# KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 5**

Date: **2024 01 15**
Docket: QBG-SA-00058-2021
Judicial Centre: Saskatoon

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BETWEEN:

CHRISTOPHER POINTER

Plaintiff

- and -

SASKATCHEWAN GOVERNMENT INSURANCE and CINDY ROMING

Defendants

**Counsel:**

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| Jonathan S. Abrametz | for the plaintiff |
| Scott R. Spencer and Ryan D. Kitzul | for the defendants |

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FIAT — CURRIE J.
January 15, 2024

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[1] In this putative class action Christopher Pointer sues Saskatchewan Government Insurance ("SGI"). He also sues Cindy Roming, whom he identifies as having been SGI's Director of Rehabilitation Services from 1998 to 2016.

[2] On this application Mr. Pointer seeks an order certifying the action as a class action. For the following reasons I am dismissing the application.

## A. Nature of the claim

[3] The nature of this claim is as I described in *Pointer v Saskatchewan Government Insurance*, 2023 SKKB 90 at paras 2-6:

> [2] The claim in this action relates to the no-fault insurance system that is described in *The Automobile Accident Insurance Act*, RSS 1978, c A-35 ("*AAIA*").
>
> [3] As set out in his notice of application for certification, Mr. Pointer proposes that this action be certified on behalf of the following class:
>
> > (b) … "all persons who were in a motor vehicle accident in the Province of Saskatchewan since January 1, 1995, who applied to SGI for no-fault benefits pursuant to Part VIII of the AAIA, including their estates, but excluding those [who] made a tort election pursuant to sections 40.2 and 40.3 of the AAIA at the time of their motor vehicle accident, and also excluding those who died of a cause related to the accident";
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> [4] Mr. Pointer proposes that the claim asserted in the class action would be as follows:
>
> > (d) … the class asserts claim against the Defendants of failing in its duty to assess unscheduled permanent impairments, unlawfully. This includes malfeasance in public office, institutional breach of the duty of utmost good faith in fair dealing, and unlawful concealment [of] institutional decision to frustrate access to unscheduled permanent impairment benefits. …
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> [5] Mr. Pointer proposes that the remedy claimed would be as follows:
>
> > (d) … The class claims as relief against SGI and Roming declaration by the Court as to their unlawful conduct, and damages including, general damages, punitive damages, damages for malfeasance in public office, breach in the utmost duty of good faith, aggravated damages for mental distress, special damages, and costs to indemnify the class;
>
> [6] In his affidavit Mr. Pointer refers to a schedule of permanent impairments that is identified in the *AAIA* and in *The Personal Injury Benefits Regulations*, RRS c A-35, Reg 3. By law, he says, SGI is required to assess even permanent impairments that do not appear on that schedule. His allegation in this action is that SGI has failed to assess such unscheduled permanent impairments, for him and for others.

[4] In his statement of claim, Mr. Pointer provides examples of unscheduled

permanent impairments:

> 24. … chronic pain, psychological symptoms and conditions (such as post-traumatic stress disorder), post-concussive symptoms (such as headaches, nausea, and dizziness), and limited range of motion of the neck and spine.

[5] In his statement of claim Mr. Pointer sets out the following details of his allegation that the defendants did not assess unscheduled permanent impairments:

(a) The defendants "made an operational decision not to investigate or assess Unscheduled Permanent Impairments in no-fault claims and the Defendant Roming issued directives pursuant to this operational decision" (paragraph 25).

(b) Ms. Roming "was the principal engineer of this decision and was responsible for its implementation and enforcement between 1998 and 2016" (paragraph 26).

(c) In a February 6, 2008 email Ms. Roming directed the medical consultants "that they must not assess Unscheduled Permanent Impairments using either the American Medical Association's *Guides to the Evaluation of Permanent Impairment* or the rating criteria under *The Manitoba Public Insurance Corporation Act*" (paragraph 43).

(d) Ms. Roming "repeatedly directed SGI's medical consultants *not to assess* Unscheduled Permanent Impairments on any file" (paragraph 36).

(e) "Based on that directive, in almost all cases between 1998 and the date on which this Statement of Claim was filed, when any of SGI's medical consultants were conducting an assessment of permanent

impairments, they ignored evidence of possible MVA-related Unscheduled Permanent Impairments" (paragraph 37), and those consultants "did not assess any no-fault claimant's Unscheduled Permanent Impairments" (paragraph 38).

(f) SGI provided such directives notwithstanding SGI knowing that it was obliged by *The Automobile Accident Insurance Act*, RSS 1978, c A-35 ("*AAIA*"), to assess unscheduled permanent impairments, and notwithstanding SGI's published policy, which provides (paragraph 55):

> If a customer's permanent impairment is not listed on the prescribed schedule of permanent impairments, SGI shall determine a percentage for the permanent impairment using the prescribed schedule as a guide.

[6] In his statement of claim Mr. Pointer asserts two causes of action: misfeasance in a public office, and breach of the duties of utmost good faith and fair dealing.

[7] As to relief, in his statement of claim Mr. Pointer claims that the defendants' conduct, combined with the passage of time, "has caused the loss and spoliation of evidence regarding the existence, causation, nature, and extent of MVA-related Unscheduled Permanent Impairments", constituting a "loss of chance" (paragraph 82), causing harm to "every person who applied to SGI for no-fault compensation in relation to an MVA-related injury" (paragraph 83). That harm, he says, includes "mental distress, loss of economic status, loss of savings and interest on savings, impairment of domestic capacity, and impairment of familial relations" (paragraph 86).

[8] Mr. Pointer claims as relief against Ms. Roming:

(a) a declaration that she was instrumental in implementing and enforcing the bad faith policy; and

(b) punitive damages exceeding $50,000.

[9] Mr. Pointer claims as relief against SGI:

(a) a declaration that SGI is liable to each class member for misfeasance in a public office;

(b) a declaration that SGI breached its duty of good faith and fair dealing;

(c) general damages exceeding $10,000 for each class member;

(d) damages for misfeasance in a public office exceeding $10,000 for each class member;

(e) damages for breach of SGI's duty of utmost good faith exceeding $10,000 for each class member;

(f) damages and aggravated damages for mental distress exceeding $10,000 for each class member;

(g) punitive damages exceeding $20,000 for each class member;

(h) special damages; and

(i) pre-judgment interest.

[10] The claimed relief does not include damages for no-fault benefits that should have been paid but that were not paid. The claim in this court action is not grounded on SGI's failure to *pay* no-fault benefits for unscheduled permanent impairment. The *AAIA* specifically prohibits such a court action, restricting the pursuit

of payment of no-fault benefits to the procedures identified in the *AAIA*.

[11] Rather, the claim is grounded on SGI's alleged failure to *assess* unscheduled permanent impairment. That failure, Mr. Pointer alleges, tainted SGI's administration of all no-fault claims. The relief claimed is not tied to whether any class member received full or any payment of no-fault benefits. The relief claimed is tied to the allegation that all class members had their no-fault claims administered in "a system that was designed to yield incomplete and partially investigated decisions" (Mr. Pointer's brief on the certification application, paragraph 91).



## B. Criteria for certification

[12] The criteria for certifying an action as a class action are set out in s. 6(1) of *The Class Actions Act*, SS 2001, c C-12.01:

> **6**(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;
>
> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

## C. Cause of action

[13] As set out in s. 6(1)(a) of *The Class Actions Act*, certification of an action as a class action requires that the court be satisfied that "the pleadings disclose a cause of action".

[14] Justice Ottenbreit discussed this requirement in *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142, 408 DLR (4th) 661, at paras 29 and 64-65:

> [29] … Judges hearing certification applications must be mindful that the hearing operates as a meaningful screening device and there should be more than symbolic scrutiny of the evidence. Despite this, the issues are essentially procedural. A consideration of the merits of the claim is neither necessary nor warranted. The process does not allow for an extensive assessment of the complexities and challenges a plaintiff may face in establishing its case. It is within these broad boundaries that the task of the hearing judge must be accomplished.
>
> …
>
> [64] … In my view, s. 6(1)(a) can continue to be an effective screening mechanism for class action claims even when the plain and obvious test is applied. In *Pro-Sys* [2013 SCC 57, [2013] 3 SCR 477], the Supreme Court of Canada very clearly has stated that the test applicable to a provision identical to s. 6(1)(a) of the *CAA* is the plain and obvious test. For all these reasons, the plain and obvious test is now preferable.
>
> [65] Accordingly, in the future whether the requirements of s. 6(1)(a) of the *CAA* [*The Class Actions Act*] have been met will be assessed on the basis of the same test as a motion to dismiss, the facts as pleaded are assumed true and the requirement is satisfied unless it is plain and obvious that the plaintiff's claim cannot succeed. [Emphasis added]

[15] Both causes of action that are identified in the statement of claim are grounded in the factual allegation that the defendants knowingly and intentionally failed to comply with the provisions of the *AAIA* by directing that unscheduled permanent impairments not be assessed.

[16] The defendants point to challenges facing the plaintiff in proving that factual allegation, referring to the evidence that is relied on by Mr. Pointer. As evidence that the defendants intentionally directed medical consultants not to assess unscheduled permanent impairments, Mr. Pointer relies in part on this February 6, 2008 email from Ms. Roming to medical consultants:

> If you are doing a permanent impairment assessment and you see that an impairment is not listed in the Schedule of Permanent Impairments (Appendix B), please do not reference the AMA Guides or the MPI Schedule or any other similar document. The Automobile Accident Insurance Act is quite clear on this point where it states:
>
> **Evaluation of permanent impairment**
> **154**(1) The insurer shall evaluate an insured's permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.
>
> (2) If an insured's permanent impairment is not listed on the prescribed schedule of permanent impairments, the insurer shall determine a percentage for the permanent impairment using the prescribed schedule as a guide.
>
> 2002, c.44, s.30.
>
> There have been quite a number of Appeal Commission decisions that have reiterated using the prescribed schedule as a guide. Please send me a copy of any assessments you do of any PI's not listed in the schedule. That way we may look at adding them when we re-visit the Regulations. Thanks. …

[17] Mr. Pointer asserts that this email establishes both that Ms. Roming was in a position to direct medical consultants, and that the defendants directed that medical consultants conduct no assessment of unscheduled permanent impairments. The defendants observe that, in fact, the email directs that *assessment of unscheduled permanent impairments must be conducted in accordance with the AAIA*, by conducting the assessments with reference to the schedule and not with reference to external sources.

[18] As further evidence that the defendants intentionally directed medical consultants not to assess unscheduled permanent impairments, Mr. Pointer relies on

testimony, in other proceedings, from persons who have served as medical consultants for SGI in no-fault claims. He interprets that testimony as supporting the allegation that the defendants directed that there be no assessment of unscheduled permanent impairments, and as supporting the allegation that medical consultants did not assess unscheduled permanent impairments. The defendants observe that the import of what was said by those consultants is not clear.

[19] The defendants' arguments about proof of the factual allegations are arguments to be raised at trial. On this application, as discussed by Justice Ottenbreit in *Pederson*, I am not concerned with whether the factual foundation for a cause of action can be proven. As to whether the pleadings disclose a cause of action I am concerned only with whether, assuming the facts as pleaded are true, it is plain and obvious that the claim cannot succeed.

[20] The defendants point also to an ongoing discussion in case law about whether a plaintiff may bring what is essentially a bad faith claim in connection with a no-fault benefit decision. That legal question has not been resolved, however, and so it does not constitute a reason for concluding that the plaintiff's claim cannot succeed.

[21] The defendants further suggest that this claim effectively is an appeal of assessment of no-fault benefits. The *AAIA* provides for appeals from assessments of no-fault benefits (s. 191), and it prohibits a court action that effectively constitutes such an appeal (s. 188). Mr. Pointer, though, has striven to frame this action *not* in terms of pursuing no-fault benefits. He has avoided pleading that class members suffered a loss as a result of not receiving benefits. Instead, he pleads that class members have suffered as a result of having to pursue their no-fault claims in a scheme that was tainted by the defendants' failure to follow the law as it relates to unscheduled permanent impairment.

[22] It is open to the defendants to raise this argument, too, in defence of the claim at trial. At this stage, however, it is not plain and obvious that the defence will

succeed. Therefore I do not find, in the allegation that this action effectively constitutes an appeal, a basis for concluding that the plaintiff's action cannot succeed.

[23] The statement of claim identifies two causes of action: misfeasance in a public office, and breach of the duties of utmost good faith and fair dealing. The statement of claim identifies the fundamental underlying factual allegation, which is that the defendants knowingly and intentionally failed to comply with the provisions of the *AAIA* by directing that unscheduled permanent impairments not be assessed.

[24] If that factual allegation is proven at trial, then the plaintiff may succeed on one or both of the pleaded causes of action. Proof of that factual allegation may provide sufficient factual foundation for a finding of misfeasance in a public office (*Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263, at para 32) or a breach of the duties of utmost good faith and fair dealing (*Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30, [2006] 2 SCR 3, at para 63).

