

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *C.R. v. Saskatchewan Government Insurance,*  
2006 SKAIA 007  
**Date:** 20060203  
**File:** 081 of 2003

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**BETWEEN**

**C.R., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**C.E., for the Applicant**  
**Jane M. Wootten, for the Respondent**

**Before:** **Ann Phillips, Q.C., Chair**  
**Beverley Cleveland, Commission Member**  
**Al Knippel, Commission Member**

**THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL AND HEALTH  
INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND  
OTHER IDENTIFYING INFORMATION.**

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Heard at Regina, Saskatchewan  
May 19, 2004 and January 10, 2005

## DECISION

[1] The Appellant, C.R., appeals a decision of Saskatchewan Government Insurance (“SGI”) dated July 21, 2003 awarding permanent impairment benefits. It increased the amount previously awarded to 67% whole body permanent impairment, and a total payment of \$89,238.64.

[2] The Appellant, who was represented by her husband and daughter, submitted that her head and related injuries impaired her more than SGI’s assessment, and that there was chest trauma evidence that had been withheld.

[3] In addition, they stated that SGI had wrongly cut off her medication benefits, and was harassed with respect to her wage entitlement.

### **Preliminary Matters — Medication and Wage Entitlement**

[4] The decision letter deals only with permanent impairment benefits under *The Personal Injury Benefits Regulations* (“PIBR”) in effect at the time of the accident. SGI had previously terminated coverage for Warfarin and other medications in a letter dated April 16, 2003. That letter contained the usual warning that if the client disagreed with the decision, she had the right to appeal it within 90 days from the date of the letter. *The Automobile Accident Appeal Act*, section 191(1) prescribes:

191(1) A claimant may appeal a decision of the insurer pursuant to this Part to either the Court of Queen’s Bench or the appeal commission within the later of:

- (a) 90 days after the date of insurer’s written decision; and
- (b) if a claimant has requested mediation pursuant to section 190, 60 days after the date the mediator’s written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[5] The Appellant did not pursue mediation with respect to the medication, and accordingly her time to appeal to the Commission expired 90 days after April 16, 2003, on July 15. Her appeal was not filed until August 5, 2003.

[6] We cannot remedy this procedural defect or hear evidence on the merits of the decision. The Court of Appeal and the Court of Queen's Bench in *Mintzler v. SGI*<sup>1</sup> have considered and decided that failure to file an appeal under section 197 of the old *Act* is fatal. It is not subject to relief under the "imperfect compliance" provisions of the *Act*,<sup>2</sup> since this applies only to proofs of claim or loss, an application for benefits rather than appeal. Moreover, they have said that the failure to launch the appeal amounted to non-compliance (from which relief could not be given) rather than "imperfect compliance".

[7] The wage loss replacement benefit was resolved by the parties, if not to the entire satisfaction of the Appellant's family. SGI accepted the Appellant's husband's information that his wife was providing 1.92 hours of farm labour a week. As the amounts in question were small, SGI provided them in the form of an annual cheque in April. The Appellant's husband had to write to inquire where the 2003 cheque was, but it was eventually received, as was the 2004 cheque.

### **Issues**

[8] The main issue to be determined by the Commission was whether the permanent impairment benefit for the Appellant had been correctly assessed.

[9] Essential to a determination of the main issue was the causation issue: whether the deterioration in her mental abilities was attributable to the head injury received in the accident, or to, for example, vascular dementia.

### **Facts**

[10] Between April 2000 and January 2001 SGI's medical consultant made 7 assessments of her permanent impairments, and SGI issued decision letters reflecting those decisions as follows:

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<sup>1</sup> 2000 SKQB 104 and 2001 SKCA 54.

<sup>2</sup> Section 65: "Where there has been imperfect compliance with the statutory conditions as to the proof of claim or proof of loss to be given by an insured or other claimant or as to any other matter or thing required to be done or omitted by an insured or other claimant with respect to a loss, and a consequent forfeiture or avoidance of the benefits or insurance money, in whole or in part, and the court considers it inequitable that the benefits or insurance money should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it may consider just."

