

IN THE MATTER OF
the *Insurance Act*, R.S.O. 1990, c.I.8 as amended,
Section 268 as amended, and *Ontario Regulation 283/95*

AND IN THE MATTER OF
the *Arbitration Act*, S.O. 1991, c.I.7, as amended

B E T W E E N:

**THE DOMINION OF CANADA GENERAL INSURANCE
COMPANY**

Applicant

- and -

INTACT INSURANCE COMPANY and UNIFUND ASSURANCE COMPANY

Respondents

ARBITRATION AWARD

COUNSEL:

D'Arcy McGoey for the Applicant

Rohit Sethi for the Respondent, Intact

Mark K. Donaldson for the Respondent, Unifund

Kevin Wolf for the Claimant (objector)

ISSUE:

1. Was the Claimant principally dependent for financial support either upon his father and stepmother (Intact insureds) or Rose and John VanKoughnett (Unifund insureds), at whose home he was staying on June 19, 2009, the date that he was injured in a motor vehicle accident?

RESULT:

1. The Claimant was principally dependent upon his father and stepmother for financial support at that time, and was therefore an “insured” under their policy. Intact is accordingly in highest priority under section 268(2)2 of the *Insurance Act* and is responsible to pay his claims under the *SABS*.

BACKGROUND:

1. James McJannet was struck by a transport truck insured by Dominion of Canada General Insurance Company (“Dominion”) while riding a bicycle outside of the town of Elgin, Ontario on June 19, 2009. He was nineteen years old. He suffered serious injuries, including a severe closed head injury, and several fractures. He has been determined to be “catastrophically impaired” pursuant to the *SABS*.

2. The Claimant submitted an Application for the payment of accident benefits to Dominion. Dominion accepted his application and has paid benefits to him. It contends, however, that James was either principally dependent for financial support upon his father and stepmother, Hunter and Chantal McJannet, who are insured by Intact Insurance Company (“Intact”), or upon Rose and John VanKoughnett, at whose home he was staying at the time of the accident. The VanKoughnetts were insured by Unifund Assurance Company (“Unifund”) at the time, and are the parents of the Claimant’s friend Jamie VanKoughnett. Dominion takes the position that either of these two insurers would be in higher priority to pay Mr. McJannet’s claim, in accordance with section 268(2)2(i) of the *Insurance Act*.

3. The Claimant lived in a few different places in the years prior to the accident. His parents divorced when he was nine years old, after which he lived with his father. When he was twelve years old his father remarried, and he, his brother and father shared a home with his stepmother Chantal and her two sons for about five years. In 2007 James left their home to live with his mother in Pembroke, where he finished high school. James remained in Pembroke until the end of 2008, after which he returned to his father's home in Elgin, Ontario.

4. The Claimant began working at Walmart in April 2009. He worked there on a casual basis until the accident occurred approximately eight weeks later.

5. The Claimant left his father's home in May 2009, because of a "family conflict". He spent approximately six weeks at the home of one friend, and when that friend's mother asked him to leave, he asked his friend Jamie VanKoughnett whether he could stay at his home. Jamie's parents agreed to put him up, and James stayed at the VanKoughnett home for a few days. The accident occurred as he was riding a bicycle from the VanKoughnett's home to work at the Walmart store.

THE EVIDENCE:

6. The arbitration took place in two distinct stages. The Claimant, Hunter McJannet, Chantal McJannet, Rose VanKoughnett, John VanKoughnett and Jamie VanKoughnett gave evidence under oath in Kingston, Ontario in May 2012. Undertakings were provided and subsequently fulfilled, and transcripts of the evidence tendered were filed. Oral submissions on the financial dependency issue were then made by counsel in Toronto in July 2013, relying on the transcripts and various other documents filed in a Joint Document Brief.

