

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I.8, s. 268, and
Regulation 293/95 thereunder;

AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c. 17;

AND IN THE MATTER of an Arbitration

BETWEEN:

TTC INSURANCE COMPANY LIMITED

Applicant

-and-

THE CO-OPERATORS

Respondent

AWARD

Introduction

This matter is an arbitration brought before me by two insurance companies in a dispute as to which of the two insurance companies has the priority to pay statutory accident benefits as a result of an accident which occurred on November 10, 2002.

In that accident an individual, who I will refer to as "Dipo M." was injured.

The parties executed an Arbitration Agreement appointing me as an arbitrator to determine this issue. In accordance with *Ontario Regulation 283/95*, this arbitration is conducted in accordance with the *Arbitration Act*, 1991.

The parties are sophisticated insurers engaged in the business of automobile insurance in the province of Ontario. They understand that the statutory regime in place in Ontario requires the payment of accident benefits in accordance with ranking provisions which are set out in section 268 of the *Insurance Act*.

In accordance with the provisions in the *Insurance Act*, Dipo M. would be considered an insured person under the policy of insurance issued by Co-operators if Dipo M. was principally dependant for financial support on her daughter, Narinder T., or her son-in-law, Balbir S. Balbir S. apparently was the named insured under a standard automobile policy issued by Co-operators.

The applicant, TTC Insurance Company Limited, is the insurer of a motor vehicle that struck Dipo M. If Dipo M. is not principally dependent for financial support on her daughter and/or son-in-law, then the applicant is the proper insurer responsible to pay the statutory accident benefits in this instance.

Proceedings

The parties entered into an Arbitration Agreement, which has been marked as Exhibit "1" to these proceedings. The question posed by the Arbitration Agreement is as follows:

"Was Dipo M. a dependant within the meaning ascribed to that term in the Bill 59 *Statutory Accident Benefits Schedule*, upon Balbir S. at the time of the subject accident?"¹

The Arbitration Agreement was marked as Exhibit 1 to the proceedings. The parties also entered into an Agreed Statement of Facts. They were able to reduce the evidentiary record to this Agreed Statement, and this matter is proceeding on the record, in the absence of any *viva voce* testimony. The Agreed Statement of Facts was entered into the record as Exhibit "2".

Dipo M. also provided a statement dated March 28, 2003. That statement recites many pertinent facts, and that was entered into the record as Exhibit "3" to the proceedings.

Dipo M. filed an Application for Accident Benefits to the applicant. That Application for Accident Benefits, dated January 8, 2003, was marked as Exhibit "4" to the proceedings.

An Employer's Confirmation of Income form dated January 8, 2003, was also filed as an exhibit to these proceedings, being marked as Exhibit "5".

In addition to the mentioned evidence record, the parties made submissions on the legal issues and made reference to various cases for my consideration.

The issue to be determined

The essential question in this case is one of dependency. Under the policy issued by Co-operators to the claimant's son-in-law, the claimant would be considered an insured person if she is a dependant of the Co-operators' insured, her son-in-law. The Regulation in place at the time provides as follows:

"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 or same-sex partner."

Essentially, I am asked to determine whether or not Dipo M. is principally dependent for financial support on her son-in-law and/or her daughter.

The Evidence

An Agreed Statement of Facts was marked as Exhibit 2 to the proceedings, and documents including a statement and claims forms were also marked as exhibits. The initial accident benefits claim form, dated January 8, 2003, was submitted to the applicant. In Part 7 of the application is found the following statement:

"I and my daughter are both primarily responsible for taking care of my great-grandchildren. I would normally provide daily babysitting

¹ I have edited the question to delete surnames of the non-parties.

services for my two great-grandchildren, aged four years and six-month-old baby that are dropped off at my residence.”

In Part 8 of the application, it is indicated that the claimant has been employed from 1998 to November 2002 doing babysitting at approximately 14 - 16 hours per week for a gross income of \$175.00 per week.

