

**IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I.8, SECTION 268 AND
REGULATION 283/95 MADE UNDER THE INSURANCE ACT;**

AND IN THE MATTER OF THE ARBITRATION ACT, 1991, S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondent

AWARD

This matter was heard at Toronto on Friday, October 24, 1997. Mr. D'arcy D. McGoey attended on behalf of The Dominion of Canada General Insurance Company. Mr. Colin S. Jackson attended on behalf of The Motor Vehicle Accident Claims Fund.

This matter has been submitted to be determined pursuant to the Arbitrations Act, 1991 and in accordance with an arbitration agreement dated October 24, 1997.

Pursuant to that agreement, the parties have asked me to determine the following question:

As of January 1, 1996, was Vincenzo (Jimmy) Palumbo principally dependent for care on either his brother, Pasquale Palumbo, or on Pasquale Palumbo's spouse?

In accordance with the agreement and the arrangements with the parties, this matter was heard before me at the offices of Rosenberger & Weir, Official Examiner, BCE Place - Suite 300, Bay Wellington Tower, Toronto, Ontario, M5J 2T3, on October 24, 1997. At the hearing, two witnesses were called to give evidence and the parties made submissions and provided briefs of authority.

This matter arises out of an injury sustained by Jimmy Palumbo. The accident or event which caused his injuries occurred on January 1st, 1996. At the time, Jimmy Palumbo was a 56 year old man who was not employed, not married, and not living with any of his family members.

Pursuant to the Insurance Act and regulations thereunder, a claim was made on behalf of Jimmy Palumbo to Dominion of Canada General Insurance Company, the insurer of Pat Palumbo, Jimmy's brother. In accordance with the regulations under the Insurance Act, Dominion of Canada had no choice but to respond to that claim and then invoke this proceeding to determine the identity of the appropriate insurer or funding agency to pay statutory accident benefits with respect to Jimmy Palumbo's injuries. It is for this purpose that I have been asked to determine whether or not Jimmy Palumbo was principally dependent for care on Pat Palumbo (Dominion's insured) or Pat Palumbo's spouse.

Pat (Pasquale) Palumbo testified before me under oath. He is a 69 year old gentleman who lives in Etobicoke, Ontario with his wife. He has three daughters who are all married. He is the older brother of Jimmy who is the injured individual.

At the time of the accident, Jimmy was a 56 year old man. Jimmy had been married at one point when he was quite young - age 19 - and has long since been separated and divorced. The locale of his spouse and family are not known. More than two decades ago, Jimmy had some kind of condition which has been described as a "nervous breakdown". It necessitated his admittance to a mental health facility. He was subsequently discharged from a mental health facility into the care of his brother, Pat.

Pat noted that Jimmy was a different person after this event but not in any way an aggressive person.

After being discharged from the facility, Jimmy came to live with Pat and his family and did so for two or three years. Pat then moved his family to Etobicoke and could not take Jimmy with him. Jimmy preferred to stay in the downtown area where he had always resided while living in Toronto.

Pat, with the assistance of social workers, located a home at 105 Oakwood Avenue in Toronto. This was determined to be an appropriate place for Jimmy to continue to live. Jimmy moved into those premises and lived in those premises until the time of the accident. This move took place twenty or twenty-two years ago.

For those decades, Jimmy made his home at 105 Oakwood Avenue. Pat was a regular visitor. Pat assisted in the management of Jimmy's affairs. When visiting, Pat assisted with Jimmy's hygiene and grooming. When, on occasion, the staff at 105 Oakwood had difficulty with Jimmy, they would contact Pat and he would respond appropriately.

The costs of Jimmy's life were being supported by various government/social agencies. A monthly cheque of about \$708.00 was sent payable jointly to Pat Palumbo and Jimmy Palumbo. Pat would arrange for this money to be deposited into an account and Pat would then pay the expenses for 105 Oakwood and would give pocket money to Jimmy and would buy Jimmy any needed clothing or shoes.

