

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Date: 2018-07-16

Tribunal File Number: 17-006910/AABS

Case Name: 17-006910 v Aviva Insurance Company

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Applicant

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Edward Kim, Counsel

For the Respondent: Ramandeep Kaur Pandher, Counsel

HEARD: By telephone on April 9, 2018

OVERVIEW

- [1] The applicant's 48 year old adult child, D. H., was injured in an automobile accident on October 31, 2014 and succumbed to those injuries less than two months later.
- [2] The applicant sought a death benefit from the respondent pursuant to O. Reg. 34/10: Statutory Accident Benefits Schedule – Effective September 1, 2010 (the "*Schedule*"). The respondent refused to pay the death benefit. The applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

ISSUES

- [3] The disputed issues in this hearing are:
 - 1) Is the applicant entitled to a death benefit in the amount of \$10,000.00?
 - 2) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] The applicant is entitled to a death benefit in the amount of \$10,000.00 and is also entitled to interest pursuant to section 51 of the *Schedule*.

BACKGROUND

- [5] D. H.'s leg was fractured as a result of being struck by a vehicle while crossing an intersection as a pedestrian. D. H. was diabetic and had surgical complications that ultimately lead to D.H.'s death. The applicant applied for and was denied a death benefit from the respondent.

BREACH OF ORDER DATED FEBRUARY 8, 2018

- [6] The parties participated in a case conference on February 8, 2018. As a result of the case conference and with the consent of the parties an order was made, scheduling a hearing on April 9, 2018, by telephone. The order instructed the parties to make initial written submissions on or before March 15, 2018.
- [7] The applicant did not file any written submissions until after the respondent and contrary to the Adjudicator's order. The respondent addressed this in the written response and requested that the applicant be barred from relying on any written submissions or evidence disclosed after March 15, 2018.
- [8] At the commencement of the telephone portion of the hearing, the respondent also requested the matter be dismissed as a result of the applicant's failure to make written submissions. The respondent relied on the principle in the decision in *K.K. and Unifund Assurance Company* where the application was dismissed

because the adjudicator found it was abandoned because the applicant did not make initial written submissions¹.

- [9] The applicant replied to the respondent's written submissions and advised that no written submissions were required in advance and that all documents had been exchanged well before the deadline to exchange documents. The applicant was unable to comment on the jurisprudence provided by the respondent as the applicant was not forwarded a copy of the decision for review prior to the telephone portion of the hearing.
- [10] After hearing submissions, I decided the hearing would proceed. I found that the applicant did not abandon the hearing by submitting a reply to the respondent's materials as well as by attending the telephone portion of the hearing. Additionally, the case the respondent refers to is distinguishable from the matter at hand as the hearing scheduled in *K.K. and Unifund Assurance Company* was entirely in writing and did not have any in-person or telephone component. There is no prejudice to the respondent as a result of the applicant's failure to make initial written submissions because, pursuant to the February 8, 2018 Order, the telephone portion of the hearing included opening submissions.
- [11] A decision on the respondent's motion to bar the applicant from relying on any further written submissions or any documents disclosed after March 15, 2018 is unnecessary because the applicant did not make additional written submissions nor rely on any documents disclosed after March 15, 2018.

DEATH BENEFIT

- [12] A death benefit is payable to a person on whom the deceased insured was dependant at the time of the accident.
- [13] Dependency generally falls into two categories: for care and for financial support. Only one kind of dependency needs to be established for the death benefit to be payable.
- [14] D.H. was diagnosed as mentally disabled at around 4 years old. The applicant submits that D.H. was primarily dependent on the applicant for both financial support and care.
- [15] The respondent submits that D.H. lived independently and was not principally dependent on anyone for financial support or for care.

Dependency for care

- [16] The applicant submits that the care the applicant provided for D.H. was essential to D.H.'s well-being and that the aspects of their relationship demonstrates that D.H. was principally dependent on the applicant for care.

¹ 17-003303 v Unifund Assurance Company, 2018 CanLII 13159 (ON LAT)

- [17] The respondent's position is that, at the time of the accident, DH was independent of the applicant for care because, according to the respondent, D.H. did not rely on the applicant for needs like protection, cleaning, or transportation. In the alternative, any dependency experienced by D.H. was not principally satisfied by the applicant.
- [18] The applicant's evidence at the hearing indicated that the support and services provided by others, namely Avenue II, a non-profit social and support service available to persons with developmental disabilities, would not have been provided if it weren't for the applicant because the applicant was the one who arranged for and coordinated the support and was present at meetings held to update D.H.'s file with Avenue II.
- [19] The *Schedule* is silent on what factors to consider when analyzing dependency for care and the parties relied on previously decided decisions for guidance. *Miller v. Safeco* is the pivotal case on dependency and outlines that I must look beyond the dependent's financial independence and also consider the ability to provide for one's own basic needs². This is expanded on in the private arbitration decision of *Intact and MVACF* where the Arbitrator wrote that key factors to consider include social and emotional support, companionship, protection, and services such as feeding, clothing, cleaning, and transportation³. *Harris & Liberty Mutual* also addresses dependency in the realm of care and considers two main factors: the nature of emotional and physical care provided and whether in fact the dependent was principally dependent on the applicant for care having regard to the amount and duration of the dependency for care, the needs of the claimant and the ability of the claimant to be self-supporting.⁴
- [20] For the following reasons I find that, at the time of the accident, D.H. was dependent on the applicant for care because the applicant principally satisfied D.H.'s care needs.
- [21] D.H. was mentally disabled, was diagnosed with type II diabetes, and required support for various aspects of life as a result. The applicant was the principal provider of social and emotional support for D.H. The applicant regularly spoke with D.H. on the telephone throughout the day to provide social and emotional support. The applicant testified that D.H. would call the applicant several times a day - after waking up, during the day, upon returning back to the apartment where D.H. resided, and before going to bed.
- [22] The applicant helped D.H. establish a residence in 1987. The applicant set up and participated in the ongoing management of D.H.'s other forms of support, such as Avenue II.

² *Miller v. Safeco Insurance Co. of America*, 1985 CanLII 2022 (ON CA)

³ Intact Insurance Company and HMQ (2012) <<http://www.densemadr.com>>

⁴ *Harris and Liberty Mutual Insurance Company*, 1998 (FSCO)

- [23] The applicant's initial and ongoing involvement with Avenue II indicates that D.H. was dependent on the applicant for services such as feeding, clothing, cleaning, and transportation. While the evidence shows that Avenue II provided D.H. with support in the form of organizing social outing and assistance with personal care, such as shaving, it was the applicant who either provided or assisted with the bulk of D.H.'s assistance in the realms mentioned above. The applicant would help D.H. with required household chores such as cleaning, vacuuming, mopping, maintaining a clean bathroom, changing and cleaning linens and laundry because D. H. lacked the capacity to understand the importance of these needs. The applicant was also responsible for ensuring D.H. maintained a healthy diet to help D.H. meet diabetic needs. The applicant's assistance with purchasing and supplying healthy food was important because D.H. had a tendency to rely on a diet of less nutritious fast food or pub fare. D.H. was able to move about town either by walking or by transit however, this ability would only arise after the applicant had taken two or three trips with D.H. to learn the route.
- [24] The applicant maintained and provided D.H. with the clothing required for the Northern Ontario climate that D.H. lived in. The evidence shows that D.H. was known to commute by foot or by bus and depended on the applicant to stain-fight, mend, or replace jackets, shoes and boots to support D.H.'s mobility in all seasons. For example, the applicant's testimony was that D.H. would wear damaged clothing because D.H. lacked the capacity to understand that worn-through shoes or boots could lead to wet feet, ulcers, and infection. Considering the testimony and evidence, I find that D. H. was principally dependent on the applicant to maintain and replace, when necessary, D.H.'s footwear and outerwear to protect D.H. from the elements and maintain good health overall.
- [25] The applicant provided companionship to D.H. through regular visits and telephone calls. However, I accept that D.H.'s involvement with the community, be it working, volunteering, playing sports, or otherwise, indicates that D.H. may not be principally dependent on the applicant for companionship.
- [26] The respondent submits that the applicant was able to travel out of province annually for up to a month at a time, without D.H., and that D.H. was able to travel out of province to participate in sports without the applicant as evidence that D.H. was independent for care.
- [27] Out of province travel by D.H. or the applicant does not preclude a finding that D.H. was dependent on the applicant for care. Although D.H. had travelled out of province to participate in sports, D.H. did not travel independently but rather traveled with adults capable of providing the requisite supervision for D.H. Further, the applicant testified that additional supports would be arranged for D.H. in the event the applicant was out of town. Examples included having D.H.'s adult sister provide additional telephone support or family friends in the community to provide telephone and in-person support.

[28] The respondent's counter submissions regarding dependency for care highlight the situations where D.H. was independent. I find that the respondent's examples of independency for care do not outweigh the evidence that the applicant principally satisfied D.H.'s needs for care. I accept the applicant's testimony as true because it is in line with the evidence before me and I find the applicant to be credible.

Financial Dependency

[29] An analysis on financial dependency is not necessary because I have found that D.H. was depended on the applicant for care.

CONCLUSION

[30] Based on the totality of information before me, I find that D.H. was dependent on the applicant for care. Considering this, the applicant is entitled to a death benefit pursuant to section 26(5)(i). Interest is payable on the death benefit pursuant to the *Schedule*.

ORDER

[31] The respondent shall pay the applicant a death benefit in the amount of \$10,000.00 plus interest pursuant to section 51 of the *Schedule*.

Released: July 16, 2018

Brian Norris, Adjudicator