

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

AP 111/92

UNDER

the Accident
Compensation Act
1982

IN THE MATTER

of an appeal
pursuant to Section
111 of the Act

BETWEEN

ACCIDENT
REHABILITATION &
COMPENSATION
INSURANCE
CORPORATION

Appellant

AND

ALISON JOAN GAY
HUGHES

Respondent

Hearing: 11 February 1994

Counsel: A D Barnett and Ms Dall for Appellant
K C Marks for Respondent

Judgment: 18 APR 1994

RESERVED JUDGMENT OF HOLLAND J.

This appeal under the Accident Compensation Act 1982 requires resolution of differences of opinion of Appeal Authorities relating principally to the interpretation of s.65(2)(a)(1) of the Act. In view of those differences I have first considered the facts and relative law independently of earlier decisions and then considered whether established precedent requires amendment to the conclusions which I have reached.

The respondent, Mrs Hughes, is the widow of a man who died as a result of personal injury by accident on 3 June 1984. She and her two infant children were totally dependent on the deceased and each received earnings related compensation since the date of his death. On 27 July 1991 the appellant, the Accident Compensation Corporation, ceased payment to Mrs Hughes of her compensation advising her:-

"It is the Corporation's view that your circumstances have changed so that you can no longer be considered to be dependent under s.65 of the Accident Compensation Act..."

It is common ground that prior to this termination Mrs Hughes had admitted living with one Ralph Green and to sharing a bedroom and social life with him but she denied that there was a de facto relationship akin to marriage between them. In evidence before a review authority both Mrs Hughes and Mr Green acknowledged that they were living together, with Mrs Hughes' two children, in a house purchased and owned by Mrs Hughes. Mr Green paid Mrs Hughes \$50 per week estimated to be one quarter of the household costs of four. He made no other financial contribution to the costs of the home or to Mrs Hughes.

Mr Green acknowledged that he was separated from his former wife and replied "Not at this stage" to a question whether he intended to marry Mrs Hughes.

Mrs Hughes said that she was not financially dependent on Mr Green in any way and that she could not see in the foreseeable future him having any obligation to support her. She agreed that when they went out socially together each paid their own expenses. She further acknowledged that she and Mr Green had together purchased a property which sold a few months later for a small profit. She was not asked about prospects of marriage.

Mrs Hughes applied for a review following the decision of the Corporation to cancel her compensation. The Review Officer upheld the

decision of the Corporation. Mrs Hughes then appealed to the Appeal Authority who allowed the appeal and directed that her earnings related compensation was to be reinstated from 27 July 1991. (Earnings related compensation payable to her in the sum of \$60 payable for each of her two children had never been suspended or cancelled).

The Corporation sought and obtained leave to appeal to this Court from the Authority's decision. That leave was granted by the Appeal Authority on 8 April 1993.

THE RIGHT TO APPEAL

S.102(8) provides that on a review the Review Officer shall act independently. S.107 gives an absolute right of appeal to the Appeal Authority against the decision of the Review Officer. S.109 provides that the appeal shall be by way of rehearing but where any question of fact is involved a record of the evidence before the Review Officer or received by the Corporation before the review shall be brought before the Appeal Authority but the Authority has power to rehear evidence or hear further evidence. In carrying out its functions the Appeal Authority is deemed to be a Commission of Inquiry.

S.111 gives the right to any party dissatisfied with the decision of the Authority with the leave of the Authority, or if referred with the leave of the Court, to appeal to this Court. Leave is to be granted on a question of law, or if in its opinion, the question involved is one which by reason of its general or public importance or for any other reason ought to be submitted to the High Court. In this case leave was granted on both grounds. S.111(5) provides that the decision of the High Court subject to s.112 giving a restricted right to appeal to the Court of Appeal, shall be final and conclusive.

THE STATUTORY PROVISIONS FOR ELIGIBILITY FOR COMPENSATION

S.65 is a lengthy section providing for earnings related compensation payable to surviving dependent spouses, children, and other dependents. There is no issue in this case as to the quantum of the compensation, the dependency of the widow at the date of death, or the rights to payment in respect of the children. The sole issue is whether by virtue of her association with Mr Green, Mrs Hughes has ceased to be a dependent person entitled to compensation.

