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 a Priority Dispute Arbitration pursuant to section 268 of the *Insurance Act* and Ontario Regulation 283/95 thereunder;

BETWEEN:

CHUBB INSURANCE COMPANY OF CANADA

Applicant

and

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent

AWARD

Written Submissions Complete: November 21, 2023

Counsel:

Applicant (“Chubb”): Kevin S. Adams, Rogers Partners LLP

Respondent: (“Co-operators”) Peter Durant, Zarek Taylor Grossman Hanrahan LLP

SCOTT W. DENSEM: ARBITRATOR

Introduction

This priority dispute arises from an accident occurring October 29, 2020. A vehicle insured by Chubb struck Joseph Faria ("the claimant") while he was riding a bicycle. A claim for SABS was submitted to Chubb on behalf of the claimant. As required by regulation 283/95, Chubb adjusted the claim and commenced a priority dispute against Cooperators.

The parties agreed to appoint me to arbitrate the dispute. The parties entered into a written Arbitration Agreement in August 2022 (Exhibit 1). Amongst other things, the Arbitration Agreement provides that either party may appeal my Award to the Superior Court of Justice, without leave.

Cooperators insured Claudia Diab-Faria ("the claimant's mother") as a named insured on a standard policy of motor vehicle liability insurance. There is no issue that this policy was in force at the time of the accident.

Chubb submits that Cooperators is a higher priority insurer pursuant to s. 268 (2) 1. of the *Insurance Act* because the claimant had named insured status under the Cooperators policy. Chubb submits that the claimant was insured under the Cooperators policy on the basis that he was principally dependent for financial support upon the claimant's mother at the time of the accident.

Cooperators submits that although the claimant was receiving some financial support from the claimant's mother at the time of the accident, he was not principally dependent upon her.

The Issue

The parties have asked me to determine the highest priority insurer by deciding whether, at the time of the accident, the claimant was principally dependent for financial support on the claimant's mother. If the claimant was principally dependent, then Cooperators is the priority insurer. If the claimant was not principally dependent, then Chubb is the priority insurer.

The Evidence

This matter proceeded by way of written submissions. There was no oral hearing. For ease of reference, I have identified below the materials submitted to me by the parties as exhibits. To be clear, the source documents contained in the document briefs submitted by the parties are the actual evidence, and the narratives contained in the written submissions of the parties are their respective interpretations of the evidence.

Exhibit 1: Arbitration Agreement, August 2022

Exhibit 2: Chubb Submissions, September 25, 2023

Exhibit 3: Chubb Document Brief, September 26, 2023

Exhibit 4: Chubb Book of Authorities, September 26, 2023

Exhibit 5: Cooperators Submissions, October 30, 2023

Exhibit 6: Cooperators Document Brief, October 30, 2023

Exhibit 7: Chubb Reply Submissions, November 21, 2023

Analysis

This is another in what is a long line of “young person in transition” cases. Whether such a young person is a “dependant” as this term from the legislation has been interpreted by arbitrators and courts is frequently contentious. The evidence available to determine the issue is often limited, and sometimes contradictory. For the cases which make it to an arbitration hearing requiring an Award, the evidentiary margin tipping the scales either in favour of, or against dependency, is frequently narrow.

This case fits neatly into the above description.

The Facts

The Claimant’s General Circumstances up to the Time of the Accident

The claimant was born on October 15, 2002. When the claimant was about three years old, his parents separated. The claimant and the claimant’s sister always lived with their mother after that. About three years before the accident the claimant’s mother, the claimant, and the claimant’s sister were living in Mississauga in a house which had been bequeathed, in part, to the claimant’s mother by her father. The claimant’s two uncles apparently also had an ownership interest in the house but had come to an arrangement with the claimant’s mother that she would live in the house with the claimant and his sister. The evidence indicates that although the house was mortgage free, the claimant’s mother was responsible for all ongoing expenses associated with the Mississauga house.

At some point (the evidence is lacking as to when) the claimant's sister moved out of the Mississauga house and it was just the claimant and the claimant's mother living there up until he left for university.

According to the OCF 1 (Exhibit 3, Tab 4), the claimant was employed by a company called Defcon Paintball from August 15, 2019 until March 15, 2020. The claimant was attending high school in Mississauga for most of this time so this was a part time job. He was working varying hours, up to 20 hours a week. This job ended when the company was forced to close because of the COVID pandemic.

