

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:

ZURICH NORTH AMERICA CANADA

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE

Respondent

AWARD

Scott W. Densem – Arbitrator

Heard: April 12, 2010

Counsel:

Kevin S. Adams and Jennifer McGlashan for the Applicant

Ian D. Kirby 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 Dennison Lacroix.

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.

Factual Background to the Issues¹

Dennison Lacroix, born April 22, 1981 was involved in an accident on January 23, 2008 at age 26. He suffered significant injuries as a result of the accident. He was operating a rental vehicle. That vehicle was insured by Zurich North America Canada (Zurich) under policy of insurance number AF9995974 issued to the vehicle owner, Routes Car & Truck Rental (the Zurich policy). Mr. Lacroix was neither a named insured nor a specified driver on the Zurich policy.

Mr. Lacroix applied for and received SABS from Zurich. As of the Arbitration Hearing date Zurich had paid just over \$68,000.00 in SABS to Mr. Lacroix.

At the time of the accident, Economical Mutual Insurance (Economical) insured Carol Lacroix-Friday (Carol Lacroix), Dennison Lacroix's mother, as a named insured under policy of insurance 2405740 (the Economical policy). Dennison Lacroix is neither a named insured nor a specified driver under the Economical policy.

In this Arbitration Zurich seeks to transfer to Economical responsibility for the payment to Dennison Lacroix of past and future SABS.

The Issues

To determine the priority issue between the parties, it is necessary to decide whether Dennison Lacroix is an "*insured person*" under the Economical policy. If he is an "*insured person*" under Economical's policy then by operation of the *Insurance Act* section 268 (2) 1. i. Economical will be responsible for the payment of SABS. If he is not, then responsibility for the payment of SABS remains with Zurich.

On the relevant facts of this case, to be an "*insured person*" Dennison Lacroix must be a "*dependant*" of Economical's named insured, his mother, Carol Lacroix, or her spouse, Clint Friday.² Zurich's evidence and argument focused on alleging principal financial dependency of Dennison Lacroix on his mother so my decision will be restricted to determining whether Dennison Lacroix was principally financially dependent on his mother, Carol Lacroix.

To be a "*dependant*", Dennison Lacroix must, at the material time, have been principally dependent for financial support or care upon Carol Lacroix³

The parties have framed the issue they have asked me to determine slightly differently in their respective *facta*. Zurich states the issue for determination as follows:

¹ These facts are either agreed or non-contentious. The particulars set out here are found in the parties' *facta*.

² See SABS section 2 (1) for the definition of "*named insured*".

³ See SABS section 2 (6) for the definition of "*dependant*".

“Was Dennison Lacroix principally dependent for financial support or care on the Economical named insured, Carol Lacroix-Friday, at the time of the accident?” Economical states the issue as follows: “Upon whom was Dennison Lacroix principally dependent for financial support or care on January 23, 2008?”

I do not think anything turns on these slightly different ways of expressing the issue to be determined. If I do not conclude that Dennison Lacroix was principally dependent for financial support or care on Carol Lacroix at the time of the accident, then as between the parties in this Arbitration, Zurich would remain responsible to pay SABS to Dennison Lacroix.

Five exhibits were entered into evidence at the Arbitration Hearing. They are as follows:

Exhibit 1: Documents Brief of Zurich

Exhibit 2: Examination Under Oath of Dennison Lacroix, October 15, 2009.

Exhibit 3: Examination Under Oath of Carol Lacroix, October 15, 2009.

Exhibit 4: Brief of Economical

Exhibit 5: Brief of Economical, Volume II.

Evidentiary Ruling

During closing argument, counsel for Economical submitted that the portions of Zurich’s *viva voce* and documentary expert accounting evidence based on Statistics Canada Spending Patterns – 2008, should not be admissible because it was not the “best evidence” of Dennison Lacroix’s personal expenses. The best evidence would be testimony from Dennison Lacroix or other witnesses about those expenses, and documents (e.g. bank statements) that were directly related to Mr. Lacroix’s own personal expenses, rather than evidence of living expenses incurred by Canadians in general. It was argued that the evidence should be ruled inadmissible absent proof that despite the exercise of reasonable diligence by Zurich, it was unable to obtain evidence of Dennison Lacroix’s actual expenses.

In response, Zurich submitted that if I was inclined to accept Economical’s argument, Zurich should be permitted to re-open its case to offer evidence that it had exercised reasonable diligence in seeking to obtain evidence of Dennison Lacroix’s expenses.

