

**IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.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**

**B E T W E E N:**

INTACT INSURANCE COMPANY OF CANADA

Applicant

- and -

STATE FARM INSURANCE COMPANY OF CANADA

Respondent

**AWARD**

**Scott W. Densem – Arbitrator**

**Heard: September 23, 2010**

Counsel:

Joseph Lin and Alex Dirlis for the Applicant

Oneal Banerjee for the Respondent

**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 insurers has priority under section 268 of the *Insurance Act* for the payment of Statutory Accident Benefits (SABS) to BG.<sup>1</sup>

The arbitration was conducted pursuant to the terms of a written Arbitration Agreement signed and dated in counterpart, February 23, 2009, and February 26, 2009, and a May 15, 2009 letter from Densem ADR Solutions Inc. to counsel.

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<sup>1</sup> Counsel jointly requested that for reasons of confidentiality I identify the SABS claimant and his mother only by their initials

## **Factual Background to the Issues<sup>2</sup>**

The SABS claimant, BG, was born March 16, 1987. He was twenty years old at the time of the January 23, 2008 accident that gave rise to his claim for SABS.

BG is the son of DS. DS resided at 2180 Miller Road in Renfrew, Ontario. While not attending Carlton University in Ottawa, BG considered his mother's residence at 2180 Miller Road his permanent home. DS died subsequent to the January 23, 2008 accident, on or about February 16, 2008.

At the time of the accident BG was a passenger in a vehicle insured by the respondent, State Farm Insurance Company ("State Farm"). BG's mother, DS, was insured with ING Insurance Company of Canada<sup>3</sup>. BG was not a listed driver on the Intact policy.

BG applied for SABS to Intact. Intact has paid SABS to BG. The claim is still open.

If BG was principally dependent for financial support upon his mother, DS, at the time of the accident then Intact is the higher priority insurer. If he was not principally dependant upon his mother then State Farm is the higher priority insurer.

## **The Issues**

- (a) Which party is higher in priority and responsible to pay statutory accident benefits ("SABS") to and on behalf of the claimant BG due to his motor vehicle accident of January 23, 2008?
- (b) If the answer to issue (a) is, the respondent, then what is the appropriate amount to be paid by the respondent to the applicant?
- (c) What is the quantum of costs and which party has the burden of payment?

The arbitration hearing conducted on September 23, 2010 dealt with issue (a), the priority issue. Subject to appeal this award resolves the priority issue. If the parties cannot agree on issues (b) and (c), it is open to them to offer further evidence and submissions on those issues.

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<sup>2</sup> The parties submitted an Agreed Statement of Facts and Documents that was entered into evidence as Exhibit 1 at the arbitration hearing. This summary of facts comes from Exhibit 1, and other non-contentious sources.

<sup>3</sup> Subsequent to the commencement of arbitration, ING Insurance Company of Canada became Intact Insurance Company. I will henceforth refer to the applicant as "Intact".

## The Law

I believe that it is most useful in these cases involving an issue of principal financial dependency to review the applicable law at the outset.

The substance of the law governing this case has been the same since the Court of Appeal's 1985 decision in *Miller v. Safeco Insurance Co. of America*.<sup>4</sup>

The Court stated that the following three factors should be taken into account in determining financial dependency.

- The amount and duration of financial dependency
- The financial needs of the claimant
- The ability of the claimant to be self-supporting

The Court stressed that each case must be decided on its own facts in applying these criteria.

Subsequent case law has put a gloss on the analysis. For example, it has been held that financial dependency should be decided by examining a sufficiently long time period before an accident that is appropriate in the circumstances, not just a brief "snapshot" of time immediately preceding the accident.<sup>5</sup>

It has also been held that to find principal financial dependency of a person on another requires that the dependant receive support valued at more than twice his own resources from that other person(s). Put another way, the dependant must receive at least 51% of his financial support from that other person(s) to be considered principally financially dependent.<sup>6</sup>

It is important to consider the ability of the claimant to be self-supporting in determining principal financial dependency. The focus is on the person's ability to provide his or her own necessities of life. If support received is simply an enhancement to the person's lifestyle, principal financial dependency is not established.<sup>7</sup>

I note that the parties agree in their *facta* that the legal principles to be applied in a principal dependency case are essentially as I have summarized above. Counsel for

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<sup>4</sup> (1985) 50 O.R. (2d) 797

<sup>5</sup> *State Farm Mutual Automobile Insurance Co. v. Non-Marine Underwriters, Lloyds, London* [1997] O.J. No. 3402 (Gen. Div.)

