

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
and Ontario Regulation 283/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

COSECO INSURANCE COMPANY

Applicant

- and -

ING INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing

Alexander M. Voudouris for the Applicant

Shelley A. Hopkins and Joseph Lin for the Respondent

Introduction

This matter comes before me as an arbitrator appointed to determine a priority dispute between two insurers. Pursuant to Ontario Regulation 283/95, a priority dispute of this nature is to be submitted in accordance with the *Arbitrations Act*, 1991.

Both of the parties to this arbitration are insurers carrying on the business of automobile insurance in the Province of Ontario. They come to be involved in this dispute as a result of a motor vehicle accident which occurred on October 6, 2003. At that time an individual who will be identified herein as BLH¹, was a pedestrian when struck by a motor vehicle insured by the Applicant, Coseco Insurance Company.

In accordance with the priority rules set out in Section 268 of the *Insurance Act*, Coseco is not the highest ranking insurer obliged to pay benefits to BLH if BLH was, at the time of the accident, an insured person under another policy. She would acquire that status of being an

¹ In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

insured person in respect to the Respondent's policy if at the time of the accident she was principally dependent for financial support or care on her son JQ.

This case comes before me for a decision with respect to this dependency status and for a determination of whether or not the Respondent ING Insurance Company is obliged to accept the priority responsibility for the Statutory Accident Benefits in this instance.

The matter proceeded before me on a record composed of a Joint Document Brief which was marked as Exhibit 1 to the proceedings and an Agreed Statement of Fact which was marked as Exhibit 2 to the proceedings.

The facts in this case are not terribly controversial. The implication of those facts, as discussed by counsel and the accountants, can take many different shapes.

The Search for Dependency

The language of the regulations requires us to determine whether or not there is a *defacto* dependency in many different fact situations. In this case we are asked to determine whether BLH is principally dependent for financial support or care upon her son JQ. There are many cases where arbitrators have been required to look at different variations of this problem.

This particular case illustrates some of the practical limitations with these evaluations.

At the outset, I should point out that there is no evidence to support a finding that BLH was principally dependent for care. The only question that I believe needs to be addressed here is whether or not BLH was principally dependent for financial support on her son.

A long series of cases have interpreted the meaning of the words "principally dependent". It is sufficient to show that the individual is dependent for meeting 51 percent of their needs on the resources of the second individual.

I feel I must comment that many of these financial dependency cases turn on findings of fact that are extremely difficult to make with any precision. Litigants marshal a bewildering array of evidence of household expenditures, actual and imputed, and offer comparisons to earnings, income, other resources, and earning capacity. The vagaries of the process are compounded. In my view there is but one test that ought to be applied in these dependency cases. We should seek to determine the costs of meeting the person's reasonable needs of living. We should evaluate whether or not the person has to obtain that funding principally from the target of the dependency.

Of course, it is sometimes easier to look at the converse situation with respect to financial support. It might be convenient to ask whether or not the person's own resources are such that they can principally meet their needs and if so we don't have to go further and determine whether or not there is dependency on another.

Determination of the Costs of Meeting a Person's Needs

In many cases the litigants have focused on trying to make a determination of the actual costs of operation of a household, and then make some kind of attribution of those costs in respect to

the claimant. The logic is to suggest that the allocation represents the cost of meeting the person's needs. I disagree. It does not logically follow that the actual expenditure in favour of the person is equivalent to the cost of meeting the person's needs. The actual expenditures might be greater than their needs, or less than their needs.

The leading decision of the Ontario Court of Appeal in *Miller v. Safeco* instructs us not to look at the general standard of living in the household. This means that we should be looking at a more objective evaluation of the cost of meeting somebody's needs and not looking at the costs incurred as necessarily equivalent.

As we are directed not to take into account the general standard of living in the household, this causes us to consider whether or not we should be taking into account factors particularly applicable to the claimant, or whether we should turn our minds to evaluating statistics, market averages and other measures devoid of any relationship to the injured claimant. It is my view that we should not adopt an inflexible rule of applying averages in order to ascribe a value to living costs for this exercise. One can readily recognize that an individual living with some sort of physical disability or health issue might have different needs than the average. Clearly the process of calculating the cost of meeting needs must reflect the personal characteristics of the claimant.

Necessarily, a fair evaluation requires us to look at each claimant individually, to have regard to the statistics that speak to the cost of living in the community, and to make a finding that fairly reflects the cost of meeting the claimant's needs taking into account these factors.

Extensive evidence about the cost of living in the claimant's circumstances at the time of the accident may or may not be helpful in this exercise. A person with an extremely high standard of living might easily demonstrate a high cost of living. But this does not necessarily equate to the cost of meeting the person's needs. At the other end of the spectrum, someone who is living in dire circumstances might not have actually incurred the costs required for meeting basic needs.

In my view, there is a balance to be drawn which requires us to give appropriate emphasis to each of the relevant factors. We should avoid blindly applying rules which, with rigidity, offer certainty but cause us to stray from fact sensitive analysis.

The Evidence With Respect to BLH

Exhibit 1 contains an extensive evidentiary record including discovery transcripts, income tax records, various bills with respect to the operations of the claimant's residence, and a litany of competing expert opinions from forensic accountants.

The Agreed Statement of Fact highlights the fact that BLH was living, alone, at 62 Laurel Avenue. She was 83 years of age on the date of the accident. She had come to this country from China around 1960 and it is reported that she does not read, write, or understand the English language. BLH has three children who all live in the general locale of 62 Laurel Avenue.

The claimant resided rent free at the Laurel Avenue home. This has been a standing arrangement for about 30 years. The home is owned by her son, JQ. The evidence did indicate that BLH made some contribution to some of the costs of the home such as utilities and taxes

but it appears that the provision of the shelter itself was without cost to BLH and was totally at the cost of JQ. On the other side of the equation, the financial resources of BLH are not trivial. She had income from the Old Age Security, the guaranteed annual income supplement, the Canada Pension Plan, a few investments and Ontario sales credits. These items are all documented in her income tax returns in Exhibit 1.

In addition to these sources of income, the claimant actually worked a modest number of hours at her son's business, for no pay. This is tendered as evidence of earning capacity which has a financial value. The transcript of evidence of JQ indicates that his mother came into the business premises for a couple of hours once or twice a week, and she would do some cleaning and helping him around the premises.

In this scenario, the parties have asked me to determine whether or not BLH is principally dependent for financial support on her son.

BLH has her own resources and receives resources in the form of shelter from her son. I have examined the documentation with respect to income as reported on the income taxes and the analysis done by the accountants with respect to the income. I agree that part of BLH's resources include the imputed value of the work done in the son's business which has been calculated at slightly more than \$700.00 per year. When combined with the documented income sources evidenced by the filed income tax returns, this yields an aggregate annual financial resource of BLH of about \$15,000.00.

At this juncture I point out that this is a substantial amount of money. On the math mandated by the legislation, BLH cannot be principally dependent for financial support on someone else unless the cost of meeting her needs is greater than \$30,000.00 per annum.

In this instance, I cannot conclude that the cost of providing for BLH's needs exceeds \$30,000.00 or any amount close to that.

Looking first at the statistical profile, I refer to Schedule 1 of the report found at Tab 18 of Exhibit 1. This shows the statistical average expenditure for household in Canada for a one-person household for a female age 65 and over. The total annual expenditure is \$22,452.00. I observe that this includes amounts that might not be components of looking at meeting a person's basic needs, including recreation expenses of more than \$1,000.00, personal taxes of \$2,448.00 and gifts of \$1,957.00. This statistical information is an indicator that the cost of meeting the basic needs of BLH are not anywhere near \$30,000.00 per year. The proportionality of the cost distribution is also interesting since it shows that the living accommodation part for shelter represents about 25 percent of the aggregate costs of the average household. It is to be noted that BLH pays for almost all of her own needs to be met except for the core living accommodation cost. Roughly, this tends to indicate that BLH is paying for about 75 percent of the cost of meeting her needs as derived from the statistical distribution of household expenditures.

Much is made of the fact that JQ provides his mother a home to live in which is likely significantly more than she needs as a basic shelter. It is a three bedroom home, fully detached, in a residential neighbourhood. Some considerable effort has been made to ascribe a value to this residence, and then to include this as the evidence of cost of meeting BLH's shelter needs. As observed earlier, I do not accept this view. This would be an example of a case where the general standard of living in the household should not be regarded. Having a three bedroom house available for a person who lives alone is not providing merely the

necessities of life. It is providing something much more, and it is not an appropriate measure for this dependency component.

I also do not agree with the proposition that the value of the provided residence should be measured somehow as a percentage of the capital value of the home. There is a reasonably robust market for rental housing in this community and I much prefer to look at comparable premises on the market to determine the value of the shelter being provided. At Tab 17 of the Exhibit 1, seemingly similar three bedroom houses have been identified with monthly rental rates of \$1,500.00 per month, \$1,700.00 per month, and \$1,900.00 per month.

Furthermore, I am not at all convinced that we should be looking at three bedroom fully detached homes as the shelter necessary to meet the needs of BLH. H & A Forensics, in their report of September 11, 2006 found at Tab 13 of Exhibit 1, has determined some information for the cost of renting a one bedroom apartment in a high rise building in the vicinity of the claimant's residence. They report that the cost of rental would be approximately \$950.00 per month including utilities. It is to be noted that BLH paid all of the taxes and much of the utility costs in the residence provided by her son. Factoring this in, I conclude that BLH could live in one of these high rise apartments, and meet all of her non-shelter needs plus have the benefit of avoiding the obligation to pay the taxes associated with the single family home, which are quantified at some amount approaching \$2,000.00 per year in this scenario. At the very most, the claimant might require financial assistance from her son or someone else to pay about ten months of rent at about \$9,000.00 or \$10,000.00. In this scenario, this contribution would represent approximately 40 percent of the aggregate household revenue available for expenditure but I must emphasize that this is the maximum, and I strongly suspect that BLH could divert more funds towards shelter expenses if pressed.

Accordingly, it is quite important in the context of this case for me to make a determination as to whether or not it is appropriate to look at BLH's living arrangement at the time of the accident as the standard of shelter to determine her dependency. If it is, then the question of dependency for financial support is a much closer call. Using the rental rates noted above, one can easily see that the cost of meeting those deemed expenses might require significant support from another source which might approximate 50 percent.

I conclude, however, that it is not appropriate to look at the cost of living in a single family three bedroom home when making a determination of dependency. In my view, this is akin to the analysis conducted by the Court of Appeal in the *Miller v. Safeco* case. It is neither appropriate to look at the general standard of living in the household in the *Miller* case, nor is it appropriate in the BLH case to look at the standard of a single person living in a three bedroom detached home as representing meeting the needs of shelter. It is much more than that. In my view, having regard to the evidence before me, the most reasonable approach to this case is to measure the needs in relation to the proffered evidence of the costs of suitable accommodation for a single person in the community, in this case illustrated by the cost of a one bedroom apartment in a proximate high rise building.

When considered in the context of "dependency" and financial needs, this is a more appropriate measure. That is not to suggest that there is anything inappropriate about the lifestyle of the claimant prior to the accident. Happily, she was able to live a lifestyle greater than merely meeting basic needs.

Conclusion

Accordingly, in accordance with the issue put before me by the parties, I conclude that at the time of the accident BLH was not principally dependent for financial support on JQ.

Therefore, the statutory accident benefits in this case are properly payable by the Applicant, Coseco Insurance Company. Coseco is obliged to pay the legal costs of ING, in accordance with the Arbitration Agreement.

The parties may make submissions to me with respect to costs within 30 days. If you require an extension of time in this respect, please let me know.

Dated at Toronto this 21st day of July, 2010.



LEE SAMIS
Arbitrator