Moses v The Territory Insurance Office Board [2001] NTSC 78

PARTIES:	MOSES, JONATHON PETER MATTHEW PAUL v THE TERRITORY INSURANCE OFFICE BOARD
TITLE OF COURT:	MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL
JURISDICTION:	CIVIL
FILE NO:	No. 8 of 2000 (20008632)
DELIVERED:	25 July 2001
HEARING DATES:	20 to 28 February 2001 inclusive
JUDGMENT OF:	ANGEL J

REPRESENTATION:

Counsel:

Appellant:	J Blokland
Respondent:	J Tippett

Solicitors:

Appellant:	Priestleys
Respondent:	Cridlands

Judgment category classification:	C
Judgment ID Number:	ang200109
Number of pages:	12

IN THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL TRIBUNAL
AT DARWIN

Moses v The Territory Insurance Office Board [2001] NTSC 78
No. 8 of 2000 (20008632)

BETWEEN:

JONATHON PETER MATTHEW PAUL MOSES
Applicant

AND:

THE TERRITORY INSURANCE OFFICE BOARD
Respondent

TRIBUNAL: ANGEL J

REASONS FOR JUDGMENT

(Delivered 25 July 2001)

[1] The hearing of this matter commenced on 20 February 2001. The oral hearing was finalised and adjourned on 28 February 2001 to give each party an opportunity to file written submissions. Unfortunately, there was some delay in the filing of the written submissions. It is only now, some months after the hearing, that I am able to publish my reasons.

[2] This is an application for benefits under s 22(1)(b) of the Motor Accidents (Compensation) Act, whereby to the spouse of a qualifying person as defined in s 20 of the Act, there is payable

an amount of lump-sum compensation. The relevant issue to be determined in this matter is whether or not the applicant, Mr Jonathon Moses, was the spouse of Ms Nita King, who was killed in a road accident on 2 March 1999.

[3] The relevant definition of "spouse" is as follows:

> "spouse, in relation to a person, means –
>
> (c) a person who is not legally married to the person but who, for a continuous period of not less than 2 years immediately preceding the relevant time, had lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis;".

[4] The applicant was never legally married to the deceased and now claims that he and the deceased lived together on a bona fide domestic basis for a period of about two years and three months, immediately preceding the death of the deceased.

[5] The applicant and the deceased were involved in a relationship which was described by counsel for the applicant as "somewhat unconventional". They had no permanent home, but instead lived at various times in various places, including their car, various camps or caravan parks in Darwin and Katherine, and in the long grass. Neither was employed. Both received benefits. The deceased's life was characterised by serious alcohol abuse.

[6] In order to ascertain whether or not the plaintiff should be entitled to benefits under the Act, it is this unconventional relationship that needs to meet the requirements under the Act, namely, that for a continuous period of not less than two years immediately preceding the relevant time, the applicant and the deceased lived together as man and wife on a permanent and bona fine domestic basis.

[7] The respondent's case is simply that the applicant's case has not been established by the evidence. The respondent has tendered before me various documents to support its position, including a statutory declaration signed by the applicant to the effect that he and the deceased were no longer "a couple" in January 1999, and a letter from an employee at Centrelink outlining, from Centrelink's records, the commencement and duration of the relationship.

[8] The admissibility of the Centrelink letter has yet to be determined, and I now proceed to deal with that issue.

[9] The question to be asked in respect of the letter is whether or not it is admissible under s 5(1) of the Evidence (Business Records) Interim Arrangements Act NT. That section provides:

> "Subject to this Act, where in a legal proceeding evidence of a fact or of an opinion is admissible, a statement of the

fact or opinion in a document is admissible as evidence of the fact or opinion if

(a) the document forms part of a record of a business, whether or not the business existed at the time when the question of admissibility arises:

(b) the statement was made in the course of or for the purposes of the business; and

(c) the statement was –

(i) made by a qualified person; or

(ii) reproduced or derived from information –

(A) in one or more statements, each made by a qualified person in the course of or for the purposes of the business; or

(B) from one or more devices designed for and used for the purposes of the business in or for, recording, measuring, counting or identifying information, not being information based on information supplied by a person;

or both."

[10] The applicant is a client of Centrelink. The arguments of the applicant in opposition to the tender of this letter were that Ms Kapser, the author of the letter was not a qualified person as required under the Act, and further, that if the statements in the letter were deemed to be derived from statements of such qualified people with the requisite personal knowledge, the

source of such knowledge was so remote that there should be an exercise of the Court's discretion to exclude it.

[11] I accept, on the basis of Ms Kapser's own evidence, that she is not a qualified person as defined under s 4 of the Evidence (Business Records) Interim Arrangements Act NT. She said she had no personal dealings with Mr Moses and did not possess the requisite personal knowledge.

[12] Ms Kapser gave evidence to the effect that she wrote the letter having reference to various file notes, which had been written by various counter staff at Centrelink, whose job it was to ascertain information from clients and record that information on the file. The recorders of the information in the file notes were therefore the various staff members who, from time to time, personally dealt with the applicant when he attended at Centrelink.

[13] The author of the statements of fact recorded was the applicant himself, thus the author of the statement of fact recorded in file note from which the letter was derived was a qualified person for the purposes of the Evidence (Business Records) Interim Arrangements Act NT, that is, "a person who had or may reasonably be supposed to have had personal knowledge of the facts stated".

[14] The question next to be determined is whether or not the court should exercise its general discretion to exclude the evidence, on the basis that the source of the information was such that the evidence, in all likelihood, was sufficiently unreliable that the court ought to exclude it.

[15] I accept the respondent's submission that the evident purpose of maintaining such records is evidence enough of their reliability. Broadly speaking, the information received over the counter from clients that is noted by staff is relevant to the assessment of a pension, or benefit that the client is entitled to receive. In the case of Mr Moses, the issue was whether or not he had a live-in partner, and whether he should be paid a defacto benefit, or whether he should be paid according to his single status. It is to be inferred that a reasonable degree of care and diligence is required in the assessment of such claims, and as such, the records from which Ms Kapser drew her conclusions were necessarily accurate and reliable records of the claimant's statements.

[16] Her conclusions derive that same accuracy and reliability. The records are not likely repositories of untruths, at least in the absence of staff being told deliberate falsehoods. There is no reason to suppose that the statements of fact here are false or in error.

[17] As Hutley JA said in respect of hospital records in *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 568:

> "No part of the records tendered, in my opinion, have been shown not be records of relevant facts, or of opinions by persons without the necessary expertise to permit the expression of opinion. The object of the Part is to permit the admission of business records. The records of a hospital are kept for the information of the staff and the treating doctors. They are not likely repositories of the speculations of the inexpert; and this is a fact to be considered on their admissibility."

[18] I am of the opinion that the letter is admissible. The letter forms part of the business records of Centrelink. The statements of fact contained in the letter were made by or derived from information in a statement by a qualified person. I proceed on that basis. That is, that the letter is admitted in evidence before me.

[19] The applicant relies, at least in part, on his own oral evidence to substantiate his claim. He has an intellectual disability, having suffered epilepsy as a child, and as such would generally be expected to have some difficulty in giving concise and accurate answers in the witness box. However, even making all due allowance for this, Mr Moses' evidence lacked credibility to such an extent that his evidence simply can not be accepted, even in part. On the question of the length of the relationship, he gave evidence to the effect that it began in December 1996, and that it continued up until the death of Ms King in March 1999. Other

than his sworn testimony, partly corroborated by the evidence of other witnesses, there is no evidence to support the continued existence of a de facto relationship with the deceased. There is, however, evidence to the contrary. The Centrelink letter illustrated that according to Centrelink records, the relationship commenced in March 1997, and ended at the end of December 1998, frequented by periods of separation of up to five months. On 6 January 1999, the applicant signed a statutory declaration to the effect that he and the deceased had separated. This is Exhibit P7. On 26 October 1998, he sought assistance from Health and Community Services to take out a domestic violence order against the deceased; Exhibit D21. An entry of the Health and Community Services (HSC) file notes dated 11 March 1998, Exhibit D21, reads in part: "Jonathan's wife Nita has left him for another man and has apparently taken approximately $300 belonging to him". Other entries in the HCS file notes also support the various submissions made by the respondent, including the existence of violence in the relationship – although the applicant denies that he was ever violent – and his concerns that she stop pestering him to look after her. That is an entry dated 22 October 1998 and Exhibit D21.

[20] The applicant's evidence as to the commencement and duration of the relationship simply can not be relied upon; nor, in my

opinion, can his evidence as to the permanency of the relationship, or the degree of mutual love and commitment that he deposed to be relied upon.

[21] Apart from the continuous nature of the relationship, a further aspect the applicant is required to prove is that of a bona fide domestic relationship. It is perhaps useful at this point to note the matters referred to by Powell J in *Roy v Sturgeon* (1986) 11 NSWLR 454 at 458-9, as being indicative of a bona fide domestic relationship. Of course the list of factors Powell J refers to in his decision can not be described as exhaustive. However, his reasoning is a useful tool in determining questions of this kind. Some of the factors to consider are the duration of the relationship, the nature and extent of a common residence, the existence of a sexual relationship, the degree of financial interdependence, ownership of property, children, household duties, reputation of the relationship, and the degree of mutual commitment and support.

[22] The applicant led evidence as to the reputation of the alleged relationship to corroborate his evidence as to the degree of mutual commitment and support shared between himself and the deceased. I accept that the deceased and the applicant were involved in a relationship, that they were often seen together, and that they were viewed as a couple by various members of the

community. However, that is not to say that their relationship satisfies the criteria of a bona fide domestic relationship. There is evidence to the contrary, including the statement made by the applicant to HCS to the effect that he wanted the deceased to stop pestering him. I have previously referred to that. It is part of Exhibit D21. There is evidence to the effect that the deceased would run away from him, evidenced by a letter signed by Mr Moses, Exhibit D15, though Mr Moses insists that it was only for a couple of days at a time. It was submitted by counsel for the applicant, that any physical separation between the applicant and the deceased was only ever a minor tiff, and did not evidence an intent to end the relationship. Counsel relied on a number of authorities, including *Todd v Todd* (No 2) FLC 90-008, *Pavey v Pavey* (1976) FLC 90-0511, and most recently, *Palmer v TIO* (2001) NTSC 13.

[23] I am unable to accept these submissions. In my opinion, the further witness testimony submitted by the applicant to lend support to his application is not sufficient to counter the evidence contained within the HSC file, that being evidence of violence and statements made by Mr Moses to the effect that he was no longer interested in looking after the deceased. Further, the fact that he sought help to complete the necessary TIO claim forms on the very day the deceased died hardly indicates, in my

view, a loving relationship of mutual care and support. It was further submitted by counsel for the respondent that although arrangements had been made for the applicant to attend the funeral of the deceased, he did not attend, and that this also is indicative of a lack of care and support.

[24] In my opinion, although the applicant and the deceased were no doubt in a relationship of some kind, it is not demonstrated to be a bona fide domestic and continuing relationship. Ultimately, the applicant's case falls far short, I think, of the standard necessary to substantiate such claims for compensation under the Act. I accept submissions by the respondent to the effect that although the legislation itself is, by its nature, beneficial legislation and should be interpreted as such, its purpose is to compensate those people who can bring themselves within the definition of a relationship characteristically one of husband and wife.

[25] I am unable to find that the relationship was of a continuous nature, for a period of more than two years. I am unable to find that the relationship was of the bona fide domestic kind. Taking into account the testimony of Mr Moses himself, the evidence of the other witnesses, the HCS file notes and the records from Centrelink, in fact on the whole of the evidence I am of the opinion that the applicant's claim simply fails for lack of proof.

[26] The application is dismissed.