

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by T.B.S.
AICAC File No.: AC-07-79**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Neil Cohen
Mr. Paul Johnston

APPEARANCES: The Appellant, T.B.S., was represented by Mr. Jonathan Woolley;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: October 30, 2008

ISSUE(S): Entitlement to Personal Injury Protection Plan Benefits

RELEVANT SECTIONS: Sections 70(1) and 71(1) 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

The Appellant, T.B.S., is appealing the Internal Review decision dated May 29, 2007 with regards to his entitlement to Personal Injury Protection Plan ("PIPP") benefits arising out of an incident which took place on July 2, 2004. The Internal Review Officer in her decision of May 29, 2007 determined that the Appellant's injuries which arose from the incident of July 2, 2004 were not caused by a motor vehicle or by the use of a motor vehicle and therefore the Appellant was not entitled to PIPP benefits in connection with this incident.

Facts and Background

The facts of this matter can be briefly summarized as follows:

- 1) On July 1, 2004, the Appellant, T.B.S. and a group of friends went to Assiniboine Park to watch the Canada Day fireworks. When the fireworks ended, the Appellant and his friends decided to walk home. The Appellant resided at [text deleted] in the City of Winnipeg, Manitoba.
- 2) By the time the Appellant reached the intersection of [text deleted] and [text deleted], it was approximately 2:17 a.m. on July 2, 2004. An automobile then approached the Appellant and his friends from the west on [text deleted] and one of the occupants of the automobile began to fire paintballs at the Appellant and his friends.
- 3) On the first pass, the occupants of the automobile shot one of the Appellant's friends in the legs. The automobile made two more passes and continued to fire paintballs at the Appellant and his friends. The Appellant ran, looking to escape the attackers, but they continued their pursuit using the automobile to track him down.
- 4) The Appellant hid behind a fence as his attackers continued to use the automobile to search for him. The Appellant saw the automobile pass by him on three separate occasions. When the Appellant thought the automobile was gone, he lifted his head from behind the fence and was shot in the eye with a paintball by one of the occupants of the car.

- 5) As a result of being struck by the paintball, the Appellant suffered severe traumatic injuries to his right eye. More specifically, he suffered a hypermature cataract, a papillary tear with iris sphincter tear, chorioretinal scarring and vitreous hemorrhage. He underwent eye surgery in 2005, which had the result of improving the vision in his eye to 20/80. The visual efficiency in his right eye was permanently reduced by 50% with a long-term possibility of further deterioration and potential for further visual loss and loss of the eye.
- 6) The Appellant subsequently filed a claim with MPIC arising from the injuries sustained in this incident. In a decision dated June 29, 2006, MPIC's case manager advised the Appellant that:

Manitoba Public Insurance will provide benefits as outlined in Section 70(1), of the Manitoba Public Insurance Corporation Act, which is attached as an appendix. Bodily injury must be caused by an automobile in order to establish entitlement to Personal Injury Protection Plan benefits.

The circumstances of this incident have been reviewed confirming that an individual had committed an assault on you whereby you were shot in the eye by a paint ball from a vehicle. This is not considered an automobile accident caused by an automobile or the use of an automobile. This is a deliberate and willful act.

As this incident is not considered an automobile accident, there is no coverage under the Personal Injury Protection Plan.

- 7) The Appellant sought an Internal Review of the case manager's decision of June 29, 2006. As noted above, the Internal Review Officer in her decision dated May 29, 2007 dismissed the Appellant's Application for Review and confirmed the case manager's decision of June 29, 2006, on the basis that the injury sustained by the Appellant was not a "bodily injury caused by an automobile".

- 8) The Appellant has now appealed from the Internal Review Decision dated May 29, 2007 to this Commission on the basis that his injuries were caused by an automobile or by the use of an automobile.

