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:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

and

AVIVA CANADA INC., AXA INSURANCE COMPANY (CANADA), ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE ON BEHALF OF THE MOTOR VEHICLE ACCIDENT CLAIMS FUND, and MICAH BRISSON

Respondents

AWARD

Heard: January 7, and January 8, 2013

Counsel:

Robert H. Rogers for the respondent, Aviva Canada Inc. ("Aviva")

John Friendly and Magda Marcula for the respondent, Her Majesty the Queen ("HMQ")

Stacey L. Stevens for the respondent, Micah Brisson

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 the respondent, Micah Brisson.

The arbitration was conducted pursuant to the terms of a written Arbitration Agreement, and a September 26, 2011 letter from Densem ADR Solutions Inc. to counsel.

Factual Background to the Issues[1]

The respondent, Micah Brisson, was involved in an accident on March 15, 2010 as a result of which she has unfortunately been rendered a paraplegic. Two applications for SABS were originally submitted on her behalf. One application was submitted to Economical Mutual Insurance Company, which, as it turns out, was the insurer of a vehicle owned by Ms. Brisson's maternal grandmother, Suzanne Lalonde. A second application for SABS was submitted to Aviva by Ms. Brisson's father, Martin Brisson.

Various Notices of Dispute Between Insurers were served in timely fashion by the parties involved in the arbitration. The parties have made a number of agreements as this matter has progressed which have resulted in the streamlining of this arbitration

[1] These facts are agreed upon by the parties, or derived from the documents and exhibits filed for the arbitration. They are not in dispute.

with respect to both the number of parties participating in the hearing, and with respect to the issues to be decided. I am grateful to counsel for their efforts in that regard.

Subject to the issue of costs, which it was agreed by all parties would be dealt with following the release of my Award, Economical Mutual Insurance Company, AXA Insurance Company (Canada), and Royal & Sun Alliance Insurance Company of Canada have been released from the arbitration as it is agreed that they would not have priority insurer status on the facts of this case.

Although Aviva had three policies of insurance that might potentially have been required to pay SABS, the parties have agreed to deal with the priority issue insofar as Aviva is concerned with respect to only Aviva's policy in favour of Micah Brisson's father, Martin Brisson. Subject to the outcome of arbitration, Aviva has assumed carriage of Micah Brisson's SABS claim from Economical Mutual Insurance Company.

Having taken over the handling of Micah Brisson's SABS claim, for procedural purposes, Aviva has assumed the role of the applicant in this arbitration. The respondents are HMQ and the SABS claimant, Micah Brisson. She has exercised her rights under Regulation 283/95, subsection 5 (3), to participate as a party in arbitration to dispute the potential transfer of her SABS claim from Aviva to HMQ.

The Issues

As indicated, negotiation and cooperation amongst counsel have resulted in a narrowing of the issues to be determined. In accordance with their arbitration agreement the parties have requested that I determine the following issues in my Award:

1) Is Aviva or HMQ liable to pay accident benefits to Micah Brisson?

The parties agree that the answer to question one will be determined by the answer to the following question:

2) At the time of this accident, was Micah Brisson principally dependent on her father for financial support or care?

The parties agree that if she was, Aviva is liable to pay accident benefits. If she was not, HMQ is liable to pay.

The Evidence

Two documentary exhibits were introduced into evidence at the arbitration hearing. They are as follows:

Exhibit 1: Joint Document Brief – Part One and Two

Exhibit 2: Economical Mutual Insurance Company letter to Aviva, May 12, 2010, attaching Notice of Dispute between Insurers.

At the outset of the hearing the parties advised me of their agreement regarding certain facts and a partial agreement concerning other facts. I have set out the details of those agreements below.

1) For the purposes of arbitration, there were three contributors to the financial support and care of Micah Brisson. These contributors were her father, Martin Brisson, her mother, Roseanne Burkholder, and Micah Brisson herself.

2) The parties agree that the three contributors noted in paragraph 1 contributed to the financial support of Micah Brisson in the following percentages:

Martin Brisson – 45%

Roseanne Burkholder – 35%

Micah Brisson – 20%

3) The parties do not agree on the exact percentages of the contribution of the three contributors to the care of Micah Brisson. HMQ and Micah Brisson take the position that the three contributors' percentage contribution to Micah Brisson's care is the same as their contribution to her financial support. Aviva submits that the following percentage contributions to the care of Micah Brisson are more appropriate:

Martin Brisson – 35%

Roseanne Burkholder – 33%

Micah Brisson – 32%

4) Notwithstanding their difference of opinion on the appropriate percentage amounts for contributions to Micah Brisson's care, the parties agree that Micah Brisson was not self-sufficient or independent with respect to financial support or care. They agree that she received the majority of financial support and care from her parents, albeit in different amounts. It is agreed that whatever the appropriate percentage, Martin Brisson was the largest contributor to the financial support and care of his daughter, Micah Brisson.

5) The parties also agree that Aviva has the onus of proving that Micah Brisson was not principally dependent on her father, Martin Brisson, for financial support or care at the time of the accident.

6) The parties agree as a term of their arbitration agreement that an appeal may be taken from this Award on a question of law or on a question of mixed fact and law.

If Micah Brisson is principally dependent on her father for either financial support or care then she qualifies as an "insured person" under Aviva's policy and thus would be entitled to the payment of SABS from Aviva. As this case has been structured, if she is not principally dependent for financial support or care upon her father then she is not entitled to receive SABS from Aviva and must look to HMQ for the payment of SABS.

Analysis

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*[2]. Those factors are as follows:

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

[2] (1985) 50 O.R. (2d) 797 ("*Miller v. Safeco*")

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*[3] as being the proper approach to determining dependency.

With respect to the issue of care dependency, the courts and arbitrators have held that it cannot be determined by simple mathematical calculation. The issue requires both a quantitative and qualitative analysis. Without intending it to be an exhaustive list, important factors that have been found relevant to the care dependency analysis include social support, emotional support, companionship, protection, and services such as feeding, clothing, cleaning, and transporting. One must look to the facts of the particular case to determine the weight to be given any of these factors. The age and physical or mental condition of the dependent must also be considered in the context of the need for care.[4]

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

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[3] (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*")

[4] *Oxford v. Cooperators,* note 3; see also *Wawanesa Mutual Insurance Company v. Underwriters, Lloyds of London Insurance* [2004] 72 O.R. (3d) 762 (Ont. Sup. Ct.) ("*Wawanesa* v. *Underwriters*"); *Barnard v. Safeco Insurance Company of America,* 57 O.R. (2d) 558 (Ont. H.C.) ("*Barnard v. Safeco*"); *Cooperators v. The Halifax Insurance Company,* Arbitrator Lee Samis, December 14, 2001 ("*Cooperators v. Halifax*")

- 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*[5] 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;

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.[6]

Arbitrator Jones referred to this approach with approval in dealing with an issue of principal dependency for care in *Wawanesa v. Underwriters*[7]

The issue that has been presented to me for determination in this case requires a decision on whether there is principal dependency where the claimant is acknowledged to be dependent on two separate sources of financial and care support, one larger than the other, while having a capacity to be self-supporting financially and for care less than either of the other two sources.

