

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s.268, as amended, and REGULATION 283/95;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

AVIVA CANADA INC.

Applicant

- and -

THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondent

DECISION

COUNSEL:

Grant R. Dow for the Applicant

Howard Sterling for the Respondent

ISSUES:

1. Is Aviva or The Motor Vehicle Accident Claims Fund (“the Fund”) responsible for the payment of accident benefits to or on behalf of Dustin Benninger?

DECISION:

1. The Motor Vehicle Accident Claims Fund is responsible for payment of accident benefits to or on behalf of Dustin Benninger.

HEARING:

The hearing in this matter was held in the city of Toronto, in the province of Ontario on February 9, 2009.

THE ISSUE:

This arbitration arises out of a motor vehicle accident that occurred on September 2, 2006. At that time Dustin Benninger, a 15-year-old boy, drove his own 1994 SUV into a ditch causing himself serious injury. Dustin, being an underage driver, had no driver's license and no insurance on the car. An application for statutory accident benefits was made to Aviva Canada Inc. ("Aviva"), on the basis that Dustin was a dependant of his grandmother, Karen McMurchy, at the time of the accident. At that time, Ms. McMurchy insured a 2003 Chevrolet Impala and 1994 Buick with Aviva. Aviva, having received the first completed application for accident benefits commenced payment of accident benefits to or on behalf of Dustin Benninger. Aviva takes the position that Dustin was not a dependant of his grandmother, but rather his mother, Sharon Benninger. Sharon Benninger, at the time of the accident, was not a named insured under any motor vehicle liability policy. She was, however, a listed driver under the Aviva policy and shown as the primary driver of the 2003 Chevrolet Impala covered by the Aviva policy.

If Dustin Benninger is a dependant of his grandmother, and her spouse, George Eastes, then pursuant to Section 2 (a) of the Statutory Accident Benefits Schedule, he would be an "insured person" as he would be the dependant of a named insured and therefore entitled to accident benefits pursuant to Section 268 (2) (1) (i) of the Insurance Act.

Section 2 (a) of the Statutory Accident Benefits Schedule defines and insured person as:

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, ...

Aviva submits that Dustin is actually a dependant of his mother, and since she is only a listed rather than a named driver under the policy, section 2 (a) does not apply and accordingly since there is no other insurer available, the Fund is responsible for payment of accident benefits pursuant to Section 268 (2) (1) (i) of the Insurance Act.

The Fund has put forward essentially two arguments:

1. Dustin was a dependant of his grandmother, Karen McMurchy at the time of the accident and therefore Aviva should respond to the application for accident benefits.
2. If Dustin was a dependant of his mother at the time of the accident, then, because of the particular circumstances of this case, Sharon Benninger should be considered a “deemed” named insured under the Aviva policy and therefore Aviva would be responsible for the payment of accident benefits.

FACTS & ANALYSIS:

For the purposes of the Statutory Accident Benefits Schedule, a dependant is defined by Section 2 (6) of the Schedule, which states:

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 criteria for determining financial dependency was established by the Ontario Court of Appeal in Miller vs. Safeco , (1986) 13 C.C.L.I. 31, and includes:

- (i) the duration of the dependency
- (ii) the amount of the dependency

- (iii) the financial or other needs of the alleged dependant
- (iv) the ability of the alleged dependent to be self supporting.

Dependency cases tend to be determined by the particular facts of each case and this case is no different.

It is particularly difficult given the young age of Dustin and his somewhat nomadic lifestyle at the time of the accident.

The parties are in basic agreement that the appropriate time frame to consider with regard to determining dependency is from the end of January 2006 until the date of the accident, being September 2, 2006 or a period of approximately eight months. It was in late January or early February that Dustin and his mother, Sharon Benninger, moved into Sharon's mother and her partner, Georges Eastes's home at 49 Erie Street, Fisherville. Prior to that Dustin had been living with mother and Omer White in Haggerville on the Six Nations Reserve.

Prior to the accident Dustin had finished grade nine. He had been earning small amounts of money by occasionally putting up tents for his grandfather's business, but that had ended sometime in the summer of 2006 and did not provide any significant income. His only job or occupation other than that appears to have been stealing cars with two associates. No evidence was led as to what income was earned from this endeavor but it does not appear to have been sufficient to make him self-supporting.

In terms of where Dustin was living, as mentioned above, he was at least formally living with his mother at his grandmother's house. There was conflicting evidence as to how much time he was actually spending at that location. According to Dustin, who gave evidence at an examination for discovery, he was supposed to be living at 49 Erie Street with his mother and grandmother but he would often stay at his girlfriend's or his friend's or his counselor friend, Glen Forest's, home. For at least part of the summer of 2006 it would appear he essentially stayed at Glen Forest's house.

