Abbott as litigation guardian for Kevin Owen Abbott & Anor v Territory Insurance Office Board [2007] NTSC 37

PARTIES:	ABBOTT, MAVIS as litigation guardian for KEVIN OWEN ABBOTT AND: ABBOTT, ERNESTINE as litigation guardian for MICHAEL GRAHAM ABBOTT v TERRITORY INSURANCE OFFICE BOARD
TITLE OF TRIBUNAL:	NORTHERN TERRITORY MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL
JURISDICTION:	APPEAL PURSUANT TO S 29 MOTOR ACCIDENTS (COMPENSATION) ACT NT
FILE NO:	M9 of 2000 (20009226)
DELIVERED:	31 MAY 2007
HEARING DATES:	28 MAY 2007
JUDGMENT OF:	ANGEL J

CATCHWORDS:

Motor Accidents Compensation – reference to Motor Accidents (Compensation) Appeal Tribunal – whether posthumous child was "primarily dependent" on the deceased for financial support – *en ventre sa mére – Motor Accidents (Compensation) Act* 1987 (NT) ss 4, 7, 22

Motor Accidents Compensation – reference to Motor Accidents (Compensation) Appeal Tribunal – disentitlement of spouse – subsequent entitlement to benefits of "dependent" children – *Motor Accidents (Compensation) Act* 1987 (NT) ss 4, 22(3)

Statutes referred to:

Compensation (Fatal Injuries) Act (NT) s 4(3)(b)
Family Provisions Act (NT) s 7(8)
Motor Accidents (Compensation) Act (NT) ss 4, 12(1), 20(a), 22, 22(1)(b), 22(1)(b)(i), 22(3), 23, 31, 31(3), 31(3)(c), 31(3)(d)
Motor Accident (Compensation) Amendment Act (No 9 of 2007) (NT)
Sentencing Act (NT) s 5(2)

Cases cited:

Aafies v Kearney (1976) 180 CLR 199
Connare v Pistola (1943) 60 WN (NSW) 95
Elliott v Joincey [1935] AC 209
Hooper v TIO (2002) 11 NTLR 182
Malbunka v TIO Board (2004) 14 NTLR 126
Orrell Colliery Company Limited v Schofield [1909] AC 433
Pegus v Associated Forest Holdings Pty Ltd [1964] Tas R 61
Schofield v Orrell Colliery Company Limited [1909] 1 KB 178
Wesley v Wesley (1998) 71 SASR 1
Williams v The Ocean Coal Ltd [1907] 2 KB 422

REPRESENTATION:

Counsel:

First Applicant:	A Young
Second Applicant:	P Barr QC
Respondent:	D Farquhar

Solicitors:

First Applicant:	Central Australian Aboriginal Legal Aid Service
Second Applicant:	Povey Stirk
Respondent:	Cridlands

Judgment category classification:	B
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IN THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL TRIBUNAL
DARWIN REGISTRY

Abbott as litigation guardian for Kevin Owen Abbott & Anor v Territory Insurance Office Board [2007] NTSC 37
No. M9 of 2000 (20009226)

BETWEEN:

MAVIS ABBOTT as litigation guardian for Kevin Owen Abbott

First Applicant

AND:

ERNESTINE ABBOTT as litigation guardian for Michael Graham Abbott

Second Applicant

AND:

TERRITORY INSURANCE OFFICE BOARD

Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 31 May 2007)

[1] This is an amended reference for benefits under ss 22 and 23 Motor Accidents (Compensation) Act NT ("the Act").

[2] On 9 February 1995 Rufus Coulthard, a Territory resident, died as a result of a motor vehicle accident in the Northern Territory the day before. The deceased was survived by his spouse Mavis Abbott and his two year old child, Michael Graham Abbott ("Michael") who sues by his litigation

guardian the second applicant Ernestine Abbott. At the time of her husband's death Mavis Abbott was pregnant with their second child Kevin Owen Abbott ("Kevin") who sues by his litigation guardian the first applicant in these proceedings. Michael was born on 8 January 1993. Kevin, a posthumous son of the deceased, was born on 24 July 1995.

