
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:

INSURANCE CORPORATION OF BRITISH COLUMBIA

Applicant

- and -

FEDERATED INSURANCE CO. OF CANADA

Respondent

AWARD

Counsel Appearing

Ian Kirby for the Applicant

Mark Donaldson for the Respondent

Introduction

This matter comes before me as an arbitration pursuant to the Arbitrations Act, 1991. The parties are both insurance companies carrying on the business of automobile insurance. The dispute between the parties, which is submitted to me for determination, is the question of the dependency of the injured party, Craig T¹. The question of dependency is material to the determination of which insurer has the obligation to pay Statutory Accident Benefits in respect of injuries sustained by Craig T. in an accident which occurred June 17, 2004.

It is understood that Craig T. sustained serious injuries in the accident and at the present time he is incapable of offering testimony to these proceedings.

Pursuant to an arbitration agreement, which was marked as Exhibit 1 to the proceedings, I have been asked to determine the question of Craig T.'s dependency in accordance with the regulations which govern access to Statutory Accident Benefits.

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

Statutory Framework

Section 268 of the Insurance Act sets out priority for determining the obligation with respect to payment of Statutory Accident Benefits. A hierarchy is created between different levels of coverage.

As a result of the design of the Statutory Accident Benefits system, and with the laudable policy goal of attempting to provide benefits for all of those who may be injured in car accidents, the legislature has chosen to broadly define the people who may be considered "insured persons" for the purpose of receiving accident benefits. As a result, in any given accident, an insurer may be exposed to several different classes of individuals who may be characterized as an "insured person". Conversely, an injured person may have the status of being an "insured person" in respect of a number of policies of insurance. Hence, s. 268 of the Insurance Act creates a priority ranking between the various coverages for the purpose of determining which insurer, amongst many, has the obligation to pay the Statutory Accident Benefits in any given case. In furtherance of this goal, the legislature promulgated a regulation, 283/95, which sets out certain procedural aspects of this determination, including the requirement that these disputes are to be submitted to an arbitrator such as myself.

Suffice it to say, that based on the statute law, the legislative and regulatory definitions, and the case law, it becomes very important for the two insurers to understand whether or not Craig T. was principally dependant for financial support on one or both of his parents at the time of the accident. That legal classification (principal dependency) has been the subject of numerous arbitration disputes and a number of appeals through the various levels of courts following arbitration. The question of dependency is factually challenging and the simple definition found in the regulations is often difficult to apply to real-life situations. In truth however, for the most part insurers and insured persons have no difficulty in determining the appropriate insurer to pay Statutory Accident Benefits. But in a very small percentage of cases, such as this one, the circumstances are such that a dispute needs to be resolved between the potentially liable insurer organizations.

Section 268 of the Insurance Act provides as follows:

268. (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. 1993, c. 10, s. 26 (1).

Liability to pay

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

- 1. In respect of an occupant of an automobile,**
 - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an Insured,**
 - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,**
 - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other 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 occupant has recourse against the Motor Vehicle Accident Claims Fund.**

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).**

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. 1.8, s. 268 (3); 1993, c. 10, s. 1.

Choice of insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. 1.8, s. 268 (4); 1993, c. 10, s. 1.

Same

(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).

The regulation which defines the available benefits also makes an effort to define insured persons and addresses the issue of dependency. The applicable regulatory provision provides a definition of "insured person" as follows:

"insured person", in respect of a particular motor vehicle liability policy, means,

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile, and

(c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the 60 days before the accident; ("personne assurée")

The same regulation addresses the concept of dependency by offering 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. O. Reg. 403/96, s. 2 (6); O. Reg. 114/00, s. 1 (3); O. Reg. 314/05, s. 1 (3).

As a result of these provisions, the question that comes to be decided in the case at hand is whether or not Craig T. was, at the time of the accident, principally dependant for financial support on one or both of his parents. There is no question of Craig having been dependent for care at any time prior to the accident.

The Agreed Statement of Facts

A large part of the record in this matter consists of an agreed statement of facts which was marked as Exhibit 2 to the proceedings. That agreed statement indicates that Craig T. was injured while a passenger in a motor vehicle, while that motor vehicle was being operated in the province of British Columbia. The vehicle in which he was a passenger was subject to a policy of insurance issued by the Insurance Corporation of British Columbia.

