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Indexed as:
N.J.H. (Re)

IN THE MATTER OF an appeal by N.J.H.
AICAC File No. AC-96-16

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[1996] M.A.I.C.A.C.D. No. 20

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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 8, 1996.
Decision: August 19, 1996.
(7 pp.)

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Issue:

Whether appellant would have been a 'dependant' of
deceased victim and, therefore, entitled to lump sum
indemnity, had victim been employed at time of accident.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.
36 ('the Act'), ss. 70 (definition of 'Dependant'),
119(2) and 121(2).

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Appearances:

Manitoba Public Insurance Corporation (M.P.I.C.),
represented by Joan McKelvey.
N.J.H., the appellant, represented by K.R.P. Kirby.

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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] The facts in this case are not in dispute, and are
well summarized in the decision of Mr. Dean I. Scaletta, the
Acting Internal Review Officer of M.P.I.C., dated March 6th,
1996. The appellant is the {text deleted} of M.K. (the
deceased victim) and his former wife, D.K. M.K. had suffered
a nervous breakdown in 1988 and was off work for some time.

Shortly after his return to work, he was laid off. His next employer went into bankruptcy in 1989. Meanwhile, M.K. had contracted {text deleted} and, by some time in 1989, the {text deleted} associated with that disease had become apparent and he was not, thereafter, able to obtain full-time employment.

[para2] For the next couple of years, M.K. did odd jobs but, by the fall of 1991, he had become so debilitated that he was no longer able to work at all. He started to receive disability benefits under the Canada Pension Plan in late 1991.

[para3] M.K. and D.K. separated in 1989. M.K. had no steady income at the time; there was no separation agreement, nor any court-ordered or other, formal arrangement for the payment of support for D.K. and the children, although M.K. did give money to his family whenever he had some to spare. When D.K. learned, in late 1991, that M.K. was living with another woman (S.K.), she commenced divorce proceedings which were finalized in December of 1992. The final order of divorce apparently made no provision for maintenance of D.K. or the children - the appellant has two younger siblings. M.K. married S.K. in June of 1994.

[para4] The appellant, N.J.H., has lived with her mother, D.K., at all times since her parents separated, and has always been given free room and board. Between 1989 and 1995 M.K. would give her occasional gifts totalling between {text deleted} and {text deleted} in any given year.

[para5] From September, 1992, until January, 1995, N.J.H. was enrolled in the {text deleted} at the {text deleted}. Being still a student dependant of M.K.'s for the purposes of the Canada Pension Plan, N.J.H. received about {text deleted} per month under that Plan and this, together with a combination of student loans and part-time earnings of about {text deleted} per annum, enabled her to pay for her books and tuition. D.K. claimed N.J.H.'s education/tuition credits on her tax return until N.J.H. turned 18; thereafter, neither parent claimed N.J.H. as a dependant for tax purposes.

[para6] In January of 1995, having learned that her student loan had been cut back and knowing that neither of her parents could afford to make up the shortfall of about {text deleted}, N.J.H. was obliged to withdraw from her {text deleted} course. Since she was no longer a full-time student, a further result was the loss of the Canada Pension Plan benefits that she had been receiving as a child of M.K. She commenced working a few more hours per week than had previously been the case, but still only grossed about {text deleted} per week. It had been the appellant's intention to start back at {text deleted} in September of 1995 but, after discussions with both her parents, the decision was made that she would keep working until the end of the calendar year

1995, in order to accumulate at least enough funds for tuition, and, at the beginning of January, start living with her father and his new wife, S.K., who would provide her with free room, board and transportation, plus access to at least some of her books and a computer, since S.K. was, herself, also attending the {text deleted} as a student.

[para7] On September 25th, 1995, M.K. was fatally injured in a one-vehicle accident. His widow, S.K., subsequently decided not to accomodate N.J.H. in the manner that had apparently been agreed upon, or at all. It was never made clear to us whether S.K. had been party to the earlier agreement, or whether it had been more of a unilateral undertaking by her husband. No evidence was adduced as to whether N.J.H. would have been expected to contribute her Canada Pension Plan income to her father's household, nor whether she was to have continued with her part-time work and contribute to the household in that manner - from the use of the phrase 'free room and board', we assume not.

[para8] The appellant claimed entitlement to the lump sum indemnity that is available to a non-spousal dependant of a victim. Her claim was denied at the original appraisal level of M.P.I.C.; that decision was upheld by the Acting Internal Review Officer, Mr. Scaletta, by way of his letter of March 6th, 1996. It is from that decision that she now appeals.

THE LAW.

[para9] The relevant portion of Section 121(2) of the Act provides that:

A dependant, other than the spouse, of a deceased victim is entitled to

(a) a lump sum indemnity in the amount opposite the age of the dependant in Schedule 3; ...

[para10] A dependant who qualifies under the foregoing sub-section and is over the age of 16 years is entitled to a lump sum indemnity of \$19,000. The question that we must answer is: was N.J.H. a 'dependant' of her late father, within the meaning of the Act, at the time of the accident that caused his death? Section 70 of the Act defines a dependant (other than a parent of the victim or someone entitled to spousal support from the victim) as:

... (d) a child of the victim

(i) who was under the age of 18 years at the time of the accident, or

(ii) who was substantially dependant on the victim at the time of the accident ...

[para11] Section 119(2) of the Act provides that:

For the purpose of this Division (i.e. entitlement to death benefits), a person who would have been a dependant of the victim if the victim had held employment at the time of the accident is deemed to be a dependant of the victim even if the victim did not hold employment at that time.

[para12] Counsel for the appellant argues forcefully that Section 119(2) was obviously intended to cover just such a situation as this. As he puts it: "M.K. had limited things to offer his daughter, and he offered everything that he had - bed, board, computer, transportation and at least some books; he remained supportive to the best of his ability, right up until a few days prior to his death, as evidenced by the family consultation and agreement despite his unemployment. It is submitted on behalf of the appellant that M.K.'s pattern of conduct was such that it should convince anyone that, had M.K. been employed, he would have been supporting N.J.H. substantially, to facilitate the completion of her degree course. A 'dependant', argues Mr. Kirby, can include within its meaning a person who is dependent upon the victim for educational and general life-style purposes, and not merely financially dependent.

[para13] On behalf of the corporation, Ms McKelvey argues that, while any sibling of N.J.H.'s under the age of 18 would clearly have been covered by sub-section (d)(i) of the definition of 'dependant' cited above, it is the realities that existed at the date of M.K.'s death by which we must be bound, and that those realities do not reflect any real measure of dependency upon M.K. by the appellant, nor any certainty that, even had he been employed, M.K. would necessarily have been supporting his daughter in anything more than a sporadic fashion. Ms McKelvey urges us to interpret the word 'would' as implying a strong measure of certainty.

[para14] It is clear that N.J.H. was not, at the date of her father's death, substantially dependant upon him in fact. What is less clear is whether, had he been employed at the time of his death, she would have been substantially dependant upon him. The answer to that question would have been easier to reach had N.J.H.'s parents been living together. In the event, not only had M.K. and his wife separated but he had remarried; N.J.H. had reached the age of 22.

[para15] Mr. Scaletta, M.P.I.C.'s Acting Internal Review Officer, in his decision letter of March 6th, notes that he has "carefully considered Section 119(2)", cited above, but goes on to say "... in other words, in order for you to be entitled to a benefit under Section 119(2), you would still

had (sic) to have been "substantially dependant" upon M.K. at the time of his death." With deference, we have to say that Mr. Scaletta's conclusion is incorrect. The question, as we have noted above, is not whether N.J.H. was substantially dependant upon her father but, rather, whether she would have been so had he been gainfully employed, since, in the latter event, she must be deemed to have been a dependant within the meaning of the Act.

[para16] However, the evidence upon which we are asked to conclude that N.J.H. would have been a dependant had her father been employed is, in our view, too thin to justify that conclusion. While we do not necessarily accept the corporation's position that we must be certain that substantial dependency of N.J.H. upon her father would have existed in the event of his employment, we can not rely purely upon surmise and there are just too many gaps in the information made available to us to permit such a leap of faith. By way of example only, amongst the facts that we do not know and can not fruitfully guess are these: was N.J.H. the only recipient of her father's gifts during the years prior to his death? What would M.K.'s income level have been, had he been employed? Given that he now had a new wife who was, herself, a {text deleted} student, to what extent could he have afforded to support N.J.H.? Against that same background, to what extent would his priorities have changed? Had he been earning, would D.K. not have had prior claims against his income for herself and for her two younger children, in priority to any claim (whether legal or moral) of N.J.H., and would she have pursued those claims, thus effectively negating any dependency of N.J.H. upon M.K.? In other words, while M.K.'s conduct during the last couple of years of his life does seem to indicate some degree of paternal benevolence, it unfortunately falls far short of establishing, even on a balance of probabilities, that had M.K. been employed a level of dependency would have existed of the kind contemplated by Sections 70 and 119(2) of the Act.

DISPOSITION:

[para17] Therefore, we have no option but to disallow the present appeal and confirm the ruling of the Acting Internal Review Officer, in its result if not in its reasoning.

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