

IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8, as amended 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:

UNIFUND ASSURANCE COMPANY

Applicant

- and -

RBC GENERAL INSURANCE

Respondent

DECISION

COUNSEL

Jason R. Frost
Counsel for the Applicant, Unifund Assurance Company
(hereinafter referred to as "Unifund")

Abby J. Tenenbaum
Counsel for the Respondent, RBC General Insurance
(hereinafter referred to as "RBC")

ISSUE

Which insurer, Unifund or RBC stands in priority to pay statutory accident benefits to the claimant, Daljit Sidhu, as a result of personal injuries sustained by him in a motor vehicle accident which occurred on October 29, 2009. This priority dispute involves the issue of "dependency". If it is found that Daljit Sidhu was principally financially dependent on his son, Navdeep Sidhu, then Unifund would be responsible for payment of statutory accident benefits. If it is found that Daljit Sidhu was not principally financially dependent on his son, Navdeep Sidhu, then RBC would be responsible for payment of statutory accident benefits.

PROCEEDINGS

This matter proceeded on the basis of a joint document brief (which included statements and Examination Under Oath transcripts of the claimant and his son and financial records), written submissions and caselaw provided by the parties.

LAW

A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the Insurance Act, R.S.O. 1990, c.l.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

As Daljit Sidhu was a pedestrian at the time of this motor vehicle accident, the priority rules with respect to "non-occupants" are applicable. They are set out in Section 268(2) of the Insurance Act, which is set out as follows:

"In respect of non-occupants,

- i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured;*
- ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant;*
- iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose;*
- iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund."*

Subsection 268(5) of the Insurance Act, R.S.O. 1990, c.l.8 provides that:

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

Subsection 2(6) of the Statutory Accident Benefits Schedule - Accidents On or After November 1, 1996 provides that:

(6) For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse .

The sections above would make the insurer of the striking vehicle responsible for the payment of statutory accident benefits, provided the claimant was not an insured under some other policy. The Respondent, RBC, takes the position that the claimant was dependent on his son and therefore an insured under their policy with Unifund.

There is considerable jurisprudence on the issue of dependency.

As I have held in several of my other decisions regarding the issue of dependency, I am satisfied that the criteria to be used in determining financial dependency, for the purposes of the Statutory Accident Benefits Schedule, was established by the Court of Appeal in Miller v. Safeco 1986, 13 C.C.L.I. 31. In that case, the court held that the relevant criteria were:

- (i) Amount of dependency;
- (ii) The duration of the dependency;
- (iii) The financial and other needs of the alleged dependent; and
- (iv) The ability of the alleged dependent to be self-supporting.

The aforesaid criteria has been adapted by several Arbitrators in the context of priority disputes involving the issue of dependency.

As I have in previous decisions involving dependency, I also accept the principals set out in Federation Insurance Company of Canada v. Liberty Mutual Insurance Company (Arbitrator Samis, May 7, 1999). The decision highlights the importance of selecting an appropriate time frame for the analysis of financial dependency. Relationships change from time to time, perhaps suddenly. Transient changes may alter matters for a short period, but not change the general nature of the relationship. A momentary snapshot would not yield any useful information about these time dependent relationships. It is the general nature of the relationship that must be viewed based on the analysis provided by Arbitrator Samis. Arbitrator Samis also deals with the issue of earning capacity as opposed to actual earnings. I accept the proposition that the ability to be self-supporting must be taken into account in measuring dependency. An intelligent, able-bodied individual fully capable of employment, who chooses to live at home with his parents ought not to be considered dependent upon them. I also accept the proposition that "dependency" implies something more than receipt of financial benefit. It requires some kind of need on the part of the person alleged to be dependent. A very wealthy person might receive food, shelter and other financial benefits from family, but this would not support a conclusion that the person is principally dependent upon the family structure.

When looking at the question of financial dependency, the related case law provides that in order to be principally dependant for financial support, one must receive more than 50% of one's financial needs from someone other than themselves.

Ref: *Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada*, [2000] O.J. No. 1234 (C.A.)

State Farm v. American Home Assurance and York Fire (Arbitrator Guy Jones, November 2002) at pgs. 14 – 16.

Allstate and ING (Arbitrator Lee Samis, August 18, 2011) at pgs. 4 – 6.

Security National and Axa (Arbitrator William McCorriston, February 15, 2011) at pgs. 3 - 6.

The calculation of "50 + 1" requires an analysis of the claimant's monthly expenses, income, savings and assets. The concept of money's worth is also used by arbitrators to determine a claimant's financial picture at the time of an accident. This assessment is not necessarily an assessment of the exact financial snapshot on the day of the accident, but rather a consideration of the personal history of the alleged dependant over some period of time in order to reflect the true financial situation of the parties at the time of this accident.

Ref: *Gore Mutual Insurance Company v. Co-operators General Insurance Company*, 2008 CanLII 46914 (ON S.C.) at para. 8.

Allstate and ING (Arbitrator Lee Samis, August 18, 2011) at pg. 4.

Counsel for both parties have agreed in their submissions that the applicable test for financial dependency is the "50% + 1" as set out in the caselaw above.

FACTUAL FINDINGS AND ANALYSIS

On October 29, 2009, Daljit Sidhu was a pedestrian struck by a motor vehicle insured by RBC. At the time, Daljit Sidhu was living with his son, Navdeep Sidhu, who owned an automobile insured with Unifund. The claimant, Daljit Sidhu, presented an accident benefits claim to Unifund. Unifund has been paying statutory accident benefits. Unifund claims that the claimant was not "an insured" under the Unifund policy as he was not principally financially dependent on their policyholder, Navdeep Sidhu. Accordingly, Unifund takes the position that the insurer of the striking vehicle (RBC) stands in priority for payment of those accident benefits.

At the time of the October 29, 2009 motor vehicle accident, the claimant was a 61 year-old retiree. He retired from his position as an audit officer with the Government of India in 2003. The evidence would suggest that he received an indexed monthly pension which was deposited into a bank in India. The evidence of the claimant indicated that his pension in 2009 was \$451.47 per month. He also received a quarterly GST payment of \$125 per month. The claimant continued following retirement to reside in India with his wife until March 2009.

On March 24, 2009, the claimant and his wife immigrated to Canada and moved in with their son (Navdeep Sidhu), daughter-in-law and two grandchildren. They occupied a 1300 square foot bungalow in Mississauga. There were a total of six people living in the household from March 24, 2009 to the date of the accident on October 29, 2009. Throughout this period, both the son and daughter-in-law were employed. Prior to the immigration of the claimant and his wife, the grandchildren were supervised by a woman who worked five days a week, eight hours per day. Her name was Ms. Dormamitiya Ubeysekara. She was paid in cash by Navdeep Sidhu. No records were kept as to the hourly wage. The evidence would indicate that when the claimant and his wife arrived, they took over the housekeeping and babysitting tasks formerly performed by the hired help. The claimant and his wife were not paid for those services. Nonetheless these would be considered moneys worth contributions to the household.

In a weekly expense claim made by the claimant in the accident benefits claim, he indicated that he performed 44 hours of housekeeping and caregiving services in the household per week at the time of the accident. These services included bathing and dressing the children, feeding, meal preparation, kitchen cleaning, dusting, washing floors, vacuuming, bed making, garbage removal, lawn care, playtime supervision, schoolwork, sports, social activities and attending to the other needs of the household as required.

As for assets, the wife owned the home that they lived in while in India. There is a divergence of evidence as to the value of that house. The evidence would indicate that it was worth somewhere between \$45,000 and \$225,733. I accept the evidence that there was no

mortgage on the property. In addition, the claimant and his wife owned Indian savings bonds. At his Examination Under Oath, the claimant indicated that the value of his savings bonds were approximately \$67,720. Documentation contained in the Joint Document Brief would indicate that the value of the bonds today total approximately \$72,844.24. They continue to grow in size while invested.

The evidence before me would indicate that when the claimant arrived from India, he paid his son approximately \$6,000 in cash to offset the living expenses for both he and his wife and thereafter, continued to pay between \$500 and \$600 per month to cover the costs of living for himself and his wife. There is no documentary evidence to support those payments. The claimant testified that when he would go back to India each year he would bring back cash.

The Respondent RBC has calculated the family's household expenses in 2009 as follows:

Mortgage payments =	\$16,640.00
Property taxes =	2,582.15
Insurance =	551.88
Utilities =	2,725.18
Communications =	1,488.00
Groceries =	<u>12,000.00</u>
TOTAL	<u>\$35,987.21</u>

The Applicant Unifund suggests that the household expenses in 2009 were as follows:

Mortgage payments =	\$ 7,896.95
Property taxes =	2,582.14
Utilities =	3,,277.06 – 4,200.00
Groceries =	12,000.00
TV/Internet/phone =	<u>1,488.00</u>
TOTAL	<u>\$27,244.00 - \$28,167.00</u>

Unifund claims that only the interest portion of the mortgage payment ought be considered, hence the difference in the positions of the parties. On my analysis it is not necessary to deal with such contention.

Unifund further contends that this amount ought to be reduced by the deductions claimed by the son on his tax return in the amount of \$6,252.13, with respect to business expenses incurred by his at-home financial advising business. I do not accept this proposition. This was a designation for tax purposes only and did not really alter the overall family needs on a monthly basis given the limited income generated by the son's self employment.

I find that the appropriate timeframe to assess financial dependency is the period of time that the claimant was living with his son's family in Mississauga. This would be a period of approximately 7 months.

On the evidence before me, I have no reason to doubt that the claimant made the financial contributions as he has claimed. Having read his statement and the Examination Under Oath transcripts I am satisfied with his credibility on this issue. His evidence is largely supported by the evidence of his son. I have considered the lack of documentary support but am

satisfied that the claimant is a simple man who probably preferred working with cash as opposed to bank transactions. I find that during the seven month period preceding the subject accident, the claimant contributed \$6,000 cash as an initial payment and seven monthly payments of \$500 for a total of \$9,500. These contributions were made for living expenses for both himself and his wife. I therefore find that the claimant's contributions for himself total \$4,750 for this 7 month period. That represents an average monthly contribution towards expenses over the 7 month period in Canada of \$678. Even if one were to consider a discount from the evidence of the claimant and his son on the basis that there was no documentary support for these contributions, it would not make a significant difference to the ultimate mathematical formulation of dependency as set out later in this decision. I am satisfied on the evidence overall that there was at least a significant financial contribution made by the claimant to the household expenses.

One must also consider the value of the services that he provided by way of housekeeping and caregiving. I am not prepared to accept the fact that he contributed 44 hours per week towards those services. The hired help that was performing those services previously was only working 40 hours per week. These services were replaced by the combined efforts of both the claimant and his wife. I do accept the fact that he did some housekeeping, home maintenance and caregiving. In a somewhat arbitrary fashion, given the imperfection of the evidence before me, I find as a fact that the claimant's total contribution (financial and services) totalled no less than \$800 per month.

Even if I were to accept the household expenses as suggested by RBC at \$35,987.21 annually, the contribution made by the claimant far exceeded 51% of his share of the household expenses. If one were to divide the household expenses by six (six people living in the household), the cost per occupant would be roughly \$500 per month. Even if one were to accept the Respondent's argument that the annual cost ought to be divided by four (four adult Plaintiffs in the household), the expenses per adult would only be about \$749 per month. I do not accept that the household expenses ought only be attributed to the adult occupants. Even dividing the costs by 5 the monthly expense attributable to the claimant would be about \$600 per month and still far exceeded by the claimants contributions which I have concluded were in excess of \$800 per month. In order for me to find that the claimant was dependent on his son I would have to find that the claimants contributions were less than \$300 per month. I am totally satisfied on the evidence that the claimants contributions to the household (financial and services) far exceeded this threshold. The plaintiffs pension alone of \$451.47 per month plus GST quarterly rebate of \$125 was sufficient to offset the household expenses reasonably attributable to the claimant without the need for dipping into his savings bonds.

I find that the claimant was not principally financially dependent on his son at the time of the motor vehicle accident. I find that the claimant's contribution to the expenses of the household was definitely more than 51% of the expenses that might reasonably be attributable to him. The simple and effective conclusion is that the claimant easily satisfies all aspects of the dependency analysis without need for a line by line analysis or an expert accounting report. When one considers the assets available to him it is clear in my view that he had the ability to be self supporting.

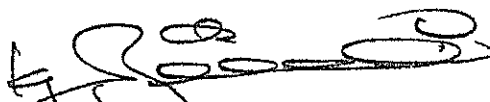
I am satisfied that given his pension income and assets he certainly had the ability to be self supporting at the time of the collision and for the foreseeable future. I am satisfied that he was a simple man with limited basic needs.

RBC is therefore the priority insurer.

ORDER

I hereby order that RBC is the priority insurer. I hereby order that RBC pay the costs of Unifund with respect to this priority dispute on a partial indemnity basis. I hereby order that RBC pay the Arbitrator's costs.

DATED at TORONTO this 2nd)
day of August , 2012.)



KENNETH J. BIALKOWSKI
Arbitrator