The agreed record also discloses that benefits in this matter are being administered by the applicant, the Insurance Corporation of British Columbia.

There is an issue as to whether priority for payment of the benefits lies with Federated, the insurer of Craig's parents.

Joint Document Brief

In addition to the agreed statement of facts the parties have put before me a joint document brief containing an array of documents relevant to the issue of financial dependency. The document brief, in two parts, was marked as Exhibit 3 to the proceedings. A third volume, consisting of the report of Debra Carter, dated March 12, 2009, and the personal account statements of Craig T., was also marked as part of that exhibit.

The parties have agreed that the documents so submitted form part of the evidentiary record in this matter, and that I may choose to accept or reject the evidence contained therein.

Evidence of Paul T.

Paul T. is the father of Craig and gave evidence before me under oath. He is currently a resident of Chelsford, Ontario, but in 2004 was a resident of Timmins, Ontario. He and his wife lived in Timmins and had lived in that home for 12 years. The residents of the household from time to time included Paul's wife Donna, and their three children, John Paul, age 31, Rebecca, age 29, and Craig, age 27.

Paul T. gave extensive evidence about the family circumstances and the history, as known to him, of his son's various employment and income-generating activities. He reported that Craig had graduated from high school in June of 2000. He was referred to some of the financial figures as shown in the produced and documented income tax returns. Those documents show fairly low levels in income in 2000, 2001, and 2002. Paul T. testified that for the first five months of 2002 Craig had lived at home. I gathered that during some of this time his siblings were away at university.

Paul T. attested to Craig's difficulty in finding full-time employment on a steady basis. He did various jobs. He went to an auto mechanical apprenticeship from high school. He had some

affiliation with Samic Electric which he could have pursued. He did some work with Lacorix Plumbing and he did some work in a lumber mill. None of this work seems to have suited Craig's interests. He did not stay fully employed with these organizations for lengthy periods of time. He was in and out of employment at various positions.

It was the view of Paul T. that during this timeframe he and his wife had supported their son Craig. They provided him with shelter, meals, transportation and dental care as needed, and had included him in the family vacations.

There is no doubt that they had the capacity to do this. They have a five-bedroom home. They had two cars in the family, allowing Craig to use one or the other from time to time as needed. Paul T. has a substantial income earning between \$65,000.00 and \$78,000.00 per year as a miner. Donna T. worked as an accountant for a day care centre and earned approximately \$20,000.00 a year.

In 2002, Craig went out west to Alberta to live with his brother "JP". He worked part time with his brother, but didn't pay any room and board in that arrangement. Indeed, Paul T. indicated that he was called upon to send money to Craig from time to time in response to phone calls. Some months later, Craig moved on to Victoria, British Columbia. He went there to live with a young lady by the name of Mercedes who he had met during his sojourn in Canmore, Alberta. Craig and Mercedes lived together in Victoria. Craig found some employment in Victoria.

However, Paul T.'s testimony was that the financial situation for Craig and/or Mercedes was poor. Craig was always calling for money, he was racking up credit card debt, and he had outstanding bills to hydro authorities and phone companies. Their accommodation was considered to be sub-standard.

Paul T. estimates that during this interval he was sending about \$200.00 a month to Craig, but Craig and Mercedes were continuing to get deeper into debt.

For a period of time Craig injured his thumb and was off of work.

Ultimately, in December of 2003, Craig decided to come home. Paul's view is that he was coming home to work, to pay off his bills and to live rent free. Paul T. and his wife Donna paid for the trip home at a cost of approximately \$1,000.00.

It is reported that when Paul arrived home around December 11, 2003, he was very thin, taken as evidence of not eating properly.

During the time that Craig had been away out west, from May 2002 until December 2003, he had come home twice, once for his sister's wedding, and once as a result of his grandmother's death. The cost of this travel was paid for by family members.

