

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-21**

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mrs. Lila Goodspeed
Mr. F. Leslie Cox

APPEARANCES: Manitoba Public Insurance Corporation ('M.P.I.C.')

represented by Mr. Keith Addison
[Text deleted], counsel for the Appellant, [text deleted]

HEARING DATE: Friday, August 30th, 1996

ISSUE: Meaning of 'caused by the use of an automobile'.

RELEVANT SECTIONS: Sections 70, 71(1), 73, 74(1) and 81(1) of the M.P.I.C.
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:

[Text deleted], the Appellant, is employed as an [text deleted], where she has worked for over seven years. We found no reason to disbelieve her evidence, which was given in a clear and straightforward manner - to the extent that clarity was possible in light of the trauma to which she was subjected.

Her evidence may be summarized, and paraphrased, this way:

- (a) [The Appellant] usually rode her bicycle to work, weather permitting, wearing brightly coloured clothing when doing so.
- (b) On Sunday, October 22nd, 1995, at approximately 2:54 P.M., she was riding to work following her usual route, travelling north along [text deleted] towards the hospital from her home in [text deleted].
- (c) [Text deleted], a divided highway, normally has two north-bound lanes of traffic; [the Appellant] was riding in the right-hand or curb lane. At a point a short distance before its intersection with [text deleted], the north-bound side of [text deleted] widens into three lanes by including an extra lane to serve the bus stop that is located at that corner.
- (d) As [the Appellant] approached the intersection, she saw that there was a [text deleted] Transit bus parked at the bus-stop, with its four-way flashers on. She stayed in her own lane until, when the front of her bike drew level with the left rear wheel of the bus, the bus starting moving off into the centre lane ahead of her, cutting her off. Since there was other traffic in the outside lane, in order to avoid hitting the bus she slowed slightly and moved to her right into the expanded curb lane, where the bus had been sitting. The signal lights of the bus had not changed from four-way flashing to a left-turn signal before she drew level with its left rear wheel; she at no time noticed a left-turn signal by the bus.
- (e) Unbeknown to [the Appellant], there was a large hole in the surface of that bus lane, immediately in front of the area previously occupied by the bus. The hole was about 4 feet by 4 feet in area, about 1 foot deep at its southerly end and becoming progressively shallower towards its northern end. She had no opportunity to avoid that hole. The right rear portion of the bus was in her line of vision until she was almost completely into the bus

lane, by which time it was too late; her front wheel hit the leading edge of the excavation and she went flying through the air over her handlebars.

- (f) [The Appellant], being unable to grip the handles of her bike, after sitting for a little while at the bus-stop in order to collect herself, continued her journey on foot. She was treated for her injuries at the hospital and reported the accident to the police.

[The Appellant] suffered a number of injuries to her hands, her left arm and wrist,, her shoulder and, to a more modest extent, her knee and thigh. She was off work for some time as a direct result of the accident, for which she now seeks income replacement indemnity from M.P.I.C., as insurer of [text deleted].

M.P.I.C.'s adjuster denied the claim, on the formal basis that neither the movement of the bus nor [the Appellant's] resultant lane change was the primary cause of the accident; that decision was upheld by M.P.I.C.'s Internal Review Officer.

While, as will appear, we happen to concur with the formal reasons given by the adjuster, there are two matters arising from M.P.I.C.'s file that, we believe, call for some comment. First, there is a suggestion (supported by page 1 of M.P.I.C.'s in-house Policy Manual, dealing with the definition of "accident" and dated October 1st, 1994) that a claim, based on an uncorroborated allegation that the victim's path was cut off by an automobile, must necessarily be rejected merely because of the lack of supporting evidence; we do not agree. Every claim must be examined individually and, while the absence of corroboration may well give rise to some doubt and, perhaps, in some cases, downright suspicion in the corporate mind of an insurer, it should by

no means be regarded as fatal to the claim. The victim's history, character, general demeanour and motivation are all factors to be taken into account. Secondly, the adjuster in the present case has noted: "She ([the Appellant]) also has a lawyer, why go to a lawyer first instead of us. Again, NO CLAIM." We are constrained to say that such a comment seems not only unworthy of a corporation having a statutory obligation to ensure that every claimant is made fully aware of his or her rights, but also unduly cynical: there are many reasons why a potential claimant might wish to seek professional advice before filing a claim; a decision to obtain that advice should not be seen as something sinister.

THE LAW:

The Act provides compensation for a victim who, regardless of fault, sustains bodily injury caused by an automobile or by the use of an automobile. Copies of the relevant sections of the Act are annexed hereto and intended to form part of these reasons. Since there was no contact of any kind between [the Appellant] and the bus, the issue that we need to resolve is whether it was the 'use of' the bus that caused her accident. We are of the unanimous view that, in order to arrive at an affirmative finding, we would have to stretch the meaning of 'caused by the use of' beyond the intent of the legislature and beyond the interpretation given to that phrase by the Supreme Court of Canada in the case of *Amos vs Insurance Corp. of British Columbia* [1994] 3 S.C.R. 405. In that case, the Supreme Court drew a distinction between the meaning of 'caused by' and other, similar but not synonymous phrases such as 'arising out of', holding that 'caused by' must be given a more narrow interpretation that requires the act or omission complained of (in the present case, the use of the motor vehicle) to have been at least the primary, if not the sole, cause of

the damage. The Supreme Court's rationale in the Amos case, as well as the reasoning of the Courts in *Law, Union & Rock Insurance Co. vs. Moore's Taxi Ltd.* [1960] S.C.R. 80 and in the High Court of Australia in *Dickson vs. Motor Vehicle Insurance Trust* [1987] 61 A.L.J.R. 553, was followed by Oliphant J. in the recent Manitoba case of *McMillan and Meek vs. R. M. of Thompson*.

The decision of the bus driver to pull out into the centre lane of traffic, and to continue doing so after [the Appellant] should have been clearly visible in his left-hand rear-view mirror, is a factor that may have been a contributing cause of the accident. But [the Appellant] was aware of the movement of the bus and, when it became apparent to her that the driver either had not seen her or, having seen her, had elected to continue cutting off her progress in the centre lane, she was able to slow down, cede that centre lane to the bus and pull back into the curb lane herself. All of that would have been accomplished without mishap, were it not for the unguarded and unmarked hole in the surface of that curb lane which, coming across it suddenly and with no reasonable reaction time, she was unable to avoid.

Without wishing to pre-empt the final judicial prerogative of the Courts, we express the view that, at least from the evidence placed before this Commission, [the Appellant] appears to have a good cause of action against the [text deleted] based upon the apparent negligence of its workers in leaving a hole of such magnitude unprotected and unsigned. She does not however, appear to have a valid claim against M.P.I.C., as insurer of [text deleted] bus.

DISPOSITION:

For the foregoing reason, we must dismiss [the Appellant's] appeal and confirm the decision of the Acting Internal Review Officer.

Dated at Winnipeg this 31st day of August 1996.

J. F. REEH TAYLOR, Q.C.

LILA GOODSPEED

F. LESLIE COX