Date	Reason	% Impairment
Apr 25/00	Rib and chest trauma	2.5%
June 8/00	Scar, left ear	1.0%
Nov 7/00	Scar/lesion, left cheek	Amount deferred
	3 rib fractures	1.5%
	Pleural impairment	1%
Nov 16/00	Skin lesion	1.2%
Dec 22/00	Loss of consciousness	1%
Jan 17/01	Alteration of brain tissue (minor)	2%
	Organic cerebral syndrome, dementia and neurologic deficiencies (very slight)	1%

[11] The Appellant's family was not satisfied that her condition had been properly assessed, and requested an internal review held in August. SGI confirmed the results of their earlier assessment on October 10, 2001.

[12] In the meantime, her family physician referred her for further neurological assessment with respect to her cognitive impairment. The neurological examination was normal, but she was further referred for psychometric evaluation.

[13] Neuropsychologist Dr. Margaret Crossley saw the Appellant, who was then [in her eighties], in May, 2002. The purpose was to "help determine whether [her] decline in memory reflects a residual cognitive effect of a traumatic brain injury sustained from the motor vehicle accident or is due to a dementing illness." The testing showed a likely decline in intellectual functioning, with difficulties in nonverbal/spatial reasoning, though verbal reasoning, working

memory and processing speed were relatively preserved. There was impairment in language comprehension, semantic fluency, word finding, confrontation naming, and recalling newly learned information. With respect to executive functioning, she performed poorly in some areas, consistent with her husband's reports of her inability to initiate, plan or organize her behaviour.

[14] The report concluded that the impairments were the result of the motor vehicle accident. She had suffered a mild to moderate traumatic brain injury with subsequent secondary complications (a stroke two weeks later). Recent research suggested older adults were at increased risk for various postinjury neurological sequelae after traumatic brain injury. The decline had been sudden, and not progressive.

[15] SGI asked its psychologist consultant, Dr. Pancyr, to carry out a file review and comment. He particularly considered the reports of neurologists Drs. Moodley and Donat, and Dr. Crossley. Dr. Moodley thought the cognitive complaints were the result of a stroke, but not due to head or brain injury, and particularly thought it unusual that a head injury would result in ischemic stroke unless there was vascular dissection. He did not think the head injury explained her multiple symptoms. Dr. Donat thought there had been a concussion with subsequent cognitive impairment. There was no history suggesting a stroke.

[16] Dr. Pancyr placed heavy reliance on Dr. Crossley's report, describing her as "uniquely qualified", with expertise in memory and aging research. and her argument as to whether the stroke was due to the effects of the accident as "most convincing".

[17] Dr. Flotre, SGI's medical consultant, then reviewed the file for the purpose of providing a permanent impairment rating. While he said he was skeptical that all her cognitive deficits were related to the accident, he accepted the opinions of Drs. Crossley and Pancyr. He recommended:

- (1) 2% for concussion (brief loss of consciousness, some amnesia/confusion, no neurologic signs, negative imaging studies<sup>3</sup>)
- (2) 20% for mild to moderate head injury (lower end of that scale)<sup>4</sup>.

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<sup>3</sup> Appendix B, Part 1, Division 2, Subdivision 1, Section 5(b): Alteration of cerebral tissue following a concussion, contusion, laceration or intracerebral haematoma, minor (0.5-2%)

[18] The total of 22% was to be added to the previous total. (No one noted that the head injury had already been evaluated in S57 and S59: see paragraph 11)

Oct 8/02	Concussion	2%
	Mild to moderate head injury	20%

[19] The Appellant's family was still not convinced that SGI's decision was correct, and applied for mediation for this and other issues. In particular, they wished compensation for Warfarin, prescribed for her atrial fibrillation (heart) and brain infarct, and treatment for leg cramps (restless leg syndrome) Dr. Flotre expressed the opinion that these were not related to the accident, and these benefits were denied in April 2003

