

1994 CarswellOnt 4996  
Ontario Insurance Commission

MacNeill v. Royal Insurance Co. of Canada

1994 CarswellOnt 4996

**Gail MacNeill, Applicant and Royal Insurance Company of Canada, Insurer**

Mackintosh Arb.

Judgment: January 10, 1994

Docket: A-000057

Counsel: Mr. Rene Liebs-Benke, for Applicant  
Mr. Nestor Kostyniuk, for Insurer  
Mr. A. Wayne Edwards, (for Mr. Kostyniuk on February 1, 1993)

Subject: Insurance

**Headnote**

**Insurance**

***Mackintosh Arb.:***

**Issues:**

1 The Applicant, Gail MacNeill, was injured in a motor vehicle accident on July 10, 1990. She applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672<sup>1</sup>. Weekly income benefits were terminated by the Insurer on August 21, 1991. The parties were unable to resolve their disputes through mediation and the Applicant applied for arbitration under the *Insurance Act*.

2 By agreement reached between the parties on September 10, 1992 (the original date scheduled for the hearing of this matter), the Insurer agreed to pay further weekly income benefits under section 12 of the *Schedule* until December 31, 1992. The Insurer also agreed to continue to pay weekly income benefits to the Applicant on a "without prejudice" basis from January 1, 1993, pending arbitration of the dispute. The Insurer retained the right to claim repayment of weekly income benefits paid after January 1, 1993.

3 The Applicant seeks weekly income benefits from January 1, 1993 to July 10, 1993. The issue of payment of weekly income benefits for any period in excess of 156 weeks, under section 12(5)(b) of the *Schedule* was not before me.

4 The issues in this hearing are:

1. Is the Applicant entitled to payment of weekly income benefits in the amount of \$637 under section 12 of the *Schedule* beyond December 31, 1992?

2. Is the Applicant entitled to payment of supplementary medical and rehabilitation benefits under section 6 of the *Schedule*?

3. Is the Insurer entitled to repayment of weekly income benefits paid to the Applicant after December 31, 1992?

5 The Applicant also claims interest on any outstanding amounts owing, and her expenses incurred in the hearing.

**Result:**

6

1. The Applicant is entitled to payment of weekly income benefits in the amount of \$637 under section 12 of the *Schedule*, from January 1, 1993 to March 24, 1993, in respect of the motor vehicle accident of July 10, 1990.

2. The Applicant is entitled to payment of supplementary medical and rehabilitation benefits under section 6 of the *Schedule*, for treatment related to her residual psychological injuries, as set out in the decision.

3. The Applicant is entitled to interest on outstanding amounts owing to her, under the provisions of section 24 of the *Schedule*.

4. The Applicant is entitled to her expenses in the arbitration under section 282(11) of the *Insurance Act*. I remain seized with regard to the amount of expenses payable.

5. The Insurer is entitled to repayment of weekly income benefits paid to the Applicant after March 24, 1993, pursuant to section 27 of the *Schedule*, and under the provisions of the agreement reached between the parties on September 10, 1992.

**Hearing:**

7 The first hearing day was on September 10, 1992 before arbitrator Naylor. On that date, the parties held settlement discussions which resulted in an interim agreement. The hearing reconvened in North York, Ontario, on January 19, 20, February 1 and concluded on February 3, 1993, before me, Janice Mackintosh, arbitrator.

8 Pursuant to the provisions of section 282(5) of the *Insurance Act*, the Executive Director of Arbitrations referred questions related to the medical condition of the insured person to the chair of the medical and rehabilitation advisory panel (M.R.A.P.) on April 13, 1993. The final report of the advisor to M.R.A.P. was delivered to the Commission on June 9, 1993. Counsel for the parties examined the advisor to M.R.A.P. in respect of his assessment of the Applicant and his reports concerning her psychological condition on September 20, 1993.

9 Present at the Hearing:

Applicant:	Gail MacNeill
Applicant's	Mr. Rene Liebs-Benke
Representative:	Barrister and Solicitor
Insurer's	Mr. Nestor Kostyniuk
Representative:	Barrister and Solicitor
	Mr. A. Wayne Edwards
	Barrister and Solicitor
	(filling in for Mr. Kostyniuk on February 1, 1993)

Witnesses: There were nine witnesses including the Applicant. Dr. Sergio Bacal also attended to respond to questions concerning his report prepared at the request of the Chair of M.R.A.P. The names of the witnesses are as follows:  
Maria Moraes  
Dr. Pat Poon, emergency room physician, York Central Hospital  
Gail MacNeill, Applicant  
Dr. Michele Stamp Macartney-Filgate, neuropsychologist  
Maureen Dwight, physiotherapist

Dr. Rae Lake, family physician  
Dr. Howard S. Seiden, family medicine  
Dr. Hugh U. Cameron, orthopaedic surgeon

*Exhibits:* There were seventeen Exhibits filed in the hearing. A list of documents filed is appended as Schedule 1. Cases considered are appended as Schedule 2.

10 The proceedings were recorded by Ms. Laurie Tobis and Ms. Joanne McConnell of Rosenberger, Weir, Macdonald.

**Evidence and Findings:**

11 On July 10, 1990, Ms. MacNeill's vehicle was struck while she was approaching the ramp onto Highway 404 from Highway 7. The impact spun the Applicant's car around so that it faced a truck approaching head-on. The truck struck the driver's side of the Applicant's car, shattering the windshield and spinning the car across several lanes of traffic. During the accident, the Applicant thought she was about to die. Fortunately, she was wearing a seatbelt and does not recall striking her body against the inside of the car. The Applicant was 26 weeks pregnant with her second child at the time of the accident. After the accident, the Applicant's first thoughts were for the well-being of her unborn child. The Applicant gave birth to a healthy baby girl, without incident, on October 10, 1990, three months after the motor vehicle accident.

12 The Applicant has been involved in two further motor vehicle accidents since the accident of July 10, 1990. The second accident occurred in a parking lot some time in July 1991. This was a minor accident. The Applicant states that she experienced no adverse effects from it. The third accident occurred on November 25, 1992. The Applicant states that the third accident aggravated her medical condition and set her several stages back in her recovery from the first accident. She applied for, and, at the date of the hearing, was receiving rehabilitation benefits from a second insurer, in respect of the third accident, to fund her ongoing physiotherapy sessions. The Applicant recently gave birth to her third child.

13 The Applicant maintains that she continues to suffer a substantial inability to perform the essential tasks of her occupation due to the effects of the motor vehicle accident of July 10, 1990 and is therefore entitled to payment of weekly income benefits beyond December 31, 1992, from this insurer.

14 The Insurer claims that the Applicant no longer suffers a substantial inability to perform the essential tasks of her occupation and therefore no longer qualifies for weekly income benefits from this insurer. The Insurer claims that the Applicant's present symptoms are consciously exaggerated or, if real, they are unrelated to the first motor vehicle accident.

***The Applicant's pre-accident employment:***

15 There is no dispute concerning the Applicant's pre-accident occupation. She was a self-employed freelance word processor, with expertise in desk top publishing, computer graphics and computer spread sheets. The physical requirements of her job included the ability to type quickly, to sit at the computer for long periods of time, to use the telephone, and to drive a car. The job also required attention to detail, and the ability to work to a deadline, under time pressures. The Applicant did most of her work out of her home.

***The Applicant's post-accident complaints:***

*a) Physical Injuries:*

16 Immediately following the accident of July 1990, the Applicant attended at the emergency ward of York Central Hospital, where she was examined and released the same day (Exhibit 2). She initially complained of pain in her left shoulder, forehead, upper thighs and lower abdomen. The Applicant saw her regular family physician, Dr. Rae Lake, the next day. He initially diagnosed the Applicant as suffering from a flexion extension injury to the neck and low back, and contused right abdomen with round ligament stretch, secondary to her pregnancy (Exhibit 1, Tab la, and Exhibit 8).

17 The Applicant began physiotherapy in July 1990, which reduced her neck pain and improved her range of movement. In his report dated September 11, 1990, Dr. Lake reported that the Applicant's neck pain had improved. However, he observed that the Applicant's round ligament abdominal pain might not resolve until "after delivery of her baby and therefore she might not be able to return to work until that time". Dr. Lake reported that:

It appears that sitting for long periods of time aggravates her abdominal pain and therefore I do not believe that she can perform the normal tasks related to her work such as sitting at a computer." (Exhibit 1, Tab 1a, pages 1 and 2)

18 Following the delivery of her daughter in October 1990, the Applicant's abdominal pain slowly resolved, as confirmed by Dr. Lake's report dated November 10, 1991 (Exhibit 1, Tab 1c, page 2).

19 The Applicant did not return to work following the delivery of her child. She increasingly complained of sharp wrist pain, arm pain, numbness and tingling of her hands and fingers (particularly of the right arm). She attributed these problems to the motor vehicle accident. Dr. Lake testified that he initially suspected that these symptoms were caused by bilateral carpal tunnel syndrome attributable to the Applicant's pregnancy, rather than the motor vehicle accident. Dr. Lake commented that carpal tunnel syndrome often occurs in the later stages of pregnancy and spontaneously disappears sometime after delivery.

20 During the three years following the Applicant's accident, Dr. Lake considered several provisional or working diagnoses in an effort to account for, and treat, the Applicant's symptoms. He organized further medical investigation and follow-up by specialists, on the basis of his provisional diagnoses.