Relevant Statutory Provisions

The relevant sections of the MPIC Act are as follows:

[70\(1\)](#) In this Part,

"accident" means any event in which bodily injury is caused by an automobile;

"automobile" means a vehicle not run upon rails that is designed to be self-propelled or propelled by electric power obtained from overhead trolley wires;

"bodily injury" means any physical or mental injury, including permanent physical or mental impairment and death;

"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;

Application of Part 2

[71\(1\)](#) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.

Appellant's Submission

Counsel for the Appellant submits that MPIC erred in determining that the Appellant's injuries were not caused by the use of an automobile. Counsel for the Appellant argues that the Appellant's claim arose out of the use of an automobile and accordingly, his injuries come within

the definition of “bodily injury caused by an automobile” set out in the MPIC Act. Relying upon the decision of the Manitoba Court of Appeal in McMillan v. Thompson (Rural Municipality) (1997) 115 Man.R. (2d) 2, he submitted that the Commission was required to take a liberal interpretation of the MPIC Act when considering whether the incident giving rise to the Appellant’s claim constituted an accident within the meaning of the MPIC Act.

Counsel for the Appellant submits that there was a clear nexus between the Appellant’s injuries and the use of the automobile. The automobile was used by the Appellant’s attackers to “hunt” the Appellant and his friends. Counsel for the Appellant argues that the automobile played a key contributing role in allowing the assault to occur. In support of that position, counsel for the Appellant maintains that the Appellant’s assailants used the automobile to make several passes by the Appellant and his friends. Counsel for the Appellant maintains that it is entirely possible that, had the assailants been on foot, the Appellant may have eluded them by running away. However, by using the automobile, the Appellant’s attackers were able to follow the Appellant and eventually locate and ultimately assault him. He notes that the assailants did not leave the automobile, but shot at the Appellant as the automobile drove by.

Counsel for the Appellant concludes that the use of the automobile was integral to the injuries suffered by the Appellant. He argues that the Appellant’s assailants had multiple opportunities to shoot at the Appellant because of the use of the automobile. Accordingly, counsel for the Appellant submits that the Appellant is entitled to coverage in accordance with Part 2 of the MPIC Act.

MPIC's Submission

Counsel for MPIC submits that the assault which caused the Appellant's injuries was a separate and independent act from the use of the automobile. He maintains that the fact that the shots were fired from a vehicle was an incidental act, only remotely connected to the use of the vehicle. In his written submission to the Commission dated October 10, 2008, counsel for MPIC sets out his position as follows:

Section 70(1) of the *MPI Act* provides that PIPP benefits are for bodily injuries caused by an automobile.

The mere use of an automobile when an injury results is not sufficient. *McMillan* October 7, 2008 (*sic*) v. *Thompson*, (1997) 115 Man. R (2d) 2 (C.A.). There must be consequential connection between the use and the injuries according to *McMillan*.

A case strikingly similar to the instant case is *Russo v. John Doe*, (2008) 63 CCLI (4th) 113 (Ont. S.C.). *Russo* was in a restaurant when assailants drove by and shot guns into the restaurant and drove off. *Russo* was struck by a bullet. The issue was whether her injuries were "arising directly or indirectly" from the use of an automobile.

The Ontario Court held that no, the shooting was independent from the use of a car despite the fact the assailants were using the car when shots were fired. The use of a car was considered incidental.

Likewise, in *Herbison v. Lumbermen's Mutual Casualty Company*, (2007) 286 D.L.R. (4th) 592 (S.C.C.), the Defendant drove to a hunting area and got out of his truck and shot at, what he thought, was a deer. The bullet struck the Plaintiff, another member of the hunting party.

The Supreme Court of Canada upheld a trial court decision dismissing the Plaintiff's claim against the insurer and found the shooting was an act independent of the ownership, use, or operation of the Defendant's truck.

The Court stated that the Defendant's vehicle merely created an opportunity in time and space for the damage to be inflicted, without any causal connection, direct or indirect, to the legal basis of the Defendant's tortious liability.

