

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by J.G.B. and M.B.
AICAC File No.: AC-97-49**

PANEL: Mr. J. F. Reeh Taylor, Q.C. (Chairperson)
Mr. Charles T. Birt, Q.C.
Mrs. Lila Goodspeed

APPEARANCES: Manitoba Public Insurance Corporation ('M.P.I.C.')
represented by Mr. Jim Shaw;
the Appellants, J.G.B. and M.B., represented
by Mr. Reuben Z. Potash

HEARING DATE: June 19, 1998

ISSUES: (i) Whether Appellants dependent upon deceased son and,
therefore, entitled to lump sum death benefits;

(ii) Whether either of the Appellants, if dependent, was
disabled on the day of their son's death and, therefore,
entitled to any additional lump sum indemnity

RELEVANT SECTIONS: Sections 70(1), 119(1) and 121(2) of the M.P.I.C. Act.

**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 basic background of this appeal is set out succinctly in the decision, bearing date February 6th 1997, of Mr. Kevin McCulloch, acting in the capacity of Internal Review Officer of MPIC.

J.G.B. and his wife, M.B., of the [text deleted], [text deleted], Manitoba, claim benefits arising from the death of their son, T.D.B. ('D.'), in an automobile accident which occurred in the City of Winnipeg February 25th 1995.

At the time of his death, D. was [text deleted] years old, married but separated from his wife. He was survived by two children, T.L.B., then aged [text deleted], and T.J.B., aged [text deleted].

At the time of his death, D. had custody of both his children.

Due to the fact that D. and his wife were not cohabiting at the time of his death, and no maintenance order or agreement existed in favour of the wife, Mrs. D.B. was not entitled to a Spousal Death Benefit. The children, both being under 18 years of age, were automatically classified as dependants of the deceased as defined in Section 70 (1) of the MPIC Act.

Accordingly, the following death benefits were paid to the children under schedule 3 of the Act:

T.L.B. \$31,000.00

T.J.B. \$29,000.00

In addition, under the provisions of Section 122 of the MPIC Act, the surviving children were entitled to share equally in the spousal benefit. That benefit was set at the minimum statutory amount of \$40,560.00, in light of the fact that D. was unemployed at the time of his death.

Accordingly, death benefits totalling \$100,560.00 were paid to the Public Trustee of Manitoba on behalf of the infant children. The children presently reside with the Applicants, their paternal grandparents, who receive \$400.00 per month from the Public Trustee for the support of the children.

The applicants in this matter do not challenge the payments made on behalf of the infant children

but, rather, claim benefits in their own right as surviving disabled dependants of D. In order to succeed in this claim, the applicants must first establish that they were dependants of the deceased, in which case they would each be entitled to a \$19,000.00 lump sum death benefit. Further, if either of them can establish that he or she was disabled at the time of D.'s death, an additional \$17,500.00 would be payable to each disabled and dependent parent.

THE ISSUE OF DEPENDENCY

A dependent parent is defined, in Section 70 of the MPIC Act, as "*a parent of the victim who was substantially dependent on the victim at the time of the accident*". Were the Appellants, J.G.B. and M.B., or either of them, "substantially dependent " upon their son, D., at the time of the latter's death?

J.G.B. gave evidence that, at the date of D.'s death in 1995, Joe was 48 years of age. He had worked for the [text deleted] as a Social Worker since 1991 and was now earning about \$[text deleted] a year. Prior to starting work for the [text deleted], he testified, he had worked as a carpenter and then as a fisherman. He had been involved in a motor vehicle accident in [text deleted] on December 27th 1990 and had been transferred to the Health Sciences Centre in Winnipeg where he had stayed from December 28th to 31st of 1990. He did not feel that he had received the full medical examinations that his condition deserved and he says that, as a consequence, his problems caused by that accident got worse. Before the accident, he testified, in addition to his commercial fishing he used to hunt as a partial source of food, participated in cultural activities, cut and hauled wood, hauled water for his family and engaged in similar, vigorous, physical activities. His evidence was that his accident

caused him rib injuries, back injury and kidney damage and that, consequently, he was obliged to seek employment of a less physically strenuous nature. Hence, his job as a Social Worker referred to above. We have to say that the medical evidence is less than compelling in support of J.G.B.'s contention that his injury required such a complete change of occupation but, in light of our interpretation of the law, the strength of that evidence becomes only marginally relevant, if at all. J.G.B. further testified that, prior to the accident, his son D. would go with him to help with hunting and fishing activities and with the hewing of wood and drawing of water. After the accident, said J.G.B., D. had to do these things by himself since J.G.B. felt unable to do so. The wood was cut up to 7 or 8 miles away from the B.'s home, and hauled by use of a boat or skidoo. The wood was usually cut in September, enough to last until the lake froze in late November and then, after freeze up, the family would use its skidoo for hauling cut wood up to three times a week.