21 In his Form 4 medical report dated December 13, 1990, Dr. Lake made a provisional secondary diagnosis of post-traumatic fibromyositis, in connection with the Applicant's symptoms of headache, shoulder and upper back pain, arm and hand pain (Exhibit 1, Tab 2b). The Applicant testified that in January 1991, Dr. Lake referred her to Dr. Charles Godfrey, a rehabilitation specialist at Wellesley Hospital, in connection with her suspected fibromyositis. In his report dated January 22, 1991, Dr. Godfrey noted he could not detect a great deal of abnormality, and concluded the Applicant was continuing to improve and that no further treatment from him was warranted (Exhibit 1, Tab 2a).

22 In January 1991, approximately three months after the birth of her daughter and six months after the accident, the Applicant attempted to return to her freelance work as a word processor. She testified that she was unable to continue due to sharp pains in both wrists (but primarily her right wrist) when they were bent.

23 Dr. Lake testified that the Applicant's symptomatology became more related to her arms and the function of her hands and fingers, particularly on the right side. In February and March 1991, he discussed with the Applicant the possibility of her returning to her work as a word processor. Dr. Lake noted a target date of March 22, 1991 in his clinical notes and records (Exhibit 8, page 9). He testified that no physical harm or damage would have accrued to the Applicant had she attempted a return to work at that time, however the Applicant felt unable to do so.

24 In May 1991, the Applicant was assessed by Dr. Hugh U. Cameron, an orthopaedic surgeon, at the request of the Insurer. In his report dated May 15, 1991, Dr. Cameron recorded the Applicant's statement that she had not returned to her work since the accident as "she cannot type because all her fingers are numb". Dr. Cameron concluded that the Applicant suffered a musculoligamentous strain of her neck. However, he opined that from an orthopaedic perspective, she was fit to return to her former activities. He suggested that the numbness in her hands and fingers might be due to a thoracic-outlet-type syndrome.

25 The possibility of continuing carpal tunnel syndrome or thoracic outlet syndrome affecting the Applicant's hands and wrists was further investigated and ruled out by Dr. Charles M. Godfrey, in nerve conduction studies, and by Dr. Timothy L. Winton, a thoracic surgeon (Exhibit 1, Tab 1d, page 3 and Tab 3a, page 2). In discussions with Dr. Lake, Dr. Winton queried whether the Applicant's symptoms were psychosomatic rather than physiological complaints.

26 The Applicant subsequently began to complain of left knee pain, which she believed was related to her accident. There was no evidence that her left knee had been struck during the July 10, 1990 accident.

27 In August 1991, the Insurer arranged for the Applicant to be examined by Dr. Howard Seiden, a specialist in the area of family medicine. During the course of their interview, Dr. Seiden questioned the Applicant about her work history. In his report dated August 22, 1991, Dr. Seiden noted:

She has not done any work at all since the accident. She says that she cannot do it because it hurts. She has problems using the key pad with her fingers. That is because of the intermittent numbness in her fingers (Exhibit 1, Tab 6a, page 4).

28 Dr. Seiden was unable to find any evidence of serious organic pathology to account for the pain and paraesthesia in the Applicant's hands, wrists and fingers, nor the "constant" pain in her left knee (Exhibit 1, Tab 6b, page 6). Dr. Seiden ultimately concluded that the Applicant was fit to return to her work.

29 In September 1991, Dr. Lake arranged for an evaluation of the Applicant to be conducted by F.I.T. for Work Centre. The physical therapist and occupational therapist who conducted the evaluation concluded:

Ms. MacNeill suffers from cervical myofascial syndrome as well as signs of abnormal tension on the neurovascular system on the right arm, causing pain and perceived sensory changes in the right upper extremity, as a result of a motor vehicle accident of July 10, 1990. Ms. MacNeill's injuries have resulted in physical, functional and psychosocial deficits which are preventing her return to work.

30 The F.I.T. for Work report concluded by recommending that Ms. MacNeill be seen by a neuropsychologist for a complete evaluation.

31 Myofascial syndrome and post-traumatic fibromyositis are both conditions relating to the inflammation of muscle and its fibrous tissue. I prefer the conclusion of Dr. Charles Godfrey, the specialist consulted by Dr. Lake, in relation to the Applicant's musculoskeletal complaints, to the opinions expressed by the therapists at F.I.T.

32 The conclusions of F.I.T. regarding signs of abnormal tension on the neurovascular system on the right arm are inconsistent with the specific test results and physical findings of Dr. Godfrey and Dr. Winton. I prefer the findings of the two medical specialists consulted by Dr. Lake, to the opinions expressed by the clinicians at F.I.T.

33 At the request of the Insurer, Dr. Cameron saw the Applicant a second time in October 8, 1992. He could find no organic or physiological basis for the Applicant's continuing complaints (Exhibit 1, Tab 5c). In his final report dated October 8, 1992, Dr. Cameron found:

There is now very clear and objective evidence of exaggeration of symptoms. This complaint of pain in the wrist on simple passive wrist movements including simple pronation and supination is obviously a figment of the plaintiff's imagination. I do not really think there is any connection between her wrist complaints and the motor vehicle accident. I cannot find anything wrong with her wrists." (Exhibit 1, Tab 5c).