According to Dustin's mother, Dustin had been staying at his paternal grandparents up to three nights a week, three or four weekends per month. She also indicated that he spent some of time at Glen Forest's home.

One is left with the impression that during the relevant time frame prior to the accident, Dustin led a very unstructured life. While counsel for the applicant submitted that he may have been dependent for care upon his mother, I do not accept this. His mother certainly provided some care and influence upon him, but it was limited, at best. Although Dustin was only fifteen at the time at the accident, he would appear to have been a very streetwise and independent person. He spent time with his friends, stayed for the most part where he wanted to, and spent a fair bit of time stealing cars. He was not dependent upon his mother for care.

FINANCIAL DEPENDENCY

In terms of financial dependency, it would appear that Dustin did not make sufficient funds to be considered financially independent, or if he was, I did receive the evidence to reach such a conclusion.

It is the Fund's contention that when one considers that Dustin was living at his grandparents and receiving some money from them, he would be considered principally financially dependent on them. Accordingly, I will now turn to the issue of the amount of support Dustin received.

As noted above, Dustin lived with his mother and grandmother, Karen McMurchy and her partner George Eastes at 49 Erie Street. As is often the case, the cost of housing as well as care is difficult to determine after the fact. This is particularly so in this case. It is clear that Dustin did spend some time at his grandparents, where he lived in the basement. Arbitrators and judges have held on numerous occasions that it is appropriate in certain circumstances to allocate some of the cost of the housing and care provided by the parent or grandparent as a financial benefit to the child. This is appropriate in this case, but only to a certain degree, as one must keep in mind that the estimate of costs and expenses were somewhat vague and general, and that Dustin only spent only limited time at his grandparents in any event.

The carrying expenses of 49 Erie Street, where Dustin lived, at least part of the time, were roughly as follows:

Item	Per Month
Mortgage	\$230.00
Taxes	\$137.00
Heating (gas)	\$91.00
Electricity	\$100.00
Water	\$40.00
TV/Phone	\$135.00
Insurance on home	\$29.17
Total	\$762.00

Given that there were four people living in the house, even though Dustin wasn't living there full time I would deem the benefit to be one quarter of the total amount or \$190.54 per month.

In addition to the roof over his head, it would appear that Dustin's needs were very basic. He needed food, occasional clothing and spending money, some of which he probably obtained by way of his used car sales business. The evidence with regard to the cost of groceries was at best vague. For example, Georges Eastes, partner of Karen McMurchy, when asked:

Q: Any idea of what you spend on groceries?

A: I haven't clue. A hundred bucks. I have no idea.

Karen McMurchy indicated that she and George Eastes, jointly bought the groceries, and that Sharon would sometimes buy some pop or chips for Dustin. Karen did not specify what she paid for groceries.

George Eastes indicated that he and Karen and Sharon all bought some groceries and no one kept track of who paid how much.

One is left with the impression that approximately \$100.00 a week or \$400.00 a month was spent on groceries. Primarily George Eastes and Karen McMurchy paid for these, although Sharon Benninger likely paid for such things as pop, chips etc. on occasion. Normally one would therefore allocate one quarter of that amount to Dustin. One must remember, however, that Dustin was away from home approximately half the time and therefore presumably eating elsewhere. I think it appropriate therefore to only allocate one half of his quarter share of the groceries. Therefore if groceries cost \$400.00 a month, Dustin's share would be \$50.00 per month.

Dustin also required and received some spending money, which he would use for lunch money, gas etc. The evidence on this was again, not surprisingly, vague. Sharon Benninger said she gave Dustin \$20.00 when he asked. Karen McMurchy indicated that she gave him \$5.00 to \$10.00 for lunch money or other things when he asked for it. George Estes said that he gave Dustin \$10.00 about two times per month. On balance I find that Dustin's mother probably contributed the same sum to Dustin's pocket money as Karen McMurchy and George Eastes did combined.

Dustin's expenses can therefore be summarized as follows:

Item	Per Month
Housing, etc.	\$190.54
Food	\$50.00
Total	\$240.54

I would note that while I have made a reduction in Dustin's food expenses because he was away from the home roughly half the time, I have not done so for his housing expense. The room for Dustin was available all the time and the fact that he did not always use it should not, in my view, reduce that expenditure.

I would also note that there was additional expense of pocket money which Dustin's mother and grandparents shared more or less equally.

Sharon Benninger indicated that gave essentially \$500.00 per month to her mother to cover the cost of housing and food for herself and Dustin. Dustin's expenses before taking into account his

pocket money was approximately \$240.00 per month. Accordingly, if Sharon and Dustin's grandparents paid his pocket money more or less evenly, Sharon would be paying more than 50% of Dustin's expenses and would accordingly he would be principally dependent upon his mother for financial support.