[25] Thus the plaintiff's claim could succeed if the fundamental factual allegation is proven at trial. Put another way, it is not plain and obvious that the plaintiff's claim would not succeed if that factual allegation is proven at trial.

[26] The first criterion for certification is met.

**D. Identifiable class**

[27] Mr. Pointer proposes the following class:

> all persons who were in a motor vehicle accident in the Province of Saskatchewan since January 1, 1995, who applied to SGI for no-fault benefits pursuant to Part VIII of the AAIA, including their estates, but excluding those [who] made a tort election pursuant to sections 40.2 and 40.3 of the AAIA at the time of their motor vehicle accident, and also excluding those who died of a cause related to the accident

### 1. Law

[28] In *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158, at para 21, Chief Justice McLachlin addressed this criterion:

> [21] The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, *Class Actions in Canada* (1996), at para. 4.205; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).

[29] In *Jameson Livestock Ltd. v Toms Grain & Cattle Co.*, 2006 SKCA 20, 279 Sask R 281, at para 28, Justice Smith discussed the necessary connection between the class members and the action:

> [28] However, the mere fact that a group of people is identifiable is not sufficient to render them a class for the purpose of a class action. In addition, there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. In effect, the class description must describe persons who in fact have a claim asserted in the statement of claim. This has often been interpreted to mean that all members of the proposed class must have at least a colourable claim and that the class definition should not be over-inclusive or under-inclusive, sweeping in those who do not have a claim against the proposed defendants or arbitrarily excluding others who share the same cause of action. See, for example, *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.), *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.). …

### 2. Rational connection

[30] Here Mr. Pointer proposes a class that includes almost every no-fault claimant in the province since no-fault was introduced, on the basis that the harm done to each was having his or her no-fault claim administered in "a system that was designed to yield incomplete and partially investigated decision". I conclude that the proposed class is too broad because it includes people who were *unaffected* by the alleged misconduct of the defendants.

[31] Since the proposed class includes almost all no-fault claimants, regardless of the severity or duration of their injuries, the following people reasonably can be expected to be included in the proposed class:

(a) people who did not suffer *any* permanent impairment, having suffered only minor and temporary injuries;

(b) people who suffered a *scheduled* permanent impairment, but not an *unscheduled* permanent impairment;

(c) people who still are in the process of having their claims assessed, because of the recency of their injuries or because time is required before a determination may be made as to whether a person's injuries have reached the point of permanent impairment;

(d) people who were not entitled to no-fault benefits because they were entitled to "other compensation" such as workers' compensation benefits: s. 202(2) of the *AAIA*;

(e) people who settled their no-fault claims, by agreeing that all of their claims had been resolved.

[32] None of these people was affected, in terms of the processing of their

claims, by the alleged misconduct of the defendants. Whatever SGI did with the claims of persons who suffered unscheduled permanent impairment had nothing to do with the processing of these people's claims. In this sense, there is no rational connection between these members of the proposed class and the cause of action.

[33] Mr. Pointer, though, presents this claim on the basis that all class members suffered harm by way of having their claims administered in a system that had been tainted by SGI's alleged misconduct. There are two aspects to this assertion. First, I repeat the above observation that whatever SGI did with the claims of persons who suffered unscheduled permanent impairment had nothing to do with the processing of the claims of the people listed above. There simply was no harm to any of those people arising from SGI having taken an unlawful approach to administering the claims of some other people.

[34] Second, part of Mr. Pointer's assertion is that every member of the class suffered, as a result of the defendants' alleged misconduct, "mental distress, loss of economic status, loss of savings and interest on savings, impairment of domestic capacity, and impairment of familial relations". In that regard I consider the example of a notional no-fault claimant who suffered a broken arm in a motor vehicle accident and who, after a period of healing, returned to full health with no lasting effects. One may presume that this claimant received no-fault benefits through the assessment (and, potentially, the appeal) process.

[35] I struggle to understand how that notional claimant could have suffered mental distress as a result of the defendants' approach to the claims of people who suffered unscheduled permanent impairment. I find no basis for thinking that the notional claimant even was aware of such other people or their claims, let alone for concluding that such knowledge would have caused the notional claimant mental distress.

[36] Similarly I find no basis for seeing how this notional claimant, as a result of the defendants' alleged treatment of other persons' unscheduled permanent impairment, suffered a loss of economic status, or a loss of savings, or a loss of interest on savings, or impairment of domestic capacity, or impairment of familial relations.

[37] In short, I see no connection – let alone a rational connection – between this notional claimant and the causes of action. The same conclusion applies to the other persons that I have described above at paragraph 31. There is no rational connection between those persons and the cause of action.

[38] It would not be appropriate to certify a class action in which the class includes persons who were unaffected by the conduct that is the subject of the action. Only those with unscheduled permanent impairment could have been affected by the alleged misconduct. Only those with unscheduled permanent impairment have a rational connection to the cause of action.

[39] The proposed class definition is overbroad because it includes people who do not have a rational connection to the cause of action.

### 3. Minimum number of class members

[40] *The Class Actions Act* provides in s. 2:

> **"class"** means two or more persons with common issues respecting a cause of action or a potential cause of action;

[41] Justice Smith said in *Jameson* at para 28:

> [28] … In addition, the application for certification must provide a minimum evidentiary basis for the court to be satisfied that there is a class of more than one person who share the common claim… [Emphasis added]

[42] Justice Nordheimer expanded on this requirement in *Bellaire v*

*Independent Order of Foresters* (2004), 19 CCLI (4th) 35 (QL) (Ont Sup Ct) at para 33:

> [33] … In my view, before the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant. [Emphasis added]

[43] This approach was adopted by Justice Rooke in *Buelow v Morrissey*, 2013 ABQB 277, 562 AR 79, at paras 37-39.

[44] Mr. Pointer has identified only himself as a class member. He has not identified any other person who would fall within the proposed class, and he is unaware of any specific person who would fall within the proposed class. For example, in questioning on his affidavit the following exchange took place:

> Q So what has SGI done to you that you feel is unfair?
>
> A Right now I don't – I can't – I don't know.
>
> Q Okay. Are you aware of anything SGI, through the no-fault program, has done to any other individual that is unfair?
>
> A I don't know. I don't know what other people's – what they've been assessed for.
>
> [Transcript, page 74, lines 7-14]

[45] To fulfill this requirement, there must be evidence that there exists at least one more person who falls within the proposed class *and* who is desirous of having the claim determined through class action. There is before me no evidence that provides a basis for concluding that there is such a person.