There is no running water on the Reserve; the B.'s now hire someone to haul water for them a distance of about a mile in a 5 gallon pail - a task that D. performed during his lifetime whenever the family needed it, 3 to 4 times each week, said J.G.B. He further testified that he now has to buy wood at \$25.00 per load of about 25 pieces, each such load lasting about 2 days. He figures that it costs him between \$150.00 and \$200.00 per month for wood and about \$1.00 for each pail of drinking water plus transportation costs of \$10.00 per trip. Evidence was also adduced, although less persuasively, that J.G.B. and M.B. were also dependent upon D. for transportation by boat and by skidoo.

At the time of D.'s fatal accident, his two young children were living with J.G.B. and M.B., D.'s wife

having left him. D. had his own place; he would occasionally take the children home to stay with him overnight but, for the most part, they lived with their grandparents. At the time of the accident, two of the other children of J.G.B. and M.B., M. and M. were both living with their parents; each of them is now an adult although, so far as we can tell, M. was only [text deleted] at the time of D.'s accident. M. has had continuing problems with solvent abuse since the age of about [text deleted] and has spent much of his life in institutional care, mainly on charges of break, enter and theft. J.G.B. testified that M. is not allowed to use equipment operated by gasoline, and so was of little help to the family when it came to chores involving the use of snowmobile or an outboard engine. M. performed similar chores for an aunt, with whom he now lives, to those performed by D. for their parents.

D. was apparently very active in the field of sports and would be away for 4 or 5 days at a time about 8 times a year. If the team happened to get into the finals, his absences would extend to about a week. On those occasions, J.G.B. testified, D. would lay in a supply of wood before leaving. We were not told what happened to the water supply during D.'s absences.

D., who had a grade eight education and had only held a full time job for a few months, in 1993, was unemployed and receiving Social Assistance at the time of his death and had never contributed financially to his parents' household - not, at least, in any meaningful way. Indeed, the reverse would be more accurate since J.G.B. testified that he would help D. out from time to time by giving him money, usually about \$[text deleted] at a time, particularly for entry fees and travel for sporting events.

There is, therefore, no suggestion that J.G.B. and M.B. were in any way financially dependent upon D.. Rather, the position of the Appellants is that, although two of their other sons were living with them at the time of D.'s tragic death, and another son, D., lived in the community with his wife and two children, the Appellants were in fact substantially dependant upon D. because it was he, and he alone, who since 1991 had been cutting and hauling wood and hauling fresh water for them. Heat and a water supply are necessities of life; D. supplied those necessities and they were therefore substantially dependent upon him. In addition, only he was able to supplement the family's food by hunting and fishing - tasks for which his father, J.G.B., had been primarily responsible prior to J.G.B.'s accident.

This Commission has already held (in the appeal of H.M. and E.M., decided June 19th 1995) that, while financial factors are not irrelevant, they are only one criterion or gauge to be considered in determining substantial dependency. The term 'substantially dependent' , where it is used with reference to a parent of a deceased victim of a motor vehicle accident, is entitled to be given a broader meaning than mere financial dependency. On the other hand, we can not accept the interpretation urged upon us by the Appellants' counsel who, adopting the view of Dr. Bruce D. Martin, would have us apply a different standard to members of First Nations communities than is appropriate for the rest of the population. First Nations members, so the argument goes, have a 'culturally determined interdependency' . As Dr. Martin puts it: "It has been identified in a qualitative review of services provided to First Nation peoples living with disability that the rule of the family in First Nation communities is culturally determined. There has been assessment of

caregiver roles in other cultures and has been reported upon by Whyte and Ingstad in a description of the multicultural context of dependency relationship. By inference, the cultural context of First Nations family members assisting those with disability cannot be overlooked."

Dr. Martin, in giving his evidence, was proceeding from the position that J.G.B. and M.B. were disabled and therefore, in the cultural context of their community, dependent upon their son. While that may be true in a broader, sociological context, we do not view it as a persuasive argument when faced with the need to interpret the relevant sections of the MPIC Act.

