

COURT OF APPEAL FOR ONTARIO

SHARPE, SIMMONS AND LANG J.J.A.

B E T W E E N :)
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OXFORD MUTUAL INSURANCE)
COMPANY) **Ian F. Leach, for the appellant**
)
 Applicant)
 (Appellant in Appeal))
)
- and -)
)
CO-OPERATORS GENERAL) **Philippa G. Samworth, for the**
INSURANCE COMPANY) **respondent**
)
 Respondent)
 (Respondent in Appeal))
)
) **Heard: October 20, 2006**

On appeal from the order of Justice Elizabeth M. Stewart of the Superior Court of Justice, dated August 18, 2005, allowing the appeal from the Award of the Arbitrator Guy Jones, dated July 28, 2004.

LANG J.A.:

[1] This is an appeal about the meaning of “principally dependent” for “care” as that term is used in the *Statutory Accident Benefits Schedule*, O. Reg. 403/96, a regulation under the *Insurance Act*, R.S.O. 1990, c. I.8. Arbitrator Jones determined that Joshua Williams was not principally dependent on his mother for care when he was involved in a motor vehicle accident that left him with quadriplegia. On appeal from that decision, Stewart J. set aside the arbitrator’s decision and substituted her decision that Mr. Williams was principally dependent on his mother for care. The motion judge’s decision was based primarily on the nature of Mr. Williams’s relationship with his mother since, at the time of the accident, Mr. Williams was living with her as his surety.

[2] In my view, the nature of the surety relationship, while relevant, is not determinative. Since the arbitrator's decision was based on reasonable factual findings and the application of correct legal principles, I would restore the arbitrator's decision.

The context

[3] Mr. Williams's accident and injuries occurred in July 2002. He applied for statutory accident benefits. The question arose as to which of two insurers would pay those benefits: his mother's insurer, Oxford Mutual Insurance Company (Oxford), or the insurer of the car that Mr. Williams occupied at the time of the accident, Co-operators General Insurance Company (Co-operators).

[4] The answer depended on the application of s. 268(2) of the *Insurance Act*, which provides that Mr. Williams's recourse is first against Oxford if Mr. Williams was "an insured person" under his mother's policy at the time of the accident. The *Statutory Accident Benefits Schedule* defines an "insured person" as one who is a "dependant" of a named insured and provides that 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." [Emphasis added.]

[5] If Mr. Williams was not an insured person under his mother's policy, he would have recourse against Co-operators, the insurer of the automobile in which he was an occupant.

Mr. Williams's circumstances

[6] The facts are not in dispute. In 2002, at the time of the accident, Mr. Williams was 22 years of age. In 1999 or 2000, he moved from his mother's Ontario home to British Columbia where he worked and lived with friends. On occasion, his mother sent small sums to help him financially, but Mr. Williams was otherwise self-sufficient.

[7] In 2001, Mr. Williams returned to Ontario. He lived briefly with his mother. He then moved in with his girlfriend, living first at her parents' home, then in an apartment and then with a friend.

[8] In early 2002, Mr. Williams and his girlfriend separated and she moved back to her parents' home. In March 2002, Mr. Williams was charged with assaulting and threatening his former girlfriend. In April 2002, he was released on bail with his mother acting as his surety on agreed-upon terms. Those terms provided that Mr. Williams would leave his apartment to reside with his mother and obey her house rules, which were filed with the court. Those rules required Mr. Williams to stay away from his former girlfriend and her friends, go straight to and from work, obey a curfew of 11:00 p.m. on

non-work nights, keep his mother informed of his whereabouts, refrain from attending at local bars, and work with his mother to seek counselling.

[9] While on release, Mr. Williams continued to work nights from about 4:00 p.m. to 2:00 a.m. Since his mother worked days, they rarely saw each other during the week, although he had meals at home one or two times a week. On the weekends, Mr. Williams was away for much of the time socializing with friends.

[10] It is not contested that Mr. Williams was independent in the sense that he cared for his own personal needs, provided his own transportation, took care of his own finances, and contributed to the household both financially and by way of taking responsibility for chores.

The arbitrator's decision

[11] The arbitrator was asked to determine whether Mr. Williams was principally dependent on his mother either for financial support or for care at the time of the accident. The arbitrator found that he was not dependent in either way.

[12] In arriving at his decision on both issues, the arbitrator considered various uncontested legal principles, including that “principally” dependent means “chiefly”, “mainly” or “for the most part”. See *Towsley v. Royal Insurance Co.*, [1996] O.I.C.D. No. 25.

[13] The arbitrator considered the important issue of the appropriate time frame on which to base his determination and recognized that a “snapshot” approach on the day of the accident was inappropriate. Rather, the time frame chosen must be one that provides a fair picture of the relationship at the time of the accident.

[14] Given Mr. Williams's circumstances, the arbitrator held that the appropriate time frame began in “at least early 2001” when Mr. Williams returned to Ontario. However, he also said that he would have come to the same result even if he had used an earlier or later date, including the date of April 2002, when Mr. Williams began living with his mother as his surety. The arbitrator characterized Mr. Williams's return to his mother's household as a “brief aberration [that]... should not be looked at in isolation” because Mr. Williams only lived with his mother to avoid jail and he intended to move out as soon as his criminal charges were resolved.

[15] Although he applied the same time frame to the question of “care” dependency, the arbitrator recognized that the “care” issue “cannot be determined with the same mathematical precision” as the issue of financial dependency. See *Wawanesa Mutual Insurance Co. v. Underwriters, Lloyd's of London Insurance Co.* (2004), 72 O.R. (3d) 762 (S.C.J.) at para. 17.

[16] Once he established the appropriate time frame, the arbitrator considered the implications of the bail provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 and acknowledged the “classical notion” that a surety, at least historically, was a “constructive jailer”. See Gary T. Trotter, *The Law of Bail in Canada*, 2d ed. (Scarborough: Carswell, 2000) at 280. He went on to consider the obligations of the surety in this case and Mr. Williams’s particular circumstances in his mother’s home. In addition, he considered Co-operators’ argument analogizing Mr. Williams’s situation to the regulation’s definition of a person “in need of care” for the purposes of caregiver benefits. As well, he considered dictionary definitions of “care”. While recognizing that other cases decided the issue on the basis of the “dependant’s” physical or emotional needs, the arbitrator was “also prepared to accept that a person may be principally dependent for care upon their surety” even though not physically and emotionally dependent.

[17] Nonetheless, based on the time frame chosen, the limited supervision exercised by Mr. Williams’s mother and Mr. Williams’s substantial personal independence, the arbitrator concluded that he was not dependent on her for his care. In the result, Co-operators and not Oxford was responsible for payment of Mr. Williams’s statutory accident benefits.

The motion judge’s reasons

[18] On appeal to the motion judge, Oxford challenged only the finding that Mr. Williams was not principally dependent for his care on his mother. Since the issue of statutory interpretation is generally considered a question of law, the motion judge determined “correctness” to be the appropriate standard of review of the arbitrator’s decision. In coming to this conclusion, the motion judge rejected the argument that deference should be given to the arbitrator’s decision on the basis of his special expertise.

[19] Although the motion judge relied on the same principles of law and definitions as did the arbitrator and she acknowledged the need to look at Mr. Williams’s physical care arrangements, she made no reference to the particulars of those arrangements. Rather, she focussed on the basis for and the nature of the surety relationship as “of great importance” to the resolution of the issue. She found that since the mother acted as a “constructive jailer”, she exercised a “measure of physical control” over Mr. Williams. As well, she considered it significant whether the “care situation is temporary, long-term or permanent and, if it can be terminated, then by which party and on what basis”. See *State Farm Mutual Automobile Insurance Co. v. Non-Marine Underwriters*, [1997] O.J. No. 3402 (S.C.J.). Concluding that it was not open for Mr. Williams to terminate the surety order, the motion judge determined that his dependence on his mother would continue for a considerable and indefinite time, at least until the next scheduled court date of December 2002.

[20] As a result of the “nature of the relationship” and the “significant obligations of ‘care’” (in the sense of “control”) inherent in the surety relationship, the motion judge concluded that Mr. Williams was principally dependent upon his mother for his care. In the result, she substituted her decision for that of the arbitrator. Oxford and not Co-operators would be responsible for payment of Mr. Williams’s statutory accident benefits.

Analysis

[21] In my view, the motion judge’s reasons err in three respects. First, the question before the arbitrator was not simply a question of law and, even if it was, the arbitrator considered the correct legal principles. In that circumstance, the arbitrator’s application of those legal principles to his factual findings was entitled to deference. Second, the time frame used by the motion judge was too narrow. Third, in light of the arbitrator’s factual findings about the *de facto* independence of Mr. Williams, the legal nature of the surety relationship cannot be determinative.

1. Standard of review

[22] The question before the arbitrator was whether the relationship between Mr. Williams and his mother made him principally dependent upon her for his care. In answering that question, the arbitrator considered the correct legal principles, including the nature of the surety relationship. He also recognized that the case should be determined on its own particular facts keeping in mind all relevant factors. See *Miller v. Safeco Insurance Co. of America* (1984), 48 O.R. (2d) 451 (H.C.J.), aff’d (1985), 50 O.R. (2d) 797 (C.A.).

[23] In those circumstances, the question became one of applying the correct legal principles to his factual findings about the particular circumstances of Mr. Williams’s relationship with his mother. Accordingly, the question before the arbitrator was one of mixed fact and law and was closer to a factual determination. See *Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada*, [1997] O.J. No. 1234 (C.A.). 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 was entitled to deference. In any event, in my view, the arbitrator’s decision was also correct.

2. The time frame

[24] The determination depended upon whether Mr. Williams was a dependant of his mother for his care at the time of the accident.

[25] The section of the *Statutory Accident Benefits Schedule* under consideration in this case is s. 2(6). For the purposes of s. 2(6), the relationship to be examined is not a “snapshot” at the time of the accident as it is in other sections of the regulation. For example, s. 2(1)(a) provides that a spouse of an insured person is also an insured person. Whether a person occupies the legal status of a spouse on a specific date is much easier to determine than whether a person is principally dependent upon another for care. In the same vein, caregiver benefits are available under s. 13 to a “person in need of care”, which includes a person who is less than sixteen years of age: the age of a person at the date of an accident involves a “snapshot” in time.

[26] In contrast, under s. 2(6), the true characterization of a dependent relationship at the time of the accident will usually require consideration of that relationship over a period of time, particularly in the case of young adults whose lives are in transition. The parameters of that period will depend on the facts of the case. The time frame chosen will also be influenced by the nature of the relationship between the person providing the care and the person receiving the care. The analysis may also consider the degree of care provided to the individual at certain times as well as the individual’s need for care.

[27] In *Liberty Mutual Insurance Co. v. Federation Insurance Co. of Canada*, Award of Arbitrator Samis, 7 May 1999, aff’d [1997] O.J. No. 1234 (C.A.) the arbitrator noted that:

[r]elationships 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-dependant relationships.... The evaluation should be made by examining a period of time which fairly reflects the status of the parties at the time of the accident.

I agree.

[28] In this case, the arbitrator did not confine the time frame to the period of the surety relationship but looked to a reasonable period beyond that time frame to determine the true nature of the relationship. In my view, the arbitrator properly considered the recent and long standing independent relationship that Mr. Williams had with his mother in the time prior to the surety order and that he unequivocally intended to resume upon completion of the criminal proceedings. Only by looking at that relationship as a whole, over a reasonable period of time, is the arbitrator able to determine the nature of the relationship at the time of the accident. Over this period, and the respondent acknowledges this, Mr. Williams was independent of his mother for his care. Moreover,

as the arbitrator concluded, this finding would not change even if the period was confined to the time of the surety relationship.

[29] While the motion judge acknowledged that a snapshot view was inappropriate, her reasoning was based on her determination that the surety relationship had been in place for three months and would continue for an indefinite time. In my view, the focus of the trial judge's reasons on the legal nature of a surety relationship unduly restricted her view of the relevant time frame to the period of the surety order. While in some cases, the nature of the relationship may dictate a narrow time frame for a determination of the issue, as I will discuss, the nature of Mr. Williams's relationship with his mother did not.

[30] In summary, the arbitrator was entitled to rely on a broader time frame that provided a perspective on the state of the relationship at the time of the accident. In any event, the arbitrator would have reached the same conclusion even if he considered the narrower surety time frame. His decision about the appropriate time frame was entitled to deference.

3. *The surety relationship*

[31] The motion judge's decision rested primarily on the surety relationship between the parties. While the nature of that relationship is relevant and important, in my view, it is not determinative, particularly in light of the facts as found by the arbitrator.

[32] In arriving at her decision, the motion judge considered that a surety relationship generally is one where the surety acts as "constructive jailer" and the person on release is in her "constructive custody". As surety, the mother was to ensure Mr. Williams's appearance in court and his compliance with the terms of bail. However, while the references to jailer or custody reflect the origins of surety relationships, as explained in *The Law of Bail in Canada, supra* at 281:

While this view of the surety relationship is still acknowledged today, the extent to which it is still tenable is a matter of debate. The constructive jailer model of the surety relationship is more metaphorical than literal.

The nature of a surety relationship will depend upon the facts of the case.

[33] As part of the nature of the surety relationship, the motion judge was influenced by her view that the relationship could not be terminated by Mr. Williams. However, this is not correct. Mr. Williams could terminate the surety order in different ways, including by application for a substitute surety. In addition, his mother was entitled to terminate her status as surety if she so desired. Furthermore, the surety relationship was not a permanent one and would end on the disposition of the criminal charges.

[34] Moreover, the facts of this case support the decision of the arbitrator that, while the mother had some control over Mr. Williams, he was not under her care. “Control” is not the same as “care”. The mere fact of control over an individual’s conduct does not in all circumstances result in a relationship of dependent care. The primary objective of the surety order in this case was to keep Mr. Williams away from his former girlfriend, her house and her friends. The degree of control that rested with the mother for this purpose, and to ensure his appearance in court, was not sufficient to make Mr. Williams dependent upon her for his care. To the contrary, subject to the parameters of the bail, Mr. Williams came and went from the house at will. For the most part, he supported himself financially, attended to his daily needs, contributed to the household, saw to his transportation, maintained his own employment and socialized with his own friends. Mr. Williams was not emotionally or in any other sense principally dependent on his mother.

[35] In my view, Mr. Williams’s status as a young adult and his surety relationship with his mother were only factors to consider in determining whether he was dependent on her for his care. Other relevant factors include consideration of the provision of social, emotional and physical care. See *Wawanesa Mutual Insurance Co. v. Underwriters, Lloyd’s of London Insurance Co., supra*, and *R. E. v. Wawanesa Mutual Insurance Co.*, [2006] O.J. No. 904 (S.C.J.) at para. 58. While the mother in this case would likely have provided this type of care to Mr. Williams because he was her son and she loved him, she did not. This is because he did not need that care.

[36] On this appeal, as before the motion judge, the respondent relies heavily on the surety relationship as creating a dependency analogous to that of a child under sixteen living with his or her parent. Under s. 2(1) of the regulation, a “person who is less than 16 years of age or who requires care because of physical or mental incapacity” is deemed to be a “person in need of care”. In my view, this analogy does not apply to dependency for statutory accident benefits for two reasons. First, the definition of a person in need of care solely informs s. 13 of the regulation, which appears only in Part IV of the regulation. Part IV deals exclusively with eligibility for caregiver benefits. The legislature chose not to incorporate a similar defined term into Part I of the regulation dealing with entitlement to statutory accident benefits. Second, a person under sixteen is often dependent on his or her parents for financial and emotional care, as well as day-to-day care. Mr. Williams was not. Accordingly, I cannot agree that this provision has any application to the circumstances of the adult Mr. Williams.

[37] Finally, to hold that a surety order is determinative of dependency for care would mean that the insurance policies of all sureties – many of whom will not be parents or family members – would be answerable for motor vehicle accidents involving a person on release. By extension, such a decision may lead to the result that such persons, being dependants of the surety, are entitled to share in any death benefits payable under other

provisions of the regulation. Neither of these results could be the intention of the legislature.

Result

[38] In the result, the arbitrator considered all relevant circumstances, including the surety relationship, in arriving at his decision. His decision was reasonable. Accordingly, I would allow the appeal and reinstate the decision of Arbitrator Jones.

[39] The parties agreed on an amount of costs that would follow the result. Accordingly, I would award costs to the appellant fixed at \$8,500, inclusive of disbursements and Goods and Services Tax.

RELEASED: RJS

“S.E. Lang J.A.”

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“I agree Robert J. Sharpe J.A.”

“I agree Janet Simmons J.A.”