

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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CT DIRECT INSURANCE COMPANY

Applicant

- and -

LIBERTY MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Scott W. Densem for the applicant

Michael Huclack for the respondent

ISSUES:

1. Was Loudmila Volovik a dependent of Catherine Prupes at the time of the accident and if so, who is responsible to pay accident benefits to or on behalf of Ms. Volovik?

DECISION:

1. Ms. Volovik was not a dependent of Ms. Prupes at the time of the accident and accordingly Liberty Mutual Insurance Company is responsible for payment of accident benefits to or on behalf of Ms. Volovik.

HEARING:

1. This arbitration was held on February 3, and March 19, 2004. Written submissions were subsequently submitted and oral arguments were made on October 1, 2004.

FACTS & ANALYSIS:

This priority dispute arises of a motor vehicle accident which occurred on November 16, 1998. On that date, Ms. Loudmila Volovik was a pedestrian when she was struck by a motor vehicle insured by Liberty Mutual. At the time of the accident Ms. Volovik was not insured by a motor vehicle liability policy, however her daughter, Catherine Prupes did have a valid motor vehicle liability policy with CT Direct. Ms. Volovik unfortunately suffered catastrophic injuries as a result of the collision. Ms. Volovik applied to CT Direct for accident benefits and pursuant to the provisions of the statutory accident benefits schedule of the Insurance Act, CT Direct paid the benefits and has continued to do so. On February 1 1999, CT Direct served Liberty Mutual with a Notice of Intent to Dispute Between Insurers, taking the position that Ms. Volovik was not a dependent of her daughter, Ms. Prupes, at the time of the accident, therefore pursuant to section 268 (2) of the Insurance Act, the insurer of the automobile that hit her should be responsible for payment of accident benefits.

Liberty Mutual argues, however, that Ms. Volovik was in fact a dependent of her daughter, Ms. Prupes, and therefore pursuant to section 268 (5) of the Insurance Act, CT Direct is responsible to pay the accident benefits. As the parties were unable to agree as to which party should pay, this matter was referred to arbitration pursuant to Regulation 283/95.

In order to be considered an “insured person” for the purposes of the Insurance Act and the statutory accident benefits schedule, Ms. Volovik must have been a dependent of her daughter at the time of the accident. Pursuant to section 2 (6) of the applicable statutory accident benefit schedule, to qualify as a dependent, Loudmila Volovik must have been principally dependent for financial support or care upon Catherine Prupes at the time of the accident.

Both parties have agreed that Ms. Volovik was not dependent upon Ms. Prupes for care, accordingly the only remaining issue is whether she was primarily dependent upon Ms. Prupes for financial support.

The factors to be considered in determining dependency were originally established by the Ontario High Court and affirmed by the Ontario Court of Appeal in Miller vs. Safeco (1984) 40 O.R. (2nd) 451 (H.C.J.) (1985) O.R. (2nd) 797 (Ont. CA). They included;

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 sufficient

While these criteria were initially applied to earlier legislation, which dealt with only “dependency” and not principally dependent, the criteria have been accepted in many subsequent cases, including those involving the present legislation which uses the term “principally dependent”.

While counsel at the hearings spent a considerable amount of time discussing the issue of what standard of living must be considered when applying the test, I am satisfied in this particular case, the standard of living within this particular family was not extravagant, and that Ms. Volovik was not receiving enhancements to a lifestyle to the point where it would affect the dependency issue. This was not a case where the injured party was living a lifestyle that was extravagant to the point where it should be taken into account in determining dependency.

In looking at the question of financial dependency, the case law has held that in order to be principally dependent for financial support, one must receive more than fifty percent than one’s financial needs from someone other than themselves. The Ontario Court of Appeal in Liberty Mutual Insurance Company vs. Federation Insurance Company [2000] O.J. 1234, approved the test used by the arbitrator, who stated:

Jonathan can only be considered principally dependent for financial support on someone else if the cost of meeting Jonathan's needs is more than twice Jonathans' resources.

I am in agreement with the Court of Appeal that this is the applicable test.

Having set out the law in this area, it remains to examine what the financial resources and needs of Ms. Volovik were at the time of the accident. Before commencing this analysis, however, I shall deal briefly with the appropriate time frame for determining the dependency issue. As will be seen from my summary of Ms. Volovik's situation that follows below, Ms. Volovik had been in a relatively stable financial and living arrangement for a number of years prior to the accident. Accordingly I find that the applicable time frame in which to examine her financial dependency was one year prior to the accident.

