

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.l.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act, 1991*,
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

NORTHBRIDGE GENERAL INSURANCE COMPANY

Applicant

- and -

RBC GENERAL INSURANCE COMPANY

Respondent

A W A R D

COUNSEL:

Daniel Himelfarb and Lauren Groen
Counsel for the Applicant, Northbridge General Insurance Company (“Northbridge”)

Jeffrey Naganobu
Counsel for the Respondent, RBC General Insurance Company (“RBC”)

ISSUES:

This arbitration involves a priority dispute between insurers. The issues, as set out in the Arbitration Agreement, are as follows:

- (a) Which insurer is higher in priority to pay statutory accident benefits to and on behalf of Maria G¹ as a result of the motor vehicle accident of April 23, 2014?
- (b) What amount, if any, is the respondent, RBC, required to pay to the applicant, including interest?
- (c) What is the amount of costs to be paid and which party has the burden of payment?

¹ By reason of privacy concerns, the claimant’s last name, together with the last names of her daughters, are not reflected in these Reasons. Maria G was 75 years old at the time of the accident and is presently some 77 years of age. She has 3 adult children, Ornella (insured by RBC), Lilly and Lucy.

EVIDENCE:

The following documents were marked as exhibits at the hearing which proceeded before me on Friday, September 9, 2016.

Exhibit 1 – Arbitration Agreement (short form)

Exhibit 2 – Arbitration Agreement (long form)

Exhibit 3 – Applicant's Document Brief

Exhibit 4 – Written Submissions of the Applicant

Exhibit 5 – Brief of Authorities of the Applicant

Exhibit 6 – Written Submissions of the Respondent

Exhibit 7 – Book of Authorities of the Respondent

In addition, I heard *viva voce* evidence from Ornella who was examined by counsel for the Applicant, cross-examined by counsel for RBC and re-examined by counsel for the Applicant.

The facts which give rise to the within Arbitration are not terribly in dispute. Rather, it is the inferences to be drawn from the facts and the application of the law which requires me to make a determination in this matter.

The basic facts which serve as a backdrop to the dispute are as follows. Maria suffered from dementia. This condition, together with her generally deteriorating health, led to a decision to have her reside at a retirement home known as Villa Leonardo Gambine ("VLG"). This came about on or about May 23, 2007. Maria's husband passed away in 2009. On April 23, 2014, Maria was being transported to or from VLG to Villa Columbo (the latter apparently provided recreational activities for seniors including Maria). Maria was a passenger in a vehicle owned by Villa Charities Inc. and insured by Northbridge.

Northbridge takes the position that Maria was principally dependent on Ornella for care at the time of the accident and, as a result, Ornella's insurance policy with RBC is higher in priority to pay Maria's claims for accident benefits.

It should be noted that shortly before the hearing commenced, Northbridge abandoned its position which had been taken from the commencement of the proceeding until that time that Maria was principally dependent for financial support on Ornella.

At the time of the accident, Ornella, Lilly and Lucy collectively had a Power of Attorney over Maria's personal property, health and financial decisions. The evidence discloses that it was generally Ornella who acted under the Power of Attorney (though her sisters were consulted on a few very significant decisions, one being the sale of Maria's home after Maria's husband passed away).

From the evidence given by Ornella at the hearing together with a review of transcripts of her examinations under oath, I find the following facts. Maria had been living at VLG for a number of years before the subject motor vehicle accident. When a spot opened up at this long term care facility, Maria was moved into the facility. She would have been unable to stay in the home by reason of her dementia, her declining health and her husband's declining health. Ornella was very much involved in her mother's well-being at VLG. She participated in family conferences with the health care team which occurred twice yearly. This would involve a doctor on staff and other healthcare professionals and address issues such as medication, nutrition and the like. There was a discussion about whether heroic measures should be taken to resuscitate Maria. Apparently, Maria had sufficient insight into her health status such that she was able to express her views in this regard.

Maria could not have lived on her own at the time of the accident. However, she was able to travel to and from Villa Columbo on Mondays, Wednesdays and Fridays to participate in social activities. Ornella made it her habit to visit her mother on these mornings and help her get ready to go out. Maria would require queuing in relation to taking her medication, dressing and moving toward the exit of the facility and getting on the bus [which, based on the evidence and the description, is something akin to a wheel trans vehicle]. The driver of the bus or staff members at VLG and/or Villa Columbo would assist Maria with her exit from the bus and entry to Villa Columbo and in her exit from Villa Columbo, entry onto the bus and return trip to VLG.

Ornella visited with Maria several times each week. Ornella might tidy up her room. They might go for a cappuccino, chat, play cards or watch TV.

Maria was independent regarding toileting. At the time of the accident, Maria was using a wheelchair more than a walker. However, she was able to walk and/or transfer to and from a recliner in her room. She was generally independent in transfers. She was able to

independently transport herself to and from the dining room at VLG. All cooking, laundry and cleaning was provided by VLG.

Ornella testified that she provided the majority of emotional support to Maria. However, in cross-examination, she acknowledged that VLG attempted to have consistency in its staffing for their patients, including Maria. This would involve nurses and personal support workers. Ornella acknowledged that consistency in staffing appeared to help Maria in terms of her familiarity with these people and her level of comfort. Staff would provide personal assistance to Maria. Ornella acknowledged that it appeared that Maria trusted and listened to the staff at VLG. They appeared to monitor her activities and well-being as caregivers.

It is worth noting that Ornella appears to have handled all of Maria's financial needs. Ornella looked after bank accounts and investment accounts and arranged for the filing of personal income tax returns on behalf of Maria.

Ornella testified that the staff at VLG were responsible for queuing Maria in relation to getting up, getting dressed, eating, meals and snacks, taking her medication and participating in activities. Maria was capable to make a decision as to whether to participate in activities offered in the morning and/or evening at VLG. Maria was partially able to dress herself and attend to her personal grooming needs before the subject accident.

Ornella acknowledged that while she made it her practice or habit to visit Maria on the mornings where she would get ready and go out to Villa Colombo, she acknowledged that Maria could have handled most of the tasks necessary to achieve this result on her own, augmented by the services of VLG. Ornella visited her mother on these occasions as she wanted her own peace of mind.

In addition, I have reviewed and considered the evidence given by Ornella at an examination under oath held on October 23, 2014 (within the confines of Maria's underlying accident benefits claim), along with evidence given by Ornella, Lilly and Lucy at examinations under oath conducted on May 20, 2016 within this Arbitration. This evidence is in conformity with the evidence I have reviewed, above.

LAW:

A priority dispute arises when there are or may be multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268(2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay accident benefits. Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other 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 occupant has recourse against the Motor Vehicle Accident Claims Fund

For purposes of the arbitration before me, the sub clauses in dispute are i., to the extent that Maria is determined by me to be an insured under the RBC policy in which case RBC will have higher priority, or ii., in which case Northbridge will have higher priority.

Section 3 [1] of the Statutory Accident Benefits Schedule – effective September 1, 2010, O. Reg 34/10 (referred to as the SABS) (“SABS”) provides as follows:

“insured person” means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse

of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario; [emphasis added]

Finally, Section 3(7)(b) provides as follows:

3(7)(b):

For the purposes of this Regulation ...

(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.

REVIEW OF CASE LAW:

There are not a great number of cases arising from the issue of principal dependency for care. The cases put before me, which I review in chronological order, are set out below.

In *Dominion of Canada v Motor Vehicle Accident Claims Fund* (a decision of Arbitrator Lee Samis dated November 10, 1997), the question was whether Jimmy Palumbo, age 56 at the time of a motor vehicle accident, was principally dependent for care on his

brother, Pasquale [Pat] Palumbo, or on Pasquale's spouse. At the time of the accident, Jimmy was not employed, not married and not living with any of his family members. Jimmy had lived with Pat for 2 or 3 years but, for some 20 years or more, had been living in what sounds to be a group home. Pat was a regular visitor. He assisted in the management of Jimmy's affairs. When he visited, he would assist in hygiene and grooming. On some occasions, he would be called by staff at the group home to attend and assist with issues experienced by Jimmy. Pat received a monthly government cheque on behalf of Jimmy, deposited the money into an account, paid for the group home and gave Jimmy pocket money and occasionally buy Jimmy necessary clothing and shoes. Pat visited Jimmy once weekly for 2 – 3 hours but might attend on other occasions as necessary.

Arbitrator Samis noted that there is ample authority to suggest that "principally" means chiefly, more than from any other source, etc. Thus, he was required to measure the care provided by Pat as against care provided to Jimmy by the group home and the care which Jimmy was able to provide for himself. Arbitrator Samis found that while the care and attention provided by Pat and his wife was important and significant, he could not conclude that Jimmy was principally dependent for care on one or both of them at the time of the accident when one measures their involvement against the comprehensive care provided and made available by the group home and Jimmy's ability to provide his own care.

In *Wawanesa Mutual Insurance v Lloyds Underwriters*,² Arbitrator Guy Jones held that the claimant, Frank Cooper, was principally dependent for care on his roommate, Edward Hales (the latter insured with Wawanesa). Wawanesa appealed and Justice Rady upheld the decision of Arbitrator Guy Jones. Hales owned a motor vehicle insured with Wawanesa. Cooper was an Anglican minister who was diagnosed with Parkinson's Disease. He retired from the Ministry and, following separation from his wife, Cooper lived independently for some 8 years. Some 6 years prior to the subject motor vehicle accident, Cooper moved in with his long time friend and professional colleague, Hales.

Hales apparently continued to be actively involved in his Ministry at the time of the subject accident. Cooper received services from CCAC, a massage therapist, a health care nurse and participated in a weekly exercise program. Arbitrator Jones found that Hales provided between 14 – 28 hours of care per week. He found that the extent of

² 2004 Carswell Ont. 3650, [2004] O.J. No. 3661

Hales' contribution to Cooper's care varied, given the ebb and flow in the nature of Cooper's Parkinson's Disease.

Arbitrator Jones concluded, correctly in the view of Justice Rady, that the assessment of dependency for care cannot be determined on the same basis as financial dependency. It is not capable of simple mathematical calculation. It requires both a quantitative and qualitative analysis. Qualitative factors will include social and emotional support.

According to Justice Rady, one of the most significant qualitative factors influencing Arbitrator Jones' decision was the fact that Cooper could not have lived on his own without significant support. Aside from the physical support provided by Hales and other service providers, Hales provided social and emotional support along with companionship and a sense of security that someone was close by in the event help was needed. Justice Rady found there was sufficient evidentiary basis to conclude that Hales provided significant physical support in terms of meal preparation, dressing, housekeeping and for personal errands such as banking. It is the cumulative effect of both the quantitative or qualitative factors that justified Arbitrator Jones' decision.

In *Echelon General Insurance Co. v State Farm Mutual Automobile Insurance Co.*,³ Arbitrator Shari L. Novick found Geshom Chikosa to be principally dependent upon his mother, Ruth Chikosa, for care. Geshom was 32 years old at the time of the accident and lived with his mother, Ruth, and his brother. He suffered from schizophrenia and was developmentally delayed. Ruth purchased his medication for him and reminded him each evening to take his medication as he had a tendency to forget. While Ruth worked on a full time basis as a machine operator at the relevant time, she maintained regular phone contact with Geshom throughout the day.

Arbitrator Novick observed that when considering the issue of whether someone is dependent for care, the analysis involves more than a quantitative consideration but also a qualitative analysis. It requires a consideration of the claimant's physical, social and emotional needs and the social and emotional support the claimant receives from the person in question. Each case must be considered on its own facts.

Arbitrator Novick found Geshom to be principally dependent for care upon his mother, Ruth. While Geshom could feed and dress and bathe himself, Ruth prepared his meals,

³ 2011 Carswell Ont. 13197

did most of his laundry and housekeeping chores, purchased his medication and ensured that he took it daily. She drove him to appointments and attended with him on medical appointments. She had complete control over his finances. She described all of the foregoing as quantitative factors. She went on to find that Ruth's involvement in Geshom's life was analogous to the "sense of security" provided by Hales to Cooper in the decision I have reviewed, above.

The last decision put before me on the issue of care is a decision of Arbitrator Philippa G. Samworth in *Economical Mutual Insurance Co. v York Fire & Casualty Insurance Co.*⁴ In this case, the claimant, Alice Lu, was a pedestrian struck by a vehicle insured by Economical. Economical took the position that Alice was principally dependent for care on Mr. Yang Jian Tan (who maintained a policy of automobile insurance with York Fire). Alice was an international student from China who was almost 16 years of age at the time of the accident. She was living with Tan pursuant to a custodian declaration – custodian form executed for immigration purposes. Tan did not provide for Alice's financial needs as money was sent to him by Alice's mother in China. Tan and his family provided food and accommodations. Alice maintained close contact with her parents in China (speaking with them up to 3 times per week on the telephone or through the internet). Arbitrator Samworth found that Alice remained principally dependent for emotional support, social support, guidance, discipline and for ensuring that her needs were met on her parents despite the fact that they resided in China.

Arbitrator Samworth reviewed a number of decisions (some having already been reviewed by me, above) and discerned the following principles:

- (a) One must chiefly or, for the most part, derive support for care to meet the definition of principal dependence;
- (b) Assessing dependency for care involves a qualitative analysis that should not take financial considerations into account. It requires a consideration of the claimant's physical, social and emotional needs and the social and emotional support the claimant receives from the person in question;

⁴ 2013 Carswell Ont. 4053

- (c) Cases involving the issue of dependency in relation to care should not be restricted to a consideration of physical care but also analyze emotional care as an important component in the analysis.

SUBMISSIONS and ANALYSIS

Counsel for the parties agree on the principles derived from the decisions I have reviewed, above. However, they disagree on the inferences which I should draw or the conclusions I should reach when applying the law to the evidence which I have reviewed. The parties agree that Northbridge, as the Applicant, has the onus or burden of proof to establish that Maria was principally dependent for care upon Ornella.

There can be no doubt that Maria was not capable of living independently. Counsel for Northbridge submits that Maria was principally dependent for care on Ornella at the time of the motor vehicle accident of April 23, 2014. There is no dispute that Maria was incapable of living independently. Consequently, Maria was dependent but the question remains was Maria principally dependent [being chiefly or for the most part] on Ornella.

As discussed and reviewed, above, Ornella visited Maria on Monday, Wednesday and Friday mornings and assisted Maria in getting ready to go out to Villa Columbo. Maria provided queuing services which augmented the same services provided by the staff of VLG. Ornella visited Maria on some other occasions. There was certainly an aspect of socialization to those visits. By the same token, Maria received socialization while participating in activities at VLG, in her interactions with the staff at VLG and when participating in activities at Villa Columbo. Some of Ornella's activities could be construed as care such as the light housekeeping she might perform from time to time. However, many of those activities could best be described as familial to her mother in terms of socialization, companionship and the like.

In this regard, I refer to the decision of Arbitrator Lee Samis in *Dominion of Canada General Insurance Company v Motor Vehicle Accident Claims Fund*. In that case, he noted "while the care and attention provided by Pat Palumbo and his wife was important and significant, I cannot conclude that Jimmy Palumbo was principally dependent for care on one or both of them at the time of the accident when one measures their involvement against the comprehensive care provided and made available by 105 Oakwood [the group home] and Jimmy's ability to provide for his own care". Similarly, I find that while Ornella's care for and devotion to her mother, Maria, was important and

significant, it cannot be said that Maria was principally, chiefly or, for the most part dependent on Ornella for care. Maria's need for care was addressed and provided chiefly or, for the most part, by the staff at VLG. This should not be viewed as taking away from the importance of the care provided by Ornella to Maria. However, VLG provides constant care for and to Maria as a long term care facility. Ornella's care is certainly important but does not rise to the level such that Maria was principally dependent for care on Ornella.

I specifically find that Maria's physical and social needs are chiefly or for the most part provided for by the combination of VLG and her visits to Villa Columbo. Put another way, I am unable to find that Ornella addressed Maria's needs in this regard chiefly or for the most part. This certainly does not take away from the importance of all that Ornella did for her mother.

On the evidence before me, I cannot make a finding regarding Maria's emotional needs by reason of Maria's health status [specifically dementia]. I do not know what Maria does and does not appreciate in the emotional sphere. It is undisputed that she has advanced or severe dementia such that she cannot live on her own and has been unable to do so for many years. To the extent that I were to make a finding in this regard, I would once again find that while Ornella's interaction with Maria was important, it cannot be said that Maria was chiefly or for the most part dependent on Ornella for emotional support. Ornella's evidence in cross-examination confirms that VLG seemed capable of addressing this need through their efforts to provide consistency in staffing which would provide comfort to their patients generally and to Maria specifically.

I find that Northbridge has failed to discharge the onus or burden upon it to prove that Maria was principally dependent for care on Ornella. As a result, Northbridge remains the higher priority insurer responsible to respond to claims for statutory accident benefits on the part of Maria arising from the motor vehicle accident of April 23, 2014.

I remain seized of this matter to address the issue of costs if counsel are unable to work this out. I order that Northbridge pay the costs of the Arbitrator in accordance with the terms of the executed Arbitration Agreements.

I am most appreciative of the efforts of counsel for their courtesy and cooperation extended to me and to each other from the inception of the Arbitration through to its

conclusion and wish to thank counsel for their thoughtful, comprehensive and intelligent submissions.

DATED AT Toronto, this day of September, 2016.

Vance H. Cooper, Arbitrator