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Indexed as:
M.S.B. (Re)

IN THE MATTER OF an appeal by M.S.B.
AICAC File No.: AC-95-8

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[1995] M.A.I.C.A.C.D. No. 12

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.,
and L. Goodspeed
Heard: August 14 and November 30, 1995.
Decision: December 1, 1995.
(10 pp.)

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Issue:

Cohabitation - whether negated by frequent, short-term separations.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36, ss. 70(1) (definition of 'spouse'), 120(1), and
122.

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')
represented by Joan McKelvey.
S.N. Rosenstock appeared for the appellant.

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MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

REASONS FOR DECISION

THE FACTS:

[para1] This is an appeal by M.S.B., the legal wife of the late S.J.B., from a decision of the Internal Review Officer of Manitoba Public Insurance Corporation ('M.P.I.C.') whereby that officer held that Ms M. was the spouse of the late S.J.B. within the meaning of Section 70(1) of the M.P.I.C. Act, which will be referred to in greater detail below.

[para2] It is not disputed that M.S.B. had not lived with her husband for a number of years, and no claim is advanced on her behalf. Rather, the claim is advanced on behalf of her children.

[para3] The facts, as they emerged from the testimony given us, may be summarized this way:

[para4] Ms M. and S.J.B. met at the Bell Hotel in Winnipeg on December 8th of 1989. A few days later they were living together at [text deleted] in Winnipeg, along with his niece, E.R. S.J.B. (herein called 'S') and R.M. ('R') were both receiving welfare monies from the City of Winnipeg, despite the fact that S.J.B. was then working for [text deleted]; neither of them, apparently, saw fit to disclose to the City that they were living together and that he was employed. Subsequently, they moved from [text deleted] to a single room apartment at [text deleted] and, thereafter, to several other addresses in the City of Winnipeg. At some undetermined point, S.J.B.'s employment by [text deleted] ceased and he started receiving unemployment insurance money, but still drew welfare funds from the City.

[para5] When S.J.B.'s unemployment insurance ran out, the couple moved to the [text deleted] Reserve at [text deleted], where they moved, together, into R.M.'s parent's home. R.M. started working as a homemaker for her parents, being paid by the [text deleted] First Nation Band and, after a short while, S.J.B. obtained work, firstly doing odd carpentry work for the [text deleted] Band and, thereafter, working on the renovation of the Band office at the [text deleted] reserve. Even then, each of them was in receipt of welfare monies - R.M. from Lake Manitoba and S.J.B. from [text deleted].

[para6] Her evidence is that she saw S.J.B. at least every week and spoke with him daily while he was working for the [text deleted] Band as a carpenter. They were, from her evidence, living at her parent's home at [text deleted] and were only separated by the demands of their respective jobs or by his not-infrequent bouts of heavy drinking whenever he had money to spend on weekends.

[para7] On the 2nd of February 1992 their son, V.S.G.M., was born at [text deleted], Manitoba. His birth certificate reflects S.J.B. as the father and R.M. as the mother. At that juncture, S.J.B. and R.M. had their permanent home at [text deleted] (although the word 'permanent', in this context, must be viewed comparatively). Some time after that, S.J.B. found further work at [text deleted] and moved there, followed by R.M. when V.S.G.M. was about nine months old.

[para8] In 1993, the couple moved into the City of Winnipeg to stay with his sister on [text deleted] Street for

part of the summer, although R.M. was still collecting her welfare cheques from the [text deleted] First Nation. While they were in Winnipeg during the summer of 1993 they were both collecting welfare from the City, although it is unclear whether they were receiving it as a couple or as two, separate and single individuals.

[para9] Toward the end of the summer of 1993 S.J.B. and R.M. returned to [text deleted] where S.J.B. obtained short term, temporary employment. Thereafter, he found more work at [text deleted] and they reverted to their former pattern - that is to say, R.M. remaining at the [text deleted] home with S.J.B. spending the week at [text deleted], returning to [text deleted] at weekends.

[para10] Evidence was given by R.M. that the Band official responsible for welfare payments was well aware of the fact that R.M. and S.J.B. were living together as man and wife at [text deleted], that members of the Band Council or, at least, one or more employees of the Band, had actually visited with her and S.J.B. at [text deleted], and yet she continued to receive welfare cheques from [text deleted] First Nation.

[para11] Thereafter, S.J.B. and R.M. moved back again to Winnipeg and into an apartment at [text deleted] Street, where they again received welfare while S.J.B. was employed in the construction industry. After one of their frequent altercations, they were apart for one night and, when R.M. returned to the apartment, she found that S.J.B. had sold all of their furniture and food to the caretaker for \$50.00 and had disappeared. R.M.'s sister, M., came to get her and V.S.G.M., and took them back to [text deleted] where S.J.B. reappeared about ten days later, sober and contrite, resulting in another reconciliation.

[para12] For a while, R.M. worked as a homemaker at the [text deleted] First Nation, in the home of her parents. S.J.B. was employed doing carpentry work for the Band there. After a while, R.M. quit her job at [text deleted] and the couple moved to [text deleted] where S.J.B. had re-established work for the Band there. Initially, S.J.B. and R.M. moved in with A.S., but his problems with alcohol were obviously equal to those of S.J.B., and the couple then moved in with E.B. and his common-law wife, S.S. V.S.G.M. was with his mother at all relevant times.

[para13] We heard much evidence of a tumultuous and, occasionally, violent relationship between R.M. and S.J.B. Indeed, on one occasion in December of 1993 he had assaulted her. She had informed the police and S.J.B., having been formally charged with that assault, was made the subject of an interim restraining order, which S.J.B. and R.M. proceeded to ignore. His case had been remanded until October of 1994.

[para14] The syndrome is an all-too-common one: on most, although not all, weekends, S.J.B. (if he had money) would embark upon a drinking spree; on those occasions, R.M. would usually seek shelter for herself and V.S.G.M. at the home of one M.S., taking with her a duffle bag containing what was needed for such a short term stay. However, as soon as S.J.B. sobered up he would seek out R.M., who would always take him back.

[para15] R.M.'s evidence is that, when their jobs kept them apart during the week, they would speak by telephone every day and would see each other either at [text deleted] or at [text deleted], on weekends, unless S.J.B.'s condition was such as to render those meetings, in her view, unsafe for herself or her child.

[para16] R.M.'s uncontradicted evidence was that, for a period of approximately 4 1/2 years from December 1989, she and S.J.B. were living together under the same roof unless kept apart by either their jobs or by S.J.B.'s alcohol intake. This evidence of hers is corroborated in large measure by the signed statements of P.W., V.R., T.B. and A.S. These statements were, with one exception, unsworn and the parties signing them were not called to give oral testimony and to be cross-examined. While allowing those statements to be tendered as evidence, we might not have ascribed much weight to them were it not for the fact that no contradictory evidence was called on behalf of the Appellant.

[para17] There is no question that R.M.'s evidence was at times somewhat confused, and occasionally self-contradictory, but the basic fact that emerges is that her relationship with S.J.B., while hardly idyllic, was patently more than the mere 'boy-friend/girlfriend' one that the Appellant's counsel urges upon us.

[para18] Apart from the largely uncontradicted oral testimony of R.M. and the written statements referred to above, we have V.S.G.M.'s birth certificate which indicates that S.J.B. was his father and we have the record of the registration of R.M.'s motor vehicle in June of 1994, indicating that her address at that juncture was at [text deleted], which is certainly where S.J.B. made his home then

[para19] S.J.B. was killed in an automobile accident on the 9th of July 1994.

THE LAW:

[para20] Section 70 (1) of the M.P.I.C. Act reads, in part, as follows:

'In this part, ...

"spouse" means a person who, at the time of the accident, is married to and cohabits with the victim, or a person of the opposite sex who has cohabited with the victim in a conjugal relationship

(a) continuously for a period of not less than five years immediately preceding the accident, or

(b) for a period of not less than one year immediately preceding the accident, and there is a child of the union."

[para21] Section 120(1) of the Act provides that:

"The spouse 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 is disabled on that day, Schedule 2."

[para22] Sections 121 and 122 provide, further, for the payment of a lump sum indemnity to each dependant (as defined in the Act) other than a spouse and, if there is no surviving spouse, for any dependant who is a child to receive the lump sum indemnity under Section 120(1) as well; if there are two or more dependent children, they share the latter indemnity equally. It is under section 122 that the present appellant's claim is based, since M.P.I.C. has already paid to the Public Trustee the lump sum indemnities to which her children became entitled under Section 121.

[para23] The sole question that we need to decide is whether R.M. was, in fact, cohabiting with S.J.B. for a period of at least twelve months prior to his death, having born his child.

[para24] While we are not necessarily bound by the precedent of our own, earlier decisions, we refer to our decision in the appeal of M.C., dated October 28th of this year, in which we adopted the comments of Jeune, P., in the case of Huxtable vs. Huxtable [1899] 68 L.J.P.83, D.C., at page 85,

"Cohabitation may be of two sorts, one continuous and the other intermittent. The parties may reside together constantly or there may be only occasional intercourse between them which, nevertheless, amounts to cohabitation in the legal sense of the term. Such cohabitation may indeed exist together with an agreement to live

apart...the circumstances of life, such as business duties, domestic service, and other things, may separate husband and wife and yet, notwithstanding, there may be cohabitation."

[para25] The Huxtable decision was rendered in 1899; society to-day, expressing its views through the medium of the courts, would include, amongst the "circumstances of life" to which the learned President referred, most forms of domestic abuse including, but by no means limited to, those having their source in alcohol. Many spouses remain loyal to their mates despite such abuse and, other things being equal, their need to take occasional, or even frequent and regular, shelter from the storms of spousal mistreatment should not be relied upon in order to prove that their cohabitation has ceased.

[para26] We asked counsel for the Appellant the rhetorical question: if R.M. was not cohabiting with S.J.B. during the twelve months in question, where was she living? The onus, in matters of this kind, is upon the Appellant to establish her claim on behalf of her children and that, therefore, M.P.I.C.'s decision was in error. It seems to us that, if R.M. was not cohabiting with S.J.B. during all relevant times, some one or more witnesses could readily have been found either at [text deleted] or at [text deleted] to attest to that fact. The only scintilla of evidence in support of the Appellant's position is a letter from G.R., who is described as the Band Membership Clerk at the [text deleted] Reserve, addressed to the Appellant's solicitor, in the following language:

"I was informed by the late S.J.B. that he had separated from his C.L. wife in the summer of 94 and that she had moved back to her Reserve in [text deleted]."

That evidence suffers from the twofold weakness of being both unsworn hearsay and unsupported by oral testimony. Even if such a statement was made by S.J.B., there is nothing before us to indicate the length of any such separation other than the evidence of R.M. herself. She acknowledges that she and S.J.B. parted quite frequently, but emphasizes that this was only for a few days at a time at the most, and it is quite clear that they were living together at the time of S.J.B.'s death.

[para27] It should also be noted that, although A.S. and E.B. were not called to give evidence on behalf of the Appellant, (although they would, by any account, have been the most logical parties to testify that S.J.B. and R.M. were not, in fact, living together had that been the case), those two gentlemen were interviewed by a representative of M.P.I.C. in the presence of Mr. Rosenstock, solicitor for the Appellant. Their evidence, reduced into an unchallenged memorandum of that meeting by M.P.I.C.'s adjuster, substantially

corroborates the oral testimony of Rosemary which, for the purposes of this appeal, we are obliged to accept.

DISPOSITION:

[para28] We therefore confirm the decision of M.P.I.C.'s Internal Review Officer.

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