The Fund, however, takes the position that Karen McMurchy and George Eastes combined had far greater financial ability to support Dustin than Sharon Benninger and furthermore Sharon Benninger did not earn enough to provide essentially half of Dustin's financial needs.

There is not doubt but that Karen McMurchy and George Eastes had a greater income than Sharon Benninger. In addition Dustin's paternal grandparents had a higher level of income than Sharon Benninger and occasionally contributed to Dustin's needs albeit in a relatively small way.

The issue is not, however, who could best afford to financially support Dustin, but rather, who financially supported him. Accordingly we must look at whether Sharon Benninger had the financial means to provide the required financial support for Dustin. This requires looking Sharon's income and expenses.

Prior to the accident, Sharon Benninger worked as a hairdresser earning \$11.00 per hour for a forty hour week or \$440.00 per week plus tips, of which I will say more later.

Sharon's income tax return indicates that she earned \$11,830.00 in 2006, although this would cover the period of January to September 2, 2006 when she stopped working for the rest of the year because of the accident. According to her tax returns, she would have earned \$1,463.54 per month from January to August 2006. A review of her bank statements for 2006 indicates that she apparently received a tax refund of \$1,496.90 in March of 2006. This is essentially the same amount that she had paid in taxes and accordingly there is an offset of that amount. In addition she received a further \$234.39 as a child tax credit. Accordingly, her monthly income would be as follows:

Income	\$1,463.54
Child tax credit	\$234.39
Total	\$1,697.93

In terms of Sharon's expenses, they can be roughly summarized as follows:

Item	Per Month
Car Payments	\$245.00
Insurance	\$100.00
Student Loan	\$136.00
Student Loan	\$47.00
Other Loan	\$124.00
Gas	\$372.00
Payment on credit card	\$42.86
Oil	\$43.00
Bell Mobility	\$138.00
Total	\$1,247.86
Contribution to Household	\$500.00
Grand Total	\$1,747.00

There were undoubtedly some extra expenses not listed above including giving pocket money, buying clothes etc. Based on the above figures, Sharon's revenues did not cover her expenses and the Fund therefore takes the position that she was in no position to provide the full \$500.00 per month for her and Dustin to Karen McMurchy and accordingly Dustin could not have been principally dependent upon her for financial support.

Counsel for the applicant submits that I should include in Sharon Benninger's revenue the \$50.00 to \$100.00 of tips that she received per week while working as a hairdresser. Counsel for the Fund took the position that tips were not reported as income on her tax return for 2006 and therefore should not be considered in the calculation of income, relying on Section 64.1 (1) of the Statutory Accident Benefits Schedule, which states:

64.1 (1) If, under the Income Tax Act (Canada) or legislation of another jurisdiction that imposes a tax calculated by reference to income, a person is required to report the amount of his or her income, the person's income before an accident that occurs after April 14, 2004 shall be determined for

the purposes of this Regulation without reference to any income the person has failed to report contrary to that Act or legislation.

This section was added to the Statutory Accident Benefits Schedule to deal with situations where a person was claiming income replacement benefits based on income they had not declared in tax returns. It was not, in my view, designed to deal with issues of financial dependency. To interpret Section 64.1 (1) to apply to questions of financial dependency could lead to an absurdity. In our situation, Ms. Benninger would appear to have more revenue than shown on her income tax return. It would explain how she would be able to provide enough money to support Dustin. To ignore it would be to ignore reality and lead to a potentially absurd result. If there are two possible interpretations and one leads to an absurdity, and then the other should be chosen. As a result, I am prepared to include the tips when considering whether Dustin was principally financially dependent upon his mother.

Sharon Benninger testified that she received \$50.00 to \$100.00 in tips per week. Taking the midpoint of \$75.00, this would amount to \$300.00 per month and would bring her monthly resources to \$1,997.93.

Based on this amount, Ms. Benninger could, at least barely, afford to provide the support she claimed for Dustin. Like many people, some months she might end up a bit short, and end up with more debts on her credit card and in some months she might have a little left over.

The above mathematical calculation is at best an estimate, containing many assumptions, such as George Eastes's estimate on the amount spent for groceries. This draws attention to the weakness of the strictly mathematical approach to the dependency issue. When one steps back to view the overall picture, one is left with the impression that Sharon Benninger was contributing \$500.00 to the household to essentially cover housing and food for herself and her son. Based on all the evidence before me, I find that Dustin Benninger was principally dependent for financial support upon his mother.

In light of that finding, Dustin Benninger would not be entitled to receive statutory accident benefits through Karen McMurchy's motor vehicle liability insurance policy, at least based on the 1991 Buick that she insured with Aviva under policy 01438147PLA.

The Fund submits, however, that Sharon Benninger should be considered a “deemed named insured” under that policy and since Dustin is a dependant of Sharon, Aviva would be responsible for accident benefits, as he would then be a dependant of a named insured pursuant to Section 268 (2) (1) (i) and Sections 2 (1) and 2 (6) of the Statutory Accident Benefits Schedule.

The concept of a “deemed named insured” has been considered in a number of arbitration cases. In Royal Insurance Company of Canada vs. Markel Insurance Company of Canada and Brian Portch, P-0008360 and P-0007701, released December 17, 1996, Director’s Delegate Naylor dealt with a situation where a Mr. Portch was injured while operating a commercial truck that Mr. Portch owned. He drove the truck exclusively for one company and was, in essence, an employee of that company. His truck was insured under his employer’s fleet policy issued by Markel Insurance. Mr. Portch, however, was not a named driver, although he was the owner of the truck and he had the cost of the insurance deducted from his pay. The policy was in the company’s name. Mr. Portch was not listed by name in the policy. Royal Insurance provided Mr. Portch insurance under his own private car policy and argued that since Mr. Portch in fact owned the truck and paid the insurance he should be deemed to be a named insured under the Markel policy. Director’s Delegate Naylor noted that the term “named insured” is not a defined term under the Insurance Act or the Statutory Accident Benefits Schedule. She noted, however, that:

“The term “named insured” has a common and well understood meaning in insurance. It means the person specified in the contract or certificate of insurance as the insured. On a plain reading of the Markel policy, this does not include Mr. Portch.”

Accordingly Director’s Delegate Naylor held that Mr. Portch was not a deemed named insured.

Arbitrator Rudolph, in Wendy and Michael Kamstra vs. Allstate Insurance Company of Canada and State Farm Mutual Automobile Insurance Company, (unreported decision of Arbitrator Jay Rudolph released October 30, 1996), dealt with a situation where Ms. Wendy Kamstra purchased a vehicle but for various reasons the ownership of the car was put in her mother’s name. Arbitrator Rudolph found that while the mother told the insurance agent that her daughter would be the principal driver, she did not tell him that her daughter was the owner. He therefore found that the daughter was not a deemed named insured.

In Allstate Insurance Company vs. Kingsway General Insurance Company and CAA Insurance Company, an unreported decision of myself released in October 2007, I dealt with a situation where a Ms. Darlene Montreuil was a named insured on an Allstate policy. The evidence in that case suggested that her daughter, Linda Terris, in fact owned the vehicle as she had essentially paid for the car. It was registered in her mother's name, but the daughter had essentially sole use and control of the car. The mother paid the insurance and the daughter paid for the gas. I held in that case that the evidence fell short of Allstate knowing that the daughter was the real owner the car and based on all the facts the daughter should not be deemed a named insured under the policy.

In Liberty Mutual Insurance Company vs. Markel Insurance Company of Canada, (unreported decision of M. Guy Jones, released July 2006) I dealt with a situation where a car was owned and registered in the name of a Mr. Senthilnathan, but a friend, Mr. Kumaravel was a listed driver in a Liberty policy taken out by Mr. Senthilnathan. He was listed as a person who would use the vehicle 100% of the time. While I indicated that in that I was prepared to accept, in the appropriate circumstance, that there could be a "deemed named insured" but I found that the facts of that case were not such that he should be deemed a named insured. I rejected Markel's position that Mr. Kumaravel and Mr. Senthilnathan had simply devised a scheme to obtain a lower rate of insurance.

Turning to the facts of this case, the evidence of Ms. Sharon Benninger, who testified at the hearing, was that she was the principal driver of the Impala. She further testified that she went to a car dealership and chose the vehicle she wanted and subsequently told her mother who then went to the dealer and signed the papers, buying the car in her, Karen McMurchy's, name. Because insurance was needed in order to take the car from the dealership, the insurance was placed on Ms. McMurchy's existing policy with Aviva, listing Sharon as the principal driver. Sharon was unaware of the contents of any discussion between her mother and the insurance agent.

There is no evidence in front of me to suggest that insurance agent knew that the car was in fact paid for and in essence owned by Sharon Benninger. As such, I am not prepared to find that Sharon Benninger should be considered a deemed named insured under the Aviva policy.

Before closing I will deal briefly with one final argument presented by the Fund. They took the position that the coverage might be obtained via the OPCF 44 R-Family Protection Coverage. This would be dependent upon the vehicle in which Dustin was injured being owned by someone other than himself. I am satisfied on the evidence that Dustin was the owner of that vehicle and therefore OPCF 44 does not apply.

In light of the above, I find Dustin Benninger was a dependant of an insured, not a named insured and accordingly the Motor Vehicle Accident Claims Fund is responsible for paying benefits to or on behalf of Dustin Benninger.

If the parties are unable to agree with regard to any outstanding issues, I may be spoken to.

Dated at Toronto, this _____ May 2009.

M. Guy Jones
Arbitrator