

IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT*,
R.S.O. 1990 S. I.8, AND O. REG 283/95

AND IN THE MATTER OF THE *ARBITRATION ACT, 1991*.
S.O. 1991, C. 17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOTORS INSURANCE CORPORATION

Applicant

- and -

YORK FIRE & CASUALTY INSURANCE COMPANY

Respondent

AWARD

Introduction:

This matter comes before me as an Arbitration pursuant to the *Arbitrations Act, 1991*. The parties have selected me as their Arbitrator on consent and the matter proceeded to a half day hearing in Toronto on December 17th, 2009.

The Applicant and the Respondent are automobile insurers and a dispute has arisen between them as to which of the two insurers' should pay no fault accident benefits to Latonya Gaisie as a result of an accident that occurred on March 4, 2007.

Counsel:

Motors Insurance Corporation: Applicant – George Kanellakos

York Fire & Casualty Insurance Company: Respondent – Mark Fonseca

Record:

The record in this matter consisted of two exhibits. The first exhibit included 11 documents and I have attached the index to Exhibit 1 to this Award. Exhibit 2 was an extract from Statistics Canada Catalogue Number 62-202-X Spending Patterns in Canada – 2007, Tables 2 and 3. (pages 16 and 18). No oral evidence was called. The parties relied upon the exhibits which included an Agreed Statement of Facts and three Examinations under Oath.

The Issue:

Pursuant to the Arbitration Agreement dated November 24, 2009, the issues for determination were stated as follows:

1. Which of Motors Insurance Corporation and York Fire & Casualty Insurance Company is required to pay benefits under Section 268 of the *Insurance Act* to or on behalf of Latonya Gaisie arising out of her involvement in a motor vehicle accident that occurred on March 4, 2007.
2. Was Latonya Gaisie principally dependant for financial support or care on her father, Albert Gaisie?
3. Was Latonya Gaisie principally dependant for financial support or care on her mother, Augustina Ampiah?
4. In the event that York Fire & Casualty Insurance Company is required to pay benefits under Section 268 of the Insurance Act:
 - i. The amount to be paid by York Fire & Casualty Insurance Company to Motors Insurance Corporation by way of indemnity with respect to the described claims;
 - ii. The amount of interest owed by York Fire & Casualty Insurance Company to Motors Insurance Corporation with respect to the amount to be indemnified.

The parties agreed at the opening of Arbitration that with respect to issue number 4(i) and (ii) that the quantum was not in dispute and was agreed upon at \$48,999.87. Any question relating to interest was deferred pending my conclusions on the primary issue. The parties also confirmed at the opening of Arbitration that the issues set out in paragraphs 2 and 3 above were limited to financial support and I need not rule on the issue of care. Therefore the main issue before me was whether Latonya Gaisie was principally dependant for financial support on either her father Albert Gaisie or her mother Augustina Ampiah.

Background Information:

On March 4, 2007 Latonya Gaisie was involved in a three vehicle collision at the intersection of 10th Line West and Thomas Street in the City of Mississauga. Ms. Gaisie was the right front seat passenger in an Acura Legend which was insured by Motors Insurance Corporation. At the time of the accident York Fire & Casualty Insurance Company insured Albert Gaisie, Latonya's father.

On March 4, 2007, Latonya Gaisie was not the named insured or listed driver on any policy of insurance. Latonya Gaisie applied for accident benefits to Motors Insurance Corporation, the insurer of the vehicle that she was an occupant of on the date of the accident. Motors Insurance Corporation has paid accident benefits to Latonya Gaisie and her claim for accident benefits was ultimately settled on September 16th, 2008.

Motors Insurance Corporation claims that Latonya Gaisie was principally dependant for financial support on her mother (the spouse of Albert Gaisie) or on her father Albert Gaisie and therefore York Fire & Casualty Insurance Company should be the priority insurer pursuant to Section 268 of

the Insurance Act. The parties agree that the onus of proof in this Arbitration is on Motors Insurance Corporation.

Facts:

Ms. Gaisie was born on September 13, 1984. At the time of the accident she was 22 years of age and had a 2 year – 10 month old daughter: Tamyrra born on May 12, 2004. It was agreed that Latonya did not receive any financial support from the father of her child.

Latonya and Tamyrra at the time of the accident lived in her parent's home in Mississauga. The following individuals were residing in the Gaisie's three bedroom semi-detached home at the time of the accident: Tamyrra Gaisie, Latonya Gaisie, Augustina Ampiah, Albert Gaisie, Henry Gaisie (Latonya's brother) and Ivy Gaisie (Latonya's sister). Latonya and Tamyrra shared a bedroom and had access to common areas of the house enjoyed by all family members.

It was agreed that at the time of the accident, Latonya was employed as a cashier at Sobeys'. The Employer's Confirmation of Income Form confirmed that from September 2, 2006 to February 25, 2007 (her last day worked) she had gross earnings of \$5,294.45. She was paid an hourly wage of \$8.76 at the time of the accident. She also received a monthly child benefit from the government of approximately \$266.00. Therefore her gross annual income would be \$14,071.00 per annum and her net per annum income was \$13,510.00. This translated to a gross monthly income of \$1,172.58 and a net monthly income of \$1,125.83.

In reviewing the attachment to the Employer's Certificate (Exhibit 1, Tab 7) from September 2nd, 2006 through to February 25, 2007 Ms. Gaisie worked a total of 609.5 hours. The hours varied from a bi-weekly low of 28.50 to a high of 65.50 hours. In the three full bi-weekly periods prior to the accident her hours were 65.50, 65.50, and 54.50.

Motors took the position that Latonya Gaisie was also attending school at the time of the accident. Motors claimed that she was enrolled in a pre-health program at George Brown College. There did not appear to be any dispute that Latonya had attended the program from September 2005 through to April 2006. However there was some considerable dispute as to whether she had returned to George Brown College and was attending between January 2007 and April 2007 to complete some additional courses. York Fire pointed to a number of inconsistencies in the evidence with respect to this issue. On the evidence before me I am unable to reach any conclusion as to whether Latonya was or was not attending school as of the date of loss. However it is my view that issue ultimately has no bearing based on other findings of fact and conclusions relating to the question of financial dependency. The parties chose to rely on a Statement under Oath from Ms. Gaisie and a statement taken by Motors of Ms. Gaisie just after the motor vehicle accident. These documents together with the Application for Accident Benefits reflected a complete inconsistency as to whether Latonya was or was not at school. In her statement, she did not indicate that she was attending school nor was it indicated in her Application for Accident Benefits. Neither the Application for Accident Benefits nor the statement was put to Ms. Gaisie in her Examination under Oath and therefore that process did not resolve the inconsistencies. However in her Examination under Oath she indicated she was attending school. Neither party chose to call Ms. Gaisie as a witness at the Arbitration to clarify this. Motors having the onus of proof, chose not to subpoena or secure the records from George Brown College which would also have resolved this issue. In my view, I can draw an adverse inference

from the failure of Motors to either call Ms. Gaisie to clarify this issue or to provide the school records. However ultimately, in my view, the question of whether the insured was or was not at school at the time of the accident is not key to the determination of the issue in dispute.

Latonya's Expenses:

There was a great deal of evidence with respect to Ms. Gaisie's expenses, the expenses of the household and as well evidence from Statistics Canada as to the average expenditure of households in Ontario and Toronto. Through the course of the submissions, the parties agreed that if I were to find that Latonya Gaisie's expenses were reduced in any categories by \$923.00 per annum (\$76.91 per month) that this would result in her being able to meet more than 50% of her needs through her own resources.

Motors relied upon a report from Price Waterhouse Coopers (Bruce Webster) dated October 22, 2009. Based on his review of the evidence, Bruce Webster determined that there were various alternatives that could be arrived at depending on which assumptions were accepted. I summarize his three alternatives below. Before reviewing the alternatives, the key conclusions of Bruce Webster's report are that Latonya's needs per year totaled \$27,942.00. Her known after tax income was \$13,510.00. Latonya's position was that she funded \$22,723.00 of her needs (excluding the non-cash portion of \$2,080.00). Considering her known after tax income, this resulted in a short fall of \$9,213.00. Bruce Webster therefore felt the key was to determine who or how the shortfall was funded. His three assumptions were as follows:

1. If it is determined that Latonya did fund the entire shortfall of \$9,213.00 from her own resources (eg. Savings) then she was personally funding 81% of her needs;
2. If it is determined that Latonya did not fund any of the shortfall with her own resources then she was personally funding 48% of her needs;
3. Similarly if it is determined that Latonya personally funded her needs with after tax income of \$13,510.00 plus only a portion of the unknown funds, then depending upon the split, the dependency percentage will vary.

Ultimately Bruce Webster concluded that Latonya was principally dependant for financial support either on her parents or on another individual not as yet identified at the time of the accident. With the greatest of respect I am unable to accept Bruce Webster's conclusions. For reasons that follow, I have concluded that the needs or expenses estimated by Mr. Webster for Latonya Gaisie are too high and do not accurately reflect Latonya's actual annual needs. Further, and irrespective of my conclusion with respect to the expenses, there is absolutely no evidence that Latonya's parents provided her with anything other than a roof over her head together with some contribution towards shelter. Both Latonya's parents clearly indicated in their Examination under Oath that they did not give her any money. As noted earlier the parties confirmed that if Latonya's expenses are reduced by \$923.00 per year or more that Motors' argument must fail. For reasons that follow I conclude that there are numerous ways in which \$76.91 per month (\$923.00 per annum) can be taken off Latonya's alleged expenses.

Shelter

Bruce Webster in looking at the question of shelter (which both parties accepted was provided by her "parents") took a statistical approach from Statistics Canada. In 2007 the average shelter cost in Ontario for principal accommodation and household operation was \$19,127.00 and in Toronto it was \$22,597.00. Bruce Webster took the shelter costs for Toronto and allocated it among 5 people living in the Gaisie household allowing \$4,519.00 per person. There were in fact 6 people living in the Gaisie household. Mr. Webster did not include Latonya's daughter presumably based on the argument that she shared a bedroom with her mother. However, Tamyrra needed to be kept warm in the house, made use of the hydro, and generally was "sheltered" in the common areas. Therefore in my view, the shelter allocation for Latonya should have been split among 6 people and not five. This would change the allocation for shelter provided by the parents from \$4,519.00 to \$3,766.00. This would reduce Latonya's annual needs by \$753.00 per year. For ease of reference I attach to this award Schedule 1 and Schedule 2 from Bruce Webster's report.

Transportation

Latonya claimed in her Examination under Oath that her transportation expenses were \$45 per week. In her statement she claimed it was \$44 per month. Considering her evidence as to where she would be travelling and how she travelled (transit pass) and considering the average cost for transit in Ontario on a yearly basis (\$1,124.00 versus \$2,340.00) and considering Latonya's ability to earn, I conclude that the cost of transportation was \$44.00 per month not \$45.00 per week. This would result in a yearly transportation cost of \$528.00 and reduces Latonya's needs from the \$2,340.00 per year found by Bruce Webster for transportation to \$528.00. This is a reduction of \$1,112.00 per year.

Telephone and Internet

Latonya's evidence was that she paid for her cell phone anywhere from \$70 to \$100 per month. In addition she shared the cost of the internet with her sister at approximately \$65 per month. Latonya also gave evidence that she contributed to the cost of the home phone at \$100 per month. I am prepared to accept Latonya's evidence with respect to the cost of her own cell phone as that appears to be consistent with the evidence of her parents. However Albert Gaisie indicated that he paid for the home phone and he paid Bell approximately \$51 per month. Latonya was required to contribute \$200 per month for food and groceries to the family expenses. However from time to time rather than take cash Mr. Gaisie indicated he would have his daughter pay one of the bills. Therefore in my view when Latonya says that she contributed towards the home phone, it would only be in lieu of her contribution for food and groceries and it would not be in the amount of \$100. I therefore exclude from the calculation of Latonya's expenses \$100 per month for the home phone. Mr. Webster with respect to the internet allowed the full value of the internet at \$65.00 per month when in fact Latonya's evidence was she contributed only one half and I therefore again reduce her monthly needs with respect to the internet expense by one half to \$32.50 per month. This results in a net deduction on a monthly basis with respect to phone and internet of \$132.50 per month or \$1,590.00 per year.

Daughter Expenses

In estimating Latonya's needs, Mr. Webster included Tamyrra's needs. In other words as part of Latonya's expenses Mr. Webster included the expenses Latonya had for her daughter. Things such as diapers, toiletries, clothing and food. Arguably in determining the needs of Latonya to assess her dependency or ability to live independently, expenses related to her daughter should not be included as these reflect Tammrya's needs and dependency as opposed to her mothers. This could result in the following reduction of Ms. Gaisie's needs: \$100 per month for diapers, a reduction of \$25.00

per month for toiletries, and a reduction of \$71.00 per month for clothing (I am reducing her estimates by the Statistics Canada figures for Toronto). In addition there would have to be some reduction for the estimate of her costs for food and groceries. Any one of these or combined one of these would bring the reduction on a monthly basis to something greater than \$76.91 per month.

Irrespective of the conclusions I reach with respect to Latonya's expenses, perhaps most important is my finding that other than providing shelter which I have valued at \$3,766.16 per year, and a few other minor expenses Latonya's parents did not provide her with any other support. Her father's evidence of this point is important and I summarize his evidence given on his Examination under Oath (exhibit 1, tab 10).

1. She can't really live free as the only reason she is living here is because she had the child;
2. I did not pay anything for Latonya, I could not afford to buy her clothes or toiletries;
3. I didn't give her any pocket money, I did not give her any loans, I did not pay any of her bills;
4. I drive a cab and I did not have the financial ability to make any payments for my daughter to go to school or other things like that;
5. I cannot provide amenities such a detergent or household items for the children. They are working. Latonya was 20 at the time of the accident and if she is working, she must be able to provide those items for herself.

The evidence of Augustina Amfiah, Latonya's mother was similar and I summarize the relevant evidence on this issue from her Examination under Oath as follows (exhibit 1, tab 11);

1. I was working at Tyndal Nursing Home on a part-time position at the time of the accident.
2. In the year before the accident Latonya took care of herself. Neither I nor my husband paid anything for her such as clothing, toiletries or make up. I did not provide her with any pocket money or spending money. I did not pay for her bus fare.

It is therefore abundantly clear to me that even if I concluded that there was a short fall as suggested by Mr. Webster between Latonya's needs and her ability to pay for those needs of some \$9,000, that that shortfall was not made up by either of her parents.

Relevant Statutes:

In determining priority one must first look at s.268 of the Insurance Act and I have included the relevant provisions as follows:

(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.*

(5) *Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependent, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c.10, s.26(2).*

If Latonya Gaisie is found to be a dependant of her mother or is found to be a dependant of her father then under Section 268(5), Statutory Accident Benefits would be payable by York Fire & Casualty Insurance Company.

The SABS provides a definition of dependency as follows at (s.2 (6)) of the Statutory Accident Benefits Schedule:

“For the purpose of this regulation, a person is a dependent of another person if the person is principally dependent for financial support or care on the other person or the other person’s spouse of same sex partner.”

The issue before me is only one of financial dependency.

In reaching my decision I have considered all the evidence that I have outlined above and in particular Exhibits 1 and 2 and the submissions of the parties.

Analysis:

There was no dispute as between the parties with respect to the law that should be applied in this case. The decision of the Court of Appeal in *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* [2000] O.J. No. 1234 (Court of Appeal) directs me to apply the four criteria that

were established in *Miller v. Safeco Insurance Company of America* [1985] O.J. No. 2742 (Court of Appeal) in determining dependency. The four criteria are:

1. The amount of dependency;
2. The duration of dependency;
3. The financial or other needs of the alleged dependant;
4. The ability of the alleged dependant to be self-supporting.

I am also aware of the case law that has developed since *Federation & Liberty* directing me to look at an individual capacity to earn and not only to look at actual earnings in determining the issue of dependency. The case law indicates that to be principally dependant for financial support an individual must receive more than 50% of their financial needs from someone other than themselves. Conversely, a person can only be principally dependant for financial support on another individual if that individual is meeting more than 50% of her needs. (*Federation Insurance v. Liberty* supra). See also *R.B.C. v. Lombard Insurance*, a decision of Arbitrator Jones, July 2002 and *Co-Operators v. Halifax Insurance Company* [2002] O.J. No. 2459.

I turn now to a consideration of the four criteria that I am directed to apply:

Duration of Dependency

The parties have agreed that a reasonable time period to determine the issue of dependency is one year. Therefore I have looked at the question of Latonya Gaisie's potential financial dependency from March 2006 to March 2007.

The Amount of Dependency

If Latonya Gaisie is capable of financially supplying more than 50% of her needs then she will not be principally dependant for financial support on either parent. In looking at the amount of dependency I have considered the evidence of Bruce Webster, the Examinations under Oath and determined that when Latonya's expenses are reduced in accordance with my findings that she is capable of paying for more than 50% of her needs with the monies that she earns.

The Financial or Other Needs of the Alleged Dependand

Latonya Gaisie was a young woman with a child who was living in shared accommodation. I have looked at the fact that Latonya shared a common home with six other individuals. I have taken into consideration that I must look at Latonya's needs and not the needs of both her and her child in determining the issue of dependency.

The Ability of the Dependand to Self-Supporting

Clearly Latonya has the ability to be self-supporting. She is a healthy young woman who has shown during the relevant time period an ability to be employed as a cashier. Her hours varied in the relevant time period from a low of 28 hours (bi-weekly) to a high of 65 hours which would translate into 32.5 hours per week. This reflects an ability to be not only be part-time employed but full-time employed. She was capable of earning at minimum \$14,000 per annum and had she chosen to work more hours she could have earning greater than \$14,000 per annum. There was no evidence before me as to whether more hours were or were not available or whether Ms. Gaisie was seeking employment. Even if I were to accept, as pressed upon me by Motors, that Latoya was attending school on a part-time basis, I still conclude that she was capable of providing for more than 51% of her needs with the monies that she earned through Sobey's and her monthly child benefit.

With respect to the issue of principal financial dependency, I have concluded that when Latonya's expenses are reduced as outlined earlier in this award that she was capable of providing for more than 51% of her needs. Any one of the deductions or alterations I have made in Latonya's needs either singularly or combined will result in a reduction of her yearly needs by \$923.00 which the parties agreed would result in a finding that she will be able to provide for 51% or more of her needs. This alone would result in a finding that Latonya was not principally dependant for financial support on either of her parents.

However in addition to that, even if I were to find that Latonya could not provide for 51% of her needs as suggested by Mr. Webster, I am not satisfied that any shortfall was made up by either of her parents. Their evidence in fact was to the contrary. They did not provide anything other than shelter. There is no evidence that they provided cash or kind to cover the alleged shortfall of \$9,000.00. Taking Mr. Webster's analysis I find that Latoya's expenses were exaggerated and/or that the choice of Mr. Webster to pick in most cases the highest number for his assessment of dependency (see Schedule 2 under heading Used in Report) resulted in an overestimation of Ms. Gaisie's expenses and that in fact her expenses were considerably lower. This would then result in there being a minimal or no shortfall in terms of Latoya's needs and her available money to satisfy those needs and would be consistent with the evidence as to how the Gaisie household was operating at the time of the accident.

As always each dependency case turns on its facts and the facts in this case are key to my conclusion. I conclude that Latonya Gaisie had the ability to be self-supporting and had sufficient resources to fund 51% or more of her needs. If I am wrong in that conclusion then I still find that Latonya would not be principally dependant for financial support on either of her parents as neither Latonya's mother or father contributed 51% or more to Latonya's needs. The facts as I have found them do not lead to a conclusion that Latoya was principally dependant for financial support on her mother or principally dependant for financial support on her father. As a result, Latonya Gaisie's statutory accident benefits should be paid by Motors Insurance Corporation.

Conclusion:

The question posed by the Arbitration Agreement is as follows:

1. *Was Latonya Gaisie principally dependant for financial support or care on her father Albert Gaisie:*

The answer to this question is no.

2. *Was whether Latonya Gaisie was principally dependant for financial support or care on her mother Augustina Emphia.*

The answer to this question is also no.

I should point out that Motors argued that I should also look at Latonya was principally dependant for financial support on both her father and mother even though this was not set out as the question in the Arbitration Agreement. I feel I am bound by the questions set out in the Arbitration

Agreement but for the sake of completeness, I note that my conclusion would also have been that Latonya Gaisie was not principally dependant for financial support on her father and mother jointly.

Costs:

The parties have provided under the Arbitration Agreement that the costs of the counsel fee for the Arbitration would be fixed in the amount of \$5,000 inclusive of GST and shall follow the event. Therefore I award costs to York Fire & Casualty Insurance Company in that amount.

Order:

It is ordered that Motors Insurance Corporation is responsible for the payment of accident benefits to Latonya Gaisie arising out of the motor vehicle accident of March 4, 2007.

DATED THIS 24th day of December, 2009 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP