

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:

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and -

ING INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing

Tricia J. McAvoy for the Applicant

Robert G. Plate for the Respondent

Introduction

This matter is a priority dispute between two insurers. Each of the insurers are automobile insurers in the Province of Ontario. There is a dispute between them as to which insurer has priority to pay statutory accident benefits in this matter in respect of Tudose R.¹

Tudose R. was injured in a motor vehicle accident which occurred on October 11, 2007. At that time he was a visitor to Canada. He had come from Romania which was his home. He had come to visit and stay with his son for a period of months.

During his stay in Canada he was a guest at his son's home.

The essential issue in this case requires us to determine whether or not he was principally dependent for financial support upon his son at the time of the accident.

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

Legislative Background

Statutory accident benefits are payable in Ontario to people who are injured in motor vehicle accidents. The scheme contemplates that every person who is injured in a motor vehicle accident would have available to him or her an insurance policy which would require the insurer to provide the available benefits. The compensation scheme is constructed so that every insurance policy has a broad range of insured persons described so that there would be ample opportunity for accident victims to find available benefits. Consequently, any person who is injured in an automobile accident in Ontario is likely to be an insured person under more than one policy of insurance because of the broad definitions that apply.

Section 268 of the *Insurance Act* sets out priority rules distinguishing between the various levels of insurance response available.

In this case, the Applicant, Allstate, is the insurer of the claimant's son, Romeo R. The Respondent insurer, ING, is the insurer of the vehicle involved in the accident with the claimant. At the time of the accident, the claimant was not the occupant of the motor vehicle.

In these circumstances, the claimant is within the definition of insured person in respect of the policy of insurance issued by ING and is also an insured person of the policy of insurance issued by Allstate, but if, and only if, at the time of the accident he was principally dependent for financial support upon Allstate's named insured, Romeo R.

The priority rules set out under section 268 of the *Insurance Act* mandate that the policy issued by Allstate would be the higher ranking coverage if indeed the claimant was principally dependent for financial support upon Romeo R.

The claimant applied for benefits from Allstate and Allstate has been paying those benefits as required by Ontario Regulation 283/95. Neither the application nor the payment by Allstate is determinative of the priority issue.

The Records in these Proceedings

The parties were able to assemble a documentary and evidentiary record for the purpose of this proceeding which allowed the parties to focus directly on the controversy. This is an efficient way of dealing with this kind of dispute and has worked well in this matter.

The parties entered into an Arbitration Agreement which was marked as Exhibit #1 to these proceedings.

The parties also submitted an Agreed Document Brief as the record of evidence. This Agreed Document Brief was marked as Exhibit #2 to these proceedings. In the Agreed Document Brief, there is an Agreed Statement of Facts setting out those non-controversial matters. Beyond that, there are a number of documents in the Agreed Document Brief, and it is understood that I may choose to accept or reject the evidence contained in those other documents, whether hearsay or not.

Included in the Agreed Document Brief are previous statements of various parties, the transcript of an Examination under Oath of Romeo R., and various other records.

The Circumstances

This accident took place on October 11, 2007. Tudose R. was a non-occupant of a motor vehicle when he was struck by a vehicle insured by ING. He was a resident of Romania and was in Canada on a visitor's permit at the time. Both Tudose R. and his wife were visiting in the Toronto area with their son Romeo R. Romeo R. lives in Canada with his own family consisting of his wife and two small children.

Mr. and Mrs. Tudose R. are ordinarily residents of Romania. They have their own apartment in Romania, which they own. They have their own income in the form of pension income in Romania.

It is understood that the monthly pension income received by Mr. R. in Romania is roughly equivalent to \$340.00 Canadian dollars per month.

While they are in Romania, Mr. and Mrs. R. are financially independent. None of their children contributed to their expenses or provided any financial support to their parents. In 2007, Mr. and Mrs. Tudose R. came to the Toronto only to visit with their son, Romeo. Their airfare was paid for by Romeo R.

When they came to the Toronto area, they stayed with Romeo R. and his family. Their needs in Ontario were met by Romeo R. and his family. They provided food and shelter and ultimately became responsible for providing medical care when that necessity arose.

