CITATION: The Dominion of Canada General Insurance Company v. Intact Insurance Company, 2015 ONSC 3689
COURT FILE NO.: CV-14-510404
DATE: 20150609

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I.8, SECTION 268 AND REGULATION 283/95 MADE UNDER THE *INSURANCE ACT*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:	
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY Applicant	*D'Arcy McGoey* for the Applicant The Dominion of Canada General Insurance Company
– and –	
INTACT INSURANCE COMPANY Respondent	*Rohit Sethi* for the Respondent Intact Insurance Company
– and –	
UNIFUND ASSURANCE COMPANY Respondent	
	HEARD: June 4, 2015

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Intact Insurance Company ("Intact") appeals the arbitration decision of Arbitrator Shari Novick, dated July 28, 2014, arising out of a priority dispute between Intact, Unifund Assurance Company ("Unifund"), and The Dominion of Canada General Insurance Company ("Dominion").

[2] Dominion is the insurer of a vehicle that struck James McJannet on June 19, 2009 and is responsible for James' statutory accident benefits ("SABS") under the *Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996*, O. Reg. 403/96, unless James was the dependent of an insured covered by another insurance company.

[3] At the arbitration before Arbitrator Novick, Dominion submitted that Intact or Unifund was the responsible insurer. Intact insured the claimant's father, Hunter McJannet and step-mother, Chantal McJannet. Unifund insured Rosemary and John Vankoughnett, the parents of James' friend, Jamie Vankoughnett.

[4] The dispositive issue at the arbitration was whether James was "principally dependent" on the McJannets or on the Vankoughnetts on the date of the accident. Arbitrator Novick held that James was principally dependent on Hunter and Chantal McJannet, and she ordered Intact to reimburse Dominion for the accident benefits it had paid to James.

[5] Intact appeals the Arbitrator's decision.

[6] The parties now accept that James was not principally dependent upon the Vankoughnetts, and the issue for the appeal is whether or not the Arbitrator erred in concluding that James was principally dependent on Hunter and Chantal McJannet.

[7] For the reasons that follow, I dismiss the appeal.

B. THE APPLICABLE LAW

1. Criteria for Determining Dependency

[8] The term "dependent" is defined in the *Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996*, s. 2(6) as follows:

> 2(6) ... a person is a dependent of another person if the person is principally dependent for financial support ... on the other person or the other person's spouse.

[9] The criteria for determining dependency for the purposes of the insurance priority disputes was established by the Court of Appeal in *Miller v. Safeco* (1986), 48 O.R. (2d) 451 (H.C.J.) aff'd 50 O.R. (2d) 797 (C.A.). In *Miller v. Safeco,* the Court held that the relevant criteria are: (1) the amount of dependency; (2) the duration of dependency; (3) the financial and other needs of the alleged dependent; and (4) the ability of the alleged dependent to be self-supporting. See also: *Security National Insurance Co. v. The Wawanesa Mutual Insurance Company,* 2014 ONCA 850, reversing 2013 ONSC 7589; *Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada*, [2000] O.J. No. 1234 (C.A.), aff'g [1999] O.J. No. 5777 (Div. Ct.), aff'g May 7, 1999, Arbitrator Samis.

[10] The case law has developed a test for financial dependency that holds that a person is principally dependent upon someone else if he or she receives more than half (or at least 51%) of his or her support from that person. See *Liberty Mutual Insurance Co.* v. *Federation Insurance Co. of Canada, supra*

[11] I will discuss the criteria for determining dependency further in the Discussion and Analysis section of these Reasons for Decision.

2. Standard of Appellate Review

[12] This is an appeal pursuant to the *Arbitration Act, 1991,* S.O. 1991, c.17. The standard of appellate review is "correctness" with respect to questions of law, and "reasonableness" on questions of fact or questions of mixed fact and law: *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.* (2006), 83 O.R. (3d) 591 (C.A.).

[13] Questions about which legal principles apply in a given matter are questions of law, reviewable on the correctness standard: *Oxford Mutual Insurance Co. v. Co-Operators General Insurance Co., supra* at para. 21. Questions that involve an arbitrator's application of legal principles to his or her factual findings about the particular circumstances of a SABS claimant's relationships are questions of mixed fact and law, closer to a factual determination, and are, therefore, reviewable on the reasonableness standard: *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co., supra* at para. 23.

[14] Provided that the arbitrator applies the appropriate legal test, the jurisprudence about priority disputes on the issue of dependency establishes reasonableness as the standard for appellate review of an arbitrator's decision. See: *Oxford Mutual Insurance Co. v. Co-Operators General Insurance Co., supra* at paras. 22 and 23; *Royal and Sun Alliance Insurance Co. of Canada v. Axa Insurance Inc.*, 2015 ONSC 217.

[15] Reasonableness is a deferential standard animated by the principle that certain questions that come before administrative decision-makers do not lend themselves to one specific, particular result, but rather give rise to a number of possible, reasonable conclusions. On the reasonableness standard, a reviewing court may not substitute its own view of a preferable outcome to the decision of an arbitrator, so long as the arbitrator's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, and so long as the process and the outcome fit comfortably within the principles of justification, transparency, and intelligibility. See: *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12.

[16] For the purpose of determining insurance benefits and who is responsible for paying them, an arbitrator's decision about dependency is entitled to deference, unless the arbitrator's decision is unreasonable: *Oxford Mutual Insurance Co. v. Co-Operators General Insurance Co., supra*; *The Dominion of Canada General Insurance Company v. MVACF*, 2013 ONSC 4717 at paras. 17, 25; *Jevco Insurance Company v. Gore Mutual Insurance Company*, 2014 ONSC 3741 at paras. 32, 36; *Gore Mutual Insurance Co. v. Co-Operators Insurance Co.* (2008), 93 O.R. (3d) 234 (S.C.J.).

C. FACTUAL BACKGROUND

[17] James was born on March 15, 1990 and was 19 years old at the time of the accident on on June 19, 2009.

[18] Until 2007, James lived with Hunter and Chantal McJannet in their home at 33 Crosby Road, Elgin, Ontario, which is near Kingston, Ontario. In 2007, he had an argument with Hunter and moved to live with his mother, Karen, in Pembroke, Ontario. While living with his mother, James did not contribute to the costs of his room and board.

[19] James graduated from high school in 2008. Unemployed, he continued to live with his mother until the end of December, 2008. In January 2009, James returned to the McJannet home, where he had a bedroom in the basement. When he returned to the McJannet home, James' plan was to enlist in the military. Chantal and Hunter are both ex-military. However, James took no steps to advance his plan.

[20] While at the McJannet home, James did not contribute to the expense of his room and board. The McJannets' average monthly utility bills were approximately $707.09. Their mortgage was $632 per month. James did not purchase his own clothing, and how much the McJannets spent to clothe or feed him was not in evidence.

[21] In February 2009, James attempted suicide. He was in the hospital for four to five days. He began taking anti-depressants that were paid for by Chantal and Hunter.

[22] In April 2009, James began part-time employment at Walmart in Smith Falls. He began work on April 15, 2009, and the last date for which he was paid was June 9, 2009. During this period of 7.86 weeks, he worked a total of 113.78 hours, an average of 14.48 hours per week. He was paid $9.95 per hour and earned a total of $1,156.18.

[23] James had no savings. He used his salary to buy movies, music and candy. While there were discussions about James paying room and board, possibly $25-50 per week, this never occurred.

[24] In May 2009, there was another argument between James and Chantal and Hunter, and James again moved out, initially to stay with his friend Shane Veley and his mother Cynthia in her apartment. He took only a duffle bag of possessions with him. After moving out, James emailed Hunter a few times about the family dispute.

[25] While at the Veley apartment, James did not have his own room. He did not contribute to rent, groceries, or utilities, nor did he assist with household chores. He stayed at the Veleys for a month and a half, and in June 2009, he was asked to leave.

[26] After leaving the Veleys' apartment, James next stayed with his friend Jamie Vankoughnett, who he had known since elementary school. The Vankoughnetts lived in a three-bedroom house. James was invited to stay for a short period of time until he found a place or moved back in with his with his father and stepmother. James lived with the Vankoughnetts for the three days before the accident. Once again, he made no contribution to the household expenses. He undertook no household chores.

[27] On the morning of June 19, 2009, James left the Vankoughnetts' house to go to work at Walmart when, while riding a bicycle, he was hit by the Dominion insured vehicle. He suffered serious injuries and was catastrophically impaired under the SABS.

[28] Arbitrator Novick was asked to determine whether James was principally dependent on Chantal and Hunter (Intact's insureds), the Vankoughnetts (Unifund's insureds), or on himself. The Arbitrator decided that James was principally dependent on Chantal and Hunter and therefore, Intact was responsible for James' SABS.

[29] Arbitrator Novick noted that the criteria for an analysis of dependency had been established by the Court of Appeal in *Miller v. Safeco, supra.* She agreed with the submissions of all of the parties that the appropriate timeframe for an analysis of James' dependency was the six-month period before the accident. She explained her finding as follows:

> ... 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. While [James] 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. .... I find that James was in a transitional stage of his life at the time of the accident... He had completed high school and was unsure of his next move at the time of the accident. There is 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... In my view, the evidence clearly points to the fact that James was still trying to "find his way".

[30] Arbitrator Novick found that she did not have sufficient evidence to undertake a detailed mathematical analysis of James' expenses and those of the McJannet household. She observed that the $1,332/month in household expenses did not take into account several items usually included in a monthly household budget, such as groceries.

[31] In considering the claimant's ability to be self-supporting, the Arbitrator acknowledged that Intact had argued that a higher income should be imputed to James based on his ability to earn and become self-supporting. She, however, disagreed with Intact's submissions and held as follows:

> 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. [Intact's counsel] 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 to achieve financial independence, and had no viable plan to do so.
>
> 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.

[32] Arbitrator Novick concluded, on the totality of the evidence, that even after his departure from Chantal and Hunter's home, the claimant was not earning enough money to achieve financial independence, and had no viable plan to do so. She concluded that James was not capable of providing for at least 51% of his needs. In her Reasons for Decision, she stated:

> 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 $1,154 during the sixth-month timeframe 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.

[33] Intact appeals the Arbitrator's decision to this Court.

D. DISCUSSION AND ANALYSIS

[34] Intact's argument is that the Arbitrator made an error in law and thus, based on the correctness standard of appellate review, her decision should be reversed. Alternatively, it submits that the Arbitrator's decision was unreasonable.

[35] More particularly, Intact submits that although the Arbitrator noted the applicable law as defined by the Court of Appeal in *Miller v. Safeco, supra,* her reasons reveal that in truth she only gave lip service to the criteria and she actually misapplied them and hence she erred in law and her decision was unreasonable and, therefore, no deference should be given to her decision and it should be reversed.

[36] Further, Intact argues that the Arbitrator made an error in law because extrapolating from her findings of fact about James' income from his work at Walmart, she erred in the application of the test that holds that a person is a dependent if he or she is capable of providing for at least 51% of his or her needs.

[37] Intact submits that based on the evidence, the Arbitrator erred in law and made an unreasonable conclusion in holding that James had not reached the stage of independency capable of being self-supporting to the standard established by the case law. More particularly, Intact submits that the Arbitrator erred by not completing a mathematical analysis that would have established that James was capable of contributing more than his share to satisfy the McJannet family's living expenses and thus was self-sufficient or independent of reliance on the family.

[38] With respect, these submissions do not themselves withstand analysis, and the Arbitrator's decision was in my opinion both correct and reasonable.

[39] The Arbitrator did not give lip service to the criteria in *Miller v. Safeco, supra.* In my opinion, she correctly applied the criteria. As she noted in her Reasons for Decision: "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."

[40] Regardless of what timeframe might be used, the evidence established that the actuality was that James had never supported himself financially and he had never been financially independent. Both before and after he was in school, he was dependent on family or friends for clothing, food, and shelter and for his lifestyle.

[41] I move from actuality to potentiality. If one extrapolates from the evidence proffered by the parties in the context of the six-month timeframe that the parties and the Arbitrator all agreed was appropriate for an assessment of James' dependency and considers the potentiality of James' self-sufficiency as opposed to the actuality of his dependency, then I see no error or unreasonableness in the Arbitrator's analysis and her conclusion that even if James had moved back into the McJannet household, he would not have been able to provide for at least 51% of his needs.

[42] In the circumstances of this case, on the assumption that James was a part of the McJannet household during the appropriate timeframe, the Arbitrator cannot be faulted for not setting out a detailed mathematical analysis of James' personal share of the expenses for his room and board and standard of living compared with his capability to provide for at least 51%

of those needs on a go forward basis.

[43] There was ample evidence that James was in a state of transition and that he was as likely to go back to school or to do something else with his life than to continue to work at Walmart. I see no error in the Arbitrator's conclusion that James was a dependent at the time of the accident. He relied on the McJannets and was a dependent of them.

[44] Since I conclude that the Arbitrator's analysis was sound and her conclusion correct, it is obvious that it was a reasonable conclusion. In other words, whatever the standard of appellate review, there is no basis to set aside the Arbitrator's decision.

E. CONCLUSION

[45] For the above reasons, I dismiss Intact's appeal. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Dominion's submissions within 20 days of the release of these Reasons for Decision followed by Intact's submissions within a further 20 days.

Perell, J.

Released: June 9, 2015

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