34 In oral testimony, the Applicant listed the physical symptoms which she believes are preventing her return to work. These include problems with her shoulder, arm, and hand function (at times the Applicant holds her right arm stiffly by her side), lack of finger control, as well as continuing headaches, upper back and neck problems. The Applicant testified that the headaches are primarily linked to her neck problems.

35 The Applicant conceded that between August and November 1992, her headaches, neck and upper back problems were improving with regular therapy. The Applicant was able to sew a Halloween costume for her eldest child in fall of 1992. However, the accident of November 25, 1992 exacerbated her neck and upper back problems, and caused new

problems in her mid to low back area. At present, she is continuing physiotherapy and massage therapy for her neck, back, arms and hands.

36 In his oral testimony, Dr. Lake could offer no firm diagnosis or explanation for some of the Applicant's ongoing complaints. Dr. Lake commented that his job was to treat the whole person and, as such, he did not attempt to isolate the psychological, social and emotional aspects of the Applicant's complaints from the purely physical. However, when pressed, he conceded that from a purely physiological perspective, the Applicant's injuries were modest and that she should be able to return to her work.

37 The preponderance of the medical evidence throws doubt on the existence of any continuing organic problem. There is, however, agreement that any organic problem that may remain from the accident cannot explain the *extent* of the pain the Applicant is reporting. Dr. Lake speculated that aspects of the Applicant's complaints are likely related to psychological rather than physical factors.

38 Counsel for the Applicant conceded that, apart from the exacerbation of the Applicant's neck and back strain in the car accident on November 25, 1992, the problems which continue to prevent the Applicant from returning to her pre-accident work, although originally rooted in her physical injuries, are now largely psychological. Counsel for the Applicant conceded that there was no physiological basis or explanation for the continuing pain, numbness and dysfunction of the Applicant's arms, hands and fingers. In his submissions, Counsel for the Applicant concluded that the Applicant continues to suffer pain and dysfunction based upon a complex psychological response to the motor vehicle accident.

39 I find that, but for the intervening accident of November 25, 1992, the Applicant's neck and upper back injuries and the related headaches were resolving. As early as September 1990, Dr. Lake noted improvement in the Applicant's neck pain. Ms. Maureen Dwight, the physiotherapist who treated the Applicant from August 1992, up to and following the motor vehicle accident of November 25, 1992, confirmed that the frequency and intensity of the Applicant's neck, upper back and headache pains were substantially diminishing prior to November 25, 1992. Had that accident not intervened, I find that the Applicant's physical injuries would likely have resolved sufficiently to allow her to perform her essential tasks as a word processor by December 31, 1992.

40 I make no finding whether the Applicant continues to suffer a substantial inability to perform the essential tasks of her occupation as the result of the intervening accident of November 25, 1992. The issues related to the November 25, 1992 accident and the responsibilities, if any, of the relevant insurer are not before me in this hearing.

41 On the balance of the evidence, I accept Dr. Lake's provisional diagnosis that the Applicant's arm, hand, wrist, and finger dysfunction, numbness, and pain more likely arose from a carpal tunnel syndrome, which resolved spontaneously after the end of the Applicant's pregnancy, than as a result of the July 1990 motor vehicle accident. In testimony, Dr. Lake was unable to specifically relate these complaints to the motor vehicle accident of July 1990. Dr. Cameron and Dr. Seiden also concluded that these symptoms arose independently from the motor vehicle accident.

42 I also agree with the suggestions of Dr. Lake and Dr. Winton that the Applicant's ongoing arm, hand and wrist pain likely have more to do with emotional, social and psychological factors than physical factors. Dr. Lake testified that he has been the Applicant's family doctor since 1985, and in that time he has found no reason to doubt the sincerity of the Applicant's complaints.

*b) Psychological Injuries:*

43 On August 25, 1992, Dr. Michele Stampf Macartney-Filgate undertook a neuropsychological assessment of the Applicant, at the request of Dr. Lake. The evaluation was directed toward the issue of whether Ms. MacNeill sustained a head injury in the motor vehicle accident of July 1990, and whether this might be contributing to her continuing symptoms. She also considered possible emotional factors involved in the Applicant's continuing symptoms (Exhibit 1,

Tab 7b, page 1). In her meeting with Dr. Macartney-Filgate, the Applicant identified her major problem as pain resulting from the accident. In particular, she reported problems with right arm function (Exhibit 1, Tab 7a, page 5).

44 Dr. Macartney-Filgate concluded that there was no compromise in neuropsychological function that would be compatible with traumatic brain injury (Exhibit 1, Tab 7a, page 5).

45 However, in the course of her assessment, Dr. Macartney-Filgate noted that:

Emotionally, she [the Applicant] demonstrates symptoms of resolving post-traumatic stress disorder, but assessment also reveals more generalized and marked psychological disturbance, with prominent features of depression, concern with physical symptoms, and problematic social relationships. (Exhibit 1, Tab 7b, page 2).

46 Dr. Macartney-Filgate concluded that Ms. MacNeill's emotional dysfunction was due, in part, to her motor vehicle accident and the resulting physical injuries. She noted that other life stresses, such as a discordant relationship, were likely contributing to the Applicant's emotional difficulties. In oral testimony, Dr. Macartney-Filgate stated that the motor vehicle accident was a "significant but not the only" contributing factor to the Applicant's psychological and emotional distress.

47 Dr. Macartney-Filgate testified that physical injury accompanied by pain can contribute to the development of emotional problems which, in turn, can exacerbate and prolong the experience of pain. This heightened experience of pain and the resulting emotional response operate in a circular fashion to amplify the effects of each. Dr. Macartney-Filgate noted that the Applicant's physical symptoms appeared to be exacerbated by emotional stress, but she indicated that the Applicant's profile was "not consistent with a classic conversion reaction" (Exhibit 1, Tab 7a, page 5).

48 Dr. Macartney-Filgate stated that nothing in the Applicant's test results suggested exaggeration or dissimulation. She considered the Applicant's complaints to be genuine and felt that the Applicant was not malingering. I accept Dr. Macartney-Filgate's conclusion about the sincerity of the Applicant's complaints. It was based upon the results of tests specifically designed to screen for such factors. Furthermore, her conclusion is supported by the opinion of Dr. Lake, which was developed over his long association with the Applicant. In contrast, the opinion of Dr. Cameron was based upon a physical assessment of the Applicant, without the benefit of an ongoing relationship.

49 Dr. Macartney-Filgate's assessment did not specifically address the issue of the Applicant's readiness to return to work. However, when questioned during cross-examination, she opined that given the degree of emotional disturbance exhibited by the Applicant in the summer of 1992, she would not, on balance, have recommended the Applicant return to work at that time.

*c) Referral to M.R.A.P.:*

50 Pursuant to the provisions of section 282(5) of the *Insurance Act*, the Executive Director of Arbitrations referred questions related to the psychological condition of the insured person to the chair of the medical and rehabilitation advisory panel (M.R.A.P.). Dr. Sergio Bacal, the psychologist chosen by M.R.A.P., was directed to consider whether the Applicant suffered any psychological injury as the result of the motor vehicle accident of July 10, 1990 and, if so, whether this injury rendered the Applicant substantially unable to perform her essential tasks as a word processor.

51 In an initial report dated April 28, 1993, Dr. Bacal reviewed the various medical reports and records, marked as part of Exhibit 1, and the clinical notes and records of Dr. Lake, marked Exhibit 8. On the basis of this review, Dr. Bacal concluded that the Applicant had developed features of a post-traumatic stress disorder as well as depressive symptomatology, which continued to affect her in a residual manner (Exhibit 15, pages 6 and 7).

52 Dr. Bacal stated that these psychological sequelae appeared to be only partially related to the Applicant's motor vehicle accident of July 10, 1990, and seemed to be significantly compounded by unrelated psycho-social problems. He

also queried whether the Applicant's current emotional problems may have been significantly exacerbated by her latest accident of November 25, 1992. Dr. Bacal noted:

In my view, the only way to adequately disentangle the differential contribution from each of these accidents to her present psychological difficulties would be to conduct an updated psychological assessment (Exhibit 15, page 7).

Dr. Bacal goes on to note:

Unfortunately, the psychological assessment on file [by Dr. Macartney-Filgate] did not specifically address the issue of Ms. MacNeill's readiness to return to work. However, the nature of the findings documented in that report suggest to me that Ms. MacNeill was not disabled from work on grounds of psychological or mental impairment (Exhibit 15, page 8).

53 At the request of the Ontario Insurance Commission, Dr. Bacal conducted an independent psychological assessment of the Applicant on June 1, 1993, in order to evaluate the Applicant's current psychological status and emotional functioning. On the basis of this assessment, Dr. Bacal prepared a further report dated June 9, 1993, marked as Exhibit 16. In his report, Dr. Bacal concluded:

All the evidence taken into account, I do not believe that at the time of the assessment Ms. MacNeill exhibited a disabling psychological disorder or psychiatric condition or that her emotional symptoms (namely, anxiety, depression and residual post-traumatic stress features) were significant enough to disqualify her from regular or modified work or to largely interfere with her abilities to perform her duties as a home maker. This certainly is not to deny or minimize the impact of her 1990 car accident on her psychological status; however, it highlights the non-disabling nature of her symptoms.

54 Dr. Bacal also reported that the Applicant's right hand/arm symptoms were not causally related to her emotional problems or residual post-traumatic stress features, nor were they psychologically-based conversion symptoms.

