



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by F.D.
AICAC File No.: AC-04-29**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Barbara Miller
Mr. Bill Joyce

APPEARANCES: The Appellant, F.D., was represented by Mr. George Ulyatt;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Mark O'Neill.

HEARING DATE: September 13, 2004

ISSUE(S): Entitlement to benefits under the Personal Injury Protection
Plan

RELEVANT SECTIONS: Meaning of the definition of "Bodily injury caused by an
automobile" as defined in Section 70 of The Manitoba Public
Insurance Corporation Act ('MPIC Act')

**MAIC 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

F.D. (hereinafter referred to as the "Appellant") is the owner of [text deleted] and he is certified by the Province of Manitoba to conduct speedometer tests on motorcycles. The Appellant's claim to MPIC for benefits under the Personal Injury Protection Plan ('PIPP'), as set out in the MPIC Act related to an injury wherein a motorcycle smashed into the Appellant's leg, fractured the fibula and crushed the tibia at the knee. In a statement to MPIC, dated July 18, 2003, the Appellant described the circumstances of the accident in relation to his claim as follows:

I am the Owner/Operator of [text deleted] located at [text deleted]. I am the only person in Manitoba that does speedometer testing. I am certified by the province to do so. I am working @ the shop @ approximately 4:00-4:30 pm doing a speedometer test for a customer. The test was complete and I was walking the bike off the ramp while on the bike. A clamp which protrudes downward got caught on the upper part of the downsloping ramp. That slowed the bike and required me to regain my balance. The ramp moved causing a gap in between the ramp. When I put my foot down, it went in between the gap. I went an extra foot and a 1/2 to the ground. When my foot hit the ground my knee buckled under the weight causing the back wheel to slide out while my leg was still there. It took my leg with it. The bike smashed into my leg and fractured the fibula and crushed the tibia @ the knee.

There was no damage to the motorcycle. The customer was not told about the incident.

As a result of this injury, the Appellant applied for benefits to MPIC under the PIPP. In a letter to the Appellant, dated July 29, 2003, the case manager stated:

In your statement dated June 18, 2003, (copy attached) you state that your injuries resulted from a situation where you had completed a diagnostic check on a motorcycle and was rolling it off the piece of equipment. A part of the motorcycle grabbed the down ramp, resulting in your loss of balance, which you were unable to regain. The motorcycle then fell on your leg, causing serious injury to your leg.

As the bodily injury was caused because of an action performed in connection with the maintenance, repair, alteration, or improvement of an automobile, there is no coverage under PIPP. A copy of Section 70(1), relating to bodily injury caused by an automobile and the two exclusions, have been included for your review.

Internal Review Decision

The Internal Review hearing took place on December 16, 2003 and the Appellant was represented by his legal counsel, George Ulyatt. In addition to legal representation provided by Mr. Ulyatt, the Internal Review officer was also provided with a written submission at the hearing.

The Internal Review Officer rejected the Appellant's Application for Review and confirmed the case manager's decision on the following grounds:

The submission provided by your counsel is that the above definition does not make specific reference to the process of "testing" as something separate and distinct from maintenance, repair, alteration or improvement of an automobile. Mr. Ulyatt's submission is that the law provides that exclusionary clauses are to be interpreted in favour of an insured in accordance with the principle of contra proferentum.

With respect to the position advanced by your counsel, I am unable to accept the suggestion that the activity of testing is something separate and distinct from the activities of maintenance, repair, alteration and/or improvement as provided for within the definition. Clearly most activities involving the maintenance, repair, alteration or improvement of an automobile are preceded by some form of testing in order to ascertain the nature of the problem to be addressed. That fact does not support the suggestion that a distinction should be drawn between testing and the other activities. Having reached that conclusion, I am therefore dismissing your Application for Review and upholding the decision of Mr. Loeppky dated July 29, 2003.

