

IN THE MATTER OF THE *INSURANCE ACT*

R.S.O. 1990, C.I. 1.8, AS AMENDED, AND REGULATION 283/95

AS AMENDED BY REGULATION 16/13

B E T W E E N:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

DECISION

INTRODUCTION:

This one day hearing took place on July 19, 2017 in London, Ontario.

The Applicant and the Respondent are automobile insurers and a dispute has arisen between them as to which of the two insurers should pay the no fault accident benefits of Joshua Rouse (hereinafter referred to as "Rouse") as a result of an accident that occurred on August 7, 2013 (hereinafter referred to as the "accident").

COUNSEL:

Catherine A. McIntosh - Foster Townsend LLP

Counsel for the Applicant, The Dominion of Canada General Insurance Company (hereinafter referred to as "Dominion")

Gabriel Flatt - Samis + Company

Counsel for the Respondent, Economical Mutual Insurance Company
(hereinafter referred to as "Economical")

RECORD:

The record in this matter consists of two Exhibits, the Joint Document Brief and the *Curriculum Vitae* of Jessy Hawley. In addition, there is the Document Brief submitted by the Applicant and the oral evidence led from the accountant, Jessy Hawley.

It is important to note Rouse died before his scheduled examination under oath could take place. The only evidence from Rouse was a transcript of an interview conducted on January 10, 2014 which was contained at Tab 4 of the Joint Document Brief. This put some limitations on the evidence available to the parties

THE ISSUE

The primary issue is whether Dominion or Economical is responsible for paying the accident benefits of Rouse. This question is answered by making a determination as to whether or not, at the time of the accident, Rouse was principally dependent on his parents, Teresa and Monte Rouse, for financial support or care.

BACKGROUND INFORMATION

On August 7, 2013 Rouse, then 19 years and 4 months old , was a passenger in a 1998 Plymouth Neon vehicle operated by Jill Mabey, owned by Deb Clark, and insured by Dominion under a policy number APP-2181775. The vehicle was involved in a two car collision.

At the time of the accident, Rouse did not own a motor vehicle. He did not have a motor vehicle liability policy of his own and was not a named listed driver under any motor vehicle policy.

Rouse's mother, Teresa Rouse, was the named insurer under a motor vehicle policy number 020176465 issued by Economical which insured a 2010 Dodge Ram truck.

Rouse suffered injuries in the accident and submitted an OCF-1 to Dominion dated August 27, 2013 on the basis he was a passenger entitled to coverage for statutory accident benefits under the Dominion policy.

FACTS

Living Arrangements During the 12 Months Prior to the Accident

The available evidence on Rouse's living arrangements during the 12 months prior to the accident is contained in the Statutory Declaration provided by Monte Rouse wherein he stated:

"He moved around a fair bit. In the year before he was probably living with me 3 to 4 months, at his girl friend's for 3 months, at his own apartment briefly and staying with friends the rest."

During this period, Rouse's parents gave him money "when he needed it" but there was no fixed amount. There was no evidence as to how much he was given or the frequency of payments. Rouse's mother paid his cell phone bills. Rouse's parents helped him with his clothes now and again although he bought most of them on his own.

At the time of the accident, Rouse had no savings or any significant tangible assets.

Living Arrangements During the 4 Weeks Prior to the Accident

At the time of the accident, Rouse lived with his parents at 7824 Alfred Street, Port Franks. He had moved in with his parents about one month prior to the accident and was living with them full time and rent free. It appears he was not responsible for any of the utilities and his parents paid for the groceries. Rouse contributed when he could. It appears Rouse paid for his clothes and entertainment. Rouse's parents stopped giving him money during this 4 week period.

According to Rouse's father, shortly after the accident, Rouse moved in with his girlfriend in Sarnia.

Education

Rouse left school in Grade 12 and estimated he was three credits short of his High School Diploma. At the time of the accident, he was a trainee working at Tim Horton's.

Employment History

Rouse had a sporadic work history. In 2012, he worked for 5 days (October 26 to 30) at Teppen Corporation. He also worked at Sandhill Golf Resort for an unknown period of time in 2012.

From January 29, 2013 to March 31, 2013 Rouse worked at Parkway Gardens, some 8 weeks of employment, his longest stretch before the accident.

As reported on his OCF-1, on or around July 10, 2013 Rouse began a job at Tim Horton's working as a trainee front counter server. His record of Employment shows he worked there from July 10, 2013 to August 7,

2013. During this period, he worked 118.25 hours and earned \$1,314.56.

In Monte Rouse's statement of November 6, 2013, he stated Rouse had moved out of his parents' home "two and half months ago" which would be shortly after the accident. He indicated Rouse had moved to Sarnia with his girlfriend. It would appear he was not planning to resume his employment at Tim Horton's in Port Franks.

There was no evidence lead with respect to whether or not Rouse had any specific plans for his future employment or education.

Rouse's Expenses

There is very little evidence upon which to determine Rouse's expenses, although they appear to be minimal. His parents did not charge him rent when he lived with them for a total of 3 to 4 months during the 12 month period prior to the accident. It is not known what rent he paid, if any, when he lived with his girlfriend, friends and when he was on his own. He paid for most of his clothes and entertainment and his mother paid his cell phone bill. Rouse did not own a car.

Independent Living

In the 12 months prior to the accident, it does not appear Rouse reached a point where he lived without some assistance. Even in the 4 weeks prior to the accident, when he moved in with his parents and was employed full time, he lived rent free and some of his groceries were paid for by his parents.

Accounting Evidence

The only accounting evidence before me was the uncontested Financial Dependency Report of Davis Martindale prepared by Ms. Jessy Hawley (hereinafter referred to as the "Report") which is found at Tab 6 of the Joint Document Brief. In addition, Ms. Hawley gave oral evidence at the Hearing. Ms. Hawley was accepted as an expert witness in forensic accounting.

In Schedule 1 of the Report, Ms. Hawley set out her calculations of Rouse's financial dependency, and in Schedule 2 set out her calculations for the value of accommodation provided by Rouse's parents. Ms. Hawley provided calculations both for the 12 month and 4 week periods prior to the accident.

When Ms. Hawley had completed her Report, she based her calculations on the assumption Rouse's parents were providing him the value of accommodation for an entire year. Subsequently, Monte Rouse provided a Statutory Declaration wherein he stated that prior to the accident, he and Teresa Rouse had in fact only provided accommodation for 3 to 4 months out of 12 months. This had a significant impact on calculating the value of the parents' contribution to Rouse's living expenses. Based on Ms. Hawley's revised calculations, the parents' total contribution was somewhere between \$2,319.99 and \$3,039.32 or \$733.33 per month. Using Ms. Hawley's approach, this means Rouse's parents contributed 33-40% of Rouse's living expenses during the 12 month period leading up to the accident.

Ms. Hawley also made a similar calculation for the 4 week period prior to the accident. Relying on the CANSIM tables, she calculated the value

of the accommodation provided by Rouse's parents to be \$712.00 per month.

When Rouse's net income of \$1,164.00 is added to the parents' contribution of \$712.00, the total is \$ 1,876.00. Assuming Rouse's basic monthly needs were \$2,282.35 (2 x \$1,164.00), the parents' contribution represents 38% of this total.

APPLICABLE LEGISLATION

Section 268 (2) of the *Insurance Act* sets out the rules to be followed when determining who is liable to pay statutory accident benefits when there are multiple motor vehicle liability policies which might respond to a claim.

The rules of determining priority are as follows:

- i) *The occupant has recourse against the insurer of an automobile in respect of which the occupant is insured;*
- ii) *If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
- iii) *If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

Regulation 34/10, Statutory Accident Schedule – effective September 1, 2010, provides at s.3(1) a definition of an “insured person” 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 dependent of the named insured, or of his or her spouse;
- (i) If the named insured specified driver, spouse or dependent is involved in an accident in or outside Ontario that involves the insured automobile or another automobile...

For an individual to be a “dependent” for the purposes of the Statutory Accident Benefits Schedule, this term is defined at s.3(7)(b), as follows:

“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”.

Pursuant to these provisions of the legislation, Economical would be the priority insurer if Rouse was found to be principally financially dependent upon his parents at the time of the accident.

The issue before me is one of financial dependency.

In reaching my decision, I have considered all the evidence referred to above, the Exhibits, and the oral evidence given by Ms. Hawley.

ANALYSIS

There are several dependency cases dealing with young men who have yet to establish themselves and get a start in life. Rouse was certainly one such person.

The case law directs that the test for financial dependency is that if a person receives at least 51% of their support from another person they are principally dependent upon that person.

At the same time, calculating the percentage of dependency is not solely a mathematical calculation done in isolation from surrounding factors.

The Court of Appeal in *Miller v Safeco Insurance Company of America* (1985) O.J. No. 2742 C. A. set the guidelines for determining dependency as follows:

1. The Amount of the Dependency;
2. The Duration of Dependency;
3. The Financial or other needs of the alleged dependent; and
4. The ability of the alleged dependent to be self supporting.

The appropriate time frame for accessing the duration of the dependency was in dispute. Economical submitted the 4 week time frame prior to the accident represented a material change in Rouse's circumstances with respect to his finances and living arrangements. Dominion submitted the 4 week period was merely a "snap shot" and the 12 month period was more representative of the reality of Rouse's life. I agree with Dominion on this issue. Rouse was 19 years old at the

time of the accident. He had worked only a few weeks in the 52 weeks preceding the accident. The evidence suggests his struggles with drugs were continuing. During the 12 months prior to the accident, he had no permanent address. He moved out of his parents' home shortly after the accident.

Since *Miller v Safeco*, the Courts and Arbitrators have also taken into account the capacity to earn income in addition to actual earnings. There was no evidence before me as to why Rouse had worked sporadically prior to the accident nor is there any evidence before me that Rouse was somehow unable to work due to illness or a disability. No doubt, however, Rouse's limited education and struggles with drugs impacted his ability to work. Although Rouse was working full time at the time of the accident, I am satisfied, based on the evidence provided to me, he was not working at his full capacity during the 11 months prior to that. Nevertheless, during the 12 month period prior to the accident, Rouse's net income/cash flow from employment was \$4,631.00. Of this amount, \$1,164.00 was net income earned in the 4 weeks prior to the accident. Even when imputing some residual earning capacity, I find Rouse had not demonstrated the ability to be self supporting.

In Ms. Hawley's Report, she calculated that during the 12 months prior to the accident, the total of Rouse's sources of income and financial support totaled \$13,911.00. Of this amount, Rouse's own contribution of \$4,631.00 was 33.33% of the total.

Although Rouse provided for less than 50% of his needs, the evidence does not support a conclusion he was 51% dependent on his parents. During the 12 month period prior to the accident, Rouse was living with

his parents somewhere between 3 to 4 months. This amounts to 25% to 33% dependency during the period under consideration. Even if I were to impute a greater contribution from his parents for the unknown amount of funds they provided him or the payment of his cell phone bill, I find Rouse would still not be 51% dependent on them.

Conclusion

I find at the time of the accident, Rouse was not dependent on his parents.

Order

It is ordered Dominion is responsible for the payment of the accident benefits of Joshua Rouse arising out of the motor vehicle accident of August 7, 2013.

It is further ordered Dominion shall pay the costs of the Arbitrator.

If the parties are unable to agree as to costs as between themselves, a pre-hearing will be scheduled to discuss the process to resolve the issue.

DATED this 16th day of February, 2018 at Toronto.



Arbitrator, Paul G. Torrie
Global Resolutions Inc.