



FSCO A06-001872

BETWEEN:

**Ms. M. ON BEHALF OF
THE ESTATE OF D.M.**

Applicant

and

**DOMINION OF CANADA
GENERAL INSURANCE COMPANY**

Insurer

DECISION ON A PRELIMINARY ISSUE

Minor errors on pages 9 and 10 corrected on February 25, 2009 in accordance with the *Dispute Resolution Practice Code* and section 21.1 of the *Statutory Powers Procedure Act*.

- Before:** Arbitrator Denise Ashby
- Heard:** In-person in Hamilton on April 29 and 30, May 1, 2 and 21, September 11 and 12, 2008. Written submissions concluded on November 12, 2008
- Appearances:** Stephen B. Abraham and David B. Hayward for Mr. M.'s Estate
Lawrence M. Foy and Anna-Marie Musson for Dominion of Canada
General Insurance Company

Issues:

The Applicant, D.M., sustained impairments on November 20, 2004. He applied for and was denied statutory accident benefits from Dominion of Canada General Insurance Company ("Dominion"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. M., by his personal representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. Mr. M. died in June 2008. I appointed his wife, P.M., to represent the Estate.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The preliminary issue is:

1. Were Mr. M.'s impairments sustained as a result of an "accident" as defined in subsection 2(1) of the *Schedule*?
2. Is Dominion liable to pay Mr. M.'s expenses in respect of the arbitration pursuant to subsection 282(11) of the *Insurance Act*?
3. Is Mr. M.'s Estate liable to pay Dominion's expenses in respect of the arbitration pursuant to subsection 282(11) of the *Insurance Act*?

Result:

1. Mr. M.'s impairments were sustained as a result of an "accident" as defined in section 2(1) of the *Schedule*.
2. If the parties are unable to resolve the issue of expenses between themselves, an expense hearing may be requested before me pursuant to the *Dispute Resolution Practice Code*.

PROCEDURAL RULINGS:

Additional Expert Witness:

Dominion sought an order permitting it to call an additional expert medical witness pursuant to Rule 42.4 of the *Dispute Resolution Practice Code* ("DRPC"). After reviewing the motion record filed by Dominion, considering the submissions of the parties, I ruled that Dominion could call an additional expert medical witness without prejudice to Mr. M.'s Estate to call evidence in reply.

The exercise of arbitral discretion, pursuant to Rule 42.4, requires an arbitrator to balance considerations of expense and delay in the context of the issues to be determined to achieve the most just result. The issue before me requires consideration of complex medical evidence.

The testimony of an additional expert medical witness could aid my understanding of the evidence. Therefore, I found this an appropriate case to permit Dominion to call its additional expert, without prejudice to the Estate of Mr. M. to call reply evidence. He chose not to.

Capacity of Witnesses and Appointments of a Representative:

In respect of a proposed witness who was a minor:

On April 29, 2008, Mr. M.'s 13 year old son, P.M., was called as a witness. He was 9 years old at the time of the incidents. Having satisfied myself that he had sufficient understanding of the significance of the proceedings and the meaning of the oath, I qualified him as a witness and administered the oath.

In respect of the Applicant's proposed testimony:

On April 30, 2008, prior to his death, Mr. M. was called as a witness. An issue arose as to his capacity to give evidence at the hearing. Mr. M. was questioned by his counsel and me. He was able to demonstrate a rudimentary knowledge of his family and its finances. However, when asked who was the arbitrator and who was counsel for Dominion he identified both as his counsel. As well, he pointed to his counsel's law clerk when asked to identify the court reporter.

On the basis of Mr. M.'s inability to identify the roles of the various participants I declined to qualify him as a witness.

Appointing a Representative Pursuant to Rule 10:

Mr. M.'s responses, while being qualified as a witness, raised doubts in my mind that he had the mental capacity to appoint and instruct a representative and conduct his own case. Dominion took no position in respect of this issue. I ordered that Ms. M. be named his representative *nunc pro tunc* to the date upon which the Application for Mediation was received by the Commission pursuant to Rule 10.5 of the *DRPC*. This order became moot on the death of Mr. M.

Appointing a Representative for the Estate of David Malleau:

In June 2008, the Commission was informed that Mr. M. had passed away and that he had died intestate. In September, his wife and representative, P.M., sought to represent the Estate of her late husband pursuant to section 45 of the *Succession Law Reform Act (SLRA)*. Ms. M. advised that the value of Mr. M.'s Estate was less than the preferential share as defined by Ontario Regulation 54/95. His major asset was his interest in their matrimonial home. As it was held in joint tenancy with P.M., it passed to her upon his death.

Dominion took no position in respect of the appointment of Ms. M. as the representative of the Estate. However, it preserved its right to seek its expenses if an adjournment was required.

Subsection 45(1) of the *SLRA* provides:

Subject to subsection (3), where a person dies intestate in respect of property having a net value of not more than the preferential share and is survived by a spouse and issue, the spouse is entitled to the property absolutely.

Section 1 of *Ontario Regulation 54/95* defines the "preferential share" as:

For the purpose of section 45 of the Act, \$200,000 is prescribed as the amount of the preferential share.

The issue to be determined by me has no monetary value. A determination that the incidents on November 20, 2004 met the definition of "accident" under the *Schedule* crystallizes a potential entitlement to benefits which might have a value beyond the preferential share. Therefore, I appointed Ms. M. as a representative of Mr. M.'s Estate at the Preliminary Issue Hearing upon her filing written confirmation that she was assuming the claim pursuant to section 45 of the *SLRA* and had retained a firm to represent the Estate. Ms. M. filed the confirmation and the Preliminary Issue Hearing proceeded without an adjournment on September 11, 2008.

BACKGROUND:

In the early hours of November 20, 2004, a neighbour found Mr. M. sitting on the street. He was straddling his truck's front tire on the passenger's side. At the time, the neighbour was investigating the damage caused by Mr. M.'s truck hitting his family's two vehicles.²

Subsequent to being found, Mr. M. was transported to hospital where he was diagnosed with a large intraparenchymal bleed. A de-compressive craniotomy, to remove a blood clot in the left temporoparietal area of Mr. M.'s brain, was performed within hours of the incidents.³

The parties dispute the cause of the intraparenchymal bleed (stroke.) Mr. M.'s Estate submits that the impact of his truck striking the vehicles caused the stroke. In the alternative, Mr. M. had a transitory spike in blood pressure resulting in the stroke. Mr. M.'s Estate submits the spike in blood pressure was caused by a panic reaction to being involved in a motor vehicle accident while having a blood alcohol level over the legal limit. As he was a professional truck driver and the main financial support for his family, a loss of his driver's license would have serious consequences.

Dominion submits that Mr. M. suffered a spontaneous intracerebral haemorrhage (ICH) or stroke prior to the first incident. As a consequence, he struck the three vehicles. It disputes Mr. M.'s ability to drive was impaired at the time of the incidents.⁴

EVIDENCE AND ANALYSIS:

Mr. M.'s wife, son, P.M., and stepson, D.P., each testified on behalf of Mr. M. As well, four neighbours testified. I found all of the lay witnesses to be credible and each gave their evidence

²Transcript page 143

³Joint Production Brief, Tab 45, pages 210 and 211

⁴Joint Production Brief, Tab 59, page 1055

in an honest and forthright manner. I have accepted their evidence as facts unless otherwise specified.

One of the investigating police officers and the two paramedics who transported Mr. M. to hospital by ambulance also testified.

In order to succeed, Mr. M.'s Estate must establish on a balance of probabilities that Mr. M.'s stroke and his resulting impairments were "directly caused by the use or operation" of his truck pursuant to subsection 2(1) of the *Schedule*.

Lay Evidence:

On the afternoon of November 19, 2004, Ms. M. left for an over-night shopping trip.⁵ Following her departure, Mr. M. took his son to get a haircut. They had dinner with Mr. M.'s stepdaughter who subsequently left for the evening. Following dinner, Mr. M. and his son went to visit neighbours. P.M. testified that he thought his dad consumed 2 bottles of beer and 2 glasses of an orange drink while they were visiting. At about 10:30 p.m. they returned home. Mr. M. put his son to bed and went downstairs. He returned to his son's bedroom shortly after to retrieve his cigarettes. The son testified that his father's speech was normal, he had no trouble walking and he had no injuries to his face when he said good night.

On November 20, 2004, at approximately 4:30 a.m., a neighbour heard a bang. She went to her living room window and observed Mr. M.'s truck backing up after hitting a parked car. The truck then left the scene. She observed it weaving slowly down the street.⁶ The father, of the owner of that car, testified that the damage to the bumper was slight and was never repaired. He estimated the time between 4:30 a.m. and 5 a.m.⁷ The neighbour, who found Mr. M., testified his family's

⁵Transcript page 26 and 27

⁶Transcript pages 112 to 116

⁷Transcript page 125

two vehicles were hit by Mr. M.'s truck. The second vehicle struck was his daughter's car. The third vehicle was his van. Both the car and the van required repairs.⁸

The police constable testified that he was dispatched to the scene at 4:53 a.m. and arrived at approximately 5:05 a.m. Initially he believed he was investigating an impaired driver. There was a faint smell of alcohol on Mr. M.'s breath which was also noted by the paramedics.

The constable found the keys for Mr. M.'s truck on its floor. None of the witnesses were able to identify Mr. M. as the driver of the truck. Having no evidence that Mr. M. was the driver of the truck at the time of the impacts, he abandoned his impaired driving investigation.⁹

The first paramedic to testify documented the call. They arrived at the scene at 5:23 a.m. and at the hospital at 5:58 a.m. On his initial examination of Mr. M., he noted the faint smell of alcohol. He found a bruise on the right side of Mr. M.'s skull and marked weakness on his right side. He took three blood pressure (b.p.) readings prior to transferring care to the hospital staff. At 5:36 a.m. Mr. M. had a b.p. of 150/80. At 5:41, his b.p. was 150/82 and at 5:55 a.m. he registered Mr. M.'s diastolic pressure as 142.¹⁰

The next morning the son awoke alone. He looked out his bedroom window and saw his father's jacket and shoe lying on the side of the road. He yelled for his father and hearing no response returned to the house they visited the previous night.¹¹

Ms. M. testified that her husband could not recall the events of the night prior to the incidents or of the incidents themselves. The neighbours, who were at the scene, the police officer who investigated and the ambulance attendants who took him to hospital, testified that Mr. M. did not speak. His only utterances were groans.

⁸Transcript pages 141, 143 and 144

⁹Transcript pages 190 and 206

¹⁰Joint Production Brief, Tab 44, page 197 and Transcript pages 236, 237, 242, 250 and 251

¹¹Transcript page 81, 94, 98, 102 to 106

Ms. M. returned from her shopping trip the morning of November 20, 2004. Both she¹² and Mr. M.'s stepson D.P.¹³ examined the interior of his truck. Ms. M. examined it the evening of November 20 and D.P. on the morning of November 22, 2004. They testified that the truck's floor mats were soaked with coffee. They saw a Tim Hortons coffee cup on the floor. Both testified that Mr. M. loved Tim Hortons coffee. Ms. M. testified her husband routinely purchased coffee at the Tim Hortons outlet close by his workplace prior to starting work. On weekends, he would regularly go to the Tim Hortons outlet closest to their home. Mr. M. would usually use the drive-through window for his purchases. She described the outlet near their home as an obstacle course to drive.¹⁴ Ms. M. took pictures of the drive-through¹⁵ and made timed trips from the outlet to the site of the first impact. She testified that the drive from the Tim Hortons outlet to the incident scene took 1.5 minutes. There are two ways to approach the scene from the outlet and both took the same amount of time to drive. Ms. M. conducted these tests at 6 p.m. in the evening.¹⁶

Although there is no direct evidence that Mr. M. was driving his truck at the time of the incidents, the parties accept that he was. As well, it is accepted that Mr. M. was travelling northbound on a street when he collided with the first car. He then turned a corner and proceeded eastbound where his truck collided with the other car and the van. Mr. M. stopped his truck in front of his home. I accept the foregoing as fact and find that Mr. M. was driving his truck when it struck the three vehicles. I also find that Mr. M. was returning from the Tim Hortons outlet where he customarily bought his weekend coffee when the incidents occurred. I am satisfied that, having left his son alone, Mr. M. used the drive-through to make his purchase to save time. I accept that this outlet's drive through was narrow and required a sharp turn.

¹²Transcript pages 47 and 48

¹³Transcript pages 477 and 478

¹⁴Transcript pages 49 to 56

¹⁵Exhibit 4

¹⁶Transcript pages 56 to 59

Medical Evidence:

Dr. Robert Hansebout, neurosurgeon, testified on behalf of Mr. M.'s Estate. He was qualified as an expert in neurosurgery. In Dr. Hansebout's opinion, Mr. M.'s stroke was caused by either a coupe contra coupe injury sustained in the first impact or a transient rise in blood pressure. He reasoned that a truck driver, whose employment is dependant on being able to drive, would have a spike in blood pressure when involved in an accident. It was more likely to occur if the person had been drinking. Dr. Hansebout did not agree with Dr. Modell's opinion that the lack of a subdural or subarachnoid hemorrhage ruled out the possibility that the stroke was caused by trauma. Dr. Hansebout testified that Mr. M.'s medical history ruled out the possibility that the stroke was caused by chronic hypertension.¹⁷

Dr. Michael Rathbone was Mr. M.'s treating neurologist at the time he testified on behalf of his patient. Mr. M.'s original treating neurologist, Dr. Duke, retired and his family physician asked Dr. Rathbone to assume Mr. M.'s ongoing care. Dr. Rathbone was qualified as an expert in neurology. In his opinion, Mr. M.'s stroke was caused by trauma to the head as a consequence of his truck colliding with the vehicles or as he exited his truck. Dr. Rathbone agreed with Dr. Hansebout that either a coupe contra coupe brain injury or a transient spike in blood pressure due to anxiety could have caused the stroke. As well, Dr. Rathbone thought it possible that the effects of trauma and a transient spike in blood pressure could have acted in combination to cause the stroke. He disagreed that one could have a hypertensive stroke in the absence of hypertension as posited by Dr. Shutz.¹⁸

Dr. Frank Silver, who was qualified as an expert in neurology, testified on behalf of Dominion. In his opinion, the location and size of the haemorrhage together with no significant head trauma led him to conclude that Mr. M. had suffered a spontaneous stroke. Mr. M.'s low platelet count, high INR levels and his history of excessive drinking and smoking contributed to his opinion that Mr. M. had a higher risk of stroke than most people. Dr. Silver concluded that a stroke spontaneously occurred on November 20, 2004. In his report, Dr. Silver noted that a possible

¹⁷Joint Production Brief, Tab 61 and Transcript pages 421, 422, 463, 464 and 466

¹⁸Joint Production Brief, Tabs 57 and 64 and Transcript pages 530 to 535, 565 and 522

cause of stroke, in the absence of chronic hypertension, is a sudden surge in blood pressure. He also referred to studies which have attributed an increased risk of stroke to alcohol consumption and binge drinking.¹⁹ In his testimony Dr. Silver stated that: “it makes sense that if the blood pressure goes up, you will have a haemorrhage, but the truth is we don’t know.” He testified that there was no evidence that Mr. M. suffered a surge in blood pressure.²⁰

Dr. Moddel, who was also qualified as an expert in neurology, testified on behalf of Dominion. In his report, he agreed with Dr. Schutz’ opinion that trauma was not the cause of Mr. M.’s stroke. In his opinion the more likely cause was hypertension or alcohol abuse. Dr. Moddel testified that in his opinion there was no evidence of sufficient trauma to cause a stroke. He held a similar opinion to Dr. Silver that Mr. M. was at increased risk for stroke due to his history of alcohol consumption and smoking. He too agreed that strokes may be caused by extreme physical exertion. However, he did not agree that a transient spike in blood pressure caused by emotional stress could cause the stroke experienced by Mr. M.²¹

Dr. Hart Shutz, was qualified as an expert in neurosurgery and testified for Dominion. In his first report, Dr. Shutz states that he reviewed the ambulance call report, the emergency room records and the initial history. He found no references to blood pressure recordings and no indications of trauma in either the ambulance call report or the emergency room records. Dr. Shutz also stated he did not have the benefit of Mr. M.’s medical history. Notwithstanding, Dr. Shutz concluded that Mr. M.’s stroke was a result of hypertension rather than trauma.²² He went on to author 5 addendums to his report after he was provided with additional information. Dr. Shutz’ opinion, that Mr. M. suffered a stroke caused by hypertension, was not altered.²³ Dr. Shutz testified that his reference to hypertension in his reports refers to acute hypertension. He continues to be of the opinion that Mr. M.’s stroke could not have been caused by trauma as a result of the impact.

¹⁹Joint Production Brief, Tab 66, page 1091

²⁰Transcript pages 701 and 702

²¹Joint Production Brief, Tab 68, page 1097 and Transcript pages 747 to 749

²²Joint Production Brief, Tab 54

²³Joint Production Brief, Tabs 55, 62, 63, 65 and 69

In his opinion, it is possible to have a hypertensive stroke in the presence of a normal blood pressure reading.²⁴

All of the doctors who testified were referred to Mr. M.'s medical records and various recordings of his pre-accident b.p. They agreed that Mr. M. did not have a history of chronic hypertension.²⁵

Dr. Shutz erred in stating there were no blood pressure readings in the ambulance call report and no note of head trauma. There are 3 blood pressure readings and a description of a ½ inch contusion to the right temporal lobe of the skull. The emergency room triage note indicates “a right zygomatic hematoma.”²⁶ I find that Dr. Shutz's initial report was based on erroneous information and therefore his conclusion was flawed. Further, I do not accept that a hypertensive stroke is possible where there is a normal blood pressure reading. Therefore, I have placed no weight on his evidence.

Dr. Hansebout, Dr. Rathbone and Dr. Silver agreed that a sudden rise in blood pressure can cause an intracerebral haemorrhage or stroke. Dr. Silver minimized it as an unsubstantiated theory. Dr. Moddel acknowledged physical stress may cause a stroke but does not accept that emotional stress and a concomitant rise in blood pressure would have the same result. I accept that severe emotional stress can cause a precipitous rise in blood pressure resulting in a stroke. I find that Mr. M.'s alcohol consumption, smoking and reduced clotting ability put him at greater risk of stroke than other men of his age. As well, I find that the blood pressure readings taken at the scene are significantly higher than those found in Mr. M.'s pre-accident medical records and are evidence of a surge in blood pressure. Further, there was a decrease in Mr. M's blood pressure, from 150/80 to 142, between 5:36 a.m. and 5:55 a.m. I infer that there was a similar decrease in his blood pressure in the 50 minutes between the time of the impact and the first reading.

²⁴Transcript page 778

²⁵Transcript pages 396 to 403; 522 to 525; 593; 747; 777 and 778 and Joint Production Brief, Tab 48

²⁶Joint Production Brief, Tab 44, page 197 and Tab 45 page 206

Conclusion:

Motor vehicle accidents do not occur spontaneously. Momentary distraction often results in accidents. Alcohol is also a common factor. Some drivers may fall asleep and have an accident.

Mr. M. had been drinking prior to going for coffee in the early morning hours when it was dark and raining. Minutes prior to the impact Mr. M. had negotiated a challenging driveway to purchase his coffee. There is no evidence that Mr. M. complained of headache or illness prior to being found. There is no evidence that he was driving erratically prior to the first impact. On a balance of probabilities it is more likely that Mr. M. was momentarily distracted. His truck struck the first car. The impact caused Mr. M. to panic. He knew he had been drinking. He knew he could lose his driver's license and thereby his livelihood. He knew that a loss of his job as a truck driver would have serious financial repercussions for his family. He knew that his nine year old son was alone. Mr. M.'s actions after bringing his truck to a stop lead me to conclude that he was in fear of being charged with impaired driving. He removed the keys from the ignition. He dropped them on the floor. He got out of the vehicle and positioned himself at the front passenger side of the truck. All of this was done when Mr. M. was experiencing diminishing cognitive and physical capacity. His actions had the desired effect, causing the constable to abandon his impaired driving investigation because he could not establish that Mr. M. was the driver of the vehicle.

The medical testimony and Mr. M.'s medical records establish that he had various risk factors for stroke. He was vulnerable to a stroke caused by a sudden fear induced surge of blood pressure. I find that the primary cause of the stroke was a panic reaction to his truck's impact with the first vehicle. His panic caused a precipitous rise in blood pressure which interacted with Mr. M.'s susceptibility to stroke causing the large intraparenchymal bleed or intracerebral haemorrhage or stroke. As well, I accept that the impact with the first vehicle and a resulting coupé contra coupé movement of the brain may have acted in concert with the increased blood pressure to cause the stroke.

I find that there is no evidence and no reasonable basis for finding in favour of Dominion's submission that the stroke caused the first impact. Events are described as spontaneous or idiopathic when there is no other explanation. In the circumstances of this case, the logical inference to be drawn is the first impact caused the stroke. The second and third impacts were caused by Mr. M.'s deteriorating cognitive abilities resulting from the stroke.

On the basis of the foregoing, I find that Mr. M.'s impairments were "directly caused by the use or operation" of his truck pursuant to subsection 2(1) of the *Schedule*.

EXPENSES:

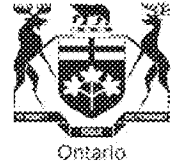
The parties made no submissions with respect to expenses. I encourage them to resolve the issue, failing which they may request an expense hearing before me in accordance with the *Dispute Resolution Practice Code*.

Denise Ashby
Arbitrator

January 30, 2009
Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A06-001872

BETWEEN:

**Ms. M. ON BEHALF OF
THE ESTATE OF D.M.**

Applicant

and

**DOMINION OF CANADA
GENERAL INSURANCE COMPANY**

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. M. sustained impairments as a result of an "accident" as defined in section 2(1) of the *Schedule*.

Denise Ashby
Arbitrator

January 30, 2009
Date