[46] In so saying, I recognize that there is at least one other person in the province who has been a no-fault claimant since 1995 – perhaps even one who suffered an unscheduled permanent impairment. That recognition alone is not enough, though. Such a person also must want to have the claim that is asserted in this action determined

by way of a class action.

[47] It is possible that such other person, who is desirous of having the common complaint determined through a class action, exists. That possibility arises, however, from mere speculation. As Justice Smith pointed out in *Jameson*, there must be "a minimum evidentiary basis" for concluding that such a person exists. There is no such evidentiary basis here. Here there is only Mr. Pointer's speculation that "there must be" such a person. Speculation does not constitute a minimum evidentiary basis.

[48] I am not persuaded that there exists another no-fault claimant who is desirous of having the claim determined through class action. Furthermore, with reference to my analysis regarding the identifiable class, I am not persuaded that there exists another no-fault claimant who suffered an unscheduled permanent impairment and who is desirous of having the claim determined through class action.

[49] For this reason, this criterion is not met.

### 4. Conclusion as to identifiable class

[50] The proposed class definition is too broad. Possibly this deficiency could be remedied by crafting a class definition that captures only those no-fault claimants who have had unscheduled permanent impairment.

[51] In any event, the proposed class does not include two or more persons. There is no evidentiary basis for concluding that this deficiency can be remedied. Consequently, this criterion is not met.

## E. Common issues

### 1. Law

[52] Under this criterion, s. 6(1)(c) of *The Class Actions Act* requires that "the claims of the class members raise common issues, whether or not the common issues

predominate over other issues affecting individual members".

[53] Justice Belobaba addressed such a provision in *Simpson v Facebook*, 2021 ONSC 968 at para 43:

> [43] The applicable law on this point is not in dispute. It is fundamental to class action certification that the plaintiff adduce some evidence (some basis-in-fact) for both the existence and commonality of each of the proposed common issues. Here, the focus is on the first part of this requirement, the evidentiary basis for the *existence* of a proposed common issue. As the Court of Appeal noted in *Fulawka* [2012 ONCA 443, 352 DLR (4th) 1]:
>
> > While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings.
>
> [Emphasis in original]



### 2. Need for class definition

[54] The essence of common issues is that they are common to the class members. To this point I do not have an identifiable class before me. It is not possible to determine issues that are common to the class members when the class has not been identified.

[55] For this reason it is not possible on this application for me to be satisfied that the common issues are appropriate. This criterion is not met.

[56] Having said that, I make some observations about the proposed common issues.

### 3. Proposed common issues

[57] Initially Mr. Pointer proposed the following common issues:

> 1. Statutory interpretation of Permanent Impairment from the Automobile Accident Insurance [A]ct and the Personal Injury Benefits [R]egulations;

2. General issues of fact;

3. Malfeasance in public office;

4. Institutional bad-faith;

5. Limitation periods; and

6. Damages.

[58] Now, as appears in his counsel's brief that was filed shortly before the hearing of his certification application, Mr. Pointer proposes the following as the common issues:

> 158. In this Application for Certification, the Plaintiff proposes the following common issues [Proposed Common Issues or PCI's]:
>
> Issues of Statutory Interpretation
>
> (1) In regard to section 2(1)(gg) of the *AAIA* which provides, "'permanent impairment' includes a permanent anatomical or physiological deficit, a permanent disfigurement, a permanent acquired brain injury or any other prescribed permanent impairment", is that definition exhaustive to the list found in the regulations?
>
> (2) Throughout the Class Period, pursuant to section 154(2) of the *AAIA* and its predecessor, section 156(2), did SGI have a mandatory obligation to assess every no-fault claim for Unscheduled Permanent Impairments?
>
> (3) If the answer to Proposed Common Issue (2) is "yes", did SGI have a necessary and ancillary mandatory obligation to investigate all no-fault claims for possible Unscheduled Permanent Impairments?
>
> (4) Throughout the Class Period, pursuant to section 152 of the *AAIA* and its predecessor, section 154, were no-fault injured insureds entitled to a timely investigation and assessment of all motor vehicle accident-related permanent impairments, regardless of whether the permanent impairments were listed in the *Schedule*?
>
> (5) During the Class Period, pursuant to section 83(1) of the *AAIA* does the provision that SGI must comply with the *AAIA* leave SGI with discretion to abandon any of its mandatory obligations in a manner that nullifies a statutory right of claimants?

(6) In relation to SGI's statutory ancillary powers, must those powers be exercised in a manner which is consistent with the terms of the *AAIA*?

General Issues of Fact

(7) During the Class Period, SGI's operational decision in implementing s. 154 evolved. Initially, SGI implemented s. 154 to consider unscheduled permanent impairment benefits and then stopped doing so. Why did SGI change its operational implementation of s. 154? The public-facing policy documents SGI published in relation to the right of injured insureds to compensation for permanent impairments and SGI's duties to investigate and assess permanent impairments in no-fault claims?

(8) During the Class Period, what written or unwritten, operational decisions did SGI take in relation to the investigation and assessment of permanent impairments in no-fault claims?

(9) Based on the answer to Proposed Common Issue (8), in respect of SGI's operational decisions *not to investigate or assess* Unscheduled Permanent Impairments during the Class Period, what was its origin and by what processes was it taken, implemented, communicated, enforced, reviewed, and affirmed?

(10) Based on, on the one hand, the answers to PCI's (1) to (6) in relation to the nature of SGI's lawful obligations, and on the other hand, the answers to PCI's (7) to (9) regarding SGI's actual conduct during the Class Period, were SGI's operational decisions for investigating and assessing Unscheduled Permanent Impairments inconsistent with its obligations and the rights of claimants?

(11) If the answer to Proposed Common Issue (10) is "yes", what is the nature and extent of the inconsistency?

(12) If the answer to PCI (10) is "yes", and based on the answer to PCI (11), what are the direct and indirect, class-wide and province-wide effects of SGI's operational decisions not to investigate or assess Unscheduled Permanent Impairments?

(13) If the answer to Proposed Common Issue (10) is "yes", during the Class Period, to what extent were the medical consultants, the Defendant Roming or any in-house lawyers of SGI aware that its operational decisions for the administration of permanent impairment benefits might be inconsistent or were inconsistent with the *AAIA*?

