

**IN THE MATTER OF AN AWARD**

**B E T W E E N:**

**PROGRESSIVE CASUALTY INSURANCE COMPANY OF CANADA**

**- and -**

**ZURICH INSURANCE COMPANY**

**AWARD**

This matter has been submitted to me for arbitration by the two insurers.

The insurers have agreed upon a submission of this unresolved dispute in order to determine their respective liabilities with respect to an injury suffered by one Patrick Howe in a motor vehicle accident which occurred on January 13, 1993.

The insurers have agreed to submit this matter to me by way of documentary evidence and have asked me to deliver a decision based on the information submitted to me and any other information which I consider to be relevant or appropriate to take into account in the circumstances.

**NATURE OF THE ISSUE**

This matter involves a claim for no fault benefits, now referred to as statutory accident benefits, with respect to a motor vehicle accident which took place in Ontario on January 13, 1993. Due to the circumstances of the injured person, it is possible that one or both of the insurers could be legally responsible for the payment of the no fault benefits in question. In fact, all of the no fault benefits have been paid by the insurers to the injured individual and the only remaining issue is the responsibility between the insurers for the amounts that have been paid already.

**FACTUAL BACKGROUND**

A motor vehicle accident occurred in Ontario on January 13, 1993. Mr. Patrick Howe was injured in that accident. At the time of the accident, Mr. Howe was an occupant of a vehicle and that vehicle was insured by Progressive Casualty Insurance Company.

Mr. Howe was visiting in Canada and at the time of the accident was staying at the residence of Mr. and Mrs. Gordon who are Howe's aunt and uncle residing in the Toronto area.

It is germane to understand the circumstances of Mr. Howe and his relationship to his aunt and uncle. Mr. Howe, at the time of the accident, was 25 years of age. He was a native of

Jamaica and his permanent address, at the time of the accident, was in Jamaica. He was employed in Jamaica with an organization described as HR International. He is employed about fifty-five hours per week earning \$4.00 Canadian per hour.

At the time of the accident Mr. Howe had been in Canada five months. He was in Canada as a visitor. He intended to return to Jamaica to his work. He held an open ticket to return to Jamaica at any time and he intended to return some time during the month of the accident.

Howe's legal status in Canada was that of a "visitor".

It appears that Mr. Howe's plans changed as he remained in Canada. He indicates that he was required to remain in Canada because of the accident and the subsequent injuries. Ultimately he apparently decided to remain in Canada permanently and has become married to a Canadian citizen.

During his sojourn to this country Howe stayed with his aunt and uncle at their premises in the Toronto area. Ginella and Dollavar Gordon are married to each other. Evidently Dollavar Gordon is a named insured under a policy of insurance issued by Zurich Insurance Company.

Patrick Howe stated that he is not paying any sort of room and board with respect to his stay with his aunt and uncle. He did not pay any money towards food that he consumed. The food that he ate at their premises was purchased by his aunt without any financial contribution from Howe whatsoever. Howe had no income at the time of the accident from any source.

Howe was using money from his aunt as spending money.

The money that was given to him by his aunt was described as a family loan and that he was going to pay her back at some subsequent point when she came to Jamaica. Howe indicated that he had the money in Jamaica to repay her in Jamaican currency at such time as she came to Jamaica.

### THE LEGAL ISSUE

As Howe, at the time of the accident, was an occupant of a vehicle insured by Progressive, he comes within the definition of "insured person" with respect to statutory accident benefits which Progressive must pay.

However, if Howe is considered to be an insured person under the Zurich policy as a result of being characterized as a dependant of the Zurich policyholder, then he is also an insured person with respect to statutory accident benefits payable pursuant to the Zurich contract of insurance.

Pursuant to the priority provisions set out in the Insurance Act, in such a circumstance, I would conclude that Zurich Insurance has the primary obligation to pay, if Patrick Howe is a dependant of the Zurich policyholder.

It is clear that the real issue in this case is the characterization of Howe's relationship with the Gordons as one of "dependency."

In accordance with the definitions applicable to the statutory accident benefits, dependency is characterized as principal dependency for financial support. The provisions further mandate that a dependency upon Ginella Gordon will be equivalent to a dependency on Dollavar Gordon. Therefore, principal financial dependency on one or both of these individuals is equivalent to dependency on the Zurich insured and makes Zurich primarily liable for the payment of no fault benefits.

While the statutory accident benefits clearly sets out that the test of dependency is for principal dependency and is only focused on financial support, there is considerable doubt about the exact parameters of the evaluation which is required to be undertaken in a case of this nature.

The time interval to be examined becomes important in certain cases. Is it appropriate to look at a person's financial status in relation to another person only at the moment of the accident, for the period prior to the accident, or should we also look at the period subsequent to the accident?

Secondly, should one examine the provision of food and shelter as a form of "financial support"?

Thirdly, does the concept of being "dependent" imply that the support is necessary for an individual's sustained existence?

In my view, in a case of this nature where the status of the individual is characterized as that of a "visitor" at the time of the accident, it is most appropriate to take a look at a significant time period in evaluating dependency issues. In that regard, I conclude that Howe is a person gainfully employed with sufficient remuneration to support himself (and a dependent son). While he had been absent from employment for five months by the time of this accident, he had been gainfully employed prior to leaving Jamaica and had the employment open to him upon his return to Jamaica. He held an open airline ticket to return to Jamaica at any point.

Except to the extent that post accident circumstances might impugn the credibility of other evidence, I do not consider that things which transpired after the accident are relevant to determining dependency at the time of the accident.

No attempt has been made by the parties in this instance, to break down the support given to Patrick Howe into financial and non financial support. The evidence simply suggests that he received all of his spending money, his shelter, and food while he was at his aunt's premises, from his aunt and uncle. Therefore, on the facts of this case, it is irrelevant to attempt to distinguish between these individual components of "support" since all emanated from the same source. It seems appropriate to look at items of shelter and provision of food as components of financial support in some cases.

As to Howe's need for the "support" of his aunt and uncle in order to sustain his existence I entertain considerable doubt. The word "dependent" implies that there is an associated need. One concludes that dependency refers to a relationship where an individual's basic needs are being met by another individual in circumstances where those needs might otherwise not be met. Howe had alternatives open to him. He had the transportation arrangements in place to return to Jamaica at any time. He had significant savings in Jamaica. He had gainful employment in Jamaica. At the moment of the accident he was a visitor in Canada and was sharing premises with his aunt and uncle. However, this was entirely discretionary from his point of view. At any point in time he could have elected to return to Jamaica, to his savings, and to his employment.

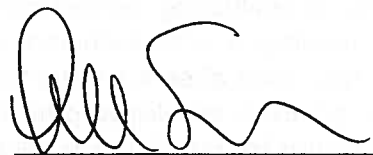
Howe also indicated that the provision of "support" to him by his aunt and uncle was intended to be reciprocated by him. He had the funds in Jamaica to do so and evidently intended to do so when his aunt and/or uncle came to visit him in Jamaica in the future.

I conclude that Howe was receiving the hospitality and generosity of his aunt and uncle at the time of the accident, but that he was not principally dependent upon them for financial support.

#### CONCLUSION

In view of the foregoing findings, it is my conclusion that Progressive is the appropriate insurer to pay the statutory accident benefits with respect to the injuries of Mr. Patrick Howe. The parties have indicated that no further decision is necessary from me with respect to appropriate action to be taken by the insurers in view of these findings.

DATED at Toronto, this 7th day of January, 1996.



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Lee Samis