S.65(2)(a) provides for payment of compensation:-

- "(a) To the deceased person's spouse, if she or he was dependent on the deceased person immediately before the time of the accident until the date on which earnings related compensation ceases under section 66(2) of this Act to be payable to the spouse on account of age or until her or his sooner death, marriage, or remarriage,-
- (i) While she or he would, in the opinion of the Corporation, have been totally dependent on the deceased person if that person were living, at the rate of three-fifths of the earnings related compensation that would for the time being have been payable to the deceased person under section 60 of this Act had the deceased person remained alive but suffered a permanent total loss of earning capacity:
- (ii) While she or he would, in the opinion of the Corporation, have been partially dependent on the deceased person if that person were living, at such lesser rate as the Corporation thinks proper having regard to the degree to which, in the opinion of the Corporation, the spouse would be so dependent:"

S.66(2) provides for compensation to cease upon a prescribed age being reached. It is not material to the issues before the Court.

"Dependant" is defined in s.2(1) of the Act as "unless the context otherwise requires,"-

""Dependant", in relation to any person, means any other person whom he had a legal duty to support in whole or in part at the time when the dependency has to be determined; and includes any other person whom he might then reasonably regard or have regarded himself as having a moral duty to support in whole or in part, and

whom he was then supporting in whole or in part; and includes a child of his born after his death; and "dependent", "totally dependent", and "partially dependent" have corresponding meanings:"

S.85 provides:-

"(1) For the purposes of this Act, it shall be presumed, in the absence of proof to the contrary, that the female spouse (as defined in section 65 of this Act) is totally dependent on the male spouse, and any child under the age of 16 years living in the household is totally dependent on each of its parents.

(2) Subject to subsection (1) of this section, dependency shall be a matter of fact."

WAS MRS HUGHES AT THE TIME THE CORPORATION CEASED PAYING COMPENSATION A PERSON WHO WOULD HAVE BEEN TOTALLY OR PARTIALLY DEPENDENT ON HER HUSBAND IF HE WERE LIVING?

It is common ground that if Mrs Hughes had married Mr Green she would not have been entitled to compensation. This would have occurred whatever the financial arrangements between her and Mr Green might have been. She would, however, have been entitled to a lump sum remarriage grant under s.70 of the Act equivalent to a further two years' earnings related compensation.

In the decision of the Appeal Authority in this case it held that the question of dependency was to be determined on a purely economic basis and that:-

"It is quite clear that while the appellant does have a sexual relationship with Mr Green her financial position has not changed since the death of her husband".

He accordingly concluded that Mrs Hughes was still "dependent" on her husband.

The task before the Review Officer, the Appeal Authority and this Court is to assume Mr Hughes to be alive and to determine as a fact whether on the proved circumstances Mrs Hughes would have been dependent on him in that he would have "had a legal duty to support her in whole or in part" or whether she would have been an "other person whom he might then

reasonably regard or have regarded himself as having a moral duty to support in whole or in part".

Although the question is to some extent fictional because Mr Hughes is not alive the facts establish a scene under which it must be assumed that she was living with Mr Green in the circumstances previously described in her husband's lifetime. As in this situation Mrs Hughes is a wife the provision in the definition of "dependant" in the Act for "any other person" does not arise. If, in the circumstances Mr Hughes was not under a legal duty to support her as his wife no separate moral duty to do so could arise.

Whether Mr Hughes would have owed a legal duty to support Mrs Hughes is to be determined by considering whether Mrs Hughes, in the circumstances would have had a right to recover maintenance from her husband if he were alive. A wife's right to maintenance from a living husband is controlled by the provisions of the Family Proceedings Act 1980, s.s. 61 to 66. Each spouse is liable to maintain the other to the extent that such maintenance is necessary to meet his or her reasonable needs where he or she cannot practicably meet the whole or any part of those needs because, (in this case) of the effects of the division of functions within the marriage while the parties lived together, or any inability of the spouse to obtain work that is adequate to provide for him or her. (S.63(1)(a) and (d)).

As the onus of establishing lack of dependency rests on the Corporation, and there is no evidence on the matters referred to in s.63(1), it must be assumed that Mrs Hughes cannot meet her reasonable needs and is unable to obtain work.

The Corporation relies on s.66 which provides:-

Relevance of conduct to maintenance of husband or wife-In considering the liability of one party to a marriage to maintain the other party to the marriage (whether during the marriage or after its dissolution), and the amount of maintenance, the Court may have regard to-

- (a) Conduct of the party seeking to be maintained that amounts to a device to prolong that party's inability to meet reasonable needs; or
- (b) Misconduct of the party seeking to be maintained that is of such a nature and degree that it would be repugnant to justice to require the other party to pay maintenance."

It is submitted that the acts of Mrs Hughes, in agreeing to share a house and a bedroom on a long term basis with Mr Green and to accompany him on social outings are conduct of such a nature and degree that it would be repugnant to justice to require Mr Hughes to pay maintenance, if he were alive. I have substituted "conduct" for "misconduct" as is contained in the section because we are considering a fictional situation of Mr Hughes being alive when sadly that is not the case. There is no "misconduct" in Mrs Hughes, as a widow, having a relationship with another man. Nevertheless if Mr Hughes were alive such conduct may be misconduct. No moralistic issue arises. Mrs Hughes is free to live as she wishes. The issue is whether, under the statute, she should continue to receive compensation as a dependant of her late husband.

The term "repugnant to justice" in the Matrimonial Property Act 1976 was described in Martin v Martin [1979] 1 NZLR 97 as being "an unusually emphatic expression not commonly found in statutes" (see judgment of Cooke J. at p.106).

Notwithstanding the emphatic expression I have no difficulty in finding that it would be repugnant to justice to require a spouse to pay maintenance to the other spouse who had elected on more than a temporary basis to assume cohabitation with one of the other sex and maintain a life to all appearances the same as that of a married person in every respect except that of legal marriage. In a decision in 1988 - McDonald v McDonald [1988] 5 NZFLR 21 Judge Inglis QC, an experienced Family Court Judge, said at p.23:-

"For myself I can see no material distinction, on the issue of maintenance, between a spouse who has remarried and a spouse who

has entered into a relationship in the nature of marriage. That there is no material distinction for the purpose of spousal maintenance proceedings appears to be confirmed by the experience of the Family Court, for there has to my knowledge been no case in which a spouse living in a so-called de facto relationship has ever claimed or recovered spousal maintenance from the other spouse."

S.69 of the Family Proceedings Act 1980 provides that a maintenance order in favour of a spouse ceases on remarriage. Obviously a de facto relationship is short of a legal marriage and to that extent the Judge's statement of there being "no material distinction" may be a slight exaggeration. Obviously s.69 does not apply. In my view however the situation proved is one that renders it repugnant to justice to require maintenance to be paid. I have quoted from Judge Inglis QC so as to rely to some extent on his lack of knowledge of any case where a spouse living in such a relationship has claimed or recovered maintenance from the other spouse. My experience is the same. In Butterworths Family Law Service at paragraph 5.9 it is stated:-

"Where there exists a semi-permanent relationship or where maintenance would be used to enable the recipient to pursue an intimate relationship with another person, the conduct may be sufficiently repugnant."

I accordingly have reached the conclusion unless other decisions of the Appeal Authority persuade me to the contrary, that at the time the Corporation cancelled Mrs Hughes' compensation and at the time of the review and the appeal Mrs Hughes had ceased to be dependent on her husband and the Corporation was correct in cancelling the compensation.

EARLIER APPEAL AUTHORITY DECISIONS

The first decision in time is that of Judge Blair in re Lomas [1981] 3 NZAR 84. It was a decision under the Accident Compensation Act 1972 but the statutory provisions relating to compensation were similar in some respects as are those contained in the 1982 Act. However, s.123(5) of the

1972 Act contained specific provisions to be regarded as relevant in considering all questions of dependency and relative needs. Those provisions have been repeated in the 1982 Act but applying only where the total amount of earnings related compensation to dependants and others exceeds the maximum allowable amount and a reduction is consequently required in the payments to the dependants and others. In the 1972 Act, because of the provisions of s.123(5), consideration had to be given in determining all questions of dependency and relative needs to:-

- (a) Any gain consequent upon death.
- (b) Circumstances that have arisen after death.
- (c) The needs of each person.

There is no such specific requirement in the 1982 Act in considering the question of whether or not Mrs Hughes at the material time could have been dependent on her husband if he were alive. In re Lomas Judge Blair considered s.123(5) in his decision and decided that it did not apply to the circumstances before him. Nevertheless there is a material amendment. I accordingly defer consideration of re Lomas.

The decision I have reached is in accord with the decisions of Appeal Authorities, Mr B H Blackwood in Van Zetten v ACC 128/88 Decision 29 June 1988, and in Krauze v ACC [1991] NZAR 356 and Mr P J Cartwright in Kerkvliet v ACC 396/92 Decision 7 May 1992.

In C v ACC [1986] 6 NZAR 167 Judge Middleton referred to re Lomas in a case where a widow dependent under the Act took in a boarder who paid her \$60 per week. They did not share a bedroom but had occasional sexual intercourse. A child was born to them. The boarder and child shared a bedroom but the Judge found that there was no special affection between the boarder and the widow and they had separate bank accounts. The Judge rejected the submission that "I should view this case as if the appellant's husband was still alive and a boarder moved into the home and had intimacy

with his wife". He considered that the "only issue is whether had her husband not been killed the appellant would have been dependent upon him and I accept that she would have been". With respect to the Judge that appears to be little more than a repetition of the test at the date of death. It gives little, if any, effect to the specific provisions of s.65(2)(a)(1).

He accordingly decided that the Corporation should not have cancelled compensation and concluded with the rather remarkable finding at p.170:-

"My examination of the appellant's bank statements and of the evidence given by both the appellant and Mr P did not lead me to accept the view expressed by the review officer that the appellant and Mr P had arranged their affairs in such a way that they could reap additional benefits from social security and accident compensation. While the situation appears to be somewhat unusual, both the parties have given very clear evidence of their relationship, and it seems to me that it is not possible on those facts to conclude that a de facto relationship exists.

On that finding of fact the decision is distinguishable from the factual situation established in this case.

In the decision before me on appeal Judge Middleton declined to follow Van Zetten and Krauze. In doing so he held that the decision in Lomas was the correct approach. In this respect he held that Judge Blair in Lomas had held that the only issue was the economics of the dependency and that moral issues were not to be considered. Lomas is not mentioned in either of the decisions in Van Zetten and Krauze. It may be that Lomas was not referred to in those cases but it also may be that the decision was considered and rejected because of the changes in the statute.

It is necessary to analyse the decision in Lomas as it is in reliance on this decision that Judge Middleton in the present case has declined to follow the two earlier decisions of different authorities. It would appear that Kerkvliet was not before him. Indeed it was decided after the hearing but before the delivery of judgment.

The principal argument before Judge Blair in Lomas was that once dependency was determined it continued for whatever period was determined at the original hearing to be the period of dependency if the deceased were living and that the statute expressly provided for abatement only on death, remarriage or attainment of the age limit, but not entering into a de facto relationship. Judge Blair rejected that submission.

While Judge Blair in Lomas referred to the right of the Corporation to consider changes in financial circumstances he did not ever state that "the only issue was the economics of the dependency and that moral issues were not to be considered" as stated by Judge Middleton. The facts in Lomas were admitted. The Corporation had reduced a widow's earnings related compensation by half on the ground that she had for some time been living in a stable de facto relationship. The decision of the Corporation was upheld by the Hearing Officer and Judge Blair as Appeal Authority. Nowhere in his judgment are the widow's financial circumstances referred to.

I accordingly conclude that my reasoning is in accord with that of Judge Blair and that re Lomas was not a decision justifying departure from the other three decisions of the Appeal Authority.

The present decision and the earlier decision of re C are the only two decisions referred to me to the contrary. For the reasons I have earlier set out I am satisfied that they are wrong and should not be followed.

EVENTS AFTER THE HEARING BEFORE THE APPEAL AUTHORITY

At the commencement of the hearing in this Court counsel for Mrs Hughes tendered an affidavit by her for me to read. Counsel for the appellant did not object. In that affidavit Mrs Hughes says that the relationship between her and Mr Green was never intended by either party to be permanent and the relationship ceased on 23 August 1993 when Mr Green left Mrs Hughes' home to which he has not returned.

S.111(6) of the Act provides that the procedure on appeals shall be in accordance with the Rules of Court. Rule 718(4) empowers the Court at its discretion to receive further evidence. It is proper to give consideration to the fact that the relationship between Mrs Hughes and Mr Green has ceased. This is an event which has occurred since the earlier hearings. It is not proper at this stage to consider Mrs Hughes' assertion that during the relationship it was not intended to be permanent. That is a matter which should have been raised at the time of the hearing. It does not affect my decision that the relationship at the time was one akin to marriage.

I do not consider that the cessation of the relationship affects the matters in issue on this appeal. The factual situation was to be determined as it was at the time of cancellation, the Review, and the hearing of the Appeal Authority.

Even if it was appropriate to consider the situation today, it would still be repugnant to justice to find Mr Hughes, if he was alive, liable to maintain his wife after this long and close relationship which she had with Mr Green.

RESULT

The appeal is allowed. The decision of the Appeal Authority is reversed and the decision of the Review Officer is confirmed. The respondent is legally aided. I make no order as to costs.

A D Hall

Solicitors:

Accident Compensation Corporation, Wellington, for Appellant
O'Driscoll & Marks, Dunedin, for Respondent