

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:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

PEMBRIDGE INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Daniel Strigberger for the Applicant

Nawaz Tahir for the Respondent

Introduction

In this matter the two insurers have come before me to resolve a priority dispute with respect to the payment of Statutory Accident Benefits. This dispute, like many others, turns on the question of whether or not the injured individual was principally dependent for financial support on someone who was a named insured under a contract of automobile insurance.

In the circumstances of the accident, if the claimant was not so dependent, then the applicant is responsible for the payment of Statutory Accident Benefits. But if the person's circumstances are such that the claimant can be categorized as principally dependent for financial support on someone who is a named insured under the respondent's policy, then it is the respondent insurer that has an obligation to pay for the Statutory Accident Benefits.

As we have seen in countless of these cases over the past 25 years, the debate turns on seeking out an understanding of the true financial relationship in a household at the time of an accident. Not surprisingly, many of these disputes involve vague evidence, incomplete documentation, and a wide divergence in views as to what constitutes "dependency". The

evolution of case law on the topic is helpful to focus the thinking of the participants. But the challenges associated with the fact finding exercise are sometimes significant.

Documentary Record

The essential facts associated with this case are set out in Exhibit 2 to this proceeding which is an Agreed Statement of Facts entered into by the parties.

We learn from that statement of facts that this dispute arises out of a claim for Statutory Accident Benefits in respect of an injury sustained by one Jared E¹. It is understood that he was a pedestrian at the time of the accident. This is important because it eliminates the possibility of him being considered as a "occupant" of some vehicle and that status can be important for dealing with priority in certain circumstances. It is understood that he was struck by a car driven by Ryan C. For the purpose of this priority dispute Ryan C.'s involvement in this incident is irrelevant except for the fact that the vehicle he was operating was insured with the respondent Pembridge. As a result of being a person involved in an accident with a vehicle insured by Pembridge, Jared E. comes within the broad description of persons insured under the Pembridge policy.

However, if Jared E. was principally dependent for financial support on his father at the time of the accident, then Co-operator's policy would also encompass Jared E. as an insured person.

The rather wide net cast by the provisions defining insured persons serves the valid policy goal of providing coverage for almost anyone who may be involved in a motor vehicle accident. The price to be paid for that broad umbrella is that we have many cases, such as this one, where a person might be considered an insured person under more than one policy. Hence, section 268 of the *Insurance Act* sets out certain priority rules to sort out which of the insurers must be ultimately responsible for the payment of the benefits.

These rules are all familiar to the parties to this arbitration. It is well understood what the priority rules are as applicable to this particular case. The key issue comes down to a determination of whether or not Jared E. was principally dependent for financial support upon his father, Bruce E., at the time of the accident. If he was so dependent, then the responsibility for Statutory Accident Benefits resides with the applicant, Co-operators. If he was not dependent in that manner, then it appears that priority would reside with respondent, Pembridge Insurance Company.

The question of what constitutes dependency for the purpose of the regulation has been the subject of regulation provision and numerous cases over decades. The key concept is that we are looking for the status of the individual as someone who is principally dependent for financial support. The key concepts are that the support is financial, that it is in the nature of dependency, and that it is "principal" dependency not "total dependency" or "partial dependency".

¹ In consideration of the privacy interests of non-parties who were required to provide information about their personal affairs, I have deleted reference to surnames.

Principal dependency has been recognized by many decisions as requiring only that the person is more than 50 percent dependent on that source. Phrased differently, the person must be more dependent on the source than on any other source in order to be "principally dependent".

Over many years the arbitration of these disputes has led to some well-understood rules of interpretation.

First and foremost, we need to recognize that dependency based on factual circumstances has a temporal element. Meeting a person's needs and judging the person's resources require us to examine the evidence in respect of a particular period of time in order to make an appropriate evaluation. Ultimately we want to know what the person's status was at the time of the accident. But is not the moment of the accident that yields the useful information. It is an understanding in a more general way what that person's dependency status is at that time, based on an appropriate window of time that usually precedes the accident circumstances.

Selection of an appropriate time window can be pivotal in arriving at an appropriate determination.

Additionally, we need to be particularly mindful of both the principles that case law has established for us in determining dependency questions, and particularly with respect to the general standard of living in the household. In the Court of Appeal case of *Miller v. Safeco*, in 1985, the court considered the concept of financial dependency in respect of automobile insurance, albeit in another context. Subsequently courts and arbitrators have repeatedly applied the *Miller v. Safeco* analysis to these Statutory Accident Benefits priority disputes. A key factor emanating from that is that we are not to take into account the general standard of living in the household when determining dependency. A determination of dependency is not to be measured against a higher lifestyle cost just because a person is accustomed to that higher lifestyle/cost. No doubt the injured person enjoyed the benefit of an enhanced standard of living, but that is not the same as measuring dependency which implies meeting a person's needs with respect to food, shelter and the other necessities of life. This important factor is also relevant to the case at hand.

Based on Exhibit 2, we know that Jared E. was a relatively young person, less than 23 years of age at the time of the accident. His living arrangements at the time of the accident are well known. He was living with his father. His father is the insured under the Co-operators' policy. A brother was living in the household at the same time.

It is understood that that living arrangement had subsisted for approximately a year at the time of the accident.

Jared E.'s employment status seems to have varied over the preceding year. At the time of the accident he was employed at Vuteq. There is varying evidence about the remuneration associated with that employment. At one point it is indicated that he earned \$1,100.00 to \$1,200.00 net every two weeks. At another point it was indicated that he earned \$9,558.00 gross over 3 months. I do not find this evidence particularly inconsistent but it is expressed in terms which makes it hard to compare.

The record does not disclose any particular special needs for this person. There is no indication of any extensive medical or other needs which would make him more dependent for financial support than any other person in the community.

The Agreed Statement of Facts has evidence about the household arrangements and the finances within the household. It is indicated that Jared E. would pay \$140.00 per month for rent. There is no documentation for this and it does seem to be a modest amount of money. In addition to paying for rent, however, he was responsible for his own groceries.

Other than paying for the rent and his own groceries, it is suggested that Jared E. was not responsible to pay for any other bills. His father paid for all of the other monthly expenses in the household which include the following:

1. A mortgage payment in the amount of \$940.00.
2. Monthly property taxes of \$180.00.
3. A monthly heating bill of \$90.00.
4. A monthly hydro and water bill of \$135.00.
5. A monthly phone bill of \$50.00.
6. A monthly cable bill of \$106.00.

There are some non-cash items that are associated with the household. In particular it is specified in the Agreed Statement of Facts that Jared E.'s father or brother provided transportation for him since he did not have a driver's license. It was also indicated that he contributed to the household by being responsible for various household chores.

It was agreed that Jared E. was not responsible to pay for any household items such as towels, dishes, toiletries, furniture and other such items.

In addition to that description of the household arrangements, the Agreed Statement of Facts gives some community context with respect to accommodation costs. It is reported that according to CHMC that the average rent, in April 2011, for a 3-bedroom apartment in the community was \$1,029.00 per month.

The Submissions of the Parties

Co-operators takes the position that the most appropriate timeframe for examining the dependency status is the three months prior to the accident during which time Jared E. was employed on a full-time basis with Vuteq. Co-operators further takes the position that meeting the cost of Jared E.'s needs is the appropriate test of dependency and that it is not relevant to look at the actual benefits that Jared E. received in his household.

Co-operators submits that the monthly income of \$2,700.00, or more, is vastly more than his needs and vastly more than meeting the cost of his modest lifestyle.

The submission of Pembridge turns on asking us not to look at a pure mathematical analysis but to look at "the big picture". As submitted by Pembridge "this means that the financial relationship generally should be considered when making such a determination." Pembridge points out that a mathematical calculation is an estimate that contains many assumptions.

Pembridge argues that I should decide who is contributing most to the claimant's expenses. The viability of Pembridge's position hinges on that last assertion. By their calculus, Jared E.'s father was the person contributing most to Jared E.'s needs. By providing him with the shelter and transportation it is argued that the father was contributing more to meeting Jared E.'s needs than Jared E. was contributing.

Pembridge also argues that the 3-month window is not appropriate and that looking at Jared E.'s resources and expenses over a full year before the accident would be more accurate.

Analysis

With respect to the time window in this case, I am not persuaded that I should look at anything other than the 3-month time window leading up to the accident. During that 3-month time window Jared E. was living in the household with his father and brother, as he was on the day of the accident. During that same time window he was employed on a full-time basis at Vuteq, as he was on the day of the accident. To enlarge that window to look at a period of time prior to his employment at Vuteq which would be to distort the dependency analysis by measuring conditions that did not subsist at the time of the accident. I decline to do so.

In my view, looking at Jared E.'s circumstances for the 3 months prior to the accident is the most reasonable timeframe to give a fair reflection of his status on the date of loss.

I turn to the competing arguments on how one should measure dependency, whether we should measure the individual's resources against the cost of meeting his needs, or whether we should, as argued by Pembridge, look at who is contributing most to meeting his needs.

It may well be, as Pembridge asserts, that Bruce E. is contributing more to meeting the needs of Jared E. than Jared E. is contributing. He is getting accommodation and all the ancillary costs of the accommodation are paid by his father. He is contributing the \$140.00 per week which seems to be a modest amount in the circumstances. Therefore it does seem reasonably likely that Bruce E. is contributing more than Jared E. to the cost of meeting Jared E.'s needs.

