

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, as amended, Section 275;

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

PAFCO INSURANCE COMPANY

Applicant

- and -

**AXA INSURANCE and THE DOMINION OF CANADA GENERAL INSURANCE
COMPANY**

Respondent

DECISION

COUNSEL:

Ian D. Kirby for the Applicant

M. Greg Abogado for the Respondent AXA Insurance

Neil Colville-Reeves for the Respondent Dominion of Canada General Insurance Company

ISSUES:

1. Was Justin Dekker principally financially dependant upon his father Neil Dekker or grandmother Wilhelmina Dekker at the time of the accident?

DECISION:

1. Justin Dekker was not principally financially dependant upon his father Neil Dekker or his grandmother Wilhelmina Dekker at the time of the accident and accordingly Pafco Insurance Company is responsible for payment of accident benefits to or on behalf of Justin Dekker.

HEARING:

This arbitration hearing was held in the City of Toronto, in the Province of Ontario on November 7, 2008. No witnesses were called and the hearing proceeded on the basis of documents filed.

FACTS & ANALYSIS:

This priority dispute arises out of a motor vehicle accident that occurred on July 11, 2006. On that date 23 year old Justin Dekker was on a bicycle that was struck by a motor vehicle insured by Pafco Insurance Company (“Pafco”). At the time of the accident Justin had no motor vehicle liability policy nor was he a named or listed driver or a spouse of any of the above. Justin suffered injuries as a result of the accident and claimed and received statutory accident benefits from Pafco. Although paying benefits, Pafco has taken the position that at the time of the accident Justin was financially dependant upon his father, Neil Dekker, or his grandmother, Wilhelmina Dekker. At the time of the accident Neil Dekker had a motor vehicle liability policy with AXA Insurance Company (“AXA”) while Wilhelmina Dekker had a policy with Dominion of Canada General Insurance Company (“Dominion”). If Justin was principally dependant for financial support on either his father or grandmother, then either AXA or Dominion respectively would be responsible for payment of accident benefits to or on behalf of Justin Dekker.

Before conducting a full analysis of Justin’s financial situation it is perhaps worthwhile to give a brief overview of his situation in the few years prior to the accident.

At the time of the accident Justin was 23 years of age. He had originally left school in 2000 at the age of 17 and held a variety of relatively low paying jobs in the food industry, and sporadically attended school. He lived outside the home until 2003. At that time he returned home to live with father, Neil Dekker, and his brother at 6094 Stevens Street in Niagara Falls, Ontario. While he remained there until the accident of July 11, 2006, his father and his grandmother essentially “switched” residences on June 10, 2006. Wilhelmina Dekker moved in to 6094 Stevens Street and was responsible for the associated carrying costs of that residence, while Neil moved into Wilhelmina’s old residence and was responsible only for the costs of that residence as of June 10, 2006. Justin and his younger brother remained at 6094 Stevens Street until the time accident. Throughout the entire time Justin lived at Stevens Street, he paid nothing for food or shelter to either his father or grandmother.

FINANCIAL DEPENDANCY:

In order to be “financially dependant” of a named insured, pursuant to Section 2 (6) of the Statutory Accident Benefits Schedule, the person must be “principally dependant for financial support.....on the other person or the other person’s spouse.”.

The courts and arbitrators have held that this in essence means that the dependant person must be financially reliant upon another person for more than 50% of his financial needs.

The Ontario Court of Appeal in Miller vs. Safeco Insurance Company of America, (1984) 48 O.R. (2nd) 451, set out what is to be considered when determining financial dependancy, namely:

- (1) The amount of the dependancy;
- (ii) the duration of the dependancy;
- (iii) financial or other needs of the alleged dependant; and,
- (iv) the ability of the alleged dependant to be self supporting

Determining financial dependancy is particularly difficult in cases where a young adult is involved. They are often in a period of transition with their financial needs and revenues changing. They receive money or other financial support such as food and shelter from various

sources. In Justin's case, the parties to this arbitration have been able to agree on a large number of issues regarding revenues and expenses, and the primary disagreement revolves around the appropriate time frame to use when determining financial dependency.

The courts and arbitrators have generally agreed that in considering the appropriate time frame to determine financial dependency one does not simply take a "snapshot" of the injured person on the date accident, but rather looks at the time frame before the accident that most accurately reflects their financial situation. Counsel before me proposed three possible time frames:

- (i) March 2006 until July 11, 2006
- (ii) June 10, 2006 until July 11, 2006
- (iii) Twelve months prior to the accident

The twelve month time frame might be appropriate if there were no significant changes in Justin's financial or life situation during the twelve months preceding the accident. However, in late March, 2006, Justin returned to school in order to obtain some of his remaining high school credits. He then worked for the summer and planned on getting his final high school credits starting in September of 2006. In the long term he would then ideally proceed to community college. While it is somewhat unclear, it what appear that Justin would have probably worked part time at Boston Pizza or another establishment and attend school in September 2006. On all the evidence, one is left with the impression that Justin's situation did change in late March 2006, in that he was going to be a student but also earn some income in the summer and part time during the year. The evidence was that Justin attended school from March 27, 2006 to May 9, 2006. He then worked on construction and later at Boston Pizza, part time up to the time of the accident. I am satisfied on the evidence that the decision to return to school amounted to a change in circumstances that would affect Justin financially. While we cannot be certain that Justin would have continued along this path, it would appear that he had at least commenced that journey and accordingly I do not think it appropriate to use the twelve month period prior to the accident to determine the issue of financial dependency.