Exhibit 5 is the Employer's Confirmation of Income form to support the claim for loss of income. That form is dated January 8, 2003 and is also completed by the claimant's daughter. Under Part 6 of the form, it indicates that the job description is "child care and meal preparation babysitting two young children". In Part 4 of the form, it indicates that the last four weeks of employment yielded gross weekly income of \$125.00, \$100.00, \$175.00, \$150.00. It is also reported that the gross income for the last 52 weeks before the accident was \$7, 200.00.

Exhibit 2 to the proceedings was an Agreed Statement of Facts and developed by the parties. The Agreed Statement of Facts recites that the claimant resided at 31 Douglas Haig Drive in Markham, Ontario with her daughter, Narinder T., and her son-in-law, Balbir S. At the time of the accident Dipo M. was a 77-year-old widow residing with her daughter and son-in-law. She spoke only the Punjabi language. She was employed in a babysitting capacity by her granddaughter, Nina T., who resides at 33 Douglas Haig Drive, which is next door to the claimant's residence. The claimant worked approximately 14 – 16 hours per week babysitting her great-grandchildren at her own residence, 31 Douglas Haig Drive. The Agreed Statement of Facts recites that the claimant was paid approximately \$175.00 per week, but that this amount would be reduced if her granddaughter bought her clothing or other items during the week.

The claimant has been in Canada since 1993 and has resided with her daughter and son-in-law since that time. At the time of the accident, she had no other source of income other than the income from her employment as a babysitter. She did receive government payment for medical prescriptions but otherwise did not receive any government assistance. She has not held any other job in Canada and was not employed outside of the home while she resided in India. The claimant has assets in India, but they do not generate any income, and the assets consist of a small piece of property of unknown value. The claimant has other family members both in India and in Canada, but those family members do not provide financial assistance to her.

It is agreed that prior to the accident the claimant performed daily household chores in the home, including cooking and cleaning. She was also active as a volunteer at her temple. Transportation to and from the temple was provided by her son-in-law or her daughter.

The claimant's daughter had not worked for an extended of time at the time of the accident. The arguments put forward in this hearing are, in large part, directed at the implied support to the claimant as a result of her benefiting from residing in the household. The parties have put into the Agreed Statement of Facts, a summary of the household expenses as follows:

- a) Mortgage, including property taxes = \$1,600.00 per month
- b) Hydro = \$300.00 to \$350.00 per every two months
- c) Gas/Heating = \$192.00 per month
- d) Phone = \$50.00 per month
- e) Cable = \$60.00 per month
- f) Truck loan = \$800.00 per month
- g) Food = \$150.00 – \$200.00 every week – every two weeks

It is agreed that the claimant did not contribute to the payment of any of the household expenses. She used her babysitting income to buy gifts or to make donations to her temple. The claimant's clothing was purchased either by her daughter or her granddaughter, for her.

Subsequent to the argument in this case, and in accordance with discussions at the hearing, counsel for Co-operators was able to provide additional information with respect to household expenses for insurance. The insurance premium on the home in the last year was \$596.00. The insurance premium for the family automobile as charged in November of 2002 was \$929.00.

Analysis

In my view, the law requires me to determine whether or not the claimant had the financial ability to provide for her own needs. If she was principally dependent upon her son-in-law, or his spouse, to meet those needs, then she qualifies as an insured person under the Co-operators' policy.

The case law has clearly established that the concept of "principal dependency" invokes a consideration of whether or not more than half of her needs are sourced from the son-in-law or daughter.

In pure mathematical terms, it would make sense to look at the claimant's ability to generate income and to compare that with the cost of meeting her needs. If her financial capacity is 50 percent of the cost of meeting her needs, then she is not principally dependent on any person. She certainly might be partially dependent on other sources, but that is not the definition of dependency which the Regulation provides.

