

COURT FILE NO.: 07-CV-344846 PD1  
DATE: 20081222

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Co-Operators General Insurance Company v. Guarantee Company of North America and Unifund Assurance Company

**BEFORE:** Madam Justice L.B. Roberts

**COUNSEL:** Bruce Keay, for the Applicant/Appellant

Maura Thompson and Jon deVries, for the Respondent, Guarantee Company of North America

John F. Graham, for the Respondent, Unifund Assurance Company

**HEARD:** November 12, 2008

**ENDORSEMENT**

Nature of the Appeal

[1] The applicant appeals the Award of Arbitrator Bruce R. Robinson dated October 15, 2007, concerning a priority dispute regarding which insurer is responsible to pay statutory accident benefits to Jesse Wood-Bell ("Jesse") as a result of a motor vehicle accident which occurred on March 26, 2005. The arbitration had taken place before Arbitrator Robinson pursuant to the provisions of the *Arbitration Act* and the *Insurance Act*.

[2] In his Award, Arbitrator Robinson decided that, at the time of the accident, Jesse was principally dependent for financial support and care upon his biological parents, Stephen Wood and Laureen Wood, pursuant to Ontario Reg. 403/96, as amended, and that their insurer, the applicant and appellant, Co-Operators General Insurance Company, is required to pay statutory accident benefits to Jesse.

[3] At the time of the accident, Jesse had been in temporary foster care for thirty-nine days with Gail Eskritt and Marc Eskritt, pursuant to a temporary care agreement between the Woods, Jesse's biological parents, Jesse, and the Chatham Kent Integrated Children's Services ("CKICS"), dated February 15, 2005. The respondent, Unifund Assurance Company, insured the Eskritts, Jesse's foster parents, under a standard automobile policy. The respondent, Guarantee Company of North America, insured CKICS.

[4] The applicant seeks an order setting aside the Award of Arbitrator Robinson and a finding that either the Guarantee Company of North America or the Unifund Assurance Company is responsible to pay Jesse's claims for accident benefits.

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[5] The applicant asserts that Arbitrator Robinson erred in finding that Jesse was principally dependent for financial support and care on his biological parents. The applicant contends that Arbitrator Robinson erroneously came to that finding because he misapprehended the evidence and erred in determining that a broader time frame for determining dependency, rather than the time frame from February 15 to March 26, 2005, was more appropriate in the circumstances.

#### Standard of Review

[6] The applicant submits that the appropriate appellate standard of review to apply is the standard of legal correctness, and the respondents submit that the appropriate standard of review to apply is the standard of reasonableness.

[7] The question before Arbitrator Robinson was to determine dependency for financial support and care for the purposes of the payment of statutory accident benefits. In those circumstances, Arbitrator Robinson was required to interpret and apply the relevant legal principles about when a person is principally dependent to his factual findings about the particular circumstances of Jesse's relationship with his biological parents and his living arrangements during the appropriate time period that Arbitrator Robinson also had to determine.

[8] As such, the question before Arbitrator Robinson was one of mixed fact and law and was closer to a factual determination. As noted below, there is no issue that Arbitrator Robinson applied the correct legal principles. The grounds of appeal are aimed more at the factual aspects of the problem. Given the special expertise of arbitrators in evaluating facts for a determination of dependency for statutory accident benefits entitlement, unless the arbitrator's decision was unreasonable, it is entitled to deference. (See: *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.*, [2006] O.J. 4518 (Ont. C.A.), at paras. 22 and 23.)

#### Summary Conclusion

[9] For the reasons that follow, it is my view that Arbitrator Robinson's decision was both reasonable and correct and therefore that the appeal should be dismissed.

#### Analysis

[10] There is no issue that at the time of the motor vehicle accident, Jesse, who was fifteen years old at that time, was not independent for financial support or care. The question is on whom Jesse was dependent for financial support and care.

[11] The parties agree that the correct criteria to be applied (and which were applied by Arbitrator Robinson) to determine dependency for financial support and care for the purposes of the payment of statutory accident benefits are those set out by the Ontario Court of Appeal in *Miller v. Safeco* (1984) 9 C.C.L.I. 1 (Ont. H.C.J.), at p. 7; aff'd, (1986), 13 C.C.L.I. 31 (Ont. C.A.), as follows:

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

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3. the financial and other needs of the alleged dependant; and
4. the ability of the alleged dependant to be self-supporting.

[12] Using the *Miller v. Safeco* factors to assess whether a state of dependency exists at a particular point in time, it is necessary to consider the personal history of the alleged dependant over some period of time and to determine a period that will reflect the true situation of the parties at the time of the accident. The parties also agree that, in determining the relevant time period, it is not appropriate to take a “snap shot”, but it is necessary to look at a representative time period. Depending on the circumstances, the appropriate time period can be a matter of days, weeks, months or even years. (See: *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.*, *supra*, paras. 25 and 26.)

[13] Counsel for the appellant submits that the court should look at the most stable period in Jesse’s life, which, he submits, is during the thirty-nine days that he spent in temporary foster care, and not the broader time period of the rest of his life, which was chosen by Arbitrator Robinson. Mr. Keay argues that, given the turbulence of Jesse’s life with his parents, the relative stability of his life in foster care is the period that fairly reflects the status of the parties at the time of the accident.

[14] I agree with the submissions of the respondents that it is not appropriate to take as the representative period the thirty-nine-day period during which Jesse was in temporary foster care, but that the Court should look at the broader time period of Jesse’s life with his biological parents. As submitted by the respondents, the Court must take into account the fact that the life of a young person, like Jesse, will often be in transition. (See: *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.*, *supra*, at paras. 26 and 27.)

[15] It is my view that Arbitrator Robinson correctly applied the *Miller v. Safeco* criteria to determine dependency for the purposes of the payment of the statutory accident benefits to Jesse. Using the *Miller v. Safeco* factors, Arbitrator Robinson correctly determined that the thirty-nine-day period in foster care was a “brief aberration” in Jesse’s life and that Jesse’s reliance for care upon his biological parents was never broken.

[16] There was ample evidence to support Arbitrator Robinson’s conclusion. For example:

- i) Jesse was living in temporary foster care at the time of the accident under an agreement that was to expire on June 1, 2005, if not terminated on an earlier date by any party on five days’ notice. The Eskritts were not parties to that agreement. At the time of the accident, the Woods were contemplating terminating the temporary foster care arrangement.
- ii) Other than the thirty-nine days in foster care, Jesse’s entire life had been spent with his biological parents. I do not see the four occasions when Jesse briefly ran away from home as altering that living pattern.
- iii) There is no question that the Woods and Jesse had problems with their relationship; however, it is also clear that the foster care arrangement was only meant to be

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temporary: as noted in the Agreed Statement of Facts, the Woods had placed Jesse into temporary foster care with the hope that Jesse would not like foster care and then come back to the Woods' home and live by his parents' rules. Jesse and his parents expected him to return home.

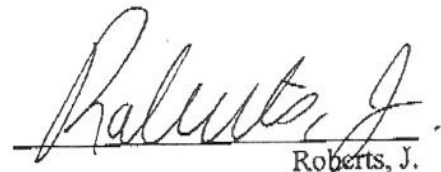
- iv) While in care, the relationship between Jesse and his biological parents was maintained: Jesse was in frequent communication with the Woods and spent most weekends and most of the March break living with them at their home. While at home, Jesse performed chores and received small amounts of money from the Woods.

[17] Based on the above, I am of the view that, in considering the parties' situation over a reasonable period of time prior to the accident, the living pattern established by Jesse that remained essentially stable up to the time of the accident was the one that he shared with his biological parents, which continued while he was in temporary foster care. As a result, Arbitrator Robinson's conclusion that Jesse was dependent on his biological parents for financial support and care was entirely correct and reasonable in the circumstances of this case. Based on that conclusion, it follows that Arbitrator Robinson correctly determined that the applicant is required to pay statutory accident benefits to Jesse.

[18] Given my conclusion that Arbitrator Robinson's Award was reasonable and correct, it is not necessary for me to decide the issue raised by the respondent, Guarantee Company of North America, namely, whether a natural person can be a dependent of a corporation for the purposes of the Statutory Accident Benefits Schedule.

[19] If the parties cannot agree on the issue of costs, they may make brief written submissions to me as follows: the respondents shall deliver their submissions by December 31, 2008; and the applicant shall deliver its submissions by January 7, 2009.

[20] I thank counsel for their very helpful and thorough submissions.

  
Roberts, J.

DATE: December 22, 2008