

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *H.R. v. Saskatchewan Government Insurance*,
2009 SKAIA 003
Date: 20090126
File: 038 of 2007

BETWEEN

H.R., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Terry Zakreski, for the Appellant
Dale Brown, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Jane Lancaster, Q.C., Commission Member
Carol Olson, 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
November 25, 26 and December 18, 2008

DECISION

- [1] On June 12, 1998, the Appellant was involved in a rear end collision. She has been in receipt of benefits pursuant to *The Automobile Accident Insurance Act c.A-35 1995 (old Act)*.
- [2] In this decision, there are two appeals filed by the Appellant. In the appeal filed April 10, 2007, the Appellant appeals a January 25, 2006 decision letter where SGI terminated benefits to the Appellant pursuant to s183 of the *Automobile Accident Insurance Act*, on the grounds she was refusing to travel to attend an independent medical examination which had been requested by SGI.
- [3] Subsequently, the insurer made arrangements for the independent medical examination to take place in Saskatchewan and this decision letter was withdrawn by the insurer.
- [4] However, counsel for the Appellant argues there remains an issue of the appropriate calculation of the Income Replacement Benefit (IRB) from the date of termination, December 2006 to the date of the Independent Medical Examination (IME).
- [5] Counsel for the Appellant states that the Appellant received IRB but there remains an issue regarding the calculation of this benefit in light of the fact that SGI took into consideration that the Appellant had also received a lump sum of retroactive Canada Pension Plan disability (CPP) which was set off against the back IRB payments. The Appellant disputes that SGI is entitled to “claw back” this CPP payment although recognize that CPP is taken into consideration in determining ongoing IRB.
- [6] Counsel for SGI acknowledges that matter of calculation of the CPP benefit is still a live issue and the parties will further discuss resolution. If not successful, it is agreed that the matter will return to the Commission for an Appeal Management Hearing to schedule a further hearing.
- [7] The Appellant has also appealed the April 20, 2007 decision letter in which SGI takes the position that it no longer has any responsibility to the Appellant for any

benefits under Part VIII of the *Act* as the Appellant's current injuries and / or symptoms are not related to the motor vehicle accident of June 12, 1998.

[8] The basis of SGI's decision is the Independent Medical Examination of Dr. McDougall but SGI also relies on other medical reports in this complex and extensive file.

[9] This file contains a significant number of medical records relating to the Appellant's June 12, 1998 accident and the subsequent medical history from 1998 to the date of the Independent Medical Examination which took place in February 9, 2007.

ISSUES:

[10] What injuries did the Appellant receive as a result of the June 12, 1998 motor vehicle accident and what responsibility has the insurer for those injuries?

FACTS AND FINDINGS

[11] The Appellant was the seat belted driver of an automobile which was stopped at a red light. She was hit in the rear by a vehicle. Her vehicle was drivable and so after exchanging names and contact numbers, the Appellant drove her car to the police station and reported the accident.

[12] The Appellant testified that she went home after reporting the accident, felt dazed and "shook up". She indicated that she was concerned as the accident had involved a recently purchased vehicle. That night she testified that she had problems with soreness and stiffness in her head and neck as well as trouble breathing.

[13] She testified that she attended massage therapy soon after the accident and attended at her family doctor, Dr. Klassen, June 29, 1998.

[14] Dr. Klassen's medical notes indicate that she attended on June 29, 1998 and related that immediately after the accident, she felt pain in her upper chest, and the next day she had a "headache, pressure, neck pain and back pain to lower spine, pain in forearms, hands numb up – more at night". She had received three massage

therapies and “it is helping.” He reported that she was not taking other treatment nor had she been off work.

[15] The Appellant applied for benefits pursuant to the *Act* on June 26, 1998 and in filling out her application, she identified pain in her shoulders, front and back as well as down her back, along the sides of her legs and the forearms.

[16] Her family doctor provided SGI with a Practitioner’s Report dated July 3, 1998 indicating a “Whiplash associated disorder Grade II, mid low back discomfort, arms feel funny with numbness in hands, decreased range of motion but improved.” His primary diagnosis was “muscle injury – neck and back.”

[17] Unfortunately, the Appellant did not heal as expected and she was referred to secondary assessment which indicated that she was at one time 90% recovered from her injuries, but for some reason she had deteriorated to 50%. She was still working at her employment as a dental assistant.