The charge for Jimmy's room and board at 105 Oakwood was \$545.00 per month. Pat Palumbo estimated that he may have spent \$100.00 per month out of his own pocket to supplement the funding from the incoming cheque.

Pat had a regular weekly visit with Jimmy on Saturday mornings. The visit would last from two to three hours. Usually, during the visit, Pat would give Jimmy a shower.

In addition to these visits, Pat would occasionally be called upon by the staff at 105 Oakwood to assist because Jimmy was reluctant to attend to his personal hygiene. Apparently these problems arose every month or two.

Pat also testified that he assisted Jimmy in attending at the offices of a physician from time to time. The facility where Jimmy lived had a physician who came to visit but Jimmy was nonetheless taken by his brother to visit a physician. There is some conflict on the evidence about this. Pat's evidence was that Jimmy did not like the physician who came to the home. Olive Gabbidon, the operator of 105 Oakwood Avenue for the last nine years, indicated that Jimmy was simply never around the home when the doctor came to visit and, therefore, he was taken, by his brother, to see the same doctor from time to time.

Jimmy spent most of his days outside of 105 Oakwood, walking from place to place. He regularly left 105 Oakwood early in the morning and spent his time at various cafés in the College Street area where Jimmy would regularly visit and drink coffee, etc. He had many friends with whom he liked to visit.

Hence his frequent absence from 105 Oakwood during daytime hours.

In addition to visiting his brother, Pat also arranged for some of Jimmy's laundry to be done by Pat's wife. This was confined to pressing of some shirts because Pat's wife felt that she could do a better job on some of these items and Jimmy would be more presentable if she did some of the laundry. It is clear that 105 Oakwood provided full laundry services and that the bulk of Jimmy's needs for laundry services were satisfied by the staff at 105 Oakwood.

Pat would occasionally invite Jimmy to his home for meals, especially at holiday time, etc. Jimmy had some reluctance to go and visit Pat at his home and would often decline these invitations.

Olive Gabbidon testified. She has been the operator of 105 Oakwood Avenue for the past nine years. She did not live in the residence but she had responsibility for the residents, knew Jimmy, and was familiar with his stay at the residence.

105 Oakwood is a facility which is partly subsidized by a social agency which pays 105 Oakwood \$18.00 per day for each resident. In addition, \$545.00 per month was paid by the residents. In consideration of these payments, 105 Oakwood Avenue provided full room and board. In addition, staff provided personal assistance with grooming and hygiene. The staff of 105 Oakwood also provide a full laundry service and do all of the grocery shopping. They exercise some supervision over the residents such as ensuring that they are appropriately dressed when they go outside and so forth. Jimmy's life prior to his car accident was based at 105 Oakwood Avenue which he considered to be his home. All of his meals were provided, his shelter was provided and all housekeeping was attended to by the staff. They would provide him with assistance bathing three times a week. It appears that one of these occasions would be the occasion that Pat would attend and provide assistance with a shower.

On two other occasions, per week, the staff at 105 Oakwood would provide assistance. According to Ms Gabbidon, Pat Palumbo and the staff at 105 Oakwood both ran into a similar degree of resistance to personal hygiene attention.

The staff at 105 Oakwood also attended to Jimmy's needs for prescription medication by ensuring that he was physically provided with the appropriate medication at the appropriate time of day. The staff assisted in a very minor way in the financial affairs by disbursing to Jimmy, pocket money which had been left with them by Pat.

According to the evidence of Olive Gabbidon, Jimmy more or less took care of himself. Ms Gabbidon's evidence differed slightly from the evidence of Pat Palumbo to the extent that she was under the impression that Jimmy would not go to Pat's home. Pat acknowledged this to be the case on some occasions, but not on all occasions.

In general, 105 Oakwood provided to Jimmy his shelter, three meals a day plus a snack, they did all necessary grocery shopping, cooking, washing of clothes, provision of toiletries, cleaning and all household services. They provided the medication on a timely basis. They generally supervised Jimmy's comings and goings and personal well being.

The Issue

Against this factual background, I am asked to determine whether or not Jimmy Palumbo was principally dependent upon Pat Palumbo or Pat's spouse for care at the time of the accident.

Ample authority was provided to me to suggest that "principally" means chiefly, more than from any other source, etc.¹ To examine the role of the care provided by Pat, I should measure that care against the care that was provided to Jimmy by 105 Oakwood and the care that Jimmy provided for himself.

Jimmy's need for care is not extreme. He is able to feed himself, dress himself and attend to his own toileting. He was able to take his own medication when it was presented to him. He spent his time independently through the days visiting with his friends. He would go and get his hair cut as needed. (His brother, Pat, had made the arrangements for the barber to bill Pat directly.)

Pat's role in Jimmy's life was not insignificant. Pat had exercised some financial control. He had been personally present on a weekly basis and on many occasions aside from the weekly visit to provide attention to Jimmy which can be regarded as care.

There was an emotional/social connection between the brothers which may well be different than Jimmy's relationship with his friends and his co-habitants. Pat's wife does some amount of laundry for Jimmy. The role of 105 Oakwood, was critical in Jimmy's life. For all intents and purposes they provided all Jimmy's meals, did all of the shopping necessary to provide

¹ Bernard v. Safeco (1986) 57 O.R. (2d) 558; Bogdan v. Royal Insurance, Feb. 6, 1996, OIC File No. A-014959, Arbitrator Palmer.

Jimmy's meals, provided all of the necessary housekeeping and cleaning services, the shelter, provided general supervision, provided and made available complete laundry services, dealt with medication needs and made available health care in the form of a doctor attending at the premises.

While the care and attention provided by Pat Palumbo and his wife was important and significant, I cannot conclude that Jimmy Palumbo was principally dependent for care on one or both of them at the time of this accident when one measures their involvement against the comprehensive care provided and made available by 105 Oakwood and Jimmy's ability to provide for his own care.

In some respects the Ontario Insurance Commission arbitration decision of Mersinidis v. Jevco Insurance Company² is analogous. Many of the tasks and services provided by Pat Palumbo and his wife were services that they performed out of love and obligation but not because Jimmy was principally or chiefly dependent upon them for that care. Without the intervention of Pat and his wife, Jimmy would have received attention to his hygiene, he would have received adequate laundry services and his medical needs would have been attended to at 105 Oakwood.

Onus of Proof

There was some discussion about the appropriate onus of proof in this case. The Dominion has paid expenses to the claimant because an application form had been submitted to them. They are obliged to respond to the claim in this fashion. The fact that they are processing a claim cannot be taken to be evidence of any conclusion about entitlement nor should this be significant in determining onus of proof. The Dominion is not in any better position to lead evidence on dependency issues than is the Motor Vehicle Accident Claims Fund.

In my view, the onus of proof ought not to be any different than it would be if this were an action commenced by Jimmy Palumbo against both insurers.

In this case, the evidence has been sufficiently clear that nothing turns on the onus of proof issue.

Decision

I conclude that the question put before me in this matter must be answered in the negative.

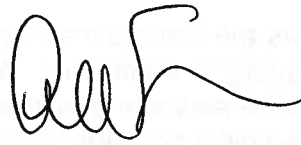
In accordance with the arbitration agreement, the Motor Vehicle Accident Claims Fund shall:

- a. Assume responsibility for payment of any future statutory accident benefits to which Mr. Jimmy Palumbo may be entitled;

²May 24, 1996, OIC File No. A-950704, Arbitrator Kirsch.

- b. Reimburse The Dominion of Canada General Insurance Company for any payments The Dominion of Canada General Insurance Company has made to, or on account of, Mr. Jimmy Palumbo for statutory accident benefits to which he was reasonably entitled;
- c. Pay legal costs to The Dominion of Canada General Insurance Company in the amount of \$3,000.00 plus assessable disbursements; and
- d. Pay the expenses of the arbitration.

DATED at Toronto this 10th day of November, 1997.



Lee Samis

Attachments:

- 1. Arbitration Agreement
- 2. Exhibit 1 - Activities of Daily Living