Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an appeal by [the Appellant]
AICAC File No.: AC-96-16

PANEL:	**Mr. J.F.Reeh Taylor, Q.C., (Chairperson)** **Mr. Charles Birt, Q.C., and** **Mrs. Lila Goodspeed**
APPEARANCES:	**Manitoba Public Insurance Corporation (M.P.I.C.), represented by Ms Joan McKelvey;** **[Text deleted], the appellant, represented by [Appellant's representative].**
HEARING DATE:	**August 8th, 1996.**
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.**
RELEVANT SECTIONS:	**Sections 70 (for definition of 'Dependant'), 119(2) and 121(2) of the M.P.I.C.Act ('the 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:

The facts in this case are not in dispute, and are well summarized in the decision of [text deleted], the Acting Internal Review Officer of M.P.I.C., dated March 6th, 1996.

The appellant is the adopted daughter of [text deleted] (the deceased victim) and his former wife, [text deleted]. [The Deceased] 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, [the Deceased] had contracted Parkinson's Disease and, by some time in 1989, the uncontrollable shaking associated with that disease had become apparent and he was not, thereafter, able to obtain full-time employment.

For the next couple of years, [the Deceased] 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.

[The Deceased] and [the Deceased's ex-wife] separated in 1989. [The Deceased] 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 [the Deceased's ex-wife] and the children, although [the Deceased] did give money to his family whenever he had some to spare. When [the Deceased's ex-wife] learned, in late 1991, that [the Deceased] was living with another woman [text deleted], she commenced divorce proceedings which were finalized in December of 1992. The final order of divorce apparently made no provision for maintenance of [the Deceased's ex-wife] or the children - the appellant has two younger siblings. [The Deceased] married [the deceased's second wife] in June of 1994.

The appellant, [the Appellant], has lived with her mother, [the Deceased's ex-wife], at all times since her parents separated, and has always been given free room and board. Between 1989 and 1995 [the Deceased] would give her occasional gifts totalling between $500 and $700 in any given year.

From September, 1992, until January, 1995, [the Appellant] was enrolled in the [text deleted] at the University [text deleted]. Being still a student dependant of [the Deceased's] for the purposes of the Canada Pension Plan, [the Appellant] received about $100 per month under that Plan and this, together with a combination of student loans and part-time earnings of about $3,000 per annum, enabled her to pay for her books and tuition. [The Deceased's ex-wife] claimed [the Appellant's] education/tuition credits on her tax return until [the Appellant] turned 18; thereafter, neither parent claimed [the Appellant] as a dependant for tax purposes.

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 $700, [the Appellant] was obliged to withdraw from her University 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 [the Deceased]. She commenced working a few more hours per week than had previously been the case, but still only grossed about $75.00 per week. It had been the appellant's intention to start back at University 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, [text deleted], who would provide her with free room, board and transportation, plus access to at least some of her books and a computer, since [the Deceased's second wife] was, herself, also attending the University as a student.

On September 25th, 1995, [the Deceased] was fatally injured in a one-vehicle accident. His widow, [text deleted], subsequently decided not to accomodate [the Appellant] in the manner that had apparently been agreed upon, or at all. It was never made clear to us whether [the deceased's

second wife] 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 [the Appellant] 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.

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, [text deleted], by way of his letter of March 6th, 1996. It is from that decision that she now appeals.

THE LAW.

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;.....*

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 [the Appellant] 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.....*

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.*

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: " [the Deceased] 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 <u>despite</u> his unemployment. It is submitted on behalf of the appellant that [the Deceased's] pattern of conduct was such that it should convince anyone that, had [the Deceased] been employed, he would have been supporting [the Appellant] substantially, to facilitate the completion of her degree course. A 'dependant', argues [Appellant's representative], 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.

On behalf of the corporation, Ms McKelvey argues that, while any sibling of [the Appellant'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 [the Deceased's] death by which we must be bound, and that those realities do not reflect any real measure of dependency upon [the Deceased] by the appellant, nor any certainty that, even had he been employed, [the Deceased] 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.

It is clear that [the Appellant] 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 [the Appellant's] parents been living together. In the event, not only had [the Deceased] and his wife separated but he had remarried; [the Appellant] had reached the age of [text deleted].

[Text deleted], 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 [the Deceased] at the time of his death." With deference, we have to say that [MPIC's Acting Internal Review Officer's] conclusion is incorrect. The question, as we have noted above, is not whether [the Appellant] **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.

However, the evidence upon which we are asked to conclude that [the Appellant] 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 [the Appellant] 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 [the Appellant] the only recipient of her father's gifts during the years prior to his death? What would [the Deceased's] income level have been, had he been employed? Given that he now had a new wife who was,

herself, a university student, to what extent could he have afforded to support [the Appellant]? Against that same background, to what extent would his priorities have changed? Had he been earning, would [the Deceased's ex-wife] 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 [the Appellant], and would she have pursued those claims, thus effectively negating any dependency of [the Appellant] upon [the Deceased]? In other words, while [the Deceased'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 [the Deceased] been employed a level of dependency would have existed of the kind contemplated by Sections 70 and 119(2) of the Act.

DISPOSITION:

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.

Dated at Winnipeg, Manitoba, this 19th day of August, 1996.

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J.F.R. TAYLOR Q.C.(Chairman)

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CHARLES T. BIRT, Q.C.

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LILA GOODSPEED