Since Economical did not raise this form of objection to Zurich's expert evidence during the hearing,⁴ I ruled that Zurich could re-open its case to introduce evidence of its efforts to obtain evidence of Dennison Lacroix's actual expenses, should that become necessary to my decision. Zurich was given 7 days to tender any such evidence, and Economical was provided a similar time frame to consider such evidence and make submissions about it, or, if so advised, call further evidence itself.

Zurich subsequently submitted to me an Affidavit sworn by Jennifer H. McGlashan, sworn April 19, 2010 (the McGlashan affidavit). For the purposes of this Arbitration, I have marked the McGlashan affidavit as Exhibit "A" for identification.

Economical responded with a May 14, 2010 letter. I have marked that letter as Exhibit "B" for identification.

Zurich then sent a further letter dated May 25, 2010. I have marked that letter as Exhibit "C" for identification.

I am not admitting the letters (Exhibits "B" and "C") as evidence on the issues in this arbitration. I regard them as further, written argument made by counsel to address the evidence admissibility issue, and to supplement their oral submissions on the issues in the Arbitration that were made (but not recorded) on the date of the hearing. I have marked these letters as exhibits only so that they can be readily identified, if necessary, should my Award or any evidentiary rulings be appealed.

I will now rule on the evidence admissibility issue raised by Economical in argument at the Arbitration Hearing. Before doing so however, I want to make clear that the ruling I made at the Arbitration Hearing permitting Zurich to reopen its case was for the limited purpose of responding to the argument advanced by Economical on the "reasonable diligence" issue. There would have been no reason for Zurich to have led such evidence except to respond to the position taken by Economical, which, as I have pointed out, was only advanced in argument once both sides had closed their cases.

My ruling permitted Zurich to reopen its case to offer evidence of its reasonable diligence before the Hearing to obtain evidence of Mr. Lacroix's actual living expenses. I was not asked at the hearing to, nor did I rule that there could be a full re-opening of the evidence for general purposes by Zurich, or by Economical for that matter, to introduce new evidence about Mr. Lacroix's or his mother's expenses. Counsel for Zurich

⁴ Economical did object to Matson Driscoll Damico Ltd. witness, Hannah Beartup testifying as an expert witness on the basis that she lacked sufficient qualifications and experience in the relevant subject matter of calculating principal financial dependency to give opinion evidence. Following a *voir dire* on the matter, I ruled that Ms. Beartup had sufficient expertise through her qualifications, training and experience to offer opinion evidence on the principal financial dependency issue. I held as well that the broad terms of section 15 of the *Statutory Powers Procedure Act* regarding the admissibility of evidence in arbitrations supported the admission of her evidence.

subsequently argued in Exhibit C that the position taken by Economical on the evidence admissibility issues justifies reopening the evidence for all purposes. I disagree, and I am not prepared to order a reopening of the evidence for all purposes.

On the latter issue, I find the trial evidence Rule 52.10 of the Rules of Civil Procedure instructive. It permits a judge to allow a party to fully re-open its case where, through accident, mistake, or other cause a party fails to prove some fact or document material to the party's case. There is no evidence before me to permit me to conclude that the information in the McGlashan affidavit obtained after the Hearing on the issue of Mr. Lacroix's or his mother's expenses could not have been available at the time of the hearing because of accident, mistake, or other cause. Therefore, to the extent that the McGlashan affidavit purports to offer further evidence of Mr. Lacroix's or his mother's personal living expenses beyond what was admitted at the April 12, 2010 Hearing, I rule that such portions of the McGlashan affidavit are inadmissible. Specifically, I am not prepared to admit into evidence in the Arbitration the facts asserted in paragraphs 8, 9, 11, 12 and 13 of the McGlashan affidavit. These assertions do not bear on the issue of reasonable diligence exercised to ascertain expense information prior to the Hearing, but rather they are assertions about the expenses themselves.

As will be seen below from my ruling on the admissibility of the statistical evidence, I am of the view that it is not strictly necessary for my decision for me to make a finding whether Zurich did exercise reasonable diligence in seeking out evidence of the Lacroix actual expenses. In the event my ruling is appealed however, I find that the portions of the McGlashan affidavit that address the "reasonable diligence" issue (I identify those paragraphs to be 2, 3, 4, and 5) are adequate to establish reasonable diligence and to permit the statistical evidence to be admitted.