7. In addition to the facts set out above, the evidence provided by the various witnesses established the following facts: The Claimant had been living with his father, Hunter McJannet, and stepmother, Chantal McJannet, until late in 2007, after which he

decided to move to Pembroke and live with his mother, Karen. He completed his high school education in Pembroke, and graduated in the summer of 2008. He spent the rest of that year in Pembroke, neither in school nor working.

8. James returned to the McJannet home in January 2009. The evidence suggested that he had expressed an interest in joining the military, and that there were opportunities to do so in the Kingston area. Both Hunter and Chantal had had careers in the military, and presumably would have been able to assist him in the process of enlisting. James explained that despite his earlier intentions to do so, he had not taken any steps to join the military before the accident occurred in June 2009 because he felt that he was not "fit enough". He spent most of the winter and spring of 2009 at home and with his friends.

9. James obtained a part-time job at the Walmart store in Smiths Falls in April 2009. He was paid \$9.95 per hour. He worked 114 hours between April 15 and June 19, 2009, the date of the accident, and earned a total of \$1156. This represents an average of approximately 14 hours of work per week, at an average weekly salary of \$144.50. James stated that he used his earnings to buy candy, movies and music. While there was some evidence that he had had a discussion with Chantal about contributing some of his earnings toward household expenses once he began to receive regular cheques, this did not occur.

10. While the evidence on the issue of why James left home in early May 2009 was somewhat inconsistent, it appears that he and Hunter and Chantal had had a disagreement about his following the "rules of the house". He packed up his clothing and music and moved into the apartment that his friend Shane shared with his mother in Elgin. It appears that he stayed there for approximately six weeks, until he was asked to leave in mid-June.

11. The Claimant then asked his friend Jamie VanKoughnett if he could stay with him at his parents' home outside of Elgin. Jamie stated that his parents agreed that James could stay there for a short while, until he found another place to stay or returned to his parents' home. Both Rose and John VanKoughnett testified that the maximum time they

had expected James to stay at their home was two weeks. Rose recalled that she had asked James to call his parents to let them know where he was staying, but made it clear that she did not want to get involved in his “family issues”.

12. While the Claimant testified that he had been staying at the VanKoughnett’s home for three weeks prior to the accident, Jamie and his parents testified that it had only been for three days. I prefer the VanKoughnetts’ evidence on this point and accept that he stayed there for three days prior to the accident.

13. While Hunter and Chantal had provided James with free room and board and paid for other expenses while he lived with them, he did not receive any financial support from them once he left their home. Chantal did not have any contact with him after he left. Hunter testified that he received a few emails from James during that period.

14. The evidence also indicated that James did not pay any rent or contribute any money toward the VanKoughnett household during the brief period that he was there. Jamie Van Koughnett said that he did not recall the Claimant eating any meals at his house.

15. When James was asked about what he had planned to do if the accident had not occurred, his answers were inconsistent. He first stated that he would have “stayed with ...Chantal...at their house, work somewhere, go to college”, and mentioned that he had been thinking of attending Ryerson College in Toronto. When it was suggested to him at a later point that he had been upset with Hunter and Chantal when he moved out, and that he did not have any plans to move back into their home, he agreed with that suggestion.

16. When Chantal was asked whether she had expected James to move back into their home after he had left in May 2009, she stated that she did not. When Hunter was asked the same question, he testified that he “had no thoughts either way”. When asked if James would have been permitted to move back home if he had asked to, Hunter responded that he would have had to “change his attitude” before being permitted to do so.

17. Chantal McJannet provided some evidence about the household's expenses around the time of the accident. She stated that there were four people living at their home at the time, and recalled that the monthly mortgage payments were \$632. Copies of utility bills were subsequently provided by way of undertaking, which indicated that the McJannet's paid approximately \$700 per month for hydro, water, TV, internet and phone service.