<sup>6</sup> *Federation Insurance Co. v. Liberty Mutual Insurance*, Arbitrator Lee Samis, May 7, 1999, affirmed by O'Leary J., Superior Court of Justice and the Ontario Court of Appeal, [2000] O.J. No 134 (C.A.).

<sup>7</sup> *Miller v. Safeco*, (1985) 50 O.R. (2d) 797, (Ont. C.A); *Federation v. Liberty Mutual*, *supra.*, note 6.

Intact noted that a further decision of the Ontario Court of Appeal has once again reaffirmed the applicability of these principles.<sup>8</sup>

Counsel also agree that Intact has the burden of proving, on a balance of probabilities, that BG was not principally dependent for financial support upon his mother, DS, at the material time leading up to and at the January 23, 2008 accident.

### **The Evidence, Factual Findings and Analysis**

One document was entered into evidence at the September 23, 2010 hearing. Exhibit "1" is an Agreed Statement of Facts and Documents which, *inter alia*, includes the documents identified on pages two and three of that exhibit. For ease of reference I have included a list of these documents as Appendix 1 to this award.

In my opinion, to determine the issue of dependency in this case the analysis should start with the time following BG's completion of high school. It was at that point that BG appears to have begun to organize his life to facilitate a university education and a subsequent career. The evidence indicates that BG completed high school and then decided to take a year off. During that year he worked as a material handler for Sandvik Materials in Arnprior, Ontario. I find that it is a reasonable inference to draw from the evidence that BG did this to take some time to more carefully consider his career goals, and to make some money to pay for his university education.<sup>9</sup>

BG had commenced employment with Sandvik January 23, 2006. He stopped working August 24, 2006. He started at Carleton University in Ottawa September 5, 2006. Over the seven months that he worked in 2006 he earned \$26,111.22 from his employment at Sandvik<sup>10</sup>

I will pause here to note that one of the arguments advanced by State Farm in this arbitration is that BG's evidence should not be considered reliable because he has suffered a head injury. In support of this submission it was emphasized that BG's evidence did not appear to be clear concerning the manner of payment of his rent for his shared apartment during the university term starting in September, 2007. He said that he paid his rent by cheque to his friend, NM, who held the lease with the landlord. There was evidence of only one cheque clearing his bank account for \$400.00 in December, 2007 although he testified that his share of the rent was \$400.00 per month.

I had read carefully the transcript of BG's examination for discovery. I did not have the advantage of observing him testify in person. My impression of his testimony

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<sup>8</sup> See *Oxford Mutual Insurance Co. v. Co-Operators General Insurance Company* (2006) 83 O.R. (3d) 591

<sup>9</sup> Exhibit 1 Examination for Discovery of Benjamin Gardner, June 5, 2009, page 11

<sup>10</sup> Exhibit 1 Tab D1 Sandvik Record of Employment dated August 30, 2006, Exhibit 1 Tab D3 Certificate of Loan – Grant Approval and Eligibility, 2006-2007

however, is that the injury he sustained in the accident did not significantly impair his ability to recall details with at least as much clarity as might be expected of anyone recalling details that were two to three years old when he testified. I find that BG's testimony is accurate enough to be relied upon for the important facts that bear on the issue of principal dependency. I am satisfied that BG did incur a \$400 per month rent expense while he was a student. I do not find it an indicator that the totality of his evidence is unreliable because he believes that he paid this expense by cheque, but there is evidence of only one cheque having cleared his account in this amount.

I am supported in this conclusion by cross referencing BG's examination testimony to the documentary evidence preceding the accident. Even though BG's own counsel suggested that BG's memory for details like dates might be impaired because of the head injury sustained in the accident, when one does the cross referencing, one finds to the contrary, that BG's testimony for such details as dates as well as income and expense amounts is remarkably accurate.

During BG's first year at Carleton University he lived in residence. He had received a combination of Canada Student Loan and Ontario Student Loan Funding. For September through December, 2006, he received \$5,461.00. For the balance of the school year, January, 2007 to April, 2007, he received a further \$2,146.00. The total for the 2006-2007 school year was \$7,607.00.<sup>11</sup>

I note that without the benefit of having these documents available at the time at the examination BG was able to estimate his loan amount for his first year at \$7,000.00. This included both his school fees as well as the cost of his dormitory lodging and meal plan. State Farm has argued, on the authority of *The Personal Insurance Company v. Allstate Insurance Company*<sup>12</sup> that scholarship and student loans should be excluded in the analysis of dependency from both income and expense perspectives. Counsel for Intact has highlighted several points of distinction between *The Personal v. Allstate* and the present case.