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[5] [1996] O.I.C.D No. 43, April 1, 1996 ("*Weiler v. Personal*")
[6] *Weiler v. Personal*, at page 6.
[7] March, 2004.

The point of approaching the matter this way as I understand it is to squarely raise an issue that has been discussed in the cases, but which may not have been clearly decided by arbitrators or by the courts.

My task then is to arrive at the proper interpretation of the term "principally" as it modifies the word "dependent" in the SABS section 2 (1) definition of "dependant", in the context of these facts presented to me by the parties.

The last factor in the dependency analysis approved of by the Court of Appeal in *Miller v. Safeco* is critical to the interpretation. This factor requires a determination of the ability of the claimant to be self-supporting. It is this factor that requires a comparison of the claimant's own resources to other sources of support that the claimant may have available to determine whether the claimant is dependent at all, and if so, whether he or she principally dependent.

In my opinion, the result of this comparison is depends on properly determining what support sources should be included in the category of the claimant's self-supporting resources, and secondly by properly comparing the claimant's self-supporting resources to the claimant's other sources of financial and care support.

It is helpful to begin the analysis with a consideration of the seminal case in this area on the meaning of "principally", *Barnard v. Safeco*. In that case the court had to determine whether an elderly mother was principally dependent upon her adult son at the time of an accident for the purposes of deciding whether the insurer would be required to pay a death benefit. The important part of the case for our purposes is the analysis of Mr. Justice O'Driscoll in seeking to determine the meaning of "principally".

He considered and adopted dictionary definitions from The Canadian Law Dictionary, Black's Law Dictionary, and the Oxford English Dictionary. The various synonyms he found included, *"chief", "chiefly", "leading", "most important or considerable", "primary", "highest in rank... character, importance, or degree", "for the most part", "pre-eminently", "especially", "most of all", and "mainly".*

The parties agree, and suffice it to say that these synonyms used to define the meaning of the word "principally", have endured throughout a couple of decades of case law. 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.

Therefore, to decide whether Micah Brisson was principally dependent for financial support or care upon her father at the time of the accident I must determine whether she was chiefly, mainly, or for the most part dependent upon her father.

As I have noted, Justice O'Driscoll's reliance in *Barnard v. Safeco* upon dictionary definitions of the term "principally" as meaning "chiefly, mainly, and for the most part" was approved in subsequent cases to the point that the Court of Appeal found it to be an uncontested legal principle.

In deciding what should be included as part of a claimant's self-supporting resources, I think it equally appropriate to rely upon definitions of the term "self-support", and "self-supporting". Dictionary definitions of these terms include, *"support of oneself or itself without aid or reinforcement"*[8], *"financially self-sufficient (self-sufficient*

[8] Webster's New World Dictionary of the American Language, Encyclopedic Edition

being defined as able to supply one's own needs; independent)"[9], *"the act or capacity for supporting oneself, especially financially, without the help of others"*[10], *"meeting one's needs by one's own efforts or output"*[11]

In my view, these dictionary definitions alone support the conclusion that the support components to be included in the category of the claimant's self-supporting resources should derive from the claimant's own efforts, capacity, or status. The fact that the definitions use phrases such as *"without aid or reinforcement"*, *"without the help of others"*, and *"...by one's own efforts or output"*, logically suggests that support emanating independently of the claimant should not be classified as part of his or her self-supporting resources.

The position of the applicant, Aviva, is that Micah Brisson was not principally dependent upon her father for financial support or care at the time of the accident. Aviva argues that she cannot in law be considered principally dependent unless her father was contributing more than 50% of her financial support and care when compared to all sources of financial support and care available to Micah Brisson. Aviva submits that the proper way to determine whether there is principal dependency is to compare the value assigned to the financial support and care contribution of Martin Brisson to the sum of the financial support and care contribution made by Micah Brisson's mother, Roseanne Burkholder, and the financial support and care contribution Micah Brisson was making herself. In other words, Aviva it submits that the contribution to Micah Brisson's support

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[9] The Oxford Dictionary of Current English, Second Edition
[10] The Free Online Dictionary
[11] Webster's Ninth New Collegiate Dictionary

made by her mother must be considered to be part of Micah Brisson's self- supporting resources.

When the comparison is done in this manner on the agreed proportions for financial support, the result is that Martin Brisson's contribution is only 45% of Micah Brisson's financial support and care, compared to 55% coming from the combination of Roseanne Burkholder's contribution of 35%, and Micah Brisson's own contribution of 20%.

Aviva argues that the result is the same for care. Micah Brisson is not principally dependent upon Martin Brisson for care if the proportions advocated by Aviva are used in the analysis. In that scenario, Martin Brisson's contribution to Micah Brisson's care would be 35%, while the combination of Roseanne Burkholder's contribution of 33% and Micah Brisson's own contribution of 32% would total 65%.

Aviva further submits that even if the same proportions as have been agreed to for financial support are used in the care analysis, as HMQ and Micah Brisson argue are more appropriate, the result is that Martin Brisson is providing only 45% of financial support and care while Roseanne Burkholder and Micah Brisson provided 55% of Micah Brisson's financial support and care.

The position of HMQ and Micah Brisson is that with respect to both financial support and care, once it has been established (and in this case it has been established by agreement) that Martin Brisson is the largest contributor to Micah Brisson's financial support and care, Micah Brisson is principally dependent upon him. HMQ and Micah Brisson submit that to properly apply the criteria established by *Miller v. Safeco* it is not

necessary to make a mathematical comparison of the contribution made by the largest contributor to the total of all other contributions being made to the dependent's care.

HMQ and Micah Brisson submit that the interpretation they put forward is not only dictated by the proper interpretation of the definition section, but it is supported by the fact that it achieves another principle of statutory interpretation in that it produces a result which best suits the legislative objective of the SABS legislation. That objective is that the amendment of the SABS legislation to include dependent relatives as insured persons was intended to broaden, not reduce insurance coverage available to policyholders.[12]

To illustrate the argument I will return to the mathematical analysis that is dictated by the financial support and care proportions agreed to by the parties. HMQ/Micah Brisson submit that if Aviva's approach is correct, there will be many cases like this one where there are two or more significant contributors to financial support and/or care that exceed the claimant's contribution, but no principal supporter. For example, consider a situation where, as here, it is acknowledged that the claimant is not independent and makes a 20% contribution to his or her own financial support and care, that the largest contributors contributed 45% and 35% respectively, but unlike this case, there were insurance policies in place for both contributors. Doing the comparative analysis supported by Aviva would result in neither of the largest contributors being deemed principal when either of their contributions exceeded the claimant's contribution. There would be two insurers involved with policies in favour of a family the parents of which significantly supported the claimant. The parents would have a

[12] See *Miller v. Safeco*

legitimate expectation that the policies would cover the situation, but the policies would not have to respond. It would be necessary to turn to The Motor Vehicle Accident Claims Fund, a governmental payor of last resort, to obtain SABS for the dependent claimant.