Putting the question this way makes the analysis deceptively simple. In truth, it is extremely difficult to understand what a person's ability to earn is in many cases. Additionally, it is quite difficult to quantify the cost of meeting a person's needs.

Naturally, we tend to look for clear answers to these questions when we have to come to grips with dependency issues. There is a natural tendency to look at a person's earned income as the person's capacity to earn. This may be true in many cases, but is not universally the case. There may be many people not working to capacity in a variety of circumstances, voluntarily or involuntarily. In my view, earned income is evidence of capacity but is not conclusive on the issue.

On the other side of the equation, the parties in this case have proffered to me evidence about household expenses for me to make a determination as to the cost of meeting this claimant's basic needs. This evidence is useful but is not necessarily conclusive. Indeed, if the household expenses were very high, supporting a lavish lifestyle, it could not be suggested that those household expenses somehow allow us to determine the cost of meeting the needs of a family member. This is notably the case in view of the Court of Appeal's direction in the *Miller v. Safeco* case that the "general standard of living within the family unit" is not an appropriate consideration when dealing with dependency. This directs us to ignore the higher cost of more luxurious lifestyle. Dependency requires us to look at meeting basic needs.

Establishing dependency relationships has been a troubling issue for automobile insurers for more than a decade. Numerous reported decisions illustrate the challenges that are faced in these cases. Almost invariably the evidentiary record is weak. Individuals do not keep

comprehensive, careful records of their personal expenditures, their income, and their needs. Precise determination of these issues is impossible or impractical. When a dispute is brought before an arbitrator pursuant to the Regulation, the arbitrator is asked to make a determination based on the material before the Tribunal with the full recognition that the evidentiary record is likely to be incomplete. Necessarily, the arbitrator is required to make inferences in order to arrive at some conclusion about dependency.

Except in a very unusual case, I would be inclined to conclude that a person's ability to earn income is a number equal to or greater than their actual earnings. How much greater it might be would be highly variable from case to case. In this case we have the evidence that the claimant's weekly income varied considerably. According to the claim forms, the weekly income ranged from \$100.00 to \$175.00 in the month preceding the accident. The 52-week income was reported at \$7,200.00 which equates to approximately \$138.00 per week. However, we have to be mindful of the evidence that the weekly cash remuneration would have been reduced if clothing was provided to the claimant.

We know that clothing was provided, and this matches with the reported fluctuations in income.

It is perhaps possible that this particular claimant could have earned more money if she provided babysitting services for more children, or for longer hours. But the reality of this household is that there was a significant language barrier, and the children being cared for were the great-grandchildren of the claimant. The children resided next door to the claimant's home and were brought to the claimant's home everyday. I am not satisfied that Dipo M. had capacity to earn more than \$175.00 a week. On the other hand, I believe that the reported actual income is something less than Dipo M's actual capacity. Whether it is less because deductions have been made for clothing or because there was less need for babysitting services during various weeks, does not matter. In my view, it is appropriate to regard the claimant's income/ability to earn, as having a value of \$150.00 per week.

However, in addition to the earnings she had from her babysitting activities, I know that the claimant contributed to the household by performing household chores. This could be accounted for by two methods, one could either increase the earning capacity of the claimant to reflect the value of the household work that she performed in addition to babysitting, or one can offset her contribution against her share of benefiting from the household expenses since her activity is a contribution to the household. I believe that the latter approach is better in this case.

In the record before me, the only contribution received by the claimant from any outside source was the value of the household that she resided in, and clothing purchased for her by either her daughter or granddaughter. Some of the value of clothing contribution is reflected in the income stream, according to the evidence. There was no other evidence of the value of clothing in this particular case.

The household expenses are expressed in some respects in ranges. I have considered the various components of the household expenses. Firstly, I should observe that it is not clear to me that in every case we should simply total household expenses and divide those expenses by the number of people in the household to measure the basic needs of the people in the household. Such calculation would assume that the household circumstances met the person's basic needs, and no more. I am not convinced that that is the case in this circumstance or in most circumstances. Nor am I convinced that the expenses should be apportioned equally between the members of a household.

