



Citation: Jeffery v Aviva Ins. Canada, 2022 ONLAT 20-006381/AABS

Licence Appeal Tribunal File Number: 20-006381/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Carmel Jeffery

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: Jesse A. Boyce, Vice-Chair

APPEARANCES:

For the Applicant: Michael D. Smitiuch, Counsel

For the Respondent: Suzanne Clarke, Counsel
Nathan M. Fabiano, Counsel

HEARD: In Writing

OVERVIEW

- [1] The applicant's husband was in an accident on July 13, 2017, and, tragically, succumbed to his injuries on July 17, 2017. The applicant claimed a death benefit from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("Schedule"). The applicant was denied the benefit in dispute based on Aviva's determination that she was not principally dependent on her late husband. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES

- [2] According to the Case Conference Order, the following issues are in dispute:
- a. Is the applicant entitled to a death benefit in the amount of \$10,000 applied for on August 8, 2017, and denied by the respondent on June 7, 2020?
 - b. Is the applicant entitled to interest on any overdue payment of benefits?
 - c. Is the applicant entitled to an award under s. 10 of *Regulation 664* for unreasonably withheld or delayed payment of benefits?

RESULT

- [3] The applicant is not entitled to a death benefit, interest or an award.

ANALYSIS

Death Benefit

- [4] Section 26(1) of the *Schedule* provides that an insurer shall pay a death benefit in respect of an insured who dies as a result of an accident. Section 26(2)(2) provides that the death benefit of \$10,000 shall be made to each of the insured person's dependents. Pursuant to s. 3(7)(b), a person is a dependent of an individual if the person is "principally dependent" for financial support or care on the individual or the individual's spouse. The leading case on this issue is *Miller v. Safeco Insurance Co. of America*, 1985 CanLII 2022 (ONCA), which confirmed the criteria to be considered when determining whether someone is a dependent: the amount and duration of dependency; the financial and other needs of the alleged dependent; and, the ability of the alleged dependent to be self-supporting.

- [5] The applicant submits that the *Schedule* is consumer-protection legislation. To this end, she asserts that she was principally dependent for financial support on her husband prior to the accident and that she meets the criteria for being a dependent due to the amount and duration of her financial dependency on him, the financial needs that she has, and her inability to be self-supporting.¹
- [6] To support her position, the applicant relies on her affidavit, a variety of bills and invoices, her Death and Funeral Benefits Application (OCF-4) and the report of Philip Nafekh, accountant at Principe Nafekh, Ltd., dated July 30, 2020, which reviewed the BDO Canada LLP report on which Aviva relied to deny the applicant’s claim. While the Nafekh report analyzed the mathematical, statistical and big picture approaches, the applicant asserts that the most appropriate analytics lens is the “big picture” approach, which demonstrates that she was principally dependent on her husband for support and does not have the financial resources to pay for her living expenses. Where the *Schedule* does not state that a spouse cannot receive a death benefit, the applicant submits that she is therefore entitled to the benefit in dispute as a dependent.
- [7] In response, Aviva submits that it has paid \$6,000 for a funeral benefit and \$25,000 for a spousal death benefit. It denied the applicant’s claim based on two BDO Canada reports that found the applicant was not financially dependent on her late husband. Aviva argues that the applicant omits consideration of the mathematical, Low Income Cut Off (“LICO”) and Market Basket Measure (“MBM”) approaches to dependency. Aviva also points to *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609—where the Court of Appeal held that the ultimate question for determining the appropriate time frame is what time period accurately reflects the true nature of the particular relationship at issue at the time of the accident—to argue that the appropriate period for review is six months prior to the accident, encompassing January 1, 2017 to July 13, 2017.

The applicant’s dependency

- [8] The applicant is now 66 years old. In her affidavit, the applicant explains that she was married to her late husband since 1973. Her affidavit states that both she and her spouse retired at the age of 60. As of the tax year 2016, the applicant indicates that her husband earned \$68,995.72 and that she earned \$46,130.56. Her affidavit explains that household expenses were \$27,984.36, comprised of

¹ See: *Allstate Insurance Company of Canada v Intact Insurance Company*, 2016 ONSC 5443 (CanLII), at para. 34; *Miller v. Safeco Insurance Co. of America*, 1985 CanLII 2022 (ONCA); and *Security National Insurance Co. v. The Wawanesa Mutual Insurance Company*, 2014 ONCA 850, at para 2

condo fees, property taxes, heat, hydro, water/sewage, telephone/cable and insurance. The affidavit states the couple spent an additional \$12,500 per year on groceries and that all expenses were shared, but that the applicant's husband made the greater contribution, owing to his higher income. The applicant also explains how her late husband did the majority of the cooking and chores, which has led to her hiring a handyman and housecleaning services.

