

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, section 268 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:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

THE ECONOMICAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Jonathan Kahane-Rapport for the applicant

Eric K. Grossman for the respondent

ISSUES:

1. Was Victoria Beattie, a dependent of her grandparents John and Darlene Boyd?
2. Who is responsible to pay accident benefits to or on behalf of Victoria Beattie?

ORDER:

1. Victoria Beattie was not a dependent of her grandparents, John and Darlene Boyd at the time of the motor vehicle accident.
2. Co-operators General Insurance Company is responsible for payment of statutory accident benefits to or on behalf of Victoria Beattie.

HEARING:

1. The arbitration hearing was held in the city of Toronto, in the province of Ontario on September 27, 2004.

FACTS AND ANALYSIS:

This dispute arises out of a tragic motor vehicle accident which occurred on August 11, 2002. At that time Victoria Beattie, age 5, was severely injured by a motor vehicle insured by Co-operators. Neither Victoria nor her mother, Dawn Beattie, had a valid motor vehicle liability policy and neither was listed as a driver on a motor vehicle liability policy at the time of the accident. Co-operators received a completed application for accident benefits and commenced paying the benefits to and on behalf of Victoria Beattie. Co-operators subsequently served Economical Insurance Company with a Notice of Intention to Dispute, taking the position that Victoria Beattie was a dependent of her grandparents, John and Darlene Boyd at the time of the accident. Mr. Boyd had a motor vehicle liability policy with Economical at the time of the accident.

THE LAW:

Pursuant to section 268 (2)(i) of the Insurance Act, the insurer of an automobile in respect of which the non-occupant is an insured has priority and is liable to pay accident benefits. If the injured party is not an insured, then section 268(2)(ii) applies and the insurer of the striking automobile is responsible to pay accident benefits. Since Victoria had no insurance of her own and was not listed the only way that she could be considered an insured is to be a dependent of a named insured pursuant to section 268 (5) of the Insurance Act, which states:

Despite subsection 4, if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is a spouse or a dependent as defined

in the statutory accident benefits schedule, of a named insured, the person shall claim no fault benefits against the insurer under that policy. ...

Section 2(6) of Bill 59, the applicable statutory accident benefits schedule, provides that a person is a dependent of another person if the person is principally dependent for financial support or care on the other person or person's spouse or same-sex partner.

It is the contention of the applicant that Victoria Beattie was principally dependent upon her grandparents for both financial support and care.

I will deal first with the issue of financial dependency. The courts have interpreted the issue of financial dependency on many occasions. The guiding principals have been set out by Mr. Justice O'Brien in Miller vs. Safeco (1985) 50 O.R.(2nd) 797 and approved by the Court of Appeal. The criteria to be considered are:

1. the duration of the dependency
2. the amount of the dependency
3. the financial and other needs of the alleged dependent
4. the ability of the alleged dependent to be self supporting

While these criteria were initially applied to earlier legislation, they have been held to apply to Bill 59 on numerous occasions.

Having set out the criteria to be applied, it now remains to apply them to the facts of this case. At the time of the accident, Victoria, her three sisters and her mother, Dawn Beattie, were living with Dawn's mother and father, John and Darlene Boyd. They had been living there for approximately for fifteen months at the time of the accident.

By way of background, Ms. Beattie was approximately thirty-two years old at the time of the accident. She had become a mother at age eighteen and had a total of four children and was

separated from her husband in 1999. While the husband had been ordered to pay support in the amount of \$709 per month, he had never paid the support prior to the accident. As a result of her pregnancy with Victoria, Dawn had fractured her pelvis and was confined to a wheelchair for

almost two years. While she had surgery in 1997 which allowed her to walk again, she still had ongoing difficulties and suffered from chronic pain. Nonetheless, in August 2000 she attended the Toronto School of Business and received a degree as a medical assistant in June 2001. Prior to moving in with her parents in May 2000, she had been living in a subsidized housing unit, however, due to financial difficulties she moved in with her parents.

