

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-95-8**

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 Ms Joan McKelvey
[Appellant's solicitor] appeared for the Appellant

HEARING DATES: August 14, 1995 and November 30th, 1995

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

RELEVANT SECTIONS: Sections 70 (1)(definition of 'spouse'), 120(1), and 122 of the M.P.I.C.Act.

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

REASONS FOR DECISION

THE FACTS:

This is an appeal by [the Appellant], the legal wife of the late [text deleted], from a decision of the Internal Review Officer of Manitoba Public Insurance Corporation ('M.P.I.C.') whereby that officer held that [Deceased's partner] was the spouse of the late [text deleted] within

the meaning of Section 70(1) of the M.P.I.C. Act, which will be referred to in greater detail below.

It is not disputed that [the Appellant] 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.

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

[Deceased's partner] and [the Deceased] met at [text deleted] in [city] on December 8th of 1989. A few days later they were living together at [text deleted] in [city], along with his niece, [text deleted]. [The Deceased] and [Deceased's partner] were both receiving welfare monies from the City [text deleted], despite the fact that [the Deceased] 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 [text deleted]. At some undetermined point, [the Deceased's] employment by [text deleted] ceased and he started receiving unemployment insurance money, but still drew welfare funds from the City.

When [the Deceased's] unemployment insurance ran out, the couple moved to [rural location #1], where they moved, together, into [Deceased's partner's] parent's home. [Deceased's partner] started working as a homemaker for her parents, being paid by [text deleted] and, after a short while, [the Deceased] obtained work, firstly doing odd carpentry work for [text

deleted] and, thereafter, working on the renovation of the [text deleted] office at [rural location #2]. Even then, each of them was in receipt of welfare monies - [Deceased's partner] from [rural location #1] and [the Deceased] from [rural location #2].

Her evidence is that she saw [the Deceased] at least every week and spoke with him daily while he was working for [text deleted] as a carpenter. They were, from her evidence, living at her parent's home at [rural location #1] 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.

On [text deleted] their son, [text deleted], was born at [text deleted], Manitoba. His birth certificate reflects [the Deceased] as the father and [Deceased's partner] as the mother. At that juncture, [the Deceased] and [Deceased's partner] had their permanent home at [rural location #1] (although the word 'permanent', in this context, must be viewed comparatively). Some time after that, [the Deceased] found further work at [rural location #2] and moved there, followed by [Deceased's partner] when [Deceased's and Deceased's partner's son] was about nine months old.

In 1993, the couple moved into the City [text deleted] to stay with his sister on [text deleted] for part of the summer, although [Deceased's partner] was still collecting her welfare cheques from [rural location #1]. While they were in [city] 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.

Toward the end of the summer of 1993 [the Deceased] and [Deceased's partner] returned to [rural location #1] where [the Deceased] obtained short term, temporary employment. Thereafter, he found more work at [rural location #2] and they reverted to their former pattern - that is to say, [Deceased's partner] remaining at the [rural location #1] home with [the Deceased] spending the week at [rural location #2], returning to [rural location #1] at weekends.

Evidence was given by [Deceased's partner] that the [text deleted] official responsible for welfare payments was well aware of the fact that [Deceased's partner] and [the Deceased] were living together as man and wife at [rural location #2], that members of the [text deleted] or, at least, one or more employees of the [text deleted], had actually visited with her and [the Deceased] at [rural location #2], and yet she continued to receive welfare cheques from [rural location #1].

Thereafter, [the Deceased] and [Deceased's partner] moved back again to [city] and into an apartment at [text deleted], where they again received welfare while [the Deceased] was employed in the construction industry. After one of their frequent altercations, they were apart for one night and, when [Deceased's partner] returned to the apartment, she found that [the Deceased] had sold all of their furniture and food to the caretaker for \$50.00 and had disappeared. [Deceased's partner's] sister, [text deleted], came to get her and [Deceased's and Deceased's partner's son], and took them back to [rural location #1] where [the Deceased] reappeared about ten days later, sober and contrite, resulting in another reconciliation.

For a while, [Deceased's partner] worked as a homemaker at [rural location #1], in

the home of her parents. [The Deceased] was employed doing carpentry work for the [text deleted] there. After a while, [Deceased's partner] quit her job at [rural location #1] and the couple moved to [rural location #2] where [the Deceased] had re-established work for the [text deleted] there. Initially, [the Deceased] and [Deceased's partner] moved in with [text deleted], but his problems with alcohol were obviously equal to those of [the Deceased], and the couple then moved in with [text deleted] and his common-law wife, [text deleted]. [Deceased's and Deceased's partner's son] was with his mother at all relevant times.

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

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

[Deceased's partner'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 [rural location #1] or at [rural location #2], on weekends, unless [the Deceased's] condition was such as to render those meetings, in her view, unsafe for herself or her child.

[Deceased's partner's] uncontradicted evidence was that, for a period of approximately 4 1/2 years from December 1989, she and [the Deceased] were living together under the same roof unless kept apart by either their jobs or by [the Deceased's] alcohol intake. This evidence of hers is corroborated in large measure by the signed statements of [4 people]. 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.

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

Apart from the largely uncontradicted oral testimony of [Deceased's partner] and the written statements referred to above, we have [Deceased's and Deceased's partner's son's] birth certificate which indicates that [the Deceased] was his father and we have the record of the registration of [Deceased's partner's] motor vehicle in June of 1994, indicating that her address at that juncture was at [rural location #2], which is certainly where [the Deceased] made his home

then

[The Deceased] was killed in an automobile accident on the 9th of July 1994.

THE LAW:

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

pre-

(a) continuously for a period of not less than five years immediately

ceding the accident, or

accident,

(b) for a period of not less than one year immediately preceding the

and there is a child of the union.”

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, Scedule 2.

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.

The sole question that we need to decide is whether [Deceased's partner] was, in fact, cohabiting with [the Deceased] for a period of at least twelve months prior to his death, having born his child.

While we are not necessarily bound by the precedent of our own, earlier decisions, we refer to our decision in the appeal of [text deleted], 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 hus[text deleted] and wife and yet, notwithstanding, there may be cohabitation.”

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.

We asked counsel for the Appellant the rhetorical question: if [Deceased's partner] was not cohabiting with [the Deceased] 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 [Deceased's partner] was not cohabiting with [the Deceased] during all relevant times, some one or more witnesses could readily have been found either at [rural location #1] or at [rural location #2] to attest to that fact. The only scintilla of evidence in support of the Appellant's position is a letter from [text deleted], who is described as the [text deleted] Membership Clerk at [rural location #2], addressed to the Appellant's solicitor, in the following language:

“I was informed by the late [text deleted] that he had separated from his C.L. wife in the summer of 94 and that she had moved back to [rural location #1].”

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 [the Deceased], there is nothing before us to indicate the length of any such separation other than the evidence of [Deceased's partner] herself. She acknowledges that she and [the Deceased] 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 [the Deceased's] death.

It should also be noted that, although [text deleted] and [text deleted] 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 [the Deceased] and [Deceased's partner] 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 [text deleted], 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 [Deceased's partner] which, for the purposes of this appeal, we are obliged to accept.

DISPOSITION:

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

Dated at Winnipeg this 1st day of December, 1995.

J. F. REEH TAYLOR, Q.C.

CHARLES T. BIRT, Q.C.

LILA GOODSPEED.