I am aware of two cases that comment on appropriateness of statistical evidence of living expenses to deal with a principal financial dependency issue. The first case was cited to me by counsel. It is the Award of a private arbitrator in *Echelon General Insurance Company v. Wawanesa Insurance Company et al.*⁵

A careful reading of the arbitrator's award in that case leaves me uncertain about his view as to when it would be appropriate to use general living expense statistics to decide a principal dependency issue. I also believe that although the arbitrator touches on the issue, it does not appear that it was necessary to his decision. Technically then, his comments may be *obiter*. There seemed to be only one expense item in Wawanesa's expert accountant's report that involved using statistically based figures rather than actual cost evidence. That related to the cost of a simple meal at McDonalds that was assumed to be \$6.43. In the end, the result did not turn on this assumption.

⁵ November 4, 2008, Kenneth J Bialkowski, Arbitrator

I do note that with respect to calculating financial dependency, the arbitrator says, “*I am of the view that the ‘actual cost’ concept for the most part is most appropriate for such calculations*”. He goes on to say that, “*...there could well be circumstances [where] actual cost information is unavailable and that statistics would be helpful*” and, “*...there may well be times where there is inadequate available evidence of actual cost and...the use of statistics would be an appropriate consideration. Much depends on the extent of the available evidence with regard to each component of the alleged financial contribution.*”⁶

In sensible judicial fashion, since it was not necessary for his decision, the arbitrator does not elaborate on the matter of in what “times” and “circumstances” the use of statistics would be appropriate for financial dependency calculations.

I do not interpret the arbitrator’s comments in the *Echelon* case as giving, nor would I give a blanket endorsement to using statistical evidence where evidence of actual costs is either unavailable or inadequate no matter what the reason. Nor do I believe that statistical evidence should automatically be given weight equal to actual cost evidence, especially in cases where actual cost evidence was available, but not obtained and introduced.

Taking this approach would not promote diligence for a full search to determine an alleged dependant’s real circumstances and a fair determination of the issue on the best evidence. Instead, it could lead to a situation where a party seeking to have someone declared a “dependant” would have no incentive to seek out and introduce evidence of the alleged dependant’s actual costs if, for example, statistical evidence of the “average spender” would yield a better result. In saying this, I should not be taken to suggest that there is any evidence this occurred in the case before me.

I am strengthened in this view by the remarks of private Arbitrator Guy Jones in *CT Direct Insurance Company v. Liberty Mutual Insurance Company*.⁷ In that case Arbitrator Jones was critical of the approach taken by Liberty Mutual’s expert accountant because he found that the use of statistics created a misleading (unintentionally so) result. That case is similar to this case because in Arbitrator Jones’ case Statistics Canada information, rather than actual cost information, was used for several expense categories. Many of the categories where statistics were used in that case are the same as those where Matson Driscoll D’Amico (“MDD”) employed statistics in this case. At page 9 of his Award, Arbitrator Jones said the following, “*While I accept that in some instances Statistics Canada figure(s) may be of some assistance, when, as*

⁶ At p. 7.

⁷ May 2009, Guy Jones, Arbitrator

*in this instance, they are used for many categories, without actual supporting information, the exercise becomes far too speculative.*⁸

At this point in my decision however, I am ruling on an issue of evidence admissibility, not its weight. The rules of evidence for arbitrations as governed by section 15 of the *Statutory Powers Procedure Act* are less strict than the rules that might apply at trial in the Superior Court. With that in mind, I am not prepared to rule in this case that statistical evidence of expenses, because it is not the “best evidence”, should automatically be excluded unless the party seeking to rely upon it proves that it exercised all reasonable diligence in trying to get actual cost evidence, but notwithstanding this the evidence could not be obtained or was inadequate. In any event, as I have indicated, I rule that the cited portions of the McGlashan affidavit satisfy the “reasonable diligence” test in this case, if it is necessary that it be satisfied.

Therefore, I am prepared to admit into evidence in this case the statistical evidence on the principal financial dependency calculation in the testimony of Hannah Beartup, and in the MDD reports found in Exhibit 1, tabs 7 and 13.

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*.⁹

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

⁸ *Loc. cit.*, p. 9

⁹ (1985) 50 O.R. (2d) 797

period before an accident that is appropriate in the circumstances, not just a brief “snapshot” of time immediately preceding the accident.¹⁰

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.¹¹

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.¹²

The Evidence and Factual Findings

I will now turn to the evidence in this case and apply the law as I have set it out above.

As is often the situation in these types of cases, the evidence bearing on the principal financial dependency issue is not entirely consistent from witness to witness, or even from the same witness. Apart from the MDD witness, Ms. Beartup, there was no *viva voce* testimony. The evidence of the principals, Dennison Lacroix and Carol Lacroix, takes the form of two, signed statements from Dennison Lacroix, a transcript of his examination under oath, and a transcript of the examination under oath of Carol Lacroix.¹³

The signed statements are certainly helpful, but I find that the best evidence from them is the testimony given in their examinations under oath. This was sworn testimony given directly by the principals, and recorded verbatim in response to questions posed by counsel for both sides of the dispute.