Upon his return at the end of December 2003, the terms of his residency at the family home were financially negligible. He paid no rent, he did not pay for food or utilities and he used family cars without contribution to the cost. His other needs were met by his parents. Following his return home he did get some work. He worked for about one month in a placement that "didn't work out". It was at this point that he worked in Lacorix Plumbing which only lasted for a couple of weeks. He returned back to his initial, post-December 2003, job from February 18, 2004 to April 16, 2004, but then injured his ankle playing basketball and was off for a further six weeks for recovery. The evidence is that Craig did not work again in Timmins.

In the spring of 2004, Craig wanted to go back to British Columbia to see Mercedes who had returned to British Columbia to live with her mother. In early May 2004, he returned to British Columbia by bus. The ticket was purchased for Craig by his sister. At that point he was unsure what he wanted to do.

In Ontario, Paul T. had found a mining job opportunity for his son. The documentation, created sometime after the accident, consists of a letter at Tab 6 of Exhibit 3. That letter documents an offer of employment for Craig -- an offer of employment that never was acted upon as a result of the accident. According to the letter, the offer was to take effect on July 5, 2005. This evidently is a typographical error intending to reference July 5, 2004. In any event, the offer was never taken up by Craig T. as the accident intervened. It was clear from the testimony of Paul T. that he was very hopeful that finding this mining job would become the source of a steady employment for his son on a long-term basis. Paul T. was prepared to make sacrifices to assist his son in this regard and did so.

Nonetheless, when his son left to go out west sometime in the spring of 2004, he continued to have debts. As Craig went west Paul T. gave him approximately \$500.00 towards his expenses. When he got to Victoria, Craig lived in a hostel for a short period of time and then moved into another arrangement which was cheaper. It is clear that Craig obtained some employment while he was in British Columbia in this early part of 2004. There are documents from All Seasons Industries found attached to Exhibit 3 which show Craig working for about \$9.00 an hour. According to the record of employment filed he was working as auto accessory sales/installation. It appears that in the three weeks that he was employed by All Seasons he had gross earnings of about \$1,345.00.

In examination by counsel for Federated, additional information came out about the job history. It was pointed out that for a period of time Craig had worked in a dinner theatre with his brother earning about \$10.00 an hour. It was also indicated that he worked for a building products firm in British Columbia for six months earning a little more than \$8,000.00 based on approximately \$10.00 per hour.

Evidence of Debra Carter

Debra Carter was tendered as an expert witness with qualifications as a labor market economist. She had given a report, dated March 12, 2001, which is found in the third part of Exhibit 3. That report describes the mandate of the expert to "provide estimates of the costs incurred by the T.s given the financial dependence of their son, Mr. Craig T.". Essentially Ms. Carter has taken two separate approaches at trying to quantify the value of the support that may have been received by Craig T. from his parents. The first methodology is to apply figures generated by a federal child support guidelines. Ms. Carter has applied those figures to suggest the value of support supplied by the family would be \$719.00 per month and has applied that figure to a seven-month interval and a two-month interval.

The second approach used by Ms. Carter is to look at statistics Canada's survey of household spending to derive an estimate of consumption patterns of children by family size and income. Through this methodology Ms. Carter has again calculated two time periods of dependency and has concluded that there is a monthly attribution towards Craig of \$1,298.00 representing his deemed share of the total household income.

It was pointed out that moving costs involved for Craig to move from British Columbia to Timmins were not taken into account in any of these calculations. And it was pointed out that the documentation shows that moving expenses for Craig to return from British Columbia to Timmins were documented as part of the tax records when a tax credit was claimed. There is a covering letter found at Tab 10[h] of Exhibit 3 wherein the claim for moving expenses is made, after the accident. Also there is an adjustment request form found at 8S of Exhibit 3. These documents tend to indicate moving expenses being incurred on two occasions, once at a cost of \$415.00 and then, in December of 2003 at a total cost \$1,925.00. For tax purposes the deduction claimed in respect to the latter amount was split over two income tax years.

Law and Analysis

It is against this background, that I am asked to determine whether or not Craig T. was principally dependant for financial support upon one or both of his parents at the time of the accident in June of 2004.

The parties have put before me briefs of a case law which touch on many of the prevalent cases dealing with these dependency issues.