Ms. Volovik was 72 years of age at the time of the accident. She came to Canada from Russia in 1994 with her daughter Catherine Prupes and her grandson Daniel Prupes who was approximately seven years old at the time of the accident. Prior to leaving Russia, Ms. Volovik was a secretary/typist. She did not work outside the home after arriving in Canada. In August 1996, Ms. Prupes bought a townhouse at 12 Robert Hicks Drive in North York. It was a 3-bedroom house in which Ms. Volovik, Ms. Prupes and Daniel Prupes lived until the time of the accident. While Ms. Volovik contributed some relatively small amount to the down payment for the house, Ms. Prupes paid most of the down payment and the title for the house was entirely in Ms. Prupes' name.

Prior to the accident, Ms. Volovik was functionally independent in the neighbourhood in which the family resided. Although she didn't have a license to drive, she walked throughout the neighbourhood to carry out normal activities of daily living and assist with the operation of the household. She travelled out of town on her own and would occasionally take the subway or a bus within the city.

Subsequent to arriving in Canada, Ms. Volovik applied for and continued to receive social services payments that amounted to \$930 per month or \$11,160 per year. In addition, she received a tax refund of \$708 per year. Accordingly, her total income for the year proceeding the accident amounted to \$11,868 a year, or \$989 per month.

Prior to the accident, Ms. Volovik helped out with the housekeeping, laundry, shopping, etcetera. In addition, she took care of her grandson, Daniel Prupes, after he finished with day care or school and prior to his mother arriving home after work. Based on the evidence, I find that this amounted to approximately 1.5 hours per day, being from approximately from 4:30 p.m. until 6:00 p.m. each weekday or a total of 7.5 hours per week. There was considerable discussion as to whether or not a service provided within the family should be valued and considered when deciding upon a person's financial resources. I am in agreement with the general proposition, put forward by counsel for the respondent, that services provided generally within the family unit that would normally be provided free of charge ought not to be valued, and counted when considering dependency issues. However, given that the courts and arbitrators have recognized that one should value services and accommodations in dependency cases, I am of the view that when the service goes above and beyond that normally provided, it should be included in the calculation. In this particular case, Ms. Volovik did various things in the household, such as housekeeping, laundry, meal preparation etcetera. Ms. Prupes did some of this as well and also drove Ms. Volovik places on occasion. All this, I find, was such that it was within the norm for a family unit and ought not to be included. The babysitting, in this particular case, was beyond the norm and should be given some value. Professor Jack Carr, an economist and professor at the University of Toronto testified at the hearing on behalf of the applicant. He testified that his very limited research indicated that live-in nannies in Toronto make \$300-\$400 per week. He took the figure of \$300 per week which amounted to \$15,000 per year. He then suggested that since Ms. Volovik was 72 at the time and had some physical limitations, doing limited work, one would take 1/3 of this or \$5,000 as a reasonable amount for the services provided. I am not in total agreement with this approach. Ms. Volovik worked a very limited number of hours. In my view it would be more appropriate to value the babysitting on an hourly basis. Using the \$10 per hour figure presented by Dr. Carr and multiplying this by 7.5 hours per week, this amounts to approximately \$75 per week or \$325 a month, or \$3,900 per year. Accordingly, when one totals

Ms. Volovik's financial resources prior to the accident, she had \$11,868 plus \$3,900 or \$15,768 per year or \$1,314 per month at her disposal.

EXPENDITURES:

The situation is considerably more complicated when it comes to determining Ms. Volovik's expenses. No less than 3 different approaches were put forward when considering this issue. I will deal with each.

Ms. Catherine Prupes testified at the hearing. Ms. Prupes stated at the time of the accident she lived with her mother and her son David in a three-bedroom home. At the time she was a software consultant at G.E. Information Services. Her T-4 for 1998 reveals an employment income of \$54,350.97. She testified that she also had a small consulting business run out of her home. In 1998, this produced gross revenue of \$2,610 and a net loss after expenses of \$3,773.96. Ms. Prupes testified that her mother had paid \$700 per month towards the household finances and that the remaining \$230 that Ms. Volovik had her disposal was spent by Ms. Volovik on whatever she wished, be it personal needs, presents for others, etcetera.

Ms. Prupes testified that she contributed \$3000 per month to the overall household expenses and that her mother contributed \$700 per month to Ms. Prupes, meant that the overall monthly household expenses were \$3,700 or \$1,233 per person, given that there were 3 persons living in the house at the time. Since Ms. Volovik only contributed \$700 to the household expenses, Ms. Prupes expressed a view that Ms. Volovik was therefore dependent on her, as Ms. Prupes had contributed the \$533 "shortfall" in Ms. Volovik's contribution to the household expenses.

