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:

INTACT INSURANCE COMPANY

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE ON BEHALF OF THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondent

AWARD

Heard: July 12, 2012

Counsel:

Michael Hochberg for the Applicant

Janis Criger for the Respondent

SCOTT W DENSEM: ARBITRATOR

Introduction

This is a priority dispute arbitration arising out of a November 22, 2009 accident. The SABS[1] claimant, Benjamin Park was a pedestrian when struck by an automobile that was uninsured. The applicant ("Intact") insured Mr. Park's father, Young-Dae Park. An application was made to Intact for SABS. Intact paid SABS to Benjamin Park. Benjamin Park was 23 years old the time of the accident, having been born June 9, 1986. He currently resides at 83 Harbour Street, Toronto. At the time of the accident he was living at his parents' home at 227 Québec Avenue, Toronto.

In this priority dispute arbitration Intact seeks to transfer responsibility for the payment of SABS to the respondent ("HMQ"). To qualify for the payment of SABS under the Intact policy Benjamin Park must be an "insured person" as defined in the SABS regulation. Section 2 (1) provides as follows:

> 2 (1) "insured person", in respect of a particular motor vehicle liability policy means,
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> (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant...
> (i) is involved in an accident in or outside Ontario...

It is common ground that Benjamin Park was not the named insured on the Intact policy, nor was he a specified driver. Therefore, to qualify as an "insured person", Benjamin Park must be a dependant of his father, Young-Dae Park, the named insured

[1] I use this term interchangeably in my Award for ease of reference to describe both the Statutory Accident Benefits Schedule to the *Insurance Act*, as well as the benefits paid thereunder.

on the Intact policy, or on his mother, the spouse of the named insured.[2] Section 2 (6) of the SABS provides as follows:

> 2 (6) for the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse.

If Benjamin Park was not principally dependent for financial support or care on his parents, Intact is not the priority insurer pursuant to section 268 of the *Insurance Act*, and HMQ is responsible for the payment of SABS to Benjamin Park.

Issue

Was Benjamin Park principally dependent for financial support or care on his parents at the time of the November 22, 2009 accident?

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.*[3] 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.*"

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[2] The evidence is clear that Benjamin Park was living with both his father and his mother at the time of the accident. My analysis therefore will consider financial and care support provided by both Benjamin Park's father and mother as a single, indivisible source of support to him.

[3] Private Arbitrator Samis, November 10, 2007 ("Dominion v. MVACF")

I agree with that approach. I do not think that either Intact or HMQ 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 Intact or HMQ must prove principal dependency or the lack thereof on a balance of probabilities. I approach it as if Benjamin Park 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 Evidence

Six documents were entered into evidence at the arbitration hearing. There was no *viva voce* evidence taken. The list of exhibits is as follows:

Exhibit 1: Transcript of the Examination under Oath of Benjamin Park, September 20, 2011.

Exhibit 2: Transcript of The Examination under Oath of Young-Dae Park, September 20, 2011.

Exhibit 3: June 28, 2010 letter from Intact to Benjamin Park.

Exhibit 4: September 24, 2010 letter from Miller Thomson LLP to Janis Criger, Barrister and Solicitor.

Exhibit 5: 2007 Income Tax Return of Benjamin Park.

Exhibit 6: 2008 Income Tax Return of Benjamin Park.

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*[4]. 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 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*[5] 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

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[4] (1985) 50 O.R. (2d) 797 (*"Miller v. Safeco"*)
[5] (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"*)

age and physical or mental condition of the dependent must also be considered in the context of the need for care.[6]

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*[7] 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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[6] *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"*)

[7] [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.[8]

Arbitrator Jones referred to this approach with approval in dealing with an issue of principal dependency for care in *Wawanesa v. Underwriters*[9]

The important aspects of the dependency analysis for the issue before me involve determining whether Benjamin Park was "principally" dependent on his parents, and the extent to which he had the ability to be self-supporting.

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".*

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*

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[8] *Weiler v. Personal*, at page 6.
[9] March, 2004.