No money changed hands in respect to this arrangement but it is clear that Mr. and Mrs. R. provided various services to Romeo R.'s household in the nature of taking the children to and from school, and staying with the children in the home. Part of Allstate's argument involves recognition of these items as having a monetary value and offsetting the monetary value of benefits received from the family of the son in the form of food and shelter.

The status of the claimant in Canada at the time of the accident is absolutely clear. His visit was a temporary one. He had a return ticket to Romania and was required by the terms of his admission to return to Romania. His intention was in fact to return. Indeed there appears to be two prior trips when the claimant visited Canada and returned to Romania afterwards.

I have no hesitation in finding that the claimant's presence in Canada was a temporary presence for the purpose of visiting with his son and daughter-in-law and their children.

The record is also quite clear about the financial arrangements with the family during the period of their stay in Canada. Essentially, all of the claimant's needs were met by the son's resources.

It is against this factual background that I am asked to determine whether or not Tudose R. was principally dependent for financial support on his son or his son's spouse at the time of the accident. If the answer to this is affirmative, then the Allstate policy is primary. If the answer is negative, then the ING policy is primary.

Analysis and Law

There are now many decisions from arbitrators and courts dealing with priority disputes that are based on dependency issues. It is well settled that one of the key tasks before the arbitrator is to determine an appropriate time window during which the financial relationship should be analyzed. The determination of the time window is often determinative of whether or not the person will be considered principally dependent for financial support.

It is well recognized that a momentary snapshot at the date of the accident is not necessarily truly reflective of the relationship between the parties. It is necessary for the arbitrator to define some window of time to examine and to look at the needs and support in the context of that time frame. That is a major issue in this case.

It is clear that if one looks at a time frame larger than the visit to Ontario, then the claimant is not principally dependent for financial support upon his son or his son's spouse. He was living with his wife in an apartment that was paid for, with independent pension in Romania. They survived on their own resources.

On the other hand, if an appropriate window for evaluation consists entirely of time during which the claimant was present in Ontario for this visit, then the calculation is much less clear. In such circumstances we would have to weigh the value of the support provided by the son in the form of food and shelter and so forth and possibly offset for the financial worth of contribution made by the claimant to the household. Only if the financial support provided by the son was more than double the resources contributed or contributable by the claimant would the law consider the claimant to be principally dependent for financial support upon his son.

I have examined the facts and circumstances in this case and I am mindful that it is important to select a time frame for evaluation of these issues which properly reflects the true nature of the relationship between the parties at the time of the accident. In my view, there is little doubt here that this relationship is not truly reflected by the status at the time of the visit. The visit was clearly a temporary one. For the most part, the relationship is a long distance relationship with the parents living in Romania and the offspring living in various other locations. For the most part, the parents are not in any part dependent for financial support upon one or all of their children.

The presence in the household in Ontario was entirely transitory, for the purpose of a visit with the family.

In my view, it is not logical to extrapolate a temporary situation of this nature to be reflective of the true nature of a financial dependency. Indeed, Tudose R. had his income in the form of a pension and his property in Romania available to him at any time, as well as a return ticket to Romania. Truthfully, he was not at all dependent for financial support from his son or his son's spouse. He was entirely at liberty to return to Romania at any time and live independently in the circumstances which prevailed prior to his visit.

For both of these reasons, I find it most appropriate to examine a window of time that includes the period of time that the claimant resided in Romania and is not confined to looking at the time frame during his visit to Ontario.

As a result, I conclude that at the time of the accident Tudose R. was not principally dependent for financial support upon his son or his son's spouse.

I am comforted in this conclusion by reviewing the various cases that have been put before me on this issue, and in particular I note the case of *Progressive Casualty v. Zurich Insurance*² dated January 7, 1996 and the case *Lewandowska v. Gain Canada*³, a decision of Justice MacPherson.

Both of these cases were cases involving claimants who were visitors to Ontario, and in both cases it was concluded that the person was not principally dependent for financial support upon their host.

In the *Progressive* case, Howe was a visitor to Canada from Jamaica. He was staying with his aunt and uncle in Canada. In that case I have made the following observations:

"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 and 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 anytime. 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."