[20] Dr. Alexander for SGI carried out a further medical file review in July, 2003. He had two new reports to consider: a recommendation from the Appellant's family physician that Warfarin be funded, since he believed that her atrial fibrillation was directly related to the injury in the accident, and a letter from Dr. Crossley reporting on her follow-up assessment of the Appellant in April. At that time, the Appellant's husband said he thought her memory problems were somewhat worse, and there was a slight decrease in her level of independent functioning. Her daughter thought she had been relatively stable, but had infrequent contact with her mother. In formal testing, she displayed relatively severe memory impairment, poor comprehension and executive functions that interfere with her ability to manage daily activities without supervision and assistance from her husband. Her scores were very consistent with the assessment done in 2002 or somewhat below.

[21] Dr. Alexander thought that this information indicated that the Appellant required more than the "occasional supervision" of her activities for which Dr. Flotre had awarded 20%. [See footnote 11.] He re-classified her as having a neurological disorder or disturbance of consciousness that "severely" rather than "moderately" disrupted the performance of everyday

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<sup>4</sup> Appendix B, Part 1, Division 2, Subdivision 3, Section 13(k)(iii): Organic cerebral syndrome, dementia and neurologic deficiencies: alteration of the higher cognitive or integrative mental functions which moderately impair the performance of the tasks necessary for every day life and require occasional supervision for performing such activities, including any side effects of medication (20 to 45%)

activities, requiring “almost constant” supervision.<sup>5</sup>, for which 60% whole body impairment was due.

[22] In addition, he acknowledged a speech disturbance, for which 10% whole body impairment was due.<sup>6</sup>

Jul 21/03	Scarring, face	1.2%
	Scarring, scalp/neck	1%
	Head injury	4%
	Chest problem	2.5%
	Speech disturbance	10%
	Neurologic disorder	60%

[23] Because more than one permanent impairment was involved, section 40 of the PIBR requiring the use of the Table for the Calculation of Successive Remainders (Appendix C) was applied.<sup>7</sup> The final value was 67% whole body impairment. Compensation for 100% whole

<sup>5</sup> Appendix B, Part 1, Division 2, Subdivision 3, Section 13 (i)(ii): Posttraumatic epilepsy, syncope, cataplexy, narcolepsy and other neurological disorders and disturbances of consciousness: (ii) a disorder or disturbance that severely disrupts the performance of the activities of daily living and requires an almost constant supervision for the performance of such activities, including the side effects of medication (50 to 80%). Note the change from Section 13 (k)(iii) to Section 13 (i)(ii). Section 13(k)(ii) reads: Organic cerebral syndrome, dementia and neurologic deficiencies: (ii) alteration of the higher cognitive or integrative mental functions which significantly impair the performance of the tasks necessary for every day life and require near-continuous supervision for performing such activities, including any side effects of medication (50 to 80%).

<sup>6</sup> Appendix B, Part 1, Division 2, Subdivision 3, Section 13(h)(iv): Dysphasia, aphasia, alexia, agraphia, acalculia and other communication disturbances (iv) disturbances entailing minor communication difficulties (1 to 15%).

<sup>7</sup> The purpose of this calculation is to combine values when more than one bodily system is impaired so as to prevent the final total from being greater than 100%. For example, a person who becomes blind in both eyes (80%) and has the moderate impairment of higher cognitive functions requiring occasional supervision (Section 13(k) (iii) – 20 to 45%) would be at least 100% impaired, but for the Table. A fuller explanation of the calculation of successive remainders is given in Cairns v. SGI, 2003skaia001 at paragraph 29.

body impairment had been established at \$133,192<sup>8</sup>, so the amount to be paid to the Appellant was \$89,238.64, from which the amount already paid (36.3% or \$48,348.70) was subtracted.