55 In oral testimony, Dr. Bacal distinguished between the Applicant's subjective impression of pain and disability, and impairment of function due to psychological factors. Although the Applicant's perception of pain is genuine, and although she continues to suffer from chronic pain, residual post-traumatic stress disorder, and depression, Dr. Bacal found no psychiatric condition, mental or psychological disorder, severe enough to render her unable to perform the essential tasks of her employment. Dr. Bacal concluded that the Applicant's psychological problems were not severe enough to justify her subjective assessment of her own disability. More particularly, Dr. Bacal did not find that the Applicant suffered a major depressive disorder at the time of his assessment in June 1993.

***Evidence subsequent to the conclusion of the hearing:***

56 Subsequent to the conclusion of the hearing on February 3, 1993, Dr. Lake arranged for an assessment of the Applicant's psychological, rehabilitation and treatment needs by Dr. Ronald Kaplan, a clinical psychologist experienced in pain management, recommended by Dr. Macartney-Filgate in her report dated November 19, 1992 (Exhibit 1, Tab 7a, page 6). Dr. Kaplan's assessment included observation and interviews of the Applicant in her home on January 30, 1993, and in his office on March 24, 1993. Dr. Kaplan prepared a report dated March 30, 1993, which was offered into evidence by counsel for the Applicant on September 20, 1993, the date set for the examination by Dr. Bacal. Counsel for the Insurer raised no objection to the filing of the report after the conclusion of the Applicant's case. The report was marked as Exhibit 17.

57 Dr. Kaplan appears to share Dr. Bacal's view of the Applicant's depression. He observed that the Applicant did not appear to be depressed, demoralized or sad, but rather hopeful and optimistic. The Applicant reported periods of low mood associated with pain flare-ups and the frustration of feeling that she was unable to work and do things. She did not appear to be showing the level of distress reported by Dr. Macartney-Filgate in August 1992. Dr. Kaplan found the Applicant to be genuine, and felt that she was sincere about her problems.



58 The Applicant exhibited a psychological profile suggestive of major depression and marked psychological distress, when examined by Dr. Macartney-Filgate in August 1992. However in January and March 1993, Dr. Kaplan noted improvement in the Applicant's psychological condition. In April 1993, upon reviewing the reports and findings of others, Dr. Bacal concluded that the Applicant's psychological problems were of a non-disabling nature. Dr. Bacal's initial opinion was confirmed following his own examination and assessment of June 1993.

59 On the balance of the evidence, I find that the Applicant suffered a substantial inability to perform the essential tasks of her occupation due to her psychological condition until March 24, 1993, the date upon which Dr. Kaplan concluded his assessment of the Applicant at her home and in his office. Beyond March 24, 1993, the Applicant continued to suffer psychological distress of a *non-disabling* nature, as the result of the July 1990 motor vehicle accident.

***Causal connection between psychological distress and the July 1990 accident:***

60 Dr. Bacal could not determine the precise contribution made to the Applicant's present psychological condition by such factors as her pre-existing personality characteristics, the difficulties in her common-law relationship, and the subsequent motor vehicle accident of November 1992. However, Dr. Bacal was of the view that the July 1990 accident was the trigger for her psychological problems. He testified that the first motor vehicle accident likely exacerbated her pre-existing personality traits. Other life stressors, such as family relationships and a further pregnancy, likely contributed to her deterioration. The November 1992 accident resulted in further sensitization and vulnerability. All of these factors had a cumulative affect upon the Applicant. However, Dr. Bacal concluded that the July 1990 accident was clearly a significant event in her present personal disruption.

61 Under sections 12 of the *Schedule*, entitlement to weekly income benefits is triggered by the relationship between a substantial inability and a motor vehicle accident, which are connected by the words "as a result of". Under section 6 of the *Schedule*, entitlement to supplementary medical and rehabilitation benefits is limited to those who sustain physical, psychological or mental injury "as a result of" an accident. The fundamental question for determination is whether there is a causal connection between the Applicant's psychological injury and the original accident, sufficient to warrant compensation under either section.

62 The Insurer's view is that, on the medical evidence, the psychological disability would not have occurred following the accident of July 1990 were it not for a host of other factors unconnected to the accident. In the Applicant's view, the motor vehicle accident was the catalyst which has brought all of these other factors into play. I find that the motor vehicle accident need not be the sole or exclusive cause of the resulting psychological injury. It is sufficient that the motor vehicle accident made a significant contribution to the development of the Applicant's present chronic pain and emotional distress. Neither Dr. Bacal nor Dr. Macartney-Filgate found that other factors in the Applicant's life overshadowed the role of the July 1990 accident in the development of the Applicant's injuries of a psychogenic nature. On balance, I am convinced that the motor vehicle accident of July 1990 made a significant contribution to the development of the Applicant's psychological injuries. She therefore qualifies for benefits under sections 6 and 12 of the *Schedule*.

