
CANADA / JUDGMENT

Manitoba Public Insurance v. Dybhaun

2016 BCSC 27

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 27 Manitoba Public Insurance v. Dybhaun

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Manitoba Public Insurance v. Dybhaun,

2016 BCSC 27

Date: 20160111

Docket: M110432

Registry: Vancouver

Between:

Manitoba Public Insurance

Plaintiff

And

Ole B. Dybhaun

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Plaintiff:

S.K. Padmanabhan

Counsel for Defendant:

J.D. James

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 9, 2015

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2016

Introduction

- [1] This matter is before the court by way of a Special Case pursuant to Rule 9-3 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [2] At issue is whether the plaintiff, which is the public automobile insurer in the Province of Manitoba, may recover from the defendant certain statutory benefits that it paid to one of its insureds as a result of a motor vehicle accident that occurred in British Columbia and for which the defendant was liable.

Facts

- [3] The following facts are taken from an agreed statement of facts prepared by the parties as part of the Special Case.
- [4] On February 13, 2009, the defendant was driving a vehicle which he owned on Highway 97 near Oliver, B.C. when it collided with a vehicle driven by Joseph Kozokowsky (the "accident").
- [5] Geraldine Kozokowsky was a passenger in the vehicle driven by Joseph Kozokowsky and was injured as a result of the accident.
- [6] For the purposes of the Special Case, the defendant admits liability for the accident.
- [7] At all material times, Ms. Kozokowsky was a resident of Manitoba and insured by the plaintiff, Manitoba Public Insurance ("MPI"), under the Manitoba Public Insurance Corporation Act, C.C.S.M., c. P215 [MPICA].
- [8] As an insured under the MPICA, Ms. Kozokowsky is entitled to various types of benefits which are referred to as Personal Injury Protection Plan ("PIPP") benefits.
- [9] Under s. 127 of the MPICA, there is a lump sum indemnity payment known as a permanent impairment benefit ("PI Benefit") available to those insureds who have sustained a permanent physical or mental impairment because of a motor vehicle accident.

- [10] The maximum payable under s. 127 as a PI Benefit is \$100,000, although that amount is indexed annually such that, at the time of the accident, the maximum amount payable was \$133,099.
- [11] MPI has made a PI Benefit payment to Ms. Kozokowsky under s. 127 of the MPICA in the amount of \$34,605.74.
- [12] That amount is calculated in accordance with a formula established by regulation in which an injured person's injuries are assigned a percentage rate which is applied against the statutory maximum in order to arrive at a value for each injury: Permanent Impairments (Universal Bodily Injury Compensation) Regulations, Man. Reg. 41/94. By way of example, Ms. Kozokowsky suffered facial scarring in the accident which was assigned a rate of 3.0% which, taken on its own, would result in a compensation payment of \$3,992.97 (\$133,099 x 3.0%).
- [13] Pursuant to the MPICA, MPI has also paid other types of PIPP benefits to Ms. Kozokowsky in the amount of \$22,505.18, bringing the total of the benefits paid to her to \$57,110.92. These additional benefits largely relate to treatment and rehabilitation expenses.
- [14] On April 3, 2009, Ms. Kozokowsky executed a subrogation indemnity agreement in which she agreed to reimburse MPI for any PIPP benefits paid to her out of any monies received as a result of a court action in B.C. in connection with the accident.
- [15] Ms. Kozokowsky commenced an action in B.C. against the defendant which was settled in or around January 2011. In consideration of payment to Ms. Kozokowsky by or on behalf of the defendant of \$86,670, Ms. Kozokowsky executed a release in favour of the defendant dated January 19, 2011.
- [16] In this action, MPI seeks to recover from the defendant the \$34,605.74 PI Benefit it paid to Ms. Kozokowsky. It does not seek to recover the additional \$22,505.18 in other PIPP benefits paid to her.

Issues

- [17] By way of the Special Case, the parties seek the court's answer to the following three questions:
1. Is the PI Benefit in s. 127 of the MPICA an injury, loss, damage or expense that raises a claim under a head of damages that may be claimed against the defendant in tort?
 2. Is the PI Benefit in s. 127 of the MPICA "similar" to those within the definition of "benefits" in ss. 1.1 and 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [IVA]?
 3. Is the PI Benefit in s. 127 of the MPICA a collateral benefit deductible from any tort claim against the defendant?

Legislative Framework

[18] The MPICA establishes a no-fault compensation system for persons injured in motor vehicle accidents. Specifically, s. 72 states:

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.

[19] Section 76 deals with situations in which a Manitoba resident is injured in an accident that occurs outside of the province:

Entitlement of resident of Manitoba re accident outside Manitoba

76(1) A person who is entitled to compensation under this Part in respect of an accident that occurred outside Manitoba may, subject to the corporation's right of subrogation under this Act, exercise any right or remedy that he or she has under the law of the place where the accident occurred for compensation in excess of the compensation received under this Part.

Subrogation re accident outside Manitoba

76(2) Notwithstanding section 72 (no tort actions), where a person is entitled to compensation under this Part in respect of an accident that occurred outside Manitoba, the corporation is subrogated to the person's rights and is entitled to recover the amount of the compensation from any person

- (a) who is not resident in Manitoba and is responsible for the accident under the law of the place where the accident occurred; or
- (b) who is liable for compensation for bodily injury caused in the accident by the non-resident.

[20] The PI Benefit is dealt with in ss. 126-127:

Meaning of "permanent impairment"

126 In this Division, "permanent impairment" includes a permanent anatomicophysiological deficit and a permanent disfigurement.

Lump sum indemnity for permanent impairment

127(1) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

Lump sum indemnity for catastrophic injury

127(2) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of a catastrophic injury resulting from an accident is entitled to a lump sum indemnity of \$215,000. for the permanent impairment.

[21] British Columbia also has a partial no-fault system in that there are certain no-fault benefits available to persons injured in vehicle accidents. These benefits are set out in Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation] and are in addition to an injured person's right to sue in tort.

[22] Section 83 of the B.C. IVA provides that where a person receives, or is entitled to receive, no-fault benefits, the person is deemed to have released any claim for damages to the extent of such no-fault benefits:

83 (1) In this section and in section 84, "benefits" means benefits

- (a) within the definition of section 1.1, or
- (b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect,

but does not include a payment made pursuant to third party liability insurance coverage.

(2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.

[23] "Benefits" is defined in s. 1.1 to mean the "prescribed benefits" which are largely those benefits found in Part 7 of the Regulation (see *Uhrovic v. Masjhuri*, 2007 BCSC 1096 at para. 5).

Case Law

[24] Issues similar to those arising on this Special Case have been considered by the courts numerous times. It is therefore useful at the outset to review some of the key authorities relied on by the parties.

[25] A good starting point is *Manitoba Public Insurance Corp. v. University of Waterloo et al*, 2007 MBCA 107 [Waterloo], where the Manitoba Court of Appeal considered the proper interpretation of s. 77 of the MPICA. That section, which is similar in many respects to s. 76, deals with the right of MPI to recover benefits paid to an insured from a non-resident of Manitoba who is responsible for a motor vehicle accident occurring in Manitoba.

[26] At the relevant time, s. 77(1) of the MPICA provided:

Notwithstanding section 72 (no tort actions), where a person is entitled to compensation under this Part in respect of an accident that occurred in Manitoba, the corporation is subrogated to the person's rights and is entitled to recover the amount of the compensation

- (a) from any person who is not resident in Manitoba, to the extent that the person is responsible for the accident

[27] The central issue in the case was whether MPI, in an action brought against a non-resident tortfeasor, could recover the entire amount paid to its insured in statutory benefits, or whether it was limited to what would be recoverable in a tort action, where principles such as remoteness, foreseeability and causation would apply.

[28] The trial judge found that MPI has a right of subrogation to acquire the rights of the injured party but no more. As such, MPI could sue the non-resident tortfeasor but the defendant could raise any defences that would exist at common law. On appeal, the Court of Appeal agreed with this interpretation. The court said at para. 42:

In summary, construing s. 77 in the context of the Act as a whole, and the Act's general scheme and the adjuncts thereto, and applying the principles of subrogation, MPIC cannot be in a better position than the injured Manitoban would be in, if he or she could sue; that is the essence of subrogation. The right of MPIC to recover, based on the concept of subrogation, is governed and potentially limited by principles of the common law, such as remoteness, foreseeability and causation. The judge was correct in so concluding. That conclusion is, as the respondents argued here, fully consistent with the preservation of the no-fault scheme for Manitobans.

