Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-73

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Barbara Miller** **Dr. Patrick Doyle**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's representative];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.**
HEARING DATE:	**January 27, 2005**
ISSUE(S):	**1. Entitlement to Income Replacement Indemnity benefits** **2. Entitlement to a greater spousal lump sum indemnity**
RELEVANT SECTIONS:	**Sections 70(1) and 71(1) of The Manitoba Public Insurance Corporation Act ('MPIC 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 Appellant, [text deleted], lost her husband and youngest son in a motor vehicle accident on August 16, 2002. The Appellant was at home in [text deleted] on that date, when her loved ones were killed in a motor vehicle accident outside of [text deleted], Ontario.

Prior to the accident, the evidence indicates that the Appellant was gainfully employed as a housekeeping aide, often working overtime. She had no history of depression.

Following the accident, the medical evidence indicates that the Appellant was diagnosed with severe depression which rendered her unable to work.

The Appellant's husband, at the time of the accident, was a student working towards his Master of [text deleted] Degree at the [text deleted]. He was also employed as a part-time teaching assistant, and in the year prior to his death earned approximately $10,000 as a part-time teaching assistant.

Internal Review Decision

On September 18, 2002 the Appellant was awarded the minimum spousal lump sum indemnity payable in accordance with Section 120 of the MPIC Act. She was also paid a parental lump sum indemnity in accordance with Section 123 of the MPIC Act.

On October 21, 2002 the case manager wrote to the Appellant and identified a further lump sum indemnity payable to the estate of her late son, who was a dependant over the age of sixteen (16) under Section 121(2) of the MPIC Act.

The Appellant filed an Application for Review of these decisions. She sought an Income Replacement Indemnity ('IRI') benefit, claiming that as a result of the accident she suffered from severe depression and was unable to work.

The Appellant also sought a greater spousal lump sum indemnity on the basis that her late husband had almost finished his Masters [text deleted] Degree and that, although he was not working full time at the time of the accident, he had good chances of obtaining a well paying job.

An Internal Review Officer issued a decision in regard to these two questions on January 10, 2003.

The Internal Review Officer decided that:

1. To be entitled to an IRI, an individual must sustain a "bodily injury" – as defined in Section 70(1) of the *Act* (copy enclosed) – which leads to a physical or mental condition rendering that individual unable to work.

   In this case, you were not in the car at the time of the accident (which occurred just east of [text deleted], ON) and were, in fact, at home in [text deleted]

   While your depression is entirely understandable, it is not a "bodily injury" which entitled you to an IRI.

The Internal Review Officer found that the spousal lump sum indemnity payable under Section 120(1) of the Act was based upon the gross income that would have been used to calculate the Appellant's husband's IRI had he survived. As the material indicated that he was not employed on the date of the accident and had not been promised an employment which was to have started after the accident, he was not eligible for an increased IRI. Rather, the Appellant was entitled to the minimum lump sum indemnity payable to their surviving spouse under Section 120(2) of the Act.

It is from this decision of the Internal Review Officer that the Appellant now appeals.

Preliminary Issues

A hearing was commenced into the Appellant's appeal on January 27, 2005.

The parties provided written submissions on both issues, and concluded oral argument on the issue of the Appellant's entitlement to an IRI benefit. However, on the issue of the greater

spousal lump sum indemnity benefit, the parties agreed to adjourn the hearing so that counsel for the Appellant could conduct a further investigation into the relevant facts, and provide further evidence if necessary.

On March 2, 2005, counsel for the Appellant advised that he had been unsuccessful in his efforts to gather further facts relevant to the issue of entitlement to a greater spousal lump sum indemnity benefit.

The parties agreed that there was no need to reconvene the hearing and that the Commission could proceed to consider its decision based on the written submissions and oral arguments made by the parties to date.

Submission of the Appellant

A. Entitlement to Income Replacement Indemnity benefits

It was argued on behalf of the Appellant that she should be entitled to an IRI benefit, in spite of the fact that she was not in the car or at the scene at the time of the accident, because she had suffered a bodily injury caused by an automobile accident or by the use of an automobile, in accordance with Sections 70(1) and 71(1) of the MPIC Act. As the definition of bodily injury includs any physical or mental injury, the Appellant, due to her diagnosed depression and inability to work, was entitled to this benefit.