In my opinion that issue for this case is moot because it appears to me that certainly during the 2006-2007 academic year BG was receiving almost the exact amount of funding that it cost him for tuition, lodging, and meals. Therefore, the income and expense elements of this are essential neutral.

During BG's first academic year at Carleton (2006-2007) he was relying upon money he had saved from working at Sandvik to pay expenses. He did not have a part-time job during that school year. On examination he was asked directly if he received

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<sup>11</sup> Exhibit 1 Tab D3-Certificate of Loan/Grant Approval and Eligibility 2006-2007

<sup>12</sup> [2010] I.L.R. I-4921

any money from his mother DS before he started at Carleton University in the fall of 2006. He answered directly and unequivocally, “no”.<sup>13</sup>

He was asked directly whether his mother DS, gave him any money during the 2006-2007 school year and once again he answered unequivocally, “no”.

BG was asked directly whether his mother helped to pay for either his 2006-2007 tuition, for his lodging and dormitory or his meal plan. For a third time he answered clearly and unequivocally “no”.<sup>14</sup>

I find that the manner in which BG answered these questions indicates that he clearly understood what he was being asked. His answers were in no way vague or uncertain. There was nothing in the evidence to suggest that he could have been mistaken about what was being asked of him. No evidence has been introduced to suggest that there would be any reason for BG to be untruthful in answering these questions or that he had any motive to want to mislead his examiners by giving false answers.

Based on this evidence alone I would conclude that BG was not principally dependent for financial support on his mother from January 2006 up until he returned home following the school year in the spring of 2007.

It was asserted by Intact’s counsel in argument that Intact can prove the lack of principal financial dependency by demonstrating either that BG was meeting at least 51% of his own expenses at the material time, or that he was not receiving from his mother 51% of expenses at the material time. I agree with this submission. For the period of time between January, 2006 and Spring 2007 there is clear evidence from BG himself to establish that he was not receiving any financial support from DS at all, let alone 51% of the value of his expenses.

The evidence indicates that in the 2007 school year, BG’s second year at Carleton, his mother paid his cell phone bill, and he was eligible to receive funding from his mother’s dental and medical plan. The latter point is of no consequence for this case since he did not receive any significant funding for medical or dental expenses. His evidence is that he “never got sick” and made only routine trips to the dentist.<sup>15</sup> State Farm’s own expert acknowledges that according to his analysis of the documents BG did not receive any funding for medical and dental expenses during the material time that is relevant to the issue of principal dependency.

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<sup>13</sup> Exhibit 1, Tab C, p. 14.

<sup>14</sup> *Loc. Cit.*, p. 20

<sup>15</sup> *Loc. Cit.*, p. 31

I will move now to consider the time when BG returned home from his first school year at Carleton (approximately, April, 2007), to the time of the accident in January, 2008. When BG returned home in the spring of 2007 he once again went to work at Sandvik. He worked full time hours but received student wages. He commenced work on May 28, 2007 and completed work July 21, 2007<sup>16</sup>

He earned \$6,309.58 while working at Sandvik from the end of May, 2007 to about the end of July, 2007.<sup>17</sup>

BG returned to Carleton for his second academic year September 4, 2007. Once again he received a Canada Student Loan. He received the amount of \$6,524.00 for the period September to end December, 2007. He received a further \$616.00 at the beginning of January 2008. His total student loan for the academic year 2007-2008 was \$7,140.00. As with the previous academic year this amount essentially offset his expenses directly connected with attending Carleton.<sup>18</sup>

The one difference from his circumstances in the second academic year is that he shared an apartment with his friend NM, and NM's girlfriend. NM's girlfriend did not contribute anything to the cost of the apartment. NM entered into the lease for the apartment with the landlord. BG gave money for his share of that expense to NM.