[29] In coming to its conclusion, the court rejected the argument that the MPICA confers on MPI a statutory right of recovery of all benefits paid. It said that had the Legislature intended to confer such a right, it could have done so. Instead, the Legislature chose to rely on established principles of subrogation (at para. 51).

[30] The court therefore held that MPI could sue to recover the lesser of (a) the amount payable in tort, and (b) the amount of PIPP compensation actually paid (at para. 49).

[31] As an aside, s. 77 has since been amended and the reference to a right of subrogation has been removed (S.M. 2014, c. 15, s. 9). Thus, on its face, s. 77 now appears to provide a statutory right of recovery.

[32] One further observation made by the court is worth noting as it relates to an argument raised by the defendant in this case. At para. 47, the court said:

It is important to remember that when MPIC pays compensation to an injured party, it does so according to a statutory system that may not include heads of damages which would attract compensation at common law.

- [33] The Court of Appeal's analysis of MPI's rights under s. 77 is instructive because s. 76, which is at issue in this case, similarly uses the language of subrogation. That language has not been removed from s. 76 as it has from s. 77.
- [34] In *Matilda v. MacLeod*, 2000 BCCA 1 [Matilda], our Court of Appeal dealt with a case very similar to the one at bar. There, the plaintiff, who was a resident of the United States, was injured in a motor vehicle accident in B.C. He received medical benefits from his insurer, Progressive Casualty Insurance Company ("Progressive"), who then sought to recover the amount of those benefits from the defendant or ICBC. As in the present case, the issue was brought in the form of a Special Case.
- [35] At first instance (*Matilda v. MacLeod* (1997), 1 C.C.L.I. (3d) 94), Mr. Justice J. T. Edwards held that Progressive could not recover the amount of the benefits paid by virtue of the application of s. 25(2) of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, the predecessor section to the now s. 83(2) of the IVA. The effect of that section was to release ICBC for the amount of any medical benefits paid or payable to the plaintiff. Mr. Justice Edwards found that Progressive had no statutory right of subrogation thus it was subject to common law principles. He said at para. 23:

The common law right of subrogation is derivative. Progressive can only pursue its subrogated claim through the person of the plaintiff and recover no more from the defendant than the plaintiff himself is entitled to receive.

- [36] The Court of Appeal dismissed Progressive's appeal. In that court, Progressive argued that under its policies of insurance, it had a subrogated right to recover the amounts it paid from the torfeasors insured by ICBC. It argued further that its rights could not be defeated by the release provision in s. 25(2) because it is constitutionally impermissible for B.C. legislation to modify policies of insurance made outside of the province.
- [37] The Court of Appeal rejected that argument on the basis that s. 25(2) is concerned with tort actions within B.C.:

The focus of s. 25(1) and (2) is on the tort action by Progressive's insureds against ICBC's insureds. The torts are the motor vehicle accidents that occurred within British Columbia and clearly are within provincial jurisdiction. The subsections simply provide that accident benefits cannot be claimed in the B.C. tort actions irrespective of where the policy paying the benefits was made. That does not purport to modify the terms of the extra-provincial policies. It merely limits the damages recoverable in tort whether by the insured beneficially or Progressive as subrogated claiming in the name of its insureds (*Matilda* at para. 8).

- [38] Progressive recently sought to revisit the outcome from *Matilda* in *Middleton v. Heerlein*, 2015 BCSC 1236 [Middleton]. Similar to *Matilda*, Progressive insured a married couple from Washington State who were both injured in an accident in B.C. and both received benefits from Progressive under their insurance policies. Progressive, through its insureds, sought recovery in their B.C. tort actions of the amount of the benefits paid.

- [39] Progressive argued that Matilda was no longer good law because when the former Insurance (Motor Vehicle) Act, which was in place when Matilda was decided, was replaced by the IVA, the statutory right of subrogation was extended to other insurers beyond ICBC. Mr. Justice Johnston rejected that argument and held that Matilda remains good law and was a full answer to Progressive's claim (Middleton at para. 21).
- [40] In *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 [Unifund], the Supreme Court addressed a similar fact situation in which an out-of-province insurer sought to recover benefits paid to its insured following a motor vehicle accident in B.C.
- [41] There, a married couple, who were Ontario residents, were injured when their rental car was struck by a tractor-trailer on the upper levels highway in North Vancouver. Both were injured and both subsequently received statutory benefits from their Ontario insurer, Unifund Assurance Company ("Unifund"). Under s. 275 of the Ontario Insurance Act, R.S.O. 1990, c. I.8, an insurer that pays statutory benefits is entitled to seek indemnification from the insurer of any heavy commercial vehicle involved in the accident. Pursuant to that right, Unifund applied to the Ontario Superior Court of Justice for the appointment of an arbitrator to determine the question of indemnification. ICBC brought a cross-application for a stay of the proceeding on the basis that the Ontario insurance scheme could not constitutionally apply to it on the facts of the case.
- [42] By a narrow 4-3 majority, the Supreme Court decided the case in favour of ICBC on the ground that the Ontario legislation is constitutionally inapplicable to it. Speaking for the majority, Mr. Justice Binnie said at para. 83:

The most that can be said for [Unifund] in this case is that the fact of a motor vehicle accident in British Columbia triggered certain payments in Ontario under Ontario law. However, the fact the Ontario legislature has chosen to attach legal consequences in Ontario to an event (the motor vehicle accident) taking place elsewhere does not extend its legislative reach to a resident of "elsewhere". It can also be said that these payments in Ontario, in turn, triggered a deduction of an equivalent amount under the laws of British Columbia. Again, however, the decision of the British Columbia legislature to attach legal consequences (the deduction) in that province to an event that occurred in Ontario (the SAB payments) does not bring the appellant (beneficiary under the British Columbia legislation) into the orbit of the Ontario legislature for the purpose of taking away the British Columbia benefit in favour of an Ontario insurance company.

- [43] A decision central to the position of both parties on this Special Case is *Gurniak v. Nordquist*, 2003 SCC 59 [Gurniak], the leading decision on the interpretation of s. 25 of the Insurance (Motor Vehicle) Act, now s. 83 of the IVA. In that case, a Quebec resident was killed in an accident in B.C. and his spouse and children received various statutory benefits under the Quebec no-fault scheme. An action was also commenced in B.C. under the Family Compensation Act, R.S.B.C. 1996, c. 126, which the parties settled. At issue was whether any of the Quebec benefits could be deducted from the settlement amount.

[44] The case turned on the proper interpretation of s. 25 which provided for the deductibility of benefits paid under other contracts or plans of insurance that are "similar" to the benefits described in Part 6 of the now repealed B.C. Insurance Act, R.S.B.C. 1996, c. 226.

[45] The Court's analysis focussed on the meaning of the word "similar" and whether the Quebec benefits were similar to the B.C. benefits so as to be deductible. The Court found that the benefits were deductible and the following passages from the majority decision of Mr. Justice Iacobucci are particularly relevant:

Obviously, "similar" does not mean "identical". Benefits may be similar in kind while differing in quantum. "Similar" does not refer to the system of law in which the benefits originate, the overall regime under which they are administered or the legal process by which they are claimed. To my mind, the legislature's use of the word "similar" in this context was intended to convey the principle that the benefits in question must be of the same general nature or character as the benefits described in Part 6 of the British Columbia Insurance Act.

In my view, there is no need to engage in a comprehensive comparative analysis of the benefits under the two regimes, as it is readily apparent that the benefits are indeed broadly "similar" within the meaning of s. 25(1) of the Insurance (Motor Vehicle) Act. The Quebec accident benefits, while differing significantly in quantum, are of the same general nature or character as those found in part 6 of the British Columbia Insurance Act.

Though [there] is a significant difference between the overall regimes in British Columbia and Quebec, this does not mean that the benefits under both schemes are not "similar" within the meaning of s. 25 of the British Columbia Insurance (Motor Vehicle) Act. An analysis of similarity pursuant to this section requires only a consideration of whether the benefits - not the overall insurance regimes - are of the same general nature and character (at paras. 31-33).

[Emphasis in original.]

[46] The majority rejected the argument, emanating from earlier B.C. Court of Appeal decisions, that there must be a match between the specific heads of damage in a tort award and the heads of damage under the insurance contract or benefit scheme in issue in order for a deduction to be made. Mr. Justice Iacobucci said at para. 45:

This approach has the benefit of simplicity and ease of application and likely explains why British Columbia chose not to introduce an explicit matching requirement into the statute, when it could readily have done so. A trial judge, once he or she has determined that the benefits under the two regimes are broadly similar under s. 25(1), will deduct from the tort award any benefits already received in respect of the claim for damages arising from the motor vehicle accident. The trial judge will not be required to engage in a complicated and cumbersome process of "matching" a head of damage in tort to a particular claim for damages under a statutory scheme. This interpretation of s. 25(2) is supported by the fact that under some statutory schemes, the benefits received are not neatly classified into the various heads of damage for which they compensate, thereby making it nearly impossible for trial judges to give meaningful effect to any sort of

matching principle.