However, we do not think it necessary to adopt the concept of 'culturally determined interdependency' in order to find that J.G.B. and M.B. were substantially dependent upon their son, D., at the time of his death.

As was said by Helper, J.A., when dismissing an application for leave to appeal an order of this Commission in the case of N.J.H. v. MPIC (an unreported decision pronounced in Chambers on October 15th 1996) "there is no magic to the word 'dependent' nor to the phrase 'substantially dependent'." While the comment was made in the case of *Terry's Motors Ltd v. Rinder* (1948) South Australian State Reports, 167, that "'substantial' is a word of no fixed meaning and is an unsatisfactory medium for carrying the idea of some ascertainable proportion of the whole ", we give the word 'substantial' its normal, everyday meaning, which is to say relatively great in size, value or importance, and we interpret the phrase 'substantially dependent' to mean reliant upon the deceased

in large measure, rather than in some inconsequential or sporadic way, for the provision in cash, in kind or by way of personal service of some of the basic necessities of life such as food, clothing, shelter, heat or personal care akin to nursing. Even that should not be regarded as an exhaustive definition of the phrase; other situations will doubtless arise in which substantial dependency can successfully be argued, but they are not relevant here.

Counsel for the Appellants has referred us to a number of judicial and quasi-judicial decisions. It is important to note that each of those cases refers to the Workers Compensation legislation extant at the time of the decision and that, with one exception, the governing legislation defined the dependant of another person as one who was wholly or partially dependent upon the earnings of that other person at the time of the latter's death. We must distinguish, therefore, between the legislation applicable to those cases and the statute with which we are here concerned: all of the Worker's Compensation statutes refer, in one way or another, to 'wholly or partially dependent' and appear to limit their scope to financial dependency or, at least, to a dependency that can be assigned a monetary value; the MPIC Act requires at least a 'substantial' dependency, but does not limit that dependency to matters of finance. Having said that, some important principles can be extracted from those Workers Compensation cases and other sources:

1. The only way to construe the Act (in this case, the Manitoba Public Insurance Corporation Act) is to read it fairly, taking the words in their common and ordinary signification and the Court ought not to strain the language in order to bring in or exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the

Act may seem to be. (per Lord Macnaghten in *Hodinott v. Newton, Chambers & Co.* [1901] A.C.49, 70 L.J.K.B. 150).

2. "Depend" - to rely on anything as a source of support or supply

"Dependence" - the act of depending, or the state of being dependent.....especially, the "state of relying on something or someone, as for anything necessary or desirable;

"Dependent" - needing support or aid from outside sources.....;
(Funk & Wagnall's Standard Dictionary of the English Language)

3. "Dependency" is not confined to dependency of necessity; it may also include dependency of choice. It is the factual situation that exists at the time of the death of a person that will govern whether others were substantially dependent upon that person; the circumstances giving rise to that dependency are of minimal importance.

Fisher v C.N.R. [1940] 1W.W.R. 583

Wolfe v C.N.R. [1934] 3W.W.R. 497.

4. In order to establish dependence, it is not necessary to prove that the person alleging that dependence can not live without the deceased's contributions.

Main Colliery Co. Ltd. v Davies [1900] A.C. 358; 69 L.J.Q.B. 755

5. Where reliance by parent on child for support is shown, the parent is entitled to compensation notwithstanding he had other means of support or could have supported himself. The test of dependency is not merely whether the contributions were necessary to bare subsistence; dependency may exist although the dependant could have subsisted without the assistance he received, if such contributions were relied on by the claimant for his means of living as determined by his position in life.

Air Castle v. Industrial Commission 67 N.E.2nd. 177; 394 Illinois Reports, 62.

Corpus Juris Secundum, Vol. XCIX, pages 452/3.

Howells v. Vivian & Sons Ltd. (1901) 85 L.T. 529; 18 T.L.R. 36.

6. It is irrelevant to consider whether the claimant could have supported himself without the contributions of the deceased if, in fact, the claimant was dependent upon those contributions at the time of the death of the deceased.

Simms v. Lilleshall Coal Co. [1917] 2 K.B. 368; 86 L.J.K.B. 965.

We reiterate that, while the Workers Compensation cases referred to above all require a measure of financial dependence by the claimant upon the deceased, we do not find that to be a prerequisite to the establishment of a claim under the M.P.I.C. Act. As we noted in the *Mozdzen* appeal (*supra*), a claimant may be comparatively well off financially but, as a paraplegic for example, be totally dependent upon others in many aspects of life.

