2018 MBQB 22
Manitoba Court of Queen's Bench

Smith v. Zrobek

2018 CarswellMan 64, 2018 MBQB 22, [2018] 4 W.W.R. 619,
[2018] I.L.R. I-6034, 289 A.C.W.S. (3d) 181, 76 C.C.L.I. (5th) 78

SHERRI SMITH (Plaintiff) and RONALD JOHN ZROBEK AND LAURIE ANN ZROBEK (Defendants) and THE MANITOBA PUBLIC INSURANCE CORPORATION (Intervenor)

Dewar J.

Judgment: February 5, 2018
Docket: Winnipeg Centre CI 14-01-90121

Counsel: Connor R. Williamson, for Plaintiff
Andrew P. Loewen, for Defendants
Steve M. Scarfone, for Intervenor

Subject: Insurance; Torts

Headnote

Insurance --- Automobile insurance — Government automobile insurance plans — Practice and procedure in matters involving government insurers

Property owners constructed small wooden fence along portion of property line that separated their property from neighbour's property — Fence consisted of four short wooden posts joined by single layer of 1" x 6" boards, such that there was gap between bottom of boards and ground — Neighbour parked her vehicle with driver's side beside fence, exited vehicle, and turned to close door — While in process of turning, back of neighbour's foot caught underneath fence, and neighbour fell back onto utility trailer on owners' side of fence — Neighbour brought action against owners for damages for negligence and under Occupiers' Liability Act — Owners brought motion for determination by way of special case that neighbour's injury was caused by automobile, and therefore her claim against owners was barred by s. 72 of Manitoba Public Insurance Corporation Act (MPIC Act) — Motion dismissed on other grounds — Where action was between plaintiff uninterested in making claim under Part 2 of MPIC Act and defendant who had allegedly committed tort that caused injury to plaintiff, court had jurisdiction to decide whether plaintiff qualified for benefits under Part 2 of MPIC Act when considering whether action should be allowed to proceed — While s. 169(1) of MPIC Act gave provincial insurer exclusive jurisdiction to decide any matter related to compensation under Part 2 of MPIC Act, s. 169(1) was only intended to govern review and appeal processes when claimant made claim against insurer for Part 2 benefits — Present case did not involve such dispute, so s. 169(1) had no application — Fact that s. 169(1) was restricted to claims made by claimant against insurer was supported when reading balance of Division 1 of MPIC Act.

Insurance --- Automobile insurance — Government automobile insurance plans — Removal of right of action

Property owners constructed small wooden fence along portion of property line that separated their property from neighbour's property — Fence consisted of four short wooden posts joined by single layer of 1" x 6" boards, such that there was gap between bottom of boards and ground — Neighbour parked her vehicle with driver's side beside fence, exited vehicle, and turned to close door — While in process of turning, back of neighbour's foot caught underneath fence, and neighbour fell back onto utility trailer on owners' side of fence — Neighbour brought action against owners for damages for negligence and under Occupiers' Liability Act — Owners brought motion for determination by way of special case that neighbour's injury was caused by automobile, and therefore her claim against owners was barred by s. 72 of Manitoba Public Insurance Corporation Act (MPIC Act) — Motion dismissed — Injury sustained by neighbour did not constitute "bodily injury caused by an automobile" as defined in s. 70(1) of MPIC Act, so neighbour could proceed with action against owners — Pursuant to s. 71(1) of MPIC Act, Part 2 of MPIC Act applied to any bodily injury suffered by victim in "accident", defined in s. 70(1) as "any event in which bodily injury is

caused by an automobile" — Section 70(1) also defined "bodily injury caused by an automobile" as "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 ..." — Authorities indicated where use of automobile was merely incidental or fortuitous to injuries that were sustained, then Part 2 should not be applicable — Injuries sustained by neighbour were not connected enough to use of vehicle to justify compensation under government no-fault program.

MOTION by property owners for determination by way of special case that neighbour's injury was caused by automobile, and therefore her claim against owners was barred by s. 72 of the *Manitoba Public Insurance Corporation Act*.

***Dewar J.*:**

INTRODUCTION

1 On October 22, 2013, the plaintiff fell while she was exiting her motor vehicle. Her foot caught underneath a fence that the defendants had constructed on or near the property line which separated their respective properties. The plaintiff sustained injuries and, on June 27, 2014, commenced an action in this court for damages against the defendants, alleging negligence and a breach of the duties imposed by *The Occupiers' Liability Act*, C.C.S.M., c. O8, referencing the type and placement of the fence.

2 Upon receiving the statement of claim, counsel for the defendants notified counsel for the plaintiff that the alleged accident arose in circumstances in which the plaintiff became eligible for Part 2 benefits under *The Manitoba Public Insurance Corporation Act*, C.C.S.M., c. P215 (hereinafter "the *Act*"), and pursuant to s. 72 of the *Act*, no action could be brought in this court against the defendants.

3 The plaintiff therefore applied to the Manitoba Public Insurance Corporation (hereinafter "MPI") who, by decision of a Senior Case Manager written on July 23, 2015, declined her claim on the basis that the plaintiff's injuries were not the result of embarking from her motor vehicle, but rather were the consequence of getting her foot stuck in her neighbours' (i.e. the defendants') fence which caused her to fall. In the letter, the Senior Case Manager advised the plaintiff that if she was not satisfied with the decision she could request a review of it under s. 172(1) of the *Act*.