Appeal

The Appellant filed a Notice of Appeal on February 20, 2004 wherein he stated:

The Applicant requests that the Decision of MPI be reversed specifically the ruling of the Case Manager and Review Officer inasmuch as MPI has misdirected themselves as to the interpretation of Section 70(1) of The Manitoba Public Insurance Corporation Act Appendix 1. It is the position of the Applicant that the action performed by the Appellant herein was not in connection with either maintenance, repair, alteration or improvement of an automobile.

The relevant provisions of the legislation in respect of this appeal is Section 70(1) of the MPIC, which states:

Definitions

70(1) In this Part,

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, 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 maintenance, repair, alteration or improvement of an automobile

Both parties agreed that a motorcycle was an "automobile" within the meaning of the MPIC Act.

The appeal hearing took place on September 13, 2004. Mr. George Ulyatt represented the

Appellant and Mr. Mark O'Neill represented MPIC. The Appellant testified at the hearing and confirmed the contents of his statement to MPIC, which is referred to on pages 1 and 2 hereof.

The Appellant further testified that:

1. he conducted a test of the speedometer to determine its accuracy and found that the speedometer was accurate.
2. at no time was it his intent to maintain, repair, alter or improve the speedometer which was attached to the motorcycle.
3. he does not repair motorcycles but does repair speedometers.

On cross-examination he admitted that in order to repair a speedometer he must first test the speedometer in order to determine whether or not the speedometer required to be repaired and, if so, what the speedometer problem was that was required to be repaired.

At the conclusion of the Appellant's testimony, both counsel submitted oral argument and, as well, Appellant's counsel submitted a written brief. During the course of the submissions by both counsel an issue arose as to whether or not the principle of contra preferentum applied to paragraph (b) of the definition "bodily injury caused by an automobile" as set out in Section 70(1) of the MPIC Act. The Commission requested both counsel to submit written briefs on this issue and, as a result, the Commission adjourned the proceedings pending receipt of submissions of both counsel.

Upon receipt of written submissions from both counsel the Commission met and reviewed all of the documentary evidence filed at the hearing, the testimony of the Appellant and both the oral and written submissions of both legal counsel.

The Appellant's legal counsel in his initial written submission, after referring to a number of dictionary definitions of the terms "maintenance, repair, alteration and improvement", also provided a dictionary definition of the term "testing" from Webster's II New Riverside Dictionary which states:

Test: 1. A means employed to examine, try, or prove. . . . 4. To administer a test in order to diagnose.

The Appellant's legal counsel further stated in his initial written submission:

3.2 Interpretation:

Note that all of the above words are used a context were they are listed and preceded by the words: "because of an action performed by the victim in connection with the..." and are followed by the phrase "of an automobile".

The proper way to interpret this phrase is in line with the maxim of interpretation known as *Noscitur a sociis*. This maxim of interpretation is usually applied to interpret terms forming part of an enumeration. The word "horn", for example, is ambiguous when read alone but not so when included in "the trombone, horn and clarinet". *Noscitur a sociis* helpfully draws attention to the fact that a statute's context can indicate a meaning far more restrictive than that found in the dictionary.

Thus it is submitted that upon examination of the group of terms above contained in the statute maintenance, repair, alteration, and improvement all have similar meanings and further they take meaning from each other. The definition of testing does not even closely match any of these definitions. Thus on the basis of interpretation it should not be considered included in the statute, and within the exclusion clause.

The Appellant's legal counsel further submitted in his written submission that the legal principle of *contra proferentum* applied to the exclusions set out in Section 70(1) of the MPIC Act and stated:

The policy of resolving in favour of the insured is known as the *contra proferentum* it is submitted that its words are not clear enough to disclose what is the joint intention of the parties. The words are given to meaning if, reasonable, favours the claimant. The law is such because this is considered fair either because the language chosen by the insurer or because the meaning adopted by the court achieves a result which the parties could reasonably expect.

The Appellant's legal counsel subsequently submitted a lengthy legal submission in support of

his position that the application of the doctrine *contra proferentum* applied to Section 70(1)(b) of the MPIC Act and, as a result, supported the Appellant's position. In conclusion, the Appellant's legal counsel argued that the Internal Review Officer incorrectly interpreted Section 70(1) of the MPIC Act and, as a result, the appeal should be allowed and the Appellant shall be entitled to receive PIPP benefits under the MPIC Act.