One of the issues often faced when dealing with dependency issues is what the appropriate time frame is to consider. In this case, the situation with regard to Victoria, as well as her mother and grandparents, had been stable since at least May 2000 when Victoria and her mother had moved into the grandparents' house. Counsel for the respondent submitted that it would be appropriate to consider a time frame which would include a short time into the future. He argued that Dawn was in the process of arranging to get her own living accommodation with her four children. He noted that Dawn had planned to see an apartment the day following the accident and but for the accident would have moved out in the very near future. I accept that Dawn had formulated an intention to move out when Victoria started school which was only weeks away. I also accept that she might have been able to afford it, given that Ontario Works would have apparently have advanced her the first and last months rent, and her benefits would have increased. I also accept that in very limited circumstances, it is appropriate to consider future arrangements. The difficulty that I have in this particular case is that the contemplated move was too speculative to take into account. The increased benefits, as well as advancing of rent monies had been available to Dawn for some period of time, however she had not taken advantage of it. While I accept that Dawn had formulated an intent to move out, she had not yet found a place and there was no certainty that she would have found a place in the near future that was appropriate. Accordingly, given all the circumstances, I am of the view that the one-year prior to the accident is the appropriate time frame to consider with regard to the dependency issue.

Ms. Janet Olsen, a chartered accountant, testified on behalf of the applicant. After reviewing various documents, Ms. Olsen testified that Dawn Beattie's financial resources in the year prior to the accident could be summarised as follows:

The National Child Benefit Program	\$9,139.00
Ontario Works	\$4,164.00
G.S.T. Harmonized Sales Tax Credit	\$856.00
Income Tax Refund	\$604.00
Child Support	nil
Lottery Winnings	\$300.00
Total	\$14,913.00
Or	\$1,242.75 per month

Ms. Olsen then assumed that these resources would be allocated equally between Dawn Beattie and her four children thereby allocating \$2,983 per year or \$248.50 per month as Dawn's financial support for Victoria at the time of the accident.

Ms. Olsen then compared this to what she calculated to be the financial resources provided to Victoria by her grandparents, Mr. and Mrs. Boyd. Mr. John Boyd had sustained a work related injury and, as a result, had been in receipt of a disability pension from W.S.I.B. and C.P.P. since at least January 1, 2001. Darlene Boyd provided day care services at their home for their other daughters' two children for which she received \$150 per week. In addition, Mr. and Mrs. Boyd bred and sold purebred Pomeranian dogs. Mr. Boyd testified at an examination for discovery that the revenue generated from the dog breeding business essentially covered his expenses and I accept this. Nonetheless I find that the business did occupy some of the premises.

Ms. Olsen calculated the annual financial resources provided to Victoria by Mr. and Mrs. Boyd as follows:

Accommodation

First mortgage payment	\$6,720.00
Second mortgage payment	\$6,360.00
Property taxes	\$1,559.00
Hydro	\$2,400.00
Gas and Water	\$600.00
Insurance	\$900.00
Telephone	\$816.00
Satellite television	<u>\$204.00</u>
Total Accommodation	\$19,559.00

Food, household and other expenses \$7,200.00

Total household expenses \$26,759.00

Less reimbursement from Dawn Beattie (\$5,600.00)

Total household expenses, net of reimbursement \$21,159.00

Transportation Expenses

Lease payments	\$809.00
Insurance	\$225.00
License	\$22.00
Maintenance and Repairs	\$140.00
Fuel	<u>\$242.00</u>

Total transportation Expenses \$1,468.00

Ms. Olsen divided the totals by seven, being the number of persons living in the household to determine the amount of financial support provided by Mr. and Mrs. Boyd. This amounts to 14.29 % of the total, or \$3,234 per year, or \$269.50 per month. Thus, if Ms. Olsen's assumptions are correct, Mr. and Mrs. Boyd provided \$269.50 per month support for Victoria while Dawn Beattie provided only \$248.58 per month. Accordingly, Victoria would be financially dependent upon her grandparents.