4 The plaintiff did not seek to review the decision of the Senior Case Manager under s. 172(1) of the *Act*. Instead, she cooperated with the defendants who presented a Special Case to this court in which two questions were asked, namely:

> (i) Does any injury sustained by the plaintiff because of the accident constitute a "bodily injury caused by an automobile" as that phrase is defined in s. 70(1) of the *Act*?; and
>
> (ii) If the answer to question (i) is "yes," is the plaintiff's claim against the defendants therefore barred by virtue of s. 72 of the *Act*?

5 This decision responds to the motion brought by the defendants pursuant to Queen's Bench Rule 22 wherein the plaintiff and the defendants concurred in stating a Special Case for the opinion of the court.

FACTS

6 The plaintiff, Sherri Smith, resides at 43 Inch Bay, in Winnipeg. The defendants, Ronald and Laurie Zrobek, are her neighbours; they reside at 39 Inch Bay, in Winnipeg.

7 The plaintiff's property features a driveway which runs from the street to a garage near the rear of the property. The edge of the driveway lies immediately adjacent and runs parallel to the property line dividing 39 and 43 Inch Bay. The Special Case included a photograph of the two properties viewed from the street.

8 On or about October 20, 2013, the defendant, Ronald Zrobek, built a small wooden fence along a portion of the property line between the two properties. The fence consisted of four wooden posts joined by pieces of 1 6 lumber. There is only one length of 1 6 board between each post. From the photos attached to the Special Case, it appears that the top of the 1 6 boards are

no more than two feet from the ground and there is a gap between the bottom of the 1 6 boards and the ground. The plaintiff's driveway lies immediately adjacent and parallel to the fence.

9 For the purposes of the Special Case, it was agreed that:

(a) on October 22, 2013, at approximately 3:30 p.m., the plaintiff was operating her four door GMC Envoy motor vehicle (the "vehicle"), while being duly licensed to do so and while the vehicle was duly registered and insured through MPI to operate in Manitoba;

(b) present in the vehicle were some small children who were in the plaintiff's care, as she operated a daycare;

(c) the plaintiff pulled into the driveway at 43 Inch Bay, parked the vehicle and turned off the ignition. The vehicle was parked so that the driver's side door was beside the final length of 1 6 board of the recently installed fence (that is between the third and fourth vertical posts counted from the street);

(d) the plaintiff proceeded to open the driver's side door and exit the vehicle. After exiting the vehicle, she planned to help the children out of the rear seats. She got out of the vehicle and was turning around to close the door. As she was in the process of turning, and before she had put her hand on the door to close it, the back of her right foot caught underneath the fence and she fell back onto the brace of a utility trailer that was parked on the defendants' side of the fence;

(e) the plaintiff had not successfully closed the front driver's side door to the vehicle before the accident occurred;

(f) following the accident, the plaintiff assisted the children in exiting the vehicle; and

(g) the plaintiff sustained injuries when she fell.

10 Counsel for the plaintiff and the defendants notified counsel for MPI of the Special Case, and upon hearing its application, MPI was given intervenor status in the hearing of the Special Case.

THE ISSUES

11 There are two general issues to decide. Firstly, counsel for MPI questions the jurisdiction of this court to address the questions posed in the Special Case. Secondly, if jurisdiction exists, how should the court address the questions posed in the Special Case.

ANALYSIS

Issue No. 1 — Whether this court has jurisdiction to decide the issues raised by the Special Case.

12 MPI takes the position in this motion that the court does not have jurisdiction to determine whether the plaintiff qualifies for Part 2 benefits. MPI relies upon the following section of the *Act*, namely:

Jurisdiction of the corporation

169(1) Subject to subsection 196(2) (appeal under this Part or Workers Compensation Act), the corporation has exclusive jurisdiction

(a) to decide any matter related to compensation under this Part; and

(b) to review any such decision, unless the decision is about a matter under section 137.1.

13 Counsel for MPI argues that the question as to whether a person qualifies for Part 2 benefits is a "matter related to compensation under this Part" and is exclusively the task of MPI, although tempered by the review and appeal provisions set out in the *Act*. Indeed, the *Act* sets forth a relatively comprehensive process for the adjudication and assessment of a claim made

by a claimant for Part 2 benefits. Division 10 of Part 2 contemplates that an officer of MPI will first make an initial decision in respect of a claim for compensation. The *Act*, however, sets forth a procedure by which that decision, upon application by the claimant, may be further reviewed by the corporation, followed by a right of appeal to the Automobile Injury Compensation Appeal Commission, followed by an ultimate right to seek leave to appeal to the Court of Appeal of Manitoba on a question of law or jurisdiction.

14 Counsel for MPI submits that given the extensive process set forth in the Act and the use of the term "exclusive" in s. 169(1), the process taken by the defendants by way of Special Case to secure a determination as to whether the plaintiff qualifies for Part 2 benefits is flawed. Counsel for MPI submits that the proper motion to be brought by the defendants is a motion for an order which stays the plaintiff's action and directs the plaintiff to take her claim to MPI and prosecute it there to the fullest.

15 In support, counsel for MPI relies upon the decision in *Wong v. Manitoba Public Insurance Corp.*, 2015 MBQB 173, 321 Man. R. (2d) 204 (Man. Q.B.), wherein Schulman J. dismissed an action against MPI in this court in which the plaintiff sought to recover Part 2 benefits. Amongst other things, Schulman J. wrote that that the statement of claim was simply an attempt to circumvent the review and appeal provisions set out in the *Act*. Counsel for MPI also supports his argument with the case of *Phillips v. Harrison*, 2000 MBCA 150, 153 Man. R. (2d) 1 (Man. C.A.), to support the proposition that where a dispute resolution scheme is set out in the applicable legislation, the court should direct the dispute to be resolved in the forum contemplated by the legislation.

16 Counsel for the defendants argues that s. 169(1) is only applicable to the assessment of the amount of compensation to be awarded a claimant, not whether the claimant is entitled to receive any Part 2 benefits. He argues that within the scheme of Part 2 of the *Act*, s. 169(1) is grouped sequentially to the provisions which detail the quantum of benefits to which a claimant is entitled. He argues that the question as to whether a claimant qualifies for benefits is found in Division 1 of Part 2 which is a group of 10 sections under the heading "General Provisions" as distinct from the balance of Part 2 consisting of approximately 120 other sections. As such, counsel for the defendants argues that s. 169(1) was clearly intended simply to deal with matters of quantum.

17 Counsel for the defendants supports his decision with the case of *Constantin v. Manitoba Public Insurance Corp.*, 2010 MBCA 76, 258 Man. R. (2d) 61 (Man. C.A.) ("Constantin #2"). That case dealt with an interpretation of s. 79(3) of the *Act*. Section 79(1) of the *Act* disqualifies claimants from receiving Part 2 benefits if their injuries were caused by an accident that was wilfully caused by the claimant. Where MPI rejects a claim on the basis of the exclusion set out in s. 79(1), s. 79(3) says that the claimant "may appeal the decision to the court within 180 days after receiving written notice of the decision from the corporation."

18 The issue in *Constantin #2* was whether the claimant who had received the negative ruling under s. 79(1) could *only* seek relief from this court, or whether the claimant could take advantage of the review and appeal provisions found in Division 10 of Part 2 of the *Act*. In coming to his decision, MacInnes J.A. drew a distinction between Division 1 of Part 2 of the *Act* and the rest of Part 2. He wrote (at paras. 44 - 45):

> [44] The scheme of the legislation, in my view, is that where the issues are the amount of compensation to be paid and the terms upon which it will be paid to eligible victims or claimants, these fall within the exclusive jurisdiction of MPIC as set forth in s. 169(1) of the *Act*. And, as part of MPIC's exclusive jurisdiction in dealing with such issues, there flows the ability to seek internal review of MPIC's decision, to appeal the review decision to the Commission and ultimately, on a question of law or jurisdiction and with leave, to appeal the Commission's decision to the Court of Appeal.
>
> [45] However, where the real question is not pertaining to compensation *per se*, but to eligibility for compensation based upon whether the event giving rise to the claim was an accidental occurrence or one wilfully caused by the victim, a victim or a dependant of a victim who disagrees with MPIC's decision on that question may appeal the decision to the Court of Queen's Bench.

19 MacInnes J.A. went on to conclude that in respect of appeals arising from s. 79 denials, the claimant was obliged to take the appeal in this court (at paras. 55 - 56).

20 It is important to recognize that *Constantin #2* deals with a situation not before this court, and it may be that the obligation of a claimant to appeal a decision of ineligibility in this court may be restricted to the "willful" accident situation described in s. 79. There is no similar section in the *Act* which references appeals from coverage denials based on grounds not covered by s. 79. I need not make that decision in this case. What is important, however, is the fact that there was a delineation of between Division 1 and the rest of the Part 2 sections of the *Act*. I too draw a delineation, but in a different way.

21 Leaving aside the issue as to whether the claimant can, or must seek remedies in this court after receipt of a denial of eligibility based on circumstances different from those described in s. 79 of the *Act*, in my respectful opinion, s. 169(1) is only intended to govern the review and appeal processes in which *a claimant* makes a claim against MPI for Part 2 benefits. This case however does not involve such a dispute. Here, the main parties to the dispute are Ms. Smith (the plaintiff) and her neighbour (the defendants). MPI only belatedly became a party to this action after making an application for intervenor status. At its root, the within action involves a claim by the plaintiff against the defendants, not the plaintiff against MPI. In my opinion, s. 169(1) has no application.

22 The fact that s. 169(1) of the *Act* is restricted to claims made by a claimant against MPI is supported when one reads the balance of Division 1. For example, s. 170(1) requires the corporation to give a decision in respect of the claimant's claim to "the claimant." The right of review is given to "the claimant." Section 174.1(1) establishes the "claimant adviser office" and a claimant may request assistance from a claimant adviser. Section 70 defines a "claimant" as "a person who applies for compensation under this Part."

23 Although the Automobile Injury Compensation Appeal Commission is authorized to determine its own practices and procedures, including presumably the right to offer intervenor status to third parties, that does not change the general tenor of Division 10 that suggests it has been legislated to cover disputes between claimants and MPI.

24 Furthermore, in the context of this case, the plaintiff has commenced her action in a manner consistent with her submission that she does not qualify for Part 2 benefits, namely by suing the defendants in a civil court. It appears that as a matter of accommodation, when the defendants confronted the plaintiff with s. 72 of the *Act*, the plaintiff proceeded to make a claim to MPI for Part 2 benefits. Her application was denied by MPI. The plaintiff was content to accept that denial. It is somewhat inconsistent for MPI to now come to this court and argue that the plaintiff should be obliged to appeal the decision that was made by MPI. If the decision of MPI is correct (and in this appeal, MPI supports the decision of the Senior Case Manager, or at least argues that it passes the test of reasonableness), namely that the plaintiff does not qualify for Part 2 benefits, then there would be no basis upon which MPI could contest the jurisdiction of the court.

25 In addition, in order to accept the argument of counsel for MPI, the court would have to make a determination as to whether the plaintiff qualified for Part 2 benefits. The court will not stay a proceeding without there being good reason to do so. In order to determine whether this case should be stayed, it is incumbent upon the court to assess the facts and, in so doing, must conduct the same determination which counsel for MPI submits it cannot conduct. To refuse to make that determination and simply punt the case back to MPI and require the plaintiff to pursue the appeal of a decision with which she is already content is simply not tenable. It would also lay the groundwork for mischievous litigants to delay court proceedings simply by raising the notion that the injuries allegedly sustained by a plaintiff are those subject to compensation under Part 2 of the *Act*, since if the argument of MPI were accepted, a court could not consider the matter and would automatically be obliged to stay the action.

26 Finally, there have already been cases in this province in which the impact of s. 72 of the *Act* have been resolved without any fear that this court had no jurisdiction to do so, although the issue does not appear to have been argued in any of those cases. Practically the issue has never received any concern until now. Indeed, in the leading case in this province that deals with eligibility for Part 2 benefits, *McMillan v. Thompson (Rural Municipality)* (1997), 115 Man. R. (2d) 2 (Man. C.A.), about which more will later be said, the judges expressed no jurisdictional concerns about the ability of a Court of Queen's Bench judge to decide the issue. Applying colloquial language to the position of MPI on the issue, this ship has already sailed.

27 It might also be said that the issue in this case is whether the action should be dismissed, and the coverage eligibility issue is simply a component in the analysis to be undertaken to be make a decision, not the decision itself.

28 I am of the opinion that where the action is between a plaintiff uninterested in making a claim under Part 2 of the *Act*, and a defendant who has allegedly committed a tort which caused injury to the plaintiff, this court does have jurisdiction to decide whether the plaintiff qualifies for benefits under Part 2 of the *Act* when it is considering whether the action should be allowed to proceed.

Issue No. 2 — Does any injury sustained by the plaintiff because of the accident constitute a "bodily injury caused by an automobile" as that phrase is defined in s. 70 of the Act, and if the answer to this question is "yes," is the plaintiff's claim against the defendants therefore barred by virtue of s. 72 of the Act?

29 The defendants argue that under the no-fault regime in Manitoba, a person sustaining injuries in an accident involving an automobile has no recourse to the civil courts for compensation. By operation of law, the only redress of such a claimant is to the Part 2 benefits contained within the Act.

30 Put very simply, the plaintiff argues that she did not sustain any injuries from the use of her automobile. She sustained injuries when she fell over the low fence which her neighbours had built too close to her driveway.

31 The solution to this case rests with the application of the facts to the provisions of the *Act*. If the injuries sustained by the plaintiff are captured by the language of the *Act*, no action can be sustained by the plaintiff against the defendants. Section 72 of the *Act* reads:

> **No tort actions**
>
> 72 Notwithstanding the provisions of any other *Act*, compensation under this Part stands in lieu of all rights and remedies arising out of bodily injuries to which this Part applies and no action in that respect may be admitted before any court.

32 It therefore becomes necessary to determine what bodily injuries are governed by Part 2. Section 71 of the *Act* reads as follows:

> **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.
>
> **Bodily injury to which Part 2 does not apply**
>
> 71(2) Notwithstanding subsection (1), this Part does not apply to bodily injury that is
>
> (a) caused, while the automobile is not in motion on a highway, by, or by the use of, a device that can be operated independently and that is mounted on or attached to the automobile;
>
> (b) the result of an accident that is caused by one of the following:
>
> (i) a farm tractor, other than a farm tractor that is required to be registered as a motor vehicle under *The Drivers and Vehicles Act*, if the accident occurs off a highway,
>
> (ii) as defined in *The Highway Traffic Act*, a self-propelled implement of husbandry, motorized mobility aid, special mobile machine or power-assisted bicycle,
>
> (iii) a snow vehicle as defined in *The Highway Traffic Act*, other than a snow vehicle capable of being registered under *The Drivers and Vehicles Act*,

(iv) an off-road vehicle as defined in *The Off-Road Vehicles Act*,

(v) a golf cart,

(vi) a prescribed personal transportation vehicle;

unless an automobile in motion — other than a vehicle described in subclauses (i) to (vi) — is involved in the accident; or

(c) is the result of any event or activity — other than an event or activity sanctioned by the corporation — on a track or other location temporarily or permanently closed to all other automobile traffic so that the event or activity may occur, whether or not the automobile that causes the bodily injury is participating in the event or activity.

33 None of the exceptions set out in s. 71(2) exist, and therefore it must be determined whether the two requirements contained in s. 71(1) are met, namely: (1) whether the injuries sustained by the plaintiff occurred in an accident that (2) occurred on or after March 1, 1994. Here the injuries were sustained on October 22, 2013. Therefore the second prerequisite has been satisfied. The main issue in this case deals with the first requirement, namely, were the injuries sustained by the plaintiff in an "accident" as that term is defined in the *Act*?

34 Under the definition section found in section 70 of the Act, the word "accident" is defined as follows:

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

35 The definition is further refined as follows:

"**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;

36 Were the injuries sustained by the plaintiff as a result of her fall caused by an automobile, or by the use of an automobile? It is that neat question which must be addressed to solve this case.

37 The place to start this analysis is with the case of *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.). That was a case which dealt with a claim by a driver for benefits under the no-fault portion of the automobile insurance plan then existing in British Columbia. While in California, the driver of a motor vehicle sustained a gunshot wound when he was shot by one of a group of men who had surrounded his vehicle while he was driving, and who were trying to impede the car's progress. The driver, even after being shot, was able to continue driving forward, albeit slowly, until he extricated himself from the situation. He was seriously injured.