In this case, the evidence is lacking in detail with respect to Mr. Lacroix’s circumstances relevant to the issue of principal financial dependency. This appears to be at least partly due to the fact that Dennison Lacroix’s memory for these details is, to use his word, “foggy”. Carol Lacroix’s recollection was better, but her knowledge of her

¹⁰ *State Farm Mutual Automobile Insurance Co. v. Non-Marine Underwriters, Lloyds, London* [1997] O.J. No. 3402 (Gen. Div.)

¹¹ *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.).

¹² *Miller v. Safeco*, *supra.*, note 7; *Federation v. Liberty Mutual*, *supra.*, note 9.

¹³ Exhibit 1, Tabs 1, 2, 3; Exhibit 2; Exhibit 3.

son's financial status at the material time was limited to whatever financial interaction she had with him and little more. In my view then, to try to get the best picture of Mr. Lacroix's status it is better to consider a much broader period of time than to narrow it solely to the six months or even one year before the accident.

Looking at Mr. Lacroix's background, he testified that he had almost completed high school. He was about four credits short of getting a diploma. He started working when he was still in high school at age 16. Upon leaving high school at about age 18, he continued to work. Although his employment was not always steady, he testified that he was always either working or looking for work. He was never on any kind of government assistance such as employment insurance or welfare. As he put it, "*there were no freebies*".¹⁴

At age 16 he took a job with Magna Formulated Coatings doing steel paint work. It appears as if his step-father had some influence in getting him the job. It started as a summer job but then went on to become more of a full time occupation. He stopped that work because he was bothered by the smell of the metal. He could not recall the duration of his employment at Magna but it appears from his evidence that he worked there several years, and stopped about 2 to 3 years before the January 23, 2008 accident.¹⁵

After leaving Magna, Mr. Lacroix had various jobs through an employment agency. He testified that he worked at Canyon Creek restaurant as an expo chef. The records indicate that this was in 2007. He had T-4 earnings of \$1,677.44 from there.¹⁶

At the time of the accident he was employed as a forklift operator with National Grocers. There is some disparity between his testimony and the employment records as to when he started this job and what his prospects were that it would become a full time position.

In his testimony, Mr. Lacroix was quite adamant that he started training for this job in the first half of December, 2007. He said that he was paid for training, and was working up to 40 hours per week during this time. He questioned the accuracy of the National Grocers records which do not show him starting the job until January 10, 2008, with his training period apparently commencing after his start date.¹⁷

The records do confirm that he was gainfully employed at the time of the accident, and that he was being paid \$12 per hour. It is not entirely clear how many hours per week he was working, but the records do indicate that it was at least 3 days

¹⁴ Exhibit 2, pp. 4-6.

¹⁵ Exhibit 2, pp. 23-24, 37.

¹⁶ Exhibit 1, tab 4.

¹⁷ Exhibit 1, tab 12.

per week. He testified that he thought if his training period went well he had a good chance to get full time work there. The National Grocers records do not indicate that full time employment was a certainty, but they do indicate that it was possible provided the employee's performance was satisfactory.¹⁸

Mr. Lacroix unfortunately did not get much time in at this employment before the accident occurred, and there is little evidence available to say one way or the other whether he would have maintained this employment. There is no evidence to suggest however, that his employment with National Grocers was in any way in jeopardy at the time of the accident. It does appear as if he had almost successfully completed his training, whether that occurred in December, 2007, or in January, 2008. From Mr. Lacroix's perspective, it appeared that he intended to keep working for National Grocers. He testified that, "...I really loved that job."¹⁹ The employment records confirm that Mr. Lacroix was being paid \$12 per hour, and indicate that his normal work week was 35 hours. Elsewhere in the file, Mr. Lacroix's work is described as "part-time", "afternoons".²⁰

I also note that Mr. Lacroix's Personal Data form in the National Grocers employment file does lend support to the general tenor of his evidence that he has always tried to be gainfully employed and to improve his prospects. In his reason for leaving a couple of the jobs listed there he indicates for one that he was not getting enough shifts, and for another that he was not being paid enough.²¹

Mr. Lacroix testified that he has also done some work in the renovation business. His evidence as to when he did this work, and for how long, is unclear. One of his statements says that he did this prior to his Canyon Creek employment. On his examination under oath he says that this was part time work through a family friend for a "certified business". Whatever income he made from this work does not appear on his income tax returns. Clearly he was reluctant to concede that this income, and perhaps other income he may have had, did not appear on his income tax returns because he had some concerns about the consequences of not declaring income. When he was asked on his examination if he declared all of his income he replied, "*Pretty much, or you'd go to jail.*"²²

The evidence with respect to his living arrangements from the time he left high school up until the accident leads me to conclude that he was not settled in at any particular place. When his two statements were taken after the accident he was residing

¹⁸ Exhibit 1, tab 14.

¹⁹ Exhibit 2, pp. 26-29.

²⁰ Exhibit 1, tab 12, pp. 4, 12.

²¹ Exhibit 1, tab 12.

²² Exhibit 2, pp. 37-38, 30-31.

at his mother's address, 16 Hallen Road, Brampton. When first asked on his examination under oath however, how long he had been living at that address he replied, "*Not that long. I would say...maybe the summer before the accident.*"²³

In explaining why he did not eat his mother's cooking very often, he said, "*I grew up with my dad most of my life, you know, in the States and stuff.*" He was asked again how long he had lived with his mother and stepfather before the accident. He replied, "*...like about the start of the summer, 2007, yes, about that. Maybe, maybe to like spring.*" When asked where he was living before that, he replied, "*...I was probably living with a friend or like back and forth between Crystal's. I wasn't really stable, stable, but I was all right, you know?...I didn't want to put an extra burden on them. Like say the times I wasn't working or something, I got a lot of help from my girlfriend those times too.*"²⁴

In responding to questions about financial arrangements at his mother's house, he volunteered, "*And just to let you know, I didn't really like – say like a set week you'd go home and sleep every night of the week, I had like a girlfriend like at the time.*"²⁵

Upon further questioning as to his living arrangements around the time of the accident, Mr. Lacroix was asked, "*...before the accident, were you living in your...mother and stepfather's house or were you living with Crystal or were you going between the two?*" Mr. Lacroix replied, "*I was pretty much with Crystal. Like, there were the odd nights I'd come home maybe one or two nights out of the week...I wasn't really like set, set at Crystal's house. I was kind of like back and forth a couple of places*"²⁶

Carol Lacroix testified that she moved into the 16 Hallen Road, Brampton, address with her husband, mother, daughter, her daughter's son, and Dennison, in July, 2007. Obviously then Dennison Lacroix was not living with his mother at the 16 Hallen Road address before July, 2007. In this respect, Dennison's evidence and his mother's is consistent.²⁷

As I have indicated, it is not clear where Dennison lived prior to that time. There is an indication from the examination evidence and from documents that he was living at least part of the time in the United States with his father or in the Brampton area with a girlfriend or girlfriends. It can also be inferred from the evidence that in the 5 to 6

²³ Exhibit 2, p. 1.

²⁴ Exhibit 2, pp. 20-21.

²⁵ Exhibit 2, p. 7.

²⁶ Exhibit 2, p. 9,10.

²⁷ Exhibit 3, pp. 2-3.

months from July, 2007, until the accident January 23, 2008, he was not staying regularly at 16 Hallen Road.²⁸

Carol Lacroix was asked, “...*just before the accident happened, was Dennison living full time with you in your home or was he living full time in his girlfriend’s home or was he going between the two places?*”. She answered, “*He lives between two places...before the accident...he lived for a few months with another girlfriend. So when that broke up he’s back home, but his...place is always there...like I said to him, no matter where you are, its still your space because I can’t put somebody else there. So, you still have to pay, I don’t care where you are.*”²⁹

Later in her examination she was asked a similar question, “*So, at the time before the accident, how would Dennison split his time between your house and his girlfriend’s house? Was it 50/50, 75/25, one way or the other way?*” She answered, “*I can’t give a percentage because...you know boys when they get a girlfriend and...they get to tuck in, they tuck in for awhile. And then they’re in and out, in and out, in and out...I don’t know if establish is the word I want to use, but he did stay for a few months with one girlfriend...I never keep track of girlfriends.*”

She was then asked whether “...*Dennison was living at your household immediately before the accident*”, and she answered, “*Yes, he was. He certainly was.*”³⁰

Both Dennison and his Carol Lacroix testified on the issue of what contribution Dennison made to the household expenses at the family’s 16 Hallen Road residence in Brampton.