[47] The following key principles emerge from the authorities:

1. Section 76 of the MPICA purports to confer on MPI a right of subrogation for the purpose of enabling MPI to pursue recovery of statutory benefits paid to its insureds in connection with motor vehicle accidents that occur outside of Manitoba. As a right of subrogation, as distinct from a statutory right of recovery, MPI is limited to seeking recovery of only the amount that would be payable in a tort action;
2. As a matter of constitutional law, a provincial legislature may not legislate beyond its territorial competence so as to affect civil rights in another province;
3. Where an out-of-province insurer pays benefits to an insured who is injured in an accident in B.C., those benefits are deductible from any damages award made in a tort action in B.C. to the extent that they are similar to benefits payable under Part 7 of the Regulation; and
4. The question of similarity is to be assessed by reference to the general nature and character of the benefits in issue and a precise match is not required.

[48] These principles inform the analysis of the questions posed in this Special Case.

Analysis

Preliminary Issue

- [49] Before turning to the questions posed in the Special Case, I will address an issue that arose during the course of the hearing. As noted in paragraph 14 above, MPI signed an indemnity agreement with Ms. Kozokowsky pursuant to which it is entitled to recover from her the amount of any PIPP benefits recovered in a court action. Further, as noted in paragraph 15, Ms. Kozokowsky executed a release in favour of the defendant upon the settlement of her action in B.C.
- [50] I raised with counsel whether either or both of these factors would preclude MPI from now suing the defendant to recover the amount of PI Benefit paid, given that it is a subrogated claim and the law is clear that an insurer stands in no better position than its insured: Matilda at para. 7.
- [51] While counsel for both parties acknowledged that MPI's claim might well be defeated in the circumstances, the defendant does not seek to rely on either the indemnity agreement or the release. Rather, the parties agree that this is a test case and they ask that the court decide the matter by reference to general principles and without regard to the specific limiting factors present in this case.
- [52] In light of the position taken by both parties, I agreed to do so. I will therefore address each of the three questions posed in the Special Case.

Question one: Is the PI Benefit in s. 127 of the MPICA an injury, loss, damage or expense that raises a claim under a head of damages that may be claimed against the defendant in tort?

- [53] The defendant submits that the recovery of the PI Benefit is not a legally recognized head of damages for which a claim in tort can be advanced. He notes again that under the MPICA, MPI has a right of subrogation pursuant to which it can only advance claims that could be made by its insured.
- [54] In this regard, it is useful to recall the observation of the Manitoba Court of Appeal in Waterloo, reproduced at para. 32 above, that the statutory compensation payable by MPI does not always correspond to heads of damage recoverable in tort.
- [55] For its part, MPI submits that there is no authority cited in support of the defendant's position and that, in any event, it is acting pursuant to the statutory authority conferred by s. 76 of the MPICA.
- [56] I agree with MPI that the issue raised by the defendant under this question is not a bar to MPI's claim. As MPI notes, notwithstanding the fact that similar issues have been litigated on numerous occasions, the authorities do not support the defendant's contention that the statutory benefits must align with a head of damages recoverable in a claim in tort.
- [57] Indeed, to require such an alignment would be contrary to the Supreme Court's finding in Gurniak that the court should not engage in the cumbersome process of matching a head of damage in tort to a particular statutory benefit.
- [58] Further, I would note that, in any event, the PI Benefit on its face is payable in respect of injuries sustained in a motor vehicle accident and, as such, is of the same nature or character as damages recoverable in a tort action.
- [59] Lastly, I agree with MPI that it is acting pursuant to the statutory authority granted to it under s. 76 of the MPICA. However, on this point, it is important to keep in mind again that pursuant to that section, MPI is granted a right of subrogation as distinct from a statutory right of recovery. If the legislation purported to grant MPI a statutory right of recovery from a B.C. resident in respect of an accident that occurred in B.C., it would suffer from the same constitutional limitation that the court found in Unifund.
- [60] Pursuant to its right of subrogation, MPI may advance its claim for recovery of the PI Benefit in the B.C. tort action. The answer to question one is therefore "yes". However, the right of subrogation is narrowly defined and is subject to any defences or limiting principles that may be raised by the defendant in the B.C. action, including the application of s. 83 of the IVA. That is the focus of the second question in the Special Case.

Question two: Is the PI Benefit in s. 127 of the MPICA "similar" to those within the definition of "benefits" in sections 1.1 and 83 of the IVA?

- [61] As MPI submits, this is the crux of the issue between the parties. It says that the PI Benefit is not a prescribed benefit within the meaning of s. 1.1 of the IVA, those being Part 7 benefits, nor is it similar to such benefits according to the Gurniak analysis. MPI does not take issue with the fact that the similarity analysis must be based on the general nature or character of the benefits in issue but submits that even applying such a high level comparison leads to the conclusion that the benefits are not similar.
- [62] In contrast, the defendant submits that the PI Benefit is of the same general character as the benefits available under Part 7 of the Regulation in that both are intended to provide compensation for injuries resulting from a motor vehicle accident. He says that this broad similarity is sufficient to trigger the application of s. 83 of the IVA.
- [63] I agree with the defendant.
- [64] Part 2 of the MPICA, in which s. 76 is found, is headed "Universal Bodily Injury Compensation" and, pursuant to s. 71(1), it "applies to any bodily injury suffered by a victim in an accident". Thus, on its face, the Manitoba legislation is intended to compensate individuals injured in motor vehicle accidents.
- [65] By comparison, Part 7 of the Regulation is headed "Accident Benefits" and pursuant to s. 79 thereof, ICBC will "pay benefits to an insured in respect of death or injury caused by an accident that arises out of the use or operation of a vehicle."
- [66] The language used in the different provisions is strikingly similar and, as such, satisfies the Gurniak test, with the result that the "full panoply of accident insurance benefits" (emphasis in original) are deductible and subject to the release provision in s. 83 of the IVA (Gurniak at para. 44).
- [67] In *Westmount (City) v. Rossy*, 2012 SCC 30, the Supreme Court of Canada described the Manitoba no-fault accident benefit scheme as being modelled after the Quebec scheme (at para. 31). As the defendant submits, given the similarities between the Manitoba and Quebec schemes, it would be an unusual result for the Quebec benefits to be deductible pursuant to s. 83, as per Gurniak, but not the Manitoba benefits.
- [68] Building on this point, as seen by the review of the relevant case law at paras. 24-47 above, courts on numerous previous occasions have found against the position now taken by MPI in this case. In my view, there is no basis on which to depart from those authorities and to come to a different conclusion here.
- [69] I would therefore answer "yes" to the second question posed in the Special Case.

Question three: Is the PI Benefit in s. 127 of the MPICA a collateral benefit deductible from any tort claim against the defendant?

- [70] The third question in the Special Case is posed by the defendant as an alternative to his position on question two. Given my answer to question two, it is technically not necessary to answer question three. However, in order to assist the parties in this test case, I will do so nonetheless.
- [71] The defendant submits that the PI Benefit is a collateral benefit provided under mandatory vehicle insurance in Manitoba and as such the private insurance exception to the collateral benefits rule does not apply.
- [72] MPI submits that where a third party has paid benefits to an insured party and has a right of subrogation, the collateral benefits rule has no application. MPI cites *Cunningham v. Wheeler*; *Cooper v. Miller*; *Shanks v. McNee*, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1, in support of its position.
- [73] I agree with MPI. In bringing its action, MPI is acting pursuant to s. 76 of the MPICA. As noted above, that section authorizes it to bring a subrogated claim in B.C. but it does not confer a statutory right of recovery as to do so again, would exceed the territorial competence of the Manitoba legislature. As set out above, because MPI has a subrogated claim, it is subject to the release provision in s. 83 of the IVA which operates to defeat MPI's claim.
- [74] In my view, the collateral benefits rule has no application in this case and accordingly, I would answer "no" to question three.

Conclusion

- [75] In summary, I would answer the questions posed in the Special Case as follows:

Question one: Yes

Question two: Yes

Question three: No

- [76] Declarations to this effect may be included in the formal order.

- [77] Neither party sought costs. In the circumstances, I decline to make any order for costs although the parties are at liberty to speak to the issue if they cannot agree.

"Skolrood J."

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