38 The Insurance Corporation of British Columbia ("ICBC") argued that the driver's injuries were caused by the gunshot and, therefore, did not fit within the wording of the relevant regulation which dealt with injuries "caused by an accident that arises out of the ownership, use or operation of a vehicle." Major J., writing for a unanimous court, indicated that the legislation should be interpreted broadly and set and applied a two-part test to the interpretation of the relevant legislation. He wrote (at para. 17):

17 In the same way, while s. 79(1) must not be stretched beyond its plain and ordinary meaning, it ought not to be given a technical construction that defeats the object and insuring intent of the legislation providing coverage. The two-part test to be applied to interpreting this section is:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?

> 2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?
>
> . . . . .

39 Utilizing a broad interpretive approach, Major J. concluded that since the plaintiff was driving his motor vehicle at the time, and because the shooting was a direct result of the assailants' failed attempt to gain entry to the driver's vehicle as it was being driven, the use of the vehicle was more than incidental or fortuitous and coverage was therefore provided.

40 The leading case on this issue in Manitoba is the case of *McMillan*. In that case, the plaintiffs sustained injuries after the car in which they were driving went over a bridge that had been washed out leaving a gap in the road. The plaintiffs sought to sue the municipality alleging negligence in respect of the unsafe condition of the bridge and the lack of any warning signs. The municipality defended on the basis that the plaintiffs' injuries were caused by the use of an automobile and, therefore, because of s. 72 of the *Act*, no independent action could be maintained against it. The municipality, unsuccessful in this court, convinced the Manitoba Court of Appeal of its position and the action against the municipality was dismissed. The plaintiffs' sole remedy was under Part 2 of the *Act*.

41 There were three separate decisions from the panel of judges who heard the case. All of them concluded that the plaintiffs could not sue the municipality, but found the need to write separate opinions. Philp J.A. applied the *Amos* case, and wrote as follows (at paras. 25 - 26):

> [25] It is those principles which the motions court appears to have overlooked. The words "bodily injury caused by an automobile, caused by the use of an automobile" found in Part 2 of the *Act*, in my view, should be given the same broad and liberal construction which the court applied in *Amos* to the insuring provision in the regulation. Major J.'s statement of principles, paraphrased to meet the factual circumstances of this case, becomes:
>
> > The no-fault character of the benefits in question does not change in interpretation of s. 70(1) of the *Act*. No-fault means that the Corporation's liability to pay benefits occurs when injury is caused by an automobile, by the use of an automobile, regardless of the presence or absence or fault. The injury must still be caused by an automobile or the use of an automobile. However, this does not mean that a narrow, technical interpretation is dictated.
> >
> > . . . . .
> >
> > In the same way, while s. 70(1) of the *Act* must not be stretched beyond its plain and ordinary meaning, it ought not to be given a technical construction that defeats the object and insuring intent of the legislation providing coverage.
>
> [26] Applying those principles to Part 2 of the *Act*, I conclude (again paraphrasing the words of Major J.) that:
>
> > 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.

42 Helper J.A. wrote (at para. 70):

> [70] Both ss. 71(2) and 72 support my conclusion that the scope of the plan is broad and that the words "caused by" are not to be given a restricted meaning. I cannot state too strongly that the focus of the plan is on the relationship between the bodily injuries sustained and an automobile or its use. That focus serves as the starting point from which the interpretation of the phrase "caused by" proceeds. The respondents' submission is focused on the cause of the accident — liability or fault. The clear words of the legislation does not support that perspective of the plan's operation with the result that the respondents' submission is not persuasive.

43 And again Helper J.A., after a review of authorities from different countries interpreting no-fault insurance plans, wrote as follows (at paras. 105 - 106):

[105] All of the above-noted cases support the reasoning that where the words "caused by" are used, there must be some link between the injuries sustained and the use of the automobile. An ordinary reading of s. 70(1) leads to the same conclusion. The legislation does not require more. It does not seek out causation in terms of the accident. It specifically eliminates the concept of fault. In light of the elimination of fault, there is no support for the submission that the proximate cause of an automobile accident determines the application of Part 2.

[106] Part 2 applies where there is a direct relationship between the automobile being used and the injuries suffered. Where Part 2 applies, other action for the recovery of damages for personal injury is barred. While there must be a connection between the automobile and the injuries, judicial cause, or proximate cause is not required by the legislation. The legislation does not address the cause of the accident, only the cause of the injuries.

44 Finally, Helper J.A. wrote (at para. 107):

[107] .... The only question which required determination was: Were the respondents' injuries caused by (in the sense of being related to) the use of an automobile? ...

45 Kroft J.A. foresaw that too broad an interpretation of the language of the governing legislation might extend Part 2 coverage beyond what was contemplated by the legislature. Although agreeing that legal causation terms were not to be utilized, he wrote that there still needed to be some consequential connection between the use of the automobile and the injuries. He wrote (at para. 129):

[129] In my view, it must be emphasized that when abolishing the need to find fault, the legislature did not do away [with] the necessity to establish some linkage or consequential relationship between the use of the automobile and the injuries. The right of an applicant to apply for and receive compensation for bodily injuries without establishing fault, without concern for negligence or contributory negligence and without belabouring such issues as "*causa causans*" and "*causa sine qua non*," does not mean that the question of cause and effect can be ignored. I am not prepared to say that any injury suffered in or in some remote way involved with an automobile is necessarily caused by it or the use of it.

