IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, section 275 and REGULATION 283/95;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

LLOYD'S OF LONDON INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Jacqueline Emerton – counsel for the applicant

Kevin Mitchell - counsel for the respondent

ISSUES:

1. Was the arbitration initiated within the time frame required pursuant to section 7 (2) of Regulation 283/95?

2. Was Frank Cooper principally dependent for care upon Edward Hales at the time of the accident?

ORDER:

1. The arbitration was initiated within the time frame required pursuant to Regulation 283/95.

2. Frank Cooper was primarily dependent for care upon Edward Hales at the time of the accident.

HEARING:

1. The arbitration was held in the City of London, in the province of Ontario, on February 26, 2004, before me, M. Guy Jones, pursuant to the provisions of the Arbitration Act, 1991.

FACTS:

This arbitration arises out of an accident which occurred on March 9, 2001, when a pedestrian, Mr. Frank Cooper, was struck by a motor vehicle insured by Lloyd's of London Insurance Company ("Lloyd's"). Pursuant to the provisions of the Insurance Act and the Statutory Accident Benefits Schedule, Lloyd's commenced paying various accident benefits to and behalf of Mr. Cooper. Lloyd's subsequently served Wawanesa Mutual Insurance Company ("Wawanesa") with a Notice of Intention to Dispute Between Insurers, taking the position that Mr. Cooper was primarily dependent for care upon Mr. Edward Hales. Mr. Hales had a valid

policy of insurance with Wawanesa at the time of the accident and therefore Wawanesa would rank higher in priority than Lloyd's, pursuant to section 268 (2) of the Insurance Act.

WAS THE ARBITRATION COMMENCED WITHIN ONE YEAR OF GIVING NOTICE?

Section 7(2) of Regulation 283/95 requires that an insurer paying statutory accident benefits which believes that another insurer should be paying the benefits is to initiate an arbitration for payment within one year of giving notice to the other insurer, pursuant to section 3 of Regulation 283/95. The "Notice to Applicant of Dispute Between Insurers" was received by Wawanesa on September 12, 2001 and accordingly they had one year from that date to initiate the arbitration.

The respondent takes the position that the arbitration was not initiated until October 7, 2002 when the formal Notice of Application was filed with the Superior Court of Justice.

Priority disputes are resolved in accordance with Regulation 283/95. Section 7 (1) of the Regulation stipulates that the dispute shall be resolved through an arbitration under the Arbitration Act, 1991. The Regulation does not stipulate how an arbitration is to be initiated, however section 23 (1) of the Arbitration Act states:

> An arbitration may be commenced in any way recognized by law, including the following:

1. a party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement

2. if the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on that person and serves a copy of the notice on the other parties.

3. a party serves on the other parties a notice demanding arbitration under the agreement.

Counsel for the respondent questioned whether or not a priority arbitration could be initiated pursuant to section 23 of the Arbitration Act in the absence of an "agreement" between the parties as required by section 23. Mr Justice Archibald, in Gore Mutual Insurance Company vs. Markel Insurance Company [1999] O.J. No. 2688 dealt with that issue. In that decision the respondent took the position that there was no "agreement" as required by section 23 and therefore the applicant had failed to initiate the priority dispute within one year. Justice Archibald rejected this position, stating:

> "it could not be said that the agreement in the Act is other than the relevant provisions of the Insurance Act and the Regulation in question".

I am in agreement with Justice Archibald in this regard. Counsel for the applicant takes the position that the arbitration was commenced by way of letters from the applicant's solicitor, Mr. Rodney Dale, to Ms. Carmen Pontieri, the adjuster handling the file for Wawanesa, dated May 9, 2002 and June 10, 2002. The first letter states:

> "We have been appointed as solicitors on behalf of Lloyd's of London for the purpose of proceeding to an arbitration to settle a dispute between insurers regarding which company should be responsible for paying the statutory accident benefits.
>
> Do you have a preference as to who is used as an arbitrator? If so, I would be pleased to receive your suggestions for our consideration.
>
> If we have not heard from you within two weeks, then we will make some proposals to you as to the selection of an arbitrator."

On June 10, 2002, Mr. Dale wrote:

> "Since we have not received a response to our letter of May 9, we are proposing either John Fidler, Paul Iacono or David Draper as potential arbitrators of this dispute.
>
> I would be grateful if you would give me the courtesy of a response within ten days of the date of this letter.
>
> If we have not received a response by that time, we will assume that you are not prepared to cooperate and we will then have no alternative to make an application to the Court for the appointment of an arbitrator with the request that Wawanesa pay the costs associated with such Court applications . . ."

Counsel for the respondent takes the position that even if one can initiate an arbitration by way of letters, as was done in the Gore case, the letters in this case were insufficient to constitute the initiation of the arbitration. More specifically, the respondents submits that the letters make no reference to an agreement, the Insurance Act, Ontario Regulation 283/95 or a specific rationale

for the arbitration. Counsel for the respondent points out that in the Gore decision noted that the letters in that case did refer to the Regulation and gives a rationale for the arbitration.

I do not read Justice Archibald's decision as requiring the mention of the specific Regulation by which the arbitration is being initiated. Mr. Dale indicated in his letter of May 9, 2002, that they were proceeding with an arbitration to settle a priority dispute as to which company should be responsible for payment of the statutory accident benefits. There is only one way that this can be done – pursuant to Ontario Regulation 283/95. There is no evidence to suggest that the respondent was not aware of which Regulation the arbitration would proceed under and accordingly I reject the respondent's submission in this regard.

I am also of the view that the letter of May 9, 2002 sets out clearly what was being disputed – it was a dispute between the two insurers as to which company should be responsible for paying the accident benefits to or on behalf of the injured party. Details in this regard had already been provided in the Notice to Applicant of Dispute Between Insurers, received by the respondent on September 12, 2001.

In my view, the letters provide clear notice that the arbitration is to be held and the rationale for same. Accordingly, the arbitration was commenced within the required time frame.

WAS FRANK COOPER PRIMARILY DEPENDENT FOR CARE UPON TED HALES AT THE TIME OF THE ACCIDENT?

As indicated above, Mr. Frank Cooper was injured when struck by a motor vehicle insured by Lloyd's. Lloyd's take the position that Mr. Cooper was primarily dependent upon Mr. Ted Hales for care. Since Mr. Hales had a valid policy of motor vehicle insurance with Wawanesa at that time, Wawanesa would be responsible for payment of statutory accident benefits pursuant to section 268 (2)(4) and (5) of the Insurance Act. Section 2(6) of the Statutory Accident Benefit Schedule states that a person is a dependent upon another person if the person is principally dependent for financial support or care on the other person or the person's spouse. The parties have agreed that Mr. Cooper was not financially dependent upon Mr. Hales and therefore it remains to be determined whether he was principally dependent for care upon Mr. Hales.

Before dealing with the extent of the care provided, I will first deal with the issue of the meaning of the word "principally" dependent. Counsel for the applicant submitted that one need only be more dependent upon any other person for that person to be dependent, whereas counsel for the respondent argued that one needed to be more dependent on the one person more than all other persons combined in order to be "principally" dependent.

Counsel for the respondent relied upon the decision of Senior Arbitrator Rotter in Giroux vs. Co-operators (November 6, 1997) O.I.C. A95-000203. In that case the arbitrator dealt with a situation where the deceased took some care of his deaf parents. Senior Arbitrator Rotter stated

that she would have to find "that they received more care from their son than was available from their own and other resources, using the same test as referred to for deciding whether an individual is principally dependent on another for "financial" support".

Counsel for the respondent also cited the decision of arbitrator Baltman in Hau vs. State Farm (November 16, 1998) O.I.C. A97-001159 who stated that the applicant in order to receive a death benefit, must establish that the deceased was more dependent on him than any other sources **combined**.

Counsel for the applicant argued that the cases cited by the respondent did not involve multiple parties, whereas arbitrator Novick in Kaur vs. Liberty Mutual (October 20, 1999) O.I.C. A98-001322 dealt with a case where more than one person was providing care. In that case arbitrator Novick found that it was sufficient that the person be more dependent simply on the one person rather than anyone else.

As will be seen from my analysis of the facts in this particular case, it is not essential to decide this issue as I am satisfied that Mr. Hales meets the test using either approach.

The leading case as to what constitutes dependency is Miller vs. Safeco (1985) 50 O.R. (2^{nd}) 797, a decision of the Ontario Court of Appeal. The factors that the Court held to be relevant are:

1. the amount of dependency
2. the duration of the dependency

3. the financial or other needs of the alleged dependent

4. the ability of the alleged dependent to be self supporting, and

That particular case involved a question of financial dependency, however the criteria set out in that case have generally been applied in the cases dealing with care dependency. While the financial dependency cases have generally involved a fairly mathematical analysis of the injured person's living expenses and the financial cost of the care provided, the care cases cannot be subjected to such strict mathematical calculation.

The term "care" is not defined in the Statutory Accident Benefits Schedule. However, the term has been the subject of some interpretation by the courts and arbitrations. It has been held to include physical, social and emotional services (see: Periera vs. Pilot Insurance Company and Canadian General Insurance Company) (September 4, 1996), O.I.C. A-953564). Care also entails attending to the emotional as well as the physical well being of the person. (See: Hairs vs. Liberty Mutual Insurance Company [1998] O.F.S.C.I.D. No. 55, Jabee vs. Liberty Mutual Insurance Company O.I.C. A96-000008 and Giroux vs. Co-operators General Insurance Company (1997) W.L. 1927298 (O.I.C.))

Arbitrator Renehan, in Wieler vs. Personal Insurance (April 1, 1996) O.I.C. File No. A95-000259, in dealing with a care case enunciated the test as considering:

1. the nature of the emotional and physical care provided; and

2. whether the claimant was in fact principally dependent on the insured for care, having regard to the amount of the dependency for care, the needs of the claimant and the ability of the claimant to be self supporting.

Finally, I note that arbitrator Novick found that principal dependency will be found where the caregiver plays a critical role in allowing the care for a person to live independently and perform fundamental tasks that the dependent is unable to. (see Liberty Mutual vs. Kaur (2000) 1447239 (O.I.C.).

Before dealing with the criteria as set out in the case law, it may be useful to briefly summarise Mr. Cooper's situation shortly before the accident.

Mr. Cooper was an Anglican Minister. He was diagnosed with Parkinson's disease in approximately 1987 and discontinued work as a Minister at that time. Following his retirement and subsequent separation from his wife in 1987, Mr. Cooper moved into an apartment on his own where he lived for approximately eight years. In 1995 Mr. Cooper and Ted Hales, who was also an Anglican Minister and had been a long time friend of Mr. Cooper, decided to share accommodation, in part because Mr. Cooper was having difficulties as his disease progressed. At the time of the accident, they were sharing a two-bedroom condominium in Toronto.

I will now turn to a more detailed analysis of the evidence and apply to the criteria as set out by the Courts and arbitrations. It should be noted that to a certain degree, there is an overlap between a number of the criteria.

DURATION OF THE DEPENDENCE:

Parkinson's Disease is a progressive disease and in Mr. Cooper's case, it had been progressing steadily since it was first detected in 1987. It had reached the point where, in 1995, Mr. Cooper moved in with Mr. Hales. This was done not simply to save money, although it was a consideration, but also in recognition of the fact that Mr. Cooper was having more and more difficulty looking after himself and it was thought that Mr. Hales, who was still a practising Anglican Minister, could help for his friend, as required. In 1998 they moved in to a condominium owned by Mr. Hales. It is clear from all the evidence that Mr. Cooper had been relying upon Mr. Hales to an increasing degree from at least 1995. The case law makes it clear that when considering the issue of dependency, one does not take a "snap shot" on the actual day of the accident and ignore the time before that. Each case depends very much upon the particular facts of that case. In this matter, it is evident that Mr. Cooper had been somewhat dependent upon Mr. Hales since 1995 and the extent was increasing with the passage of time. The appropriate time frame for determining the dependency issue would be subsequent to his moving into the condominium in 1998 and more particularly in the months leading up to the accident of March 2001.

MR. COOPER'S DEPENDENCY AND RELIANCE ON MR. HALES AND OTHERS FOR CARE:

I will deal with the remaining criteria together as they overlap.

In the time leading up to the accident, it is evident that Mr. Cooper was becoming less and less sufficient as time passed. It was seventy-three years of age at the time of the accident. A review of the evidence did reveal some discrepancies as to the extent of the care required, however, I attribute this to the way in which the disease ebbed and flowed. Mr. Cooper had good and bad days and so the degree of care varied. In any event, the evidence filed reveals that shortly before the accident Mr. Cooper required a considerable amount of care. He was able to dress himself, sometimes with difficulty and assistance. He required assistance bathing and on occasion to go to the washroom. Mr. Cooper would do little or no food preparation. Mr. Hales prepared most of the meals except breakfast and the most Mr. Cooper would do would be to make very simple meals or reheat food prepared earlier by Mr. Hales. On occasion, when he was having a bad day, he would require someone to feed him. He did little or no house cleaning and he did not do the laundry.

Mr. Cooper often needed help with paperwork and doing such things as banking. He did not do any significant shopping. His mobility was very restricted in that he did not drive and usually required someone to accompany him when he went outside, in case he fell or required other assistance. He used a cane when he did go outside and even indoors his mobility was limited.

Mr. Cooper filled out a Priority of Payment Checklist on July 3, 2001, wherein he indicated he did not think that he was a dependent upon a named insured. Mr. Hales, at his examination for discovery, indicated at the time of the accident Mr. Cooper was not dependent upon him. On another occasion, he also expressed the opinion that prior to the accident Mr. Cooper was not capable of living on his own. While both Mr. Hales' and Mr. Cooper's point of view as to dependency are useful, they are not determinative of the issue.

A considerable amount of time was spent at the hearing attempting to determine how much care was provided by Mr. Hales as opposed to a home care agency, Community Care Access Center. While it varied somewhat, the agency provided roughly ten hours of homecare a week, primarily in the area of bathing, housekeeping and getting around.

The amount of time spent by Mr. Hales in caring for Mr. Cooper was somewhat more difficult to quantify as it would appear that it varied somewhat from week to week. The estimates of care provided by Mr. Hales varied from roughly two hours to four hours per day. Mr. Hales did such things as prepare meals, grocery shop, occasionally assist in bathing and going to the washroom. He also went regularly for walks with Mr. Cooper, helped him with his paperwork, took him to the bank and cared for him at night. He occasionally assisted in feeding Mr. Cooper.

Mr. Hales' evidence was that he worked at his Ministry office from Monday through Thursday from 9:00 a.m. until noon and then usually went home for lunch with Mr. Cooper. He then worked in his office at home or visited parishioners in the afternoon. He worked eight or nine

hours a day on church business, including some evenings. Fridays he took off. Saturdays he would work about five hours, on Sundays five to six hours. He would provide the assistance to Mr. Cooper, noted above, when he was home during the day or in the evenings.

One cannot, in my view, assess Mr. Cooper's dependency for care in the same way as one determines financial dependency. It is not capable of simple mathematical calculation. The mere fact that the care agency provided approximately ten hours a week and Mr. Hales fourteen to twenty-eight hours a week is not determinative of the issue. Similarly the fact that Mr. Cooper was, to some degree, on his own more than the combined time of the care agency and Mr. Hales does not mean that he was not dependent upon Mr. Hales. One must look at the degree of dependency of Mr. Cooper and the type of care being provided by the person or care agency. After reviewing all the care required by Mr. Cooper and the care provided by the agency as well as Mr. Hales, I have come to the conclusion that Mr. Cooper was dependent for care upon Mr. Hales. It is evident that Mr. Cooper could not have lived on his own and required a great deal of care, described above, to live as he did. Mr .Hales provided not only physical care, but emotional support and help as well. He was also there at night if required. The mere fact that Mr. Cooper was not being attended to at least twelve hours a day does not mean that he was not dependent on another for the purposes of the Statutory Accident Benefits Schedule. He clearly could not have survived on his own and Mr. Hales provided a degree of care such that I find that Mr. Cooper was dependent upon him for the purposes of the Statutory Accident Benefits Schedule.

I will deal with one final argument presented by the respondent. Counsel submitted that dependency should be restricted to members of the family for the purposes of priority. The argument is based on the theory that the intention of the legislature was to provide insurance coverage to members of the family unit. It is not clear to me that the legislature has such an intention. If it did, it could have clearly said so in the legislation. It did not, and I find that there is no such restriction.

In light of all the above, I find that Mr. Cooper was a dependent of Mr. Hales and accordingly Wawanesa is responsible for paying accident benefits to or on behalf of Mr. Cooper.

COSTS:

I may be spoken to in the event that the parties are not able to agree as to costs.

Dated this _____ day of March, 2004 in the city of Toronto.

_____

M. Guy Jones
Arbitrator