I must observe that there continues to be some confusion about the best way to approach these dependency cases. Perhaps one formula is not appropriate for all of these cases. However, the effect of the case law developed over the years and the statutory and regulatory provisions is clear. We are to examine the question of principal dependency for financial support. That question requires us to (1) measure the cost of providing for the person's needs and (2) to determine whether or not the person was required to derive more than 50 percent of those costs from someone else. If so then the person might be principally dependant for financial support on that other individual.

We need to be mindful of the evolution of the law in this respect. The leading case of *Miller v. Safeco*² has set out the criteria to be applied in these cases. Our Court of Appeal has concurred that the *Miller v. Safeco* principles apply to these SABS priority disputes.

Importantly, note that in the *Miller v. Safeco* decision, the court instructed that we are not to take into account the general standard of living in a household as part of our analyses of dependency. In my view, this is a critical instruction because it guides us not to look at a standard of living which is reflective of the household, but rather to look at the cost of meeting the person's basic needs. The fact that someone has lived a very high standard of living does not mean that they have a higher cost of meeting their basic needs.

This is important because the approach taken in this case by the expert economist treads closely to the line of taking into account the general standard of living in the family. By deriving her conclusions from the family's aggregate income, Ms. Carter is indirectly taking a measurement of the standard of living in the household. By starting with that aggregate income number, and applying the formulae referenced in her report, she is certain to come up with a conclusion which indicates a higher cost of dependency and higher dependency for a person living in a higher income household, regardless of the cost of meeting that individual's actual needs. In particular, in this case, we can see that the methodology is suspect because of the wide variation between the two scenarios constructed by the report. The two scenarios

² 48 O.R. (2d) 451

generate widely divergent numbers purporting to represent the family costs of providing support to Craig T. at either \$791.00 or \$1,298.00 per month.

In my view, we should be trying to make a determination of the cost of meeting Craig T.'s basic needs at the time of the accident. We should then look at whether or not he had the income earning capacity to meet his own needs. His earning capacity would be evidenced by his actual earnings, but might include his capacity to earn additional amounts in some circumstances.

Once we have derived that number it is reasonable to try to understand the extent to which Craig T.'s needs were met by his own resources or by the resources of others. However, it is important to bear in mind that the total of his own resources, combined with the resources of others, might well exceed the cost of meeting his basic needs as a result of contributions to a higher lifestyle, for payments with respect to old debts, or other matters.

As in most of these cases, it is extremely difficult to confidently evaluate the cost of meeting a person's needs and it is equally difficult to reconstruct how the various financial needs of an individual have been met for previous years. Seldom do we have full information that allows us to confidently make those calculations. The process that we embark upon is necessarily approximate, and to the extent possible is based on the evidence before the arbitrator using the direct and indirect evidence available as to the family and other circumstances.

Part of the challenge is to examine an appropriate timeframe to look at dependency issues. Different timeframes might be appropriate in this case and changing timeframes will almost always result in a change in the financial calculations. This is particularly true where the individual's income has been erratic and his shelter and other needs have had varying costs as a result of different arrangements.

The approach of Ms. Carter was to look at statistical information. This approach is not necessarily incorrect, but it obviously has its limitations as it does not purport to represent an exact accounting of the needs and resources of the individuals in this family and all of the circumstances unique to the household. However, I am struck by the fact that the statistical numbers generated by the evidence of Debra Carter tend to indicate that the cost of meeting a person's basic needs as a child in a household of this nature are something between \$791.00 and \$1,298.00 per month. Admittedly these numbers are generated by a high-family income which, for reasons previously mentioned, may inappropriately set a high number. But even accepting these numbers to be so, it indicates the cost of meeting Craig T.'s needs to be at most \$1,300.00 per month. The evidence before me shows that he had actual income in the 6 months prior to the accident of about \$1,200.00 per month. In the month before the accident he had income of \$1,345.00 [gross] \$1,135.00 net. His tax return indicates that for the calendar year prior to the accident, for 2003, he had total earnings of \$12,809.00. Similarly in 2002, he had total earnings of \$13,415.00.

