Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-12

PANEL:	**Mr. J. F. Reeh Taylor, Q.C., (Chairperson)** **Mr. Charles T. Birt, Q.C.** **Mrs. Lila Goodspeed**
APPEARANCES:	**[Text deleted], the appellant appeared in person;** **Manitoba Public Insurance Corporation ('M.P.I.C.')** **represented by Mr. Keith Addison**
HEARING DATE:	**July 4, 1996**
ISSUE:	**Whether injuries 'caused by the use of' motor vehicle**
RELEVANT SECTIONS:	**Sections 70(1) and 71(1) of the M.P.I.C. Act,** **being Chapter 36, S.M. 1993 ('the Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

REASONS FOR DECISION

THE FACTS:

To the extent that they are known, there is no dispute as to the facts underlying this appeal. [The Appellant], carrying her handbag on her left shoulder, was walking across a large parking lot adjacent to the [text deleted] store at the intersection of [text deleted] and [text deleted] in [text deleted] at about 2:30 p.m. on December 21, 1994. She heard a vehicle's engine being 'revved up' somewhere behind her but, initially, continued walking forward. It

quickly became apparent that the vehicle was headed her way. She looked over her left shoulder, to see a half-ton truck bearing down upon her at an increasing speed, a young man hanging out of the passenger-side window. She was afraid that she was going to be hit by the truck but, before she had time to move completely out of the way, her purse was forcibly removed from her shoulder and she was thrown to the ground. She recalls nothing more about the actual occurrence - as she puts it, "I next remember blackness." The appellant, a [text deleted] -year-old lady who was then taken by ambulance to [hospital #1], had obviously hit the ground with substantial force, for she suffered major contusions on her right breast, ribs and stomach; she lost skin from both hands and a broken bone in her right hand which had to be re-set and placed in a cast for 4 weeks; her clothing had to be cut off, her eye-glasses were broken and one of her rings was damaged; she sustained a cut over her right eye and a 'black eye'; her right cheek suffered some abrasion; her right shoulder and lower back became painful as a result of this incident. Her physician referred her to the [hospital #2] for physiotherapy to her shoulder and wrist, prescribing Tylenol 3 as an analgesic in addition to the cast noted above. She attended for chiropractic treatments for approximately one year, commencing about 2 months after the incident.

The vehicle in question was found some 2 1/2 weeks later. Her handbag, minus her wallet and all the money that she had been carrying, was found in the truck.

The only factual aspect of the matter that remains unclear is whether the appellant was actually in contact with the vehicle, or whether it was the force to which she was subjected when her handbag was tugged from her arm that threw her to the ground.

THE ISSUE:

The issue here may be simply stated: was this an 'accident' within the meaning of Section 70(1) of the Act?

THE LAW:

Section 70(1) contains two definitions which, together, form the nub of this case:

> 'accident' is defined as "any event in which bodily injury is caused by an automobile":
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> 'bodily injury caused by an automobile' is given the specific definition "any bodily injury caused by an automobile, by the use of an automobile, or by a load ..... but not including bodily injury caused
>
> (a) by the autonomous act of an animal that is part of the load, or
> (b) because of an action performed by the victim in connection with the the maintenance, repair, ... (etc.) of an automobile.

The definition of 'automobile' includes the vehicle that was involved in the incident under review.

The evidence, while not conclusive, indicates quite strongly that the appellant was not actually hit by the vehicle. It approached her, fast, from her rear at the left, yet there were none of the injuries to the rear quarter of her body that one might have expected had the truck collided with her. By the same token, since it is clear that the primary objective of the truck's occupants was robbery rather than mayhem, it is probable that the driver sought to avoid hitting the victim and, thus, to give his accomplice a chance to snatch her handbag. We proceed, therefore, from the premise that the appellant's injuries were not 'caused by an automobile.'

The question that remains, then, is whether the appellant's injuries were 'caused by the use of an automobile.'

Counsel for the insurer submits that the injuries were not caused by the use of an automobile but, rather, were caused by the actions of the thief in reaching out of the vehicle and pulling the bag from the appellant's shoulder. Counsel refers us to the recent, and as yet unreported, decision of Oliphant, A.C.J.Q.B., in the cases of McMillan and Meek v the R.M. of Thompson, ('the R.M. of Thompson case') - two separate but interrelated matters that were heard and dealt with concurrently by way of pre-trial motions under Queen's Bench Rule No. 21.01 to determine a question of law. In those cases, McMillan was a passenger in a vehicle owned and driven by Meek; they were both injured in a single vehicle accident when crossing a municipal bridge which, for the limited purpose of the argument then before the court, was assumed to have been negligently kept in a state of disrepair by the municipality, which had also failed to post proper, or any, warning signs. The question before the learned judge was whether the accident had been "caused by the use of an automobile," since an affirmative answer to that question would effectively bar the commencement of any court action by the plaintiffs and would require them to have recourse only to the provisions of Part 2 of the M.P.I.C. Act. (Section 72 of the Act provides that no action may be admitted before any court in Manitoba for damages for bodily injuries caused by, or by the use of, an automobile to which that statute applies). Oliphant, A.C.J.Q.B., following the reasoning of the Supreme Court of Canada in Amos v Insurance Corp. of British Columbia [1995] 3 S.C.R. 405 and in Law, Union & Rock Insurance Co. v Moore's Taxi Ltd. [1960] S.C.R. 80, as well as that of the High Court of Australia in Dickson v Motor Vehicle Insurance Trust [1987] 61 A.L.J.R. 553, found that the

words ‘caused by’ required a more narrow interpretation than, for example, the phrase ‘arising out of,’ and concluded that, in order for bodily injuries to be ‘caused by’ the use of an automobile, there must be a direct or proximate relationship between the use of the automobile and the injuries - a conclusion in law with which we respectfully concur. Oliphant, A.C.J.Q.B., applying that reasoning to the case before him, held that the accident had been caused, not by the plaintiffs’ use of an automobile, but by the presumed negligence of the municipality; it was not possible to trace a continuous chain of causation, unbroken by the interposition of a new act of negligence. We understand that that decision is currently under appeal. Counsel for M.P.I.C. urges us to apply the same reasoning in the appeal now before us, and to find that the assault was the cause of [the Appellant’s] injuries, the use of the automobile being “merely fortuitous” (to use the language of Associate Chief Justice Oliphant). However, we have some difficulty in accepting that argument, for it seems to us that the circumstances underlying this appeal are markedly different from those in the R. M. of Thompson case. We are of the view that the use of the truck was an integral and essential part of the theft of [the Appellant’s] handbag and that, had the thieves not made use of a vehicle, it is morally certain that she would not have sustained the injuries that resulted. “If a man walks with a gun with intent to kill game, he ‘uses’ the gun for that purpose without firing, within the statute which makes using a gun, with that intent, penal.” (Maxwell on the Interpretation of Statutes, 10th edition at p. 280, citing the Game Acts of 1706 (6 Anne, C. 16) and 1831 (1 & 2 Will.4, c.32); R. v King, 1 Sessions Cases, Scottish, 4th Series, 88).

Counsel for M.P.I.C. submits that even had the thief been on foot or on a bicycle the appellant might, and probably would, have been thrown to the ground, and that it is pure

speculation to suggest that her injuries would not have resulted without the use of the vehicle. With deference, we do not agree. The thief leaning out of the window of a moving vehicle - a vehicle that does not stop but appears, indeed, to be accelerating - has the same kinetic energy as the vehicle itself; he derives that energy from the vehicle. It was, in our view, the extreme force exerted upon the person of the appellant by the use of the vehicle that was the direct cause of her injuries. We find that the use of the truck, far from being merely fortuitous or incidental, was as much an essential part of the robbery as is a firearm (whether discharged or not) used in the hold-up of a retail grocery store. It follows, therefore, that since the appellant's injuries were patently caused by the robbery and accompanying assault, and since the use of the vehicle was an integral part of that robbery and assault, the injuries were caused by the use of the vehicle.

We have, on other occasions, pointed out that the M.P.I.C Act is, in effect, an insurance policy - albeit a statutory one - and while the accepted rules for the interpretation of statutes differ in many ways from those applicable to the interpretation of contracts, if ambiguity exists in the language of the M.P.I.C. Act there is a well-established rule of insurance law which, in our view, should then be applied. We refer to what is known as the *contra proferentem* rule, which, in the context of an insurance policy, may be stated thus: where any ambiguity arises upon the face of a policy, the language in question must be construed against the underwriter that has drawn the policy and has inserted that language for its own protection. In other words, if a phrase used in the insuring document is ambiguous, "that meaning must be chosen which is the less favourable to the underwriters who have put forward the policy." See English v Western [1940] All E.R. 515, C.A. per Clauson L.J. To the extent that the definition of

"bodily injury caused by an automobile" may be felt to be ambiguous, the application of the *contra proferentem* rule gives further strength to the position of the appellant.

DISPOSITION:

We find that the appellant's injuries were caused by the use of an automobile. The decision of the corporation's Internal Review Officer is, therefore, rescinded and the appellant's claim is referred back to the corporation to be dealt with in light of the foregoing finding.

Dated at Winnipeg this 10th day of July, 1996.

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J.F. REEH TAYLOR, Q.C.,
(CHAIRPERSON)

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CHARLES T. BIRT, Q.C.

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LILA GOODSPEED