[emphasis added]

46 And again Kroft J.A. wrote (at para. 137):

[137] I hope that my concerns have been made clear. It is true that inquiries into fault and effective negligence have been made unnecessary in determining whether coverage is available. Nonetheless, if a tort action is to be barred, the words "bodily injury ... caused ... by the use of an automobile" clearly do require a demonstration of consequential connection between the use of an automobile on the one hand and the bodily injuries suffered by the claimant on the other.

47 What propositions can be drawn from these three opinions? Firstly, all judges appear to accept that the Part 2 provisions of the Act are to provide compensation to individuals who sustain injuries caused by an automobile, or the use of an automobile, irrespective of fault. A careful reading of each of the judgments demonstrates that each judge determined that the focus of the inquiry should be on the injuries sustained by the claimant and whether they logically flowed from the *use of an automobile*. In addition, each judge appears content to apply a broad interpretation to the language of the Act, although the breadth of the interpretation was not unlimited. Philp J.A. relied upon Amos, which had contained a caution against accepting claims where the use of the automobile was "incidental" or "fortuitous." Helper J.A. spoke of a "direct" connection between the use of the automobile and the injuries. Kroft J.A. spoke of a "consequential" relationship between the injuries and the use of the automobile. Certainly, Kroft J.A. (and perhaps inferentially to some extent Philp J.A. and Helper J.A.) anticipated that an overly broad interpretation might lead to situations in which the no-fault scheme would be used where injuries were only tangentially the result of the use of an automobile. This caution is no different than the caution which was expressed by Major J. in *Amos* in developing his two-part test, when he expressed the second part as follows (at para. 17):

17. . . .

> 2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?
>
> . . . . .
>
> [emphasis added]

48 In other words, where the use of the automobile is merely incidental or fortuitous to the injuries that were sustained, then Part 2 of the *Act* should not be applicable.

49 There have been other cases before the Supreme Court of Canada in which similar issues have arisen. For example, in the case of *Rossy c. Westmount (Ville)*, 2012 SCC 30, [2012] 2 S.C.R. 136 (S.C.C.) ("*Rossy*"), the Supreme Court interpreted the similar, but not identical, provisions of the Québec no-fault legislation to provide coverage to an individual, who, while driving from point A to point B, was killed when a tree fell on the car that he was driving. There appears to have been some question in the case as to whether the vehicle was even moving at the time of the accident, but coverage was afforded in any event. LeBel J. cited, with approval, the case of *Productions Pram Inc. c. Lemay*, [1992] R.J.Q. 1738 (C.A. Que.), 1992 CanLII 3306 ("*Productions Pram*"), and certain propositions laid down therein (at para. 27):

> 27 Baudouin J.A. analysed the jurisprudence and distilled from it the following principles with respect to causation in the context of the Act:
>
> • The identification of a causal link remains a matter of logic and fact, and depends on the circumstances of each case.
>
> • For the act to apply, it is not necessary for the vehicle to have entered directly into physical contact with the victim.
>
> • It is not necessary for the vehicle to have been in motion when the damage occurred. Whether the vehicle's role was active or passive is not determinative of causation.
>
> • Whether the act that caused the damage was voluntary or involuntary is of no consequence.
>
> • The mere use of the vehicle, that is, its use, handling and operation, is sufficient for the act to apply. The meaning of "damage caused by the use of the automobile" is broader than that of "damage caused by the automobile".
>
> • The damage need not have been produced by the vehicle directly. It is enough that the damage occur in the general context of the use of the vehicle (p. 1742).

50 In the *Productions Pram* case, a person was situated in a car trying to take a picture of a low-flying plane when the wheels of the plane struck him. In that case, the injured person was obliged to seek compensation from the government insurance plan and could not sue others for compensation.

51 More recently in the case of *Godbout c. Pagé*, 2017 SCC 18, [2017] 1 S.C.R. 283 (S.C.C.), Wagner J. (as he then was) adopted the *Productions Pram* principles and said this (at para. 48):

> [48] These few examples show that in interpreting and applying the *Act* [*Automobile Insurance Act*, CQLR, c. A-25], the ATQ has adopted a large and liberal interpretation of causation to enable automobile accident victims to obtain full compensation. Although the ATQ has frequently referred to the test of a "direct" link, such a test could lead to confusion with the principles of the general law of civil liability. It is my view that the test that must be applied is that of a plausible, logical and sufficiently close link between the injury and the accident. ....

52 The *Godbout* case involved the issue whether the claimant could sue doctors for the negligent treatment of injuries sustained in a motor vehicle accident. Wagner J., writing for the majority, concluded that the plaintiffs in that case were unable to sue the doctors. This is a decision which runs contrary to an earlier decision of the Court of Appeal in Manitoba in which the court had concluded otherwise (*Mitchell v. Rahman*, 2002 MBCA 19, 163 Man. R. (2d) 87 (Man. C.A.)).

53 Wagner J. also cautioned against slavishly using the Manitoba scheme to interpret the Québec no-fault scheme (and presumably vice versa), but at least for Québec, was prepared to acknowledge that there needed to be a plausible, logical and *sufficiently close link* between the injury and the accident.

54 What is significant in all of these cases is that the injuries were sustained while a motor vehicle was being driven or "en route." In *McMillan*, the vehicle drove over a defective bridge. In *Rossy*, the tree fell on the vehicle as it was travelling from Point A to Point B, although it may have been temporarily stationary when the accident occurred. In *Rossy*, the initial injuries were sustained by the claimants while the car in which they were riding was being driven. In *Productions Pram*, the injured party was a passenger in a vehicle on a country road trying to get a good picture of the plane. Even in *Amos*, the claimant was driving his vehicle, albeit slowly. In each case, the vehicle was being used for an ordinary purpose, namely the transport of people from one location to another. The question in the current case is whether the injuries sustained by the plaintiff are connected enough to the use of the vehicle to justify the plaintiff's compensation under the government no-fault program.