Counsel for the respondent has taken issue with a number of the assumptions made by Ms. Olsen. As the difference between the support provided by the grandparents and the mother is so small, almost any change in the figures could alter who provided the most support for Victoria.

There are a number of household expenses which counsel for the respondent took issue with. Ms. Olsen, in determining the value of the accommodation provided by the Boyd's, used the total mortgage payments made by the Boyd's. This would include both the principal and interest. In my view, it is inappropriate to include the principal in the calculation as it represents an amount going into the equity held by Mr. and Mrs. Boyd. Victoria does not receive that benefit.

I received no information with regard to how much of the mortgage payments were interest and how much were principal and accordingly I have not calculated how it would change the numbers presented by Ms. Olsen. In the final analysis it does not matter, given my findings on other expenses other than to note that if the mortgage payment changes were taken into account, this would make it even more apparent that Victoria was not financially dependent upon her grandparents.

Counsel for the respondent submitted that the amounts deducted as being Dawn's contribution to the total household expenses were incorrect. Ms. Olsen calculated this to be \$5,600 per year based on the payment by Dawn to her parents of \$300 for the first two months and \$500 per month for the remaining ten months of the year prior to the accident. This was based on the evidence given by Mr. and Mrs. Boyd and Dawn Beattie at the examinations for discovery filed

at the hearing. My review of the examination for discovery transcripts leads me to the conclusion that Dawn contributed more than \$5,600 that she gave to her parents during the twelve months prior to the accident. She purchased food in addition to this. Mrs. Boyd gave evidence at the examination for discovery, stating:

Q: How much money did she give you?

A: At first, she - - because it was summer, she gave us around \$300 and she bought us a lot of the groceries.

Dawn Beattie testified at her examination for discovery as follows:

Q: Raising them on a budget, what do you mean?

A: Well, quite honestly, money was very very tight. Umm . . . I . . . money came in on the 1st, money came in on the 20th, and you budget it from the 1st to the 20th. The 1st, I usually bought groceries with whatever number it was, \$200 . . . whatever the ballpark figure we had.

Darlene Boyd also further stated at her examination for discovery:

Q78: . . . when Dawn Marie started buying a lot of groceries for her own kids - - well for everybody but . . . because she received two cheques a month: one at the beginning and one in the middle, I believe; and the one, she'd pretty well spend on groceries, so the coverage were . . . we always had lots of groceries.

Q79: Dawn would use that first pay cheque - - not pay cheque, but first cheque that she would get . .

Q80: Which one came in on the first of the month?

A: There was one that came in around the first and one that came in around the 20th of the month;
I think the baby one came in around the 15th or 20th

Mr. Grossman: the smaller one, the \$200 and some odd dollar one was the first of the month, and the \$800 dollar one that was the 20th.

The Deponent: mm-hmm

Mr. Kahane-Rapport:

Q81: So, she would use that money to buy the groceries?

A: Mmm-hmm. She'd me the \$500 out of that and the rest, she'd go buy groceries or if the kids needed something . . .

Elsewhere in the examination for discovery Dawn Beattie stated:

Q 98: A: In the fall of 2001 when I moved in, in the fall - - because in July my child tax credit had gone up and I knew that we were going to be using the heat in the basement, that they didn't use, my parents and I agreed that I would pay them \$500 a month and with the balance of that, as I say, I bought groceries . . .

John Boyd at his examination for discovery confirmed that Dawn contributed \$400 - \$500 towards the house and would also contribute to the groceries. (see question 27 of the examination for discovery of John Boyd)

It is difficult, based on the evidence provided, to determine exactly what amount of money were contributed for groceries by Dawn Beattie, however \$200 a month seems realistic based on Dawn's answers at her examinations for discovery, including question 98. It is unclear to what extent this food was used by Dawn and her four children as opposed to the entire family, although in all likelihood it was used by the entire family and should therefore increase the deduction for "reimbursement from Ms. Dawn Beattie" in Ms. Olsen's calculations, thereby changing it from \$5,600 a year to \$8,000 per year.