On this issue, I find that the evidence is generally consistent, although the precise amount of Mr. Lacroix’s contribution to the 16 Hallen Road household is not totally certain. In his first statement, Dennison Lacroix said that he would give his mother \$100 to \$150 per week from each paycheque to help with the bills. There was no set amount.³¹ In his second statement Mr. Lacroix said that he did not pay rent, but he helped out with expenses and groceries. No amount was specified.³²

When first asked on his examination under oath about whether he paid rent to his mother, the following exchange occurred, Q. “*As of the time of the car accident, were you paying rent to your mother?*” A. “*I was giving her a set amount every month to cover like whatever I was using in the house or for like the burden of me being there*”...Q. “*So you say there was a set amount that you were paying every month. And how much was*

²⁸ Cf. footnotes 20-23.

²⁹ Exhibit 3, p. 11.

³⁰ Exhibit 3, pp. 33-34.

³¹ Exhibit 1, tab 2, p. 1.

³² Exhibit 1, tab 3, p. 3.

that?" A. *"It depends on my paycheque, right? But pretty much like \$300, \$200-\$300 about, plus I'd get groceries once in awhile also."*³³

According to the evidence, Mr. Lacroix contributed in other ways to his mother's household. He was asked, Q. *"...around 2007, how often would you buy groceries? He replied, A. "...Let's just say three times a month, maybe two times a month. Because we do fairly large groceries...(the) groceries...came up to like \$250...or maybe like a little less, I'd put in \$180...I always contributed..."* Q. *...even when you weren't working, you would have some money saved up that you would give your mother? A. "Yes, yes. Because I have to be myself good all the time, right?"*³⁴

Carol Lacroix's evidence on this point is similar to that of her son. She was asked, Q. *"Was Dennison paying any rent? A. "Yes". Q. "What was he paying? Q. "Well I don't have a set amount for him, it depends on how much he makes. He gives between \$200 and \$400. But sometimes he'd come and he'd give me an extra \$50 if he makes a little bit more..."*³⁵

On the subject of groceries, Carol Lacroix had this to say, *"...on occasions if he didn't pay enough, he'd buy – he looked to see what's missing and he'd buy stuff."*³⁶

Dennison Lacroix and Carol Lacroix gave evidence in their examinations under oath going to the issue of Dennison Lacroix's financial means, in addition to the evidence previously discussed regarding his employment.

It appears that Mr. Lacroix had the means to purchase one or more automobiles prior to the accident. At the time of the accident he owned a 1998 Honda Acura 3.5 RL. It was not on the road at the time of the accident because his insurance had been cancelled. He was in the process of attempting to find insurance that he could afford so that he could put the vehicle on the road again.³⁷

Carol Lacroix testified on this issue as follows: Q. *"Carol, I understand that as of the time of the accident Dennison...had a car, but it wasn't on the road? A. "He had a car, he had several cars. One was the one outside his workplace when he worked at Canyon Creek. When he finished work and he came outside, it was gone...And he had another one. I think he sold it. Q. "...In January 2008, did he have a car that he could drive? A. "I think so."* He never used his mother's or stepfather's vehicles.³⁸

³³ Exhibit 2, p. 7.

³⁴ Exhibit 2, pp. 16, 18.

³⁵ Exhibit 3, p. 6.

³⁶ Exhibit 3, p. 17.

³⁷ Exhibit 2, pp. 11, 12.

³⁸ Exhibit 3, pp. 12, 13.

With respect to other expenses for both necessities and lifestyle items, the evidence reflects that Dennison Lacroix was independent, or at the least, he did not receive assistance from Carol Lacroix with these expenses.

He was asked the following series of questions and gave the following answers:

Q. "...Let's talk a little about your personal expenses...Before the accident, you could buy your own clothes? A. "Yes". Q. "You bought your own food? A. "Yes". Q. "Did you have a cell phone? A. "I believe so, yes." Q. "Did you pay for that? A. "Yes". Q. You paid for your own transportation? A. "Everything." Q. "Nobody helped you?" A. "No." ...Q. "You'd pay for all your haircuts, toiletries? A. "Everything...grooming everything".³⁹

Carol Lacroix testified as follows: Q. Did you ever...other than gifts that you might get him for birthdays and Christmas and things like that, did you every buy things for Dennison? A. "No...only for birthdays and Easter and Christmas, stuff like that."⁴⁰

The evidence indicates that before the accident, Dennison Lacroix was not given any money by either Carol Lacroix or his step father, Clint Friday. Mr. Lacroix was asked about this by both counsel for the applicant and counsel for the respondent. His answer was the same. Q. "...In say a year or two before the accident, was your mother or your stepfather ever giving you money? A. "No." Q. "...in the year before the accident in 2007, if you needed any money or anything like that, would your parents give you any? ...A. "I have my own money." Q. ...So you wouldn't go to your parents house and ask them...look mom dad --..." A. "Who does that? No, no."⁴¹

