-approved framework", or "PAF", introduced in 2003. See Bill 198, *An Act to implement Budget measures and other initiatives of the Government*, 3rd Sess, 37th Leg, Ontario, 2002 (assented to December 9, 2002).
[5] *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O Reg 34/10, ss 3(1), 18(1). Note that if one provides compelling evidence that there is pre-existing condition that will "prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the $3,500 limit" then the $3,500 limit can be avoided: see s. 18(2).

recovery.[6] Based on this idea, the purpose of the MIG, at least how it is envisioned by FSCO, is four-fold:[7]

(i) To speed access to rehabilitation for persons who sustain minor injuries in auto accidents;

(ii) To improve utilization of health care resources;

(iii) To provide certainty around cost and payment for insurers and regulated health professionals; and

(iv) To be more inclusive in providing immediate access to treatment without insurer approval for those persons with minor injuries as defined in the *Schedule*.

Whether or not these purposes are fulfilled when faced with an injured person who, as a result of a motor vehicle accident suffers chronic pain, is an open debate.

Chronic Pain and the Schedule

Chronic pain has been referred to as an "umbrella" term, which refers to pain caused by a number of conditions, such as fibromyalgia, rheumatoid arthritis, osteoarthritis and multiple sclerosis.[8] Most courts begin with Justice Gonthier's definition in the Supreme Court of Canada case of *Nova Scotia (Workers' Compensation Board) v. Martin*[9], in that it is:[10]

> … generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury … it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event …

While Justice Gonthier acknowledged that chronic pain lacks any objective signs or scientific explanation, he expressed that "there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real".[11]

The interaction between chronic pain and the MIG has been considered in the arbitration decision of *Belair v. Scarlett* and its subsequent appeal.[12]

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[6]Minor Injury Guideline, Superintendent's Guideline No. 02/11 at 4.
[7]*MIG*, *supra* note 6 at 3, cited in *Scarlett*, *supra* note 1 at para 25.
[8]*Degennaro v Oakville Trafalgar Memorial Hospital*, [2009] OJ No 2780, 67 CCLT (3d) 294.
[9][2003] 2 SCR 504.
[10]*Supra* note 9 at para 1.
[11]*Ibid* at para 1.

Belair v. Scarlett

The decision of *Belair v. Scarlett* involved Mr. Lenworth Scarlett, a passenger in a motor vehicle that was rear-ended in September 2010. He initially suffered "various sprains and strains to the joints and ligaments of the lumbar and cervical spine as well as headaches and acute stress reaction".[13] These injuries led to depressive symptoms, chronic pain, and temporomandibular joint disorder (TMJ). Mr. Scarlett took the position that his injuries took him out of the MIG; Belair, the accident benefits insurer, took the position that the MIG applied.

Arbitrator Wilson agreed with Mr. Scarlett, stating that the chronic pain, depression, and TMJ were not minor injuries. Arbitrator Wilson placed the burden on the insurer to prove that the claimant fell within the MIG. Several of his comments show this claimant-friendly disposition; for example, he notes that "Mr. Scarlett was a new arrival and did not have working status in Ontario. Hence he was not covered by OHIP at the time of the accident. Consequently, the only access Mr. Scarlett had to paid treatment was through the accident benefit system".[14]

The decision of Arbitrator Wilson was appealed to Director's Delegate Evans. The Director's Delegate rescinded the Arbitrator's decision and ordered that a new arbitration be held. The appeal dealt with several issues; unfortunately it provided only limited guidance as to when chronic pain can be separated from minor injuries so as to take the claimant out of the MIG.

As an important backdrop, in contrast to the Arbitrator, Director's Delegate Evans held that the guideline issued by FSCO is binding on accident benefits decision-makers, and that the relevant onus always rests on the injured person to prove that they fall within coverage.[15] Therefore, the claimant *will always* be responsible for showing why they should receive more than the $3,500 cap.

The Director's Delegate laid out the process by which a claimant would be successful in escaping the MIG: one can first attempt to prove that the injuries they sustained are not predominantlyminor (s. 18(1) of the *Schedule*); and if they are minor, one can show that there is compelling evidence that there are pre-existing injuries (s. 18(2) of the *Schedule*). Mr. Scarlett attempted to escape the MIG under the first branch, pointing to the fact that his chronic pain was in itself beyond the MIG. The Arbitrator agreed when he stated:

> *Mr. Scarlett does not deny that he has some minor injuries, and injuries that come within the MIG. He also has significant other problems arising from the accident that are not necessarily consequent to soft tissue injuries. When the totality of his injuries is assessed, they come outside of the MIG.*[16]

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[12] *Supra* note 1.
[13] Arbitration, *supra* note 1 at para 7.
[14] Arbitration, *supra* note 1 at para 18.
[15] Appeal, *supra* note 1 at para 32, citing *TTC Insurance Company Ltd and Wootton*, FSCO P04-0004.
[16] *Scarlett*, *supra* note 1 at para 72.

However, the Director's Delegate found that the Arbitrator had failed to decide whether the impairment that was suffered, *as a whole*, was not predominantly a minor injury. The analysis must look to the entire constellation of injuries, "not simply whether any particular injury is a minor injury".[17] While the Director's Delegate found that the "Arbitrator never directed his mind to that test", this position is difficult to reconcile with the fact that the Arbitrator explicitly looked to the totality of the injuries suffered by the Claimant. It is true that the Arbitrator did not sufficiently explain *why* the totality of injuries escaped the MIG. Unfortunately, Director's Delegate Evans did not discuss what was meant by the term "predominantly", or how the test differs from what the Arbitrator stated above.

What is clear from the Director's Delegate's comments is that his overall approach places a heavy burden on the claimant to show why he or she is entitled to benefits beyond what is available under the MIG. The claimant served their notice of judicial review on January 13, 2014 to have the decision reviewed by the Divisional Court. The parties to the judicial review have reported to the authors that they continue to draft their judicial review materials, and that the hearing has not yet taken place.

Thoughts & Conclusion

The issue of whether chronic pain will allow a claimant to escape the MIG remains an open question. The Appeal decision in *Scarlett* appears to have placed a higher bar on claimants to provide a rationale that the injury suffered is not predominantly minor. However, the Appeal decision did not provide any guidance on whether chronic pain will be considered separate and distinct from injuries, which would normally fall under the MIG.

There is no doubt that statutory accident benefits are remedial in nature; the courts have continually interpreted the legislation liberally and openly so as to promote the recovery of those who are injured in motor vehicle accidents.[18] If the purpose of the accident benefits system is therefore to promote the recovery of injured parties, one must wonder whether the accident benefits system fulfills its purpose if chronic pain claimants are restricted by the MIG.

Further guidance on this issue will hopefully come as more chronic pain cases are arbitrated and tried in the context of the MIG.

[17] Appeal, *supra* note 1 at para 22.
[18] See e.g., *Belair Insurance Co v McMichael*, [2007] OJ No 1972 (Div Ct).