(14) If the answer to Proposed Common Issue (10) is "yes", following each of the following judicial or quasi-judicial decisions, what internal deliberations occurred within SGI, including within its legal department, regarding the question of whether SGI should commence assessing Unscheduled Permanent Impairments in no-fault claims pursuant to section 154(2) of the *AAIA*:

(a) the decision of Justice Klebuc in the Court of Queen's Bench in *Chernoff v Saskatchewan Government Insurance*, 2002 SKQB 383, which held that pain-related chronic impairments are compensable permanent impairments under Part VIII of the *AAIA* (at para 15) which was set aside on procedural grounds 2004 SKCA 166 at para 11; and

(b) the decision of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 SCR 504, 2003 SCC 54, in which the Court found that the blanket exclusion of chronic pain from eligibility for workers' compensation in Nova Scotia was unconstitutional. The Court stated that fears about possible fraudulent claims could not justify depriving injured workers of compensation to which they are entitled. (para 117)

(15) At any and all material times, what was the legal analysis underlying SGI's interpretations of its lawful obligations pursuant to sections 83(1), 87, and 91(2)(a) generally, and in relation to compensation for permanent impairments in particular, the definition of "permanent impairment["] in the *AAIA* and sections 152 and 154(2) of the *AAIA* and their predecessors?

(16) During the Class Period, did the essential duties of the Manager of Rehabilitation Services of SGI include authority to oversee policy development approval and authority to make, implement, enforce, and review operational decisions in relation to permanent impairment benefits under section 152 and 154 of the *AAIA*?

Misfeasance in Public Office

(17) During the Class Period, was SGI a public body for the purposes of the tort of misfeasance in public office?

(18) During the Class Period, did SGI's medical consultants know that SGI's operational decision *not to investigate or assess* Unscheduled Permanent Impairments was contrary to the rights of the Plaintiff and members of the Proposed

Class pursuant to section 152 of the *AAIA* and contrary to SGI's obligations pursuant to section 154(2) of the *AAIA*?

(19) Did SGI exert direct control over the assessment of permanent impairments by SGI's medical consultants, such as to render SGI vicariously liable for the conduct of its medical consultants?

(20) Is SGI directly or vicariously liable for the misfeasance in acts and omissions of its employees or agents involved in this unlawful scheme?

(21) Did SGI, its employees or agents know that its operational decision *not to investigate or assess* Unscheduled Permanent Impairments was contrary to the rights of the Plaintiff and members of the Proposed Class pursuant to section 152 of the *AAIA* and contrary to SGI's obligations pursuant to sections 2(1)(gg), 83(1) and 154(2) of the *AAIA*?

(22) Did SGI, its employees or agents know that its operational decision *not to investigate or assess* Unscheduled Permanent Impairments could not be sustained by a reasonable interpretation of sections 2(1)(gg), 152, 83(1) and 154(2) of the *AAIA*?

(23) Were SGI's operational decisions not to investigate or assess Unscheduled Permanent Impairments in no-fault claims the legal cause of harm to the Plaintiff and members of the Proposed Class?

(24) If the answer to common issue (23) is "yes", what is the nature and extent of that harm?

(25) Based on the answers to Proposed Common Issues (17) to (24), does SGI's [*sic*] meet the elements of misfeasance in public office?

(26) Insofar as SGI's medical consultants implemented SGI's operational decision not to investigate or assess Unscheduled Permanent Impairments in individual cases and those medical consultants worked under professional fee-for-service contracts, did SGI exert sufficient direct control over their conduct to render SGI vicariously liable for their conduct?

(27) Does the statutory limitation of liability for good faith acts and omissions of SGI's employees pursuant to section 207 of the *AAIA* shield SGI from liability for the claim in misfeasance in public office?

(28) During her tenure as Manager of Rehabilitation Services

of SGI from approximately 1998 to 2015, was the Defendant Roming a public office-holder?

(29) In the course of the Defendant Roming's participation in operational decisions regarding the administration of no-fault claims, did she have particular knowledge that SGI's operational decision *not to investigate or assess* Unscheduled Permanent Impairments was contrary to the *AAIA*?

(30) Did she know that that operational decision was likely to cause harm to the Plaintiff and members of the Proposed Class?

(31) If the answer to Proposed Common Issue (30) is "yes", did the Defendant Roming's misfeasance cause harm to the Plaintiff and members of the Proposed Class?

(32) If the answer to common issue (31) is "yes", what is the nature and extent of that harm?

(33) Based on the answers to Proposed Common Issues (28) to (31), did the Defendant Roming's conduct constitute misfeasance in public office?

(34) In relation to the liability of the Defendant Roming, does the limitation of liability for good faith acts and omissions of SGI's employees in section 207 of the *AAIA* shield her from this claim?

Institutional Bad Faith

(35) At all material times, did SGI owe the Plaintiff and members of the Proposed Class a duty of utmost good faith and fair dealing at an institutional level?

(36) If the answer to common issue (42) is "yes", what is the nature and scope of that duty in relation to the statutory right of the Plaintiff and members of the Proposed Class in relation to their statutory right to compensation for MVA-related Unscheduled Permanent Impairments?

(37) Given the nature of SGI's duty of utmost good faith and fair dealing as set out in the answer to Proposed Common Issue (36) and based on the factual answers to PCI's (7) to (15), did SGI's operational decision not to investigate or assess Unscheduled Permanent Impairments during the Class Period have an institutional quality so as to constitute an institutional breach of SGI's duty of good faith and fair dealing?

(38) If the answer to Proposed Common Issue (37) is "yes",

was that breach the legal cause of harm to the Plaintiff and members of the Proposed Class?

(39) If the answer to Proposed Common Issue (38) is "yes", what is the nature and extent of that harm?

(40) If the answer to Proposed Common Issue (38) is "yes", does the statutory limitation of liability for good faith acts and omissions of SGI and its employees pursuant to section 207 of the *AAIA* provide SGI with any relief?

Limitation Periods

(41) What statutory limitation periods, if any, apply to the claims of the Class Members?

(42) If SGI's conduct constitutes breach of the duty of utmost good faith, since SGI has maintained this unlawful scheme continuously since 1995, does SGI's continuous bad faith renew the limitation period and bar a limitation defence to the action in bad faith?

(43) Based on the answer to common issue (7) in relation to the publication of false and misleading policies, did SGI fraudulently conceal its failure to assess Unscheduled Permanent Impairments in first-instance decisions?

Damages

(44) Depending on the answers to Proposed Common Issues (25) to (27) and (38) to (40), is this an appropriate case for the declaratory relief against SGI as set out in the Statement of Claim?