I have a number of difficulties with this approach. While I will not go into detail about the household expenses Ms. Prupes included in her calculation, I do have some difficulty with the manner in which she allocated the expenses. For example, she ignored the fact that she ran a business out of the household. This, in my view, should be taken into account when deciding how much of the overall expenses should be allocated to each person. In addition, Ms. Prupes

ignored the fact that Ms. Volovik had an additional \$289 per month at her disposal. While it may not have been used for household expenses, it should be taken into account in determining Ms. Volovik's financial dependency.

While Ms. Prupes' views as to Ms. Volovik's financial dependency are helpful in determining the financial situation that existed in the household, they are by no means determinative of the issue. I do note, however, that if one used Ms. Prupes' approach, it would result in Ms. Volovik being dependent upon herself, as she would have contributed at least \$700 towards her overall needs and Ms. Prupes would have contributed only \$533 towards her mother's financial situation.

Mr. Jack Carr prepared a report with regard to the dependency issue and also testified at the hearing on behalf of the applicant. Professor Carr, in his report, came to the conclusion that Ms. Volovik was essentially self-supporting. He did this on the basis of sworn statements given by Ms. Prupes and Ms. Volovik as well as Ms. Prupes' income tax returns. The tax returns indicated to him that Ms. Volovik paid her daughter \$700 for room and board out of the \$930 per month she received from social services. He noted that while Ms. Volovik provided some babysitting services to Ms. Prupes, Mr. Carr was unaware of any significant uncompensated services provided by Ms. Prupes to Ms. Volovik. In fact, at the hearing, Ms. Prupes testified that there were numerous goods and services as she provided to Ms. Volovik that would not be covered by the \$700 paid to Ms. Prupes. The confusion in this regard may have been created by what might be considered, at best, confusion or inaccurate information provided by Ms. Prupes at her examination for discovery. At the examination for discovery Ms. Prupes appeared to indicate that the \$700 per month covered all Ms. Volovik's expenses, however, this was later clarified by Ms. Prupes, who at the hearing indicated that the goods and services provided were far more than the \$700 per month previously indicated.

Professor Carr took the position that one could look at Ms. Prupes' income tax returns to obtain an accurate indication of the value of the accommodation being provided by Ms. Prupes to Ms. Volovik.

An examination of the 1998 income tax return revealed that Ms. Prupes claimed \$5,400 income from renting accommodation at her house to her mother. This works out to \$450 per month, leaving the remainder of \$250 that Ms. Volovik contributed, to the household for food, clothing etcetera.

Counsel for the respondent questioned this approach, taking the position that this was simply an accounting exercise done for the purposes of obtaining the best possible income tax result. Professor Carr noted that Ms. Prupes had signed the income tax return and sworn it to be true. Ms. Prupes, in her testimony, indicated that she had used the income tax return figure on the advice of her accountant and it did not reflect the reality of the situation.

While Ms. Prupes swore that the information was true for income tax purposes, I do not think that it is determinative of the issue. At the time that she filled out the income tax return, she may or may not have turned her mind to exactly what value the accommodation that she was providing was actually worth. The estimate is certainly of some value, however, just as with Ms. Prupes' estimate at the hearing, it is not determinative of the issue.

A different approach to the issue was presented by Mr. John Seigel, who prepared a report and testified at the hearing on behalf of the respondent. Mr. Seigel estimated the annual financial resources of the family unit at \$54,394 made up of approximately \$46,000 net income from Ms. Prupes and \$8,400 from Ms. Volovik. Mr. Seigel then worked out the annual household expenditures. For food and shelter he used information provided to him from a statement made by Ms. Prupes and her 1998 income tax returns. He also took transportation and childcare expenses from Ms. Prupes' income tax returns. All other figures he took from Statistics Canada figures for families with a similar disposable income. His calculations are as follows:

	Annual Amount
Food	\$7,200
Shelter	
Mortgage	\$15,000
Utilities	\$1,886
Insurance	\$402

Maintenance and repairs	\$2,474
Property tax	\$2,435
Total Shelter Expenses	\$22,197
Child Care Expenses	\$3,850
Clothing	\$2,927
Transportation	\$6,780
Health Care	\$1,623
Personal Care	\$1,161
Recreation	\$4,389
Reading materials and other primitive matters	\$328
Education	\$1,018
Tobacco products and alcoholic beverages	\$1,608
Miscellaneous	\$909
Games of Chance	\$324
Total Household Expenses	\$54,394

I have a number of difficulties with such an approach. The blind use of Statistics Canada figures is potentially misleading. For example, \$1,018 has been allocated to education, where in fact there were little or no evidence of any such monies being spent for such an item by or for the benefit of Ms. Volovik. Another example would be \$4,389 for recreation. While I accept that in some instances Statistics Canada figured may be of some assistance, when, as in this instance, they are used for many categories, without actual supporting information, the exercise becomes far too speculative.