The Appellant cited several decisions of the courts where consideration was given to the term "caused by" an automobile. These decisions included *McMillan v. Thompson (Rural Municipality)*, [1997] M.J. No. 67; *Honan v. McLean and McLean* (1952) 7 W.W.R. 337, affirmed [1953] 3 D.L.R. 193; *Darel v. Pennsylvania Manufacturers Association Insurance Co.*

555 A. 2d 570 (N.J. 1989); and [text deleted] *(AC-96-12)*, [1996] M.A.I.C.A.C.D. No. 16, a decision of the Commission.

Counsel for the Appellant argued that, as noted by the Court of Appeal in the *McMillan* decision, a restrictive interpretation of the words "caused by" would defeat many of the objectives identified by the legislators. The Act should apply where an automobile or the use of an automobile in some manner contributes or adds to an injury. It is not necessary that there be direct personal contact between the vehicle and the property damaged or the person injured. Rather, a "but for" test would satisfactorily determine whether an automobile could be considered the "cause of" or to have "caused" a plaintiff's injuries. There need be nothing more than some link between the injury sustained in the use of an automobile, it was submitted.

Counsel for the Appellant sought to distinguish a previous decision of the Commission in [text deleted] *(AC-02-97)* where the Commission concluded that the use of the term "in an accident" suggests:

> The use of the term "in an accident" suggests inclusion or involvement in the event, which in our view, in the circumstances of this present case, implies physical presence at the scene of the accident, when the accident took place.

The Appellant submitted that a purposive approach should be taken with regards to the interpretation of "in an accident". He pointed to the common law tort system which recognizes that a person may suffer injury (usually termed "nervous shock") which is compensable under the tort system, although not directly involved in an accident. Since the legislature's intention when framing the act would not have been to remove a claimant's cause of action as it relates to this type of action, and no such specific exclusion exists under Section 71(2), a restrictive

interpretation of "in an accident" would not provide a comprehensive scheme in lieu of the tort system, as the legislation was designed to do.

B. Entitlement to spousal death benefit

It was submitted on behalf of the Appellant that the Internal Review Officer erred in determining that the Appellant was not entitled to a greater benefit under Section 120(1) of the Act because her husband did not hold such employment at the time of the accident and it could not be demonstrated that he would have held employment but for the accident during the first one hundred and eighty (180) days. Although the Appellant's husband had earned only $10,000 as a part-time teaching assistant in the year before his death, the Appellant submitted that the analysis used by MPIC did not take into account the fact that he was a student at the time of the accident and would, upon graduation, have earned a much greater income.

The Appellant submitted that decisions of the Commission and of the Manitoba Court of Appeal in [text deleted] *(AC-96-10),* [1996] M.A.I.C.A.C.D. No. 10, and *Goossen v. Manitoba Public Insurance Corp.,* [2003] M.J. No. 245, provided that the Appellant's benefit ought to have been calculated based on an income her husband would have likely earned but for the accident. This does not require proof of certainty that he would have earned this income.

Submission of MPIC

A. Entitlement to Income Replacement Indemnity Benefits

Counsel for MPIC submitted that even under the tort law of nervous shock, there is no principle which provides that a person who suffers depression because family members have died in a car accident is entitled to compensation from a wrongdoer. The facts in this case fall far short of nervous shock principles.

Further, he submitted that pursuant to Section 71(1) of the MPIC Act, PIPP coverage applies only to a person who was "in an accident". The plain and ordinary meaning of this term does not apply to the claimant who simply was not in an accident. Her depression was not caused by an automobile or the use of an automobile and the interpretation of the term "in an accident" as found in the [text deleted] *(AC-02-97)* decision suggests inclusion or involvement in the event on the part of the applicant, which is not the case in this appeal.

B. Entitlement to spousal death benefit

Counsel for MPIC submitted that the Appellant's husband was a student who worked part-time as a teaching assistant. His entitlement to IRI would have been determined under Section 89 of the Act, and under Section 89(2)(a)(i) the basis for determining his IRI was the gross income he earned or could have earned from employment he held or could have held. It was submitted that the *Goossen* (supra) decision provided that evidence of hypothetical employment was not enough. The relevant questions was:

> If on the evidence, the victim would have likely held employment, what would he have earned?