18. When James was released from the hospital after the accident, he returned to live in the McJannet home.

RELEVANT PROVISIONS:

Insurance Act -

268(2) The following rules apply for determining who is liable to pay statutory accident benefits:

*2. In respect of **non-occupants**,*

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

Statutory Accident Benefits Schedule –

2. (1) In this Regulation,

“insured person”, in respect of a particular motor vehicle liability policy, means,

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile,

2. (6) *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.*

PARTIES' ARGUMENTS:

19. Counsel agreed that if the Claimant was determined to be principally dependent for financial support upon the McJannets, Intact would be in highest priority to pay the claim. Similarly, if he was determined to be principally dependent upon the VanKoughnetts, Unifund would be in priority to pay. If he was found to be financially independent, Dominion would retain priority over the claim.

Dominion's submissions

20. Counsel for Dominion cited the criteria that the court stated should be applied in an analysis of financial dependency in the *Miller v. Safeco* decision (1985) 9 C.C.L.I 1, upheld by Ont. C.A. (1986) 13 C.C.L.I 31. He suggested that the appropriate time frame to apply was the six-month period from early January 2009 when James returned to Elgin and moved in with Hunter and Chantal McJannet, to the date of the accident in mid-June.

21. Mr. McGoey contended that the evidence was clear that the Claimant was not self-supporting during this period, and that he was not mature enough to live independently. He noted that James had left the McJannet home suddenly after a conflict, only taking a duffel bag with his clothing and music with him. He submitted that his earnings from Walmart were not enough to pay rent on a shared apartment, buy groceries and other necessities. He asserted that if the accident had not happened, the Claimant would likely have returned to the McJannet home, until he was able to “stand on his own two feet”.

22. Counsel contended that the facts presented in the case of *Co-operators' v. Western Assurance* (September 19, 2012) were strikingly similar to those in the instant case. He noted that Arbitrator Bialkowski had determined in that case that on a “big

picture” analysis, a young man who had been living with his grandparents but had left for seven weeks over the summer to live with friends was not financially independent.

23. Dominion argued that a consideration of all of the above factors leads to the conclusion that James was principally dependent for financial support upon Hunter and Chantal McJannet, and that Intact is accordingly in highest priority to pay the claim. Alternatively, he submitted that if I find that it is more appropriate to consider a shorter time frame, I should find that James was financially dependent upon the VanKoughnetts, and that Unifund is in higher priority to pay. He stressed that the evidence was clear that the Claimant was not financially independent, and that Dominion was therefore not the priority insurer.

Unifund’s submissions

24. Mr. Donaldson submitted that the preponderance of evidence suggests that the Claimant had only stayed at the VanKoughnett home for three days prior to the accident, and that his stay at their home was merely a short-term solution, until he was able to figure out his next move. He contended that while the VanKoughnetts had provided him with shelter and perhaps a bit of food during that period, a few days was simply too short a time on which to base the dependency analysis and conclude that James was principally dependent upon them for financial support.

25. Counsel cited various cases in which it was determined that even if a Claimant stays temporarily at someone else’s home and is clearly financially dependent upon them for the short period of their visit, they would not be “dependants” within the meaning of the *SABS*. (*Progressive Casualty Insurance Company of Canada v. Zurich Insurance Company* – Arbitrator Samis, January 7, 1996; *Allstate Insurance v. ING Insurance* – Arbitrator Samis, August 18, 2011; *State Farm Mutual v. American Home Assurance Company* – Arbitrator Jones, November 2002)

26. Counsel agreed with Mr. McGoey’s submission that the evidence clearly indicated that James could not afford to live on his own at the time in question, and that

he would either have returned to the McJannet home after a short stay with the VanKoughnetts, or spent the rest of the summer “bouncing around” friends’ places. He noted Hunter’s statement that his son would have had to change his attitude before being permitted to move back into their home, but submitted that James simply did not have any other choices at that point.

27. Mr. Donaldson allowed that the Walmart job may have provided James with some spending money, but contended that it was not indicative of him embarking on a career path, and that he had not yet landed on a plan to become financially independent. He contended that I should conclude that James was financially dependent upon the McJannets at the relevant time, and that Intact is in highest priority to pay the claim.