If one were to simply take the figures that Mr. Seigel presented, the expenditures of \$54,394 and divide them by 3, being the number of persons in the family, each person's cost would be \$18,131.

By Mr. Seigel's calculation Ms. Volovik contributed only \$8,400 and Ms. Prupes contributed the difference of \$9,731.33.

There are a number of shortcomings to this approach. To begin with, Ms. Volovik had revenue of \$11,868 available to her, if one includes all her resources. While she may have only given \$700 per month to Ms. Prupes, Ms. Volovik had the additional money available to her. While she may have spent part of it on some of her own needs such as clothes, and gifts for others, there was also evidence that she had approximately \$2,000 to \$2,500 in the bank so she was saving some of it and it was therefore available for support. If one were to calculate Ms. Volovik's resources at \$11,868, then Ms. Prupes would only have had to contribute \$6,263 which is clearly less than Ms. Volovik's contribution.

I also have difficulty with Mr. Siegel's approach to a number of the items. In his calculation he used the figure of \$15,000 for the mortgage expense. In fact, the annual mortgage payments were \$10,300 per year. This included both principal and interest. I am in agreement with Professor Carr that one should only include the amount spent on interest for the mortgage as the principal represents the equity interest in the house, something which would benefit Ms. Prupes. The interest component alone was \$8,157. I also have difficulty with the child care expense of \$3,850 put forward by Mr. Seigel. The day care benefited only Ms. Prupes and Daniel and therefore should not be part of the equation. If one were to simply put in the proper mortgage figure and exclude the childcare expenses, the total household expenses would be \$44,061. One third of this would be \$14,687. If even if one credited Ms. Volovik of only resources of \$8,400 this would mean Ms. Prupes was contributing \$6,287 per year towards Ms. Volovik, obviously less than Ms. Volovik was paying herself.

Counsel for the respondent, in his submissions, put forward his own summary of the expenditures made from the family pool, solely for the benefit of Ms. Volovik, as well as those made jointly. They may be summarized as follows:

(a) Expenditures made solely for Ms. Volovik's benefit:

	Monthly	Yearly
Clothes/shoes	\$83.00	\$1,000
Entertainment	\$300	\$3,600
Glasses	\$8 - \$16	\$100-\$200
Dentist	\$83	\$1,000
Television	\$33.75	\$405
Boston Vacation	\$40	\$500
Cigarettes	\$50 - \$100	\$600- \$1,200
Total	\$597.75 - \$655.75	\$7,205 - \$7,905

(b) Joint Expenditures of which Ms. Volovik derived a portion of the benefit

	Monthly	Yearly
House Mortgage	\$860	\$10,320
Utilities	\$300	\$3,600
Food	\$600	\$7,200
Telephone	\$50 - \$100	\$600 - \$1,200
Cleaning Products	\$150	\$1,800
Property Insurance	\$40	\$480
Property Tax	\$203	\$2,434
Automobile	\$540	\$6,485
Renovations	\$83 - \$125	\$1,000 - \$1,500
Cutting grass	\$20	\$240
Total	\$2,846 - \$2,938	\$34,152 - \$35,252

The above figures were based on the evidence given by Ms. Prupes at the hearing. While I accept that Ms. Prupes gave her best estimates as to the expenses involved, I am not convinced that she was a totally reliable historian. The hearing occurred more than six years after the accident and accordingly it would be difficult for any witness to provide totally accurate estimates of the expenses incurred so long ago. Added to this is the evidence that Ms. Prupes gave at her examination for discovery on February 27, 2002. When asked about whether there were any other financial arrangements that would lead her to incur any expenses on behalf of her mother other than her mother's contribution of \$700 per month, the exchange went as follows:

Q.: Now, aside from the arrangement about the \$700 was there any other financial arrangement between you and your mother whereby she gave you money or you gave her money or was that it?

A.: I took care of all finances. She . . .

Q.: So, you paid the bills?

A.: Yes. She had no idea of how much I pay or - - never, ever. This part was mine.