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 last factor in the dependency analysis approved of by the Court of Appeal in *Miller v. Safeco* is critical to the principal dependency analysis in this case. 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.

Arbitrator Lee Samis considered the meaning of principal dependency, in *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company.*[10] The facts in that case are not unlike those in the case before me. 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. 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

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

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.[11]

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 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"*

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

dependent on someone else. He only becomes "principally" dependent on another when that other person provides for most of his needs.[12]

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."*[13]

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 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

[12] *Federation v. Liberty*, page 5.
[13] *Federation v. Liberty,* page 5

> 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*"[14]

Arbitrator Samis once again had to deal with a principal dependency issue in *Cooperators v. Halifax*.[15] 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.

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[14] [2000] O.J. No. 1234 (Ont. C.A.)
[15] *Cooperators v. The Halifax Insurance Company,* Arbitrator Lee Samis, December 14, 2001 ("*Cooperators v. Halifax*").

Arbitrator Samis made the following statements about the law of principal dependency[16]:

> 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 person's reliance on the other person must be for more than 50% of their need in a two-person relationship.
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> ...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.
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> ...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:[17]

> 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

[16] *Cooperators v. Halifax*, pages 7, 8, my emphasis
[17] *Cooperators v. Halifax*, page 10, my emphasis

> than the financial resources that she could bring to bear to support herself.
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> 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.

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.

I will now apply the law as I have stated it to the facts of this case. I will begin first with the issue of principal financial dependency. As the case law directs, an arbitrator deciding an issue of principal dependency must choose a period of time leading up to the accident that fairly represents the SABS claimant's status at the time of the accident. It is not appropriate to consider the circumstances as they were solely at the time of the accident since that would provide only a "snapshot" of the claimant's life. The arbitrator must examine a sufficiently long time period so that it provides a stable reflection of the claimant's financial and care status.

In this case, I am of the view that the key piece of evidence in determining an appropriate time period to examine is the point at which Benjamin Park obtained full-time employment. This occurred just over one year before the accident. He was 22 years of age at that time. In October, 2008 Benjamin Park was appointed the Account Manager of the Financial Leasing and Credit Division for Enwise Power Solutions. In the four years prior to this Benjamin Park had been attending the University of Guelph. He

graduated from the University of Guelph in 2008 with a Bachelor of Arts Degree in Sociology.[18]

In the year leading up to the accident Benjamin Park remained employed full-time, 40 hours per week with Enwise Power Solutions. This was a permanent position.[19] During this year important changes occurred in Benjamin Park's circumstances. Although he continued to live at home with his parents, after he became employed full-time there was a discussion about him paying rent. This had not actually occurred by the time the accident happened, but it is noteworthy that not long after the accident Benjamin Park began giving his father money to repay his parents for their support over the years. He estimated that he had given his father between $4,000.00 and $5,000.00 in just less than the two years from the time he moved out of the house shortly after the accident in November 2009, and his examination under oath in September, 2011.[20]

When the accident occurred, Benjamin Park was in the process of arranging to move out of his parents' home to his own premises. This process had been ongoing for two or three months before the accident.

Therefore, I am of the opinion that the approximate 13 month time period leading up to the accident is the appropriate time period to consider for the purposes of the principal financial and care dependency analysis.

The next question to consider for the purposes of the financial dependency analysis is whether Benjamin Park was capable of providing for at least 50% of his own

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[18] Exhibit 1, Examination under Oath of Benjamin Park, Q. 19 – 23, Q. 114 – Q. 123 ("EUO Benjamin Park").
[19] EUO Benjamin Park, Q. 24 – Q. 31.
[20] EUO Benjamin Park, Q. 33 – Q. 34, Q. 170 – Q. 176.

financial needs in the 13 months leading up to the accident. The corollary of this is to ask, was Benjamin Park dependent upon his parents for more than 50% of his financial needs in the 13 months leading up to the accident?