Intact’s submissions

28. Counsel for Intact agreed with Dominion’s submission that the most appropriate time frame to apply when considering whether James was financially dependent or independent is the six month period between the day he left the McJannet home in May of 2009 and the date of the accident. He contended, however, that the Claimant’s decision to move out of his father’s home in May of 2009 indicated a clear intention to sever his dependency from his father and Chantal, and that I should find that he was not financially dependent upon them at the relevant time.

29. Mr. Sethi acknowledged that James had only taken a duffel bag with clothing and music when he left, but noted that those were all of his belongings. He submitted that the fact that he did not return home at all during that period, and did not see Hunter or Chantal once during the six or seven weeks between the time he left and the accident was significant, and indicated an intention to establish his independence. Counsel emphasized that the Claimant also did not receive any financial assistance from them after he left, and that they no longer paid for his prescription medication.

30. Mr. Sethi also noted that after being asked to leave his friend Shane’s place, James did not return to the McJannet home, but rather asked his other friend Jamie

whether he could stay with his parents. He submitted that this fact also points to a more independent relationship with Hunter and Chantal, and an intention to live on his own.

31. Mr. Sethi noted the Ontario Court of Appeal's affirmation of the correct legal principles to apply in considering questions of dependency in Arbitrator Jones' decision in *Oxford Mutual Insurance v. Co-operators' General Insurance* (2005) CanLii 28857 (rev'd by Ont. S.C.J.) but aff'd by Ont. C.A. [2006] O.J. No. 4518, including the well-accepted "rule" that if a claimant has sufficient resources to fund 51% of his financial needs, he should not be considered to be dependent upon someone else. He also submitted that courts and arbitrators have determined that the ability to be self-supporting should be taken into account when assessing dependency, and that it is appropriate to impute a higher income to a claimant based on his or her ability to earn and become self-supporting (*ICBC v. Federated Insurance* (Samis – July 3, 2009, *TTC v. Co-operators* (Samis – July 23, 2007)). Counsel contended that while James had earned \$1156 from his job at Walmart prior to the accident, he was only provided with part-time hours, and that his true earning capacity was greater than that.

32. Counsel submitted, however, that even if the \$1156 that James had earned over the eight weeks that he worked was used as the basis for the analysis, his expenses would have had to be in excess of \$2312 during the period in question in order to conclude that he was principally dependent upon Hunter and Chantal. He acknowledged that there was no clear evidence on this point, but asserted that that was unlikely. He referred to Arbitrator Samis' decision in *Primmum v. State Farm* (August 31, 2009) in which a student's expenses were estimated to be approximately \$13,000 per year. Mr. Sethi submitted that if this figure is used, and the "51% test" applied, James would have had to earn just over \$6,500 per year to be considered "not financially dependent". He stated that when the Claimant's income from Walmart for the eight-week period is extrapolated over a full year, his annual earnings would be approximately \$8,262, which would exceed that threshold.

33. Alternatively, Mr. Sethi noted that the evidence relating to the McJannet household expenses suggested that they were approximately \$1340 per month. Given that four people were living at the home at the point that James had left, his notional share of the monthly expenses would have been \$335. Counsel contended that James' earnings from Walmart would have enabled him to pay his share of these expenses, and that he would not therefore have been financially dependent upon Hunter and Chantal.

34. Finally, Mr. Sethi argued that the *Co-operators v. Western, supra*, decision is distinguishable from the instant case, as the claimant in that case had made plans to return to school in the fall and acknowledged that he would accordingly be required to reduce his hours of work. He also pointed out that the grandparents in that case had clearly stated that they would like the claimant to move back into their home, whereas Hunter's comments suggested the opposite conclusion.

Reply submissions:

35. Counsel for Dominion suggested that it would not be appropriate to use the annual expense figure of \$13,000 that Arbitrator Samis had used in the *Primum v. State Farm, supra*, case as James was not a student at the relevant time, and no accounting evidence had been tendered to suggest that his financial needs were similar to those of the claimant in that case. He also made the point that the \$335 monthly figure provided was only for the McJannet household's utility expenses, and did not include amounts spent on food, clothing or transportation. He argued that an estimate for these expenses must be incorporated into the calculation in order to determine whether James would have been able to provide for over 50% of his needs.