55 Counsel for the defendant has cited a number of cases to support his contention that the plaintiff has sustained injuries caused by an automobile, or the use of an automobile. For example, in *Wu v. Malamas* (1985), 21 D.L.R. (4th) 468 (B.C. C.A.), 1985 CanLII 235, the Court of Appeal of British Columbia granted liability insurance coverage to a woman who parked her car on the north side of the street and allowed her child out to go to her school which was situated on the south side of the street. The child was injured when she was struck by another vehicle while crossing the street. The operative language of the insurance policy was whether the injury to the child arose out of the use, or operation, of the mother's vehicle.

56 Similarly, in the case of *Lefor (Litigation Guardian of) v. McClure* (2000), 49 O.R. (3d) 557 (Ont. C.A.), 2000 CanLII 5735, the Ontario Court of Appeal declared that liability coverage existed for a mother who had also parked her vehicle on the opposite side of the street from her destination, and one of her children darted in front of another car while crossing the street. In writing for the court, Sharpe J.A. relied upon *Amos* and concluded that there was a "clear nexus" between the use of the mother's vehicle (in stopping to drop off passengers) and the injuries sustained by her child.

57 Counsel for the defendants also cited arbitration cases such as *Mariano v. TTC Insurance Co.*, 2006 CarswellOnt 5837 (F.S.C.O. Arb.), and *Pinarreta v. ING Insurance Co. of Canada*, 2005 CarswellOnt 6926 (F.S.C.O. Arb.), where arbitrators permitted access to claimants for accident benefits where the claimants had fallen after disembarking from a bus.

58 Counsel also made reference to an appeal of an arbitrator's decision in *Webb v. Wawanesa Mutual Insurance Co.*, 2012 CarswellOnt 10014 (F.S.C.O. App.), where a woman was denied accident benefits in a situation in which she had parked her car, exited the vehicle, and locked the door, but subsequently fell on some ice when walking in front of her car. There, however, the arbitrator took the time to say that the fall had not occurred when the claimant was actually "alighting from the vehicle," inferentially suggesting that his decision might have been different if the fall occurred during disembarkment.

59 When I look at the trend of authorities, they do appear to be weighted towards extending coverage for no-fault benefits whenever possible. There is a very generous approach being taken by courts and arbitrators in cases in which the eligibility of a claimant for no-fault benefits is at issue. Some of the decisions appear to extend coverage beyond what is necessary to give effect to the legislation, or policy under consideration. Indeed, there does not appear to be any comment on the need to strike a balance in an assessment as to how liberal an interpretation ought to be used. An unlimited liberal approach extends coverage, but at the same time deprives a citizen from seeking compensation, even better compensation than the statutory compensation, from third parties. There are two interests that compete when the manner of interpreting the coverage provisions is being considered, namely, those who wish to maximize coverage in every case and those who wish the right to seek compensation from third parties unrestricted by a government program. The balance which needs to be struck between these two interests is perhaps best achieved by injecting into the analysis a consideration of the mischief which the Part 2 provisions were legislated to address.

60 All of the authorities suggest that the *Act* should be interpreted in accordance with its purpose. The purpose of the Manitoba legislation was discussed by Helper J.A. in *McMillan* (at paras. 54 - 55):

> [54] I have concluded that the legislature created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile. I find favour with the observations of Pitt J. in the case of *The Economical Mutual Insurance Co. v. Lott*, 1995 CanLII 66 (SCC), [1995] I.L.R. 1-3213 (Ont. G.D.):
>
> > I am of the view that the main objective of motor vehicle insurance legislation in the nineties is the reduction in the volume and costs of litigation. The means to achieve that objective is the limitation of access to the courts. For that reason alone I would agree with the observations of Matlow J. in *Canadian General Insurance Co. v. Jevco Insurance Co.*, dated October 21, 1994, that: the no-fault provisions of the *Act* were intended to constitute a comprehensive code determining the rights of insured persons against their insurers and the rights of insurers against other insurers.
>
> [55] What other intent can be attributed to the legislature when you examine the definition in the context of the scheme as a whole?

61 The purpose of the Manitoba legislation was to reduce the volume and costs of litigation arising from accidents involving automobiles. Injuries sustained by people disembarking from vehicles was not the mischief which the legislature was concerned about when the no-fault scheme was introduced. The legislature was concerned about people being injured in what are commonly called "automobile accidents," not the occasional slip and fall during disembarkment. To extend coverage for these injuries goes further than necessary, even if a broad and liberal interpretation were to be given to the provisions.

62 During argument, I was advised by counsel that this is the first time that a similar situation has reached this court. There is a danger that decisions made in these kinds of cases act as stepping stones to the gradual extension of coverage, regardless as to whether they were ever intended by the legislature to be caught by the legislation. There is what might be called a "coverage creep," and it becomes increasingly difficult to deny coverage where there are small incremental differences from the various fact situations where coverage is found to exist. Since this fact situation is one of first impression in this province, I do not feel bound to simply conclude that coverage must exist because in other cases on other facts it was found to exist in other jurisdictions. There is a limit as to how far coverage can or should be stretched. In this case, I have asked myself this question — Was the no-fault legislation brought into effect because there was a concern about people falling when they were exiting their cars? I think not.