Q.: She gave you the \$700?

A.: Yes

Q.: And you took care of the bills and those kinds of things?

A.: Yes.

Q.: Now, was there ever any other sum of money that your mother gave you other than the \$700 aside from buying you a gift or things like that from time to time?

A.: I don't think so.

Q.: Did you ever have to give your mother any kind of money on a regular basis? Was that necessary or was she able to get what she needed with what she had left over after she gave you \$700?

A.: I don't think so because . . . she would go somewhere and buy things and I would pay with a credit card, right? I mean, if she didn't have any money I would give her some money too, you know, but she . . . if she needed some but . . . no, it was never an issue. I mean if she needed some money how much would it be?

Q.: As far as, for example, did the ESL course cost anything for her to go?

A.: Ten dollars.

Q.: Aside from whatever household expenses that were common to you, did your mother have any other expenses of her own that had to be dealt with?

A.: Well, clothes I don't know.

Q.: Would she ever go to the store and buy her own clothes? Was she able to go and do that with the money she had?

A.: Theoretically yes. Practically, we would go together and buy things. She would go to the drug store and buy, you know little things, personal care and stuff or whatever she liked.

Q.: What about the trip how was that being paid for, the trip to the Dominican that was planned, how was that going to be paid for?

A.: Well, I was going to pay for it. It was money I had, like she was contributing, right?

Q.: Your mother's contribution to the family situation was the \$700?

A.: Yes

It was only subsequent to the examination for discovery that Ms. Prupes came up with the revised figures. In light of the above, one must approach Ms. Prupes' figures with a certain amount of caution. I also have some difficulty with the allocation expenses, for example the television is attributed as a one time expense which in fact will last many years and I have

accordingly put \$100 a year towards it. In addition, the trips would probably not occur every year, however, I will use that figure, however, using the low-end figure. Therefore, \$6,905 per year was used solely for Ms. Volovik.

I also have some difficulty with the joint expenditures listed by counsel for the respondent. The mortgage figure, as stated above, should be the interest only, or \$8,157. The automobile was used primarily by Ms. Prupes to go to and from work and to take Daniel to various activities. I find that only half the amount should therefore be applied to the joint use when making the calculation, or \$270 per month. The utilities figure shown in Ms. Prupes' 1998 income tax returns was \$1,886. In her tax returns she attributed \$568 as a business expense. I will use the figure of \$1,886 for our purposes but will make comment about the business use later in this decision.

With these reductions alone, and using the low-end of the estimates, given their questionable validity, one arrives at a total of \$27,039. What has not been taken into account when considering these amount, however, is the fact that Ms. Prupes used the premises for her own business purposes and deducted part of the expenses for taxes. With the exception of food and the automobile, which I have already reduced for business purposes, each of these items should be reduced because of the business use. I am reducing that amount by 10% or \$16,597 minus 10 percent or \$1,659. While I accept that this is somewhat arbitrary, I note that it is less than Ms. Prupes claimed for it in her 1998 tax returns. Accordingly, I calculate the joint expenses as follows:

Item	Annual Amount
Mortgage	\$8,157 minus 10% = \$7,341
Utilities	\$1,866 minus 10 % = \$1,697
Food	\$7,200
Telephone	\$600 minus 10 % = \$540
Cleaning Products	\$1,800 minus 10 % = \$1,620
Property Insurance	\$480 minus 10 % = \$432
Property Tax	\$2,434 minus 10 % = \$2,190

Auto	\$3,242
Renovations	\$1,000 minus 10 % = \$900
Grass cutting	\$240 minus 10 % = \$210
Total	\$25,378

If we had the expenses solely attributable to Ms. Volovik of \$6,905 plus one third of the joint expenses of \$25,378 or \$8,459.33, we get a total of \$15,364 as the yearly expenses attributable to Ms. Volovik. As noted above, the financial resources above were \$8,404 if you take only what she paid to Ms. Prupes, or \$11,868 if you take into account of the money available to her in 1998. If you add the value of the babysitting this would rise to \$15,768. Any of these figures is more than half the total expenditures attributable to Ms. Volovik. Accordingly, I find that Ms. Volovik was principally dependent upon herself for financial support. As such, she was not principally dependent upon Ms. Prupes for financial support. That being the case, Liberty Mutual is responsible for payment of accident benefits to or on behalf of Ms. Volovik.

In the event that the parties cannot agree on the issue of costs, I may be spoken to.

Dated this _____ day of December, 2004.

M. Guy Jones