Counsel for the respondent also pointed out that Dawn spent \$15 a month to get food from the Salvation Army that was worth at least \$35. She also received milk coupons that allowed for purchase of four containers of milk. (see examination for discovery of Dawn Beattie Q 155) On

a yearly basis this would amount to approximately \$440, raising the above-noted deduction to \$8,420 per year.

Counsel for the respondent also took issue with a number of transportation expenses listed by Ms. Olsen, primarily dealing with the cost of insurance. While there may have been some small miscalculations in this area they were more than offset by the fact that Ms. Olsen factored in one trip per week for groceries for Victoria and did not include any cost for other trips to doctors, dentists, pleasure trips, etcetera that were undoubtedly taken. In addition, Ms. Olsen only attributed a transportation cost based on a Chevrolet Cavalier rather than the more expensive truck that Mr. Boyd actually used. Ms. Olsen did this based on the theory that it was unfair to charge based on the more expensive vehicle that Mr. Boyd had purchased and used because of his dog breeding business. I agree with Ms. Olsen's approach in this regard.

Counsel for the respondent also took the position that Dawn's "relief" babysitting of her sister's two children should be taken into account in determining Dawn's contribution to the household expenses. The evidence suggests that Dawn helped out her mother, babysitting her sister's children approximately ten hours per month. He proposed that this be valued at \$3/hr., roughly the same rate that Mrs. Boyd had been paid. This would amount to \$360 per year or \$30 monthly. While I accept that Dawn's babysitting relief babysitting did allow Mrs. Boyd to get away and accompany her husband on trips and to other matters, I am reluctant to take such relatively small matters into account, when such things are often done in family situations. If this were to be taken into account then one would also presume they take into account any times that Mrs. Boyd looked after Dawn's four children. On balance, the two probably more less offset one another.

Counsel for the respondent also took issue with Ms. Olsen's approach to dividing the allocated household expenses simply by the number of persons in the household. He questioned this approach on two grounds. Firstly, he argued that it was inaccurate to allocate an equal amount for five-year-old Victoria as it was for Dawn or her parents. Clearly, at the age of five, Victoria was unlikely to have used the telephone as much as say, John Boyd, who used not only in his

personal capacity but also in his business capacity. On the other hand, Victoria may have made greater use of the television than Mr. Boyd. While I agree that an even distribution among the individuals in the household is somewhat arbitrary, it would appear to be a reasonable starting position, from which one may vary depending on the facts of each particular case. The second ground for counsel's objection was that simply dividing by the seven persons living in the household, this did not accurately reflect the situation as it existed before the accident. Mr. Boyd did not simply live there but also conducted his dog-breeding business there. This used up hydro, gas, water and other household expenses. In addition, two of Mr. and Mrs. Boyd's other daughter's children were babysat in the house for approximately ten hours a day each or fifty hours per week. Counsel argued that each of the two children were there 50 of the 168 hours that exist in a week and that their combined time at the house represented the equivalent of .595 persons per week. He therefore argued that you should divide the household expenses by 7.595 rather than being divided by seven persons. In this particular case, taking into account Victoria's young age, the use of the premises by Mr. Boyd's business, and the babysitting of the other two children, I am of the view that Victoria's share of the household expenses should be 1/8 of the overall expenses. The transportation expenses, since the business expenses have already been taken into account, should remain at 1/7.

In light of my findings above, the revised calculations of John and Darlene Boyd's contribution to Victoria would be as follows:

Household expenses	\$26,759
Less reimbursement from Dawn Beattie	- \$8,420
Total Net household expenses	\$18,339

Pro rated share (1/8 equals 12.5 %) \$2,992.37 a year or \$191.03 per month.