Mr. Kirby made the point that the Carter approaches do not reflect the moving expenses incurred by the family on behalf of their son. The suggestion is that this should be added onto the amounts derived by Carter, being a notion that the specific (evidence based) and implicit (formula approach) amounts combined would yield a larger number going towards Craig, than the amount that Craig was able to generate from his resources. From this I might find that Craig was principally dependent for financial support on his parents. I reject this approach.

Firstly, the formula approach is incorrectly based in part on the general standard of living in the household by virtue of being derived from the aggregate income of the parents.

Secondly, I doubt that the household was at all typical of the households analyzed for the statistics. I would not expect that most households have characteristics similar to this household. Rather, I would suspect that three person households most commonly would involve younger children rather than adult children. Further, it would only be a minority of cases where all three members of a three person household were in the labour force.

Thirdly, if we are to turn from the statistical model and seek to adjust for specific circumstances, we should adjust for all of the specific circumstances, not only the moving expenses. We should recognize that the evidence for much of the time that Craig was away was to the effect that financial support was \$200 per month.

Fourthly, the approach of comparing the individual's contribution to the parental contribution is not necessarily responsive to the issue before us. The mere fact that parents might have provided more than the child does not mean that the child received more than 50% of the cost of his basic needs from the parents. This would only be so if the aggregate amount met the basic needs, and no more. Only then would the mathematics yield an answer that is called for by the regulation. We know that the effect of some of the support given by the parents to Craig was to reduce debt which arguably goes to support for another timeframe.

In my view, we must strive to find the cost of meeting Craig's needs and then compare that with his resources. If, and only if, his resources are less than 50% of the cost of meeting the needs do we look further for possible dependency on others. When looking at resources we must look at earnings, but might also take into account capacity to earn. An argument could be made that Craig's actual earnings do not reflect adequately his capacity to earn, especially in view of the fact that he appears to have been out of the workforce for various intervals, including for injuries. In spite of this, given the established level of income associated with Craig T.'s income-earning activities, it would be necessary to show that the cost of meeting his basic needs was something greater than \$27,000.00 per year in order to show dependency on some other source of funds. Again I reiterate that the dependency in this context means dependency for more than 50 percent of meeting needs.

In my view, the evidence in this case does not establish this regardless of the timeframe that one selects as an appropriate measure of the status of Craig T. at the time of the accident. Indeed, the cost of meeting Craig's needs was likely quite modest in view of the evidence that he generally lived in shared accommodation or low cost arrangements, and there was no evidence of any special costs associated with meeting his day to day needs.

However, based on the evidence that is before me I would choose the four weeks prior to the accident as an appropriate timeframe to look at Craig T.'s status. It represents his date of loss status as a person in British Columbia, perhaps with an intention to shortly return home and take on other employment, but that was entirely prospective as of the date of the accident. Looking backwards more than four weeks takes into account periods of time during which Craig T. was in Timmins or relocating, a period of time during which he had a disabling injury for six weeks, and other transitions in his personal and employment relationships. As I look for the timeframe that most closely reflects his status on the date of accident, I would choose a timeframe indicating the four weeks prior to the accident which reflects his status and the problems in British Columbia as it was on the day of the accident.

Based on that information and the evidence in the record about the statistical cost of meeting the needs of persons in a household etc., it is my conclusion that Craig T.'s income far exceeded 50 percent of the cost of meeting his own needs.

I hasten to add that it is clear on the record that Craig T. was very much in need of the help and support of his family from time to time over the years preceding the accident. Their financial support was no doubt important, but in my opinion, it did not create principal financial dependency support in the context of the terminology of the regulation.

I find that, at the time of the accident, Craig T. was capable of providing for more than 50 percent of his own needs and therefore, in accordance with the terms of the regulation he was not principally dependent for financial support on any other person at the time of the accident.

In accordance with the submissions made to me by counsel, I order costs of the arbitration to be paid by Insurance Corporation of British Columbia, and I order counsel fee of \$7,500.00, plus GST and disbursements, payable by the Insurance Corporation of British Columbia to Federated Insurance Co. of Canada.

Dated at Toronto this 3rd day of July, 2009.

A handwritten signature in black ink, appearing to read "Lee Samis", written in a cursive style.

LEE SAMIS
Arbitrator