***Supplementary medical and rehabilitation benefits:***

63 The issue of the Applicant's entitlement to ongoing supplementary medical and rehabilitation benefits was originally not before me. However, counsel for the Applicant requested that this issue be included when he appeared before me on September 20, 1993 in connection with the examination of Dr. Bacal. Counsel for the Insurer did not object to the inclusion of this further issue. Accordingly, I heard the submissions of both parties in respect of this issue on September 20, 1993.

64 The Applicant seeks payment of the rehabilitation and therapy programs proposed by Dr. Ronald Kaplan in his report dated March 30, 1993 (Exhibit 17). Dr. Kaplan recommended pain education, strategies, and cognitive reframing to deal with the emotional consequences of pain. He suggested phobic desensitization with her treating psychologist to

assist her with her fear of taking her children in her car and possibly parent education to deal with an overprotective attitude towards her daughter.

65 Dr. Kaplan also suggested that the Applicant's overprotectiveness of her daughter Michelle was affecting her reintegration into the work force and her willingness to expand her horizons. He suggested that this issue be explored by the Applicant's family physician and other specialists such as a paediatric or child psychologist.

66 Dr. Macartney-Filgate recommended follow-up and treatment of the Applicant by a psychologist, including participation in a pain-management program that includes a behavioural, psychologically-oriented approach in addition to physical treatment.

67 Dr. Bacal endorsed the recommendations set forth in Dr. Macartney-Filgate's reports. Dr. Bacal noted that such treatment should be directed towards the Applicant's post-traumatic stress features and depressive symptoms and should address the issue of equipping the Applicant with additional stress and pain-coping skills. Dr. Bacal suggested that the program should be time limited to weekly therapy sessions for between three to six months, with a further evaluation at that time, in the event that further treatment is sought or recommended. Dr. Bacal also encouraged the Applicant to continue her physiotherapy program in conjunction with an increased level of daily activity, to obtain maximum results in combating her psychological symptoms. In his report dated April 28, 1993 (Exhibit 15), Dr. Bacal emphasized that none of this recommended therapy should interfere with the Applicant's ability to return to work or detract her from pursuing that option.

68 All three psychologists supported the continuation of the Applicant's physical rehabilitation program in conjunction with ongoing treatment from a psychologist. Dr. Kaplan stated that the physiotherapy program the Applicant is currently involved in appears comprehensive and appropriate. I accept the recommendations of the three psychologists concerning these programs. I also accept Dr. Bacal's suggestion regarding the time limited nature of the psychological treatment.

69 In connection with the Applicant's difficulties with her arm, wrist, hand and finger function, Dr. Kaplan recommended a functional, vocational, evaluation to assess the Applicant's employability, along with the services of a senior rehabilitation consultant, as well as the possibility of a voice-activated computer in the event of permanent hand disabilities. The evidence has failed to establish a sufficient connection, on either a psychological or organic basis, between the motor vehicle accident of July 1990 and the Applicant's current problems with the function of her arms, wrists, hands and fingers. The Insurer's responsibility for rehabilitation extends only to those injuries that are the result of the July 1990 accident. Although Dr. Kaplan's suggestions may well benefit the Applicant, the Insurer is not responsible for paying the cost of a functional, vocational, evaluation, the services of a rehabilitation consultant, or a voice-activated computer.

70 Similarly, I find that the Insurer is not responsible for the cost of therapy from a paediatric or child psychologist for the Applicant and her daughter. Dr. Kaplan could not determine what non-accident factors were contributing to the Applicant's anxiety concerning her daughter. However, he refers to the cumulative effect of *numerous* accidents as a significant factor. I find that the evidence does not establish a sufficient link between the Applicant's high anxiety concerning her daughter and the motor vehicle accident of July 1990.

***Insurer's claim for repayment:***

71 In accordance with the agreement reached between the parties on September 10, 1993, the Insurer continued to pay weekly income benefits to the Applicant beyond January 1993, on a "without prejudice" basis. The Insurer is entitled to recover weekly income benefits paid to the Applicant beyond March 24, 1993.

**Expenses:**

72 The Applicant claims her expenses in the arbitration. An award for expenses may be made under section 282(11) of the *Insurance Act*, which provides as follows:

The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

73 The prescribed expenses and maximum amounts are set out in Schedule 1 of the Dispute Resolution Practice Code and in Ontario Regulation 664 (R.R.O. 1990), Dispute Resolution Expenses.

74 In the case of *Ralph McCormick and Economical Mutual Insurance Company*, Commission File No. A-000139, Arbitrator Naylor stated that the discretion to award expenses should be exercised in light of the objective of facilitating applicants' access to relatively inexpensive, speedy and informal adjudication of disputes. Arbitrator Naylor concluded that expenses should be awarded unless it is determined that the application was manifestly frivolous or vexatious, or that the applicant's conduct unreasonably prolonged the proceedings.

75 The Applicant's claim was reasonable and successful in part. The Applicant is entitled to her expenses incurred in connection with the arbitration. I remain seized of this issue in the event of a dispute concerning the amount of such expenses payable.

**Order:**

76

1. The Applicant is entitled to payment of weekly income benefits in the amount of \$637 under section 12 of the *Schedule*, from January 1, 1993 to March 24, 1993, in respect of the motor vehicle accident of July 10, 1990.

2. The Applicant is entitled to payment of supplementary medical and rehabilitation benefits under section 6 of the *Schedule*, for treatment related to her residual psychological injuries, as set out in the decision.

3. The Applicant is entitled to interest on outstanding amounts owing to her, under the provisions of section 24 of the *Schedule*.

4. The Applicant is entitled to her expenses in the arbitration under section 282(11) of the *Insurance Act*. I remain seized with regard to the amount of expenses payable.

5. The Insurer is entitled to repayment of weekly income benefits paid to the Applicant after March 24, 1993, pursuant to section 27 of the *Schedule*, and under the provisions of the agreement reached between the parties on September 10, 1992.

**Appendix 1**

**List of Documents before the Arbitrator:**

Report of Mediator, dated February 11, 1991

Original Application for Appointment of an Arbitrator, dated March 6, 1992

Response by Insurer, dated March 25, 1992

Reply by Insured Person, dated March 30, 1992

Letter from Arbitrator Naylor to parties, confirming interim agreement reached between parties on September 20, 1992, dated September 14, 1992

Second Application for Appointment of an Arbitrator, dated January 4, 1993, redefining issues

Letter from Arbitrator Naylor to parties, confirming agreement regarding calculation of weekly income benefit, and deferring issue of rehabilitation benefits, dated January 18, 1993

**List of Exhibits:**

1. Joint Book of Medical Documentation (20 medical reports)
2. Medical records (4 pages) from York Central Hospital
3. Report from Dixie X-Ray Associates Ltd., dated July 15, 1985
4. Disability Questionnaire, Royal Insurance, dated 18/7/90 (4 pages)
5. Application for Accident Benefits (Form 1)
6. Curriculum Vitae of Dr. Michele Stamp Macartney-Filgate (9 pages)
7. Curriculum Vitae of Maureen Dwight (6 pages)
8. Clinical Notes and Records of Dr. Rae Lake (16 pages)
9. Curriculum Vitae of Dr. Rae Lake (2 pages)
10. Curriculum Vitae of Dr. Howard S. Seiden (7 pages)
11. Page 1 of Tear-off Form on Royal Insurance letterhead, dated 2/8/91
12. Page 1 of Tear-off Form on Royal Insurance letterhead, dated 2/12/91
13. Consent Letter of Dr. Howard S. Seiden, dated August 22, 1991
14. Curriculum Vitae of Dr. Hugh U. Cameron (37 pages)
15. April 28, 1993 Report of Dr. Sergio Bacal (9 pages)
16. June 9, 1993 Report of Dr. Sergio Bacal (10 pages)
17. March 30, 1993 Report of Dr. Ronald Kaplan (8 pages)

**List of Cases, Articles & Authorities:**

**A. Articles**

Tab 1 Miller, Rickey, "Psychological Approaches to Chronic Pain: Assessment and Treatment", (1989) 9 Advocates Quarterly, 148

Tab 2 Corey, David, "Chronic Pain Syndrome - Identification and Management", (1988 8 Advocates Quarterly, 223

Tab 3 Gregory, George et al., "A Comparative Examination of the Judicial Treatment of Chronic Pain Syndrome in Canada", 76

Tab 4 Davis, H. (VAN), "Chronic Pain Syndrome and Somatoform Pain Disorder", (1988) 46 The Advocate, 877

**B. Case-law**

Tab 5 *Del Bello v. Hagel*, (1980) 34 A.R. 242 (Alta. C.A.), Clement, J.A.

Tab 6 *Seer v. Royal Insurance Co. Ltd.* [1980], I.L.R. 905 (Ont. Co. Ct.) MacNab, Co. Ct. J.

**C. Commission Decisions**

Tab 7 *Flemming v. Wawanesa Mutual Insurance* [1992], O.I.C. A-000406 (Naylor, S.)

Tab 8 *Khan v. Pilot Insurance Co.* [1993], O.I.C. A-000984 (Palmer, J.)

Tab 9 *Tritto v. Wellington Insurance Co.* [1992], O.I.C. A-001178 (Mackintosh, J.)

Tab 10 *Power v. Allstate Insurance Co. of Canada* [1992], O.I.C. A-000322 (Rotter, F.)

**Authorities of Insurer:**

Malleson, Andrew "Whiplash: Folly and Fakery", (1990) *Humane Medicine*, Volume 6, 193

**Footnotes**

- 1 Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.