HMQ/Micah Brisson submit that this cannot be what the legislature intended by the legislation. HMQ/Micah Brisson argue that interpreting "principally" as meaning the largest contributor when compared to any other single contributor, including the claimant, not only properly applies the "chiefly, mainly, or for the most part" definition of principally as determined by the court, it also best achieves the objective of the legislation.

Aviva's response to the policyholder expectation and legislative intention argument is that the SABS legislation was amended further to add the word "principally" as modifying the word "dependent". It is a principle of statutory interpretation that each word in a statute must be given meaning, and in it is plain and ordinary sense. The addition of the word "principally", given its definition, must be taken to refine or reduce the circumstances in which dependency could be found. Insurers write their policies in the expectation that they will be called upon to pay claims on the basis that the requirement to pay will be determined fairly in accordance with the plain meaning of the legislation. If the proper interpretation of "principally" means that a person is only principally dependent upon the largest contributor to financial support and/or care as compared to a total of all of the other resources available to the claimant, then fairness requires that an insurer should be called upon to pay only in those circumstances.

Aviva submits that there is no indication based on the available case law that there has been a flood of cases resulting in insurers not being found responsible to pay in principally dependent situations, leaving the Motor Vehicle Accident Claims Fund to step in. If the legislature felt it necessary because of this to change the legislation to clearly make it say what HMQ argues then it could have done so by now.

HMQ and Micah Brisson advance an alternative argument in the event that it is found to be appropriate to compare the financial and care contributions made by Martin Brisson to the total contributions of Roseanne Burkholder and Micah Brisson. With respect to the agreed 45%/35%/20% financial support proportions, they argue it is incorrect to add Micah Brisson's full contribution of 20% to Roseanne Burkholder's contribution of 35% when comparing it to Martin Brisson's contribution of 45%. They submit that Micah Brisson was essentially residing in two separate households at the time of the accident. Her parents had never married. They had been separated for many years at the time of the accident, and were married to other people. HMQ and Micah Brisson submit that Micah Brisson's financial support and care contribution should be divided in half and attributed 10% to Martin Brisson's contribution and 10% to Roseanne Burkholder's contribution. If the comparison is done in this way, then Martin Brisson comes out at 55% while the combination of Roseanne Burkholder and Micah Brisson totals only 45%.

The HMQ/Micah Brisson approach would produce the same result for the care dependency analysis even using the Aviva supported 35%/33%/32% proportionate contributions to care. They would have Micah Brisson's 32% contribution divided in half and attributed equally to Martin Brisson and Roseanne Burkholder. Therefore, when

comparing Martin Brisson's contribution to the combined contributions of Roseanne Burkholder and Micah Brisson, Martin Brisson's contribution would be 51% while the total of the Burkholder/Micah Brisson contributions would be only 49%.

Even if I were to find it proper for the principal dependency analysis to add the contributions of any other financial contributors to the claimant's own contribution before comparing it to the contribution made by an alleged principal supporter, I do not agree that the alternative mathematical method proposed by HMQ/Micah Brisson is a calculation that should be done because this is a split family case.

HMQ/Micah Brisson submitted that if Micah Brisson's contribution was not divided as proposed and attributed equally to both parents that her contribution would be counted twice. The rationale for this argument is that since Micah Brisson effectively lived in two separate households, and only one at any given time, her contribution should be split between those households. I think the logic is flawed in that it assumes Micah Brisson can only access a certain portion of her self-supporting resources depending upon where she is living. In this case, the conclusion would have to be that Micah could only access 50% of her own resources while with her father, and 50% while with her mother. In my opinion the self-supporting resources of Micah Brisson were always available to her regardless of the household she was residing in at any particular time. For example, she maintained her part-time job and hence her income whether she was living at her father's home or at her mother's home. The availability of her own resources was not determined by whether she was living with her father or with her mother. What was affected by where she was living was whether she was drawing upon resources provided by her father or by her mother in addition to her own contribution.

Some time was spent in the presentation of the case on behalf of Micah Brisson emphasizing that the analysis of principal dependency for care is not the same as the analysis of financial dependency. It was stressed to me by counsel for Micah Brisson that since care dependency involves evaluating both the quantity and quality of care being provided that I should find on the evidence that the quantity and quality of care being provided by Martin Brisson substantially exceeded the quantity and quality of care being provided by either Roseanne Burkholder or by Micah Brisson herself.

I agree with the position taken by Aviva on this point that by agreeing to a range of proportionate contributions to care the parties must have considered both the quantity and quality of care provided by the contributors in arriving at the percentages in the ranges. Therefore, although I agree that the law requires an analysis of both the quantity and quality of care being provided to evaluate principal dependency, that analysis has already been done in this case and a value attributed to it by the agreement of counsel. The overriding conclusion is that whether one accepts the proportions advocated by Aviva or by HMQ/Micah Brisson, Martin Brisson was the largest contributor to Micah Brisson's care.

I accept the submission of HMQ however, that depending on how I rule on whether it is appropriate to add Roseanne Burkholder's financial and care support contribution to Micah Brisson's self-supporting contribution, it could be relevant to decide whether the proportions advocated by Aviva or the proportions advocated by HMQ/Micah Brisson, or something in between, is most appropriate to determine principal dependency for care.

For the reasons that follow later in this Award, is not necessary for my decision to determine which proposed care contribution range is appropriate. The result is the same in either case. In the event that I am found to be in error with respect to my other conclusions however, I have conducted an analysis of the care contribution issue based on the evidence, and I have made findings with respect to which of the proposed care contribution ranges I view to be the most accurate.

The position advanced by HMQ/Micah Brisson is that one should consider most of Micah Brisson's lifetime in evaluating the quantity and quality of care provided by her parents. They argue that from the time Micah Brisson was about six years old up until her accident at age 16 ½ she was principally dependent upon her father, Martin Brisson, for care. She lived with her father in Cochrane starting in 1999. She saw her mother infrequently after that for quite a while. In 2004 a court order was obtained whereby Micah Brisson's principal residence was with her father. Her mother was given visitation rights twice during the week, every other weekend, two weeks in the summer, and five days over the Christmas holidays.[13]

Although starting at about age 13 Micah Brisson began spending more time with her mother, a development that was supported by her father, HMQ/Micah Brisson argue that this did not change the status quo, and that Martin Brisson was still the principal care provider. They point to the fact that couple of weeks before the accident this status quo was clearly restored when following an argument between Micah and her mother

[13] Exhibit 1, part II, Tab D3, Statement of Martin Brisson, Exhibit 1, Part II, Tab C4, Examination under Oath of Martin Brisson, pages 18, 23.

Micah returned to live at her father's house and was living there at the time of the accident.