Carol Lacroix's evidence on this point is the same. Q. "Did you ever give Dennison money?" A. "Not at all, he's a grown man."⁴²

One other area of expenses was addressed in the examination of Carol Lacroix that is relevant to consider, especially when I come to dealing with the MDD evidence. Carol Lacroix was asked, "...So, in the year before the accident, if Dennison had to go to any doctors' appointments or dentist appointments, did you help pay for that?" A. "No, it was none of my business. Like I say, I never interfere with my children's life. All I care about is that they put money into my budget and then you do whatever you want as long as you're not breaking the law."⁴³

The following evidence from Mr. Lacroix's evidence on his examination under oath is, I find, an accurate summary of his circumstances, insofar as they relate to the issue of any financial dependency on his mother, Carol Lacroix.

³⁹ Exhibit 2, pp. 13, 14.

⁴⁰ Exhibit 3 p. 7.

⁴¹ Exhibit 2, p. 7, 45.

⁴² Exhibit 3, p. 7 (see also pp. 18,19).

⁴³ Exhibit 3, p. 26.

In answering questions about his financial contribution to the 16 Hallen Road household, and whether he received any money from his mother or Clint Friday, he said the following, “...I don’t really like ever being a burden on my parents...they taught me...to go out and work hard...and I know being at home at such an age was like a burden, so I would help out where I see fit...there are a lot of people living in my house...my parents don’t make a lot of money either...if I’m there, I’m going to help. I’m not going to be a burden...I’m a grown man...”.Q. “...you always did that?” A. “Yes, even when I did move out”.⁴⁴

I will turn now to consider Zurich’s expert evidence as presented through MDD. The evidence takes the form of two written reports, and *viva voce* evidence from Hannah Beartup, a Certified Management Accountant employed by MDD.

The essence of the MDD evidence is as follows:

- They examined the one year period and the six month period prior to the January 23, 2008 accident to provide their opinion principal financial dependency.⁴⁵
- They assumed Mr. Lacroix’s income from all declared and undeclared sources for the one year period to be \$5,260.86, and for the six month period to be \$2,954.59.
- They assigned no value to Mr. Lacroix’s non-monetary contributions to the 16 Hallen Road household (laundry, snow shovelling, garbage removal, lawn mowing) because he “...receives the benefits provided by his mother.”
- They assumed an average monetary contribution by Mr. Lacroix to the 16 Hallen Road household of \$300 per month.
- They assumed Mr. Lacroix was responsible for his personal expenses.
- Relying on the *Echelon v. Wawanesa* decision, since they did not have any details of Mr. Lacroix’s personal expenses they used Statistics Canada information for the average expenses of a one person household in either a bachelor or one bedroom apartment in Brampton in 2008.
- They concluded that Mr. Lacroix resided at home (16 Hallen Road) at the date of the loss and, “...has lived with his parents for his entire life”.⁴⁶
- They calculated Mr. Lacroix’s income as a percentage of his expenses based on his “*present living arrangement with his parents*”, and based on what it would cost for him to live on his own in Brampton. On either

⁴⁴ Exhibit 2, p. 8.

⁴⁵ As instructed by Zurich’s counsel.

⁴⁶ The information relied upon by MDD for this conclusion is described in Exhibit 1, tab 13, p. 2.

scenario, they concluded that Mr. Lacroix was not able to be self-supporting.

- They concluded that Mr. Lacroix was principally financially dependent on his mother because he could not be self-supporting in the absence of his mother providing him with a residence and food.

In my view, the MDD conclusion cannot be sustained based on the evidence in this case. I will examine the MDD analysis insofar as it relates to Mr. Lacroix's "*present living arrangements with his parents*." I find that of the two scenarios, this is the proper analysis to undertake, because the issue is whether Mr. Lacroix is principally financially dependent on his mother. I do not believe that the second approach undertaken by MDD – what it would cost Mr. Lacroix to live on his own in Brampton, is appropriate since that does not properly reflect his living arrangements during any time period under consideration in this case. He has always lived with others, his father in the United States, his various girlfriends, or from time to time, his mother and Mr. Friday.

My most significant problem with the MDD analysis is the same problem that Arbitrator Jones had with the expert evidence in the *CT Direct v. Liberty Mutual* case. In this case, MDD had to make assumptions using Statistics Canada information for nine out of ten of the expense categories they used in their financial dependency calculation. Not only was there no evidence of the amount of Dennison Lacroix's actual expenses for these nine categories, there was no evidence that he incurred any expenses at all for at some of these categories.