In *Vytlingham (Litigation Guardian of) v. Farmer*, (2007) 286 D.L.R. (4th) 577 (S.C.C.), the Vytlingham family was driving along a highway in the United States when their vehicle was struck by a large boulder dropped from an overpass by the Defendants. The Vytlingham family received Statutory No Fault Benefits from their Ontario insurer but sought to recover civil motorist coverage. Under this policy, damages were payable if they arose directly or indirectly from the use or operation of an automobile.

The Supreme Court held that the rock throwing was an independent act that broke the chain of causation and the family failed to establish that the Defendant's liability arose directly or indirectly out of the use or operation of the Defendant's vehicle. The family had argued that the Defendant's vehicle had been used to carry the rocks to the scene of the crime and also had been used to escape thereafter.

In this case, the claimant relies largely on *Amos v. Insurance Corporation of British Columbia*, (1995) 127 D.L.R. (4th) 618 (S.C.C.). There, the Plaintiff was attacked by a gang while driving his van, and was injured when shot as he attempted to drive from the assailants. The issue was whether the use of the Plaintiff's van was an ordinary and well known use, and if so, whether a causal connection existed between the Plaintiff's injury and the ownership, use, or operation of the van.

The Supreme Court of Canada found a causal connection and held the shooting was the direct result of the assailants' failed attempt to gain entry to the Plaintiff's van. The shooting arose out of the Plaintiff's ownership, use and operation of the Plaintiff's vehicle.

Amos involved a claim for first party statutory no fault benefits, involving the claimant's own car. This case involves the Third Party's vehicle, like *Russo*, *Herbison*, and *Vytlingham*.

Amos is also distinguishable, however, as clearly the shooting was the direct result of the assailant's failed attempt to car jack the Plaintiff's van.

Amos is also analogous to *Hannah v. John Doe 1* [2008] 2008 B.C. S.C. 1123, where the Court found the actions of unidentified individuals who had driven past a woman and grabbed her purse, injuring her, were caused by an automobile. There was a clear causal link between the use of the vehicle and the injuries the Plaintiff sustained.

In the instant case, there is no connection between the claimant and the vehicle other than the fact that the assailant's own vehicle created an opportunity in time and space for the assailant to inflict damage on the Plaintiff. There is no real connection between the vehicle and any involvement or responsibility of the assailant. The assailant could just as easily have been out of the car when he shot the pellet gun. The vehicle was merely the situs of the shooting.

This case is far more similar to the facts in *Russo* where the assailant fired a gun into a restaurant striking *Russo*.

Accordingly, there is not the requisite consequential connection between the use of an automobile and the claimant's injuries.

Therefore, there is no PIPP coverage for this incident.

Appellant's Reply

Counsel for the Appellant provided the following written response to MPIC's written submission in this matter:

MPI's argument in its October, 10, 2008 letter relies heavily on the decisions of the Supreme Court of Canada in the cases of *Herbison v. Lumbermen's Mutual Casualty Insurance Company* (2007) 286 D.L.R. (4th) 592 and *Vytlingham (Litigation Guardian of) v. Farmer* (2007) 286 D.L.R. (4th) 577 and the decision of the Ontario Superior Court of Justice in *Russo v. John Doe* (2008) 63 C.C.L.I. (4th). All of these decisions dealt with motor vehicle accidents in tort-based liability systems, not no-fault benefit systems like the system contained in Part 2 of *The Manitoba Public Insurance Corporation Act* (the "Act").

Earlier this year, the Manitoba Court of Appeal had occasion to determine the impact of the Supreme Court's decisions in *Herbison* and *Vytlingham* on the no-fault insurance system in Manitoba. In the case of *Constantin v. Manitoba Public Insurance Corporation* (2008) MBCA 5 (copy enclosed), the Court stated in para. 12:

The two recent Supreme Court of Canada cases [*Herbison* and *Vytlingham*] do not deal with no-fault insurance schemes. The issues in both cases related to the application of insurance policies that went beyond the scope of a no-fault plan. Those decisions have not altered the law with respect to no-fault benefits.