However, with his employment income Jared E. had vastly more resources and was capable of contributing more towards meeting his needs. He simply wasn't required to do so. This, in my view is a critical difference in analysis. Jared E. was receiving a benefit from his father but he did not depend upon that benefit. He was able to meet his own needs if he was required to do so or if he chose to do so. I point out that this is very much the situation that was considered in the often quoted case of *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company*. In that case Jonathan S. received significant benefits from his parents:

"They provided him with food and shelter. They gave him some spending money on occasion. He earns a significant income but he was allowed to spend this freely, and was not required to pay for any of his own basic needs. His lifestyle was enhanced by the assistance from his parents....

In short, he was not providing for any of his own basic needs. Nonetheless he had the reasonable ability to do so."

In that case, I determined that Jonathan S. was not principally dependent for financial support on his parents even though they actually provided him with virtually all of his support. The

Federation v. Liberty case was upheld on appeal and a further appeal to the Ontario Court of Appeal was dismissed with a brief endorsement.

The case at hand shows quite clearly the fallacy in examining whether or not some person contributed more to Jared E.'s needs than he contributed himself. The reality is he has significant income. Given his very significant income he doesn't actually "depend" on anybody. He can, if he chooses, meet most of his own needs. Accepting the generosity and support of his parent does not make him a person who is principally dependent for financial support within the meaning of the regulation.

I continue to be of the view that the preferred way to calculate whether or not a person is principally dependent for financial support is to examine their resources against the cost of meeting their needs.

I have some reluctance to endorse the "big picture" approach which seems to me to be a reaction to the fact that we have doubts about the accuracy and completeness of the evidence that we can garner about dependency issues. Adjudicators and parties frequently see that the marshalled information is incomplete, that documents and specificity are lacking, that the witnesses are indifferent and that memories have faded. I have seen this often. It is a valid concern that we are relying on imperfect evidence.

Against this background there is discomfort with undertaking a precise mathematical analysis in dependency cases. Such approach implies a level of certainty that does not exist in every case. In such cases it is indeed tempting to back off from making findings with (unjustified) precision implied. But I am inclined to resist that temptation. In my view it is preferable to do our best, however imperfectly, to determine a person's resources and to compare that with the cost of meeting most of their needs. It is a principled approach, albeit fraught with uncertainty in some cases, but that is why we need adjudicative processes to make determinations in the cases which are close calls. Therefore, I prefer to attempt a quantitative evaluation of dependency whenever possible.

As we conduct that process, we frequently find ourselves looking at a person's household circumstances in order to determine the cost of meeting that person's needs. That finding is the denominator of the 50% formulation. That finding is pivotal in a dependency case.

Often the evidence led on this point focuses on the person's household circumstances at the time of the accident. I again point out that a person's household circumstances may or may not be reflective of the cost of meeting their needs. In some circumstances, it may be that the household standard of living is very high and that the cost of maintaining that household far exceeds the cost of meeting the individual's needs. We have been directed by the Court of Appeal in *Miller and Safeco* to disregard this factor. I adhere to that guidance.

This takes me to the point of measuring Jared E.'s resources against the cost of meeting his needs. This means making some judgment about what it would cost for him to be provided with the necessities of life, mostly food and shelter. The relevance of this is a function of the person's resources. In this case the resource of income is paramount and substantial. We can most succinctly evaluate the dependency hypothesis by extrapolating from the known resources and asking whether or not the cost of meeting Jared's needs is more than twice the resource amount. I agree therefore with the analysis in *Co-operators' Factum* whereby it is suggested that his minimum monthly income of \$2,700.00 mathematically makes him independent unless the cost of meeting his needs exceeds \$5,400.00 per month.

In fact there is evidence upon which one could conclude that the number is even higher than \$5,400.00 per month. But it is of no consequence. The cost of meeting Jared E.'s needs in a community where a 3-bedroom apartment can be rented for \$1,029.00 per month, can never come remotely close to a number that would make him principally dependent for financial support on anyone else, within the meaning of the regulation. His steady and established income of \$2,700.00 or more per month precludes Jared E. from being principally dependent for financial support on any other person.

Conclusion


I find that Jared E. was not principally dependent on Bruce E. at the time of the accident. Therefore, Pembridge is the insurer responsible for payment of Statutory Accident Benefits for Jared E.

The parties have provided for costs in the Arbitration Agreement by leaving that item to my discretion.

If either party wishes to make submissions on the question of costs, I ask that this be done within the next thirty days.

If there are any remaining matters to be addressed that the parties are unable to work out, I look forward to hearing from counsel and we can arrange a telephone call to address those matters.

Dated at Toronto this 25th day of June, 2015.



LEE SAMIS
Arbitrator