IN THE SUPREME COURT OF CANADA

(On appeal from the Court of Appeal for Ontaric)

BETWEEN:

SHARON TURPIN

- and -

LATIF SIDDIQUI

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEYS GENERAL OF CANADA,
MANITOBA, AND BRITISH COLUMBIA

Interveners

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PART I

STATEMENT OF FACTS

1. At the appellants' trial on a charge of murder, the presiding judge ruled that they were entitled to be tried by judge alone rather than by judge and jury.

2. The facts of the case were summarized as follows by the Court of Appeal:

> "...The victim was one Paul Turpin, the separated husband of the accused Sharon Turpin. The location of the killing was the former matrimonial home now occupied by Sharon Turpin, her children and others, where the deceased had gone on the morning of 9th February 1983 to pick up the children of the union to take them to school. It is common ground that the victim was killed by the accused Siddiqui. The main concern at the trial was the complicity of the other two accused.
>
> The theory of the Crown was that Sharon Turpin, believing herself the beneficiary of substantial life insurance on the victim's life (it developed that all policies had other beneficiaries designated), conspired with her co-accused to kill her husband. While she took no part in the actual killing, she was, however, present in the house at the time. The Crown's theory with respect to the accused Clauzel was that he assisted Siddiqui in the actual killing. No one actually saw him so assisting, although there was ample evidence of his presence shortly after the act and of his assistance in the disposal of the body." (Appeal Case pp. 101, 102)

3. Following the conviction of two of the accused for second degree murder and the acquittal of the third, Turpin, the Crown appealed on the sole ground of the ruling as to the mode of trial.

4. The Court of Appeal held, with regard to the interpretation of the legislation then in place:

> "Every superior court has jurisdiction to try any indictable offence (s. 426); every court has jurisdiction to try any criminal offence except certain ones including murder (s. 427); and, except where otherwise provided by law, an indictable offence shall be tried by a court composed of a judge and jury (s. 429). [Examples of "otherwise provided" are found in s. 484 (which gives an election to the accused in certain indictable offences to be tried by either a magistrate or a judge without a jury), but that section specifically excludes the offences mentioned in s. 427. The only exception in the case of murder is found in s. 430, which in 1985 applied only to Alberta.] Under the Code, an accused charged with murder anywhere in Canada except Alberta had no choice but to be tried by a superior court of criminal jurisdiction consisting of a judge of that court together with a jury." (Appeal Case p. 82)

5. With respect to section 11(f) of the Charter the court ruled:

> "We agree that in this country also the government (i.e., the Crown) has a legitimate interest in the method of trial of the most heinous of crimes. The Criminal Code has decreed that it will be by jury. Until the amendment of December 1985, there was no other method provided for outside Alberta. Section 11(f) of the Charter simply assured that trial by jury for murder (and other serious crimes) would continue as a right of the accused. It in no way affected the similar right in the Crown or granted any unilateral right of waiver in the accused. Indeed, there was no right of waiver, even with the consent of the Crown, until the enactment in December 1985 of the new s. 430 of the Code." (Appeal Case p. 86)

6. The Court of Appeal expressed its method of analysis where section 15 of the Charter was in issue:

> "This court in R. v. Ertel, 3rd June 1987 now reported 58 C.R. (3d) 252, 20 O.A.C. 257, has confirmed that recent decisions concerning s. 15 have established a three-step analysis of laws allegedly contravening Charter equality rights. To establish a s. 15 infringement, the one challenging the law must: (1) identify the class of individuals who are alleged to be treated differently; (2) demonstrate that the class purported to be treated differently from another class is similarly situated to that other class in relation to the purposes of the law; and (3) show that the difference in treatment is discriminatory, in the sense of there being a pejorative or invidious purpose or effect of the impugned law." (Appeal Case p. 88)

7. Applying this scheme of analysis the Court held that a geographic classification with respect to mode of trial fulfilled the first requirement:

> "The effect of subsection 429 and 430 of the Criminal Code is to treat individuals charged with murder in Alberta differently from their counterparts in other provinces, because the latter class of persons is limited to a trial by a judge and a jury, while the former class can, with the agreement of the judge, be tried by a judge alone." (Appeal Case p. 90)

8. The Court also found that indeed the class of persons in 1985 charged with murder in Ontario was similarly situated with their counterparts in Alberta charged with that offence.

9. The Court of Appeal conducted a two-phase inquiry to determine whether having regard to the purpose and effect of the legislation, the distinction drawn between the class of persons charged with murder in Alberta, and the similarly situated class of individuals in Ontario, was discriminatory. The Court accepted in the first phase that the denial of the benefit of choice as to mode of trial in Ontario must be considered a disadvantage.