There is another case from the U.S.A. to which it may be useful to refer. In the Pennsylvania case of *Arnold v. Logue*, 592 A.2nd 735, 738; 405 Pa. Super. 422, a mother whose 16-year-old son was killed in an automobile accident was held not to be entitled to survivors' benefits under a "no-fault" insurance system. She claimed that her son had performed chores on the family farm and that his earnings from a full-time position he started just before his death would have been used to defray household expenses. The court found that there was insufficient evidence of interdependence between mother and son, and nothing to indicate that she had incurred expenses to obtain services that her son would have performed, but for his death. In the case before us, the

evidence is clear that, although D. contributed nothing in the form of cash to his parents' home, he contributed fuel, water, food and, perhaps, transportation. The fuel and water has even been given a monetary value through the sworn testimony of J.G.B., and the applicants say that their food bill has risen from about \$600 every two weeks to about \$1,200 since D. is no longer there to supplement their food supply with fish or game. Dr. Martin testified that, from his knowledge of the [text deleted], he was not at all surprised to learn that the family's food bill had doubled as a result of D.'s death.

While it may well be, as counsel for M.P.I.C. suggests, that the evidence given by J.G.B. as to the additional expenses incurred for fuel, water and food was exaggerated, we have no difficulty in finding as a fact - if such a finding is necessary to establish dependency - that D.'s untimely and tragic death has indeed caused substantial, additional expense to his parents, an expense that could, if necessary, be quantified. In this context, we refer to what appears to have been the unanimous decision of the arbitration tribunal in another Workers Compensation Act appeal, being Decision No. 632/90, reported at 16 W.C.A.T. Reporter, page 268, from which the following portions of that panel's conclusions, commencing at page 271, are relevant:

It is clear from the legislation that parents of a deceased worker can receive compensation benefits if, at the time of death, they were in whole or in part dependent upon the worker. It is also clear from the material in the claim file that the worker did not earn wages for most of his life. Rather, he worked in a non-conventional fashion at hunting and trappingThe worker had only commenced work for a very brief period of time.....when a wall of the trench collapsed, causing his death.

The worker's parents submitted that, given the nature of the relationship between the

deceased worker and his parents, the worker would have shared (his earnings) with his parents and thereby provided them with direct monetary support. The panel notes that the worker's parents were in receipt of pensions of various sorts, amounting to approximately \$24,000 per year. The worker was employed in a job paying 6 dollars per hour at the time of his death. In the opinion of the panel, it is entirely speculative as to whether the worker would have paid all or any of his earnings to his parents. **This question, however, is not material to the decision. The question to be answered is whether the worker's parents were, in whole or in part, dependent upon him.**

This enquiry is somewhat complicated because of the lifestyle of the worker and his parents. They lived on an Indian reservation and the worker, for the most part, did not work for wages. This panel, however, is satisfied that the worker, in the months prior to his death and at the time of his death, lived with his parents, provided fish and game and did chores around the house. In addition, it would appear that the worker's parents provided the worker with certain monetary benefits, such as a place to live and perhaps other monies from their pension income.

The most appropriate description of the relationship between the worker and his parents was one of interdependency at the time of his death, in which each provided support to the other. The worker was not providing support in the form of direct cash payments. The Act, however, in the definition of "earnings", provides only that earnings must be capable of estimation in terms of money. Clearly, the provision of services and of foodstuffs is so capable. The definition of "dependant" makes it clear that the person is entitled to benefits pursuant to S.36(6) if they were partially dependent upon the

deceased worker. In this case, the panel is satisfied that the worker's parents were partially dependent upon him and that the worker had supported his parents by the provision of services and the provision of foodstuff in the months and years prior to his death.

There are two principal factors that distinguish the foregoing case from the appeal now before us: first, D. did not live with his parents - his two children did, but he maintained his own home on the Reserve; second, the claimants in Decision 632/90 only had to establish that they were "wholly or partly dependent" upon the earnings of their son, whereas J.G.B. and M.B. must prove that they were "substantially dependent" at the time of D.'s death.

We are satisfied that J.G.B. and M.B. were substantially dependent upon D. at the date of the latter's death and, therefore, entitled to dependants' benefits under Section 121(2) of the Act.

Were the appellants, or either of them, disabled?

Section 119(1) of the Act clearly defines 'disabled', for the purposes of this decision and of Section 121(2). A copy of each of the relevant sections of the Act is annexed and forms part of these reasons.

It is, of course, a matter of common accord that J.G.B. was not disabled; he was, after all, a full-time employee of the [text deleted].

