Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-16

PANEL:	**Ms. Yvonne Tavares, Chairperson** **The Honourable Mr. Armand Dureault** **Ms. Barbara Miller**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.**
HEARING DATE:	**October 1, 2003**
ISSUE:	**Apportionment of liability for motor vehicle accident.**
RELEVANT SECTION:	**Section 161 of The Manitoba Public Insurance Corporation Act (the 'MPIC Act').**

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

Reasons For Decision

The Appellant, [text deleted], was involved in a motor vehicle accident on June 28, 1998. As a result of that motor vehicle accident, the Appellant was found guilty, after trial, of dangerous driving causing death pursuant to Section 249(4) of the *Criminal Code* of Canada.

Section 161(1)(d) of the MPIC Act provides that:

Reduction of indemnity where victim convicted under *Criminal Code*

> **161(1)** An indemnity to which a victim is entitled under Division 2 shall be reduced if the victim is, in respect of the accident, convicted under any of the following provisions of the *Criminal Code* (Canada):
> (d) clause 249(1)(a) or subsection 249(2) (dangerous operation of a motor vehicle), or subsection 249(3) (dangerous operation causing bodily harm) or subsection 249(4) (dangerous operation causing death).

In a decision letter dated January 29, 2002, MPIC's case manager advised the Appellant as follows:

> As you were convicted under Section 249(4) of the Criminal Code of Canada and you were fully responsible for the accident, we will proceed to recover the Income Replacement Indemnity that was paid to you in the first twelve (12) months after the accident. Income Replacement Indemnity was paid to you after the initial seven-day waiting period in excess of one year. You will be responsible for the first twelve (12) months of Income Replacement Indemnity in the amount of $17,253.81.

The Appellant sought an Internal Review of that decision, on the basis that he was not solely responsible for the motor vehicle accident. Counsel for the Appellant argued that responsibility for the accident should be apportioned and his Income Replacement Indemnity ('IRI') reduced in accordance with subsection 161(3) of the MPIC Act. Counsel for the Appellant also argued that MPIC ought to forgive the Appellant's debt because he had no notice that he had only a conditional entitlement to the first year's IRI and that MPIC would expect a refund if he were convicted.

The Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. In his decision dated December 6, 2002, the Internal Review Officer found that:

> Before you get near the stage of working out the allocation, however, you first have to conclude that passenger interference did, in fact, contribute to this accident. That assessment has to be made on a balance of probabilities. The evidence simply does not support that essential first step. There is nothing showing that it is more probable than not that passenger interference was involved in causing this accident. Constable [text

> deleted] August 27, 2002 report concludes that the evidence raises the "possibility of driver (*sic*) interference in this crash". (The context makes it clear that Constable [text deleted] is here talking about *passenger* interference.) But the report goes on to stress that this is only one possible explanation, among several, for what happened. He concludes by saying, "Consequently, I cannot suggest that this is the *most likely* sequence of events."
>
> Since there is no basis on which I can find that passenger interference probably accounted in part for this accident, I cannot apportion responsibility under Section 161(3). The decision I have for Review, therefore, must be confirmed.

The Appellant has now appealed from the Internal Review decision to this Commission. The issue which requires determination in this appeal is whether the apportionment of responsibility for the accident pursuant to subsection 161(3) of the MPIC Act was correct.

At the outset of the hearing of this matter, the Commission determined that it would only consider the issue under Appeal as regards the apportionment of liability. If MPIC were to exercise its rights to recover any IRI overpayment, the Appellant could then raise any defenses he may have to the debt collection at that stage of the proceedings.

Counsel for the Appellant submits that the Internal Review decision was flawed because the Internal Review Officer based his decision, in part, upon the case manager's opinion. The case manager presumed that the Appellant was completely responsible for the accident, because of his conviction. However, counsel for the Appellant submits that the conviction for dangerous driving causing death does not require that the driver of the vehicle be found 100% responsible for the accident. Therefore, the conclusion that the Appellant was completely responsible for the accident does not necessarily flow from the conviction for dangerous driving.

Counsel for the Appellant also submits that there was evidence that the Appellant was not solely responsible for the motor vehicle accident. Counsel for the Appellant relies on the evidence of Constable [text deleted] of the [text deleted] RCMP Traffic Services. In his letter dated August 27, 2002, Constable [text deleted] comments as follows:

> The possibility of driver *(sic)* interference in this crash was suggested by the following facts: first, the headlight switch was found in the hand of the deceased. Second, there was a sudden, unexplained turn of the car steering wheel to the right on a straight section of highway. Third, the deceased was identified as a passenger.
>
> If the passenger attempted to reach the headlight switch it would have been necessary for him to lean across the driver's position. This could have pushed the driver's right arm downward causing a sudden steering input to the right. At the rate of speed the car was going, this could explain the reason for the loss of control.
>
> However, even though this explanation provides a full and plausible account of the incident that corresponds to the physical evidence found, it is not the only explanation that would be satisfactory. Consequently, I cannot suggest that this is the most likely sequence of events.

Counsel for the Appellant also referred to the evidence of Constable [text deleted] taken before The Honourable Judge [text deleted] of the Provincial Court. Counsel for the Appellant specifically referred to an excerpt of his cross-examination of Constable [text deleted] in the transcript of those proceedings, which was as follows:

> Page [43]
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> . . . . . .
>
> Q Just like driver interference, and that means interference on the part of the passenger, may have been a factor; am I correct?
>
> A Yes.
>
> Q And it's entirely consistent with what you observed that driver interference was the actual cause of this accident; am I correct?
>
> A It's consistent with - -
>
> Q Yes, that's what - -

29 A - - the circumstances.
30 Q - - I'm saying. It's consistent that driver
31 interference, or interference with the driver by the other
32 party, it's consistent with that being the cause of the
33 accident?
34 A Yes.
Page [44]
1 Q And that might have been, might have been, the
2 sole cause as to what caused that car to steer into the
3 ditch causing the yaw marks?
4 A Possibly.

Counsel for the Appellant also relies upon the Traffic Analyst Investigation Report prepared by Constable [text deleted]. He notes that Constable [text deleted] conclusion as to the cause of the motor vehicle accident was:

> Loss of control occurred as a result of excessive steering input. The reason for this input cannot be definetly *(sic)* established: however, the presence of the headlight switch knob in the deceased passenger's hand suggests the possibility of horseplay or some similar type of driver interference. Alcohol consumption by the driver, if definitely established, may also be a factor.

Relying upon Constable [text deleted] conclusions, counsel for the Appellant submits that the Appellant did not lose control of the vehicle simply because of speed, but rather, because of oversteering. Therefore, he contends that something must have interfered with the driver's control of the vehicle - probably the passenger - and that's what caused the car to steer into the ditch. Accordingly, counsel for the Appellant maintains that the Appellant cannot be held solely responsible for this accident, since external factors clearly interfered with his driving to cause the oversteering. As a result, counsel for the Appellant submits that the Appellant should only be

held 15 - 20% responsible for the accident, and his IRI benefits reduced accordingly, pursuant to subsection 161(3) of the MPIC Act.

Counsel for MPIC submits that the undisputed evidence in this case clearly establishes that the Appellant is solely responsible for the motor vehicle accident. Counsel for MPIC maintains that the case manager made a finding to this effect, and invoked subsection 161(3) of the MPIC Act, so as to require the Appellant to repay 100% of his IRI benefits received during the first year after the motor vehicle accident.

Counsel for MPIC submits that the facts of this case, establish a *prima facie* case of common law negligence on the part of the driver, the Appellant. Counsel for MPIC also submits that Sections 153(1) and 153(2) of *The Highway Traffic Act* – when read together – establish a presumption of sole responsibility on the driver of a vehicle involved in a single vehicle accident. Sections 153(1) and 153(2) of *The Highway Traffic Act* provide as follows:

PART V

ACCIDENTS

> **Onus on owner or driver**
> **153(1)** Where loss or damage is sustained by any person by reason of a motor vehicle upon a highway the onus of proof that the loss or damage did not arise entirely or solely through the negligence or improper conduct of the owner or driver is upon the owner or driver.
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> **Limitation of subsec. (1)**
> **153(2)** Subsection (1) does not apply in case of a collision between motor vehicles on the highway or to an action brought by a passenger in a motor vehicle other than a public service vehicle in respect of any injuries sustained by him while a passenger.

Counsel for MPIC submits that in the case of a single vehicle accident, the onus of proving – on a balance of probabilities – that the accident "did not arise entirely or solely through the

negligence or improper conduct of the . . . driver is upon . . . the driver." He maintains that in this case, a presumption of sole responsibility arises on the part of the Appellant. The onus therefore rests with the Appellant to adduce evidence to reduce his responsibility for the accident from 100%.

Counsel for MPIC contends that the only pieces of evidence that suggest that anybody other than the Appellant bears any responsibility for the accident are the headlight switch knob which was found firmly grasped in the deceased passenger's right hand, and the fact that the car took a "sudden, unexplained turn . . . to the right". However he maintains that there are several eminently reasonable explanations for this evidence, which do not require the imputation of any interference on the part of the passenger. For instance, counsel for MPIC suggests that the headlight switch knob may have fallen off when the headlights were engaged, and the Appellant simply handed the knob to the passenger of the vehicle. Counsel for MPIC proposes that this explanation would appear to be much more likely in the circumstances, rather than the passenger reaching over the console and the driver to turn on the headlights, while the vehicle was travelling at a high rate of speed. As a result, counsel for MPIC submits that the evidence in this case falls short of establishing passenger interference on a balance of probabilities.

Counsel for MPIC also notes that the Trial Judge in the criminal proceedings specifically rejected the notion of interference with the driver as a probable cause of the accident. In his Reasons for Decision, The Honourable Mr. Justice [text deleted] found that:

> Page [7]
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> . . . . .
>
> 22 There is no doubt that Constable [text deleted] has said
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> 23 possible factors involved in this accident are speed,

alcoholic consumption and interference with the driver. I am satisfied beyond a reasonable doubt that the principle factors which caused the loss of control are speed and alcohol consumption. Exceeding the speed limit by 66 kilometres per hour, with alcohol affecting his ability to operate the motor vehicle resulted in [the Appellant] being unable to bring the [vehicle] into control after first oversteering.

I am satisfied beyond a reasonable doubt that whatever caused the first yaw, an animal, oncoming traffic lights or passenger interference, all of which were

Page [8]

suggested by counsel for the accused, the second yaw or oversteering was a result of the combination of speed and diminished or impaired ability to drive. I find that impairment was due to the consumption of alcohol. I would note that both speed and alcohol consumption have been proven as causes of this accident to the criminal standard. Oversteering on both occasions is also proven to that standard.

At a reduced rate of speed and without impairment, due to the consumption of alcohol, I am satisfied [the Appellant] would not have lost control of the [vehicle] or he would have been able to recover loss of control if the first loss of control was due to oversteering. He should have been able to recover control of that vehicle without leaving the highway.

Counsel for MPIC submits that the Appellant has not established that he should bear less than full responsibility for the accident. As a result, counsel for MPIC submits that the appeal should be dismissed and the Internal Review decision dated December 6, 2002, confirmed.

The Law

Section 161 of the MPIC Act provides as follows:

> **Reduction of indemnity where victim convicted under *Criminal Code***
> **161(1)** An indemnity to which a victim is entitled under Division 2 shall be reduced if the victim is, in respect of the accident, convicted under any of the following provisions of the *Criminal Code* (Canada):
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> (a) section 220 (cause death by criminal negligence);
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> (b) section 221 (cause bodily harm by criminal negligence);
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> (c) section 236 (manslaughter);
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> (d) clause 249(1)(a) or subsection 249(2) (dangerous operation of a motor vehicle), or subsection 249(3) (dangerous operation causing bodily harm) or subsection 249(4) (dangerous operation causing death);
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> (e) subsection 252(1) (failure to stop at the scene of an accident);
>
> (f) section 253 or subsection 255(1) (operating a motor vehicle while impaired), or subsection 255(2) (impaired driving causing bodily harm) or subsection 255(3) (impaired driving causing death);
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> (g) subsection 254(5) (failure to comply with a demand for breath sample).
>
> **Reduction of indemnity where victim convicted of similar offence in U.S.**
> **161(2)** An indemnity to which a victim is entitled under Division 2 shall be reduced if the victim is, in respect of the accident, convicted in a state or territory of the United States or the District of Columbia in the United States of an offence that is the same as, or similar to, an offence referred to in subsection (1).
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> **Amount of reduction of indemnity**
> **161(3)** The corporation shall determine the extent to which the victim was responsible for the accident and shall reduce the indemnity of the victim under Division 2 by an amount equal to the amount that would have been payable to the victim in the first 12 months after the accident multiplied by the percentage of responsibility attributed to the victim by the corporation.

> **Victim may appeal to court**
> **161(4)** Notwithstanding sections 72 (no tort claims), 172 (review) and 174 (appeal), a victim who disagrees with the corporation's decision respecting the responsibility of the victim for the accident may appeal the decision to the court within 180 days after receiving written notice of the decision from the corporation.

Discussion

After a careful review of all of the evidence, both oral and documentary, we find that the Appellant has not established, on a balance of probabilities, that factors, other than the negligence or improper conduct of the Appellant, as the driver of the vehicle, were responsible for this motor vehicle accident. As a result, we find that the Appellant was 100% responsible for the accident and, pursuant to Section 161(3) of the MPIC Act, his IRI benefits should be reduced accordingly.

We find that as the driver of the vehicle, the Appellant had care, conduct and control of the vehicle and as such was responsible for the operation of the automobile. We rely on the findings of The Honourable Mr. Justice [text deleted] that, notwithstanding whatever caused the first yaw, the second yaw or oversteering was a result of the combination of speed and diminished or impaired ability to drive. The impairment having been caused by alcohol consumption. We also accept his findings that at a reduced rate of speed and without impairment, due to the consumption of alcohol, the Appellant would not have lost control of the vehicle or he would have been able to recover loss of control if the first loss of control was due to oversteering. As a result of these findings, we have determined that the Appellant was fully responsible for the accident since, he was the driver of the vehicle, he chose to drive at an excessive speed and he drove while impaired, due to the consumption of alcohol.

Additionally, even though counsel for the Appellant raised passenger interference as a possible justification for the oversteering, we find that this explanation was not probable in the circumstances of this case. Many other reasons could account for the fact that the passenger had the headlight switch knob in his hand, which we find likely in these circumstances.

As a result of our findings, and the fact that the Appellant bore the onus of proof in this appeal, we did not find it necessary to invoke subsections 153(1) and 153(2) of *The Highway Traffic Act*. Although counsel for the Appellant submitted that an onus or presumption under one Act, would not necessarily apply to another Act, we find it likely that these two Acts should be read together when interpreting subsection 161(3) of the MPIC Act. We rely on the following discussion from Driedger on the Construction of Statutes, Third Edition By Ruth Sullivan, Canada: Butterworths Canada Ltd., 1994, at page 285, which notes that:

> STATUTES ON THE SAME SUBJECT
>
> ***Governing principle.*** Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in *R. v. Loxdale:*
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> > Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.[1]
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> In effect, the several statutes are construed together as if they constituted a single Act and the presumptions of coherence and consistent expression apply to these statutes as if they were part of a single Act.[2]
>
> . . . .

[1] (1978), 1 Burr. 445, at 447, 97 E.R. 394. For a modern Canadian authority, see *Nova, an Alberta Corp. v. Amoco Canada Petroleum Co. Ltd.* (1981), 128 D.L.R. (3d) 1, at 9 (S.C.C.), *per* Estey J.: "While each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes, sometimes assistance in determining the meaning of the statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere."

[2] For discussion of these presumptions, see *supra*, Chapter 7, at pp. 176-77 and 163-68.

> ***Acts constitute a single scheme.*** Where two or more statutes are enacted by a legislature on the same subject, they are presumed to operate together to create a single regulatory regime. In such cases, the provisions of each statute must be read in the context of the others and consideration must be given to their role in the overall scheme.

Given the above noted discussion, we find it likely that subsections 153(1) and 153(2) of *The Highway Traffic Act* create a rebuttable presumption which could be used in interpreting subsection 161(3) of the MPIC Act. Although for the purposes of this appeal, we did not find it necessary to rely on those provisions of *The Highway Traffic Act*.

As a result, and for these reasons, the Appellant's appeal is dismissed and the Internal Review decision dated December 6, 2002 is confirmed.

Dated at Winnipeg this 20th day of November, 2003.

YVONNE TAVARES

HONOURABLE ARMAND DUREAULT

BARBARA MILLER