PARTIES:	KATHLEEN ELAINE McMORROW AND AIRESEARCH MAPPING PTY LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP8 OF 1996
DELIVERED:	7 March 1997
HEARING DATES:	10 December 1996
JUDGMENT OF:	Kearney, Angel & Priestley JJ

CATCHWORDS:

Workers' compensation - Entitlement to and liability for compensation - Persons entitled to compensation - Death of worker in course of employment - Benefits payable to dependant - Whether spouse partially dependent on deceased's earnings at date of his death - Nature of dependency - Test for partial dependency at date of death - Relevance of past events and future probabilities -

Work Health Act 1986 (NT), ss 49(1), 62 and 116 -
Aafjes v Kearney (1975) 8 ALR 454, applied.
Lee v George Munro (1928) 21 BWCC 401, followed.
Hodges v Scott's Provisions Stores Pty Limited [1964] NSWR 887, followed.

REPRESENTATION:

Counsel:

Applicant:	J.B. Waters
Respondent:	J.C. Tippett

Solicitors:

Applicant:	Messrs Waters James & McCormack
Respondent:	Messrs Ward Keller

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Judgment ID Number:	kea96036
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

AP No 8 OF 1996

BETWEEN

KATHLEEN ELAINE McMORROW

Appellant

AND

AIRESEARCH MAPPING PTY LTD

Respondent

CORAM: Kearney, Angel and Priestley JJ

REASONS FOR JUDGMENT

(Delivered 7 March 1997)

KEARNEY J: I respectfully concur in the analysis, reasoning and conclusions of Priestley J, and in the orders which his Honour proposes.

ANGEL J: I agree with the judgment of Priestley J.

PRIESTLEY J: This case began as an application under the Work Health Act for benefits pursuant to s 62. That section provides that where the death of a worker results from an injury arising out of or in the course of employment amounts are payable for the benefit of the worker's dependants.

The applicant alleged that immediately preceding the death of John Robert Bamford, a worker who died in the course of his employment, she was not legally married to him but was living with him as his wife on a bona fide domestic basis, and was thus his "*spouse*" as defined in s 49(1) of the Act.

When the applicant's claim came on for hearing before Mr McCormack SM, the applicant gave evidence which satisfied the Magistrate that she fell within the definition of "*spouse*". As "*dependant*" was relevantly defined as meaning a spouse "*wholly or in part dependent on the deceased's earnings at the date of his death*" this meant that she fulfilled one of the requirements of the definition of "*dependant*" in s 49(1) for the purposes of her death benefit claim under s 62, and in order to succeed in her claim had additionally to persuade the Magistrate only of at least partial dependence.

Despite what appears to have been quite a strong factual case supporting the applicant's claim of partial dependence, the Magistrate found against her on this issue and dismissed her claim.

Section 116 of the Act gives a right of appeal to the Supreme Court against the first instance decision on a question of law. The applicant appealed. Her appeal was heard by Mildren J. Before him the applicant relied on two grounds: that the Magistrate had erred in law in failing to provide proper reasons for his determination that there was no dependency and that the Magistrate did not properly identify the test for dependency and misapplied the test set out in

Kauri Timber Co (Tasmania) Pty Limited v Reeman (1972) 128 CLR 117 and *Aafjes v Kearney* (1975) 8 ALR 454.

The evidence before the Magistrate had been that the applicant and the deceased were living together as man and wife in a bona fide domestic relationship, that both were anxious to keep in employment, that the applicant during the two year period approximately when she lived with the deceased prior to his accidental death, was able to keep in employment more continuously than the deceased was and that each made his or her earnings available to the other. The evidence on this last matter, although to my mind comparatively clear, arguably raised some problems for the applicant, which seem to have led the Magistrate to his conclusion the applicant had not shown partial dependency.

The critical part of the Magistrate's reasons was contained in the following passage:

> "*I am satisfied that the applicant was a spouse of the worker within the meaning of that term under the* ***Work Health*** *Act. Between August 1991 and August 1993 the applicant's work history was one of regular employment and regular income and in my view she exhibited a greater degree of self sufficiency than the worker. Not only had she loaned him money to pay off a motorcycle (which had not been repaid at the date of his death) she was also planning the purchase of her own vehicle with her own money. True it is that the applicant shared her earnings with the worker and he reciprocated but the evidence does not show that the applicant came to depend upon this sharing of income or that without the assistance of the worker she would not be able to meet her living expenses or other financial commitments.*"

Counsel for the applicant before Mildren J submitted that this passage showed the Magistrate had not applied the right test in considering the factual

question whether the applicant was partly dependent on the deceased. He also submitted that it was impossible to tell from the reasons given by the Magistrate why it was that he had come to the conclusion expressed in the critical passage. Counsel also submitted that on the evidence before the Magistrate only one possible conclusion was available on the question of dependency.

Mildren J did not accept any of these submissions. He expressed the opinion that "*partial dependency is sufficiently established from facts which show mutual dependency*" but went on to say that the primary facts and uncontested evidence before the Magistrate were not of such a character that it was not open to him to reach the conclusion that he did. He said that in order to overturn the Magistrate's decision it was not enough that had he been sitting at first instance he may have drawn a different conclusion. In his view sharing expenses did not unequivocally show dependency and was not necessarily the same as the pooling of income in order to meet the needs of both.

This disposed of the ground of appeal which to my mind had the greatest merit of the three argued before Mildren J. His non acceptance of the remaining two grounds was on the footing that the Magistrate had sufficiently explained his reasons and that it could not be said that the evidence before the Magistrate was all one way in the strong sense which would be necessary before the court on appeal could say that not to have found dependency was an error of law.

One aspect of the argument before Mildren J, only inferentially referred to by him, and not dealt with in the reasons he gave for dismissing the appeal, came

to assume critical importance in the further appeal which the applicant brought to this court from the dismissal of the first appeal. Counsel for the applicant introduced this point by reference to a passage in the judgment of Gibbs J in *Aafjes*, a case in which the way in which dependence should be approached for the purposes of workers compensation legislation was discussed at length. In the passage particularly relevant to the present case, Gibbs J said:

> "*The question whether there is in fact dependence or reliance at the date of death is not to be answered by looking only to the circumstances as they existed at that date; 'past events and future probabilities' have to be considered.*" ((1975) 8 ALR at 461)

For this proposition Gibbs J cited *Lee v George Munro* (1928) 21 BWCC 401. That case is instructive for present purposes. The deceased's usual employment was as a cab driver earning £2. 5s a week but his employer died leaving him out of work for eighteen months at the end of which time he obtained occasional employment only from which he averaged five shillings a week. In the course of this employment he suffered an accident from which he died. At the time of his death he and his wife, who then made a widow's claim, had been mainly dependent for their living needs on the assistance of a son. The County Court Judge dismissed the widow's claim at first instance, on the ground that she had not been partially dependent upon her husband at his death. She appealed to the Court of Appeal, (Scrutton, Lawrence and Sankey LJJ) one of her grounds being that in view of the fact that she had a reasonable prospect of being maintained by the husband in the future, she should be considered a dependant at the time of his death.

Scrutton LJ at the commencement of his reasons said:

"*This case must go back to the learned County Court Judge because the language used by him in his judgment renders it doubtful whether he has considered the matters which he ought to have considered, namely, the probability of the deceased workman, if he had lived, again obtaining full employment in the future.*" (at 404)

A little later in his reasons he said:

"*If, at the time of the death, there was a reasonable probability that in the future the workman, if he had lived, might be in full employment, that probability must be considered in deciding whether the widow was dependent on the deceased at the date of his death.*" (at 406)

And again:

"*The learned County Court Judge has decided the question of dependency without taking into account the reasonable probability of the deceased getting into full employment again in the future if he had lived, and making actual payments to his wife. The case, therefore, must go back to the County Court Judge for him to consider the probability of this man, if he had lived, getting into full employment and making actual payments to his wife in the future. From the language which the County Court Judge has used it is not clear that he considered that probability*." (at 406)

Lawrence LJ agreed, noting that it was conceded by counsel for the employer that the County Court Judge in deciding whether there was partial dependency ought to have taken into consideration the probability of the deceased workman, if he had lived, becoming again fully employed in the future. He added that in his view the language of the County Court Judge indicated he had not taken that fact into consideration.

Sankey LJ also agreed. He said:

> "*Dependency may exist in certain cases without any actual payment being made at the time dependency is claimed. Whether dependency exists or not is a question of fact. In deciding whether or not there is dependency the factors to be considered are past events and future probabilities. The authorities for that statement are* ***New Monckton Collieries v Keeling*** *[1911] AC 648; 5 BWCC 332;* ***Young v Niddrie & Benhar Coal Co*** *(1913) 6 BWCC 774 and* ***Dobbies v Egypt & Levant SS Co*** *(1912) 6 BWCC 348.*"

The reference by Gibbs J to *Lee* is one of many references in Australian cases to the line of authorities it represents. Stephen J referred to a number of the Australian cases in *Kauri Timber* (128 CLR at 194). Of these, particularly in point for present purposes are *Blum v Lipski* (1938) VLR 247, *Hodges v Scott's Provisions Stores Pty Limited* [1964] NSWR 887 and *Borson v G.A. Hine & Co Pty Ltd* [1965] WAR 19. In *Hodges* Sugerman J, with whom Taylor J agreed, discussed the authorities in some detail. Inter alia, he adopted what was said by Scrutton and Sankey LJJ in *Lee*. The case was one where both the deceased husband and his wife had been working when he died, in June 1962. It had been decided between them she would stop working after Christmas 1962. The first instance judge held that at the date of the husband's death, the wife was keeping herself, and future intentions were not relevant.

Sugerman J, after discussing the cases, said at 893:

> "*The factors here, whose effect upon dependency at the time of death requires to be assessed by the tribunal of fact as a matter of degree, include such factors as the enduring or intermittent or casual nature of the wife's employment, the probabilities of it having continued into the future had the husband not died, and the probable duration of its continuance. The possible combinations of circumstances are too various to permit of elaboration. Nor would elaboration seem to be necessary, the principle being clear enough. A broad practical test is*

suggested by the speech of Lord Shaw of Dunfermline in ***Hodgson v West Stanley Colliery****, [1910] AC 229 at 238: 'Suppose the wife had been asked on the morning of her husband's death what she had to live on; would she have answered that this was her husband's earnings and her own?'*

In the present case the question is entirely one of fact for the Commission. It is not for this Court to suggest what the answer should be. The case must, in my opinion, go back to the Commission because I am not satisfied, having regard to the reasons which it gave, that the Commission directed itself correctly in point of law, that is, that it did not unduly restrict itself as to the facts which it treated as material to the question of dependency. Speaking subject to any question of the credit which the Commission might attach to any of the appellant's answers, which is, of course a matter for it, it appears to me that the Commission did unduly restrict itself in the range of facts considered - that it decided the question of dependency at time of death, without taking into consideration an estimate of the probabilities, as then existing, of the appellant's continuance in employment had her husband lived. What conclusion the Commission may come to on a consideration of the probabilities, and the amount of any determination which it may make, in favour of the appellant, in the event that on such consideration it finds a partial dependency as on the date of the husband's death established, are, as I have said, matters of fact and entirely matters for it."

In the present case, the passage set out at p 3 above from the Magistrate's reasons contains what appears to be the whole of his reasoning upon the facts of the case leading him to conclude the applicant had not established dependency. This passage contains no hint that the Magistrate gave any consideration to what were the probabilities of the deceased securing better paid and more constant employment in the future or of the applicant stopping work to have children. The passage, in fact, to my mind positively suggests that he did not consider whether or not such things might happen. There undoubtedly was a need to consider these

matters. At the time of his death the deceased and the applicant were in their early twenties. They had been living together for two years. The applicant's evidence was that she and the deceased had discussed becoming formally married and having children and had intended to do so. The complete absence of any reference to these matters, and the way in which the magistrate expressed his reasons lead me to conclude that the Magistrate gave no thought to what Sankey LJ succinctly described as "*future probabilities*". Not to have done so was an error of law.

Further, in my respectful opinion Mildren J also erred in not recognising that the Magistrate had erred in law. In his reasons Mildren J cited the passage from Gibbs J's reasons in *Aafjes* concluding with the sentence I have set out above at p 5 which ends with the statement "*past events and future probabilities have to be considered*", and said that the Magistrate had referred to that passage in his reasons. However, the Magistrate had referred only to part of the passage, not including the part critical in the present case and in the context showing in my opinion, that the Magistrate did *not* have in mind the need to give consideration to "*future probabilities*". It is in not recognising this feature of the Magistrate's reasoning that, in my respectful opinion, Mildren J's error lay.

In my opinion, therefore, the appeal from Mildren J should be upheld and his judgment set aside. In its place I would propose that this court order that the judgment of Mr McCormack SM should be set aside and, pursuant to the provisions of s 55 of the Supreme Court Act a new trial should be ordered. The

applicant should have her costs of the appeal. The costs of the first hearing should follow the event of the second hearing.

Counsel for the applicant in this court argued with considerable energy that if the court came to the conclusion that the Magistrate had erred, the court should simply enter judgment for the applicant. Associated with this submission was what appeared to be a submission very similar to the one dealt with by Mildren J, namely that on the Magistrate's findings and on the uncontested evidence it was so clear that the applicant had established dependency, the only proper result was that this court should enter judgment in her favour without subjecting her to the delays, troubles and worries associated with a new trial.

I do not think this court can follow that course. The credibility of the applicant is involved in assessing the facts of the case. The Magistrate clearly enough accepted her in many respects, but it is not clear, in my opinion, that he accepted the entirety of what she said. A problem for this court is caused by the fact that he was not more specific about the matters that he accepted, the matters he may not have accepted, and matters about which he may have been doubtful, in the applicant's evidence. It may be that had he set out his findings on these aspects, they would have been almost if not entirely favourable to the applicant. Unfortunately however, this court does not know and cannot, in my opinion, assume that. It seems to me that the only possible outcome in the circumstances is that there be a new trial as I have proposed above.
