

**IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.1.8,
s.268 and Ontario Regulation 283/95 thereunder;**

**AND IN THE MATTER OF an Arbitration under the
Arbitration Act, S.O. 1991, S.O. 1991, c. 17;**

AND IN THE MATTER OF an Arbitration;

BETWEEN:

THE CO-OPERATORS

Applicant

- and -

ZURICH INSURANCE COMPANY/ING

Respondent

AWARD

Introduction

This matter comes before me as an arbitration pursuant to the *Arbitrations Act*, 1991.

The applicant and the respondent are automobile insurers carrying on business of automobile insurance in the Province of Ontario. As the result of an accident, Thomas Harrison has become entitled to the payment of Statutory Accident Benefits from one or both of these insurers. The insurers dispute which of them ought to be obliged to pay the no-fault accident benefits pursuant to the statutory scheme. I have been asked to decide this issue in accordance with the statute, the regulations, and case law applicable to the issues.

The parties have selected me as an arbitrator on consent and the matter proceeded to a hearing on these issues in Toronto, Ontario on July 13, 2004.

Legal Framework

The Statutory Accident Benefits scheme in the Province of Ontario provides an elaborate regime of no-fault, first party, benefits that are available to injured persons as a result of motor vehicle accidents which take place in the Province of Ontario. The benefits are more precisely described in a schedule to the *Insurance Act* mandated by Ontario Regulation 403/96.

For the purpose of making these accident benefits broadly available to people who are injured in car accidents, the regulations broadly define the individuals who may be entitled to benefits from any one insurer. An insurer has obligations with respect to accident benefits to a named insured, a spouse of a named insured, a dependant of a named insured, an occupant of a vehicle, or any person involved in an accident with the vehicle that is insured. The public policy behind this broad definition is clear. It ensures that benefits will be available to people who are involved in motor vehicle accidents in the Province.

The necessary corollary of this broad range of classification of "insured person" is that any individual involved in a car accident is likely to be within the definition of "insured person" in respect of more than one insurance policy. This is what has happened in the case of Mr. Harrison.

In Section 268 of the *Insurance Act*, the legislation sets out a scheme of priority between insurers. The purpose is to assist insurers in defining which insurer, amongst many, has the obligation to pay Statutory Accident bBenefits.

The rules set out under Section 268 of the *Insurance Act* dictate that a person must claim benefits first from the insurer of a policy where that person is the named insured, the spouse of the named insured, or a dependant of the named insured. Only if there is no recourse to coverage under such a policy, then the individual should claim benefits from the insurer of a vehicle involved in the accident.

The dispute in this case is to determine whether or not Co-operators or Zurich has the obligation to pay the benefits with respect to Trevor Harrison. Co-operators was the insurer of Trevor's mother and step-father. Zurich was the insurer of the vehicle that struck Trevor. Trevor was a pedestrian at the time of the accident. Within the broad definitions applicable by the Regulations, Trevor Harrison could be an insured person under both policies. He could be an insured person under the Co-operators policy on the basis that he is a dependant of the named insured or the spouse of the named insured under the Co-operators policy. With respect to the Zurich policy, he could be an insured person by reason of being injured in an accident which involved being struck by a vehicle insured by Zurich.

For the purpose of having this dispute resolved, the parties executed an Arbitration Agreement to bring this matter before me. During the course of this matter, there was testimony offered before a court reporter. The testimony was the evidence of Trevor Harrison and the evidence of his mother.

Factual Background

Trevor Harrison was involved in an accident on August 25, 2001. He was a pedestrian. He was struck by a vehicle which was insured by Zurich Insurance Company.

At the time of the accident, Trevor Harrison lived in a house in the Toronto area with his mother, Wendy Harrison and her husband. Wendy Harrison and/or her husband were the named insureds under a policy of insurance issued by Co-operators. The vehicle insured by Co-operators is not involved in this accident.

Evidently, Co-operators has received an Application for Accident Benefits and has processed various claims in respect of Trevor Harrison's entitlement. Co-operators has instigated this proceeding in accordance with Ontario Regulation 283/95 for the purpose of obtaining reimbursement from Zurich and having Zurich accept the liability for any further benefits which may be due to Mr. Harrison.

At this stage in the Arbitration, the parties have agreed to have this issue of liability to pay benefits determined. They reserve the right to further arbitrate any issue with respect to quantum if reimbursement is found to be in order.

