CITATION: Gore Mutual v. Dominion and Certas Home., 2024 ONSC 5239
COURT FILE NO.: CV-22-00683270-0000
DATE: 20240924

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GORE MUTUAL INSURANCE COMPANY, Appellant

– and –

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY and CERTAS HOME & AUTO INSURANCE COMPANY, Respondents

– and –

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY, Appellants by Cross-Appeal

– and –

GORE MUTUAL INSURANCE COMPANY and CERTAS HOME & AUTO INSURANCE COMPANY, Respondents by Cross-Appeal

BEFORE: Justice E.M. Morgan

COUNSEL: *Mark Donaldson*, for Gore Mutual Insurance Company

Jay Stolberg, for Dominion of Canada General Insurance Company

Benjamin Lee and Melanie Van Vliet, for Certas Home & Auto Insurance Company

HEARD: September 23, 2024

ENDORSEMENT

[1] This three-way insurance company priority dispute comes to the Court as an appeal of the decision of Arbitrator Scott Densem dated May 5, 2022.

[2] On July 21, 2017, Alyssia Lafontaine-Greenwood ("Alyssia") was involved in a single vehicle accident and is entitled to accident benefits under the Statutory Accident Benefits

Schedule, O. Reg. 34/10 (“SABS”). Alyssia was 17 years old at the time of the accident. The dispute is over which insurer is required to pay Alyssia’s benefits.

[3] The question addressed by the Arbitrator is whether the primary responsibility for payment of those benefits rests with Gore Mutual Insurance Company (“Gore”), who issued a policy of insurance to Alyssia’s father, with Dominion of Canada General Insurance Company (“Dominion”), who issued a policy of insurance to Alyssia’s mother, or with Certas Home & Auto Insurance Company (“Certas”), who issued a policy of insurance to the driver of the motor vehicle in which Alyssia was an occupant at the time of the accident.

[4] Counsel are all in agreement that the answer depends on the application of section 268(2) of the *Insurance Act*, R.S.O. 1990, c. I.8, which provides that if Alyssia was determined to be principally financially dependent on her father, Gore would have priority to pay her accident benefits. If Alyssia were determined to be principally dependent on her mother, then Dominion would have priority. If it were determined that she was not principally financially dependent on either one of them, then Certas would have priority.

[5] The dispute was adjudicated by way of private arbitration in writing only, with all parties waiving their right to oral submissions. The Arbitration Agreement permitted an appeal of the Arbitrator’s decision on issues of law or mixed fact and law.

[6] After reviewing the evidence, the Arbitrator found that at the time of the accident, Alyssia was dependent for financial support on both her mother and father equally. Accordingly, he held that Gore and Dominion were jointly responsible for the payment of Alyssia’s accident benefits. Gore and Dominion both appeal that decision, while Certas submits that it was correct and that the appeal should be dismissed.

[7] The parties generally agree that the decision of the Arbitrator is to be accorded some deference: *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co*., 2006 CarswellOnt 6991 (CA), at paras. 22-23. The right of appeal here arises from their agreement and from the *Arbitration Act, 1991*, S.O. 1991, c.17, section 45. The Supreme Court of Canada opined in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653, at paras. 1, 7, 39, that the standard of review in these circumstances is not that applicable to judicial review; rather, it is the ordinary appellate standard described in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 – i.e. “correctness” for questions of law and “palpable and overriding error” for questions of fact or mixed fact and law.

[8] The Appellant here argues that the Arbitrator erred in applying the law to the facts. If that is the case, the Arbitrator’s decision should only be overridden where an error is patently obvious or plainly seen. This level of deference recognizes the role of the Arbitrator, as decision-maker of first instance, as having assessed the evidence in its entirety. Unlike a “correctness’ standard, the appellate court should not intervene in the Arbitrator’s decision where there was some evidence on which the Arbitrator could have relied on to reach his conclusion *Housen*, at paras.1 5, 11-12.

[9] In reviewing the Arbitrator's decision, the important question is whether the arbitrator had authority under the applicable agreement to engage in the analysis that he pursued. In the instant case, section 1 of the Arbitration Agreement provides that the Arbitrator "shall determine all matters in dispute among the parties arising out of a priority dispute with respect to accident benefits paid…" Section 3 of the Arbitration Agreement adds to this, stating: "The arbitrator shall have the power to grant any relief appropriate to the facts and circumstances that would be within the jurisdiction of a Judge of the Ontario Superior Court of Justice…" The Court of Appeal has reasoned that where an arbitrator is mandated in this way to determine "all matters in dispute," the Arbitration Agreement can be read to confer a wide latitude of discretion on the Arbitrator: *Alectra Utilities Corporation v. Solar Power Network Inc*. (2019), 145 O.R. (3d) 481, at paras. 37-38 (CA).

[10] As indicated above, Alyssia was a 17-year-old minor at the time of the automobile accident in question. The Arbitrator found that she was financially dependent on both parents, who were not married to each other and who had, over the years, alternated in supporting her. The evidence before the Arbitrator is that Alyssia lived with her father for a period of 1 year and 10 months before the accident – from July 2015 to March 2017 – and then with her mother for the 3-4 months immediately preceding the accident – from March 2017 to July 2017.

[11] Counsel for Gore submits that a finding of financial dependence on both parents was not contemplated in the Arbitration Agreement. That said, the Arbitration Agreement does not specifically exclude a finding of dependency on both parents. As counsel for Certas point out in their factum, the *Insurance Act* specifically contemplates that a dependent minor may be covered by two insurance policies, and in subsections 286(5.1) and (5.2) ranks them equally in priority.

[12] Furthermore, nothing in the jurisprudence of this Court precludes the conclusion reached by the Arbitrator. Judicial decisions with respect to dependency provide a number of factors to consider when determining dependency, including the ability or inability of the insured to be self-supporting: see *Miller v. Safeco Insurance Co. of America* (1984), 48 O.R. (2d) 451, aff'd (1985), 50 O.R. (2d) 797 (CA); *Allstate Insurance Company of Canada v. Intact Insurance Company*, 2016 ONSC 5443. It is uncontroversial that Alyssia herself was not capable of being self-supporting. She had just finished high school and was contemplating the possibility of post-secondary education, and earned only a small income through part-time work at a fast food restaurant.

[13] The Arbitrator's decision took into account the remedial intent of the *Insurance Act* with respect to dependent minors. The Court of Appeal has stated: "it would be preferable to approach the question of this interpretation on the basis the legislation was of a remedial nature, intended to broaden insurance coverage to include members of family units as persons insured under the policy": *Miller v. Safeco Insurance Co. of America* (1984), 48 O.R. (2d) 451, aff'd (1985), 50 O.R. (2d) 797 (CA). In concluding that Alyssia was dependent for financial support on both of her parents equally, the Arbitrator adhered to the remedial intent of the *Insurance Act* and SABS and applied it in a principled way to the priority dispute at hand.

[14] In his decision, the Arbitrator explains that he took note of the appropriate dependency factors: a) the amount and duration of financial dependency, b) the financial needs of the claimant and c) the ability of the claimant to be self-supporting. The Arbitrator determined that both the mother and the father contributed roughly the same amount per month for Alyssia's support.

[15] Counsel for Gore submits that the Arbitrator should also have taken into account the amount that Alyssia's maternal grandmother had, not out of obligation but through personal generosity, contributed to Alyssia in the past. He points out that the Arbitrator did not factor the grandmother's past contributions into account. Rather, the Arbitrator observed that the grandmother, a non-driver who was not insured, was not responsible for Alyssia's support, and was not a party to the case before him. As he put it in his decision:

> According to the Arbitration Agreement, it is only relevant to compare the contributions to financial support made by the claimant's parents to the claimant's own contribution, and to determine whether the claimant was principally dependent for financial support or care upon her mother, her father, or neither of them (Arbitration Agreement, 2(b)(i), (c), (d), Tab 18, JDB). Therefore, I make no findings in respect of the claimant's grandmother's support of the claimant.

[16] The evidence before the Arbitrator was that the grandmother's contribution was in the form of housing. That is, Alyssia's mother, along with the mother's partner and Alyssia, had moved in with the grandmother in a house which the grandmother owned.

[17] Counsel for Dominion argues that the value of the "free rent" which Alyssia received from her grandmother should have been factored into the dependency equation. That, presumably, would undermine the equality that otherwise prevails as between the two parents' financial contributions and tilted the priority to Gore.

[18] With respect, I do not agree with that approach. Alyssia was a minor at the time of the accident. She lived with her mother; she was in no sense her grandmother's "dependent". All children live "rent free" with a parent or parents, regardless of whether the parent owns a mansion or a hovel, or pays a high, low rent, or no rent at all. If anything, the grandmother's contribution was to her own daughter – i.e. to Alyssia's mother – but not to the mother's dependent who resided with her. The grandmother's contribution was non-obligatory and entirely discretionary from time to time – made out of the goodness of her heart. It was not a payment made because of any legally recognizable "dependency" on Alyssia's part.

[19] I therefore agree that the Arbitrator correctly factored out any financial contribution by the grandmother in the form of foregone rent to the mother. The contributions of the mother and the father were in the same dollar range, and it makes sense to divide the priority equally between their respective insurance companies, Dominion and Gore.

[20] As a final twist to the saga, counsel have all expressed the view that this finding of equal priority may raise further issues of how the mechanics of payment will work. They explain that

the usual mechanisms for sorting out payments among insurance companies does not accommodate this kind of arrangement.

[21] It may be that the Arbitrator's decision creates the need for some flexibility in the mechanics of how the three companies here work out their payments among each other. But all of that is beyond the scope of the present appeal. I understand that Alyssia has already been paid the insurance proceeds; the division of them will have to be arranged as between Dominion and Gore, presumably without Alyssia's or her family members' further involvement.

[22] I see no error of any significance in the Arbitrator's decision.

Disposition

[23] The Appeal and Cross-Appeal are dismissed.

[24] The parties may make written submissions on costs. I would ask counsel for Certas to email its submissions, with an accompanying Bill of Costs, to my assistant within two weeks of today. The submissions should be no more than 3 pages in length. I would then ask counsel for Gore and counsel for Dominion to email equally brief written submissions to my assistant within two weeks thereafter.

Date: September 24, 2024 **Morgan J.**