> "A choice as to having or not having a jury trial (even though limited by the overriding determination by the trial judge), based upon the advantages of one mode of trial over the other because of a wide range of factors, such as the nature and circumstances of the killing, the amount of publicity, the reaction in the community, the size of the community from which the jury is being drawn, and even the preference of defence counsel with respect to trying to convince a jury or a judge of the defence version of the facts (or leave them with a reasonable doubt), indicates that having that choice must be considered a benefit. The absence of that benefit in Ontario must be considered a disadvantage." (Appeal Case pp. 95, 96)

10. Other variations in procedures applicable in criminal cases in different provinces were noted, but the Court concluded:

> "If any of these variations were found to be an advantage, would Parliament have had to extend them to every other province? It seems unreasonable to so require. If it is unreasonable to so require, can one conclude that there is such an "invidious" or "unfair" or "irrational" distinction with respect to the requirement for jury trials for charges of murder in all provinces except Alberta as to amount to "discrimination" for purposes of section 15? It cannot be so. We would have to conclude, therefore, that the limited option of a non-jury trial of a murder charge in Alberta, whereas that option was not available in any of the other provinces or the two territories, did not amount to discrimination in the sense of a denial of equal benefit of the law pursuant to section 15(1) of the Charter." (Appeal Case pp. 99, 100)

11. The Court, mindful of the reality of Canadian federalism, and the historical absence of absolute uniformity of criminal procedure, ultimately concluded that there had not been discrimination in the sense of a denial of equal benefit of the law, pursuant to section 15(1) of the Charter, and that had there been, this would have been the result of a reasonable limitation demonstrably justified in a free, democratic and federally-organized society.

PART II

ISSUES

The constitutional questions stated with respect to the Appellants Siddiqui & Turpin are as follows:

1. Do sections 429 and 430 of the Criminal Code (as they read in May, 1985) requiring in Ontario a jury trial in murder cases, contravene the rights and freedoms guaranteed by section 11(f) of the Canadian Charter of Rights and Freedoms by denying the right of an accused person to waive the benefit of the guarantee of trial by jury?

2. If the answer to question 1 is affirmative, are sections 429 and 430 of the Criminal Code (as they read in May, 1985) justified by section 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982?

3. Do sections 429 and 430 of the Criminal Code (as they read in May, 1985) requiring in Ontario in 1985 a jury trial in murder cases, but permitting in Alberta in 1985 a non-jury murder trial, infringe or deny the rights and freedoms guaranteed by section 15 of the Canadian Charter of Rights and Freedoms?

4. If the answer to question 3 is affirmative, are sections 429 and 430 of the Criminal Code (as they read in May, 1985) justified by section 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982?

The Attorney General of Canada respectfully submits that questions 1 & 3 should be answered in the negative and, that if it is necessary to consider questions 2 & 4, they should be answered in the affirmative.

PART III

ARGUMENT

A. INTRODUCTION

12. The arguments set forth in the factum of the Respondent Attorney General of Ontario with respect to s.11(f) of the Canadian Charter of Rights & Freedoms are adopted herein in full. The arguments set forth in the factum of the Respondent Attorney General of Ontario with respect to s.15 of the Charter are adopted herein, subject to the following observations or refinements.

B. THE PURPOSE OF SECTION 15(1)

13. The general approach to the interpretation of the provisions of the Charter was set down by this Honourable Court in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344 by Dickson J. (as he then was) as follows:

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important

> not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

14. It is therefore submitted that in order to identify the purpose of s.15, regard must be had to the historical origins of the equality guarantee, to the text of s.15, and to the overall objects of the Charter.

(a) Historical Origins of s.15

15. It is submitted that s.15 derives from the traditional concerns that have led to the implementation of anti-discrimination and equality guarantees in many jurisdictions. These guarantees are not aimed at ensuring the universal application of the law per se. Their purpose is the elimination of those classifications that offend basic values of human worth and dignity.

Canadian Human Rights Act, S.C. 1976-77, c.33, s.2;

Human Rights Act, S.B.C. 1984, c.22;

Individuals Rights Protection Act, R.S.A. 1980, c.I-2;

The Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1;

The Human Rights Code, S.M. 1987, c.H175;

Human Rights Code, 1981, S.O. 1981, c.53;

Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12;

Human Rights Act, S.N.S. 1976, c.31;

Human Rights Act, S.N.S. 1969, c.11;

Prince Edward Island Human Rights Act, S.P.E.I. 1975, c.72;

(b) The Text of Section 15

16. The opening words of s.15(1) of the Charter declare that "[e]very individual is equal before and under the law". This declaration indicates that s.15 operates with respect to both the administration of the law and its substance.

Re Andrews and Law Society of B.C. et al. (1986), 27 D.L.R. (4th) 600 (B.C.C.A.) at 604-5

R. v. Le Gallant, [1986] 6 W.W.R. 372 (B.C.C.A.) at 380.

Reference re an Act to Amend the Education Act (1986), 53 O.R. (2d) 513 (Ont. C.A.) per Howland, C.J.O. and Robins, J.A. dissenting at 553; appeal dismissed, [1987] 1 S.C.R. 1148

17. Various revisions were made to the text of section 15 during debates of the Special Joint Committee of the Senate and the House of Commons in 1980-81. These revisions included the replacement of the word "everyone" with the words "[e]very individual", to make clear that the equality guarantee applies only to human beings and not to corporations. It is submitted that these words demonstrate that s.15 is intended to protect interests that are central to an individual's worth and dignity, (as contrasted, for example, with economic interests).

Milk Board v. Clearview Dairy Farm Inc., [1987] 4 W.W.R. 279 (B.C.C.A.) at 288

Elliot, "Interpreting the Charter - Use of the Earlier Versions as an Aid", 1982 U.B.C. Law Rev., Special Edition, 11

18. It is further submitted that the nine grounds specifically enumerated in section 15(1) typify the scope and nature of the interests that section 15 is designed to protect. These grounds indicate that section 15 is concerned with legislative classifications and government actions based on a personal characteristic that has been the subject of stereotyping or prejudice (e.g., race, mental or physical disability), or legislative classifications and government actions affecting a personal choice or value of the type the Charter is intended to protect (e.g., religion).

Kask v. Shimizu et al. (1986), 28 D.L.R. (4th) 64 (Alta. Q.B.) at 71

Smith, Kline and French Laboratories Ltd. et al. v. A.G. Canada (1986), 34 D.L.R. (4th) 584 (Fed. C.A.) at 591-2

Spitz, "Litigation Strategy in Equality Rights: The American Experience" in Weiler and Elliot, Litigating the Values of a Nation, Vancouver: Carswell (1986) at pp.401-2

19. It is further submitted that the recognition of affirmative action programs for "disadvantaged individuals or groups" in s.15(2) is an indication that the purpose of s.15(1) is, in part, to protect individuals who have been traditionally disadvantaged (based on either an enumerated or unenumerated ground).

Minutes of Proceedings, January 12, 1981, Vol. 36:15 per The Honourable Jean Chrétien.

Action Travail des Femmes v. Canadian National Railway Company, [1987] 1 S.C.R. 1114

(c) The Objects of the Charter

20. The purpose of the Charter was outlined by this Honourable Court in R. v. Oakes, [1986] 1 S.C.R. 103 at 136 by Dickson C.J.C. as follows:

> Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter...

It is submitted that the objects of the Charter, support an interpretation of section 15 that would focus on prohibiting distinctions based on personal characteristics which are the subject of stereotyping or prejudice, as well as prohibiting distinctions that affect an individual's entitlement to or enjoyment of "the values and principles essential to a free and democratic society", as outlined in the above quotation.

See also: Reference re an Act to Amend the Education Act, supra, at 554

Kask v. Shimizu et al., supra, at 71

Smith, Kline and French Laboratories et al. v. A.G. Canada, supra, at 592

(d) Conclusion - Purpose of Section 15

21. It is submitted that the purpose of section 15 is to ensure respect for the human worth and dignity of individuals by restricting legislative classifications or government actions that (a) are based on a personal characteristic which is the subject of stereotyping or prejudice, or (b) impinge on an individual's entitlement to or enjoyment of a choice or value that is of the type the Charter seeks to protect (i.e. essential to a free and democratic society).

C. APPLICATION OF SECTION 15

22. It is submitted that the appropriate analysis for resolution of section 15 claims should incorporate the principles outlined below.

23. At the outset, it is important that section 1 and the substantive provisions of the Charter be kept analytically distinct.

R. v. Oakes, supra, at 134

Smith, Kline and French Laboratories Ltd. et al. v. A.G. Canada, supra, at 590

24. Secondly, it is submitted that the words "in particular" placed immediately before the list of enumerated grounds of discrimination, demonstrate that the list of enumerated grounds is not exhaustive.

Re Andrews and Law Society of B.C., supra, at 610

25. Thirdly, it is submitted that the types of distinctions encompassed by section 15(1) must be carefully limited. The use of the term "discrimination" and the nature of the enumerated grounds indicate clearly that s.15(1) was not intended to operate with respect to all kinds of differential treatment or with respect to all legislative classifications. An unlimited list of grounds would give little or no meaning to the express enumeration of certain grounds of discrimination in s.15(1), making them appear to have been selected on a purely random basis. Moreover, since virtually all legislation and government action necessarily distinguishes between individuals on some

basis, an analysis that considered all distinctions would make all legislation and government action presumptively unconstitutional. This would result in overburdening the courts and trivializing the Charter. Finally, an analysis that considered all distinctions would not focus on or fulfill the purpose of section 15. Some distinctions bear no relation to characteristics affecting personal worth and dignity (e.g. manufacturers of different products).

Re Andrews and Law Society of B.C., supra, at 600

R. v. Big M Drug Mart Ltd., supra, at 347

Smith, Kline and French Laboratories Ltd. et al. v. A.G. Canada, supra, at 591

26. Fourthly, it is submitted that equality is necessarily a relational or comparative concept. Determining whether equality has been denied therefore requires the identification of appropriate bases of comparison, as is indicated by the word "discrimination" in s.15(1). The nine grounds specifically enumerated in s.15(1) provide indications of the types of grounds of distinction that are not permissible under s.15(1).

Re Andrews and Law Society of B.C., supra, at 610

R. v. Le Gallant (1986), 33 D.L.R. (4th) 444 (B.C.C.A.) at 453

Mahé v. Alta. (Govt.), [1987] 6 W.W.R. 331 (Alta. C.A.) at 363

Smith, Kline and French Laboratories Ltd. et al. v. A.G. Canada, supra, at 591

27. It is submitted that the following characteristics typify the nine enumerated grounds:

(i) an intimate or fundamental personal characteristic of a human being by which people identify themselves or by which they are identified by others;

(ii) a characteristic which is immutable or at least not easily changed;

(iii) a group that has been historically disadvantaged, resulting in stigmatization of the group as inherently unworthy of equal treatment;

(iv) a group that has tended to be the focus of inaccurate or unfair generalizations, based on prejudice, paternalism or stereotyping;

(v) a group that is relatively politically powerless;

(vi) an aspect of personhood that falls within the sphere of values or choices that the Charter is intended to protect (e.g., religion).

Kask v. Shimizu et al., supra, at 71

Smith, Kline and French Laboratories et al. v. A.G. Canada, supra, at 591-2

Gold, "Equality Rights and the Grounds of Discrimination", Speech given at the University of Ottawa, Continuing Legal Education Program, February 1-2, 1985.

28. It is submitted that the proper approach to section 15(1) in respect of a non-enumerated ground, is to require an individual to establish that a law or government action treats him or her disadvantageously on the basis of a ground that shares the characteristics of an enumerated ground. Once disadvantageous treatment on such a ground is established, the law or government action is inconsistent with s.15(1) and the party seeking to uphold it must justify it under s.1 of the Charter.

29. It is submitted that this approach would best fulfill the purpose of s.15, as outlined above, and as well, would permit a court to dismiss frivolous s.15 claims summarily, without necessitating any judicial inquiry into the wisdom, reasonableness or rationality of the impugned law.

D. SECTIONS 429-430 OF THE CRIMINAL CODE

30. In the case at bar, ss.429 and 430 of the Criminal Code provided, at the time of the trial, that a person charged with murder anywhere in Canada except Alberta was to be tried by a

court composed of a judge and jury. Thus, only in Alberta could an accused consent to a trial by a judge alone, rather than a trial by a judge and jury.

31. It is submitted that sections 429 and 430 of the Code (as they existed in May 1985) created a distinction based on the locus of the crime which affected the mode of trial for a murder charge. It is further submitted that this distinction does not bear any characteristics analogous to those of the grounds specifically enumerated in s.15(1). The distinction is not based on a personal characteristic nor does it affect the type of interest that the Charter seeks to protect.

R. v. Frohman; R. v. M.C.O. (1987), 56 C.R. (3d) 130 (Ont. C.A.)

R. v. Hamilton (1986), 54 C.R. (3d) 193 (Ont. C.A.)

R. v. Killen (1985), 49 C.R. (3d) 242 (N.S.C.A.)

Paquette (No. 2) v. R., [1987] 2 W.W.R. 44 (Alta. C.A.); leave to appeal denied (S.C.C., Feb. 25, 1988)

Ref. re French Language Rights of Accused in Sask. Criminal Proceedings, [1987] 5 W.W.R. 577 (Sask. C.A.)

R. v. Sheldon S. (Ont. C.A., March 17, 1988)

R. v. Turpin, Siddiqui and Clauzel (1987), 22 O.A.C. 261 (Ont. C.A.)

32. It may be that a distinction based on the locus of the crime could be discriminatory if it impinged on the type of interest that the Charter seeks to protect. It is respectfully submitted

that such is not the case as regards the current accused. It is submitted that the accused are entitled to a fair trial and that the inability to secure a trial by judge alone, rather than by judge and jury does not detract from that entitlement. As was noted by La Forest J. in R. v. Lyons, [1987] 2 S.C.R. 309, 362, accused are entitled to a fair trial, not to "the most favourable procedures that could possibly be imagined." The following remarks of Wood J. in R. v. Andrew et al. (1986), 17 W.C.B. 167 (and reproduced in Re Patrick and A.G. Canada (1986), 28 C.C.C. (3d) 417 (B.C.S.C.) at 435-6) are also relevant in this regard:

> "A person charged by way of direct indictment is denied an election as to his mode of trial. While such denial may not be a breach of fundamental justice, there can be no doubt that there are some cases in which it is at least perceived that a defence may be more advantageously presented, and therefore be more likely to succeed, before a judge alone rather than before a judge and jury. Viewed in the abstract, this perception results not from the fact that the truth of the defence varies according to the forum in which it is presented, but from the belief that certain preconceived notions of either the law, social conditions, or identifiable groups of offenders, will affect, adversely or otherwise, the judgment of one forum or the other. As long as the law continues to be administered by human beings, whether in groups of twelve or individually that belief will prevail. The fact is that in those cases where there might be some foundation to the belief, the appellate process serves to ensure that no miscarriage of justice results. Viewed in the shadow of that safeguard, the adverse effect of the denial of an election is reduced to the complaint that an accused may thereby have less chance of succeeding with a defence of questionable merit. Such complaint must surely have little, if any, weight in a section 15(1) inquiry."
>
> To which Cumming J. in Patrick added - "I accord it none".

See also: Morgentaler v. The Queen (1975), 20 C.C.C. (2d) 449, 465 (S.C.C.)

R. v. Ertel (1987), supra, at 274

Re Hanneson And The Queen (1987), 31 C.C.C. (3d) 560, 564 (Ont. High Ct.)

White v. The Queen (Nfld. C.A., Feb.12, 1988)

33. Furthermore, the right to a trial by jury is considered so fundamental as to be enshrined in s.11(f) of the Charter. This right is respected by ss. 429 and 430 of the Criminal Code, to which the accused were subject. Again, the remarks of Wood J. in R. v. Andrew et al., supra, and reproduced in Re Patrick and A.G. Canada, supra, at page 435) are relevant:

> "Indeed, to the extent that the mode of trial is at all relevant to what is recognized as fundamental justice, it would appear that the guarantee of a right to trial by jury is recognized in section 11(f) of the Charter as a principle of fundamental justice, at least for offences which carry a maximum punishment of imprisonment for five years or more. I fail to see how a form of proceeding which forces an accused to accept a mode of trial which fundamental justice guarantees him can be said to be contrary to fundamental justice because it, at the same time, denies him the opportunity to elect a mode of trial which is not so guaranteed." (emphasis added)

34. It is submitted that the inability of an accused to consent to a trial by a judge alone on a charge of murder in all jurisdictions in Canada except Alberta, did not affect the human worth and dignity of the person, and therefore was not discriminatory within the context of s.15. As such, the accused have not been denied their right of equality, and sections 429 and 430 of the Criminal Code (as they read in May 1985) are not inconsistent with the Constitution Act, 1982.

35. For the reasons expressed in the factum of the Attorney General of Ontario, and herein, the Attorney General of Canada respectfully submits that the challenged legislation does not violate either section 11(f) or section 15 of the Charter, or in the alternative, that it is justifiable under s.1 of the Charter.

PART IV

NATURE OF THE ORDER REQUESTED

It is respectfully requested that this appeal be dismissed for the reasons that are expressed herein.

All of which is respectfully submitted.

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Counsel for the Attorney General of Canada

LIST OF AUTHORITIES

STATUTORY AUTHORITIES

Criminal Code of Canada, ss. 429 and 430 as they read at the time in question.

429. Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

430. Notwithstanding anything in this Act, an accused who is charged with an indictable offence in the Province of Alberta may, with his consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without a jury.

Section 430 as it reads now.

430. (1) Notwithstanding anything in this Act, an accused charged with an offence listed in section 427 may, with his consent and that of the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

(2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1), such consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, s. 15

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.