The question of M.B.'s claim as a disabled dependant under Section 121(2) is a more vexed one. Marie, aged [text deleted] or [text deleted] at the date of D.'s death, was then and still is suffering from several of the well-known signs of non-insulin-dependent diabetes mellitus, initially diagnosed in 1966. She had developed complications:

- (i) peripheral neuropathy, manifest by decreased sensation in her feet and recurring, minor infection of her feet but, fortunately, no apparent threat of gangrene;
- (ii) retinopathy, requiring laser therapy to preserve her visual acuity;
- (iii) deterioration in her kidney function (more recently, in November of 1997, diagnosed as 'significant,.....rapidly progressing to end-stage renal disease');
- (iv) long-standing hypertension, expected to have an adverse impact upon her retinopathy and renal failure.

M.B., in her own evidence, testified that she was unable to do any heavy work and, while D. was alive, had relied upon him to help her with his children and with other domestic chores such as putting water into the washing machine, taking wet clothes outside and hanging them up, chopping wood and bringing it in for the stove.

On the other hand, M.B. also testified that she had felt much better before and up to the time of D.'s accident and that, about 15 to 18 months after D.'s death, she had obtained employment in the alcohol and drug abuse programme at the Band Office where she had worked for about 9 months, three or four days each week, although she had been hospitalized for about one week due

to her diabetes during the course of that employment. Later on, having quit work due to sickness, she was again hospitalised - this time for about a month, she said - but after being discharged from hospital she went back to work for a few months.

Dr. Martin, in his report of November 14th 1997, to counsel for the appellants, says, in part:

Despite her significant medical conditions, M.B. has not become physically disabled and at the time of last review was not restricted in mobility or activities of daily living even in the context of her living environment.

It is my opinion that M.B. sustained significant emotional illness following the tragic death of her son of February 25th 1995; this was manifest in a number of ways. It was addressed therapeutically by counselling and initial then intermittent tricyclic anti-depressant therapy. M.B. herself developed appropriate social supports. There was evidence of continued emotional distress for at least fifteen months following the death of her son. Additionally M.B. has chronic illnesses from which she was experiencing significant and anticipated sequelae at and around the time of her son's death. The sequelae of these chronic illnesses have progressed in a predictable fashion in the interval since the onset of the illness. Conclusions cannot be drawn regarding the excelleration (sic) of such conditions causally related to the death of a son. She was not observed to be dependent upon assistance for activities of daily living at or about the time of her son's death, and apart from some transient objective emotional deterioration in the Spring of 1995, there is no recorded evidence of continued emotional disability. The cultural context of dependency is noted as an issue for evaluation.

In his oral testimony, Dr. Martin qualified his earlier, written report by emphasizing that he had been referring to M.B.'s normal, domestic activities when denying her physical disabilities. He felt that it would have been difficult for her to hold down employment of a traditional nature for an indeterminate length of time. Dr. Martin expressed the view that the job with the Band Council had probably been 'orchestrated' as part of the healing process, rather than as genuine employment.

While we must say that we were much impressed by Dr. Martin's testimony and by his obvious dedication and thoroughness, our task in this context is to decide whether, immediately prior to D.'s death on February 25th 1995, M.B. was 'unable to hold any substantially gainful employment because of a physical or mental disability that was likely to be of indefinite duration or result in death.

While the loss of D. exacted a heavy emotional toll and, probably, a physical one as well, some of those forms of disability followed, and were in large measure caused by, D.'s death. In the days leading up to February 25th 1995, M.B. was able to cope well with the raising and handling of two youngsters whom she and J.G.B. both described as 'difficult' and to run her household practically single-handed, at least during the day-time. Her diabetes had not by that time progressed to the point of rendering her disabled. Most significantly, once she had started to come to terms with the emotional impact of her tragic loss, and whatever may have been the commendable motives of the Band Council in employing her, she was, in fact, able to hold gainful employment for 3 or 4 days each week for the better part of a year. It follows that she would have been even more capable of doing so before D.'s fatal accident.

We are unable, therefore, to conclude that M.B. was 'disabled', within the meaning of the MPIC Act.

DISPOSITION

We therefore find that J.G.B. and M.B. were each dependents of their deceased son, D., at the time of his death, and each is entitled to a lump sum death benefit of \$19,000.

We further find that neither J.G.B. nor M.B. was disabled, within the meaning of Section 121(2) of the MPIC Act.

Dated at Winnipeg this 24th day of July 1998.

J.F.REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED