

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *R.R. v. Saskatchewan Government Insurance,*
2006 SKAIA 050

Date: 20062808

File: 176 of 2004

BETWEEN

R.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

R.R., for the Applicant

Dale Brown, for the Respondent

Before: Ann Phillips, Q.C., Chair
Marjory Gammel, Commission Member
Darleen Topp, Commission Member

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

Heard at Saskatoon, Saskatchewan
August 17, 2006

DECISION

[1] The Appellant, R.R., appeals a decision of Saskatchewan Government Insurance (“SGI”) dated October 28, 2004, terminating funding of further treatment benefits, including medication, on the ground that SGI’s medical consultant’s advice was that SGI had met its obligations to the Appellant.

[2] After the appeal was filed, SGI’s Head Office Claims sent the file again to medical consultant Dr. P. Taillon, asking for his opinion on five questions likely to be in issue on the appeal. Dr. Taillon’s thoughtful and reasoned opinions in his letter of March 4, 2005 make our decision relatively easy.

[3] By way of background, the Appellant was injured when she lost consciousness driving a truck and hit a tree on August 27, 1999. While there was a detailed investigation of what caused the loss of consciousness before and after the accident, the ongoing problem was MVA related neck and back pain, and pain radiating down her left leg. For various reasons, including the investigation of the loss of consciousness, the case of split responsibility between SGI and the Workers’ Compensation Board, and her several family moves in Saskatchewan and Alberta, it was not until January 2004 that she received any treatment other than medication for her soft tissue injuries. She did continue to work.

[4] Her family physician had referred her for an assessment by Dr. Simmonds at the University of Alberta Hospital Pain Clinic, and to the Canadian Back Institute in Edmonton, but it took some time to arrange appointments.

[5] Dr. Simmonds’ assessment in May 2003 was that she suffered from a regional myofascial pain syndrome affecting her upper back. He recommended a change in her medication, which was then Percocet (2 tablets) four times a day, and sometimes five, as well as Tylenol #3. Because of long term problems with the acetaminophen in the Tylenol #3, he recommended that it be discontinued, along with the Percocet, in favour of a pure narcotic such as Oxycodone on an as-needed basis. He felt she wished to tail off her medication, and urged support for this, as well as trigger point injections with local anesthetics for short term pain relief.

[6] She was assessed and later treated for 7 weeks at the CBI Centre in Edmonton. On discharge she had a functional range of movement, could tolerate 2 hours of continuous activity, and had increased strength. While her pain tolerance had increased, she had unchanged back symptoms, with thigh and leg pain on prolonged sitting. She was given a home exercise program and pain management strategies. As Dr. Taillon noted, there was no psychological intervention nor a report from a psychologist. However, he felt there were other factors contributing to her chronic pain syndrome, such as multiple pregnancies and deconditioning. He concluded at that time that SGI had met its treatment obligations, and this led to SGI's decision terminating benefits.

[7] Returning to his report of March 2005, his findings were:

- (a) The motor vehicle accident was responsible in part for her current chronic neck and spine pain. While determining the percentage of responsibility was difficult, his opinion was that it was 60-70% responsible for her current symptoms.
- (b) He gave his reasons for attributing to pregnancies and deconditioning some contribution to her symptoms. They seem plausible, but do not have to be considered further here.
- (c) Based on his opinion that the accident was 60-70% responsible for her condition, he thought SGI should be responsible for 60-70% of her medication costs. He accepted Dr. Simmonds' approach to pain management strategy: aerobic exercise and maintenance of function, with pure narcotics and long-term avoidance of NSAIDs or acetaminophen¹. He discussed a discrepancy between the Appellant's report to CBI in January 2004 that she was on Oxycodone 5 mg eight times a day and OxyContin 40 mg bid and Dr. Vivier's June 2004 report apparently indicating either a reversion to or continuation of the Percocet and Tylenol.² Dr. Taillon thought the narcotic dose very high considering the Appellant's light weight, and repeated the concern re effects of Percocet and Tylenol on a long term basis. He again suggested a pain management specialist referral, and the possibility of using low doses of Amitriptyline or Gabapentin.

¹ Non-steroid anti inflammatories, Tylenol.

² We think the latter is likely an error by the physician. The Appellant was asked about this on cross-examination.

(d) He concluded that she fitted a “thin skull” scenario, rather than a “crumbling skull”. He said it was impossible to say if she would have needed the medication if the accident had not occurred. However, there were non-accident-related factors that contributed to and perpetuated the duration and intensity of her current pain syndrome.

[8] “Thin skull” and “crumbling skull” are two rather gruesome terms used by the law to determine the extent to which a person will be found responsible for injuries he has caused to another. “Thin skull” means that if a person had an unusually thin skull, as delicate, for example as an eggshell, and someone who did not know of that condition were to tap that person on the head, causing the skull to break, the responsible party would be held liable for all injury resulting from the wrongful contact, even though these consequences were not foreseeable.

[9] The “crumbling skull” rule is raised by a defendant arguing that whatever harm incurred by the victim was inevitable and the defendant's action only had a minimal effect upon the already deteriorating circumstances. There may not be any medical condition in which skulls actually crumble without assistance, but there are many in which a bad outcome would have occurred regardless of the defendant’s wrongful act. For example, some bone diseases produce fractures in the absence of anything that could be classed as trauma.

[10] As the Saskatchewan Court of Appeal has said³:

[13] The ‘thin skull’ rule makes the tortfeasor⁴ liable for injuries caused to the plaintiff even if those injuries are unexpectedly severe due to a pre-existing vulnerability or condition. As indicated in *Athey v. Leonati* at para. [34] ‘The tortfeasor must take his victim or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff’s losses are more dramatic than they would be for the average person.’

[14] The ‘crumbling skull’ rule was explained by Major, J. in *Athey v. Leonati* at para [35]:

‘The so-called ‘crumbling skull’ rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s ‘original position’. The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: [References deleted].

³ Saskatchewan Government Insurance v. Jessie L. Steinhauer, 2006 SKCA 1.

⁴ The person at fault

Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: [References deleted]. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.' ”.

[11] Very briefly, in “thin skull” cases, responsibility is full; in “crumbling skull” cases, an apportionment can be made. Dr. Taillon found, and we agree, that the Appellant had no pre-existing neck or back pain, and now she does. She may have had a predisposition to chronic pain due to extensive burn injuries and lengthy treatment as a child, and to mechanical back pain as a result of multiple pregnancies. These are “thin skull” characteristics. Counsel for SGI conceded that this was a “thin skull” situation. [Subsequent deconditioning (if this is the case) is neither “thin” nor “crumbling”.]

[12] As a result, we find that SGI has not “met its obligations” to the Appellant, and is responsible for 100% of the expenses of her medications related to the motor vehicle accident, which now consist of two tablets, 20 mg, of Oxycontin (slow release) three times daily, and two tablets of fast acting Subidol, 10 mg, three or four times daily.

[13] In April 2005, SGI wrote the Appellant to say that its medical consultant had recommended a referral to a pain management specialist, and that it would reinstate funding of medication attributable to the accident pending that referral. The Appellant confirmed that her medication is now being paid for.

[14] We think this is appropriate. We also are of the opinion that it would be highly desirable for such a review to occur. It has now been three years since she was last seen by Dr. Simmonds, she had not yet then received treatment at CBI. We are concerned by the high level of medication and by the fact that the exercises she describes performing on a daily basis consist of stretches rather than the aerobic exercise mentioned by Dr. Simmonds. We are further concerned, as was Dr. Taillon, by the absence of a psychological component in the CBI program. There are often psychological components to a chronic pain condition, and these have yet to be addressed in the Appellant's case. We believe that the pain management specialist, however, would be in a better position than we are to assess the situation.

[15] The Appellant has indicated her willingness to re-attend. We trust that her family physician will facilitate the referral, although we can understand that at the time he declined to do so it was perhaps too soon after the first referral and physio treatment.

[16] Accordingly, we order SGI to pay for the Appellant's medication attributable to the accident. SGI may terminate this payment if the Appellant does not attend for review by a pain management specialist within a reasonable time. SGI will pay the expenses of such review. SGI may determine what constitutes a reasonable time, in all the circumstances, subject to our review.

[17] The Appellant is entitled to her costs of the application, including the \$75 application fee, and reasonable travel and accommodation expenses, and any fee paid by her for Dr. Vivier's report of January 16, 2006.

Dated at Regina, Saskatchewan, on August 28, 2006.

Ann Phillips, Q.C., Chair

Marjory Gammel, Commission Member

Darleen Topp, Commission Member