The two important factors to consider in answering this question are, what were Benjamin Park's means of self-support, and what were his needs? As far as his means of self-support are concerned, Benjamin Park had been employed full-time for over a year at the time of the accident. The evidence he gave on his examination under oath was that he was being paid $15.00 per hour for every hour that he worked. Typically he worked 40 hours per week from 9:00 a.m. until 5:00 p.m. He agreed that he had been earning an income of approximately $600.00 per week since October, 2008. On an annual basis this works out to a gross income of $31,200.00 per year. On top of this amount he stated that he was paid commission. This began about two months after the start of his full-time position in October 2008. Other than the fact that this was paid on top of his salary, no amount was identified for commission earnings.[21]

No documentary evidence was introduced that exactly confirms Benjamin Park's examination under oath testimony with respect to how much money he was earning through his employment with Enwise Power Solutions. His income tax returns for the years 2007 and 2008 are Exhibits 5 and 6. The 2007 income tax return is not very helpful as he was not yet a full-time employee of Enwise Power Solutions. The 2008 income tax return would only include a maximum of 3 months full-time employment income. He testified on his examination under oath that while he was attending the

[21] EUO Benjamin Park, Q. 38 – Q. 43, Q. 95

University of Guelph he worked as a lifeguard. He worked full time hours in the summer months.

One could try to approximate his earnings from Enwise Power Solutions in 2008 after he started working full-time in October by comparing the amount on his 2008 income tax return with his evidence concerning his hourly rate of pay and regular hours worked, and taking into account what he earned from his summer employment as a lifeguard. According to his 2008 income tax return he had T-4 income of $11,332.00. Accepting his evidence that he was earning approximately $600.00 per week from his job at Enwise Power Solutions, a pro-rated monthly income amount would be $2,598.00 ($600.00 per week X 4.33 weeks). Therefore over three months he would earn approximately $7,794.00.[22]

This would mean that he would have had to have earned approximately $3,538.00 working full-time hours in the summer of 2008 as a lifeguard, to total $11,332.00 in T-4 income. Estimated earnings in that range for a full-time summer job are, in my experience, achievable.

I have done this analysis only to demonstrate that the evidence given by Benjamin Park about his earnings from Enwise Power Solutions after he commenced working full-time in October 2008 is consistent with other evidence in the case. I appreciate however, that it does involve some speculation, and there is a lack of evidence about his earnings from his summer employment as a lifeguard.

[22] This analysis does not take into account any commission Benjamin Park might have earned.

So there is no doubt on the issue, I want to be clear that I am not relying on this analysis for my findings with respect to Benjamin Park's earnings at the time of the accident. I accept without qualification, Benjamin Park's testimony from his examination under oath that he was earning approximately $600.00 per week from his full-time employment at Enwise Power Solutions from October 2008 right up until the time of the accident. The evidence was not directly challenged either during his examination under oath or at the arbitration hearing. I am not aware of any reason why Benjamin Park would be motivated to give false evidence on this issue. My impression of his examination under oath evidence as a whole is that it was internally consistent, forthright, and honest.

A point was raised in argument at the arbitration hearing by counsel for HMQ as a tangential challenge to the evidence that Mr. Park was earning $600 per week from his employment at Enwise Power Solutions. It was submitted that in the approximate 9 months from the accident date until termination, Benjamin Park had received only about $7222.00 in income replacement benefits from Intact.[23] If he was earning a gross income of $600.00 per week, at 80% of his net income he would have been entitled to an income replacement benefit of $400.00 per week. Had he been paid $400.00 per week for 9 months he would have received almost double the amount in income replacement benefits.

Although I do not disagree with the calculations, it is impossible to conclude from the available evidence that Benjamin Park was not being paid $600.00 per week by Enwise. There is no evidence before me as to the weekly amount that was paid to

[23] See Exhibit 4.

Benjamin Park by Intact, nor how it was calculated. There is no evidence before me as to when Mr. Park returned to his employment after the accident, and whether he was working full-time or part-time hours. There is no evidence before me as to any amount that he may have made for post-accident income during the period for which he received income replacement benefits. All of these factors would have affected the quantum of his weekly benefit rate, and hence the total payment he received.