In that case, I concluded that Howe's receipt of the hospitality and generosity of his aunt and uncle at the time of the accident did not make him principally dependent upon them for financial support as contemplated by the Regulations.

In the *Lewandowska* case, a similar issue came on for hearing before Justice MacPherson. In that case, the question was whether or not Lewandowska was principally dependent for financial support on her uncle at the time of the accident.

Lewandowska was a visitor from Poland. In Poland she was supported by her parents and she had part time employment. At the time of the accident, Lewandowska was a guest of her uncle in Canada. He provided accommodation, food, and some incidental expenses. Lewandowska's personal resources during the course of her 10 week visit were limited to less than \$300.00. Justice MacPherson held as follows:

"Nevertheless, I do not think that these factors create a legal relationship of dependency between Lewandowska and her uncle. I am of the opinion that she was a tourist. She was well treated by her uncle, as one would hope in a family situation. But her daily expenses in Poland when she lived and where she would return after her vacation were met by her parents and her own contributions. Moreover, soon after the accident her mother came to Canada to look after her and she paid some of the expenses during her stay. This is a clear signal of the real dependant relationship. It is a parent-child, not uncle-niece."

² *Progressive Casualty Insurance Company of Canada v. Zurich Insurance Company*, January 7, 1996, Arbitrator Lee Samis

³ *Lewandowska v. Gain Canada* (1996) O.J. No.5102, (ON.GEN.DIV.) MacPherson J.

Similar to the *Lewandowska* case, in the case at hand I think it is most appropriate to look at the status of the visitor in a larger time frame, and not to focus on the time frame of the visit.

Counsel for ING referred to the case of *Dominion v. Zurich*⁴, a decision of Arbitrator Robinson from September of 1999. I find the facts of that case to be significantly different than the facts of the case at hand. Arbitrator Robinson was dealing with a situation where the claimants had essentially immigrated to Canada and where they had assumed a more or less permanent relationship. This is far from the situation for Tudose R.

In my view, the fundamental characteristic of the dependency relationship is to examine an individual's ability to fend for themselves. The fact that someone takes a vacation, and during the course of that vacation benefits from the hospitality and courtesy of a friend or family member, does not create a financial dependency relationship. To infer such status from the time limited presence of a visitor in Canada miscasts the true status of the individual.

Having concluded that the most appropriate time frame is not the time of the visit, I would look at a very much larger time frame, spanning years, not weeks. In the larger picture the visit is an aberration. The independence of Tudose R. is established on the record before me. He had shelter and adequate income to meet his needs. There is no question of him needing any support from Romeo R., let alone meeting the much tougher test of being "principally dependent for financial support".

The Regulation, as applied in many cases, requires an examination of "principal dependency". This would require ING to establish that Tudose R. requires support from Romeo R. for meeting 50% of his cost of needs. This is a high bar that is not in range in this case.

Therefore in any appropriate time frame, Tudose R. is not dependent, as that term is used in the Regulation, and interpreted by the cases.

Conclusion

For all of these reasons, I conclude that Tudose R. was not principally dependent for financial support on his Romeo R. Therefore, Romeo R.'s insurer is not obliged to treat Tudose R. as a "named insured". Allstate has no SABS obligations at all, let alone a SABS obligation that is higher ranking than the obligation of ING.

Under the *Insurance Act*, ING has obligations to the claimant as being the insurer of the vehicle which struck the claimant while he was a pedestrian.

Therefore, ING has the obligations with respect to Statutory Accident Benefits.

I conclude the priority in respect of the claims of Tudose R. lies with ING Insurance Company of Canada.

⁴ *Dominion of Canada General Insurance Company v. Zurich Insurance Company*, September 27, 1999, Arbitrator Bruce Robinson

If counsel wish to make any submissions with respect to costs or any other matters, I will look forward to hearing from them within the next 30 days.

Dated at Toronto this 18th day of August, 2011.

A handwritten signature in black ink that reads "Lee Samis". The signature is written in a cursive, flowing style.

LEE SAMIS
Arbitrator