The gross income used to calculate the Appellant's husband's IRI should not be his hypothetical salary potential. There was no evidence that he would have likely earned more than the approximately $10,000 he earned as a part-time teaching assistant in the year before his death. In fact, the evidence showed that the Appellant's husband was unable to find work other than this part-time work. As such, the best evidence shows he had an annual income of approximately $10,000, which would entitle the Appellant to the minimum payment under Section 120(2) of the Act.

Discussion

A. Entitlement to Income Replacement Indemnity benefits

Section 70(1) of the Act contains the following definitions

> **Definitions**
> **70(1)** In this Part,
> **"accident"** means any event in which bodily injury is caused by an automobile;
> **"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;
> **"spouse"** means the person who, at the time of the accident, is married to and cohabiting with the victim;
> **"victim"** means a person who suffers bodily injury in an accident.

Section 71(1) sets out the Application of Part 2:

> **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.

A plain and literal interpretation of Section 70(1) and 71(1) of the Act suggests that to be eligible for benefits, a victim must have been, at the very least, physically present at the scene of the accident when it took place. This is supported by previous decisions of the Commission in [text deleted] *(AC-96-61)* and in [text deleted] *(AC-02-97).*

In the [text deleted] *(AC-96-61)* decision, the Appellants, parents devastated by the loss of their daughter in a car accident, sought benefits for professional help in the form of grief counseling. The Commission stated:

> . . . however, it must be noted that the emotional or mental injuries suffered by [the Appellant], although no less real than if they had been personally present at the scene,

> cannot be said to have been suffered in an accident. The statute does not say "as a result of an accident" but, merely, "in an accident". Whatever else that latter phrase may mean, it necessarily implies presence at the scene. That concept is given further weight by the definition, also found in Section 70(1) of a "parent of a victim" as a person related to a victim as a parent by blood or adoption or who stands in loco parentis to a victim at the time of the accident. The foregoing definition distinguishes between a victim and the parent of a victim.

The Act also contains a separate definition of the "spouse" of a victim.

In the [text deleted] *(AC-02-97)* decision, the Commission considered the Appellant's argument that she should be entitled to IRI benefits for the loss of time from work which she incurred due to the stress she suffered after a vehicle lost control and crashed into her apartment, while the Appellant was at work.

The Commission considered the interpretation of Section 71(1) of the MPIC Act:

> The meaning of the phrase "*in an accident*" was previously considered by this Commission in the appeal by *[*[text deleted] *(AC-96-61)]*. In that decision, the Commission found that the phrase *"in an accident"* necessarily implied presence at the scene of the accident. We concur with their reasoning. The use of the term "*in an accident"* suggests inclusion or involvement in the event, which in our view, in the circumstances of this present case, implies physical presence at the scene of the accident, when the accident took place.

The panel has reviewed the cases referred to by the Appellant to support the argument that the Appellant should be entitled to IRI benefits, as her injuries were "caused by" and "as a result of" the accident, and would not have occurred "but for" the accident. These cases turn more on the issue of the words "caused by" in Section 70(1). In all of these cases the Appellant or plaintiff was present at the scene of the accident, either in an automobile, or directly injured by something or someone attached to or in the automobile. These decisions do not address the question of the interpretation of the words "in an accident" found in Section 71(1).

While the Appellant has urged the panel to take a more purposive interpretation of the relevant sections, in accordance with the common law tort of nervous shock, our review indicates that that doctrine is not quite broad enough to cover a victim in a case such as this where the Appellant was never present at the scene. Although the law regarding nervous shock might allow a person to recover damages even if they were not "directly involved" in an accident, a person claiming damages for nervous shock must be at or in the vicinity of the scene of an accident to recover. Alternatively, a plaintiff may recover under the "aftermath" doctrine, which may be applied where the plaintiff arrived at the accident soon after the event. The law has not allowed recovery for distant shock where the plaintiff's injury lacks temporal or locational proximity to the event.

As a result, we find that the Appellant does not come within either the definition of "victim" set out in Section 70(1) of the MPIC Act, or within the terms of Section 71(1) of the MPIC Act which applies to a victim "in an accident". We are therefore obliged to dismiss the Appellant's appeal on this point, and confirm the decision of the Internal Review Officer dated January 10, 2003.