[24] When the Appellant appealed to the Commission, SGI commissioned two more file reviews: the first by its medical director, Dr. Alport, the second at Dr. Alport's request, by psychologist Dr. Pancyr again.

[25] Dr. Alport's review on causation made several points:

- (1) There was no documentation of medical concern about neurologic symptoms in the eight or nine days after the accident in September 1999, although she was in hospital for other reasons. It was not until April 2000 that her family doctor linked memory loss and speech problems to the accident, without saying how long these problems had been present, and referred her to Dr. Moodley. Dr. Moodley thought there was no correlation between the accident and a frontal lobe infarction seen on CT scan, and her memory seemed reasonably intact to him when she provided a detailed history of her illness. Dr. Alport felt there was no documentation of cognitive impairment as of April 2000, and observed that brain injuries are usually worst immediately after an accident, and usually improve, even if there is not full recovery. He suggested that this information was not available to Dr. Crossley in 2002 when she made her evaluation.
- (2) She had pre-existing (1997-1998) atrial fibrillation of which her attending physician was unaware. He did not think SGI should have paid for the Warfarin after they became aware of this.
- (3) He noted that Dr. Crossley's follow-up report in 2003 did not suggest a dementing illness (which would get worse, while the Appellant was relatively stable). As a result, he suggested that the cognitive impairment seen might have been an ischemic stroke, or series of small strokes, which Dr. Moodley had said would be unlikely following an injury. He concluded that he was uncertain what *was*

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<sup>8</sup> Section 157(2) of the AAIA: The minimum amount of a lump sum benefit for a permanent impairment pursuant to this Division is \$500 and the maximum amount is \$125,000. Section 188 provides for annual adjustments of Part VIII (no fault) benefits according to the Consumer Price Index.

causing the cognitive impairment, but that the evidence was “heavily against brain injury”, and “quite possible” she had “multi-infarct dementia (brain injury caused by a number of smaller strokes)”.

- (4) There was insufficient information, in his view, of her day to day living, especially as a basis for assessing permanent impairment.
- (5) There was some evidence of degenerative spinal spinosis, to which the accident might have contributed. There was not enough information available for a permanent impairment assessment.
- (6) There was a report two weeks post accident describing a brief episode of visual distortion of unknown cause. This could have been a transient ischemic attack (small short stroke), a local eye condition or a migraine aura. It did not have much significance either way: even if it had been a stroke, the effects should have been noticed right after the event, while other documentation did not mention such effects.

[26] At Dr. Alport’s request, Dr. Pancyr re-reviewed the file. He reversed his opinion on Dr. Crossley’s report, saying he had previously believed SGI had hired her to perform a differential diagnosis on causation, that she had had all the relevant medical information, that she would not be relying on “self-report and subjective information”, and that brain injury and dementia were the only alternatives on causation (as opposed to a stroke). He said he had spoken by telephone to her recently, and she said the only documents she had at the time of her initial assessment were those provided by the patient and her family. He also said he understood she had not assessed the Appellant at SGI’s request, but as a normal referral from the family physician “to determine if the customer’s reported cognitive symptoms were attributable to dementia or the effects of a car crash”, to establish a diagnosis and treatment plan. He said he now thought there was insufficient information to conclude the accident caused the cognitive deficits, and that vascular dementia was more likely. He could not say if the accident played a contributory role in the development of the dementia, although it could not be ruled out.

[27] SGI called neither Dr. Alport nor Dr. Pancyr to testify in person. At the end of the hearing on the first day, the Commission asked SGI to make arrangements for Dr. Crossley to again see the Appellant, or to submit any further material she considered pertinent.<sup>9</sup> SGI's counsel did so, but Dr. Crossley wrote declining to re-assess her.

[28] SGI advised during the course of the hearing that while it now took the position that the part of the permanent impairment award relating to the "severe" neurological deficit (60%) was over-compensation, because it now believed that this deficit was not caused by the accident, it would not seek to recover any such over-payment from the Appellant, and undertook to replace the stale-dated permanent impairment cheques which had not been cashed by the Appellant pending the appeal, in case it should prejudice her position that she had been undercompensated. SGI's brief. This was done.

## Discussion

[29] Was the Appellant under-compensated for the injuries she received in the accident?

[30] She has received 2.5% with respect to the chest problem (rib fractures 1.5% and pleural impairment 1%). She had one broken rib and two possible broken ribs, and that each was assessed at 0.5%, for a total of 1.5%. We find that this is the appropriate amount, under the PIBR.<sup>10</sup> No differentiation is made between fractures that heal uneventfully and those in which there is pseudoarthrosis or misalignment (and there is no evidence there was in her case). An additional allowance was made for pleural thickening / pleural impairment. An X-ray shortly after the accident (September 20, 1999) apparently referred to evidence of pleural fluid, which Dr. Alexander thought would *likely* result in thickening. He did wonder if this (either the impact that broke the ribs, or the breaking of the ribs themselves) might have led to a heart contusion, which in turn might have precipitated the atrial fibrillation, as had been suggested by a specialist in September 1999 (or at least a change for the worse in her long standing asymptomatic atrial fibrillation condition and possible changes in the cardiovascular system. by SGI continued to

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<sup>9</sup> See the Commission order, dated May 27, 2004.

<sup>10</sup> Appendix B, Part 1, Anatomical and Physiological Deficits, Division 1, Musculo-Skeletal System, Subdivision 1, Upper Limb and Scapula, 2, Clavicle, scapula and thoracic cage, c) rib fractures: pseudoarthrosis or misalignment 0.5%.

monitor the heart/cardiac situation, to fund the Warfarin recommended for the first six months for treatment of the symptomatic atrial fibrillation. While Dr. Alexander recommended a cardiology review in July 2003, nothing seems to have come of this. It had not been carried out by the time of Dr. Flotre's report of April 14, 2003, which concluded that her heart rate in 1998 was not different from that of her admission to hospital post-accident, and recommended that SGI should discontinue funding the Warfarin, long after the 6 month trial period had expired. Dr. Alport's pre-hearing review similarly did not deal with the cardiology review proposal: he also recommended that SGI deny responsibility for ongoing responsibility for the atrial fibrillation once it was learned to have been pre-existing. SGI paid for Warfarin from 1999 to 2003.

[31] The Commission concludes that there is insufficient evidence that the Appellant's atrial fibrillation condition now is the result of a possible injury at the time of the accident. (This, of course, does not prevent the Appellant from providing fresh cardiology information to the contrary to SGI, which is responsible for reviewing it in the usual way.) Without such evidence linking a *permanent* deterioration of her pre-existing atrial fibrillation condition to the accident, the two awards for rib fractures and pleural thickening are all that have been substantiated.

[32] With respect to the head injury (4%), speech disturbance (10%) and neurologic disorder (60%), the decision under appeal is based on Dr. Alexander's report, which found "relatively severe disruption" of the performance of activities of daily living. More than 50% of her daily life had been affected. As stated above in paragraph [20], footnote 17, the applicable regulation has a discretionary range of from 50% to 80% whole body impairment, and Dr. Alexander selected 60%.

[33] The Commission's jurisdiction to review a decision of SGI is set out in section 193(7) of the *Automobile Accident Insurance Act* in force at the time of the claimant's accident (the "*Act*"). The Appeal Commission may:

- (a) set aside, confirm or vary the insurer's decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part.

[34] The Commission determined in *R.C.*<sup>11</sup> that its discretion under section 193(7) must be exercised in a judicial manner. The discretion will be exercised in favour of the Applicant only if it is demonstrated that the decision of SGI was wrong in law; or based on erroneous assumptions; or at the very least, the decision was unreasonable.<sup>12</sup>

[35] Applying that test in this case presents an unusual difficulty because Dr. Alexander, in following Dr. Crossley's reports, *may* have been proceeding under an erroneous assumption, that is, that she was providing an opinion with respect to causation, that the accident was responsible for the mental deterioration that occurred after it. Dr. Pancyr's letter says that she was not, and Dr. Crossley has declined to provide a further re-assessment and has not commented further.

[36] Very briefly, the Appellant did strike her head during the accident. While her mental condition deteriorated after the accident, Dr. Alport points out that there are no neurologic concerns expressed in the documentation until April 2000 (six months after the accident), with the exception of the episode of visual distortion reported by the home care nurse September 28. He observed that even if this episode had been a TIA (transient ischemic attack), it would not (being transient) have much long term effect (which is relevant to permanent impairment issues), and if it were a stroke, its worst effects should have been observed immediately after the event.

[37] Dr. Crossley said with respect to this incident: "The occurrence of a stroke<sup>13</sup> approximately two weeks post injury is consistent with recent findings indicating that older adults are at increased risk for various postinjury neurological sequelae because of age-related changes in the cerebrovascular system."

[38] Unfortunately, we do not know the basis for that comment, or what material was available to the neuropsychologist that caused her to conclude the Appellant had had a stroke (which Dr. Alport could not determine from the information available to him). We do not know if she saw Dr. Moodley's report, or Dr. Donat's, or what weight she gave to either. Without medical guidance, we are unable to say what mechanism in head trauma might produce an ischemic stroke (lack of oxygen), as opposed to a hemorrhagic stroke, of which there is no

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<sup>11</sup> *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

<sup>12</sup> *Belchamber v. Saskatchewan Government Insurance*, [1997] TWL QB 97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB 98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB 98113.

<sup>13</sup> Her diagnosis of stroke is based on information provided by the Appellant, her family and medical reports.

evidence. (In other words, if she had a stroke at all two weeks after the accident, is a hemorrhagic stroke (with ruptured tissue) not more consistent with head injury than one in which the brain is deprived of oxygen? We simply do not know.) Like Dr. Pancyr, we do not think the effects of the MVC (accident) can be definitively ruled in or out, with the information currently available.

[39] If we accept Dr. Crossley's assessment with respect to causation, we believe Dr. Alexander's assumption that he could use it in assessing permanent impairment was appropriate and his weighting of her disability at 60% relying upon it was also appropriate.

[40] In 2003, Dr. Crossley described the injury as "mild to moderate", and her "significant" deficits in memory, language, executive function, and visual spatial activities "significantly" affected her everyday functioning, i.e. she requires assistance with daily activities such as cooking, cleaning and shopping. The 2003 update refers to a "slight decline in memory and daily functioning", "relatively severe memory impairment, poor comprehension and executive functions that interfere with her ability to manage her daily activities without supervision and assistance from her spouse. Should this be at the lower end of the 50-80% range for "severe disruption" requiring "almost constant supervision", or at the higher end, 70-80%? Considering that the 100% classification is reserved for "stupor, coma or other disorder or disturbance that *prevents* the performance.." we believe that the lower end of the range of the 50-80% scale more closely corresponds to the scant description we have available on the limitation of her functions. We are relying to a considerable degree on Dr. Crossley's choice of words in describing her capacity. The Appellant's husband and daughter were clearly very upset by her condition, but did not describe it specifically enough to be of assistance. We agree with Dr. Alport that there is very little information upon which to assess the severity of her day to day living.

[41] To the extent that we have concerns that the accident may not have caused or contributed to her neurologic condition in any way, and we do, we are satisfied with SGI's assurance that it will not seek to claw back the substantial permanent impairment benefit payment it made to the Appellant on the assumption that the accident was at least a contributing factor.

[42] The Appellant has not convinced us that SGI has under-compensated her for her permanent impairments. We do not have to decide if it over-compensated her. The appeal is dismissed.

**Dated** at Regina, Saskatchewan, on February 03, 2006.

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Ann Phillips, Q.C., Chair

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Beverley Cleveland, Commission Member

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Al Knippel, Commission Member