

IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended  
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended  
AND IN THE MATTER OF an Arbitration  
BETWEEN:

AVIVA CANADA INC.

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

**AWARD**

Heard April 24, 2012

Counsel:

Harry P. Brown for the Applicant

Mark Donaldson for the Respondent

SCOTT W. DENSEM: Arbitrator

**Introduction:**

The parties appointed me pursuant to the *Arbitration Act, 1991*, and Regulation 283/95 of the *Insurance Act* to arbitrate a dispute concerning which of the parties has the highest priority to pay Statutory Accident Benefits Pursuant to the *Statutory Accident Benefits Schedule*, Regulation 403/96, as amended ("SABS") to Warren Woolsey.

Pursuant to their agreement to arbitrate, the parties are entitled to appeal this Award on a question of law or a question of mixed fact and law.

This arbitration arises out of an accident occurring June 17, 2009 on Highway 2 in Quinte West, Ontario. Mr. Woolsey was riding a bicycle. He was struck by a vehicle insured by the respondent ("State Farm"). He applied for SABS to the applicant ("Aviva"). Aviva insures Robin Hughes and Guy Hughes pursuant to a standard automobile policy issued to Guy Hughes as the named insured. Robin Hughes is his spouse, and is the sister of the claimant, Warren Woolsey. The application was made to Aviva on the basis that Mr. Woolsey was alleged to be a dependent of his sister and/or her spouse.

There is no dispute that Mr. Woolsey suffered very serious injuries and impairments as a result of the accident. He has been declared catastrophically impaired. Aviva continues to pay SABS to and on behalf of Mr. Woolsey.

Aviva seeks to transfer responsibility for the further handling of the SABS claim to State Farm, and indemnity for SABS paid to date, taking the position that Warren Woolsey was not principally dependent for financial support or care on Robin and/or

Guy Hughes. State Farm argues that Mr. Woolsey was principally dependent for financial support or care on Mr. and/or Mrs. Hughes.

If Mr. Woolsey was principally dependent for either financial support or care on his sister and/or her husband, he would be a deemed named insured under the Aviva policy and it would take priority. If Mr. Woolsey was not principally dependent for either financial support or care on his sister and/or her spouse then State Farm's policy would take priority.<sup>1</sup>

**The Issues:**

1. Was Warren Woolsey principally dependent for financial support on Robin and Guy Hughes, or either of them?
2. Was Warren Woolsey principally dependent for care on Robin and Guy Hughes or either of them?

**The Evidence:**

Counsel agreed that *viva voce* evidence was not required. The following documents were introduced into evidence at the arbitration hearing:

**Exhibit 1:** Applicant's Document Brief, Volumes 1 – 3

**Exhibit 2:** Respondent's Document Brief, tabs 1 – 3

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<sup>1</sup> See the definitions of "insured person" in section 2 (1) of the SABS, the definition of "dependant" in section 2 (4) of the SABS, and the priority determination rules in section 268 (2) of the *Insurance Act*.

## Analysis:

### The Onus of Proof

The question of which party has the onus of proving principal financial and/or care dependency or the lack thereof was addressed by Arbitrator Samis in *The Dominion of Canada General Insurance Company v. The Motor Vehicle Accident Claims Fund*.<sup>2</sup> That was a case involving the issue of whether a SABS claimant was principally dependent upon his brother and his brother's wife for care. He noted that Dominion was processing the SABS claim because it was obliged to do so under regulation 283/95. It was not however, in any better position to lead evidence on dependency issues than was the Motor Vehicle Accident Claims Fund. He concluded, "In my view, the onus of proof ought not to be any different than it would be if this were an action commenced by (the SABS claimant) against both insurers."

I agree with that approach. I do not think that either Aviva or State Farm is in any better position than the other to lead evidence on the dependency issues. Therefore, I do not approach the case on the basis that either of the insurers must prove principal dependency or the lack thereof on a balance of probabilities. I approach it as if Warren Woolsey was the plaintiff in an action against these insurers and I have weighed the dependency evidence accordingly. As in the *Dominion v. MVACF* case, in my view the evidence is sufficiently clear that nothing turns on the onus of proof issue in any event.

### The Financial Support Issue

The relevant factors for the analysis of the issue of financial dependency that I must consider are set out in the Court Of Appeal's decision in *Miller v. Safeco Insurance Co. of America*<sup>3</sup>. Those factors are as follows:

- The amount and duration of financial dependency
  
- The financial needs of the claimant

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<sup>2</sup> Private Arbitrator Samis, November 10, 2007 ("Dominion v. MVACF")

<sup>3</sup> (1985) 50 O.R. (2d) 797 ("*Miller v. Safeco*")

- The ability of the claimant to be self-supporting

These factors have to be considered specifically in the context of the facts of each case. They have been applied by the courts and arbitrators in many subsequent cases, including the Court of Appeal, which recently re-endorsed the *Miller v. Safeco* principles in *Oxford Mutual Insurance Company v. Cooperators General Insurance Company*<sup>4</sup> as being the proper approach to determining dependency.

To satisfy the definition it is not sufficient for there to be only some financial dependency of the claimant on someone else. The dependency must be “principal”. Case law has established that “principally” dependent means “chiefly, mainly, or for the most part” dependent. In 2006, in *Oxford v. Cooperators* the Court of Appeal referred to the definition of “principally” dependent meaning “chiefly”, “mainly”, or “for the most part”, as an uncontested legal principle.

The case law has further refined the meaning of “principal”. In a two party relationship, if the claimant is able to provide for more than half of his or her needs, then the claimant cannot be principally dependent for financial support on the other party. Dependency contemplates a need to be met on the part of the claimant, not just the receipt of a benefit from the other party. It is also relevant to consider the capacity in the circumstances of the claimant to be able to generate support for himself or herself<sup>5</sup>

In this case, I must compare the self-supporting resources of Warren Woolsey to the financial support he received from his sister, Robin Hughes, and her husband, Guy

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<sup>4</sup> (2006) 83 O.R. (3d) 591; (“*Oxford v. Cooperators*”); see also *Liberty Mutual Insurance Company v. Federation Insurance Company of Canada*, [2000] O.J. No. 1234 (C.A.) (“*Liberty v. Federation*”)

<sup>5</sup> *Liberty v. Federation*, note 4.

Hughes over a time period that would be most appropriate to properly appreciate the financial relationship. The evidence in this case supports treating Robin Hughes and Guy Hughes as a single source of support, rather than two separate sources. At the time of the accident Mr. Woolsey was living with his sister and her husband in their home at 234 Lawson Settlement Road in Brighton, Ontario. Whatever financial support he received from them was jointly given. There is no evidence that he received financial support that could be independently attributed only to Robin Hughes or Guy Hughes separately.

The financial support Mr. Woolsey received from his sister and her husband took the form of room and board after Mr. Woolsey came to live with them in 2000.<sup>6</sup> Mr. Woolsey had suffered a very serious motorcycle accident in 1997. He sustained a brain injury with some ongoing cognitive deficits including a seizure disorder, and the complete amputation of his right leg.<sup>7</sup> As a result of this accident Mr. Woolsey was disabled from gainful employment.

Mr. Woolsey did not receive SABS or any other compensation as a result of the 1997 accident.<sup>8</sup> Initially he received general welfare assistance, and later received a monthly benefit under the Ontario Disability Support Program ("ODSP"). He had a medication card through this program that covered his medication expenses, subject to a small deductible. He has been in receipt of this government assistance since 1998. At the time of the 2009 accident his monthly ODSP benefit was \$779. This was his sole

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<sup>6</sup> Examination under Oath of Robin Hughes, March 8, 2011 ("EUO"), Q. 236, 284.

<sup>7</sup> This accident and its consequences for Mr. Woolsey are discussed throughout his medical records found in Exhibit 2, tab 2.

<sup>8</sup> EUO, Q. 209, 210.

personal source of support. In the 12 months prior to the June 17, 2009 accident the ODSP benefit produced \$9,264 in income to Mr. Woolsey.<sup>9</sup>

The financial arrangement Mr. Woolsey had with his sister and her husband is that he rented a room at their home. Initially he paid \$400 per month. This was later increased to \$500 per month although the evidence is not clear as to when that increase occurred.<sup>10</sup> This was a “room and board” arrangement whereby Mr. Woolsey received his lodging and his meals for this rental payment. He also had the use of the facilities in the Hughes home. Mr. and Mrs. Hughes’ bedroom was upstairs in the home as was Mr. Woolsey’s. Mrs. Hughes’ daughter, Darlene, also resided in the home with her infant son. They lived in the basement apartment.

The evidence indicates that apart from the \$100 increase in Mr. Woolsey’s rent, the financial relationship that existed between Mr. Woolsey, and his sister and her husband remained the same from the time Mr. Woolsey moved in with them in 2000 up until the 2009 accident.

In terms of whether the amount paid by Mr. Woolsey for his room and board fairly represented what it would have cost him to secure a similar arrangement in an “arms-length” situation, there is evidence on the point from Robin Hughes. She agreed that \$500 per month was “fair value” for what Mr. Woolsey was receiving in the house.<sup>11</sup>

There is also market value evidence in the ODSP file in the form of an April 20, 2000 letter from Zegouras Investments confirming that Mr. Woolsey had agreed to rent

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<sup>9</sup> These facts are confirmed in Exhibit 1, volume 3, EUO Q. 39 – 42, 205 – 206, and the report of Price WaterhouseCoopers (“PWC”), Exhibit 1, volume 1, tab 18.

<sup>10</sup> EUO, Q. 37 - 38, Q. 279 – 280.

<sup>11</sup> EUO, Q. 198.

a one-bedroom apartment at an address in Belleville at a cost of \$465 per month, plus utilities. When one factors in the value of "board" or meals received by Mr. Woolsey at his sister's home, and the fact that he was not paying extra for utilities, one might conclude that the original \$400 amount Mr. Woolsey paid for rent to his sister and her husband could have been on the low end of the fair market value range. It should be noted however, that living with his sister and her husband Mr. Woolsey was living in a rural area of Brighton, Ontario, not in the City of Belleville. His rent was also increased to \$500 at his sister's home.

All things considered, there is insufficient evidence before me to conclude that Mr. Woolsey was paying an amount for room and board that was so far below the range of a fair market value amount that it would impact the financial dependency calculation.

PWC used a 12 month period before the 2009 accident for their examination of the financial dependency issue. They comment that they could have used a different period and come to the same conclusions. For the purposes of determining financial dependency, I agree with PWC on this point. It is not critical whether one examines only the year before the accident, or the nine year period before the accident because the circumstances of the financial relationship between Mr. Woolsey, and his sister and her husband were basically unchanged from the time he moved in with them. Mr. Woolsey's personal sources of financial support also remained unchanged over that time with the exception of inflationary increases in his ODSP benefit.



According to Robin Hughes, Mr. Woolsey paid his rent in cash using the money he received from his ODSP cheque every month, and in nine years he never missed payment.<sup>12</sup>

Financially, Mr. Woolsey led a fairly simple life. His major expense was the rent he paid his sister. He had sufficient monies left over from his ODSP income to pay for his own toiletries, and his own clothes. He would also buy some specialty food items that he wanted.<sup>13</sup> Generally he got himself from place to place using a bicycle. At the time of the accident he was riding a bicycle that he had borrowed from friends who lived nearby.<sup>14</sup> Sometimes Mr. and Mrs. Hughes would give him a ride to a medical appointment, and sometimes he would hitchhike.<sup>15</sup> He had not driven since the 1980s and may not have had a license at the time of the 2009 accident.<sup>16</sup> Mr. Woolsey operated a bank account. He did not have a significant amount in it at the time of the 2009 accident. The evidence indicates that the balance was about \$400. He owned no major assets, but he had no liabilities either. His only monthly commitment was his room and board payment.<sup>17</sup>

PWC concluded that with an annual income of \$9264 in ODSP, he was able to provide for all of his expenses that totaled \$8360, leaving a surplus of \$904.<sup>18</sup>

There was evidence advanced in the exhibits that would be relevant to the concept of "money's worth" as it relates to the issue of financial support. Specifically,

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<sup>12</sup> EUO, Q. 239, 277, 282 – 285.

<sup>13</sup> EUO, Q. 139 – 141, Q. 225.

<sup>14</sup> EUO, Q. 68 – 74.

<sup>15</sup> EUO, Q. 245.

<sup>16</sup> EUO, Q. 266 – 268.

<sup>17</sup> EUO, Q. 222 – 224.

<sup>18</sup> See Schedule 1 of PWC report, Exhibit 1, tab 18.

there is evidence that Mr. Woolsey performed various activities around the Hughes residence and property. The Hughes residence is actually a hobby farm. It is a fairly large property that houses animals such as chickens, turkeys, goats, and sheep, as well as dogs. The evidence indicates that Mr. Woolsey assisted with activities inside the residence such as meal preparation and cleaning chores. He also assisted with activities outside the residence such as grass cutting, snow shoveling, constructing and repairing pens for the animals, mending fences, and doing minor repairs.<sup>19</sup> In doing its analysis of the financial dependency issue, PWC felt that it did not have sufficient detail to properly value these services so they were not factored into the dependency calculation.

The one activity performed by Robin Hughes for Mr. Woolsey that PWC considered which could possibly have had some financial value for this analysis was the assistance provided by Robin Hughes to Mr. Woolsey in taking his medication. As with the services performed by Mr. Woolsey, PWC did not feel it had adequate information to properly quantify the value of this service performed by Robin Hughes so it was not given a value in the analysis.

Once again I am in agreement with the approach taken by PWC on this issue. I will have more to say about these activities in dealing with the principal dependency for care issue. In so far as they may bear on the principal financial dependency issue, without more evidence I am not prepared to factor them into the analysis. If I did, I would say that they would tend to reinforce the conclusion that I have come to on this

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<sup>19</sup> EUO, Q. 91 – 121.

issue, which is that Mr. Woolsey was not principally dependent for financial support on his sister and her husband.

Ms. Hughes gave evidence on her Examination under Oath in response to questions concerning whether Mr. Woolsey was paid for helping out around the farm. She confirmed that he was not paid for this help. She agreed that it was expected that while he was living there, he and everyone living there would help each other out by doing whatever chores they could do.<sup>20</sup> I take from this that Mr. Woolsey was considered to be a member of the household with the same privileges and obligations as other members. The activities he performed were thus not really “money’s worth” activities performed in exchange for a reciprocal financial benefit, but rather things that an ordinary member of any household would be expected to contribute to its upkeep.

In any event, to come to my conclusion on the matter I do not find it necessary to value in a financial way these activities performed by Mr. Woolsey for the Hughes, or by Robin Hughes for Mr. Woolsey. It is conceivable that there may have been some financial dependency by Mr. Woolsey on his sister and her husband, but on the evidence before me I must conclude that if there was any such dependency it was far less than 50% of Mr. Woolsey’s needs. I find that the analysis of PWC correctly concludes that Mr. Woolsey was able to provide for well more than 50% of his financial needs<sup>21</sup>, and thus he cannot have been principally dependent upon his sister and her husband for financial support.

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<sup>20</sup> EUO, Q. 299 – 300.

<sup>21</sup> PWC actually says Mr. Woolsey could provide for 100% of his needs, but there only needs to be evidence of more than 50% to rule out principal dependency.

## The Care Issue

Of the two issues this is by far the most difficult to resolve on the evidence in this case. The criteria to be considered in determining whether someone is principally dependent for care are similar to the criteria used to determine whether there is principal financial dependency.

In *Oxford v. Cooperators*, the Court of Appeal specifically endorsed the correctness of the arbitrator's application of the principles set out in *Miller v. Safeco* in answering the question of whether the person under consideration was principally dependent for care. With necessary changes for the context, it would seem to me then that the appropriate factors to consider in dealing with an issue of principal dependency for care would be as follows:

- the amount and duration of care dependency
- the care needs of the claimant
- the ability of the claimant to be self-supporting for care

I note that a similar approach to the principal dependency for care issue has been taken by other arbitrators. For example, in *Weiler v. Personal Insurance Company of Canada*<sup>22</sup> FSCO Arbitrator Renahan held that the proper factors to consider for determining whether a person is principally dependent on another for care were as follows:

- 1) the nature of emotional and physical care provided;

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<sup>22</sup> [1996] O.I.C.D No. 43, April 1, 1996 ("*Weiler v. Personal*")

2) whether in fact the claimant was principally dependent on the insured 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.<sup>23</sup>

The way these criteria are applied in a principal care dependency case is different however, from the way they are applied in a financial dependency case. The case law<sup>24</sup> confirms that the care issue cannot be determined with the same mathematical precision as the issue of financial dependency. Both the quality as well as the quantity of care must be examined. One must determine the claimant's need for social, emotional and physical care, and decide whether the claimant is more dependent another person for such care than on himself or herself, based on all of the circumstances of the case.

It is not sufficient that care is provided because of love, affection, or the existence of familial relationship alone. There must be a need on the part of the claimant for the care, however it is being provided.

Control is not the same as care. The mere fact of control over an individual's conduct does not in all circumstances result in a relationship of dependent care.

In considering the social and emotional support factors, it is important to consider whether the caregiver provides companionship, and a sense of security to the claimant so that the claimant knows help is readily accessible if needed.

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<sup>23</sup> *Weiler v. Personal*, at page 6.

<sup>24</sup> Court decisions setting out the law as summarized in this and the following paragraphs are: *Oxford v. Cooperators* (note 3), and *Wawanesa Mutual Insurance Co. v. Lloyd's Underwriters*, 2004 72 O.R. (3d) 762;

A "snapshot" at the time of the accident is not appropriate to determine the principal care dependency issue. The relationship between the claimant and the caregiver must be considered by looking at the relationship as a whole over a reasonable period of time so that the true nature of the relationship can be determined.

In this case to properly understand the relationship between Mr. Woolsey and his sister and her husband as far as the care dependency issue is concerned, it is necessary to examine Mr. Woolsey's circumstances before he came to live with Mr. and Mrs. Hughes.

A careful review of the documents contained in the family physician's clinical notes and records<sup>25</sup> confirms that Mr. Woolsey has had a difficult time with life since he was a young teenager. His mother was concerned that he had a drug problem when he was only 13 years old. It appears as though the doctors were unable to confirm that drugs were the problem, but they did suspect Mr. Woolsey of having deficient mental capacity from a young age.<sup>26</sup>

Mr. Woolsey also evidenced behavioural problems that appear to have plagued him certainly up until the time he came to live with his sister and her husband. The internal medicine specialist Dr. Hunt had this to say about Mr. Woolsey in 1983:

I tend to believe Warren that he has not been into the drugs recently but one really can't depend on a gut feeling like that. I would suspect that he has never had any motivation for learning anything in school and with total lack of

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<sup>25</sup> Exhibit 2, tab 2.

<sup>26</sup> See the report of psychiatrist, Dr. Thurlow, August 16, 1983 where he offers a differential diagnosis of drug addiction, chronic cerebral dysfunction, and transient cerebral dysfunction.

discipline he is just going his own way and I would expect him to remain a social misfit for the rest of his life unless some miracle occurs.<sup>27</sup>

Dr. Thurlow commented in his September 1, 1983 report, "*my intuition keeps telling me that this patient has an impairment and I question the function of his temporal lobes*".

The records indicate that Mr. Woolsey also developed alcohol problem. This too continued up until the time that he moved in with his sister and her husband in 2000, and even after that.

The clinical notes and records disclose that in April, 1987, Mr. Woolsey had fallen asleep after drinking 6 to 8 beers (which he told the doctors was "*a lot less than he normally drinks*") and set fire to his residence. He woke up on the picnic table in the backyard having suffered smoke inhalation

A note in the records from the Belleville Hospital for November 3, 1987 indicates that Mr. Woolsey was picked up downtown "*apparently intoxicated*". He had been beaten up.

In September, 1992 at the age of 22 he signed himself into the rehabilitation facility, Serenity House for treatment of alcoholism. He did not complete the treatment.

In September, 1995 he suffered his first car accident. The hospital records indicate that he was hit by a car. He suffered a tibial plateau fracture, ACL, and MCL ligament tears in his left knee. He clearly had been in difficulty with the law as the notes

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<sup>27</sup> August 29, 1983 report of Dr. Hunt, p. 2.

indicate that he was brought to the hospital by his probation officer. The history records problems with drug and alcohol use, and "organic confusion".

At the end of November, 1995 he was at the Lennox Addington Hospital. He was noted to be an alcoholic taking antabuse medication. The notes indicate that he "*wants detox and to get life in order*".

In June, 1997 he was involved in serious motor vehicle accident. He fell off his motorcycle and was run over by a car. Amongst other things he suffered a traumatic brain injury and required the complete amputation of his right leg. One of the consulting physicians had this to say concerning Mr. Woolsey's past medical history:

His past medical history is most remarkable. I note from the records that accompanied him from Kingston that there is a past history of a left middle cerebral artery stroke that preceded his trauma. The cause of this was never known...there is a past history of psycho-active substance abuse with both alcohol and drugs... He... meets the DSM-IV criteria for antisocial personality behavior and he is also been driving with a suspended license in the past. The medical record notes that he is impulsive and agitated from time to time and he has never held a steady job tending to move from different places from time to time.<sup>28</sup>

Mr. Woolsey was admitted to St. Mary's of the Lake Hospital for rehabilitation from the 1997 accident. On discharge the medical team appeared more concerned with Mr. Woolsey's prospects for rehabilitation with respect to his right leg amputation. It was thought that he would need ongoing physical therapy "*...predominantly from the perspective of his amputation rehabilitation rather than issues related to brain injury... It*

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<sup>28</sup> October 5, 1997 Belleville General Hospital Consultation Report, Dr. B. Guppy, p. 2



*was felt that there were some residual effects of the traumatic brain injury, but in fact that he was functioning close to what he was prior to his injury.*"<sup>29</sup>

Notably however, his family physician, Dr. Truman, did not share the views of the St. Mary's of the Lake Hospital rehabilitation team. On April 8, 1998 he authored a report stating the following:

Mr. Woolsey was assessed at St. Mary's of the Lake Hospital in October and November 1997 with regards (*sic*) his brain injury and it was their opinion that his functioning was close to what he was prior to his injury. I am not in total agreement with this assessment as I feel that this man needs fairly close supervision on a daily basis as I feel his life skills are somewhat deficient.<sup>30</sup>

In November, 1997, Dr. Truman had completed a report to the Ontario Ministry of Community and Social Services in support of Mr. Woolsey's application for welfare stating, "*I think this man is permanently medically disabled and unable to engage in remunerative employment.*"<sup>31</sup>

The medical records indicate that Robin Hughes and her husband were supportive of Mr. Woolsey following the 1997 accident. There are references in the records to consultations about Mr. Woolsey's medical care that involved Mr. and Mrs. Hughes. Shortly after his discharge from rehabilitation, in December, 1997, Mr. Woolsey moved in with Robin Hughes and her husband. A note in Dr. Truman's records states "*Now living with sister (third week of Dec.) – Brighton. She is very supportive.*"<sup>32</sup>

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<sup>29</sup> St. Mary's of the Lake Hospital Discharge Summary, November 7, 1997.

<sup>30</sup> April 8, 1998 report of Dr. Truman, p. 1.

<sup>31</sup> Ontario Ministry of Community and Social Services Medical Report Form 4, November 8, 1997, Dr. Truman.

<sup>32</sup> January 9, 1998 clinical note of Dr. Truman.

Dr. Truman's clinical notes throughout 1998 document Mr. Woolsey's continuing problems with alcohol. By March, 1998, he had also been diagnosed with a seizure disorder. He was having episodes where he was confused, incontinent for urine, and nauseated. By March, 1998 he was on the anti-seizure medication, Dilantin.

Mr. Woolsey's troubles with the law continued. Dr. Truman's clinical notes of July 6, 1998 and July 31, 1998 suggest that he was incarcerated in Napanee for the month of June, 1998. After his release he was not living with his sister. The notes also indicate that in December, 1998, Mr. Woolsey was discharged from the amputee clinic (for the second time) because he was not compliant with rehabilitation treatment concerning his amputated right leg, and training for the use of a prosthetic. In the end, the evidence indicates that Mr. Woolsey simply did not like the prosthetic and ultimately elected not to use it.

A note in Dr. Truman's clinical records for October 4, 1999 states the following:

*"Passed out last night – due to ETOH. Nothing to suggest seizure. Now living at Haig Rd. since February. Does not like prosthesis – uses crutches. Still drinking."*

In February, 2000, Mr. Woolsey was in the Belleville Hospital as a result of the seizure. On May 2, 2000 Dr. Truman's note confirms his seizure disorder and noted his eyes to be "very glassy".

Mr. Woolsey was living on his own, but had moved again from the Haig Road address. The ODSP records indicate that in April, 2000, he had rented a one-bedroom apartment at 51 ½ Victoria Avenue in Belleville.

On June 23, 2000, Mr. Woolsey was in the emergency department of Belleville General Hospital. He had been found unconscious and brought into the hospital. The diagnosis was "*alcohol poisoning*". On July 5, 2000 Dr. Truman records that Mr. Woolsey was "... *Still drinking (and) using cocaine*". The note records ongoing substance abuse problems and seizure disorder. The August 18, 2000 note of Dr. Truman indicates, "*Continues to use ETOH.*"

On September 20, 2000, Mr. Woolsey was visiting Robin Hughes and her husband when he had a lengthy seizure. He was taken to Trenton Memorial Hospital by ambulance. It was determined that his Dilantin level was lower than it needed to be and it was suspected that he was not taking his medication as prescribed. Alcohol withdrawal could have been a precipitating factor as he not been drinking for a few days. Marijuana was also found in his system. He was kept overnight and then discharged. He went to the Hughes residence.<sup>33</sup>

The evidence indicates that it was about this time that Mr. Woolsey began living with his sister and her husband on a permanent basis. The testimony of Robin Hughes on her Examination under Oath is helpful in understanding Mr. Woolsey's circumstances at this watershed point between Mr. Woolsey's pre-2000 situation, and the his life since moving in with his sister and her husband. The following exchange took place on the examination:<sup>34</sup>

Q...How did it come to be that Warren moved in with you and your family?

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<sup>33</sup> September 20, and September 21, 2000 consultation and discharge reports of Trenton Memorial Hospital, Dr. Koshy.

<sup>34</sup> EUO, Q. 337 – 340.

A. He came for a visit, and we decided that he needed to move in with me.

Q. And was he having money problems or was he just having trouble getting along with his injuries and his medication or both?

A. Probably both.

Q. So, some money problems and coping problems for want of a better term.

A. Yes.

Q. So, you offered – you said, “you can move in with us and we’ll help you out.”

A. Yes.

Up until this point there is little if any disagreement between the parties on the facts of Mr. Woolsey's history. I think it is important that I pause at this point in my analysis to outline the positions of Aviva and State Farm on the principal care dependency issue.

Aviva does not dispute that Mr. Woolsey had a very troubled past up until the time that he moved in with Robin Hughes and her husband. Aviva argues however, that over time while he was living with his sister and her husband the structure and assistance provided by that environment made Mr. Woolsey essentially self-sufficient. This self-sufficiency evolved over the nine-year period from 2000 to 2009, but it had developed well before the June 17, 2009 accident. By June, 2009 Mr. Woolsey was essentially independent in all of his activities of daily living, and self-care. He needed very limited assistance from his sister to ensure that he took his anti-seizure medication properly, but apart from that he did not require any care from Robin and Guy Hughes.

Aviva submits that although there was some dependency on Robin Hughes for care, it was far from a principal dependency as required by the SABS to make him a deemed named insured under the Aviva policy.

State Farm emphasizes the history that I have reviewed, and argues that by 2000, Mr. Woolsey's need for care was so significant that he would not have been able to continue to function on his own in any reasonable way without the intervention of his sister and her husband. Essentially the only thing that saved Mr. Woolsey from what was obviously a continuing downhill slide was the fact that his sister and her husband took him in and cared for him. State Farm argues that although as the years went by Mr. Woolsey increased his ability to better control his life functioning, this was only possible because of the environment created by his living arrangements. Even though he was apparently able to function fairly normally in terms of activities of daily living and personal care, State Farm submits that this was only because living with his sister and her husband provided him daily with structure, companionship, and a sense of security. Without this, Mr. Woolsey would have once again regressed into the self-destructive behaviour he had demonstrated throughout his life.

Since the consequences of taking away the intangible comfort provided by knowing that his sister and her husband were either always with him, or available to help would have been devastating to his life functioning, Mr. Woolsey was principally dependent on Robin and Guy Hughes for care.

In deciding which of these positions should be preferred on the principal care dependency issue a careful examination of Mr. Woolsey's medical records subsequent to the fall of 2000 is also necessary.

The move to his sister's home by Mr. Woolsey does appear to have had an immediate impact on improving his life functioning. Doctor Truman's October 19, 2000 note states, "*Now living with sister, no seizures since out of hospital. Not drinking.*" A January 24, 2001 note in the clinical notes indicates that he was "*Still living at sister's. Urinary incontinence*". There is no mention of seizures or drinking. By November 6, 2001 Doctor Truman reported, "*Living with sister. Urinary incontinence. Looks good*".

Going into 2002, a February 2, 2002 note states, "*No seizures*". There was a bit of a relapse in May, 2002. A May 14, 2002 note states, "*six seizures over last three (illegible). Forgot meds Saturday.*" On August 15, 2002 Doctor Truman's note states, "*No further seizures, stable, not drinking.*" November 19, 2002 the note says, "*seems very confused. No seizures.*"

The note for May 6, 2003 states, "*2 seizures in last month. Forgets...Dilantin.*" On June 24, 2003 Mr. Woolsey was at the Trenton Memorial Hospital presenting with a seizures complaint. On July 7, 2003 Doctor Truman reported, "*Apparently having more seizures. Claims he is taking Dilantin.*"

On May 4, 2004, Doctor Truman's note states, "*talked to sister – more agitated, increased seizures, she feels he is not taking meds properly.*" On May 12, 2004 the note states, "*2 seizures last weekend. Denies drinking. Still living with Robin*". Doctor Truman's note of July 19, 2004 indicates that he called Robin Hughes and discussed

with her what medications she should give to Mr. Woolsey. He was experiencing confusion so she stopped his Dilantin and was only giving him his other medication (Tegretol). The note for November 16, 2004 states, "*Had one seizure*".

On January 2, 2005 Doctor Truman's note states, "*Seizure before Christmas. Increase Tegretol*". On April 21 Doctor Truman reports, "*Only 1 seizure. Missed (medications)*." The note for June 16, 2005 states, "*3 seizures over last few months.*" On August 9, 2005 Mr. Woolsey was reported, "*Stable. No seizures. Still living with sister.*" On December 5, 2005, Doctor Truman reports, "*No seizures since last visit.*"

In January 13, 2006, Doctor Truman's note states, "*seizure on January 6. Claims to be taking his meds.*" April 15, 2006 states, "*Seizure yesterday.*" On June 28, 2006 Mr. Woolsey was in the Belleville General Hospital. The attending physician, Dr. Bloom, summarized the situation as follows:

Patient was brought in after being found on the side of the road seizing. He was treated in the emergency room with Dilantin... he had no identification on him and was significantly postictal and not able to express himself... Mr. Woolsey... Is not compliant with his medications at home... As Mr. Woolsey has a history of recurrent seizures, with noncompliance, we decided to discharge him home to the care of his family...

On August 9, 2006 Dr. Truman noted that Mr. Woolsey was, "*Stable. No seizures. Still living with sister.*" On December 7, 2006 Dr. Truman reported, "*Seizure recently*".

On January 11, 2007 Dr. Truman notes that Mr. Woolsey had recently been at the emergency department of Trenton General Hospital because of chest pain. Dr.

Truman records Robin Hughes' telephone number in his note. On January 18, 2007 Dr. Truman records that on December 30, 2006 Mr. Woolsey had been in the Trenton Memorial Hospital Emergency Department because of an overdose of his medications. He was kept in until December 31, 2006. The note indicates that Robin Hughes was present for this visit. The note goes on to state, "*Drinking at home. Counselling not to drink. Robin will not allow it.*" On March 22, 2007 Dr. Truman reports, "*re seizure disorder – stable. Counseling re no drinking. Sister present.*" On June 21, 2007 Dr. Truman records that Mr. Woolsey, "*fell in bath*". He had experienced no further seizures. Robin Hughes is present for this visit. On November 20, 2007 Dr. Truman reports, "*re seizures. 3 weeks ago had one. Not drinking.*"

On February 12, 2008 Dr. Truman's note states, "*No further seizures*". On August 4, 2008 his note states, "*No further seizures. Not drinking.*" On August 19, 2008 Dr. Truman reports, "*1 seizure recently.*" On November 24, 2008 Dr. Truman records, "*No seizures.*" Dr. Truman wanted to see him in three months. The note makes reference to Robin Hughes and an appointment time.

On February 24, 2009 Dr. Truman's note states, "*No seizures since last saw. Still with sister.*" On June 9, 2009 Mr. Woolsey was admitted to the Trenton Memorial Hospital through the emergency department. It appears from the discharge note that Mr. Woolsey had over consumed Dilantin. The attending physician, Dr. Prasad, summarizes matters as follows:

Mr. Woolsey is a 39-year-old who was admitted to the hospital through the emergency department. He was brought into emergency feeling unwell, he was seeing double, his balance was extremely poor, he had several falls...(the



doctor then describes the medication adjustments)... During his stay here I spoke to his sister-in-law (*sic*) Robin as well as his brother (*sic*) Guy at home and discussed his case with him many times...

This was Mr. Woolsey's last medical attendance before his accident on June 17, 2009.

Evidence was led that the arbitration hearing that had been generated post-accident to address the question of Mr. Woolsey's functionality before the accident. For example, Exhibit 1, tab 13 contains a series of six statements from people in the Brighton community who had some knowledge of Mr. Woolsey's functioning before the June 17, 2009 accident. The common theme in the statements is that Mr. Woolsey appeared to be able to function fairly normally while participating in the community at church related activities. The statements confirm that Mr. Woolsey was observed to be hitchhiking in the area, and many of them mention Mr. Woolsey cutting the grass at his sister and brother-in-law's home.

My attention was also directed to reports prepared by Amanda Burns, an occupational therapist who worked with Mr. Woolsey following the June 17, 2009 accident. In her first report, December 9, 2009 she described Mr. Woolsey's pre-accident functioning status the following terms:

Self-Care: Mr. Woolsey was independent with all self-care tasks. Despite his amputation, Mr. Woolsey was independent with mobility with use of crutches. He was able to use a bicycle for accessing the community. Mr. Woolsey did not have a driver's license. Robin reports that just prior to the current accident, Mr. Woolsey was having difficulty managing his medications and his family doctor, Dr. Truman, recommended that Ms. Hughes assist with

tracking medication to improve consistency. With this assistance is reported that Mr. Woolsey had not had a seizure.

Social: at the time of the accident, Mr. Woolsey was 40 years old and living with his sister Robin Hughes, her husband Guy and their adult daughter (Darlene, 18) and granddaughter (Riley, one year) in a rural area east of Brighton. Mr. Woolsey paid his sister room and board. Ms. Hughes works midnight shifts on a rotating schedule as a Personal Support Worker at Hastings Manor. Family have a number of animals and birds for which Mr. Woolsey helped to care. Mr. Woolsey is described as a very social person enjoying spending time with his family and friends. He would be out in the community daily attending to daily care tasks and socializing.

Vocation: Mr. Woolsey was not working at the time of the motor vehicle accident. He assisted his brother-in-law, Guy, with attending the family farm and gathering and loading scrap metals for sale.

Home maintenance: Mr. Woolsey was independent with instrumental activities of daily living including meal preparation, banking, financial management and grocery shopping. He was independent with home maintenance tasks. He assisted the family with lawn care, gardening, snow removal and assisted with general housekeeping tasks as well as repairs and maintenance. He was responsible for his own laundry. Mr. Woolsey would frequently assist the family with caring for the home and animals while the family were away camping in the summer.

Leisure: Mr. Woolsey enjoyed socializing with friends and family. He enjoyed leisure activities such as camping and bike riding.

Typical Day: it was reported that (*sic*) typical day prior to the accident would see Mr. Woolsey up early and active through the day biking into Brighton, visiting friends and assisting the family with care of the home and animals.

In a second report dated February 4, 2010, Ms. Burns commented as follows:

Pre-Accident Roles/Responsibilities: ...At the time of the subject accident Mr. Woolsey was living with his sister, Robin and her family. He was

independent with his self-care tasks with the exception of assistance from Robin to ensure he was ingesting his medication as prescribed, assisted the family with homemaking and home maintenance tasks, caring for the variety of animals and was accessing the community independently on a daily basis. Mr. Woolsey is described as having an active lifestyle.

At the suggestion of Mr. Woolsey's lawyer, the family has obtained testimonials from people who have known Mr. Woolsey in the community and are familiar with Mr. Woolsey's pre-accident level of independence. These testimonials attest to Mr. Woolsey being active member (*sic*) of the community, independently accessing the community, assisting with cleaning up after community functions, participating in men's club and fellowship meetings, independently climbing stairs, riding a bicycle and mowing the lawn with a push mower and his crutches.

Following the June 17, 2009 accident Mr. Woolsey once again received rehabilitation care at the St. Mary's of the Lake Hospital. In a discharge recommendations report dated October 14, 2009, social worker Bill Gibson makes the following comments:

A Long and Winding Road: (Psychology). Warren is recovering from a serious brain injury that follows on the heels of earlier significant brain injuries. Reports of his recovery from earlier brain damage suggest that he was courageous and fiercely independent, becoming competent and achieving successes in many life areas in the face of remarkable challenges... Warren is fortunate in having the support of his family, who have shown enormous patience and creativity during his earlier rehabilitation and recovery phases...

In my view the anecdotal summaries provided of Mr. Woolsey's pre-accident condition in these reports and statements are somewhat helpful and must be given some weight. I think it is necessary to be cautious however, not to over emphasize their value. The information contained in the reports is a recording of second-hand

information that the persons recording it must have been receiving from Mr. Woolsey's family members such as Robin and Guy Hughes. The information is, of necessity a summary of what the persons recording it were told and is not in the words of the family members providing it. In this regard is probably more beneficial to examine what Robin Hughes said directly either in her examination under oath, in follow-ups to undertakings, or in her statements.

I also do not place a great deal of significance on the statements given by the community members. That is not to say I doubt veracity of the information contained in the statements or the credibility of the persons giving the statements. It is important however to consider the context in which the statements were requested and given. They were asked for by Mr. Woolsey's lawyer obviously for the purposes of advancing a claim on his behalf arising out of the June 17, 2009 accident. As with the second-hand information recorded by the medical personnel, they are not the best source of information to describe the relationship between Mr. Woolsey and Robin and Guy Hughes in the context of the care dependency issue.

Robin Hughes was examined under oath with respect to the issue of assisting Mr. Woolsey with his medication. She was asked whether someone in her family helped him with taking his medication and she confirmed that she did it.<sup>35</sup> She acknowledged that her training as a Personal Support Worker made her well-equipped to assist Mr. Woolsey with taking his medication properly.

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<sup>35</sup> EUO, Q. 346 – 347.

She was asked how long she had been assisting Mr. Woolsey with his medication. She answered that she had been assisting for 2 to 4 months before his last accident. This was because he was having more difficulty in the 2 to 4 months before his June 17, 2009 accident.<sup>36</sup>

Dr. Truman's records confirm Ms. Hughes' evidence that Mr. Woolsey did appear to be having difficulty with his medication shortly before the last accident. The notes also confirm however, that Mr. Woolsey's difficulties with his medication had persisted since he had been first diagnosed with epilepsy. The notes also show that Ms. Hughes was assisting Mr. Woolsey with his medication quite some time before only the 2 to 4 months before the June 17, 2009 accident. In fact, in my opinion a fair reading of the clinical notes and records indicates that Robin Hughes was involved to a significant extent with the medical management of Mr. Woolsey's condition from the time he moved in with her on a permanent basis in the fall of 2008. The notes are replete with references to her attending medical appointments with Mr. Woolsey, or having telephone consultations with the doctors.

The notes also indicate that Mr. Woolsey's condition was discussed with both her and her husband, Guy Hughes on many occasions from the time Mr. Woolsey started living with them in the fall of 2000. The notes indicate that at least as early as 2004 Robin Hughes was managing Mr. Woolsey's medications and reviewing his medical condition with his doctors.

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<sup>36</sup> EUO, Q. 348 – 350.

In my opinion the impact of the value of Robin Hughes care of her brother is aptly summarized in her own words. In discussing with counsel Mr. Woolsey's admission to hospital concerning his medication and seizures just before the June 17, 2009 accident she confirmed that he had been admitted to hospital on previous occasions for the same problem. She described his seizures as grand mal seizures. The following exchange took place on the examination.<sup>37</sup>

Q. And from the time Warren moved in with you in 2000, was he having trouble with the seizures then, was it something that was getting worse over time or getting better over time?

A. It was getting better.

Q. When did the seizures start to get better?

A. After he moved in with me.

Q. And frequency the seizures reduced as a result of moving in with you?

A. Yes.

Q. Do you know why that is?

A. Because I took care of him.

I will now examine the evidence in this case as it compares to some of the case law on the issue of principal care dependency to which I have been referred. Some cases are more similar to the facts in this case than others.

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<sup>37</sup> EUO, Q. 359 –366.

In *Giroux v. Cooperators General Insurance Company and the Motor Vehicle Accident Claims Fund*<sup>38</sup> the arbitrator was dealing with a claim for death benefits on the part of the parents of a son killed in an accident. One of the issues in the case was whether the parents were principally dependent upon their son for care. The son was 24 years old the time of the accident. He was living at his parents' home with his girlfriend at the time of the accident. The parents claimed principal dependency on their son on the basis that they were both deaf and relied on their son for interpretation services and communication with the outside world. Neither of the Giroux's had any mental disability. They did not depend on their son for their ordinary day-to-day personal care needs. They prepared their own meals and they both worked at full-time jobs. As the arbitrator put it, they "*generally ran their own lives, quite independently*". The Giroux did have some limitations in their English literacy as they had originally learned sign language in French. Their son assisted them with more complex documents.

Although the arbitrator accepted that their son made their lives much more comfortable, less difficult and stressful, his assistance to them was not provided as a result of a need sufficient to make them principally dependent for care.

The arbitrator concluded as follows:

The evidence is clear that the Giroux have the independent ability to look after their own personal needs for food, clothing, self-care and hygiene, transportation and financial support. They were able to independently care for and raise their son to maturity. They have some ability to communicate with others for routine daily purposes. There is no evidence that, due to their deafness, they required any extraordinary emotional support from their son, or

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<sup>38</sup> FSCO A95-000203, Arbitrator Rotter, July 11, 1997, "*Giroux v. Cooperators*".



were otherwise dependent on him for their physical well-being... I am satisfied that Glen Giroux provided his parents with affection, support, and frequent assistance in communicating with others in dealing with difficult or complex written material. However, I find that this falls far short of providing the degree of care for his parents required to show dependency for care, in the sense that the term is used in the Schedule.

This case is similar to the one before me in that Mr. Woolsey appears to have developed a fair degree of ability to take care of his basic needs on a day-to-day basis. He was able to access the community on his own, and he was able to contribute to the work around the Hughes farm.

A significant point of distinction in my opinion however, is the fact that Mr. Woolsey sustained a brain injury in his 1997 accident which exacerbated his cognitive deficiencies and caused a serious epilepsy condition. This was superimposed upon a long history of behavioural problems that the records suggest were never really under control. He was not competitively employable and although he could assist with chores at the Hughes farm the evidence suggests that he also needed cueing and direction on a consistent basis to do so. Mr. Woolsey's self-reliance from a mental, behavioural and physical point of view was, in my opinion, not nearly as significant as the Giroux.

In *The Dominion of Canada General Insurance Company v. The Motor Vehicle Accident Claims Fund*<sup>39</sup> the issue was whether a 56-year-old man was principally dependent upon his brother and his brother's spouse for care. The claimant, Mr. Palumbo, was not employed and had not been employed for some time. About two decades before the accident he had suffered a nervous breakdown and was admitted to

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<sup>39</sup> Private Arbitrator Samis, November 10, 2007 ("Dominion v. MVACF")



a mental health facility. He was initially discharged into the care of his brother. For two or three years he lived with his brother and his brother's family. When his brother moved he was not able to take Mr. Palumbo with him. At that point Mr. Palumbo was moved into an assisted living home. Mr. Palumbo's brother visited him regularly, assisted with his hygiene and grooming on those visits, and administered Mr. Palumbo's monthly social assistance cheque that was made payable jointly to Mr. Palumbo and his brother. Mr. Palumbo's brother gave pocket money to him and would buy his clothing and shoes. Mr. Palumbo's brother attended doctors appointments with him from time to time. Mr. Palumbo was able to access the community independently. He would spend his time at cafés in the College Street area. He had many friends with whom he liked to visit. Mr. Palumbo's meals and laundry were taken care of by the staff at his assisted living home. Occasionally his brother and his wife would have him over for a meal or assist with his laundry. The staff at the home also made sure that Mr. Palumbo had his prescription medication and that he took it appropriately. The arbitrator concluded as follows:

Jimmy's need for care is not extreme. He is able to feed himself, dress himself and attend to his own toileting. He was able to take his own medication when it was presented to him. He spent his time independently through the days visiting with his friends. He would go and get his haircut as needed. (His brother, Pat, had made the arrangements for the barber to bill Pat directly.)

Pat's role in Jimmy's life was not insignificant. Pat had exercised some financial control. He had been personally present on a weekly basis and on many occasions aside from the weekly visit to provide attention to Jimmy which can be regarded as care.

There was an emotional/social connection between the brothers which may well be different than Jimmy's relationship with his friends and his co-habitants..,

While the care and attention provided by Pat Palumbo and his wife was important and significant, I cannot conclude that Jimmy Palumbo was principally dependent for care on one or both of them at the time of this accident when one measures their involvement against the comprehensive care provided and made available by 105 Oakwood and Jimmy's ability to provide for his own care... Many of the tasks and services provided by Pat Palumbo and his wife were services that they performed out of love and obligation but not because Jimmy was principally or chiefly dependent upon them for that care. Without the intervention of Pat and his wife, Jimmy would have received attention to his hygiene, he would have received adequate laundry services and his medical needs would have been attended to at 105 Oakwood.

Once again this case has some similarities to one before me. I wonder however, whether the arbitrator would have come to the same conclusion had Mr. Palumbo not been residing in an assisted living home, in addition to receiving the care that he did from his brother and his brother's wife. It seems that the arbitrator felt Mr. Palumbo's needs were being taken care of primarily by the staff at his assisted living residence. Although it was not necessary for him to conclude that Mr. Palumbo was principally dependent upon the staff at his assisted-living residence for care, this seems to be the implication of his analysis. With his needs being taken care of by the staff at the assisted living residence, the arbitrator was able to classify the care Mr. Palumbo received from his brother and his brother's wife as being provided out of natural love and affection rather than need.

In *Kaur v. Liberty Mutual Insurance Company*<sup>40</sup> Mrs. Kaur was seeking death benefits as a result of her two children having been killed in 1994 accident in India. The issue was whether Mrs. Kaur was principally dependent for care on her children. She had come to Canada from India in 1972. She became disabled as a result of a workplace accident in 1991 and had not worked since. She was receiving a CPP disability pension. She was uneducated and her ability to communicate in English was limited.

The arbitrator found that after Mrs. Kaur's work accident or condition gradually worsened. She developed various pains all over her body. She was unable to concentrate and spent her days lying down or sitting around the apartment she was taking various medications. She was able to make a basic meal and manage her own personal care. Before the accident however, her daughter had cooked most of the meals, had done the grocery shopping, and the household chores. She also did the laundry.

Mrs. Kaur was however, well enough to travel to India for three months in the summer of 1993 and again in 1996 (two years after the accident). Her daughter was out of the house most of the day during the week and on weekends. She worked part-time, attended school, and went out frequently with her friends. That meant Mrs. Kaur was on her own quite a bit of the time.

In concluding that Mrs. Kaur was principally dependent for care upon her daughter, the arbitrator emphasized that Mrs. Kaur had significant health problems

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<sup>40</sup> FSCO A98-001322, October 20, 1999, Arbitrator Novick (affirmed on appeal, June 7, 2000, David Draper, Directors Delegate) ("Kaur v. Liberty")

sufficient to qualify her for a CPP disability pension. She required several types of medication for many years. The arbitrator concluded:

Other than her trips to India, during which she was always accompanied by someone, she did not venture out on her own and relied on Shelley and to a lesser extent her son Tajinder to take care of the household chores and to look after her. While she may not be a complete invalid... She is significantly disabled by her medical condition and that as a result she was more dependent on Shelley for care than on anyone else, including herself.

Mr. Woolsey appears to have been able to do more than Mrs. Kaur, at least in terms of physical activities. It is noteworthy however, that there was evidence that Mrs. Kaur was able to travel long distances, even though she was accompanied. She was also on her own in the apartment most of the time, perhaps a good deal more so than Mr. Woolsey was alone at the Hughes farm.

The case is significant from the standpoint that it demonstrates the principal dependency for care test does not require anything near "complete invalidism" to be satisfied.

In *Wawanesa Mutual Insurance Co. v. Lloyd's Underwriters*<sup>41</sup> the court upheld the arbitrator's decision that the SABS claimant who had progressive Parkinson's disease was principally dependent for care upon a friend with whom he shared a residence. Mr. Cooper, the SABS claimant, was first diagnosed with Parkinson's disease in 1987. He moved in with his friend, Mr. Hales in 1995. The arbitrator found that Mr. Cooper had been somewhat dependent upon Mr. Hales since 1995 and the extent was increasing with the passage of time. He found that Mr. Cooper required a

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<sup>41</sup> (2004) 72 O.R. (3d) 762, (Ont. Sup. Ct.), ("Wawanesa v. Lloyds").

considerable amount of care. He required assistance with bathing and on occasion to go to the washroom. Mr. Cooper did little or no food preparation. He could make very simple meals or reheat food that had been earlier prepared by Mr. Hales. On occasion, when he was having a bad day, he needed someone to feed him. He did almost no housecleaning and no laundry. He needed help with paperwork and banking. His mobility was restricted and he needed to be accompanied when he went outdoors.

A care agency provided about 10 hours a week of care. A care cost analysis report determined that Mr. Hales provided somewhere between 14 and 28 hours per week of care. The arbitrator noted that he could not rely upon a mathematical analysis alone to determine the principal care dependency issue. The quality as well as the quantity of care and had to be examined. The arbitrator concluded that Mr. Cooper was principally dependent for care upon Mr. Hales. He could not have lived on his own and required a great deal of care to live as he did. Mr. Hales provided not only physical care, but emotional support and help as well.

Justice Rady, on appeal, in affirming the arbitrator's decision said the following:

One of the most significant qualitative factors influencing Arbitrator Jones' decision was the fact that Mr. Cooper could not have lived on his own without significant support. Aside from the physical support from Mr. Hales and the other service providers, Mr. Hales provided social and emotional support. Mr. Hales undoubtedly provided Mr. Cooper with companionship and a sense of security that someone was close by in the event help was needed.

It would appear to me that Mr. Cooper was in greater need of physical care than Mr. Woolsey. He had difficulty with personal care tasks such as bathing and periodically

with feeding himself. He also had difficulty with mobility and had limited access, unassisted, outside of his condominium.

This case does illustrate the point however, that one cannot simply look at the daily life tasks that a person may or may not require help with, and decide principal dependency based on whether mathematically there are more tasks or less tasks with which the person in need of care requires assistance. On appeal the court emphasized the importance of care support provided in the companionship, security, and emotional sense. The judge focused on the fact that Mr. Cooper derived companionship and a sense of security from Mr. Hales. It was this knowledge that help was available in case he needed it that enabled him to function independently to the extent that he did. In my view, this was also Mr. Woolsey's greatest need, satisfied by Robin and Guy Hughes.

The last case that I will refer to is *Echelon General Insurance Company v. State Farm Mutual Automobile Insurance Company*.<sup>42</sup> The SABS claimant, Mr. Chikosa, was injured in a November 26, 2008 accident. He was 32 years old at the time of the accident. He lived with his mother and brother. He suffered from schizophrenia and was developmentally delayed. He had immigrated to Canada from Zambia in 1997. His mother sponsored him and he had lived with her and his brother in a three bedroom apartment since his arrival. Mr. Chikosa was receiving CPP disability benefits, as well as ODSP benefits. He required daily medication to control his condition. His mother purchased the medication and reminded him each evening to take it as he had "a tendency to forget." Before the accident Mr. Chikosa was able to participate in an incentive earnings program at a facility providing supported employment programs. He

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<sup>42</sup> Private Arbitrator Novick, July, 2011 ("*Echelon v. State Farm*")

worked a few days a week if work was available doing “piece work”. He worked there through 2007 and for a few months in 2008. His mother had been appointed his trustee for the purposes of receiving his monthly ODSP payments. She was responsible for administering the money. They had a joint bank account. His mother deposited the cheques and made any financial decisions required. Mr. Chikosa contributed \$550 per month towards his room and board. Mr. Chikosa’s mother worked full time so she was out of the apartment during the day. She made all of the meals and did all of the laundry. They would grocery shop together. Mr. Chikosa did some cleaning and vacuuming in the apartment, and shoveled snow in the winter. He was able to stay home alone but she called regularly to check up on him. He was able to access the community but he would tell his mother if he was going out. He would go to the local park to watch soccer, or to the mall to play video games. If he wanted to go anywhere else his mother would drive him or he would take the bus. A Life Care Planner delivered a report expressing the opinion that Mr. Chikosa “...was unemployable, required supervisory oversight, and frequently exercised poor judgment in keeping with the behaviour generally displayed of people with developmental disabilities...”. Mr. Chikosa’s mother was asked whether she thought he could live on his own and she replied that she felt that he could, but that he would need supervision.

The arbitrator identifies the proper test for principal care dependency as requiring both a qualitative as well as a quantitative analysis. She considered that Mr. Chikosa’s mother did most of the laundry and housekeeping, purchased and directed his consumption of medication, drove him places from time to time, attended medical appointments with him and made decisions about his medical care, and had complete



control over his finances, as quantitative factors or concrete tasks supporting a principal care dependency.

With respect to the qualitative factors, the arbitrator stated the following:

Ruth (Mr. Chikosa's mother) does not fulfill many of Geshom's social needs (not surprisingly, given that she is his mother). However, it is clear that she provides supervision or a level of oversight that is critical, given the poor judgment he is often exercised in the past, as a result of his illness or developmental deficits. While there was some evidence to suggest that his schizophrenia was well-controlled by his medication, the Corbrook records contained various references to Geshom abusing alcohol or drugs, and being exploited by others. While Geshom is able to remain at home unattended, his mother calls at least once each day to check in on him. When he goes out of the house on his own, he will always tell his mother where he is going. I find that Ruth's presence and involvement in Geshom's life is analogous to the 'sense of security' provided by Mr. Hales as noted by the court in (*Wawanesa v. Lloyds*)...(his mother) not only provides assistance to him in many 'concrete' or quantitative ways, but also administers his medication and directly manages his finances. Most importantly, her presence in his life provides him with the security and supervisory oversight that allows him to go out into the community, knowing that she is always available to assist, if required... He is reliant on his mother to the point where he should be considered to be principally dependent upon her for care...

In my view facts of this case are probably the closest to the facts of the case before me. One can however, always find points of distinction. It would appear that Mr. Chikosa was not quite as self-sufficient as Mr. Woolsey was just before his accident. Mr. Chikosa relied upon his mother for housekeeping and laundry chores. Mr. Woolsey was able to accomplish more of this for himself. Mr. Woolsey also appears to have been able to manage his own banking, although that was not a complicated exercise. He



simply took cash out of his ODSP cheque and gave it to his sister to pay to for room and board. On the other hand it appears that Mr. Chikosa was capable of a type of modified or supported employment that he was involved in a few days a week. Mr. Woolsey was certified by his doctor as being permanently unemployable as a result of his brain injury and leg amputation from the 1997 accident. Both Mr. Chikosa and Mr. Woolsey appear to have been able to access the community to some extent. They were also both capable of being left on their own at times. Both of them did complete some tasks at their homes. Mr. Chikosa assisted with grocery shopping and snow shoveling, as well as some minor housekeeping. Mr. Woolsey assisted with both inside and outside chores at the Hughes farm. Both men required assistance with the administration of their required medication, and in both cases it appears that this was a need that required fulfillment indefinitely. Mr. Chikosa's mother took care of this for him, while Robin Hughes was doing the same for Mr. Woolsey.

As Arbitrator Novick described however, these are essentially quantitative or concrete tasks that are only one component of the principal care dependency analysis. The other part of the analysis involves trying to evaluate the more qualitative care provided by a caregiver that cannot be measured with the same mathematical precision, as the cases have held.

In this case it is my opinion that without the support of Robin and Guy Hughes, Mr. Woolsey would not have achieved the level of independence that he did with respect to the quantitative daily life tasks. More importantly, it is my view that Mr. Woolsey would not have been able to maintain his independence with respect to these tasks were it not for the ongoing support of Robin and Guy Hughes.

The evidence demonstrates that in years leading up to the fall of 2000 when he moved in with his sister, Mr. Woolsey's lacked the ability to cope with life on his own, or in other words, to take care of himself. Having questionable mental capacity, he abused both alcohol and drugs for many years living in a transient way. He had experienced what I would term many "close calls" over the years where his inability to manage his behaviour and lifestyle landed him in trouble with the law, in hospital, and involved in incidents that caused him serious injury.

After his serious, 1997 accident in which he suffered a brain injury and a leg amputation his ability to cope was further diminished. His behaviour remained unchanged and that, coupled with the fact that the accident created a dangerous epileptic seizure condition rendered him a person in need of care, if he was not one already. The doctor who would have the best understanding of Mr. Woolsey's circumstances, his family physician, Dr. Truman, in my opinion accurately summarized the situation at this point with his comment, "*...I feel that this man needs fairly close supervision on a daily basis as I feel his life skills are somewhat deficient.*"<sup>43</sup>

As Robin Hughes testified on her examination, in the fall of 2008 matters had come to the point for Mr. Woolsey where financially, and with respect to the impact of his impairments, he was no longer able to cope on his own. She and her husband took him in to help him and take care of him. This was not done solely out of familial love and affection, it was done to stop Mr. Woolsey's downhill slide into oblivion.

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<sup>43</sup> See note 29.

It was the help, supervision, and companionship – all creating a “sense of security”, provided by Robin Hughes and Guy Hughes that enabled Mr. Woolsey to get out of the downward spiral he was in, and to slowly gain more control over his life. In this way Robin and Guy Hughes provided Mr. Woolsey with the psychological foundation essential for him to maintain the gains he had made.

Given the extent of Mr. Woolsey’s problems however, I do not believe that this was the kind of situation where it is realistic to believe he would have at any time in his life achieved true independence. His was not the situation in *Oxford v. Cooperators* where a mother was exercising a temporary type of control and direction over her adult son’s life as his surety because of his difficulties with the law. In that case the son, who had no physical or mental disabilities, was gainfully employed, and was otherwise self-sufficient, did not require care in the sense anticipated by the SABS. He just needed some temporary guidance to get himself back on track.

Mr. Woolsey on the other hand, had physical impairments, and more significantly, mental and behavioural impairments that were going to last a lifetime. Although he had developed some capacity to function independently in a quantitative sense, I do not think this was ever likely to occur in an emotional, intellectual or behavioural sense.

In my view Mr. Woolsey was only able to maintain the level of independence he had because of the circumstances of his living arrangements. Had he not continued to live with his sister and her husband I think it is quite likely that the removal of this safety

net would have resulted in a re-emergence of the same problems that brought him to their doorstep in the first place.

A careful review of the medical records from 2000 to 2009 confirm this point. Although I think it is reasonable to say that over those years Mr. Woolsey appeared to have been making slow progress towards stabilizing his condition, it is also clear that this course had its ups and downs. It was by no means evident that he could make it on his own. Mr. Woolsey's seizure condition required constant monitoring of medication and behaviour. It is apparent from the records that he had many lapses in both respects over those years and he was certainly not out of the woods by 2009. His admission to hospital only a week before his last accident illustrates the point.

Once again I think the words of Mr. Woolsey's sister, Robin Hughes, provide the best insight into why he was principally dependent upon her and her husband for care. When asked about why Mr. Woolsey's circumstances seemed to improve, particularly with respect to his epilepsy management after he came to live with her and her husband, she answered, "*because I took care of him*".

They may not have been dressing him, doing all of his laundry, or watching over him every minute, but the fact that Robin Hughes and her husband were continuously available to Mr. Woolsey and were always there when he needed them most, must have been a tremendous source of mental sustenance for him. In my view, this is what gave him the strength to stay on the "straight and narrow". Without it, he likely would have slipped back into his old, self-destructive behaviour.

The value of this support is impossible to measure in a quantitative way so that is why it must be considered as a qualitative factor. In Mr. Woolsey's case, it is my opinion that he had consistently demonstrated, sometimes dangerously so, his inability to be self-reliant for care. His life was headed in the wrong direction and he had proven himself incapable of maintaining a viable lifestyle without his sister's help.

I think on balance the evidence shows that without the care in the qualitative factors of companionship, supervision and a sense of security provided by Robin and Guy Hughes, Mr. Woolsey was extremely vulnerable to descend again into the depths of despair from which they had rescued him.

For these reasons I conclude that Mr. Woolsey was principally dependent for care upon his sister, Robin Hughes, and her husband, Guy Hughes at the time of the June 17, 2009 accident.

### **Conclusion**

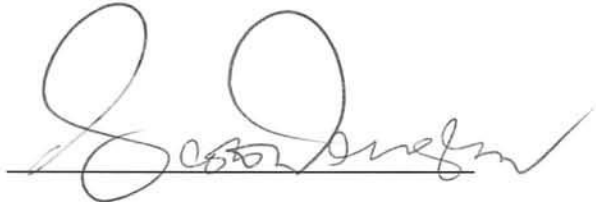
1. Warren Woolsey was **not** principally dependent for financial support on Robin and/or Guy Hughes at the time of the June 17, 2009 accident.

2. Warren Woolsey **was** principally dependent for care on Robin and Guy Hughes at the time of the June 17, 2009 accident.

3. State Farm has been successful with respect to issue 2 of the arbitration, and therefore Aviva is responsible to continue to administer Mr. Woolsey's SABS claim. Regulation 283/95, section 9, states that the cost of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful party to the arbitration. Should the parties wish to make submissions concerning costs however, I

invite them to contact my Coordinator to schedule a post-arbitration conference to discuss arrangements for costs submissions.

Dated at Toronto, May 14, 2013.

A handwritten signature in black ink, appearing to read "Scott W. Densem", written over a horizontal line.

Scott W. Densem, Arbitrator