- [9] *Allstate Insurance Company of Canada v Intact Insurance Company*, 2016 ONSC 5443 provides that the assessment of whether someone is “principally dependent for financial support” on another person does not turn on the mathematical analysis of whether a person provides more than 50% of the needs of another but rather requires a broader consideration of the various factors approved by the Court of Appeal in *Miller*. However, in *Economical Insurance Group v. Desjardins Insurance*, 2020 ONSC 1363, the Court held that the “big picture” approach urged by the applicant is derived from cases where there is insufficient evidence to apply a 50% + 1 analysis or where it is too arbitrary and nuanced a cut-off when viewed in the overall circumstances. While acknowledging that a strict mathematical approach is seldom conclusive, the Court reasoned that if most of a person’s needs can be met from their own resources, then they are not principally dependent on the other person.

The applicant was not principally dependent

- [10] I am guided by this reasoning and prefer the BDO Report and the determination of Aviva that the applicant was not principally dependent on her late husband for support. As a starting point, Aviva submits that the period six months pre-accident is the appropriate time frame to conduct the dependency analysis, as it accurately reflects the true nature of the relationship at the time of the accident and is a reasonable period of time instead of a mere “snapshot.”² The BDO report, meanwhile, used the period January 1, 2016 to December 31, 2016 in its two-scenario analysis.
- [11] The applicant objected to the use of a time period of six months, arguing that it was not relevant to the determination, but did not provide an alternative time period to assist the Tribunal, submitting instead that the applicant shared an interdependent financial relationship with her late husband for 44 years. Where the case law provides that the trier of fact should determine the nature of the relationship at the time of the accident by considering a reasonable period of time, the applicant’s preference for a 44-year period where there are no financial

² See: *Oxford Mutual Insurance Co. v. Co-Operators General Insurance Co*, 83 OR (3d) 591 (CA), at paras. 27 – 28 and *Intact Insurance Co. v. Allstate Insurance Co. of Canada*, 2016 ONCA 609. at para 70.

documents available is not helpful. Instead, I agree with Aviva that the six-month period prior to the accident, being January 1, 2017 to July 13, 2017, is an appropriate sample size, as there is ample financial documentation to assess or infer the applicant's financial situation during this time where the couple had recently retired. I find it is reasonable to assume that the expenses and lifestyle were relatively stable if not fixed during this time. That is not to say that it is not lost on me that the applicant and her husband were married for 44 years and likely developed a rich emotional dependency, just that the focus of my analysis is on whether the applicant was financially dependent on her late husband at the time of the accident. Where the Court accepted a seven-month window in *Intact*, I accept that a six-month window is reasonable here.

- [12] On this time frame—and providing the applicant with the benefit of the doubt that a single income household is at a significant financial disadvantage compared to a dual income household—the financial calculations provided still do not, in my view, support the applicant's claim that she was principally dependent on her late husband at the time of the accident. Being principally dependent for financial support requires more than some financial dependence—it requires “principal” dependence—so if the applicant has sufficient income to fund 51% of her financial needs, she is not considered a dependent.³ On the mathematical approach and using the applicant's 2016 tax return and stated expenses to tailor to the six-month period, her yearly expenses during this period were approximately \$20,242.20, while her income would have been approximately \$23,065.26. On this basic calculation, the applicant has an excess of \$2,822.76 before accounting for reductions in expenses.
- [13] Where the applicant resided in Mississauga at the relevant time period, the LICO statistic for a household of one person in Mississauga in 2017 was \$20,998—approximately \$1,749.83 per month or \$10,499 for the six-month period. During this time, we know the applicant's income was approximately \$23,065.26, meaning the applicant would again have quite a bit of remaining income, some \$12,566.25, based on this calculation. To be frank, I do not consider the LICO method to be the fairest or most accurate way to conduct this analysis, as it is more of a baseline poverty marker than an indication of financial dependency. Given the financial documents provided by the applicant, I find it is also not a reasonable reflection of the applicant's pre-accident lifestyle, even if it is helpful in providing a financial “floor” for the dependency analysis based on regional markers.

³ *K.J. and Aviva Insurance Canada*, 2019 CanLII 72225 (ON LAT), at 10

- [14] Next, the MBM graph from the 2015 census was used by Aviva, as it was the most recent available. The MBM for Mississauga during that time was \$18,436—being \$1,536.33 per month or \$9,218 for the relevant period. Accounting for inflation and other variables that may have increased this amount after 2015, where the applicant's income during this period amounted to approximately \$23,065.26, or 2.5 times the MBM cut-off, it is still clear that the applicant had sufficient income to cover her expenses based on this metric as well, even though the cut-off is not remotely comparable to the applicant's actual expenses or living situation as a retiree. Again, I do not consider this metric to be particularly assistive, as it does not account for the applicant's specific circumstances at the time of the accident.
- [15] Expanding beyond the six-month period, however, the applicant's reported income for 2016 was \$46,130. The stated household expenses were \$27,984.36, meaning the applicant was able to cover about 164% of her needs before discounting expenses for her late husband, which further weakens her dependency claim. As Aviva submits, even if the period is expanded to include one year pre-accident and the applicant's specific expenses are assessed, the results are the same.
- [16] The big picture is not lost on me. I am alive to the applicant's statements in her affidavit that she was principally dependent on her former husband for care, not only financially, but physically, emotionally and socially. I have no doubt that after 44 years of marriage, there are aspects of a relationship and dependency that are not captured by mathematical formulas and baseline measures and that only the applicant may appreciate. However, I agree with Aviva that interdependency exists in most relationships and is not the same as principal dependency, as that term is contemplated by the caselaw. With respect, I find this is especially so where there is no evidence of vulnerability or disability requiring care (as with a disabled adult child or a minor) and where the raw income and expense numbers suggest the applicant also did not have a financial dependency, even if her total household income was significantly reduced post-accident.
- [17] The Nafekh report considered the big picture approach, highlighting the fact that the applicant was 63 years old at the time of the accident, that she resided in a condo, was retired, that her husband generated higher income than her, that the couple shared expenses, that she would have been unable to sustain her standard of living without her husband's income and that she does not have the financial resources to pay for her living expenses. It then offers the conclusion that the applicant was principally dependent for financial support on her husband but does not provide any calculations to back up this analysis. While I agree with

the applicant that the big picture is important, I was not provided with authority to suggest that it is the paramount consideration when all of the other numbers-based approaches suggest there was no dependency. In a financial dependency analysis, I am not prepared to accept that the big picture approach somehow trumps the objective calculations provided where the applicant's solo income was likely able to cover her stated expenses.

- [18] The applicant submits that the mathematical, LICO and MBM approaches are unnecessary and not relevant if a proper big picture analysis is conducted. While the big picture is one consideration, I was not directed to authority to support the contention that these measures cannot be assistive in determining dependency for a spouse or that they should not be utilized at all in favour of the more holistic big picture approach she prefers. At minimum, I do not find that this is a situation where there is insufficient evidence to apply a 50% + 1 analysis or where the six-month period is too arbitrary and nuanced a cut-off when viewed in the overall circumstances, as the Court reasoned in *Economical Insurance Group v. Desjardins Insurance*.
- [19] In reply, the applicant asserts that her yearly expenses with a 60% reduction for food expenses "has been calculated at \$47,484 and her after tax income is only \$36,000", meaning she does not have the required income to maintain her needs. However, no citation was provided to support this claim and it is unclear where these numbers came from. Indeed, the applicant's own affidavit indicates that her net income for the year 2016 was \$46,130.56, which is supported by her tax statement. Again, her affidavit states that household expenses for the same year were \$27,984.36, with an additional \$12,500 for groceries, totalling \$40,484.36. While I accept that a single income household is less efficient than a dual income household, after a reduction in food expenses and utilities, it is still difficult to see how the applicant was "principally dependent" on her late husband where she can largely maintain the lifestyle and expenses she claimed during the pre-accident period on her own.
- [20] Turning to the *Miller* factors, while I cannot account for the intangible dependencies between spouses and agree that the total household income has been reduced, there is limited indication that the applicant had expenses or a lifestyle that required dependency on her late husband, that she has seen an increase in ongoing financial needs (other than a housecleaner and an occasional handyman) or that she cannot be self-supporting based on the metrics analyzed in the competing reports or on the raw expenses numbers provided above. To borrow again from *Economical Insurance Group v.*

Desjardins Insurance, where most of a person's needs can be met from their own resources, they are not "principally dependent" on the other person.

- [21] On the evidence before the Tribunal, including the applicant's affidavit, I cannot find that the applicant relied on her husband to provide her with the necessities of life, including shelter, even on a broad consideration of the facts, as the case law invites. Rather, with great respect, I find the applicant was not principally dependent on her late husband for financial support and is therefore not entitled to the benefit in dispute. As no benefit is payable, it follows that no interest applies under s. 51.
- [22] Finally, the applicant sought an award under s. 10 of O. Reg. 664, arguing that Aviva did not respond to her claim in a timely manner and did not consider the totality of the evidence when addressing the benefit and did not reconsider its position based on new information. Under s. 10, the Tribunal may award up to 50% of the total benefits claimed if it determines that an insurer unreasonably withheld or delayed the payment of benefits.
- [23] With respect, an award is not appropriate. Having determined that there is no benefit payable, it follows that Aviva did not unreasonably withhold or delay the payment of same. In turn, where there is no benefit payable, it follows that the Tribunal has no basis on which to grant an award.

CONCLUSION

- [24] The applicant is not entitled to the benefit in dispute, interest or an award. The application is dismissed.

Released: April 21, 2022



Jesse A. Boyce
Vice-Chair