B. Entitlement to a greater spousal death benefit

Section 120(1) of the Act sets out the methods of computing the indemnity to which a spouse is entitled, and sets out a minimum indemnity in Section 120(2):

> **Computing indemnity under schedules**
> **120(1)** The spouse or common-law partner of a deceased victim is entitled to a lump sum indemnity equal to the product obtained by multiplying the gross income that would have been used as the basis for computing the income replacement indemnity to which the victim would have been entitled if, on the day of his or her death, the victim had survived but had been unable to hold employment because of the accident, by the factor appearing

> opposite the victim's age in Schedule 1 or, where the spouse or common-law partner is disabled on that day, Schedule 2.
>
> **Minimum indemnity**
> **120(2)** The lump sum indemnity payable under subsection (1) shall not be less than $40,000. whether or not the deceased victim would have been entitled to an income replacement indemnity had he or she survived.

Section 89 of the Act sets out entitlement to IRI benefits for students:

> **Entitlement to I.R.I.**
> **89(1)** A student is entitled to an income replacement indemnity for any time after an accident that the following occurs as a result of the accident:
> (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;
> (b) he or she is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.
>
> **Determination of I.R.I.**
> **89(2)** The corporation shall determine the indemnity to which the student is entitled on the following basis:
> (a) under clause (1)(a), if at the time of the accident
> (i) the student holds or could have held an employment as a salaried worker, the gross income the student earned or would have earned from the employment,

The onus is on the Appellant to establish that she is entitled to a greater benefit.

The panel has reviewed the relevant sections, as well as the decisions of the Commission and the Court of Appeal in *Goossen* (supra) and of the Commission in [text deleted] *(AC-96-10)* (supra). From these decisions we have noted that the Commission has settled on a liberal interpretation of the word "would", in considering the employment a claimant "would have held during that period if the accident had not occurred", and the "gross income that would have been used" for computing IRI benefits.

In the *Goossen* decision, the Court of Appeal quoted the Commission in [text deleted] *(AC-96-10)* when it stated:

> . . . the claimant needs only to establish the likelihood of those earnings on a reasonably strong balance of probabilities. By that, we mean something stronger than a mere, slender balance that could have been inferred had the legislature used the word might rather than would, but nevertheless falling short of the heavier onus that must be met by the prosecution in a criminal case. None of the quoted sources suggests that the legislative use of the word would, even when used in the present context, necessarily implies certainty. (see paragraph 12)

Therefore, the panel has concluded that the test which should be applied is whether the Appellant has established a likelihood of earnings and employment on a reasonably strong balance of probabilities, stronger than a mere, slender balance.

In the Notice of Appeal, the Appellant argued that:

> 6. Further, at the time of the accident, [the Appellant's] husband was actively seeking employment. Her husband was a post-secondary student prior to his death and was about to receive his Masters [text deleted]. At the time of the accident he was searching for work and was actively participating in job interviews. [The Appellant's] husband had very good prospects for securing employment as a result of obtaining his degree. As such, he would have been entitled to an IRI pursuant to the Act and, as a result, [the Appellant] is entitled to a corresponding increase in the Spousal Lump Sum Indemnity she received from MPI.

However, an examination of the evidence shows a slightly different picture. The evidence is much more limited. Although the Appellant had told her psychiatrist that her husband had gone for job interviews at [text deleted] and [text deleted], she also noted that he had received no call backs. A letter from general counsel of the [text deleted] dated February 13, 2004 indicated that the Appellant's husband would have required another twelve to eighteen (12-18) months of continuous effort in order to attempt to complete the requirements of a Masters Degree [text deleted].

Therefore, in weighing this evidence, the panel is of the view that the Appellant has failed to

establish, on the balance of probabilities, a strong enough likelihood that the Appellant's husband would have held other employment or could have earned additional income beyond the approximately $10,000 he earned as a part-time teaching assistant in the year before his death. Accordingly, the Commission finds that the Appellant's spousal death benefit was correctly determined and that she is not entitled to a greater spousal lump sum indemnity.

As a result, for these reasons, the Commission dismisses the Appellant's appeal and confirms the decision of MPIC's Internal Review Officer bearing date January 10, 2003.

Dated at Winnipeg this 15th day of June, 2005.

LAURA DIAMOND

BARBARA MILLER

DR. PATRICK DOYLE