ANALYSIS & FINDINGS:

36. The general principles to apply in cases of financial dependency have been stated many times by the courts – both the amount and duration of dependency must be considered, as well as the financial needs of the Claimant, and his or her ability to be self-supporting (*Miller v. Safeco, supra*). In order to show that a person is principally dependent upon someone else, he or she must receive more than half (or at least 51%) of

their support from another person (*Federation Insurance v. Liberty Mutual Insurance – Arbitrator Samis*, May 7, 1999, aff'd by Ont. Sup. Ct. (September 15, 1999) and Ont. C.A. (April 10, 2000)).

37. The appropriate time frame must also be defined in order to properly assess the various factors under consideration. All counsel in this case suggested that the most appropriate time frame to use for the analysis is the approximately six-month period prior to the accident, namely from early January 2009, when James returned to live with Hunter and Chantal McJannet in Elgin, to June of that year. I agree.

38. The cases direct us to examine a period of time that fairly reflects the status of the parties, as opposed to merely taking a 'snapshot' at the time of the accident (see *Oxford Mutual v. Co-operators, supra*, Ct. of App. decision at para. 27). I find that the evidence supports this period as being reflective of the parties' status. James had been staying with his mother in Pembroke for a year or so, until the end of 2008. Returning to live in Elgin with his father and Chantal represented a new "life stage" - he had finished high school, and was considering what direction his life would then take.

39. While the Claimant did work for approximately eight weeks during this period, the evidence establishes that he spent most of his time thinking about whether he wanted to follow in the footsteps of Hunter and Chantal and join the military, or whether he might pursue other options. He spent a considerable amount of time at home and with his friends.

40. James began working at the Walmart store in Smiths Falls in mid-April 2009. He worked on average 14 -15 hours each week, at the rate of \$9.95 per hour. His total earnings for the approximately eight weeks he worked prior to the accident were just over \$1150. The evidence suggests that James enjoyed the work, because it gave him something to do and provided him with some spending money. There was no evidence to indicate that he was intent on embarking on a career in retail sales, or that he had either requested or been offered more hours or full-time employment there.

41. James moved out of the McJannet home in May 2009, after having an argument with Hunter and Chantal. This was a few weeks after beginning his job at Walmart. Mr. Sethi argued that this move clearly indicated an intention to move away from their past relationship and move toward financial independence, pointing out that he had minimal contact with Hunter and Chantal once he left and did not receive any financial support from them. While these facts may often be reliable indicia of someone establishing an independent relationship, the reality here was that James was simply not earning enough money to achieve financial independence, and had no viable plan to do so.

42. The issue of determining whether a teenager or young adult whose life is in transition is principally dependent for financial support upon someone else is always challenging. It is often an exercise in “crystal ball gazing”, and arbitrators and courts are in no better position than anyone else to predict how a claimant’s life would have unfolded if the accident had not happened. It is trite to say, but true, that each case must be decided on the basis of the evidence presented, applying logic and common sense.

43. Counsel cited a few decisions involving claimants in somewhat similar circumstances. In the *Co-operators’ v. Western Assurance, supra*, case, Arbitrator Bialkowski determined that a seventeen year-old who had been living with his grandparents for several years prior to the accident but had moved out to live with friends for seven weeks over the summer was not financially independent, despite the fact that he had held a part-time job for two years prior to the time in question, and was earning approximately \$240 per week. The Arbitrator noted that the claimant had planned to return to school in the fall, and would likely have reduced his hours of work. Two expert accounting witnesses were called to testify at that hearing, and Arbitrator Bialkowski determined on a mathematical analysis of the evidence tendered that the claimant was financially dependent upon his grandparents. He also considered the general nature of their relationship and determined that the claimant was not capable of living independently in the long term.

44. In *Primum v. State Farm, supra*, Arbitrator Samis determined that a nineteen-year old claimant who had just finished high school was financially dependent upon his mother, despite the fact that he had started working almost full-time hours at a Canadian Tire store and was staying at the home of a friend who lived closer to the store. The claimant testified that he had decided to move out of his mother's home and live at his friend's house, although his mother testified that she was not made aware of that. Arbitrator Samis determined that the claimant's transition to independence was not complete, and that it was not clear that he would have successfully held down a full-time job.

45. While the facts in these cases may not be "on all fours" with those of the instant case, I find that James was in a transitional stage of his life at the time of the accident, as were these other teenaged claimants. He had completed high school and was unsure of his next move at the time of the accident. There was no evidence that he had either achieved financial independence or developed a plan to do so during the six weeks or so after he left the McJannet home. He had not taken any steps to move toward his stated goal of joining the military, nor had he requested increased hours at Walmart. When asked what his plans were at that stage, he gave different answers ranging from considering attending Ryerson College in Toronto to becoming more fit and eventually joining the military. Hunter testified that he had discussed the possibility of James enrolling in the military and pursuing a two-year course on Surveying at Algonquin College. In my view, the evidence clearly points to the fact that James was still trying to "find his way".

46. While neither James nor his parents testified that he had planned to move back into their home around the time of the accident, it is clear that his stay at the VanKoughnetts was only meant to be temporary. The accident happened after James had been staying there for three nights, so it cannot be determined with certainty how long he would have stayed. The evidence tendered on that point by Jamie VanKoughnett and both of his parents was that the arrangement was meant to be short-term, for a couple of weeks at most until he could figure out what to do next.

47. Applying the “big picture” analysis espoused by Arbitrator Bialkowski in the *Co-operators v. Western, supra*, case, I find that James was not on his way to financial independence at the time of the accident, as suggested by counsel for Intact. He had a much shorter work history than the claimant did in that case, and worked fewer hours. He had no prospects for steady employment beyond the fifteen or so hours of work at Walmart, and was contemplating various academic options.

48. The evidence provided on the issue of the Claimant’s expenses and those of the McJannet household was not very detailed, making a detailed mathematical analysis difficult. James earned a total of \$1154 during the six-month time frame under consideration. He stated that he spent his money on music and candy. Intact suggests that this income should be extrapolated to arrive at an annual earnings figure of \$8,262. I am not prepared to adopt this approach, as it is unclear that James would have continued working at Walmart for a year. In any event, I note that several items usually included in a monthly household budget were not included in the estimate of McJannet household expenses (such as groceries) and I therefore conclude that even if the Claimant had moved back into the McJannet household, he would not have been able to provide for at least 51% of his needs.

49. Accordingly, for all of the reasons expressed above, I find that James was principally dependent for financial support upon Hunter and Chantal McJannet, the Intact insureds, at the relevant time. He accordingly meets the definition of an “insured person” under their policy, and Intact is therefore in highest priority to pay the claim pursuant to section 268(2)2(i) of the *Act*.

ORDER:

I hereby Order Intact to re-imburse Dominion for the benefits it has paid out to James McJannet to date, subject to any dispute that may arise about the reasonableness of payments made. I remain seised of this matter in the event that any such issue is raised by the parties.

Intact shall also take over the adjusting of Mr. McJannet's accident benefits claim. I leave it to the parties to finalise the transfer of all relevant materials.

COSTS:

In accordance with the parties' Arbitration Agreement, Intact is responsible for payment of legal costs incurred by both Dominion and Unifund, on a partial indemnity basis. If any disputes arise with respect to the quantum of costs payable, I invite counsel to advise me in writing and a further pre-hearing call will be convened.

Finally, given the result, I will forward my account for arbitration fees and disbursements to Mr. Sethi's office.

DATED at TORONTO, ONTARIO this __28th__ DAY OF JULY, 2014.

Shari L. Novick
Arbitrator