[18] The Appellant commenced secondary treatment in January 1999 and the appellant testified that in her view she was getting worse and when treatment ended in April 1999, the discharge report indicated minimal improvement with symptoms of headache, neck and shoulder pain, low back pain, occasional sharp shooting pains in her neck.

[19] Her family doctor referred the Appellant to Dr. Wine, neurologist, in August 1999 who diagnosed her with post-traumatic fibromyalgia. Her symptoms as reported to Dr. Wine was pressure sensations in the head worsened with sitting and riding in a vehicle, neck pain, thoracic and lumbar pain, and heavy chest symptoms. She reported trouble sleeping, legs feel funny, and diminished coordination in upper extremities while walking. His diagnosis was based on the fact that she had a number of tender points consistent with a diagnosis of fibromyalgia.

[20] For this reason, the Appellant was also referred by her family doctor to a rheumatologist, Dr. Pollock, for an opinion on her condition. In December 1999, Dr.

Pollock reported that the Appellant had reported pain in her back, hypersensitivity of the scalp and skin of the back, numbness in the feet and hands, problems with coordination, memory, visual disturbances and problems with sleep.

- [21] The rheumatologist's report goes on to state: "Review of systems reveals that she experiences considerable fatigue. She states that she has lost approximately 5 lbs. over an unspecified period of time. She complains of headache with the location of the pain being in different areas at different times. She also has tinnitus. She sometimes sees objects moving that aren't moving. She also complains of dysphagia and dyspnea at times. She is chronically in pain and is unable to maintain her posture for very long. She has tingling along the spine, arms, legs, feet and hands. She denies any past psychiatric history and states her mood is only low when symptoms are particularly bad."
- [22] Dr. Pollock diagnosed that it "was quite likely the Appellant has fibromyalgia syndrome." However, the report was that she was resistant to attend education programs on fibromyalgia held at the Royal University Hospital or to follow suggested treatment.
- [23] The Appellant's condition continued to deteriorate to the point whereby she left her employment in September 2000 because of her fatigue, pain, difficulty standing and the carpal tunnel symptoms in her hands.
- [24] In October 2000, she was referred to FIT rehabilitation centre for a further reassessment. As she had recently left her employment which she described as an important and valued part of her life, and had expressed an overwhelming grief for her functional losses, there was a recommendation for psychological counseling
- [25] At the FIT assessment, the Appellant reported that she was functioning below sedentary which were consistent with the clinical findings of the assessment.

- [26] The assessment recommended some further physiotherapy and her family doctor wrote to SGI indicating that she was reluctant to participate as in her view it “did not do her any good and she in fact says that it made her worse.”
- [27] This position was also supported by Dr. Wine who indicated that he agreed with the Appellant that “a program of vigorous exercise will undoubtedly result in a flare up.”
- [28] In November 2000, the Appellant also made an application for disability benefits from Canada Pension on the basis that she was unable to work due to being “below sedentary”.
- [29] As the Appellant’s condition was still deteriorating, SGI referred her file to their medical consultant, Dr. Jutras, for advice for treatment. This was because of the Appellant’s resistance, supported by her medical practitioners, to participate in the usual active treatment programs.
- [30] The insurer communicated with the Appellant that they were prepared to tailor a treatment program for her that was sensitive to her concerns as well as take into consideration the views of Dr. Klassen and Dr. Wine as to what would be best for her.
- [31] On August 7 and 9, 2001, the Appellant attended at the Emergency room with shortness of breath; she refused a number of diagnostic tests to determine breathing problems. She did attend with Dr. Wine who indicated that he could find no signs of neurological causes of the shortness of breath and choking she was experiencing. She was referred for a MRI which did not identify any problems regarding breathing.
- [32] In December 2001, Dr. Wine had changed his diagnosis of the Appellant to chronic myofascial pain syndrome which he attributed to the soft tissue injury which occurred in the accident. Dr. Wine also rejected the suggestion that psychological barriers were impacting on the Appellant’s recovery. In his view, “the presence of pain out of proportion to the stage of healing is when chronic myofascial syndrome emerges Anxiety and dissociative symptoms are part of the pain disorder and

not the cause of it. A program based on premises, which do not apply in this patient, is likely to fail. Further a program of conditioning is likely only to result in exacerbation or pain wind-up and further impairment.” He recommended that her goal should be to manage her basic activities of daily living through modification of activity and energy budgeting and the usual of pharmacological agents to manage pain and symptoms.

- [33] With contradictory assessments and treatment plans, on January 2, 2002, the insurer took the advice of their medical consultants that an independent medical examination was crucial in determining the insurer’s on-going responsibility to the Appellant.
- [34] There were issues with regard to obtaining this report because the Appellant was of the firm opinion that she would be unable to travel for such an assessment. She was supported in this view by Dr. Klassen.
- [35] The insurer took the position that they needed another medical opinion as to whether the Appellant’s decision not to attend an out of province assessment was medically reasonable and made arrangement for the Appellant to be assessed by Dr. Sibley, a rheumatologist at Royal University Hospital.
- [36] Dr. Sibley provided a report to the insurer that after his examination of the Appellant and after reviewing her medical file, he could find no organic disease to account for her reported symptoms and although hesitant to diagnose a psychosomatic disorder, he could see no alternative in this case.
- [37] With regard to travel for an independent medical examination in Calgary, he found no medical reasons why she would not be able to travel by car.
- [38] In addition, he recommended that she discontinue current chiropractic and craniosacral therapy as he felt they were promoting her symptoms and disability. She had been receiving these therapies for several years and had indicated the

therapies helped her, however, Dr. Sibley indicated that despite this, her condition appeared to have deteriorated substantially.

[39] He also recommended that she not have active rehabilitation as her belief is that this will make her worse and would undoubtedly prove to be self fulfilling prophecy.

[40] He also recommended that the Appellant be assessed by a psychiatrist and psychologist with their recommendations to determine subsequent therapy.

[41] As a result, the insurer attempted to make arrangement for the IME, but the Appellant with the support of her family doctor continued to insist that she was unable to travel. SGI agreed to postpone this decision as the Appellant also agreed to see a psychiatrist in July 2002 and they would consider their position after that examination.

[42] In January 2003, the Appellant was seen by Dr. Kok, psychiatrist and Dr. Boyes, psychologist and their report suggested that the Appellant presented with psychiatric symptoms suggestive of an Undifferentiated Somatoform Disorder. This is a chronic disorder in which there are numerous physical complaints caused by psychological problems and no apparent underlying physical problems can be identified. In their view, the psychological difficulties “do not appear to be causative but rather secondary to pain and symptoms and loss of employment sustained in the MVA of June 12, 1998. In their view, because prior to the 1998 MVA there was no documentation of symptoms and there was a continuous work record, the accident “may be the most poignant factor contributing to [the Appellant’s] difficulties. That is, [the Appellant] might have coped adequately with her other life events if she had not experienced this MVA.”

[43] Drs. Kok and Boyes indicate that they recognize that there may be obscure underlying physical issues not yet diagnosed and that their diagnosis of somatization does not exclude the presence of an organic medical condition.

- [44] Once again the insurer asked for advice from their medical consultant as to how to proceed with this exceedingly complicated file.
- [45] Dr. Alport, SGI medical consultant, reviewed all the medical reports on this file and recommended to the insurer that they obtain an IME especially to determine causation, ie. the reason for the Appellant's disability and its relationship to the accident.
- [46] As a result of this opinion, SGI again approached the Appellant to attend an IME in Alberta. Once again, the Appellant indicated that she would not be able to travel to participate.
- [47] On December 1, 2005, SGI sent the Appellant a decision letter terminating benefits under the Act on the basis of s 185 of the *Act* and especially s185(d) that she was without valid reason refusing to undergo an examination by a practitioner.
- [48] The Appellant appealed that decision and during mediation between herself and the insurer in August 2006, it was agreed by the parties to have the IME performed in Saskatchewan by having the doctor travel. As a result, that decision was withdrawn except with regard to the outstanding issue outlined in paragraph [5].

Independent Medical Examination – Dr. D. McDougall

- [49] Dr. McDougall examined the Appellant February 9, 2007. He provided an extensive report and also testified at the hearing.
- [50] Dr. McDougall is a medical consultant with over 28 years of experience particularly in the areas of occupational health and disability assessments.
- [51] He indicated that the protocol he uses is to examine the referring patient before reading all the medical information provided so as to unconsciously colour his examination. He obtained a medical history from the Appellant and did a physical examination. He noted that she had oxygen attached with nasa prongs and was

pulling an oxygen cylinder with her. During the time they spent together, he indicated that he continually observed the Appellant.

[52] Dr. McDougall testified at the hearing that in his opinion the Appellant had injuries which were not consistent with the initial diagnosis of whiplash. He stated that in his experience the very first reports of injury are historically the most accurate.

[53] He noted some symptom magnification on the part of the Appellant, for example, during the examination, the Appellant neck range of motion was severely limited, but he observed her turn her neck without discomfort when he was adjusting the blinds in the examining room.

[54] He also testified that she indicated a significant number of complaints and there appeared to be no evidence of any neurological damage. He stated that the Appellant's use of oxygen was not consistent with a whiplash injury and neither was the issue of trouble swallowing solid food. In addition, any medical reports showed no abnormality with her breathing or throat.

[55] In addition, he noted as important that two years after the accident, the patient had more symptoms, was getting worse and yet there was no evidence of medical disease to explain her deterioration.

[56] He stated that although there was no evidence of medical disease, there was some significant social disruption such as the Appellant's perceived difficulty at work and subsequently leaving her employment as well as her husband being laid off from his employment.

[57] In summary, in his opinion, the Appellant's presentation was inconsistent with a medical model. In fact, Dr. McDougall went so far as to say that her presentation was "bizarre" and "out of the ordinary and not what we usually see."

[58] Dr. Wine had reviewed Dr. McDougall's report and had indicated that he did not agree with Dr. McDougall's assessment that the medical model does not account for the Appellant's condition. He stated as follows:

There is a large body of research on chronic pain in the last twenty or more years that provides pathophysiological mechanisms of how pain may last beyond the normal healing period, and spread beyond the initial focus or foci to become regional and generalized. This process is called neural sensitization.....

Secondly, Dr. McDougall does not use the biopsychosocial model appropriately in my opinion. The biopsychosocial model is not an alternative to the medical model when the medical model fails. The biopsychosocial model is an adjunct to the medical model. The biopsychosocial model is used most notably in psychiatry, but can be used for any dimensions, notably biological, psychological, and sociological. The notion that [the Appellant's] condition is related to workplace stress and /or an unemployed husband and not related to the motor vehicle accident is implausible in my opinion.

[59] Dr. McDougall was asked by counsel to comment on Dr. Wine's diagnosis of neural sensitization. Dr. McDougall indicated that he had significant experience with neural sensitization as it is a vast field for medical research especially in the area of disability. However, in his opinion, although he was not adverse to Dr. Wine's attempt to explain the Appellant's symptoms, Dr. McDougall was of the view that his physical examination of the Appellant did not support this diagnosis. He further explained that his physical examination showed embellishing of symptoms and inconsistent results, all of which would not support a diagnosis of neural sensitization.

[60] Dr. McDougall indicated in both his testimony and his notes that the Appellant's symptoms are not explainable in a medical model and are not consistent with either the mechanism of injury or the Appellant's clinical course post injury from the whiplash.

[61] However, when questioned by the panel, Dr. McDougall stated that in his view, he did not think the Appellant has a psychiatric pathology, but he agreed with the assessment of Drs. Kok and Boyes that:

Psychological difficulties do not appear to be causative but rather secondary to pain and symptoms and loss of employment associated with injuries sustained in the MVA of June 12, 1998.....

Because prior to the 1998 MVA, there is no documentation of symptoms and there is a continuous work record, the 1998 MVA may be the most poignant factor contributing to [the Appellant's] difficulties. That is, [the Appellant] might have coped adequately with her other life events if she had not experienced this MVA.

[62] He stated that in speaking to the Appellant during the IME, that she expressed frustration that her symptoms were trivialized by her caretakers, especially during rehabilitation and she did not feel that she had the support of her employer. In addition, she felt that her accident was seen as trivial and it was not trivial to her. All of these, in addition to losing a job in which she felt significant self worth, and further information received that she had felt that she was not physically able to visit her terminally ill parent or seeing her newly born grandchild were all significant psychological traumas.

[63] Dr. McDougall stated that he believed that the Appellant's presentation was exaggerated and exhibited symptom magnification but that her symptoms were very real to her and she felt them. His report states clearly that the medical model has not been helpful to the Appellant and all enabling support to remain as a disabled person should be removed as there is no medical reason to support such activities.

[64] When asked specifically if the Appellant would be somatized without the accident, Dr. McDougall indicated that it would be entirely speculative especially as it appears that there was no evidence of disability prior to the accident.

Dr. Klassen

[65] Dr. Klassen testified at the hearing. He had been the Appellant's family doctor since 1978. He indicated that except for the onset of celiac disease the Appellant saw him only routinely until she was involved in the accident in June 1998. However, his records show that in April 21,1998, prior to the accident, she had attended with complaints of chest pain which he diagnosed as chest wall pain. These symptoms were not of the severity or as widespread as after the accident.

[66] From that time her health appeared to deteriorate although he referred her for medical testing and to see specialists to determine what the reason for her marked deterioration.

- [67] During his testimony he indicated that he has tried to advocate and support the Appellant and he feels that currently her situation has stabilized. In saying that, he indicated that she reports being in constant pain, requiring oxygen 24 hours a day, not being able to swallow and subsisting on liquid food, sleeping sitting upright in a hospital bed. In his view, her quality of life has diminished and he does not foresee her getting better.
- [68] He indicated that he and other medical practitioners had recommended medications or counseling to the Appellant but she had been resistant to any of these suggestions. He indicated that he had never prescribed oxygen for the Appellant as all of the medical tests indicate that there is no medical reason for her difficulty breathing. However, she had began using oxygen and he signed authorizations on her behalf as the forms do not require him to advise of a reason for the request and he does not feel that it does her any harm.
- [69] Dr. Klassen indicated that in reviewing his notes in preparation of attending this hearing, he suspects that the Appellant suffers from a somatization disorder although she does not think she has this disorder.

ANALYSIS

- [70] Counsel for the Appellant takes the position that the accident caused her current condition. He argues that we should accept the opinion of Dr. Wine that the Appellant suffers from a myofascial syndrome which is directly related to the trauma of the accident.
- [71] Counsel argues that the appeal is not about whether the Appellant is doing what she can to get better and therefore, she is making her condition worse. Counsel argues that there is no evidence that her condition would be better if she had followed the treatment suggested by her medical practitioners.
- [72] Alternatively, he argues that the opinion of Drs. Boyes and Kok that the Appellant suffers from a somatoform syndrome does not preclude an organic medical

condition. In his view, Dr. McDougall in his testimony conceded that although in his view she had no underlying medical condition, she could suffer from a somataform disorder. In counsel's view, these opinions all acknowledge that she had no pre-existing physical or mental health issues, and that her condition began to deteriorate with the motor vehicle accident.

[73] To support his submission, counsel argues that medical personnel may have underestimated the severity of the accident if they only considered the damage to the Appellant's vehicle, that the Appellant has been consistent in her symptomogy over time although within 6 months of the accident, it certainly became more severe, that the Appellant has been consistent in her disability to the point whereby she did not travel to see her dying mother or her new grandchild; that all parties agree that the Appellant suffered some physical injury in the accident: that there was no pre-existing injury, and there was no significant post accident event like a trauma which would break the causation chain.

[74] Counsel for SGI concedes that they are not arguing that the Appellant had a pre-existing condition; in their view, the question is whether she is a "thin skull" case and not whether she is a "crumbling skull" case.

[75] Counsel for SGI argues that the appropriate test is whether "but for" the motor vehicle accident, would the Appellant suffer the condition that she currently does. In his view, the medical personnel have found her symptoms "weird" and "bizarre."

[76] Counsel for SGI disagrees that there has been a consistency in the Appellant's symptomatology pointing to differing diagnosis proffered by several of the Appellant's medical practitioners, Drs. Wine and Klassen. In addition, he argues that the Appellant continued to work after the accident from June 1998 to September 2000 wherein she left her employment without discussion with her family doctor.

[77] Counsel argues that it is relevant to look at the Appellant's behaviour regarding treatment. There is ample evidence that suggestions made by her medical practitioners regarding drug therapy, pain medication, group therapy and support

group, tai chi as a form of exercise which were all discounted by the Appellant to the point whereby her family doctor indicated that he did not suggest any therapies for her. She has determined her own treatment which has extended to her use of sacrocranial manipulation and a chiropractic release as well as to her decision she requires oxygen 24 hours of day. She will not take testing to determine why she is experiencing difficulty swallowing and has developed her own regime of eating baby food and liquid supplements.

[78] Counsel for SGI argues that her symptomatology is so extreme that it may not be foreseeable and so that may lessen SGI's responsibility to the client.

[79] The Commission's jurisdiction to review a decision of SGI is set out in subsection 193(7) of the *Act*. The Commission may set aside, confirm or vary the insurer's decision. In addition, the Commission may make any decision that the insurer is authorized to make pursuant to Part VIII of the *Act*.

[80] When the Commission reviews a decision by SGI to terminate benefits on the basis that the motor vehicle accident did not cause the Appellant's injuries, the standard of review is correctness.

[81] The principal issue in this appeal is whether the motor vehicle accident of June 12, 1998 caused or contributed to the Appellant's injuries.

[82] The key evidence on this issue is the Appellant's testimony and the medical opinions, practitioners' reports especially the IME report of Dr. McDougall, the medical reports of Dr. Sibley and Dr. Boyes and Kok, the FIT report, the testimony and medical records of Dr. Klassen and Dr. Wine.

[83] The Appellant submits that she did not suffer from the debilitating symptoms before the motor vehicle accident and was in good health. Following the accident, her symptoms became worse until in the fall of 2000 she left her employment. Leaving her employment was a serious set back for her as it is clear that she took great pride in her work. We do not have a lot of information as to what caused the Appellant to

leave her job, she mentioned extreme fatigue and occasionally mixing up x-rays, but it is clear that she felt that her employer was less than supportive of her during this time.

[84] The Appellant's counsel argued that his client's health was good at the time of the motor vehicle accident but that she was vulnerable to the unexpected and severe consequences of the accident because of a pre-existing condition – in other words, she was what is sometimes referred to in law as a “thin skull” and that SGI is responsible for all benefits.

[85] Counsel for SGI argued that the Appellant's injuries have been described as “bizarre” by Dr. McDougall and “weird” by her family doctor, Dr. Klassen. As a result, her condition is well out of the ordinary that would be expected as the consequences of this accident. Counsel also argues that there is no consistency among those medical practitioners who have treated the Appellant and their view as to a diagnosis has changed as the years have progressed. In particular, Counsel notes that Dr. Wine's diagnosis has changed from post traumatic fibromyalgi and now he theorizes that the Appellant suffers from neural sensitization.

[86] Counsel submits that the panel should rely more on the opinions of Dr. McDougall, Dr. Alport, and Dr. Sibley which do not attribute the Appellant's symptoms to the accident.

[87] Counsel also takes issue with the Appellant's contention that it is not relevant that she has been offered and declined options for treatment and tests to determine medical conditions (barium test). Counsel argues that the issue of foreseeability is relevant and when the Appellant presents with bizarre and weird symptoms then the manifestation of these symptoms is so far beyond what would be foreseeable.

[88] Counsel referred the panel to the decisions of *Athey v. Leonati*, [1996] 3 SCR 458 and *Resurface Corp. v. Hanke* {2007} 1 SCR 333. For SGI to be liable for the consequences of the Appellant's condition, it must be shown that the injuries sustained by her in the motor vehicle accident caused or contributed to this

condition. Causation will be shown if the Appellant would not have suffered from this condition “but for” the accident for if the accident contributed materially to this condition. Adapting the analysis outlined by Mr. Justice Major in *Athey*, the ramifications for this appeal are as follows:

- (a) if the condition would likely have occurred at the same time without the injuries sustained in the accident, then causation is not proven.
- (b) if it were necessary to have both the accident and a predisposition to the condition for the condition to occur, then causation is proven, since the condition would not have occurred but for the accident. Even if the accident played only a minor role, SGI would be fully liable because the accident was still a necessary contributing cause.
- (c) if the accident alone could have been sufficient cause and the pre-existing condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the condition. It would have to be determined, on a balance of probabilities, whether the motor vehicle accident materially contributed to the condition.

[89] The Saskatchewan Court of Appeal has held that these principles of causation apply for benefits under Part VIII of the *Act*: *Saskatchewan Government Insurance v. Steinhauer*, 2006 SKCA 1.

[90] Counsel has also referred us to the case of *Mustapha v. Culligan*, 2008 SCC 27 on the issue of whether the psychological reaction that the Appellant is experiencing is too remote to the motor vehicle such that the insurer is not responsible. Mr. Mustapha became completely disabled when he observed a dead fly in an unopened bottle of the defendant’s water. He experienced this disability even though he had never drunk from the bottle. Crucial to the Supreme Court’s reasoning in the *Mustapha* case was whether there was the fact that there was no physical injury, although Mustapha had a psychological reaction which became debilitating to him.

In this case, Appellant's counsel argued that the Appellant suffered a physical injury and it was foreseeable that there could be a psychological impact.

[91] This is a very difficult case. The Appellant appeared to have no medical problems except as noted in paragraph [65], prior to the June 12, 1998 accident; it appeared that the injuries she received, ie. whiplash, would be resolved in the usual fashion with some massage therapy or chiropractic treatments. Instead, by September 15, 1998 according to Dr. Klassen's medical notes, she was suffering pressure in her head, reduced range of motion of her neck, back pain, legs numb, and trouble breathing.

[92] Since that time the Appellant has undergone "torture" in her words as medical practitioners tried to diagnose how to stop the downward spiral of her health.

[93] We agree with the reports of Drs. Kok and Boyes and Sibley and the suspicion of Dr. Klassen that the Appellant suffers from a somatization disorder. We found the testimony of Dr. McDougall particularly helpful in trying to make sense of how the Appellant has come from being a healthy person who was gainfully employed in a job which she said she loved to what Dr. Klassen describes as "her life is a disaster – she can't do anything. I don't know if she has any enjoyment."

[94] Dr. McDougall testified that it is hard to determine exactly what events cause certain reactions as life is a series of complex multi-factoral decisions. In the Appellant's case, her concerns which he related (see paragraph [62]), included what she saw as trivialization of her accident and symptoms, her loss of self-worth following her loss of employment, and her sorrow at her inability to travel to her mother, daughter and grandchild. As Dr. McDougall indicated, we do not know all the circumstances of the Appellant's situation which may also have had an impact on her recovery. What we do know is that she was functioning well before the accident and after the accident, there was a significant decline in her function. If the loss of her employment was a significant traumatic event, it is clear from her testimony that the extreme fatigue, headache and leg pain which she reported early after the accident were reasons why she felt she could no longer continue the job she loved.

[95] As a result, we are convinced the accident was in the words of Drs. Kok and Boyes “the 1998 MVA may be the most poignant factor contributing to [the Appellant’s] difficulties. That is, [the Appellant] might have coped adequately with her other life events if she had not experienced the MVA.”

[96] The SGI decision letter of April 20, 2007 is set aside.

[97] Although it is not before us, we wish to comment on SGI’s obligation with regard to the Appellant’s treatment. The medical record shows that the Appellant was not prepared to follow the recommended treatment of her various medical practitioners, preferring to use herbal remedies, some massage treatments, and chiropractic treatments as well as using oxygen on a 24 hour basis. None of these treatments have been mandated for a particular medical condition by a medical practitioner. At best, her family doctor, Dr. Klassen, indicates that the use of oxygen “does her no harm”.

[98] We have accepted that the Appellant suffers from a Somatoform Disorder and although it is possible that there may be an organic/physical diagnosis, at present there is none. The insurer’s responsibility with regard to providing treatment is prescribed in the *Act* at s110 (1) as follows:

S 110(2) Subject to the regulations, the insurer may take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen the disability resulting from bodily injury and to facilitate the victim’s recovery from an accident.

[99] Dr. Klassen testified that his treatment plan was to continue to encourage her to do as well as she can but was not optimistic that she was going to get much better. In his view, she had maintained for the last few years. He indicated that the Appellant was the only patient he had who had such a condition and in his reading, it appeared to be a very difficult condition to treat except by support and encouragement to do as well as she can.

COSTS

[100] As the Appellant has been successful in her appeal, she is entitled to the costs of her application to a maximum of \$2500 as well as the return of her appeal fee.

Dated at Saskatoon, Saskatchewan, on January 26, 2009.

Ann Phillips, Q.C., Chair

Carol Olson, Commission Member

Jane Lancaster, Q.C., Commission Member