(45) Depending on the answers to Proposed Common Issues (25) to (27) and (38) to (40), and as against SGI, are members of the Proposed Class entitled to general damages, and if so, in what amount?

(46) Depending on the answers to Proposed Common Issues (25) to (27) and (38) to (40), and as against SGI, are members of the Proposed Class entitled to punitive damages, and if so, in what amount?

(47) If the answer to Proposed Common Issue (33) is "yes" and PCI (34) is "no", what award of damages is appropriate against the Defendant Roming?

[Plaintiff's brief, paragraph 158]

[Emphasis in original]

### 4. Some concerns about the proposed common issues

[59] I will not review the proposed common issues in detail, since doing so cannot be done until the class has been identified. I suggest, however, that eventual common issues would be made less daunting by addressing the following observations.

[60] The meaning of some of the proposed common issues is not clear (e.g., Issues 1 and 7). Issue 7 has controverted assumptions built into it. There appears to be duplication among some of the proposed common issues (e.g., Issues 2, 3 and 4; Issues 19 and 26; and Issues 21 and 22).

[61] Issue 46 refers to assessment of punitive damages. Chief Justice Richards said in *Ross v Canada (Attorney General)*, 2018 SKCA 12, [2018] 5 WWR 669, at paras 91-92:

> [91] However, *punitive* damages are a different story. They are not compensatory in nature and thus may be amenable to class-wide determination in a way that general damages typically are not. A number of class actions have been certified with punitive damages as a common issue. For example, in *Rumley* [2001 SCC 69, [2001] 3 SCR 184], at paragraph 34, the Supreme Court found both the appropriateness and the amount of punitive damages to be amenable to resolution as common issues. *Cloud* [(2004), 247 DLR (4th) 667 (Ont CA)] is to the same effect. There, the Court of Appeal for Ontario certified questions as to whether punitive damages were warranted and, if so, the amount of such damages. See also: *Good v Toronto Police Services Board*, 2014 ONSC 4583 at paras 79-80, 375 DLR (4th) 200, affirmed 2016 ONCA 250 at paras 76-82, 396 DLR (4th) 411; *Merck Frosst Canada Ltd. v Wuttunee*, 2009 SKCA 43 at paras 156-158, [2009] 5 WWR 228.
>
> [92] I acknowledge that the question of whether the quantum of punitive damages should be determined by way of a common issue can be somewhat vexed. The potential complication is that, according to *Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595, punitive damages are to be awarded only if compensatory damages are inadequate to punish the defendant. But, given the approach taken in *Rumley*, in particular, it seems appropriate to include the quantum question here as a common issue. Nonetheless, it is presumably possible that the common issues trial judge could ultimately conclude the quantification of punitive damages (as opposed to Canada's and

> Saskatchewan's liability for them) must await the determination of the individual damage awards, or is otherwise not appropriate in light of how the litigation has evolved. In that eventuality, he or she would be entitled to either defer the quantification of punitive damages until after awards of individual compensatory damages have been determined or, as appropriate, decide not to proceed with the quantification of punitive damages by way of a common issue. [Emphasis in original]

[62] Thus punitive damages typically are appropriate for common issues. In his statement of claim, though, Mr. Pointer claims punitive damages on the basis that the defendants' alleged unlawful conduct caused each class member mental distress, loss of economic status, loss of savings and interest on savings, impairment of domestic capacity, and impairment of familial relations. This allegation seems to require proof of those consequences for each class member in order for punitive damages to be awarded. Based on Mr. Pointer's estimate, that would require as many as 140,000 individual assessments before punitive damages could be awarded (although that number could be expected to be lower if a class were identified more restrictively, as I have discussed).

[63] If this matter were proceeding to certification, attention would have to be paid to whether punitive damages would be determined as a common issue or as an individual issue.

### 5. Conclusion as to common issues

[64] This criterion is not met.

## F. Preferable procedure

### 1. Law

[65] This criterion, set out in s. 6(1)(d) of *The Class Actions Act*, requires that "a class action would be the preferable procedure for the resolution of the common issues".

[66] Addressing preferable procedure in *Hollick*, Chief Justice McLachlin referred at paragraph 27 to "the three principal advantages of class actions -- judicial economy, access to justice, and behaviour modification".



**2. Need for class definition and common issues**

[67] Chief Justice McLachlin went on in *Hollick* to say at paragraphs 28 and 30:

> [28] The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": *Report of the Attorney General's Advisory Committee on Class Action Reform* [Ministry of Attorney General, February 1990], at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.
>
> …
>
> [30] The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. … I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, *given all of the circumstances of the particular claim*, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (1993), at p. 27.
>
> [Emphasis (italics) in original; emphasis (underlining) added]

[68] Since the class is not defined and the common issues are not established, I am unable to determine whether a class action is the preferable procedure.

### 3. Insufficient number of class members

[69] In any event, already I have concluded that there is no identifiable class in this action, because only one class member has been identified. For that reason, a class action is not the preferable procedure for the resolution of any issues in this action. The preferable procedure is the continuation of this action as a regular court action with Mr. Pointer as the plaintiff.

### 4. Conclusion as to preferable procedure

[70] This criterion is not met.

## G. Representative plaintiff and litigation plan

### 1. Representative plaintiff

[71] The representative plaintiff, as set out in s. 6(1)(e) of *The Class Actions Act*, is someone who:

> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[72] In *Pederson* at para 100, Justice Ottenbreit addressed what is needed in a representative plaintiff:

> [100] The governing principles respecting the appointment of representative plaintiffs in the context of the issues at play have been recently summarized by Perell J. in *Fehr v Sun Life Assurance Company of Canada*, 2015 ONSC 6931, 56 CCLI (5th) 15:
>
> > [335] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the

> representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, 2007 CanLII 27970 (ON SC), [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 C.A.).
>
> ...
>
> [337] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46, [2001] 2 SCR 534] at para. 41. The representative plaintiff should be able to instruct counsel and exercise independent judgment concerning the important issues that will arise during the progress of the litigation: *Martin v. Astrazeneca Pharmaceuticals Plc*., 2012 ONSC 2744 (CanLII) at para. 367, affirmed, 2013 ONSC 1169 (CanLII), 2013 ONSC 1169 (Div. Ct.); *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 (CanLII) at paras. 54-55.
>
> [338] Although the court must be satisfied that the proposed representative plaintiff is a genuine plaintiff who will vigorously and capably prosecute the interests of the class, because the plaintiff will have advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff, and the court will be sceptical of the defendant's arguments based on the personality of the candidate: *Shah v. LG Chem Ltd.*, 2015 ONSC 3257 (CanLII) at paras. 26-27.
>
> [339] The critical ingredients or factors for the determination of the representative plaintiff criterion are the competence of counsel and on the qualification of the plaintiff as reflected in the litigation plan, which in a sense is a synthesis of the other certification criteria: *Shah v. LG Chem Ltd.*, [2015 ONSC 3257] at para. 32.
>
> I agree with this summary of the law.
>
> [Emphasis added]

[73] In *Sondhi v Deloitte Management Services LP*, 2018 ONSC 271, 45 CCEL (4th) 217, at para 44, Justice Perell provided this elaboration on the topic:

> [44] … A proposed representative plaintiff must demonstrate autonomy and a minimum level of general knowledge about the nature of class proceedings and his or her responsibilities to give instructions on behalf of the class. …

[74] The evidence that is before me establishes that Mr. Pointer does not meet these requirements. While it is evident that Mr. Pointer wishes this action to continue

as a class action, it also is evident he knows little about the allegations or the issues, and little about some documents that are highly relevant to the claim. It is evident that he has left much of the conduct of this action to his wife and to his counsel.

[75] I reach this conclusion on the basis of Mr. Pointer's evidence in cross-examination on his affidavit:

> Q You don't think she's getting at the fact that you are taking a position with SGI that there's unscheduled permanent impairments that weren't properly assessed?
>
> A I don't know. I just – I don't know about the charts or anything of that, so I don't know what the chart is or what it means.
>
> Q Do you know what the schedule is?
>
> A No.
>
> Q No? You're a representative Plaintiff in a class action involving 150,000 potential Plaintiffs based on your pleadings and you don't know what the schedule is?
>
> A I don't know.
>
> Q Okay. You would agree this – Amanda was representing you and that this email was sent. Any issue that way? Do you want to consult with her if you want?
>
> A No.
>
> Q No?
>
> A I'm sure she sent it.
>
> Q Okay. This is in 2020, and in 2022 there was a new assessment which you could have appealed and raised any issues whatsoever about your permanent impairment.
>
> A I don't know. I don't – I – yeah.
>
> Q Okay. In your mind is there any – any reason that in response to that February 9th, 2022, correspondence to you that you could not have appealed that on the basis that you feel your actual permanent impairment exceeds the 86 percent you've been paid for?
>
> A I don't know. I – yeah. I don't know. I just – Amanda does – looks after that stuff for me 'cause I would forget it right away.
>
> Q Okay. Sitting here today is there – can you think of any reason whatsoever that you would not have appealed? If your argument

is that your actual impairment exceeds 86 percent, you've been paid for 86 percent, that you would not appeal that to the Court or the Commission to make your arguments with able counsel or able assistance to say I'm actually at 87 or more?

A I don't know. I just – I don't know.

Q Did you discuss the February 9th, 2022, letter with your counsel?

A I don't remember.

Q Did you discuss the potential of an appeal with any legal counsel?

A I don't remember. It's – I know – yeah. I don't know. I don't remember.

[Transcript, page 44, line 10, to page 46, line 11]

…

MR. SPENCER: Switching gears here so just need a different notepad. Okay. So you've attached a transcript to your affidavit. Herbers, which one is that?

MR. KITZUL: Which one?

MR. SPENCER: Herbers

MR. KITZUL: Herbers, I believe, is tab – paragraph 27, Exhibit A.

Q MR. SPENCER: Exhibit A. Okay. Do you know Mr. Herbers?

A No, I don't.

Q. Okay. Never heard of that name before?

A No.

Q Have no idea what his circumstances are whatsoever?

A No.

Q Okay. How did you get the transcript from his process, his SGI process?

A I believe my wife went onto SGI's site, and it has all the appeals and everything from them.

Q Okay. So the transcript of the hearing was acquired from the SGI website?

A I'm not even sure.

MR. SPENCER: Would you like to consult with your spouse or with Mr. Abrametz 'cause I don't think that's likely.

*(Off the Record)*

A It was all done with – my lawyer had everything.

Q MR. SPENCER: Okay. So your lawyer has provided you with materials off another client's file?

A I don't think it was – I don't know. Yeah. I don't know how it was.

Q Okay, and that transcript – you've read that transcript. It relates to another individual's personal medical information?

A I don't know. I don't know what it's about. I don't even know what page it's on.

[Transcript, page 64, line 6, to page 65, line 19]

…

Q So what has SGI done to you that you feel is unfair?

A Right now I don't – I can't – I don't know.

Q Okay. Are you aware of anything SGI, through the no-fault program, has done to any other individual that is unfair?

A I don't know. I don't know what other people's – what they've been assessed for.

[Transcript, page 74, lines 7-14]

…

Q MR. SPENCER: Okay. You've had a chance to review paragraph 37, and –

A Yeah.

Q Did you read most of that page 'cause it all kind of relates to the same thing?

A Okay.

Q Okay. So what directive are you referring to?

A I believe Mr. Abrametz was looking into – was doing this, was part of this.

Q Okay. Your entire claim is based on this directive. Do you know what directive you're talking about?

A Okay. What do you mean by directive?

[Transcript, page 82, lines 12-24]

…

Q MR. SPENCER: Okay. Do you know what directive is being referred to in the statement of claim?

A I don't know what directive means. I'm an idiot, so you're going to have to tell me what directive means.

Q You don't know what directive means.

A No.

[Transcript, page 86, lines 14-21]

…

Q Okay. So let's have a look at Exhibit D to your affidavit. Is that the directive you're referring to? And you can check with counsel if you want to because I get a sense that this is counsel's show.

A I – I don't know.

Q Okay. Are you aware of any other written directives?

A I don't know.

Q Are you aware of any other directives unwritten, and directives, directions, anything of that nature? You know what a direction is?

A Yeah.

Q Are you aware of any other directions in writing or otherwise?

A I don't know.

Q You're not aware of any.

A I don't know.

Q Well, are you aware of any or not?

A I don't know.

Q You don't know whether you're aware of any or you're not aware of any?

A Either way I don't know. I don't understand all the legal stuff. That's why it goes through my wife and Mr. Abrametz.

Q So you don't know if this is the directive you're referring to in your statement of claim. You don't know if there's any other written directives. You don't know if there's any other directions or directives or anything. You're just not aware of it.

A I don't know.

[Transcript, page 90, line 4, to page 91, line 10]

…

Q So – okay, and we discussed the unrelated hearings, unrelated – you don't know anything about those, those other hearings of the other individuals that are attached?

A. No.

Q Don't know the people, don't know anything about the facts, nothing.