This amount would be further reduced if one took into account just the interest payments on the mortgages rather than both the interest and principal. Since the numbers were unavailable at the hearing, I have used the fully blended amounts.

With regard to the resources of Dawn Beattie, I have left them unchanged. Counsel for the respondent has argued that the amount for “lottery winnings” should be \$300 rather than \$150 given that it was \$300 that was actually won. Since \$150 of the \$300 winnings was spent directly on one of the Dawn’s other children, I am of the view that the resources left to be divided among Dawn and her four children should be the remaining \$150.

Counsel for the respondent argued that I should include in Dawn’s financial resources \$709 per month that her husband, James Beattie had been ordered to pay as child support. I am not prepared to do so. While there was a court order dated shortly before the accident ordering him to pay \$709 per month, effective immediately, and to pay arrears at a later date, the evidence led suggested that this money was never paid. Certainly nothing was paid up to the time of the accident and indeed Mr. Beattie had not paid any support in the previous three years despite court orders. To take the payments, which were never received, into account when considering Dawn’s resources would create an utter fantasy and render the financial dependency analysis completely useless.

The issue of whether monies received from welfare or other government sources should be attributed to the providing service or the individual was raised briefly. I am in agreement with the decision of Director Sachs in Allstate Insurance Company of Canada vs. Fathead Ahmed (O.I.C.A.P – 003995 released March 11, 1997). The monies received from the social agency are properly attributable to the individual.

None of my other findings materially affect the amount that Dawn was able to contribute to Victoria. With regard to the ratio of Dawn’s resources spent on Victoria, I heard nothing that would persuade me to vary from the even five-way division based on Dawn and her four

children. While there may have been minor amounts such as the milk coupons or tickets that went directly to Dawn's children, all the other changes involved, contributions by Dawn to the overall household expenses, which have already been taken into account when considering the financial contribution of John and Darlene Boyd. Accordingly, Dawn's financial contribution to Victoria amount to \$2,983 a year or \$248.50 per month. This is obviously greater than the \$2,293.37 or \$191.03 provided by John and Darlene Boyd.

Based on the above analysis, it is clear that Victoria was principally dependent for financial support upon her mother, Dawn Beattie, rather than her grandparents, John and Darlene Boyd. My views in this regard are strengthened by two affidavits sworn by Dawn Beattie in 2000 and 2002. On November 2, 2000 Dawn Beattie swore an affidavit in an action to obtain financial support from her husband. In that affidavit she set out a financial statement that showed both her revenues and expenses. It showed a gross monthly income and benefits of \$1,637.78 and expenses of \$1,646.00 for an actual monthly deficit of \$2.22. On June 13, 2002 Dawn Beattie swore an affidavit with an accompanying statement of revenue and expenses again for the purposes of obtaining support from her husband. I note that the affidavit was sworn when she was living at her parents and only nine weeks prior to the accident. At that time, she estimated her monthly revenues at \$1,053.73 per month and her expenses at \$1,230 per month, for a deficit of \$176.27 per month. Counsel for the applicant points to this as evidence of Dawn's inability to be the principal financial supporter of Victoria. In my view, it points, if anything, to the opposite conclusion. While it may show that Dawn could not provide all of the financial support that Victoria required, it suggests that she provided the majority of the financial support and that is all that is required for the purposes of this priority dispute.

I am further reinforced in my view that Victoria was principally dependent upon her mother for financial support by the views expressed by some of the persons closest to the situation, John and Darlene

Boyd as well as Dawn Beattie herself. When questioned at her examination for discovery Dawn stated:

Q 274: Do you feel that at the time of Victoria's accident, you were dependent upon your parents?

A: No.

Q: Why not?

A: Because I was doing the same thing I was doing before I moved in there and the year prior . . . budgeting my money, accordingly. Umm . . . if there was a necessity that the girls had, whether it was on a Zellers' bill or putting something on "layaway", I managed as I had before to acquire what it was that they needed.