63 The evidence before me shows that the plaintiff had parked her automobile on her driveway, just before she tripped over the fence. She had reached her destination, she had climbed out of her car, and although she had not yet closed the door, nor extricated the children from the vehicle, she had both feet on the ground. The fact that the children were still in the car should not impact upon how the legislation should be applied to the plaintiff, although it might be a pertinent factor in assessing coverage if the children were injured in the event that the car caught fire while they remained in it. I simply say that injuries sustained in a fall during a person's exit from a vehicle should not automatically be classified as "injuries caused by the use of an automobile." In my view, in this case, the use of the plaintiff's automobile was only a fortuitous prelude to her sustaining injuries in the fall. In my opinion, there should be no coverage under Part 2 of the Act for these injuries.

64 If one concluded that all injuries sustained while disembarking from a vehicle are injuries sustained from "using a vehicle," absurdities arise. A person who slips on an icy driveway while disembarking from a vehicle would be entitled to Part 2 benefits whereas a person who simply slips on the same patch of ice as he/she walks up the driveway is not. Similarly, a passenger who trips on his shoelaces would qualify for compensation if he tripped while disembarking from a vehicle, but not if he simply fell while walking down the street. Similarly, subject to s. 79 concerns, an inebriated person who fell from a parked car in his own driveway has a better chance at Part 2 benefits than a drunk man on the street who falls. In all of these examples, the fact that the person was driving or riding in a vehicle immediately before the fall was simply incidental to the subsequent fall. If such a person wished to make a claim for Part 2 benefits, the fact that he/she had been in a car would be fortuitous. Using the language in *Amos*, to the extent that the two-part test is applicable, the second test would not be satisfied.

65 Since Philp J.A. applied *Amos* in *McMillan*, refusing coverage in this case would not be inconsistent with his opinion. Helper J.A. spoke about the *direct* relationship between the injuries and the use of the automobile, and a fall while exiting a vehicle can fairly be regarded as an indirect relationship between the injuries and the use of the vehicle. Refusing coverage in this case would not be inconsistent with Helper J.A.'s opinion. To the extent that Kroft J.A. required some "consequential" connection between the use of the automobile and the injuries, refusing coverage in this case would not be inconsistent with his opinion.

66 Counsel for the defendant also cited Manitoba cases that he submits support a decision awarding coverage in this case. For example, in the case of *Ducharme v. Revy Home & Garden*, 2004 MBQB 251, 189 Man. R. (2d) 105 (Man. Q.B.), Kennedy J. permitted a plaintiff who fell from his truck while adjusting his load to have access to Part 2 benefits. In *Constantin v. Manitoba Public Insurance Corp.*, 2008 MBCA 5, 2008 CarswellMan 24 (Man. C.A. [In Chambers]) (*Constantin #1*), Chartier J.A. (as he then was) dismissed an application for leave to appeal from a decision of the Automobile Injury Compensation Appeal Commission who had awarded coverage to a woman who, while in her car, lit a cigarette which ignited propane fumes coming from a propane cylinder in her car. I distinguish the *Ducharme* decision because, at the time of the fall, the plaintiff was clearly using his vehicle by adjusting his load. I distinguish *Constantin #1* because there, the claimant was at least still in her car.

67 It might be argued that the use of a motor vehicle starts during entry and ends after the doors are closed following disembarking. In my view, it would be wrong to set such a definitive approach. There still needs to be an examination as to the actual manner in which the injuries were sustained. Here, the injuries were sustained because the plaintiff fell over the fence, not because she had travelled in her car.

68 If one truly considers the mischief which the legislature intended to address when it enacted the Part 2 benefits legislation, the kind of accident in this case should not be covered. Part 2 benefits were never intended to create a universal disability compensation plan for society. I recognize that courts in past cases have sometimes extended the ambit of liability insurance coverage and no-fault benefit plans in order to temper the unfortunate circumstances of a suffering claimant. However, although there is a temptation to do so, the Part 2 provisions should not be extended as if they were part of a global insurance plan. In *Herbison v. Lumbermens Mutual Casualty Co.*, 2007 SCC 47, [2007] 3 S.C.R. 393 (S.C.C.), Binnie J. referenced the Ontario Court of Appeal remarks in *Alchimowicz v. Continental Insurance Co. of Canada* (1996), 37 C.C.L.I. (2d) 284 (Ont. C.A.) (*Lumbermens* at para. 11):

> 11 .... "[a]s liberally as one may choose to interpret legislation which provides benefits to persons who are injured, it must be remembered that this is automobile legislation" (para. 9). ...

69 Similarily, this is an "automobile" no-fault insurance plan, and hence the mere fact that an automobile has some proximity to the incident (in this case the "fall") is not enough. In close cases, the question should repeatedly be asked: Is the situation in which the injuries were sustained the type of situation that a person, thinking liberally, would expect would be covered by a no-fault automobile accident insurance plan? Here, in my respectful opinion, the answer is no.

Conclusion

70 I therefore answer the questions set out in the Special Case as follows:

> (i) Does any injury sustained by the plaintiff because of the accident constitute a bodily injury caused by an automobile as that phrase is defined in s. 70(1) of the *Act*?
>
> Answer: No.
>
> (ii) If the answer to question (i) is "yes," is the plaintiff's claim against the defendants therefore barred by virtue of s. 72 of the *Act*?
>
> Answer: Given the answer to the first question, this question need not be addressed.

71 It follows that the plaintiff may continue the within action against the defendants.

72 If they cannot agree, the parties may speak to costs.

Motion dismissed.