A I don't know them. I've never met them or –

Q Okay. Now, you also attach to your affidavit SGI policies and policy papers, the online stuff indicating how permanent impairments are assessed.

A Yeah.

Q Have you reviewed those?

A I haven't. My wife looks after that stuff and then gives me a break – like a dumbed-down version of it.

[Transcript, page 106, lines 7-23]

[76] In short, Mr. Pointer does not truly understand this action. He does not have "a minimum level of general knowledge about the nature of class proceedings and his or her responsibilities to give instructions on behalf of the class". He is not in a position to "exercise independent judgment concerning the important issues that will arise during the progress of the litigation".

[77] For this reason, he is not an appropriate representative plaintiff.

### 2. Litigation plan: need for class definition and common issues

[78] A litigation plan cannot be evaluated and adopted until the class is identified and common issues are determined. Here the class is not identified and common issues are not determined.

[79] Having said that, I make the following observations regarding the proposed litigation plan's inadequacy regarding the litigation process and regarding communicating with class members.

### 3. Litigation plan: the litigation process

[80] In *Sorotski v CNH Global N.V.*, 2007 SKCA 104, [2008] 1 WWR 386, at para 78, Justice Richards (as he then was) discussed the elements of a litigation plan:

> [78] The appropriate content of a litigation plan is necessarily dependent on the nature, scope and complexity of the litigation to which it relates. There are no fixed rules or requirements. That said, a number of cases have approved the following non-exhaustive list of the matters to be addressed in a litigation plan:
>
> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and
>
> (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided…

[81] The proposed litigation plan here is deficient, as it relates to the litigation process, in that it does no more than list the normal stages of a court action (pleadings, discovery, questioning, etc.). It provides no detail specific to this claim. Specifically, the plan does not address the points identified in *Sorotski*.

### 4. Litigation plan: reporting to the class

[82] If Mr. Pointer were correct in his liability assertions in this action, and if his estimate of 140,000 class members were found to be accurate, and if the court were

to award judgment for the *minimum* damages amounts claimed, then the amount of judgment money to be administered in this action would exceed $8 billion. Setting aside the administrative organization that would be required to deal with as many as 140,000 people seeking their shares of $8 billion, the statutory requirements are not met by Mr. Pointer's proposed reporting to class members, which is:

> 3. Based on the information available in the public domain, there are approximately 140,000 no fault beneficiaries who fall into the prospective class.
>
> 4. Class Counsel have developed a website for this proposed class proceeding at www.nofaultclassaction.com and www.nofaultclassaction.ca. Counsel will post the Notice of Certification on the website and the status will be updated regularly. Copies of some of the Court decisions and other information relating to the action are or will be accessible on the website.
>
> 5. The website contains a "contact us" webpage, a feature that permits putative class members to submit inquiries to Class Counsel. Inquiries are sent directly to Class Counsel who will promptly respond. The website lists a toll-free telephone number for Class Counsel which will contain a recorded message providing information regarding the litigation. The recorded message will be updated as required.

[83] This arrangement is not adequate to handle the number of persons that Mr. Pointer anticipates would be making contact with the office of his counsel. Whether it would be adequate to handle the smaller class that is contemplated by my discussion of the class cannot be determined at this time.

### 5. Conclusion as to representative plaintiff and litigation plan

[84] This criterion is not met.

## H. Possible amendment

[85] Chief Justice Richards said in *Ross v Canada (Attorney General)*, 2018 SKCA 12, [2018] 5 WWR 669, at paras 95-96:

> [95] In assessing the appellants' submission on this point, it is necessary to begin by noting that s. 7(1) of the *Act* [*The Class Actions Act*] expressly contemplates the possibility of certification applications being adjourned to permit the amendment of materials. It reads as follows:
>
> > **7**(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.
>
> [96] The difficult question, of course, is when and in what circumstances an adjournment to permit amendments to a statement of claim or a certification application is appropriate. On this point, I wrote as follows on behalf of the Court in *Alves v First Choice Canada Inc.*, 2011 SKCA 118, 342 DLR (4th) 427:
>
> > [31] Speaking generally, it is obviously not acceptable to simply assume a court will, on its own initiative, repair the problems found to exist in the certification application. A court must operate with an eye to satisfying the objectives of the *Act* and with sufficient flexibility to ensure that justice is done. It must also be sensitive to the reality that new facts and insights into claims can emerge during the certification process as affidavits are filed and arguments are sharpened. Reasonably liberal efforts should be made to accommodate such developments by way of amendments to the pleadings, adjustments to common issues and otherwise. Sometimes the judge or court might have suggestions or thoughts about how best to proceed. However, all of that said, counsel have an obligation to do more than place the raw ingredients of a class action before the court and then expect the court itself to construct a viable proceeding. This is especially so at the appellate level.
> >
> > [32] There are no bright lines in any of this. Each case will have its own dynamics. But, while avoiding an unreasonably rigid approach to the certification process and appreciating its somewhat evolving nature, a judge or a court must nonetheless avoid being inappropriately conscripted into the role of ongoing assistant to one side or the other of the litigation.

[86] There are five criteria to be met for certification to be granted.

[87] Here the cause of action criterion is met.

[88] The identifiable class criterion is not met, and that deficiency is not reparable. The overbreadth of the class definition may be reparable, by limiting its range to include those who had unscheduled permanent impairment and who are desirous of pursuing a class action. The lack of a second member of the class cannot be remedied, however. As I have discussed, there is no evidentiary basis for concluding that such a

person exists.

[89] The common issues criterion has not been met, but if a class had been identified this deficiency may have been remediable.

[90] The preferable procedure criterion has not been met, and that deficiency is not reparable. Only one class member has been identified, and so the preferable procedure is that this action continues as a regular action.

[91] The representative plaintiff criterion has not been met. The litigation plan potentially could be remedied, if a class had been defined and if common issues had been identified. Mr. Pointer, though, is not an appropriate representative plaintiff. An alternate representative plaintiff, of course, would have to fall within the class definition and, as I have discussed, there is no reason to conclude that such a person exists.

[92] In the end, three of the five certification criteria are not capable of being remedied by amendment: identifiable class, preferable procedure and representative plaintiff. Attempts to repair deficiencies by amendment would be futile. The application for certification must be dismissed.

## I. Conclusion

[93] The application for certification is dismissed. This action remains a regular court action with Mr. Pointer as the plaintiff.

[94] Any party has leave to arrange with the local registrar for costs to be spoken to.

"G.M. Currie" J.
G.M. CURRIE