BG has testified that his rental contribution was \$400.00 per month, 50% of the full rent. He testified with some particularity regarding other expenses that were associated with the apartment rental. His agreement with NM was that he would share 50% of those expenses. He estimated his share of the hydro cost at about \$10.00 per month. He paid the full cost of telephone services at \$60.00 per month. He also paid the full cost of internet service at \$20.00 per month. His mother paid his cell phone bill which he estimated at \$30.00. He estimated his food at \$50.00 per month.<sup>19</sup>

Very shortly after starting his second academic year at Carleton, BG commenced part-time employment at the Home Depot. He worked 16 hours a week and was paid \$10.00 per hour. He continued to work at Home Depot part-time until his accident in January, 2008. His combined 2007 earnings from working at Sandvik in the spring and summer of 2007, and from his part-time work at Home Depot, totalled \$8,940.00<sup>20</sup>

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<sup>16</sup> Exhibit 1, Tab D1, Record of Employment from Sandvik Materials Tech dated August 9, 2007

<sup>17</sup> *Loc. Cit.*, T-4, 2007

<sup>18</sup> Exhibit 1, Tab D3, Certificate of Loan/Grant Approval 2007-2008

<sup>19</sup> Exhibit 1, Tab C Examination for Discovery of BG, June 5, 2009 pages 16 to 18

<sup>20</sup> Exhibit 1, Tab E 2007 Income Tax Return for BG

On examination BG was once again asked by counsel whether he received money from his mother on a regular basis during his second year at Carleton in 2007. Once again his answer was clear and unequivocal. He answered, "no".<sup>21</sup>

Based on BG's evidence, which I have already stated I find coherent and reliable, apart from two items there is no basis to find that BG's mother was making any financial contribution to BG from the Spring of 2007 until the accident date.

The first of these items is the \$30.00 a month estimated cost of BG's cell phone that BG testified that his mother was paying. Intact's expert report from Deloitte Touche report attributes this expense to BG's mother but it still comes up with percentages that exceed the 51% level for BG to be able to meet his own expenses.

The second item concerns the imputed value of BG living at home for four months in 2007. This disputed point could be more significant. The position of State Farm's expert, IBC International Investigation Accounting Inc. is that the appropriate amount to impute as a value for room and board for BG for four months at his mother's home would be \$1,000.00 per month for a total of \$4,000.00 for the period.

Intact's expert disagrees. Deloitte Touche has commented that BG lived at home during this period by choice and not out of necessity. Had he chosen to do so he could have remained at the Carleton University in his apartment. Intact's counsel argues that \$1,000.00 per month is much too great an imputed value absent evidence of fair market rents in the Renfrew area at the material time. Intact's counsel suggests that at most, something along the lines of what BG was paying to share an apartment in Ottawa, a larger City, would be more appropriate to impute to the value of BG living at his mother's home in Renfrew.

I can see placing a value on BG's living with his mother during the four months of 2007, but without evidence as to what a reasonable value to impute would be for the Renfrew area, it requires speculation. Whether he could have remained in Ottawa or not also involves some speculation and he would have incurred some cost for doing so in any event. I can also see an argument that while BG was living at home with his mother he may have been providing some assistance to his mother. BG might have been assisting with household chores either inside or outside, such as cutting grass. These too would have an imputed value.

I must make findings from evidence that is before me. A consideration of the matters in the previous paragraph involves too much speculation to draw any firm conclusions. Absent better evidence of what market rents were like in Renfrew during the summer of 2007 I am not inclined to accept the assertion of State Farm's expert that

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<sup>21</sup> Exhibit 1, Tab C Examination for Discovery of BG, June 5, 2009, page 20



an imputed value of \$1,000.00 per month would be appropriate. In light of the lack of evidence on this issue I am unable to conclude that an imputed value of more than what BG was paying to live in Ottawa would be appropriate.

In any event, my conclusion in this case does not depend on trying to resolve on an appropriate imputed value for BG living with his mother for four months in 2007. State Farm acknowledges that even with an imputed value for room and board of \$1,000.00 per month BG could have satisfied 51% of his expenses, depending on whether certain deposits to BG's bank account are attributed to him, or DS.

The first example is a term deposit which is shown as a credit to one of BG's bank accounts on January 30, 2007. The amount is \$2,068.00. State Farm's expert has isolated this deposit rather than assign the value of it to BG in the dependency calculation. He indicates that this amount was withdrawn to fund the term deposit in January, 2006, before BG commenced full time employment at Sandvik. Technically this is incorrect. BG's record of employment with Sandvik shows that he commenced work January 23, 2006. The debit from BG's bank account for this term deposit was made two days later, on January 25, 2006. I do not think anything turns on this inaccuracy.