MPIC's legal counsel, in his written submission to the Commission, stated:

At the hearing of this matter held on September 13, 2004, I appeared before the Commission. We put forward our primary position that there was no ambiguity with respect to the intent of the Act and the interpretation of "bodily injury caused by an automobile" - i.e. that this was a statutory compensation scheme to cover injuries caused by automobile accidents, not a garage liability insurance programme. I also argued our position that, on the evidence, the testing work performed by [F.D.] at his shop was all part of the process of repair and maintenance of automobiles. On the issue raised by the Appellant - whether the *contra proferentum* principle applied to this legislation - you invited written submissions. I have received Mr. Ulyatt's submission and the following is Manitoba Public Insurance's response.

Generally, the Appellant asks the Commission to consider Supreme Court of Canada case law dealing with the interpretation of contracts of insurance and apply the principle of *contra proferentum* to this statutory scheme of compensation (Co-operative Fire & Casualty Co. v. TWA, et al, Appellant's Tab 2¹). The Appellant asks you to ignore the decision of the Supreme Court in *Chu v. Madill*² (Appellant's Tab 3, p.299) where Ritchie, J said "...the principle of *contra proferentum* does not apply to the interpretation of the exclusion here in question as it is one which is required to be in such a policy by virtue of the provision of Schedule E of the *Insurance Act* hereinbefore referred to, and the insurer is not to be held responsible for the manner in which it is expressed." (underlining added). The Supreme Court addressed its mind to the issue in *Chu*. At any rate, in *the TINA* case, the Court said, at p. 729, in considering how to construct an exclusionary clause, "the situation is not the same as if one had to construe a statute".

MPIC's legal counsel further stated that the Appellant's legal counsel, in his written submission, ignored comments of the Manitoba Court of Appeal in *Martin v. Manitoba Public Insurance*

¹ Co-operative Fire & Casualty Co. v. TWA et al., 39 D.L.R. (3d) 723.

² *Chu v. Madill*, 71 D.L.R. (3d) 295.

Corp., [1988] M.J. No. 353 (MBCA) as well as the decisions by British Columbia Provincial Court, Supreme Court and Court of Appeal. MPIC's legal counsel concluded his submission by stating:

In summary, legislation is created by the government of the day and imposed on both the insured and insurer, in this case. The principle behind *contra proferentum*, therefore, has no application to this scheme. This principle not to apply a contractual principle to statutory interpretation was stated by the Supreme Court of Canada *Chu v. Madill* and the Courts of Manitoba and British Columbia have followed it. There is no reason for this Commission to say those Courts are wrong.

Discussion

The Commission agrees with MPIC's legal counsel's submission that there is no ambiguity in Section 70(1)(b) in respect of the meaning of Section 70(1)(b) of the MPIC Act. The Commission further determines that since there was no ambiguity in respect of the meaning of Section 70(1)(b) of the MPIC Act, it is not necessary to consider whether the principle of *contra proferentum* applies to MPIC legislation.

The Commission finds that prior to repairing a speedometer or maintaining it in a condition of good working order, the Appellant was required to test the speedometer in order to determine if any repairs were required to the speedometer, or whether it required any maintenance work or alternatively, that it required no repair or maintenance work at all. When the Appellant was administering the test of the speedometer he was in fact attempting to diagnose whether or not the speedometer was in good working order and, therefore this was an action:

1. in connection with the maintenance of the speedometer; and/or
2. to diagnose the speedometer for the purpose of attempting to repair, alter or improve the speedometer.

In either case, the Commission concludes that testing is an aspect of repair or maintenance of the speedometer.

The Commission therefore concludes that the Internal Review Officer correctly interpreted Section 70(1)(b) of the MPIC Act and, as a result, the appeal is dismissed and the decision of the Internal Review Officer is confirmed.

Dated at Winnipeg this 23rd day of November, 2004.

MEL MYERS, Q.C.

BARBARA MILLER

BILL JOYCE