If we were dealing with an assumption about the cost of a meal at a fast food restaurant, as in the *Echelon* case, then it would be easier to see how Statistics Canada information might be given more weight. In this case however, some minor changes in the assumptions in only a few expense categories changes the dependency result.

As was argued by counsel for Economical, removing only the assumed amounts for health care expense, tobacco and alcohol, and games of chance, would put Mr. Lacroix over the 51% level in terms of his ability to be self-supporting.⁴⁷ There is no evidence that Mr. Lacroix incurred any expenses in these categories. As far as health care is concerned we know additionally that his mother did not make any contribution to these expenses.⁴⁸

In these circumstances, where only minor changes to the amounts of just a few of the several assumed, not actual expenses can determine the result, and there is no evidence that Mr. Lacroix incurred any expense at all for some of the assumed categories, I am not prepared to give very much weight to the dependency conclusion of

⁴⁷ Almost 60% for the six month analysis, and just over 52% for the 1 year analysis.

⁴⁸ See note 43.

MDD. Like arbitrator Jones in the *CT Direct v. Liberty Mutual* case, I find that the MDD dependency conclusion is founded too much on speculation as to Mr. Lacroix's expenses to be a reliable conclusion.

A second difficulty I have with the MDD analysis is that it proceeds on the basis that Mr. Lacroix resided at home at the time of the accident and has lived with his parents his entire life. This is one of the underpinnings of MDD's conclusion that Mr. Lacroix could not be self-supporting unless his mother provided him with a residence and food.

In my view, the evidence does not support this conclusion. I find instead that the preponderance of evidence indicates Mr. Lacroix stayed at his mother's home only from time to time in the year or so prior to the accident. At the time of the accident, he may have considered 16 Hallen Road his "home" in the familial sense, but both his evidence and his mother's evidence indicates that he was living a good deal of the time at the home of his girlfriend, Crystal, and before that, with other girlfriends, or with his father in the United States. During these times he would not have been drawing on his mother's resources of residence and food. In fact the evidence shows the opposite in that even when he was not staying at his mother's home, he continued to contribute to the expenses of its operation.

In closing argument, counsel for Economical argued that within the six month period before the accident, Mr. Lacroix was within about \$282 of being able to provide for 50% of his expenses even if the assumed expenses used by MDD were included in the analysis. It was argued that any of removing just some of the assumed expenses, using 2007 statistics rather than 2008 or 2009 statistics, or making an allowance for the fact that Mr. Lacroix might well have had some additional, undeclared income, would easily put him over the 51% expense to income ratio.

Counsel for Zurich urged me not to speculate about any additional, undeclared income Mr. Lacroix may have had, and to consider the "common sense" point that it would have been very difficult, if not impossible for Mr. Lacroix to be financially independent based on earnings of \$2,954.59 (six months before the accident) or \$5,260.86 (1 year before the accident).

In coming to my decision in this arbitration, I believe it is important to avoid speculating about either the income or the expenses of Mr. Lacroix, and to consider the evidence in the context of what has to be proven and by whom. In this case, the onus rests with Zurich to prove, on a balance or probabilities, that Dennson Lacroix was principally financially dependent upon his mother, Carol Lacroix.

Counsel for Zurich effectively presented evidence, including the MDD evidence, which raises some questions about Dennson Lacroix's ability to be financially

independent. It is difficult to say one way or the other whether Mr. Lacroix's resources were sufficient to satisfy his needs without some financial support. MDD speaks to this difficulty in their own analysis of the file as reflected in their notes. They say that the financial dependency calculation is "*close/marginal*". They would have like to see more information including bank statements.⁴⁹

The evidence indicates that Dennison Lacroix did receive financial support from sources which included not just his mother, but also his various girlfriends, especially Crystal, with whom he now has a child, and his natural father. I do not need to decide however, whether Dennison Lacroix could have managed without some financial support from other sources. For Zurich to succeed, it must prove on a balance of probabilities that Dennison Lacroix derived at least 51% of his financial support from his mother. Based on my analysis of the evidence, I find that the evidence is insufficient for Zurich to establish dependency on his mother at the level required to discharge this burden of proof.

I conclude that Zurich has not established that Dennison Lacroix was principally financially dependent on his mother at the time of the accident and so Zurich retains the obligation to pay SABS to Mr. Lacroix.

I exercise my discretion to award costs of the arbitration to Economical as the successful party. If counsel wish to address the issue of quantum of costs with me, I invite them to contact my Coordinator to schedule a telephone appointment.

Dated at Toronto, November 2, 2010

Scott Densem, Arbitrator

⁴⁹ Evidence of Hannah Beartup, MDD.