

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE ARBITRATIONS ACT, 1991

B E T W E E N:

FEDERATION INSURANCE COMPANY OF CANADA

Applicant

- and -

LIBERTY MUTUAL INSURANCE COMPANY

Respondent

AWARD

Introduction

This matter was heard before me at Toronto on March 4, 1999. Ms Ruth A. Henneberry appeared on behalf of the applicant, Federation Insurance Company of Canada. Mr. Mark K. Donaldson appeared on behalf of the respondent, Liberty Mutual Insurance Company.

This matter was put before me pursuant to the Arbitrations Act, 1991, to arbitrate a dispute between Federation Insurance Company of Canada and Liberty Mutual Insurance Company. The parties agreed to submit the issue to me pursuant to the Arbitrations Act and have reserved the right to appeal without leave.

This dispute involves a determination of which of the two insurers is obliged to pay auto accident benefits pursuant to the *Statutory Accident Benefits Schedule* under the Insurance Act to Mr. Jonathan Sebastian.

This is a case about dependency. It is one of many that arise from motor vehicle accidents where there are injuries. The automobile insurance schemes in place since 1990 provide for very rich compensation, without fault, based on Statutory Accident Benefits Schedules. Those schedules have changed from time to time, but have consistently required that an injured person claim benefits from the insurer on a policy where he or she is an insured, and not necessarily from the insurer of a vehicle involved in the accident. The schedules provide benefits to persons who are not named insureds, but who stand in some relationship with a person who is a named insured, notably spouses and dependants. Priority rules apply to spouses and dependants as if they were the named insureds under contracts of insurance.

Where a person is not a named insured, or spouse or dependant of a named insured, he or she is to claim benefits from the insurer of the vehicle occupied, or insurer of other involved vehicles or from the Motor Vehicle Accident Claims Fund.

Hence the status of being a dependant can be very significant for determining entitlement. The injured individual will be entitled to benefits from some source, but the critical issue of dependancy will determine which source.

In this case Liberty Mutual must pay the benefits if Jonathan Sebastian was not dependent on his parents. If he was dependent on one of his parents at the time of the accident, then their insurer, Federation, must pay the benefits.

Proceedings

In recognition of the number of disputes that can arise between insurers with respect to the obligation to pay Statutory Accident Benefits, the legislation provides for a regulation to create a process aimed at resolving these cases. O. Reg. 283/95 requires the parties to submit the dispute to an arbitrator pursuant to the Arbitrations Act, 1991.

The parties have so submitted their dispute, based on an arbitration agreement dated January 21, 1999¹.

As the basis for making a decision the parties have put the following before me:

1. Agreed Statement of Facts;
2. Affidavit of Jonathan Sebastian;
3. Affidavit of Mary Goretti Sebastian and exhibited Statement; and
4. Transcript of cross-examination of Mary Gorretti Sebastian.

The parties participated in a prehearing conference with me. The parties attended before me and presented their cases on March 4, 1999 and made their submission on costs by letter on April 27, 1999.

The Legal Issue

This accident occurred on February 13, 1998. The entitlement is under the Statutory Accident Benefits Schedule for accidents that occur on or after November 1, 1996 (Bill 59). For the purpose of the Regulation a person is deemed to be 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. The parties have narrowed the issue somewhat to pose the question:

Was the claimant, Jonathan Sebastian, principally dependent for financial support on his parents at the time of the motor vehicle accident?

¹

The agreement contemplates a confidential proceeding, but the parties agreed that the decision would be public.

The analysis of this issue requires me to consider whether there was financial dependency and if so whether Jonathan Sebastian was principally dependent. The parties have agreed, however, that there was some dependency.

In effect, I am required to examine the relationship between Jonathan and his parents and make some conclusions about the salient issues.

Time frame

When examining the financial and other arrangements of a family or household it is necessary to set some time frame during which to examine income, expenses and other matters which necessarily occur over a period of time. Relationships change from time to time, perhaps suddenly. Transient changes may alter matters for a short period, but not change the general nature of a relationship. A momentary snapshot would not yield any useful information about these time dependent relationships.

Mr. Sebastian's case is one on point. It appears that he did not work during the last few days prior to the accident. However he considered himself to be employed on a full time basis since July of 1997. In my view it would not be appropriate to examine his income for these few days as an indication of his financial status. A broader view of his circumstances is necessary.

Choosing the appropriate time frame could be critical. The evaluation should be made by examining a period of time which fairly reflects the status of the parties at the time of the accident. As Jonathan Sebastian's situation seems to have been stable since September of 1997, up to the time of the accident, this would appear to be an appropriate time frame for consideration. Prior to September of 1997 he was employed and had earnings, but there were significant periods of lay offs.

The evidence indicates that Jonathan earned \$5700.00 in the 19 weeks prior to the accident.

During this interval he lived at home with his parents. He performed household chores. His parents provided him with free room and board and between \$40.00 and \$100.00 per week in spending money². In addition, his parents purchased minor clothing items for him.

Capacity vs. earnings

Earnings are evidence of capacity. But many individuals may not be earning up to their capacity. If this is because earnings are foreclosed by the unavailability of work, then the person may become a dependant, even with a very high earning capacity. On the other hand, a person who could earn significant income, but simply chooses not to, can't be regarded as dependent in the sense that a need for financial support is imposed on the person.

Students, for example, illustrate a special problem. They may have significant ability to earn income, but not without sacrificing their educational pursuits.

²

Some of the evidence was contradictory in this area.

In my view it is not appropriate to look at bare capacity to evaluate dependency. If the individual alleged to be dependent is reasonably exercising his or her capacity by providing for his or her own needs to the extent permitted by the circumstances, then it is reasonable to regard the earnings as the amount that the person can contribute to his or her own expenses of living.

FSCO arbitration decisions have suggested that it is appropriate to examine a person's "ability" when considering whether there is a dependency. An appeal decision from FSCO suggests that it is not appropriate to consider "imputed earning capacity"³.

Some case law from Ontario courts is very instructive on this issue. Pre OMPP⁴ case law needs to be examined with care because of the different wording which was introduced in June of 1990. Definitions previously employed in insurance contracts did not always look at dependency solely in terms of financial support. Additionally, the concept of "principal" dependency was not always applicable.

However the decision of Miller v. Safeco⁵ is extremely relevant to the issue at hand because that case dealt with the concept of dependency. The court focused on whether or not an individual was a dependant within the meaning of the automobile insurance policy of the time. Justice O'Brien suggested that consideration be given to:

1. amount of dependency;
2. duration of dependency;
3. financial or other needs of the alleged dependant;
4. the ability of the alleged dependant to be self supporting, and
5. the general standard of living within the family unit.

On appeal, the Court of Appeal agreed with all of these criteria with the exception of the "general standard of living within the family unit"⁶. In my view this is compelling authority for the proposition that the "ability" to be self supporting must be taken into account in measuring dependency.

Thus, when considering Mr. Sebastian's dependency, I consider his earnings as well as his reasonable capacity to earn. He was an able bodied man. His skills were such that he was gainfully employed, earning \$13.00 per hour, on a regular basis. This suggests that Jonathan's reasonably exercised capacity was to earn something in like \$450.00 per week.

³ Raffoul and State Farm (April 25, 1996) OIC A-004476.

⁴ Ontario Motorist Protection Plan, the first major "no fault" scheme implemented June 22, 1990.

⁵ (1985) 9 C.C.L.I. 1.

⁶ (1986) 13 C.C.L.I. 31.

Benefit received vs. needs

"Dependency" implies something more than receipt of a financial benefit. It requires some kind of need on the part of the person alleged to be a dependant. A very wealthy person might receive food, shelter and other financial benefits from family, but this would not support a conclusion that the person is principally dependent upon the family structure.

To interpret the regulation as requiring an evaluation that is confined to reviewing the actual financial contributions, without regard to need, is to ignore the wording of the regulation which calls for dependency. In this case Jonathan Sebastian has received significant benefits from his parents. They provided him with food and shelter. They gave him some spending money on occasion. He earned a significant income, but he was allowed to spend this freely, and was not required to provide for any of his own basic needs. His lifestyle was enhanced by the assistance from his parents⁷. It is noted earlier that the Ontario Court of Appeal disapproved of consideration of the "general standard of living within the family unit" in dependency cases.⁸

In short, he was not providing for any of his own basic needs. Nonetheless he had the reasonable ability to do so. He may well have had the need for support or care to supplement what he could provide for himself. Against these facts the regulation challenges us to discern whether his parents are persons upon whom he is "principally" dependent.

It is difficult to precisely quantify his financial needs. He is a single young person in need of food, clothing and shelter. He seems content to live as part of a larger household. No direct evidence was offered about the value of these items.

The problem posed is more difficult than simply measuring the cost of Jonathan's needs and comparing that to his own resources. Even if Jonathan was unable to meet the basic costs, this would not render him "principally" dependent on someone else. He only becomes "principally" dependent on another when that other person provides for most of his needs.

In other words, Jonathan can only be considered principally dependent for financial support on someone else if the cost of meeting Jonathan's needs is more than twice Jonathan's resources. I can not conclude that Jonathan is principally dependent for financial support on others.

Conclusions

Jonathan Sebastian was a young, able bodied man, regularly employed earning \$13.00 per hour. Not working to full capacity he earned \$300.00 per week. He supports no family. On these facts I find that he not principally dependent for financial support on his parents.

⁷ This is similar to the OIC case of Crnkovic and Simcoe and Erie (April 8, 1993) OIC File No. A-002228.

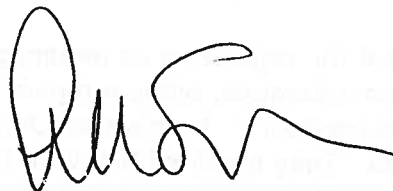
⁸ Miller v. Safeco. Note 6.

The claims of Jonathan Sebastian for statutory accident benefits should be paid by Liberty Mutual Insurance Company.

The costs of this proceeding shall be paid by Liberty Mutual Insurance Company.

Federation's costs of \$3,500.00 plus assessable disbursements as agreed by the parties shall be paid by Liberty Mutual Insurance Company.

DATED at Toronto this 7th day of May, 1999.



Lee Samis