With these variables undetermined, it would be unfounded speculation to conclude that because Intact paid only $7,222.00 in income replacement benefits to Benjamin Park, he was not earning the amount that he directly testified to have been earning, on his examination under oath.

Having determined Benjamin Park's self-supporting resources to be his income from Enwise Power Solutions – $31,200.00 per year, I will now examine the evidence concerning his expenses and needs.

There was very little detailed evidence introduced by either party concerning the quantum of Benjamin Park's expenses. I think it is a reasonable conclusion to draw however, from the evidence as to the nature of his expenses that Benjamin Park's largest monthly expense would have been the value of his accommodation cost had he been paying fair market value for his room and board at his parents' home. The evidence indicates that he had his own room at his parents' home. He appears to have generally had the use of the facilities in the house. Certainly there was evidence that he was able to use the kitchen and bathrooms. I will take judicial notice of the fact that since the Park residence was located at 227 Québec Avenue in Toronto that it was

located in a nice area of the City, and that it was in all likelihood equipped with modern amenities such as cable television, and Internet service.

The only specifics as to the value of the cost of accommodation were referred to in argument by counsel for Intact. He directed me to the decision of Arbitrator Bialkowski in *Security National Insurance Company v. The Personal Insurance Company/Certas Insurance*[24] In that case the issue was whether a 19-year-old son was principally dependent for financial support upon his mother at the time of an accident occurring September 5, 2008. The important part of the decision for our purposes is the fact that Arbitrator Bialkowski rejected the approach to valuing the accommodation cost taken by both accounting experts. They attributed a notional amount to the SABS claimant for the bi-weekly mortgage payment on the house. Arbitrator Bialkowski felt that a better approach was to look at the market value of the accommodation provided and what that would likely cost on the open market.

The exact address of the premises in which the SABS claimant lived with his mother is not identified in the decision. Arbitrator Bialkowski approaches the issue however, on the basis that he was trying to determine the appropriate market value for the accommodation provided to the SABS claimant in the Greater Toronto area. He states as follows:[25]

> This 19-year-old was living in a house in the GTA with his own room, kitchen facilities, laundry facilities, t.v., cable and Internet. One would be hard-pressed to find even modest accommodation of a similar type in the GTA for $750 per month.

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[24] August 9, 2011 ("*Security v. The Personal*").
[25] At page 8.

I agree with Arbitrator Bialkowski's approach to valuing the accommodation as well as with his views concerning the approximate market value of accommodation in the Greater Toronto area at that time. The accident in this case occurred just over a year later than the accident in *Security v. The Personal*. It is likely that accommodation of the kind enjoyed by Benjamin Park would cost at least $750.00 per month in November, 2009, and quite possibly more than that. It should be pointed out however, that the SABS claimant in that case had self-supporting resources of less than $7,000.00 per year. Benjamin Park's resources were more than 4 times this amount.

Although I agree with the approach taken by Arbitrator Bialkowski to making a reasonable valuation of the accommodation the SABS claimant was living in at the time of the accident, I do not think that is the end of the inquiry. Following the reasoning of Arbitrator Samis in *Federation v. Liberty*, and *Cooperators v. Halifax*, one must also consider whether the SABS claimant had the ability to afford accommodation that may have been more basic than his parents' home, but would have nonetheless met his needs.

In my opinion, as a single man with no dependents, and an income of $31,200.00 plus commission, Benjamin Park did have sufficient means to afford accommodation in the Greater Toronto area that would have met his needs, perhaps without the luxury that might have been afforded to him by continuing to live with his parents. He was already looking for a place of his own a few months before the accident. I think the fact that he did move out with a roommate to an apartment in Toronto very shortly after the accident confirms that he had the wherewithal to satisfy the fair market value cost of accommodation in Toronto sufficient to satisfy his needs.

In my view the reason that Benjamin Park was not paying rent to his parents in the year leading up to the accident, even after he had secured full time employment was not because he could not afford to pay rent. It was because his parents acted out of natural love and affection towards him to give him every advantage as he was starting out his working career, rather than acting as arms-length landlords who were only concerned with receiving a monthly cheque from a tenant.

The evidence given by Benjamin Park's father, Young-Dae Park on his examination under oath supports the inference that Mr. and Mrs. Park were concerned parents who wanted to give their children as much help as possible, but also at the same time teach them responsibility so that they could make it on their own. Young-Dae Park was asked about his arrangement with Benjamin Park's younger brother, Steven, who was working part-time, whereby he asked the younger brother for a contribution to the household. His answer indicates that he was less concerned about getting the money for the sake of the money, and more concerned about how making a contribution might be good for his son. The exchange was as follows:[26]

Q. Did any of your children pay rent?...

A. Well, right now, last few months I've been trying to get my second son, to some success...

Q. What made you start asking for contribution?

A. I want him to have a more sense of ownership, to participate something, you know. It would be a good thing. I know it's a lot of money for him, amount of money he earns, but I thought I would make a point to contribute to some household.

[26] Exhibit 2, Examination under Oath of Young-Dae Park, September 20, 2011 ("EUO Young-Dae Park"), Q. 36 – Q. 47.

With respect to the remainder of Benjamin Park's expenses and needs, as a general comment I find that the evidence indicates he had sufficient resources to meet his expenses, and did not have to rely upon his parents for financial support. The areas that I would consider come under the heading of necessary expenses where his parents appear to have contributed more than he did appear to have been utilities, groceries, periodic visits to the dentist, and possibly his 2009 tax return.[27] The latter two items I would consider very insignificant expenses.

To the extent that he received a benefit from living at his parents' home in terms of having the use of devices that would require a utility cost, or consuming food that was purchased by his parents, I find that this really amounted to an enhancement to his lifestyle, but was not something that he could not have provided for himself on the basis of need had he been living on his own.

Even in the grocery department, Benjamin Park appears to have made a contribution. He testified that occasionally he and his brother would go to the grocery store and buy whatever was needed. He usually would purchase his own lunch every workday.[28]

His regular mode of transportation was public transit. He would buy a monthly transit pass and pay for that himself. He generally used public transit to travel to work and for social activities. The evidence indicates that he did not typically make use of his

[27] EUO Benjamin Park, Q. 35 – Q. 37, Q. 189 – Q. 190, Q. 209.
[28] EUO Benjamin Park, Q. 108.

parents' vehicle, although at one point it appears that he may have had a G1 license and briefly practiced driving using his parents' car. [29]

Benjamin Park purchased his own personal grooming aids and at least 50% of common bathroom items such as soap, toothpaste and cleaning supplies.[30]

He purchased his own clothing and must have been doing so for some time because he commented that, *"I cannot remember the last time my parents bought me any clothes".*[31]

Benjamin Park had a cellular phone. He paid the bills in connection with the phone. He had his own credit card for which he was responsible to pay the charges. He was not receiving any allowance from his parents at the time of the accident nor the several months before the accident.[32]

In summary, even if one attributed as much is $1000.00 per month to the value of "room and board" expenses (by this I mean accommodation, meals/groceries, and utilities), given Benjamin Park's income he would still have over $19,000.00 per year available to satisfy his other needs. Based on the evidence in this case, in my view this would be more than enough to find that he could meet at least 50% of his own needs.

In coming to this conclusion I have not overlooked the argument that there may be money's worth in services provided to Benjamin Park by his parents. The evidence from the examinations under oath indicates that such services may have taken the form mainly of meal preparation by his mother. It would appear that she was the best cook in

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[29] EUO Benjamin Park, Q. 44 – Q. 58.
[30] EUO Benjamin Park, Q. 62 – Q. 66.
[31] EUO Benjamin Park, Q. 80 – Q. 81.
[32] EUO Benjamin Park, Q. 181 – Q. 187, Q. 206 – Q. 207.

the family and may have done the majority of the food preparation from which Benjamin Park benefited.

The evidence is also clear however, that he was expected to, and did clean the house as necessary, do his own laundry, cut grass, rake leaves, shovel snow, and do other activities that would be expected of a contributing family member. As arbitrators before me have observed, whether a value should be attributed to services of this nature must be determined on a case-by-case basis. In situations where the value of the contribution of the alleged dependant to the household operation is more or less the same as the value of household services provided by others to him, the value of the services is equalized for the purposes of the dependency calculation and need not be attributed a substantive numerical value.[33] In my view that conclusion is appropriate in this case. I do not view the value of any household services received by Benjamin Park to be any greater than the value of services that he contributed to the household operation.

It may well be that there was some dependency on the part of Benjamin Park on his parents beyond just enhancements to his lifestyle or benefits provided to him by his parents through natural love and affection as opposed to need, but in my opinion the evidence falls far short of establishing that he was dependent upon his parents for more than 50% of his financial needs. As Arbitrator Samis put it in *Cooperators v. Halifax*, I certainly cannot conclude that Benjamin Park was principally dependent for financial support upon his parents, as that would entail a finding that his parents' support was more significant than the financial resources he could bring to bear to support himself.

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[33] See *Security v. The Personal*, at page 7.

Looking just at his actual earnings, Benjamin Park was clearly capable of providing chiefly for his own needs.

I will turn now to consider whether Benjamin Park was principally dependent for care upon his parents' at the time of the November 22, 2009 accident.

I do not find that this aspect of the issue requires extensive consideration in this case. As I have observed at the outset of this Award, care in the sense that it is used in the SABS has been interpreted to mean something different than financial support. The physical care cases generally include situations where care is needed for a person with a mental or physical disability or is of tender years. Other cases involve circumstances that are less capable of quantitative analysis. The focus in these cases is on qualitative care factors as social and emotional support, supervision where necessary, and care that creates a sense of security for the person in need. Sometimes the circumstances require an assessment of both the quantitative and qualitative aspects of care.

In every case however, the emphasis is upon the need for care that is required to ensure the dependant is able to maintain a reasonable level of function in his or her daily life. In my opinion Benjamin Park was not a person in need of care in that way. In any case, the evidence is clear in my opinion that he was certainly more than capable of providing for more than 50% of his own care needs, and he was not reliant upon his parents for more than 50% of his care needs.

At the time of the accident Benjamin Park was an able-bodied 23-year-old young man with a university education. He was fortunate not to be afflicted with any type of mental or physical disability. He did not have any type of behavioral problem that

required exceptional supervision or oversight by his parents. He was independent in that he maintained full time employment and had an active social life appropriate for a young man in his early 20s. He was able to carry out every activity necessary for his daily life without any assistance from his parents. There was nothing about his circumstances that required the type of exceptional care in the sense contemplated by the SABS to create dependency, let alone principal dependency.

To the extent he received any type of social and emotional support from his parents, this was the natural love and affection that two caring parents provide a fortunate child. The cases are clear however, that benefits conferred upon someone that arise out of the circumstances of a caring family relationship, or the natural love and affection parents express for children, are not sufficient to satisfy the requirements to establish a principal dependency for care as defined in the SABS.

Therefore, on the evidence in this case I have no difficulty in concluding Benjamin Park was not principally dependent for care upon his parents.

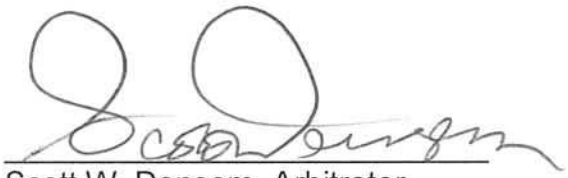
Conclusion

1. Benjamin Park was **not** principally dependent for financial support or care on his parents at the time of the November 22, 2009 accident. Therefore, he is not an "insured person" under the Intact policy.

2. As there is no other insurer in priority pursuant to section 268 of the *Insurance Act*, HMQ must assume responsibility for the payment of SABS to Benjamin Park, and, subject to any reasonableness of quantum issues, HMQ must reimburse Intact for SABS paid to or on behalf of Benjamin Park to date.

3. 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, July 10, 2013.



Scott W. Densem, Arbitrator