For example, there is an auto loan with a repayment required of \$800.00 per month, and there is a mortgage on the property which, including taxes, is \$1,600.00 a month. Together these items represent a cost to the household of \$2,400.00 a month, but there is a benefit derived to the owners of the house and the owners of the vehicle by the repayment of the loan and the net capital asset that is left to those owners. In short, I am not satisfied that it is appropriate to attribute the full amount of mortgage payments and the full amount of loan payments to every person in the household. The claimant is not contributing to household expense and, I infer, is not benefiting from the gradual accumulation of an asset resulting from repayment of mortgages and loans.

One might also question the expenses for food. It is arguable that in a three-person household, the elderly mother is probably not consuming an equal amount of food as the younger children. For these reasons, I think it is doubtful whether or not the total household expenses should simply be divided by the number of occupants (3) to result in a number which we say is the cost of meeting the basic needs of each individual. This, in my opinion, would be an overestimate to some degree. It would be an overestimate to the extent that the actual family circumstances were more comfortable than what was required to meet the basic needs of food and shelter. It is an overestimate to the extent that the household expenses do not result in a benefit equally to all of the members of the household, in particular the claimant.

However, it is instructive to initially analyze the figures on the assumption that a per capita share of household expenses may be a good approximation of the maximum cost of meeting the claimant's basic needs.

The evidence with respect to the expenditures was slightly variable with respect to hydro and with respect to food consumption. At the low end, it looks like the household expenses totalled \$3,304.08. At the high end of the ranges, the household expenses would total \$3,870.08 per month. Dividing this by three, on the assumption of an equal distribution of the expenses, would yield a low monthly expense of \$1,101.36 and a high monthly expense of \$1,290.00.

If we compare this with the earnings ability figure of \$150.00 per week, which is \$650.00 per month, we see that the claimant does in fact have the ability to meet more than 50 percent of the cost of her own needs and, therefore, cannot be conceived of as principally dependent for financial support on someone else.

For the reasons noted, I would be reluctant to accept the basic cost of meeting the claimant's needs as an equal share of the total household expenses. In my view, this includes a slight error that would need a downward adjustment to reduce the household expenses attributable to meeting basic needs of this claimant. Additionally, the claimant has given consideration for that benefit by performing certain household duties and that should be offset from the benefit value she derives. For example, if the value of the household services that she performed during a month was \$200.00, then the net benefit that she derives from the household, on an equal per capita distribution, would be about \$900.00 per month on the low or about \$1,100.00 per month on the high end. On the other hand, there may indeed be other items of value provided to the claimant such as clothing that is not accounted for in the weekly income. Not surprisingly, there is no evidence available of those amounts. I find those amounts to be insignificant in relation to the amounts that have been attributed to household expenses that ought not to be equally distributed to the three household occupants.

Ultimately, I find the claimant's earnings/capacity to be \$650.00 per month and that the net benefit she derives from the household is an amount less than \$1,100.00 per month. The

benefit she derives from the household meets or exceeds her basic needs. Accordingly, she is not principally dependent for financial support on anyone else as her own resources are sufficient to meet more than half of her basic needs.

Conclusion

The parties have asked me to answer the question: was Dipo M. a dependant within the meaning ascribed to the term in accordance with Bill 59 *Statutory Acts and Benefits Schedule*, upon Balbir S. at the time of the November 10, 2002 accident? Answer: no.

The parties have asked me to award party and party costs to be born by the unsuccessful party. Please contact me within 30 days to arrange to make submissions in this regard.

Dated at Toronto this 23rd day of July, 2007.

A handwritten signature in black ink, appearing to read 'Lee Samis', written over a horizontal line.

LEE SAMIS