(Emphasis added)

As the law relating to no-fault insurance benefits in Manitoba has not been changed or altered by the recent decisions of the Supreme Court of Canada, the essential principle for determining coverage under the Act remains the one set out by the Court of Appeal in *McMillan v. Thompson (Rural Municipality)* [1997] M.J. No. 67 (at para 26):

Generally speaking, where an automobile or the use of an automobile in some manner contributes to or adds to the injury, Part 2 of the Act applies.

In the *Russo* decision which is relied upon by MPI, the victim was shot in a drive-by shooting. The Ontario Superior Court held (at para. 36 of the decision):

There is no doubt the assailant's vehicle "contributed in some manner" to Russo's injuries.

The Court in the *Russo* case was dealing with a claim in a tort-based system, and ultimately dismissed the Plaintiff's action. In dismissing the plaintiff's claim, the Court relied heavily on the *Vytlingham* and *Herbison* decisions which are not applicable to the no-fault system in Manitoba.

This case involves a drive-by shooting, which could not have occurred without the use of a motor vehicle. As noted in paragraph 36 of the *Hannah* decision cited by MPI, "the use

of a motor vehicle to effect a criminal purpose does not render its use as anything other than a motor vehicle”.

In this case, the motor vehicle was an integral component of the assault. The uncontroverted evidence is that the assailants used the motor vehicle to “hunt down” T.B.S., making several passes at him. The assertion by MPI that “The assailant could just as easily been out of the car when he shot the pellet gun” is completely unsupported by the facts of this matter. Rather than being simply the *situs* of the shooting, the vehicle in this case was an essential component of the assault on T.B.S..

Decision

Upon a review of all of the evidence made available to it, both oral and documentary, and upon hearing the submissions made by counsel for the Appellant and by counsel on behalf of MPIC, the Commission finds that the Appellant’s injuries were caused by the use of an automobile, and accordingly, he is entitled to benefits pursuant to Part 2 of the MPIC Act.

Reasons for Decision

The Commission relies upon the decision of the Manitoba Court of Appeal in Constantin v. Manitoba Public Insurance Corporation (2008) MBCA 5, where the Court stated at paragraph 12:

The two recent Supreme Court of Canada cases [*Herbison and Vytlingham*] do not deal with no-fault insurance schemes. The issues in both cases related to the application of insurance policies that went beyond the scope of a no-fault plan. Those decisions have not altered the law with respect to no-fault benefits.

Since the law relating to no-fault insurance benefits in Manitoba has not been changed or altered by the recent decisions of the Supreme Court of Canada, the essential principles for determining coverage under the MPIC Act remain those set out by the Manitoba Court of Appeal in McMillan v. Thompson (Rural Municipality) supra. In McMillan, at page 21, Helper, J.A., states that:

The only question which required determination was: were the respondent's injuries caused by (in the sense of being related to) the use of an automobile? The answer to that question is undoubtedly "Yes".

The Commission is thus required to ask in the present circumstances, were the Appellant's injuries caused by, or related to, the use of an automobile? The Commission finds that the Appellant's injuries were caused by the paintballs fired from the assailant's vehicle and the use of the vehicle was an integral part of that assault. We find that the automobile allowed the assailants to pursue the Appellant and provided the assailants the opportunity for the assault on the Appellant. The use of the automobile was thus integral to the actual injuries suffered by the Appellant. Accordingly, the Commission finds that the injuries were caused by, in the sense of being related to, the use of the vehicle.

By the authority of Section 184(1) of the MPIC Act, the Commission therefore orders that:

- a) the Appellant's claim be referred back to MPIC for processing in light of the foregoing findings; and
- b) the decision of MPIC's Internal Review Officer, bearing date May 29, 2007, is therefore rescinded and the foregoing substituted for it.

Dated at Winnipeg this 24th day of March, 2009.

YVONNE TAVARES

NEIL COHEN

PAUL JOHNSTON