State Farm's expert did not want to attribute the term deposit to BG because, "*... we do not know the source of these funds or the extent to which they were facilitated by Mr. Gardiner living with his mother prior to commencing University.*" I find this reasoning inconsistent with the burden of proof. The evidence indicates that this term deposit was connected to BG and his bank account. If State Farm wants to allege that this money should be attributed to DS, and not BG, then it has the onus of proving that allegation. No evidence was led to establish that DS had anything to do with this term deposit. Without such evidence, the reasonable conclusion from the evidence is that this term deposit should be attributed to BG.

The second example is an income tax refund of \$2,382.14 deposited to BG's account. Again, State Farm's expert did not attribute this amount to BG because there was a lack of evidence to establish whether BG's mother may have somehow contributed to BG's ability to secure an income tax refund. This approach again fails to recognize who has the burden of proving this assertion. The available evidence indicates that this was BG's tax refund. To displace this conclusion, the onus is on State Farm to lead evidence to show that DS somehow made the refund possible. Absent such evidence, I can see no valid reason why this should not be treated as BG's money. No evidence was led to suggest that it should be attributed to DS.

I find as well that the approach IBC International took with respect to evaluating BG's revenues and expenses was not consistent. Their analysis with respect to expenses involved adding up all withdrawals from BG's bank accounts for 2006 and 2007 without evidence of the reasons for those withdrawals. In their report they indicate that it is "assumed" that all of these withdrawals represent necessary living expenses for 2006 and 2007. The problem with this approach is that the principal dependency analysis must focus on necessary expenses to permit someone to support oneself, not on expenditures incurred to enhance one's lifestyle. As an example, there is evidence from BG's testimony that he had a television at Carleton that he had purchased from his own funds. Strictly speaking, the television was an enhancement to lifestyle and not a necessary expense for BG to sustain himself as a university student. There is no evidence to establish that every withdrawal from BG's bank accounts was for necessary living expenses.

In my view it is only consistent that if one is going to assume all withdrawals made from BG's bank account must have been for necessary living expenses without having any actual proof that they were, the same approach should be taken to the assumptions made about deposits to BG's account. One should not engage in speculation as to how BG came by the money. The only reasonable inference that can be drawn, absent evidence to the contrary, is that BG, not someone else, is the source of money in accounts owned and controlled by BG.

I conclude that it is appropriate to attribute to BG's income the value of the \$2,068.00 term deposit, and the income tax refund of \$2,382.14. The money is in BG's bank accounts. He is the sole owner and controller of these accounts. There has been no evidence introduced to suggest that anyone else is the source of this money other than BG. More importantly, there is absolutely no evidence whatsoever to suggest that BG's mother was the source of the term deposit money or the income tax refund.

As was pointed out by counsel for Intact in his submissions, if even one of either the term deposit or the income tax refund is attributed to BG, then he was meeting more than 51% of his personal expenses. This is true even if one employs the assumptions of State Farm's accountant that all withdrawals from BG's bank accounts were for necessary living expenses and that \$1,000.00 per month would be an appropriate imputed value of room and board at BG's mother's home in 2007. I have already stated that I do not find these assumptions supported by the evidence.

In summary, I am satisfied that Intact has met its burden of proof in establishing that BG was managing 51% of his own expenses during a reasonable time relevant to the analysis of the principal dependency issue. In other words I find that he was not principally dependent for financial support upon anyone else other than himself during the relevant time leading up to the January 23, 2008 accident. I find as well that Intact

has established, on a balance of probabilities, BG's mother, DS, was not providing 51% or more financial support to BG during the relevant time leading up to the January 23, 2008 accident.

### **Conclusion**

For the foregoing reasons, in answer to issue (a), I rule as follows:

State Farm Insurance Company is higher in priority to Intact Insurance Company and it is responsible to pay Statutory Accident Benefits to and on behalf of the claimant BG as a result of his motor vehicle accident January 23, 2008.

If the parties are not able to agree on the quantum that should be paid by State Farm to Intact then they are at liberty to introduce further evidence and make further submissions on the issue.

Intact Insurance, being the successful party in the arbitration, is entitled to its costs from State Farm Insurance. If the parties cannot agree on the quantum of costs then they are at liberty to make submissions in that regard.

Should either or both of the issues of quantum and costs need to be addressed I would ask that counsel contact my co-ordinator to arrange a telephone conference so that the details of further proceedings can be discussed.

Dated at Toronto, April 19, 2011

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Scott W. Densem, Arbitrator