John Boyd at his examination for discovery was questioned and stated:

Q267: So the children – at least, as she put it, she felt that she was carrying her own freight and the freight of her children on her own back and that she wasn't relying on you for that?

A: I am pretty sure she was. She was . . . you know - - like, here and there and . . . but I mean, she contributed as much as she possibly could, and like I said, I never even kept track of it . . . food bills or whatever.

Darlene Boyd, when questioned, stated:

Q53: It's her home.

A: So they came, and she paid her way. She gave us money every month which was more like, for utilities or for groceries, things like that. Dawn Marie is very independent and nobody takes care of Dawn Marie.

Q91: Mr. Grossman: Let me put it to you this way: Did your spending on groceries change any after Dawn and the children came, or did you spend what you used to spend before and Dawn spent the rest?

The Deponent: That's about it - - yes. We didn't spend anymore, because we had bills to pay, and we paid them, and we were still able to go to the dog shows. So she didn't put us in the hole or we wouldn't be able to go to the dog shows . . .

In light of all the above, I am of the view that Victoria Beattie was principally dependent for financial support upon her mother, Dawn Beattie. It remains to be determined, however, whether Victoria was principally dependent for care upon her grandparents.

PRINCIPALLY DEPENDENT FOR CARE:

Counsel for the applicant submitted that Victoria had a very close relationship with her grandparents to the point where Victoria was principally dependent for care upon them rather than her mother. Counsel pointed to a statement made by John Boyd at his examination for discovery, which was as follows:

Q36: You're a busy guy?

A: And this is one of the reasons why I was so close to Victoria, because she was only in Kindergarten or Junior Kindergarten at the time . . . so she stayed home a lot of the time with me and so on and so forth. So we had quite a repertoire of - - like, kind of a taunting one another back and forth so . . .you know, I'd say we were, very close.

I accept that Victoria was very close to both her grandparents. She lived with them and they provided her with care and guidance. Mr. and Mrs. Boyd drove her to where she wanted to go, played with her and helped her. Due to Dawn's physical limitations, as well as the living arrangements, her grandparents may well have done things above and beyond that of the normal

grandparent/grandchild relationship. That does not, however, necessarily mean that Victoria was principally dependent for care upon her grandparents. Indeed, a review of the evidence makes it clear that her mother remained the principal provider of her care. At her examination for discovery Dawn stated:

Q251: Dealing still with the relationship between your children and your parents when you were living together; if the school called for a problem, if one of the children was sick, who would it be to speak to you or to speak to your parents?

A: Would speak to me.

Q252: When the children needed shoes for graduation, or a book, who would they speak to?

A: Me.

Q253: Any child need that the children would have; who would they go?

A: They would come to me.

Q254: Had you, in any way, changed things so far as parental role when you moved in with your parents?

A: No.

Q255: Had you given up any of those obligations to your parents?

A: No

Q256: Did you share them with your parents?

A: No

Q257: Was it just - - - ?

A: We had our own space downstairs and we spent a lot of time down there watching movies, listening to music - - you know . . . reading books, and the girls and I did a lot of sitting outside reading or listening to music outside - - you know, being in the country we can turn the music up out there, nobody really cares - - walking,

and bike riding, and we did as we had living on our own - - you know . . . the only difference was: I'd say to my parents - - you know "I'm going for a walk" . . . and just so they knew where I was in case they were wondering where I happen to be but . . . you know . . .

In light of this, I conclude that Victoria was principally dependent upon Dawn Beattie for care.

Having found that Victoria Beattie was not principally dependent upon John or Darlene Boyd for financial support or care, it follows that she was not a dependent of them for the purposes of the statutory accident benefits and therefore Co-operators is responsible for payment of accident benefits to or on behalf of Victoria Beattie.

In the event that the parties cannot resolve the issue of cost, I may be spoken to.

Dated this _____ day of November, 2004.

M. Guy Jones
Arbitrator