[3] The motor vehicle accident which caused the death of the deceased was an "accident" within the meaning of s 4 of the Act. The deceased was a "qualifying person" within the meaning of s 20(a) of the Act in relation to the motor vehicle accident.

[4] At the time of the death of the deceased Michael was supported in the household of his father and mother from the pooled financial resources of his father and mother which were approximately equal. All financial resources of the mother and father were expended for the benefit of the family. The deceased received about $250 per week in wages from the Community Development Employment Programme and Mavis Abbott received about $200 per week in wages from that source and additionally about $44 per week for family allowance in respect of Michael.

[5] At the time of the death of the deceased Mavis Abbott was the de facto partner of the deceased and had been so since 15 November 1993.

[6] On 10 June 1998 Mavis Abbott applied for Motor Accident Compensation Benefits as spouse of the deceased on behalf of herself and Michael and Kevin.

[7] On 14 December 1999 the designated person under the Act made a determination:

(a) that Rufus Coulthard was a qualifying person as defined in s 20 of the Act;

(b) that the applicant (Mavis Abbott) was a surviving spouse of the deceased at the time of the occurrence as defined in s 4 of the Act;

(c) that the applicant's claim could not be considered as per s 31 (3)(c) of the Act her application was made more than three years after the date of the accident;

(d) that Michael and Kevin were dependent children of the deceased, that their claims were to be considered within time pursuant to s 31(3) (d) of the Act and that their entitlements were determined as follows:

(e) that pursuant to s 22 of the Act there being a surviving spouse and two dependent children, the prescribed amount of $115,642.80 was to be proportioned 90 per cent referable to the surviving spouse which was not payable being time barred by s 31(3) of the Act and 10 per cent payable equally between Michael and Kevin who were each to be paid $5,782.14;

(f) that pursuant to s 23 of the Act the persons having the care and custody of Michael and Kevin were to be paid an amount equal to 10 per cent of the average weekly earnings per week (then currently $74.10) per child on a monthly basis until the child attained the age of 16 years, married or reached the age or 21 years if receiving full time education at a school, college or university.

[8] On 4 April 2000 the respondent Territory Insurance Office Board upheld the determination of the designated person dated 14 December 1999.

[9] Mavis Abbott has abandoned her claim as the spouse of the deceased.

[10] On the present amended reference two questions arise, first, whether Kevin as the deceased's posthumous child was a "dependent" child at the date of the deceased's death for the purposes of s 22 of the Act, and secondly, whether disentitlement of the spouse results in her son or sons, as the case may be, being entitled to 100 per cent or 10 per cent of the prescribed amount by way of benefits, or expressing it another way, whether her one time 90 per cent entitlement enures for the benefit of her son or sons or reverts to the Statutory fund.

[11] Section 4 of the Act provides, inter alia:

> "dependent child", in relation to a person, means a child of the person, or a child in relation to whom the person stands or stood in *loco parentis*, who is not the spouse of another person and who –

(a) has not attained the age of 16 years; or

(b) having attained that age but not having attained the age of 21 years, is a full time student or is physically or mentally handicapped,

and is primarily dependent on the person for financial support;

[12] The term "primarily dependent" was considered by the Tribunal in *Malbunka v TIO Board* (2004) 14 NTLR 126. There the Chief Justice held that the word "primarily" did not require a comparison between sources of financial support and a conclusion as to which single source was the primary or principal source. Consistent with *Aafjes v Kearney* (1976) 180 CLR 199 a dependant may be wholly dependent upon more than one person. In the circumstances of the respective contributions of the deceased and Mavis Abbott to the household it is readily to be concluded that Michael Abbott was a dependent child and therefore entitled to a proportion of the prescribed amount under s 22(1)(b) of the Act and weekly benefits under s 23 of the Act in respect of the death of his father.

[13] The question of what proportion of the prescribed amount is payable under s 22(3) for the benefit of Michael can only be determined after the entitlement, if any, of Kevin is considered and the consequences of the exclusion of Mavis Abbott's claim as spouse is examined.

[14] The first question is whether Kevin, as a posthumous child of the deceased, comes within the requirement in the definition of dependent child in s 4 of

the Act that he "is primarily dependent on (his father) for financial support". The respondent argues that as the accident occurred on 8 February 1995, his father died on 9 February 1995, and Kevin was born on 24 July 1995, on a plain reading of the section Kevin was never primarily dependent on the deceased for financial support, or putting it another way, he was not a legal person at the time of the death of his father.

[15] In *Malbunka v TIO,* supra, at 135 [35] Martin (BR) CJ said:

> "In respect of children and parents of a deceased, the Legislature has plainly evinced an intention to compensate or provide benefits only to those who were dependent in a relevant way upon the deceased at the time of the deceased's death."

[16] Similarly in *Hooper v TIO* (2002) 11 NTLR 182 at 197 [43] Martin (BF) CJ: said:

> " … I am of the opinion that the relevant date for establishing needs and dependency is the date of death of the qualifying person. It is the fact of death which gives rise to the entitlement to the benefit (s 7)."

[17] The respondent submitted that the absence of provision for unborn children in the definition of dependent child in s 4 of the Act was significant, particularly given that the Act superseded the Compensation (Fatal Injuries) Act NT which by s 4(3)(b) expressly provided that a child of a deceased person born alive after the death of that person was to be treated as having been born before the death of the deceased person. Reference was also made to s 7(8) Family Provisions Act NT which expressly makes provision for unborn children. Reference was additionally made to the Motor

Accident (Compensation) Amendment Act (No 9 of 2007) which will commence operation on 1 July 2007 with application to accidents occurring after that date which redefines "dependent child" to include an unborn child where there is a reasonable expectation that the child will be dependent on the parent for financial support.

[18] It is a well established rule of construction that a child *en ventre sa mère* at a relevant date is deemed to be born so far as necessary for the benefit of that unborn child. Thus no distinction is to be made between children of a worker for the purposes of awarding a benefit under workers' legislation simply because a child was unborn at the relevant time: see *Williams v The Ocean Coal Ltd* [1907] 2 KB 422 at 429, and *Schofield v Orrell Colliery Company Limited* [1909] 1 KB 178, affirmed, *Orrell Colliery Company Limited v Schofield* [1909] AC 433, authorities which have been followed in Australia: *Connare v Pistola* (1943) 60 WN (NSW) 95 and *Pegus v Associated Forest Holdings Pty Ltd* [1964] Tas R 61. As Jordan CJ (with whom the other judges of the Court agreed) said in *Connare v Pistola*, supra, at 96:

> "There is a rule of construction that words referring to children in existence at a particular time may be read as large enough to include a child *en ventre sa mère* but not born at that time if so to read them will secure to the child a benefit to which it would have been entitled if then born, if it appears that such a child is within the reason and motive of the gift: *Elliott v Joincy & Ors* [1935] AC 209 at 233–4. This rule has been applied to bring posthumously born children within provisions corresponding to those of s 8 of the New South Wales Act: *Williams v The Ocean Coal Co Ltd* [1907] 2 KB 422."

[19] In my opinion this rule of construction applies to the Motor Accidents (Compensation) Act NT. The provisions of the Act neither expressly nor impliedly exclude the "fictional construction" necessary to include an unborn child as a dependent child of the deceased: see *Elliot v Joincey* [1935] AC 209 at 233–34; *Wesley v Wesley* (1998) 71 SASR 1 at 9. Nothing in the Act indicates a contrary intention.

[20] That the Act's predecessor expressly provided for unborn children and that the Act does not is in my opinion a circumstance which is neither here nor there. Nowadays the Legislature often enacts current, commonplace, familiar matters, if only to spell them out. See eg. s 5(2) Sentencing Act NT which solemnly announces that a court in sentencing an offender is to have regard to, amongst other things, the nature of the offence and the maximum penalty prescribed therefor.

[21] In the circumstances Kevin is a "dependent child" as defined in s 4 of the Act and for the purposes of ss 22 and 23 of the Act.

[22] The remaining question is what proportion of the prescribed amount under s 22 of the Act is claimable on behalf of Michael and Kevin.

[23] The provisions of s 22 of the Act and of the accompanying table are as follows:

> "22**. Lump-sum compensation in respect of death**
>
> (1) Subject to section 37, where the death of a qualifying person results from or is materially contributed to by an injury suffered in or as a result of an

accident that occurred in the Territory or in or from a Territory motor vehicle, there is payable –

(a) to the person liable to meet the expense of the qualifying person's funeral, a funeral benefit equal to –

(i) the cost of the funeral; or

(ii) 10% of the annual equivalent of average weekly earnings,

whichever is the lesser amount; and

(b) for the benefit of the qualifying person's spouse or dependent child or dependent children, or a spouse and a dependent child or dependent children –

(i) the prescribed proportions; or

(ii) in the case of a dependent child or dependent children such proportions as the Board determines on an application under subsection (2), having regard to the relative needs and degrees of dependency of the dependent child or dependent children,

of an amount equal to 156 times average weekly earnings at the time the payment is made. (*See* back note 8)

(2) For the purposes of subsection (1)(b), a person claiming to be a spouse or a dependent child of the deceased qualifying person may apply to the Board for a determination under that subsection.

(3) For the purposes of subsection (1)(b)(i), the prescribed proportions are those specified in column 2 of the Table in respect of the spouse or dependent child or dependent children specified opposite in Column 1 of the Table.

TABLE

Column 1	Column 2
Dependants	Proportion
Spouse	100%
one child	100%
2 or more children	Equally between children
Spouse and one child	10% to child, balance to spouse
Spouse and not more than 5 children	5% to each child, balance to spouse
Spouse and more than 5 children	25% divided equally between children, balance to spouse

”

[24] The respondent submits that if both Michael and Kevin are held to be “dependent children” they would each be entitled to five percent of the lump sum compensation provided under s 22(1)(b)(i). The applicants submit that the spouse of the deceased being ineligible to participate, the whole of the prescribed amount should be divided equally between Michael and Kevin. The applicants submit the 90 per cent portion of the disentitled spouse is not forfeited in favour of the scheme corpus but rather that the prescribed amount under s 22 is divisible amongst whoever is entitled according to a determination of the Board pursuant to s 12(1) of the Act.

[25] I agree with the applicants’ submission.

[26] The legislation is beneficial legislation and should be construed to give the fullest relief which a fair meaning of the language of the Act will allow: *Hooper v TIO* (2002) 11 NTLR 182 at 191[22]. The reference to

"Dependants" in Column 1 of the Table to s 22(3) of the Act is to be read as a reference to entitled dependants. This takes account of the fact that the inchoate rights under s 22 are subject to the time provisions in s 31 and most particularly the Board's determination under s 12(1) of the Act. The latter provision provides that the right of any person to a benefit under the Act shall be determined by the Board. A right only vests upon a determination of the Board.

[27] As counsel for the second applicant submitted the Table to s 22 of the Act is somewhat cryptic and certain things are necessarily to be implied. The "one child" and "two or more children" categories are not expressly drafted conditional upon there being no other claimant – spouse or other – but that is necessarily to be implied. It is in my opinion to be implied in respect of those categories that there is no one else entitled. This accords with the apparent legislative intent that on the death of a qualifying person s 22 of the Act creates a prescribed pool of money for the potential benefit of qualifying members of the deceased's family subject to the statutory requirements for the making of claims within the times prescribed by s 31 of the Act and the favourable determination of such claims by the Board pursuant to s 12 of the Act.

[28] The Table to s 22 of the Act provides that two children of a deceased person in the absence of a spouse or siblings would each receive 50 per cent of the prescribed amount. It also provides that if there is a spouse two dependent children without siblings would between them receive only 10 per cent of

the prescribed amount, presumably reflecting the view that they would generally be expected to benefit indirectly from the spouse's receipt of 90 per cent of the prescribed amount. On the respondent's contention if there is a spouse but she makes no claim or is disentitled to receive 90 per cent of the prescribed amount the two dependent children are limited to 10 per cent of the prescribed amount, an odd if not perverse outcome given that there is no obvious reason why children should be in a worse situation where their mother is absent, alive, but not participating in the prescribed amount than where they have no mother.

[29] In conclusion Michael and Kevin are each a dependent child for the purposes of the Act and each is entitled to a 50 per cent share of the prescribed amount being an amount equal to 156 times average weekly earnings at the time of payment as defined in s 4 of the Act. Some payments have already been made for the benefit of both Michael and Kevin. I shall hear submissions on relief and as to costs.