Aviva disagrees with this characterization of the situation, and submits that the relevant period of time to consider is the one to two-year period leading up to the accident which occurred when Micah was about 16 ½ years of age[14]. Aviva argues that Micah was coming into her own as a young woman as she entered her teenage years. This is evidenced by the fact that she became much more independent with respect to her living arrangements as she progressed in her early teenage years. By the time she was 15 she effectively moved between her father's home and her mother's home at her discretion. She was spending approximately half of her time at her father's home and half of her time at her mother's home.[15]

Further evidence of Micah coming of age, Aviva argues, is the fact that she began working while still attending high school. In 2009 he was employed at Zavnor Subs and Salads, and Empire Theatres.[16]

As far as Micah's return to her father's home about a week before the accident is concerned, Aviva submits that this was no more than a temporary interruption of what had become Micah's living pattern. Micah and her mother had a disagreement and they both needed some time get over the argument. In fact, this is exactly how Micah's mother describes it in her examination under oath. She stated that she called Martin

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[14] She was born September 29, 1993
[15] Exhibit 1, Part I, Tab C1, page 16
[16] Exhibit 1, Part I, Tab C1, pages 35, 36, 37, 46, 52, 53, 54

Brisson and asked if he would take Micah for the month of March because they both needed some time to "cool down".[17]

Micah Brisson describes the event much like her mother did. On her examination under oath she agreed that the "most likely scenario" would have been that she would move back with her mother after they got over the argument.[18]

If it was necessary for me to do so for my decision on principal dependency for care, I would to be inclined to look at a time period not for the majority of Micah's life, but rather starting when she decided she wanted to spend more time with her mother. Generally speaking, I see the appropriate time period as beginning when Micah starts high school, begins to mature as a young woman, and starts to make more of her own decisions independently of her parents.

Perhaps because she grew up with a split family from a very young age, Micah appears to have understood her situation fairly early on, and considered that she wanted to maintain a relationship with both her parents. Roseanne Burkholder describes in her April 20, 2010 statement[19] that Micah had lived with her until about age 7 when Micah decided that she wanted to live with her father and meet the Brisson family. That is when she moved to Cochrane to live with her father. Roseanne Burkholder goes on to describe that Micah decided to move back with her and began living with Roseanne Burkholder at least 50% of the time about when she was starting high school. This was approximately January 2008. As she puts it, *"We waited till she was 14, she could make her own decisions then. With whom she decided to live."*

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[17] Exhibit 1, Part I, C2, Examination of Roseanne Burkholder, page 64
[18] Exhibit 1, Part I, C1, Examination of Micah Brisson, page 45
[19] Exhibit 1, Part I, D 4

In his examination under oath Martin Brisson confirms the developing transition of Micah Brisson from a child to a young woman who was beginning to think and act more independently. He said *"... The older she got, the more freedom she got, you know what I mean. It's hard to stop a 15-year-old girl."*[20] He was referring to a time that was at least a year to a year and a half before the accident.

In my opinion it is not whether these developments can be said to have clearly taken place only one year before the accident or whether it could be as much as two or more years before the accident that is important. It is the fact that these developments mark, in my view, evidence of the natural growing up process that occurs when a young person begins the life change from a child to a young adult. For this reason I do not think it significant that there was an argument between Micah and her mother a week before the accident and that Micah either decided to return to live with her father for a while or she was forced to do so by her mother. I do not see this as a regression from the progress towards adulthood that Micah had made such that she was going to come under her father's care in a more significant way either quantitatively or qualitatively than she would otherwise have had she remained at her mother's house.

At the age of 16 ½ Micah was past the point of requiring the type of care that a young child would require in attending to her daily needs. She was a healthy young high school student with a part-time job, and no physical or psychological limitations. The care that she would require at this stage would, I suggest, be more akin to social, or emotional support. I do not think the evidence indicates that at this point in her life her father was providing larger amounts of this type of care to her than her mother. The

[20] Exhibit 1, Part II, C4, page 36

main difference between the households seems to have been that Martin Brisson's household was more structured and had more rules than did Roseanne Burkholder's home. Ironically, perhaps this is why Micah wanted to increase the amount of time she was living with her mother since as a young teenager she had more freedom there.

I would not conclude however, that a household with more structure or rules is necessarily providing more care in the social and emotional sense contemplated by the SABS. One could suggest however, that a more structured environment provided more protection for a young, and potentially vulnerable adult like Micah. So in that way, to resolve the issue of whether Martin Brisson or Roseanne Burkholder was providing a larger amount of care, protection would be one area where the evidence suggests Martin Brisson was the largest contributor.

Otherwise however, I have difficulty discerning from the evidence in the time period I consider to be relevant that Martin Brisson was providing significantly more care to Micah than her mother, Roseanne Burkholder. I would say that to the extent the evidence supports such a finding the difference is marginal.

I note that when Roseanne Burkholder was asked this question regarding the year leading up to the accident she responded that she thought she and Martin Brisson were providing equal amounts of care to Micah.[21]

I am of the opinion that Aviva is correct that the proportionate care contributions are much closer together than the financial support contributions. As will become clear from my further reasons it is not necessary for me to decide with percentage precision

[21] Exhibit 1, Part I, Tab C2, page 39

the respective care contribution amounts. For the purposes of my analysis I accept that Aviva's suggested proportions of 35% (Martin Brisson), 33% (Roseanne Burkholder), and 32% (Micah Brisson) are accurate.

I will turn now to consider the meaning of "principal dependency" in light of the cases that have interpreted the term following *Miller v. Safeco, and Barnard v. Safeco*. I will deal with them in chronological order.

The first case is a decision of a FSCO arbitrator, *Najem v. Axa Insurance Co*[22]. As was pointed out by HMQ this case was decided at a time that predated regulation 283/95, when disputes between insurers were handled by FSCO. I do not think anything turns on that. The claimant, Peter Najem, was injured while a passenger in an Axa insured vehicle. His mother was insured with Economical Mutual Insurance Company. His father was deceased. The arbitrator had to determine which of the two insurers had the highest priority to pay SABS. The issue was whether Mr. Najem was principally dependent for financial support on his mother.

One of the issues in the case concerned Orphan Benefits received by Mr. Najem from the Canada Pension Plan and health care benefits received by Mr. Najem from his deceased father's former employer, General Motors. Axa argued that these benefits should be considered to have been received by Mr. Najem as a result of dependency upon his father. Axa, arguing in favour of dependency, wanted the value of these benefits to be added to the financial support contribution being made by his mother as

[22] A-003115, A-003116, July 27, 1993, Arbitrator Mackintosh (*"Najem v. Axa"*)

that would have pushed the value of his mother's contribution to his financial support higher than Mr. Najem's own resources.

The arbitrator declined to add the value of these benefits to his mother's contribution. She reasoned that these benefits did not flow to Mr. Najem from his deceased father's estate. They came to him directly based on his own statutory and contractual entitlement. In addition, she held that the definition of "principal dependency" in section 3 (2) of the SABS where it refers to possible dependency on the insured's spouse did not include a spouse who was deceased.[23]

It is instructive to examine what the arbitrator considered to be Mr. Najem's own financial resources. She includes amongst these employment income he had earned from employment, income from student grants, health care benefits, and income from the Orphan Benefits. The latter two items although not strictly self-generated, accrued to him through statutory or contractual entitlement in his own right as an individual. Money, or the reasonable value of goods and services provided by his mother were considered to be separate, additional financial support received from his mother.