The Issue

Pursuant to Section 268(2) of the *Insurance Act*, a series of rules are to be applied to determine which insurer is liable to pay statutory accident benefits. In respect of a pedestrian who is struck by an automobile (such as Trevor Harrison), it is prescribed that:

Liability to pay

268.(2) The following rules apply for determining who is liable to pay statutory accident benefits:

...

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. 1.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

Section 268(5) provides specifically as follows:

268.(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Therefore, if Trevor Harrison is considered to be a dependant of the named insured or of the spouse of the named insured under the Co-operators policy, then the statutory accident benefits are payable by Co-operators.

In accordance with the definitions found in Section 2(6) of the *Statutory Accident Benefits Schedule*, we find the following:

2.(6) For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse or same-sex partner. O. Reg. 403/96, s. 2 (6); O. Reg. 114/00, s. 1 (3).

Appropriately, the parties have framed the question with respect to dependency as follows:

"Was Trevor Harrison as dependant within the meaning ascribed to that term in the Bill 59 Statutory Accident Benefit Schedule, upon his mother, at the time of the subject accident?"

If the answer to that question is "Yes", then Co-operators is the insurer responsible to pay the statutory accident benefits. Otherwise, Zurich is responsible for the payment of the statutory accident benefits.

The Record

The record in this matter consists of:

1. The Arbitration Agreement between the parties;
2. The Joint Statement of Agreed Facts submitted by the parties;
3. The Document Brief which was marked as Exhibit "3" to the proceedings.

The Evidence in this Proceeding

Agreed Facts

The Agreed Statement of Fact in this matter is marked as Exhibit "2" to the proceedings. This document recites the basic facts which are not in controversy in this matter.

It is clear that Trevor Harrison was injured as a result of being struck when he was a pedestrian on August 25, 2001. He was struck by a vehicle insured by Zurich. Co-operators, on the other hand, insured Trevor's mother and step-father.

Trevor submitted an Application for Accident Benefits to Co-operators and Co-operators has dealt with the claim and has claimed reimbursement against Zurich in accordance with the provisions of Regulation 283/95.

The Agreed Statement of Fact contains detailed information with respect to Trevor Harrison's economic independence. He was 19 years of age at the time of the accident and single, living at home with his mother, where he had always lived. For the previous several years, they had lived in a home in Brampton with his mother's husband.

Trevor had finished high school several years prior to this accident. He dropped out of high school before he completed Grade 11. It is believed that Trevor stopped attending high school in the spring of 1998, more than three years prior to the accident.

Trevor had various employments prior to the accident. While still attending high school, he had a part time job at Giant Carpet. That job continued to some extent following his departure from high school. After dropping out of school, Trevor started working by signing on with employment agencies. There was evidence in the proceedings that there were three employment agencies that were involved. These employment agencies provided him with work opportunities, which were sporadic in nature. Most of the job placements were with physical work in warehouses, stocking shelves or working on an assembly line in a factory.

The job placements through the employment agencies yielded relatively modest income between \$9.00 per hour and \$10.00 per hour. However, the job placement secured immediately prior to the occurrence of the accident involved an hourly wage of \$12.60 plus a monthly bonus payment.

In the interval between leaving high school and the time of this accident, Trevor Harrison did attempt to upgrade himself by taking a training program as a heating and air conditioning technician. He took this program between January and April of 2001 at a cost of \$2,600.00. The evidence indicates that Trevor made a significant contribution towards this tuition fee and his mother assisted by making up the balance. Unfortunately, after completing the technician's course, Trevor failed to pass the final exam and again sought out employment through the various agencies with which he had previous relationships.

During the summer of 2001, he generally did not work on a full time basis. It appears that he may have been called in for one or two shifts per week, but those shifts were "full time, eight hour shifts". These were his only sources of income during the interval.

Trevor had no driver's license. He had household responsibilities in the home in which he lived. He did some work with lawn care, vacuuming, and emptying the dishwasher. He also did his own laundry.

He made some financial contribution to the household from time to time. In the Agreed Statement of Facts, he indicated that in a good week he would give his mother less than half of his pay cheque, to a maximum amount of \$100.00 per week. Occasionally, his mother would provide him with money for bus fare but generally, if he needed money for something, he was expected to go and earn it. His mother did not give him any monetary allowance. Trevor purchased his own clothing and funded his own entertainment expenses.

In the household, Trevor sometimes purchased groceries and sometimes contributed money toward food and expenses in the household. In the latter part of 2000, Trevor was contributing \$100.00 per week but this did not necessarily occur every week.

Trevor had his own bedroom and bathroom in the house but otherwise had use of the balance of the house.

Very shortly before this accident took place in which Trevor was injured, he received a job placement with Canadian Tire. This was through Armor Industrial/Faulkner Placements Inc. In the weeks leading up to the accident, Trevor had completed two weeks of orientation for which he was paid and four out of five days of his first week of work at Canadian Tire before the accident intervened.

The Testimony of Trevor Harrison and Wendy Harrison

These two witnesses testified before me on August 14, 2003 and the transcript of that is part of Exhibit "3" to these proceedings. That evidence is largely reflected in the matters that have been agreed to in the Agreed Statement of Facts. However, there are some other comments of interest.

There was some testimony about the possibility that Trevor Harrison might return to educational pursuits in the fall of 2001, if the accident had not happened. He suggested that he might re-do his course that he had previously failed. It is mentioned that this might have taken place in October of 2001. The testimony on this issue was rather vague and imprecise. Indeed, it is somewhat contradictory with the notion that came forward from this testimony that he had started work on a three-month probationary period in the latter part of August of 2001 with Canadian Tire. Clearly, he could not have taken a three-month probationary job on a full time basis and also have re-taken a full time educational program in October. My impression of this testimony is that the possibility of returning to the educational pursuit was merely a possibility and that the preferred course for Trevor Harrison was to be accepted at Canadian Tire on a full time basis going forward. I do not find that he had made a decision to return to full time educational pursuits in preference to full time employment at Canadian Tire or other similar work.

There was also testimony from Wendy Harrison with respect to the household arrangements. There was information given about the financial contribution of Trevor to the household during 2001. Whereas she testified that in the year 2000, Trevor contributed \$100.00 per week on some weeks, she indicated that in 2001, he contributed about \$20.00 per week to the household. While he was providing services within the household and making a contribution in this manner, it is clear that his financial contribution to the household during 2001 was modest indeed.

It was clear from the testimony of these parties that the work history of Trevor Harrison in the years 2000 and 2001 had been sporadic. He did not do much work at all from January to April, 2001, when he was engaged in full time educational pursuits, but other than that, until the latter part of August, 2001, he was employed only sporadically through the various agencies. He did not have steady income.

Most importantly, during the testimony, it was indicated that Trevor Harrison worked about as much as he could work. It was indicated that he took the opportunities that were available to him. In this sense, he was working to his achievable capacity. He

certainly had the physical capacity to work more, but the opportunities were not readily available, according to his evidence.

The testimony of the parties as to how much work was done by Trevor, and the financial details of that employment, is understandably vague. It is clear that the employment was sporadic and significantly less than full time most of the year. It is equally clear that the employment opportunity embarked upon during the three weeks prior to the accident represented full time, five days a week, well remunerated employment. He completed the two weeks of orientation towards this new job and four days of the first week of work prior to this accident taking place.

The Evidence of Armor Professional Employment Organization

Trevor Harrison worked through three different agencies, one of which was Armor Industrial. That agency facilitated the employment which he had at the time of the accident, possibly leading to full time employment with Canadian Tire. Exhibit "1" from the examinations of Trevor Harrison is a letter dated October 31, 2001 from Armor. That letter indicates that Trevor Harrison was "on a long term assignment" which started August 15, 2001. The letter reflected his current rate of pay at \$12.60 per hour plus a bonus structure equivalent to \$13.60 per hour.

It is significant that this was regarded to be a long-term assignment with the company at that juncture.

The Income Tax Returns

Trevor Harrison testified that he filed income tax returns in the years 2000 and 2001 and those tax returns for those calendar years are found at Tab 6 of Exhibit "3" in the proceedings. These are the printouts from Revenue Canada with respect to the filings made on behalf of Trevor Harrison. With respect to the year 2000, the information indicates that Trevor Harrison had total earnings of \$12,071.00. With respect to the year 2001, the tax return information indicates that he had total earnings of \$3,572.00.

There was no evidence of any earnings other than that which is shown on these tax information returns, for those calendar years.

Analysis

On the facts of this case I am asked to determine whether or not Trevor Harrison was, on August 25, 2001, principally dependant for financial support upon his mother and/or her husband.

I am mindful of the fact that the Regulation requires me to consider whether or not Trevor Harrison is principally dependant for financial support upon his mother or her spouse. Many decisions have considered the implications of the use of the word "principally". It is clear that for Trevor Harrison to be "principally dependant", it must be shown that he derives more than half of his financial support from some other source. Looked at in reverse, if he has the financial ability to provide for 50% of the cost of his

needs, he cannot be considered as principally dependant for financial support on some other person or persons.

The Appropriate Time Frame to Consider the Financial Relationships

Many of the dependency cases have recognized that it is necessary to consider some time frame or "window" to analyze the financial and other relationships. The economic status of many individuals is changeable. This is certainly true in Trevor Harrison's case. For example, during the first four months of 2001, he appears to have had no income and was totally involved in his educational pursuits. During the year 2000, Trevor had \$12,000.00 worth of income and did not seem to be involved in much by way of educational pursuits. At the time same, he appeared to have made significant contributions to the cost of the household.

Hence, it is necessary in any analysis to try to consider what time frame is most appropriate for us to understand whether or not there is a relationship of principal financial dependency.

Certainly, in Trevor's case, we could look at several different time frames. We could simply look at the time frame starting with his initial employment with respect to the Canadian Tire job, approximately three weeks prior to the accident.

Alternatively, we might look at the time frame from the completion of the course in April of 2001, up until the accident. Further alternative time frames might be to look at the calendar year 2001 until the time of the accident, or to expand it further to include the calendar year 2000.

Clearly, if we examine only the three week time frame prior to the accident, Trevor Harrison is not principally dependant for his financial support on anybody. He was fully employed at a substantial hourly rate during this interval.

However, the very short duration of that time frame causes me to question whether or not it is truly reflective of his economic status at the time of the accident. The employment was still probationary, and it was very early in the relationship. It was much too early to draw the conclusion that this would have been a long term employment.

In my view, it is preferable to examine the time frame following the completion of the technician's course up until the time of the accident. This essentially involves examining the months of May, June, July and August of 2001. I do not think it is appropriate to consider a longer time frame because a longer time frame would necessarily include the months of attendance on a full time basis at an educational institute and I do not believe that that is a fair reflection of his true status on the date of the accident.

The Income and Capacity of Harrison

The evidence of his income during these three months is sparse but is probably best summarized by the tax return for the year 2001. This tax return reflects income made during this interval. The income is slightly more than \$3,500.00. That income was earned by Trevor Harrison over a period of about four months.

This indicates earnings of nearly \$1,000.00 per month. I am mindful of the fact that I should consider not only the actual earnings of Trevor Harrison, but his capacity to earn. This is in accordance with the case law in Ontario and in particular, in accordance with the Decision of *Miller v. Safeco*, and the subsequent Decision of the Ontario Court of Appeal in *Liberty v. Federation*. Capacity to earn income is a highly relevant consideration when we are dealing with a person such as Trevor Harrison who is able bodied and in the workforce. The income he actually earned is certainly evidence of his capacity but it is probable that his capacity was greater than his earnings. Certainly, if he had been called out to further employment, he would have earned more and there was certainly no evidence that he refused available employment at any time. To the contrary, he indicated that he took the employment opportunities that came his way.

I note that the evidence with respect to the calendar year 2000 is to the same effect. During that year, he did not engage in educational pursuits. In twelve months, he earned about \$12,000.00 from his sporadic participation in the workforce. This again demonstrates monthly earnings of about \$1,000.00.

In my view, Trevor Harrison is a young man who has a capacity to earn that exceeds \$1,000.00 per month. He has actual earnings very close to this at all times except when he was engaged in a course on a full time basis. During the latter weeks prior to the accident, he would have earned income at more than twice this rate. I find that Trevor Harrison's capacity to earn money is at least \$1,000.00 per month as is clearly evidenced by his actual earnings.

Dependency

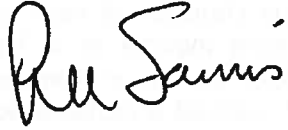
With capacity of this level, in order for him to be principally dependant for financial support on some other person, it would have to be demonstrated that the costs of meeting his needs exceeds \$2,000 per month. It has not been demonstrated that this is the case. Clearly, from the evidence before me, he was living a modest existence. He contributed \$100.00 weekly from time to time towards his shelter. He lived in a room in a house with others, albeit in a family arrangement. He did not own or operate an automobile. It appears to me that his costs of living are modest, much less than \$2,000 per month, and therefore he was not principally dependant for financial support on any other person at the time of this accident.

Conclusion

It is my view that Trevor Harrison was not principally dependant for financial support at the time of this accident. The answer to the question posed in Section 2(a) of the Arbitration Agreement is "No".

The costs of this part of the Arbitration are to be paid by Zurich Insurance Company. I invite Co-operators' counsel to make its submissions with respect to appropriate party and party costs and I would suggest that this be done prior to June 5, 2005. Zurich's response to the cost submissions should be filed by June 26, 2005.

Dated at Toronto this 11th day of May, 2005



Lee Samis