If we are to look at the period from late March to July 11, 2006, the date of the accident, this is a period of approximately three and half months. Justin commenced his school work on or about March 27, 2006. Counsel for Pafco submitted that a period commencing a few months prior to that date would be appropriate as it would take some time for Justin to make the decision to return to school, enrol and then finally begin his course work. While I agree that it would take some time to arrive at the decision and to enrol in classes, there was no evidence before me as to when Justin made the actual decision and when he decided to enrol. In addition, until Justin actually started classes he was free to do anything else. When he actually started classes he was committed to spending time at school. Accordingly I think that the appropriate starting date for this potential time frame for financial dependency is March 27, 2006.

Mr. Bruce Webster of the accounting firm, Price, Waterhouse, Cooper, prepared a report for Dominion of Canada in which he suggested that the cost of food and shelter provided for Justin by his father, Neil Dekker, when divided on a per person basis (Justin lived with father and younger brother until June 10, 2006) amounted to \$563.00 per month. If one then takes the period as being three and a half months from March 27 to July 11, 2006; Justin's expenses amounted to approximately \$1,970.00. One must remember, however, that Justin's father Neil only provided the food and shelter until June 10, 2006, when he moved out. Thus Neil provided room and board for approximately 2.5 months or amounting to approximately \$1,407.50. Wilhelmina Dekker provided shelter for approximately one month, that, according to the evidence amounted to \$399.00. During that month Justin ate primarily at Boston Pizza, where he worked.

During the March 27 to July 11, 2006 time frame, Justin earned income from two sources. He worked on construction for 3-4 weeks commencing approximately May 10, 2006. It is unclear exactly how much Justin earned during that time frame, as he was paid cash weekly, in an envelope. He did state at examinations for discovery, a transcript of which was filed at the hearing, that he received approximately \$1,000.00 in one of the envelopes and he was not sure of the others. I would conservatively estimate his income from construction at \$2,500.00. In addition, he worked at Boston Pizza from June 25, 2006 until the time of the accident, earning \$873.00. Accordingly, his income for the March 27, 2006 to July 11, 2006 time frame was

\$3,373.00. This amounts to \$973.00 per month. This is clearly more than either Neil or Wilhelmina Dekker provided by way of food and shelter. Accordingly, if one takes the March 27, to July 11, 2006 time frame, as I believe is appropriate, Justin was not principally financially dependant on his father or grandmother at the time the accident.

A suggestion was made at the hearing that the appropriate time frame was from June 10, 2006 when Wilhelmina Dekker took over 6094 Stevens Street to the date of the accident. I do not agree that this is the appropriate time frame to use when considering Justin's financial dependancy. Really all that happened on June 10, 2006 was Justin had a change of landlords as his grandmother now had the residence where Justin lived. Things continued on for Justin financially the same as they had before with the exception that Wilhelmina Dekker didn't provide the food that Neil Dekker previously had done. This is primarily because Justin now worked and ate at Boston Pizza.

Even if one were to take the June 10 to July 11, 2006 time frame as the appropriate figure, Wilhelmina Dekker's contribution would be approximately \$ 399.00 per month. During that time frame Justin earned \$837.00 and accordingly he was not financially dependant upon his grandmother.

Based on the evidence, it would appear that Justin's needs were fairly basic, being primarily food and shelter. While he did not earn a great deal of money, he did earn more than he received from any other individual source, and accordingly I find that he was not primarily financially dependant upon his father or grandmother at the time of the accident.

My conclusion in this regard is fortified by a statement made by Justin's father Neil at his examination for discovery. Mr. Dekker was asked:

Q. Now Sir, after you moved out of the ah - - the - - property in Stevens in - - in June of - - ah - - 2006 - - ah - - did you - - ah - - in - - in terms of your plan - - ah - - moving forward - - did you plan on supporting Justin?

A. No.

Q. And when you say no, what - - what do you mean by that?

A. No

Q. Okay. Ah ...

A. Like Justin - - Justin was self-sufficient. He was - - he was 22 years old - - uhmm - - uhmm - - a grown man who didn't wanna work. Uhmm, it - - he needed - - okay - - time for you to move on. And this wasn't - - and this wasn't a new thing with Justin. This was an ongoing thing with Justin. You know, Justin was - - and as he had done for years previous, he took care of himself and only himself. So, he was expected to do it again. He was a - - he was planning to move forward - - uhmm - - and that's - - we just kind of pushed towards it. Say, this is where you're gonna go now.

In light of the above, I find that the appropriate time frame for consideration of Justin's financial dependancy was March 27, 2006 to July 11, 2006 and during that time frame he was not principally financially dependant upon his father or grandmother. Rather he was primarily financially dependant upon himself. Accordingly, Pafco is responsible to pay statutory accident benefits to or on behalf of Justin Dekker.

In the event that the parties are unable to agree with regard to the issue of cost I may be spoken to.

Dated at Toronto, this _____ December 2008.

M. Guy Jones
Arbitrator