In applying the *Miller v. Safeco* criteria, the arbitrator compared Mr. Najem's financial resources to his expenses, and considered the effect of the financial support contribution being made by his mother. She concluded that Mr. Najem's mother made the largest contribution to his financial support of any individual source when compared to the individual sources comprising his own, self-support as described in the preceding paragraph. When compared as a whole however, Mr. Najem's own total financial

[23] *Najem v. Axa*, paragraphs 41 to 44

resources exceeded both his expenses and his mother's contribution. Thus, although there was some financial dependency on his mother, Mr. Najem was not principally financially dependent because his own, self-supporting resources exceeded the contribution being made by his mother.

Aviva puts this case forward as authority for the proposition that in calculating the claimant's total financial resources, any financial support received by the claimant from other persons (*i.e.* other than the person under consideration as a possible principal supporter), should be added to support sources generated by the claimant or identified specifically with the claimant. Aviva submits further that the case is authority for the proposition that a person can be the largest contributor to a claimant's financial support but is not the principal supporter unless the person's contribution exceeds the total financial resources of the claimant calculated as indicated above.

With respect to the first argument, I do not think that this case stands for the proposition that support received from persons other than the individual under consideration as the possible principal financial supporter should be considered as part of the claimant's personally generated resources. Firstly, based on the arbitrator's own analysis there was no other person making a contribution to Mr. Najem's financial support apart from his mother. In determining Mr. Najem's personal financial resources, the arbitrator added his employment income, income from his student grants, health care benefits, and income from his Orphan Benefits all of which she specifically determined accrued to him personally and were not connected with another person. She then compared that total to the mother's contribution. The resources she classified as Mr. Najem's personal resources were being generated by him or he was entitled to

receive them in his own right as an individual. They did not derive from another person (or another person's spouse).

In my opinion what the arbitrator did in this case is exactly what is called for by *Miller v. Safeco* in deciding whether a claimant has the ability to be self-supporting. The critical part of the decision is that the arbitrator determined the claimant had sufficient personal resources to satisfy the majority of his expenses quite apart from the financial support contribution being made by his mother. Once that determination is made, then although there can be some dependency, the dependency is not principal because the claimant does not depend on the financial support contribution to satisfy the majority of his expenses. In this respect the decision is also consistent with the later Superior Court decision in *Liberty v. Federation*.[24]

As far as the second argument is concerned, only in a limited sense does *Najem v. Axa* support the conclusion that being the largest, single source of support does not necessarily make one the principal supporter. In making that comment the arbitrator was comparing the value of the mother's contribution to the individual components that comprised the total of Mr. Nadem's self-supporting resources. The mother's contribution exceeded any one of those individual components, but when those components were added together and their total treated as Mr. Najem's self-supporting resources, they exceeded the financial support contribution received from the largest, single contributor, his mother.

[24] See the discussion of this case at pages 31 – 35 of this Award

The second case to consider is another decision of a FSCO arbitrator, *Hau* v. *State Farm Mutual Automobile Insurance Company.*[25] This case involved a SABS application for death benefits by the father of the university student killed in an accident. To be entitled to recover the death benefit the deceased father had to prove that his son was principally dependent for financial support on him or his spouse at the time of the accident.

The arbitrator describes the law applicable to the principal dependency test to be as follows:

> ... For an individual to be found dependent he must chiefly or for the most part derive his financial support from another person. In other words, an applicant must be more financially dependent on the other person (and/or his or her spouse) than on any other source, including himself. Consequently, in order for Mr. Hau to recover a death benefit, he must establish that Derek was more dependent on him than on any other sources combined, including Mrs. Hau; as she and Mr. Hau were no longer spouses at the time of the accident, Mr. Hau gets no credit for any reliance that Derek had upon his mother. Quite the opposite: Derek's reliance upon Mrs. Hau is one of many other sources of support which must be added together to determine how they compare to the support given by Mr. Hau.[26]

The arbitrator goes on to say that Mr. and Mrs. Hau split all expenses equally, suggesting that Derek was equally dependant on each of his parents, so he could not be principally dependent upon his father. Apart from the arbitrator's conclusion that the claimant's parents contributed equally to their son's expenses, the quantum of the

[25] A-97-001159, August 4, 1998, Arbitrator Baltman (*"Hau v. State Farm"*)
[26] *Hau v. State Farm*, paras. 28, 29

father's contribution to the expenses is not specifically identified in the body of the decision. She notes that Derek earned $8,674.84 in the summer before the accident. The arbitrator concludes on this point by stating that *"Mr. Hau has still not demonstrated that Derek depended more on him than on Mrs. Hau and/**or** his employment income."*[27]

Once again, Aviva submits this case is authority for the proposition that in determining whether principal dependency exists one must treat as part of the claimant's personal resources any support contribution received from another person, apart from the person under consideration as the principal supporter. If the contribution made by the alleged principal supporter does not exceed the sum of the claimant's personal resources so calculated, then the claimant cannot be principally dependent upon the alleged principal supporter.

HMQ/Micah Brisson submit that if the arbitrator's analysis as characterized by Aviva is accurate, then the purported statement of law is *obiter dicta.* They also submit that the analysis of the issue by the arbitrator must be considered in the circumstances under which the claim for death benefits was being advanced by the father.

With respect to the first argument, HMQ/Micah Brisson point out that the arbitrator concluded the father was precluded from arbitration because he failed to comply with the SABS time periods for making the application for death benefits. Having come to that conclusion, as the arbitrator herself points out, it was unnecessary for the decision to consider any remaining issues including principal dependency.

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[27] *Hau v. State Farm,* paragraph 30, my emphasis

HMQ/Micah Brisson further submit that in all likelihood the arbitrator was influenced in coming to the conclusion that she did in her dependency analysis by the fact that a death benefit had already been paid to Mrs. Hau under a separate insurance policy. It is suggested that she was probably influenced in her analysis by not wanting to allow double recovery for the death benefit. This latter point involves much speculation so I do not rely on that to distinguish the decision.

I agree with the HMQ/Micah Brisson submission that the arbitrator's analysis on principal dependency was *obiter*. I also agree with Aviva's responding argument that the arbitrator nevertheless gave a considered analysis of the issue. In fact, she noted that she was doing so in case she was in error with respect to her conclusion that Mr. Hau was out of time to pursue his claim for the death benefit.

Although the arbitrator's comments were technically *obiter*, I do not think they can be dismissed as having no weight. I propose to address them on the merits as if they were not *obiter*.

In my view one must look carefully at the arbitrator's analysis in coming to any conclusions as to how it should be interpreted. The arbitrator's analysis on the principal dependency issue is open to a couple of interpretations. On one interpretation it goes no further than concluding that the claimant's father, as the person who was attempting to establish himself as the principal supporter, was unsuccessful in demonstrating that his contribution exceeded that of his deceased son based on the son's employment income, without considering his mother's contribution. This is one way that the arbitrator's use of the words "and/or" in her paragraph 30 conclusion can be viewed.

The arbitrator's analysis and her use of the "and/or" wording can also be interpreted to indicate that one should make a support contribution comparison on a one to one basis, first between the parents themselves as independent sources of support, and secondly between Mr. Hau the possible principal supporter, and the claimant. As between the parents, the arbitrator concluded that Mr. Hau and his ex-wife contributed equally to the support of their son, and thus it cannot be said that Mr. Hau was the principal supporter of his son on that basis. As between Mr. Hau and his son, the arbitrator concluded that Mr. Hau had not proven he was contributing a larger amount of support than the claimant was providing for himself through his own income, so Mr. Hau could not be said to be the principal supporter on that basis either.

When viewed this way, I would suggest that the arbitrator's approach is consistent with what is called for by *Miller v. Safeco,* and *Liberty v. Federation*.

I will concede that there is some language in the arbitrator's analysis that could be interpreted as endorsing the approach of treating support contributions received from persons other than the alleged principal supporter as part of the claimant's personal resources, when making the comparison between the principal supporter's contribution and the claimant's personal resources.

As I have previously cited, at paragraph 29 of her analysis the arbitrator states, "*... In order for Mr. Hau to recover a death benefit, he must establish that Derek was more dependent on him than on any other sources combined, including Mrs. Hau... Derek's reliance upon Mrs. Hau is one of many other sources of support which must be added together to determine how they compare to the support given by Mr. Hau".*

I acknowledge that It is also possible to interpret the arbitrator's "and/or" wording discussed above to require adding Derek's own resources with his mother's support contribution to compare it to the support contribution made by his father.

The one to one type of comparison that is open from the arbitrator's analysis as I have discussed it on page 29, and most of page 30 is, in my opinion, consistent with the principal support analysis mandated by *Miller v. Safeco* and *Liberty v. Federation.* It is also consistent with dictionary definitions of what is meant by self-supporting, which is to provide for one's own needs without the aid of others.

In my opinion, including support received from another person or persons as part of the claimant's personal resources for the purposes of determining whether the claimant is self-supporting or whether he or she is principally dependent upon a different source outside his or her own resources is not consistent with the definition of self-supporting. It goes much further than the approach approved by the courts.

That interpretation may be available based on the arbitrator's analysis, but I would decline to follow that approach. While the arbitrator's analysis must be accorded some weight, nevertheless it was *obiter,* and as all parties acknowledge, *Hau* v. *State Farm* is not binding upon me in any event.

Private arbitrator Lee Samis considered the meaning of principal dependency, in *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company.*[28] The case arose as a dispute between insurers as to which of them had the highest priority to pay SABS to the claimant, Jonathan Sebastian. Priority turned on whether Mr.

[28] Award May 7, 1999 ("*Federation v. Liberty*"), which on appeal became *Liberty v. Federation*

Sebastian was principally dependent for financial support on his parents at the time of the accident. The parties agreed that there was some dependency on the parents. The question was whether it amounted to principal dependency.

Arbitrator Samis recognizes that the criteria in *Miller v. Safeco* set out the relevant test for determining dependency. In determining Mr. Sebastian's self-supporting resources, the analysis undertaken by the arbitrator focuses not just on what the claimant was actually producing as self-support, but also on whether the claimant was reasonably exercising his capacity to provide for his own needs. He states as follows:

> In my view it is not appropriate to look at bare capacity to evaluate dependency. If the individual alleged to be dependent is reasonably exercising his or her capacity by providing for his or her own needs to the extent permitted by the circumstances, then it is reasonable to regard the earnings as the amount that the person can contribute to his or her own expenses of living.[29]

The arbitrator notes that dependency implies more than receipt of a financial benefit. It requires some kind of need on the part of the person alleged to be a dependent.

In this case the arbitrator noted that Mr. Sebastian earned $5,700 in the 19 weeks before the accident. He was performing household chores. His parents provided him with free room and board and some spending money. His parents also purchased minor clothing items. The arbitrator concluded that Mr. Sebastian earned a significant

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[29] *Federation v. Liberty*, page 4

income that he was allowed to spend at his discretion. He was not required to provide for any of his own basic needs, however; he had the reasonable ability to do so.

Since the parties had agreed that Mr. Sebastian did have some dependency on his parents, the arbitrator said that the problem posed *"... is more difficult than simply measuring the cost of Jonathan's needs and comparing that to his own resources. Even if Jonathan was unable to meet the basic costs, this would not render him "principally" dependent on someone else. He only becomes "principally" dependent on another when that other person provides for most of his needs.*[30]

The arbitrator concluded his comments on principal dependency by saying, *"... Jonathan can only be considered principally dependent for financial support on someone else if the cost of meeting Jonathan's needs is more than twice Jonathan's resources."*[31]

Arbitrator Samis concluded that Mr. Sebastian was a young, able-bodied man, regularly employed earning $300 per week. He supported no family. On these facts he could not find that Mr. Sebastian was principally dependent for financial support on his parents.

The arbitrator's decision was appealed first to the Superior Court and then to the Court of Appeal. Mr. Justice O'Leary of the Superior Court considered the arbitrator's legal analysis. In interpreting arbitrator Samis' comment that Jonathan could only be considered principally dependent for financial support on someone else if the cost of

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[30] *Federation v. Liberty*, page 5.
[31] *Federation v. Liberty,* page 5

meeting his needs was more than twice his resources, Justice O'Leary said the following:

> I understand him to be saying that if Jonathan's resources were sufficient to pay for 51% of his financial needs, then he would not be dependent on others. That in my view is a correct statement. In concluding that Jonathan was not principally dependent on others the arbitrator looked at his gross earnings of $300 per week over the 19 weeks prior to the accident, the 19 week period when he had become employed on a full-time basis and concluded that he was not principally dependent on his parents. It is implicit in that finding if indeed it is not explicit in his full reasons, that out of gross earnings of $300 a week Jonathan was able to provide for at least 51% of his financial needs.

The decision was appealed to the Ontario Court of Appeal. While the court did not specifically analyze the arbitrator's decision, nor Justice O'Leary's interpretation of it, the Court of Appeal upheld the arbitrator and Justice O'Leary by commenting that the arbitrator had followed the principles set out in *Miller v. Safeco.* It is important to take note of the following paragraph in the court's decision: "*There is nothing in the language of the present legislation that would dictate a different approach* (other than *Miller v. Safeco*) *to measuring of dependency*"[32]

In my view *Liberty v. Federation* confirms the approach I endorse as appropriate to properly apply the law of principal dependency in this case. The claimant's self-supporting resources were considered by both the arbitrator and Justice O'Leary to be the claimant's employment income, and his reasonable capacity to earn. In determining what the claimant's financial resources were, the focus was on what he was doing for

[32] [2000] O.J. No. 1234 (Ont. C.A.)

himself, or what he was reasonably capable of doing for himself. This is consistent with the definition of "self-supporting" as meaning to be able to provide for one's own needs through one's own efforts or output. These self-supporting resources were compared to the financial support the claimant was receiving from an outside source, his parents. Both the arbitrator and Justice O'Leary determined that while the claimant was partly dependent upon his parents, he was able to provide for the majority of his financial needs, and therefore he could not be principally dependent upon his parents.

Arbitrator Samis once again had to deal with a principal dependency issue in *Cooperators v. Halifax*. The SABS claimant, Sherri Pallister advanced a claim for SABS to the Cooperators, the insurer of her mother, Debbie Pallister. Sherri Pallister was a passenger in a vehicle insured by Halifax. At the time of the accident Sherri Pallister was 22 years old and resided with her mother. In the year or so leading up to the accident she was employed as a waitress at one restaurant, and in the few weeks before the accident she had additional employment on a part-time basis at another restaurant. The Cooperators calculated her entitlement to income replacement benefits (at 80% of her net income) at $192.62 per week.

Arbitrator Samis made the following statements about the law of principal dependency[33]:

> It is also worthy of note that the definition requires a dependency to be a "principal" dependency resulting in the determination that a person is only a dependant if they are "chiefly" or "for the most part" dependant on the other person. Mathematically, this suggests that the

[33] *Cooperators v. Halifax,* pages 7, 8, my emphasis

> person's reliance on the other person must be for more than 50% of their need in a two-person relationship.
>
> ...we are obliged to examine Sherri Pallister's ability to be "self-supporting" at the time of the accident. In fact, given the current definition which requires principal dependency, the question to be answered is whether or not Sherri Pallister had the ability to be self-supporting by providing for her own needs, more than such provision was required from any other source.
>
> ...it is appropriate to measure dependency by examining the individual's capacity to provide for their own needs. In a financial context, it is necessary to look at the individual's capacity to generate an income...the financial dependency test requires us to form some understanding about the person's basic needs for food, shelter and other necessities of life.

The arbitrator concluded that Sherri Pallister was not principally dependent upon her mother. He reasoned as follows:[34]

> While she certainly derived a benefit from being in the household with the rest of her family, she had the income and the income earning ability to live away from her family at any point. I certainly cannot conclude that she was principally dependent on her mother, as that would entail a finding that her mother's support was more significant than the financial resources that she could bring to bear to support herself.
>
> Whether one measures Sherri's actual earnings or whether one looks at her more significant ability to earn, she is clearly capable of providing chiefly for her own needs and was therefore not a dependent of her mother at the time of the accident.

[34] *Cooperators v. Halifax*, page 10, my emphasis

In my opinion this decision of arbitrator Samis follows and reinforces the Superior Court's analysis of his earlier decision in *Liberty v. Federation*. The essence of his conclusion is that Sherri Pallister was not principally dependent because she had the capacity to provide for more than 50% of her own needs through her own efforts.

Arbitrator Samis makes reference to a "two person relationship". In this reference arbitrator Samis seems to clarify his comments in *Federation v. Liberty* about the mathematical implications of the principal dependency test. He explains that dependency only becomes principal dependency if the dependent is chiefly or for the most part dependent on another person. In a two person relationship this means that the other person must be providing support for more than 50% of the claimant's needs. In my view this analysis supports the argument that the proper comparison to be made for the principal dependency analysis requires comparing the claimant's self-supporting resources to any independent sources of support one at a time to see which is largest.

The *Liberty v. Federation*, and *Cooperators v. Halifax* cases support a principal dependency analysis that focuses on a comparison between the claimant's reasonable capacity or ability to support himself or herself through his or her own efforts, contrasted individually with support the claimant is receiving from independent sources.

In my opinion this approach is consistent with including in what are considered to be the claimant's self-supporting resources such things as the claimant's income, their reasonable ability to earn an income, benefits that may accrue to the claimant through statutory or contractual rights, or any other resources that are generated by the claimant's own efforts or status. Support received from another person is not, I suggest,

what is contemplated by the principal dependency analysis of these cases as something that should be included in the claimant's self-supporting resources. In fact, these cases suggest that support received from another person is to be measured against the claimant's self-supporting resources (the total of the components such as I have described) on a one to one basis, to determine principal dependency.

The last case I will refer to in my review of the law on the interpretation of the meaning of principally dependent is the decision of private arbitrator Jones in *Economical Mutual Insurance Company v. Insurance Corporation of British Columbia.*[35] At the time of the accident the SABS applicant James Brown was a passenger in a vehicle insured by Mr. Brown's stepmother (spouse of his father) with Economical Mutual. He applied to Economical for SABS. Economical disputed its priority arguing that Mr. Brown was principally dependent for financial support on his mother, who was insured by ICBC, and not on his father (spouse of their insured, the stepmother). Mr. Brown received a support contribution from his father, and a separate support contribution from his mother. The issue was upon whom, if anyone was Mr. Brown principally dependent for financial support?

Arbitrator Jones found that Mr. Brown's self-supporting resources (consisting of income he earned) were less than 50% of the amount he required to support himself. He also found however, that Mr. Brown's self-supporting resources exceeded either the support contribution he received from his father or the support contribution he received from his mother. The arbitrator concluded that since Mr. Brown's income alone was

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[35] Arbitrator Jones, Award, February 25, 2002, ("*Economical v. ICBC*")

greater than the contribution made by either of his parents individually he was not principally dependent on either of them for financial support.

In coming to his decision arbitrator Jones considered the *Liberty v. Federation* decision. He states that Justice O'Leary's interpretation of arbitrator Samis' analysis that if a claimant is capable of providing for 51% of his financial needs then he is not principally dependent on others, was a view upheld by the Court of Appeal.

Arbitrator Jones also reviews the decisions of the FSCO arbitrators in *Hau v State Farm* and *Najem v. Axa*. He agreed with the *Hau v. State Farm* approach that in the case of divorced parents the support given to the claimant by one parent cannot be added to the support being given by the other parent to establish financial dependency on one parent. They should be treated as independent sources for the purposes of the comparison. It will be remembered that in *Hau v. State Farm*, Mr. Hau was seeking to add the value of his divorced wife's support of their deceased son to his own contribution to demonstrate dependency on the part of the deceased son.

Arbitrator Jones then discussed the suggestion in *Hau* v. *State Farm* and *Najem v. Axa*[36] that the support contribution made by one divorced spouse should be added to the claimant's self-supporting contribution before comparing it to the other divorced spouse's contribution.

Arbitrator Jones does not find it necessary to follow what he terms the "broad approach" that the *Hau v. State Farm* and *Najem v. Axa* decisions might seem to support. He distinguishes the facts of those cases from his by noting that in his case the

[36] In my opinion *Najem v. Axa* does not support this suggestion

claimant's own financial contribution was larger than the financial contribution he received from either parent, so there could not be any principal dependency on others.

While I agree with arbitrator Jones' conclusion, I am not sure that this is a clear factual distinction between *Economical v. ICBC* on the one hand and *Hau v. State Farm* and *Najem v. Axa* on the other. In *Najem v. Axa* the arbitrator concluded that the claimant's self-supporting resources exceeded the value of any other individual source of support. The same conclusion is open on the findings of the arbitrator in *Hau v. State Farm*.

I think the important point of distinction is that both *Hau v. State Farm*, and *Najem v. Axa* preceded the decisions of the Superior Court and Court of Appeal in *Liberty v. Federation*, which dealt with the proper application of the dependency principles in *Miller v. Safeco.* The arbitrators in those arbitration decisions did not have the benefit of the courts' analysis in the *Liberty v. Federation* case.

There nothing in either *Miller v. Safeco* or *Liberty v. Federation* to support the argument that a claimant's self-supporting resources should be determined by including sources of support that are not generated by the claimant or do not accrue to the claimant as a result of the claimant's individual status. In fact, a careful examination of the focus of the decision makers' analysis, particularly in *Liberty v. Federation,* indicates that the opposite is true. They look at the claimant's actual earnings and reasonable ability to earn in determining the claimant's self-supporting resources.

There is also nothing in the law as stated in *Miller v.* Safeco and *Liberty v. Federation* that requires only one source independent of the claimant's self-supporting

resources provide more than 50% of the claimant's support for the claimant to be chiefly, mainly, or for the most part reliant on that source. In my opinion this is a logical *non sequitur* from Justice O'Leary's analysis in *Liberty v. Federation*.

It must be remembered that Justice O'Leary was dealing with comparing the claimant's self-supporting resources to one other independent source of support. It was on those facts that he said principal dependency does not exist if the claimant's self-supporting resources are sufficient to meet more than 50% of the claimant's needs. Assuming that 100% of the claimant's needs were being met by the total of the claimant's self-supporting resources, and the contribution being made by the one independent source, mathematically this simply means that the claimant would have to be contributing more than 50% of his or her needs, and the independent source would be contributing less than 50% of the needs. As arbitrator Samis points out in *Cooperators v. Halifax*, this is how the math applies in a two person relationship.

The corollary of this is not however, that principal dependency can only exist where one source of independent support provides more than 50% of the claimant's needs. In my opinion, principal dependency exists where the claimant is chiefly, mainly, or for the most part (i.e. more) dependent on one, independent source of support, than he or she is on their self-supporting resources, and on any other single independent source of support.

The claimant can have any number of independent support sources which when combined with the claimant's self-supporting resources provide for 100% of the claimants needs. If one of these independent sources is the largest contributor to the

claimant's support, then by definition that source is the principal supporter. The value of the principal supporter's contribution does not have to be greater than 50% of the claimant's needs, it only has to exceed the value of any other independent support contribution, and exceed the value of the claimant's self-support for the claimant to be chiefly, mainly, and for the most part dependent on that source.

In summary then, in my opinion the proper way to apply the *Miller v. Safeco* criteria as interpreted in the subsequent court decisions of *Barnard v. Safeco,* and *Liberty v. Federation* to the question of principal dependency for financial support or care requires the decision maker to do the following:

- Determine the amount of the claimant's dependency by examining a sufficient length of time in the claimant's life leading up to the accident that a consistent and reliable picture of the amount and duration of the claimant's financial and care needs can be ascertained

- Determine what the needs of the claimant are with respect to such requirements as food, clothing, shelter, the basic necessities of life, social, emotional, physical, and protection needs. In making this determination one must distinguish between the claimant's needs, and enhancements to the claimant's lifestyle provided either by the claimant or through other support sources

- Determine whether the claimant is providing for or reasonably has the capacity to provide for 51% of the claimant's financial and care needs. If so, there can be no principal dependency. If not, determine whether there is an independent source of support that is greater than any other independent source of support, and is

also greater than the value of the claimant's self-supporting resources. If so, the claimant is principally dependent upon that source.

I have set out below the results that this analysis will produce on the principal dependency issue:

1) Claimant's self-supporting resources > 50% of claimant's needs

   Result – no principal dependency

2) Claimant's self-supporting resources < 50% of claimant's needs, but claimant's self-supporting resources > any person's support contribution when compared on a one to one basis

   Result – no principal dependency[37]

3) Claimant's self-supporting resources < 50% of claimant's needs, and one person's support contribution > claimant's self-supporting resources, and any other person's support contribution when compared on a one to one basis

   Result – principal dependency on the largest support contributor

4) Claimant's self-supporting resources < 50% of claimant's needs. Each support contribution of other persons > claimant's self-supporting resources, but equal to each other

   Result – principal dependency*

[37] This is the *Economical v. ICBC* case

*I have put an asterisk on this result because the conclusion of principal dependency may not be so clear in this case. The case law suggests that there can be principal dependency on only one source at a time.[38] Although I think it would be rare that the contributions of even two supporters for both financial support and care would be found to be exactly equal (*Hau v. State Farm* notwithstanding), I will suggest what I believe to be a more reasonable way to resolve this situation than to find no principal dependency. Where the equal contributors are insured, and their contributions each exceed the claimant's financial resources, I suggest that they both be deemed principal supporters for the purposes of applying the "Choice of Insurer" provisions in subsection 268 (5.1) and (5.2) of the *Insurance Act* to determine which insurer should pay SABS. I recognize that this analysis is not essential to my decision since based on the agreed facts submitted to me by the parties it is not necessary for me to consider a situation where there are exactly equal support contributors whose contributions exceed the claimant's self-supporting resources. I offer it however, because in my view it would accord with the objectives of the SABS legislation.

I will now apply my reasoning to the evidence in this case. By agreement the parties stipulated that Micah Brisson was able to contribute only 20% to her own financial needs and a range of 20% to 32% of her own care needs. Since she could not meet 51% of her financial and care needs from her own resources, Micah Brisson was dependent on both her parents for financial support and care. With a 45% contribution to Micah Brisson's financial support, and either a 45% or 35% contribution to her care,

[38] See *Szpotek (Litigation Guardian of) v. Cooperators General Insurance Company* [1996], O.J. No. 224 (Ont. Ct. Gen. Div,)

Martin Brisson was making the largest contribution to both financial and care support when compared separately to his wife, Roseanne Burkholder, and Micah herself.

These facts fit into the third of the four scenarios I have outlined (see page 43). Therefore, I conclude that at the time of her accident Micah Brisson was receiving her financial support and care chiefly, mainly and for the most part from her father, and thus was principally dependent upon her father, Martin Brisson for both financial support and care.

Conclusion

1. At the time of her accident, Micah Brisson was principally dependent for financial support and care upon her father, Martin Brisson

2. Aviva is liable to pay SABS to Micah Brisson.

3. The costs of the arbitration, including the arbitrator's fees and disbursements are recoverable by the successful parties from the unsuccessful party or parties. If counsel are unable to resolve the costs issue I invite them to contact my Coordinator to schedule a post-arbitration conference to discuss the issue, and if necessary, make arrangements to have the costs issue determined.

January 29, 2013

Arbitrator Scott W. Densem