The claimant was unemployed from March 15, 2020 up until the date of the accident, October 29, 2020. He did receive Canadian Emergency Relief Benefits ("CERB") for a few months, but these benefits ceased when he began university in September 2020.

At the time of the October 29, 2020 accident the claimant was two weeks past his 18th birthday (October 15, 2002). He was starting the first year of a program of undergraduate study in Communications at Wilfrid Laurier University in Waterloo, Ontario. The evidence is not clear on this, but assuming it was a standard, undergraduate university program, it was likely to be three or four years.

The claimant was living in a rented house shared with five house mates. Presumably his house mates were also students, but there is no specific evidence on this point. The only relevant fact to note as far as his house mates are concerned is that there is no evidence they were providing him with financial support.

The evidence is unclear, and somewhat contradictory on the question of when the claimant began living in his shared accommodation. On his examination under oath the claimant initially stated that he moved to the shared accommodation in Waterloo in September 2020. Then he stated that he thought it might have been late August 2020 that he moved into the Waterloo accommodation.

On her examination under oath, the claimant's mother stated at first that the claimant moved into the Waterloo accommodation about a month to a month and a half before school started.

Upon further questioning however, the claimant's mother suggested that it could have been as early as the middle of July 2020 that claimant moved into the Waterloo accommodation. She emphasized that she was keen for him to develop a familiarity with the area, and she wanted him to have some extra time to do so before school began. There is no specific evidence on this point but typically university undergraduate school terms begin around mid-September of each year.

The claimant did not have his own vehicle. He did not have a driver's licence. His main means of transportation was a bicycle, which is what he was riding when the accident occurred.

On the day the accident occurred, the claimant interviewed for a retail position at a shoe store called Journeys. There is no evidence as to how much the claimant was going to be paid, or how many hours he was going to work in a week. I think it is reasonable to assume however, that this was going to be a part time job for the claimant since his primary focus would be attending university. I note as well that the claimant gave

some evidence he was going to participate in intercollegiate football, so this would have made significant demands on his time as well.

He only learned that he was accepted for the Journey's position some months after the accident in late December 2020. Since his injuries from the accident impacted the amount of time he could work, looking at his post-accident experience is not helpful in answering the question as to how much he likely would have earned at this job had the accident not occurred.

There is limited evidence on the question of what the claimant intended to do after the university school term finished each year (likely in May). We do not know whether the claimant was going to return to live with his mother in Mississauga during this time or stay in Waterloo. The claimant testified that he planned on continuing to work in the summers, but there are no further details on the subject.

The Claimant's Financial Circumstances up to the Time the Claimant Started University

The exercise in determining principal dependency involves comparing the contribution to support made by a potential principal supporter, to the resources a claimant has available, or could reasonably have available to be self-supporting.

The period considered under this heading does not, in my view, pose any difficulty in determining principal dependency. The evidence from the examinations under oath of both the claimant and the claimant's mother is consistent that while the claimant was living with his mother, and specifically in the three years they were living in the Mississauga house, the claimant's mother was the claimant's principal financial

supporter. Both the claimant's mother (Exhibit 3, Tab 8, Q. 66, Q. 80) and the claimant (Exhibit 3, Tab 7, Q. 121 – 124) confirm this.

The claimant's mother was effectively a single parent. The claimant's father had not been in the picture for more than a decade before the claimant started attending university. On her examination under oath, the claimant's mother stated that the claimant's father was supposed to pay child support but did so inconsistently or not at all. The evidence is vague on what contribution the claimant's father may have made to his financial support. I am satisfied however, that there is insufficient evidence to suggest that the claimant's father would have contributed enough to the claimant's financial support at any relevant time to displace the claimant's mother as the claimant's principal financial supporter.

The claimant's mother testified that apart from some furnishings of her father's, she furnished the Mississauga house. She also paid all the ongoing expenses, including utilities, heat, electricity, water, and cable expenses. There is no evidence as to whether the claimant's mother was paying the property taxes herself, or whether these were shared with her brothers.

The exact nature of the arrangements between the claimant's mother and her brothers (the claimant's uncles) is not clear. The house appears to have been bequeathed to all three of them by their father. It was mortgage free so there was no ongoing mortgage payment. The claimant's mother testified however, that *"…I just moved in here and started taking care of the bills"* (Exhibit 3, Tab 8, Q. 319).

There is evidence from the claimant's mother that she also paid for all the other family living expenses like groceries, the claimant's recreational pursuits such as football equipment, camps, league registrations, and family vacations. There is scant detail of these expenses. The claimant's mother estimated the grocery expense to be $400 per week, but its not clear whether it was in this range when her daughter was living with them too, or whether that was just for the claimant and her. The football related expenses were estimated by the claimant's mother to be around $1,000 to $1,500 per year.

From time to time, it appears that the claimant would use his own resources (from his part time job at Defcon Paintball or possibly from his CERB? – there is no evidence on the point) to pay for personal items, haircuts, and possibly some entertainment such as eating out with friends.

The claimant's cell phone was listed on his uncle's account. The cost was around $50 per month. The claimant's mother testified however, that she would reimburse her brother for this expense, or once in awhile the claimant would do so.

With respect to the claimant's resources during this time, the claimant's T-4 Income Tax Return schedule for 2020 (Exhibit 3, Tab 10) indicates that he had T-4 earnings from his job at Defcon Paintball of $559.73. This would have been from January 2020 to mid-March 2020 when Defcon Paintball closed down due to COVID.

The claimant's 2020 income tax return for 2020 confirms that he received $14,000 in CERB. He confirmed in his evidence that he received CERB from March 2020 until September 2020. The benefits terminated when he started university.

The claimant reported $3,746.92 in RESP Educational Assistance payments. There is no evidence to indicate who established this RESP plan, so it would be speculative to attribute the value of this contribution to either the claimant or the claimant's mother. The claimant could not have opened this plan for himself until he achieved the age of majority, which was already at least a month after he had started university. Therefore, it seems highly unlikely that this was done by the claimant. Absent evidence however, I cannot simply attribute this to the claimant's mother as the originating source of the money. For the purpose of comparing the contributions of the claimant and the claimant's mother to the claimant's support, I view this RESP amount as neutral and will not include it in the analysis.

The claimant's inheritance from his grandfather is similarly perplexing. It appears that this may have accrued to the claimant upon his grandfather's death in 2007. The claimant's mother was not certain of the exact amount, but she estimated it to be in the range of $10,000. There is also no evidence as to what form this inheritance was in during the relevant time. Was it in a locked-in investment or trust, and inaccessible to the claimant? Was it a "liquid asset" in an ordinary bank account?

We also do not have complete evidence as to how the inheritance was to be utilized. The evidence of the claimant's mother suggests that she considered this inheritance to be a kind of long term "nest-egg", not a source of funds to be used for the claimant's day to day expenses.

When asked if the claimant had any investments and savings at the time of the accident, the claimant's mother replied, *"No"*. She only mentioned the inheritance when asked if the claimant was *"…the beneficiary of a trust or anything like that."*

The way the claimant's mother described the inheritance leads me to conclude that she was not considering this inheritance to be an available source of funding for the plaintiff's ongoing expenses, even those associated with starting university. As she put it, up to the date of the accident the inheritance *"hasn't been touched"* by the claimant in the approximate 13 years from her father's death in 2007.

We do not know how the claimant viewed the inheritance. He was not asked about it on his examination under oath, but I find it notable that he does not mention it during questioning about his personal sources of financial support when he started university.

During questioning on this subject, it was pointed out to him that when he started university he did not have a job and his CERB benefits had ceased. In response, he commented that, *"…I had money saved up…".* Upon later questioning, he stated that he had saved *"...Roughly $10,000".* There are no bank documents to confirm that the claimant had this amount of savings. He does not identify the source of these savings, and makes no mention of having an inheritance which he could use to fund expenses.

The claimant gave some evidence that he had been approved for OSAP support to assist with his Wilfrid Laurier tuition and related expenses. Once again, there is very little detail available. The claimant estimated that he had been approved for between $10,000 and $15,000. He did not know however, how much, if any of this amount was a grant, and how much was a loan.

The case law suggests that grants and loans for tuition should be treated as neutral factors in evaluating resources available to students. Essentially, they offset or at least defer a debt the student would otherwise incur to attend school, so they are not “income” in the ordinary sense.

In this case, because the accident occurred within weeks of the claimant having started university, there had been no OSAP payments made to him and none were ever made because he did not continue at school after the accident.

In fact, the claimants mother testified that she and a family member met with the dean to discuss reimbursement of between $800 and $900 in tuition that had been paid (the evidence is not clear whether the claimant or the claimant’s mother paid it) since the claimant was unable to continue school after the accident.

The Claimant’s Financial Circumstances Between Starting University and the Accident

If the picture of the claimant’s available, personal financial resources (i.e. not contributed by the claimant’s mother) seems rather murky up to the time he started university, it is not much clearer in the approximate two-month period between his moving to Waterloo to start university, and the October 29, 2020 accident.

There are a few of things, however, which are certain. When the claimant started university in September 2020 his CERB income ceased. He did not have any other source of income. He was now obligated to pay $600 per month for rent which obligation appears to have started in August 2020 (see Rent Receipt, Exhibit 3, Tab 13). We know the claimant interviewed for a part-time job the same day the accident occurred. It was not confirmed that he got the job, however, until at least two months after the accident in late

December 2020. There is also no evidence as to how many hours he would (or could) have worked, and how much he could have made at the job. It is also uncertain whether he could have maintained employment on top of the demands of university courses and intercollegiate football.

Further, on his examination the claimant estimated that at university his monthly food cost before the accident was in the range of $200 to $300, depending on how often he ate in restaurants. It will be recalled that he had no grocery expense while living at home.

In summary, instead of having an average of about $2,000 a month coming in (I divided the CERB benefits of $14,000 he received by the seven months he received them) and only some minor, personal expenses, the claimant now had an income of zero, a new rent obligation of $600 per month, and a new grocery bill of $200 to $300 per month. In addition, the claimant would also have to find the resources to meet the cost of his personal items, haircuts, and entertainment.

How then, were the claimant's expenses managed when he started university? In my view, the best evidence on this comes from the claimant's mother. She testified that when the claimant moved into his university accommodation *"…I had gotten him a desk, his TV, …laptop and…computer…a chair I got, utensils."*

When asked if the claimant paid for any part of these items to set him up for university she gave an answer which I believe is a fair summary of the claimant's financial situation after he started university, up until the time of the accident (Exhibit 3, Tab 8 Q. 170):

> That's why Joseph desperately wanted to get a job because for some reason he always felt guilty that I was paying for stuff and so he would always offer. But he wasn't – I paid for everything. I was supporting him.

The claimant's mother's evidence with respect to the claimant's ongoing expenses after he started university such as rent, and groceries was similar.

With respect to rent her evidence was clear. She was asked: *"And did you pay all of the rent, like every month of rent?* She answered *"Yes"*. The rent receipt confirms this.

I found the claimant's evidence on the rent issue vague and uncertain. He said, *"My mother helped me pay for the rent and I covered like a few months, then my mother covered the majority of my rent."* It is unclear during what period the claimant would have "covered" the rent, or with what means. There were only three months of rent paid before the accident occurred. Further, the rent receipt indicates that $3,600 of rent ($600 per month) was paid between August 1, 2020, and February 2021 with the payments made by "Claudia Daub" (the claimant's mother).

Although the claimant suggested that he was responsible for his groceries while at university, as with his evidence about rent, I find it is likely based more on good intentions than accurate recollection. I think it is more probable that he continued what he had been doing while living at home in Mississauga – paying for meals or entertainment if he went out with friends out of whatever limited funds of his own he had saved from his CERB.

The claimant's mother's evidence is that not only did she give him money for groceries so he could buy what he needed, but she also prepared and delivered food to the claimant after he started university.

She was asked: *…"when he moved to university…you continued to buy him groceries...?* She replied*: Yes…I would give him cash sometimes, he would buy what he needed. And sometimes I would cook and take it there."* (Exhibit 3, Tab 8, Q. 156.)

I do not think the claimant was being deliberately untruthful in any of his testimony. This is not a credibility issue. It is a reliability issue. In my view the claimant's recollection of things after he started university was influenced by two things – his desire to make starting university a step towards being more independent (probably in all respects - not just financially), and the impact of the accident.

The following exchange took place during the claimant's examination under oath: (Exhibit 3, Tab 7, Q. 121 – 125)

Q. Do you think that you could have got along on your own financially without your mother's assistance at the time of the accident?

A. Does that mean before or after?

Q. Before, yes.

A. Not to any great extent, like she's helped me quite a bit.

Q. Would you say that she was your primary source of support?

A. At the time – like prior to me coming to university –

Q. Yes.

A. – yes. Once I turned 18, started doing more stuff in university, I'd say it was kind of like more me.

Q. You turned 18 while you were at university without a job and without CERB.

A. Yes, I had money saved up as well as I was supposed to continue working. I was supposed to get a job…I was planning to work throughout the summers and stuff to pay a lot of stuff. (Arbitrator's underlining)

With respect to the impact of the accident, the claimant confirmed that he was not able to continue with school because of the head injury he suffered in the accident, nor was he able to continue with his part-time job because *"…after the concussion…my head was just not working with like how it was supposed to be running…"*

I find the claimant's assessment of his financial situation after he started university and in the short, three-month period up to the date of the accident was based on "supposed tos" and plans for how he wanted the situation to evolve, rather than on the financial reality of that time.

The claimant's mother's evidence was succinct and unequivocal on the point. She was asked*: "…What about after he moved to university, would you say that you still supported his financial needs and paid for more than half of his expenses?* She answered: *"Definitely, yes."*

In summary, I find the evidence of the claimant's mother on the issue of principal financial dependency to be credible, and reliable. Where there is any contradiction between her evidence and that of the claimant, I believe her evidence to be the most reliable.

Co-operators has submitted that I should apply the same tests of credibility and reliability to the claimant's mother's evidence regarding her means to be the principal financial supporter for the claimant, as I do for the for the claimant's evidence regarding his ability to be self-supporting.

As I have already mentioned in my discussion of some of the claimant's evidence, I do not think there is an issue of credibility with respect to either the claimant's evidence or the evidence of the claimant's mother.

The overall tone and content of their responses to counsel's questions on examination under oath seemed to me to be co-operative. Both appeared to me to be making an honest effort to answer questions truthfully and with as much detail as they could remember.

I also do not think that either the claimant or the claimant's mother had any motive to be less than forthright in their evidence.

Neither party raises any serious argument that there is a credibility problem in the evidence. Co-operators' point is directed more to the question of whether the evidence of the claimant's mother about her ability to pay for more than half of the claimant's financial needs could be considered reliable.

I agree that this is a legitimate question to ask. I think once it is accepted, however, that the claimant's mother is a credible witness, then it is not necessary to conduct a forensic inquiry designed to test the veracity of her evidence. One should make sure that her evidence makes sense from the standpoint of what is known about her financial and other circumstances. If there is no credibility issue, however, then the evidence can be accepted unless there is reason to believe that what she says would not be possible given what is known about her financial and other circumstances.

In this case, the claimant's mother's evidence is that she was the principal financial "single mother" supporter of both the claimant, and the claimant's sister since she

separated from her spouse many years before the accident we are concerned with here. We know she was able to do this without much, if any, financial assistance from her estranged spouse.

After moving into the Mississauga house, she paid all the operating expenses for the household which included her, the claimant, and up to an undetermined time before the accident – her daughter. The claimant corroborates her evidence on the living arrangements and the fact that she was his principal supporter during this time in all respects, at least, according to him, until he “turned 18”.

The claimant’s mother was working as an Uber driver for some time prior to February 2020, when she ceased working because of an accident. She testified that her income was in the range of $2,200 to $3,000 per month. She also referenced the fact that she had some savings that she was able to access, when necessary, to make sure the bills were paid. There is some evidence from counsel representing the claimant and the claimant’s mother that some of these savings may have come from the sale of a home she previously owned, but no details have been provided.

There is also evidence from the same source, confirmed by a letter from Desjardins Insurance (Exhibit 3, Tab 12) addressed to the claimant’s mother that the claimant’s mother received over $100,000 from a critical illness insurance policy in January 2019. The details are lacking, but I am satisfied that this evidence is sufficient to confirm that the claimant’s mother received this money.

In my opinion, the question is not whether it would be desirable to have more evidence of the claimant’s mother’s financial situation at the relevant time, but whether,

in the absence of any credibility issue, more evidence is necessary for me to find that she was capable of being the claimant's principal financial supporter at the time of the accident?

In my view, this evidence is sufficient for me to conclude that the claimant's mother had the means to be the claimant's principal financial supporter with the financial resources available to her which have been described. An overarching fact is that there is no reliable evidence to contradict her that she fulfilled this role for many years leading up to the accident.

The Law

The basic law of dependency has not changed since the seminal 1980s case of *Miller v. Safeco Insurance Co. of America*[1]. The relevant factors for the analysis of whether principal financial dependency exists that I must consider are set out in the Court of Appeal's decision in *Miller v. Safeco*. They are as follows:

- The amount and duration of financial or other (now care) dependency
- The financial needs of the claimant
- The ability of the claimant to be self-supporting

These factors must 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 re-affirmed the *Miller v. Safeco* principles in *Oxford*

[1] ([1]1985) 50 O.R. (2d) 797 ("*Miller v. Safeco")*.

Mutual Insurance Company v. Cooperators General Insurance Company[2] as being the proper approach to determining dependency.

With respect to the duration of the dependency, cases over many years have stipulated that the decision maker must examine a period in the claimant's life leading up to the accident that provides a consistent, and reliable picture of the amount and duration of the claimant's dependency, if any. This period must necessarily be longer than a mere "snapshot" to properly evaluate these factors.[3]

This case turns on a determination of whether the claimant was principally financially dependent upon the claimant's mother. No arguments were advanced suggesting that the claimant was dependent upon the claimant's mother for care.

Arbitrator Lee Samis has had a significant impact on the law of principal dependency, especially where financial dependency is in issue. The Court of Appeal approved of his decision in *Liberty Mutual Insurance Company v. Federation Insurance Company*[4] where he established what has become known as the "51%" rule" for principal dependency cases. In *Cooperators v. The Halifax Insurance Company*[5] he made it clear that the 51% rule applied in two party relationships.

Essentially this analysis compares the self-generated resources of the claimant, the support received from the external source, and the level of expenditure required to

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[2] (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")*

[3] See, for example, *State Farm Mutual Automobile Insurance Co. v. Non-Marine Underwriters, Lloyds, London* [1997] O.J. No. 3402 (Gen. Div.) and *Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, 2006 CanLII 37956 (ON CA).

[4] [2000] O.J. 1234, Ont. C.A. ("*Liberty v. Federation")*.

[5] *Cooperators v. The Halifax Insurance Company,* December 14, 2001, Arbitrator Samis, pp. 7 and 8.

meet the claimant's needs, without considering enhancements to lifestyle. It is important to note that the analysis requires examining not just the self-support a claimant is actually generating, but also determining what their reasonable capacity to generate their own support is and will continue to be in the circumstances. This is the fourth dependency factor to consider established in *Miller v. Safeco* – the ability of the claimant to be self-supporting.

In the two party situation, if the claimant is able to provide for 51% their needs then there is no principal dependency. If the independent source of support is suppling 51% or more of the claimant's needs then there is principal dependency.

Where there is more than one independent source of support, the claimant is principally dependent on one of those sources if it provides more support to the claimant than the claimant provides for themselves, and if this source provides more support than any other source. In this scenario the principal supporter does not have to be providing 51% or more of the claimant's support, just more than the claimant and any other source of independent support. For example, if one independent source of support supplies 40% of the claimant's needs, another independent source provides 35% of the claimant's needs, and the claimant provides 25% of their needs, the claimant is principally dependent on the source providing 40% of the claimant's needs.[6]

The *Miller v. Safeco* factors concerning the amount and duration of financial dependency, and the financial needs of the claimant require a comparison of the

[6] *Economical Mutual Insurance Co. v. Aviva Canada Inc. et. al.*, Arbitrator Densem, January 29, 2013; *North Waterloo Farmers Mutual and the Guarantee Co. of North America*, Re, 2019 CarswellOnt 1494 (Ont. Arb. (Ins. Act), Arbitrator Bialkowski).

claimant's self-supporting resources against the claimant's needs over a period which is a stable reflection of those resources and needs.

Although not true in every case, it is easier to determine what the claimant's self-supporting resources are by looking at things like wages earned by the claimant, or government benefits accruing to the claimant such as age or income status benefits.

Measuring needs is frequently more difficult. An arbitrator generally has to make a determination of the claimant's needs by evaluating what is often very limited and not very reliable evidence regarding the necessary expenses and other expenditures to be attributed specifically to the claimant.

To remedy the problem of incomplete or unreliable evidence, in recent years a practice has developed amongst arbitrators to use statistics generated by government authorities to determine what an appropriate amount would be to attribute as a particular claimant's needs.

Arbitrators have begun using government statistics relating to the Low Income Cut-Off ("LICO"), and the Market Basket Measure ("MBM") to fix an amount for a claimant's needs which is not dependent upon the vagaries of evidence specific to a particular claimant.

The LICO approach focuses on the statistical average needs of an individual in the geographical area where the claimant lives, rather than an analysis of the claimant's specific individual needs.[7]

[7] See *Belair Direct* v. *Allstate Insurance Company,* Arbitrator Bialkowski, July 23, 2022, at p. 7.

The LICO method has been used by arbitrators and has received some endorsement from the court. In *Allstate insurance v. ING*[8], the arbitrator preferred to use government of Canada statistics regarding the average needs of a person residing in an area over the analysis of accountants who were basing their opinions on estimates of household expenses which they felt could be specifically attributed to the claimant.

The arbitrator relied on earlier arbitration decisions[9] which described the use of statistics as a more objective valuation of the cost of meeting a claimant's needs as opposed to trying to allocate a portion of household expenditures to the claimant.

The Superior Court upheld the arbitrator's decision. Justice Myers noted that the court in *Miller v. Safeco* relied upon similar statistics for its calculations concerning dependency and commented further that the Court of Appeal affirmed the trial decision albeit without comment on the use of statistics issue.[10]

This decision was by no means an endorsement of focusing exclusively upon the mathematical equation comparing the claimant's needs to the claimant's means to determine dependency. I will refer later to comments in this decision by Justice Myers which make clear that a mathematical analysis of means and needs should not determine dependency without a consideration of other factors.

On this point, there is a line of authority which recognizes that a strict mathematical analysis of financial dependency is not necessarily appropriate for claimants in transition

[8] Arbitrator Cooper, May 1, 2014.
[9] See *Coseco v. ING*, and *St. Paul Travelers v. York Fire & Casualty Insurance Company*, Arbitrator Samis, July 21, 2010, and August 11, 2011 respectively.
[10] *Allstate Insurance Company of Canada v. ING Insurance Company of Canada*, 2015 ONSC 4020, Myers J.

– especially young claimants, such as students, and claimants in special circumstances, who have not settled on a path in life. In such cases arbitrators and courts have employed what has been termed a "big picture" approach to the dependency analysis.[11] I will comment further on this later in my Award.

Continuing with the discussion of the use of statistics to compare means and needs, more recently, the MBM approach has emerged in the jurisprudence as the preferred method of determining a claimant's needs. The MBM is based on data compiled by Statistics Canada. It examines data to value the cost of meeting basic modest needs for different family sizes in different parts of the country, segmented by size of community.

This is how Arbitrator Samis described the MBM approach in *The Wawanesa Mutual Insurance Company v. State Farm Insurance Companies.* Arbitrator Samis adopted the MBM as his preferred approach over LICO or trying to compile a list of expenses specific the claimant.

The MBM approach values a specific basket of goods and services representing a modest, basic standard of living. It considers quantity and quality of various requirements such as food, clothing, footwear, and transportation.

As Arbitrator Samis phrases it, the MBM credibly provides a number for the denominator when making the 50% calculation that the dependency regulation requires. The numerator for this calculation is the total of the claimant's means.

[11] See, for example, *Co-operators General Insurance Company v. AXA Insurance* (Arbitrator Bialkowski, August 13, 2015).

To return to the discussion of the big picture line of authority, *State Farm Insurance Companies v. Bunyan*[12] is a good example of this approach. Like all of these cases the result is very much driven by the facts. In this case the claimant was an adult but had not really achieved independence from being financially reliant on his mother despite several attempts to do so. He did work on a regular basis but appears to have spent much of his earnings on alcohol, cigarettes and other "amusements".

The outcome in this case (the claimant was found to be dependent) was also undoubtedly influenced by the legal finding that State Farm was estopped from terminating payment of benefits because it had paid for years, and the claimant was out of time to pursue any other insurer for benefits should State Farm be permitted to stop paying.

Nevertheless, Justice Corbett's comments are indicative that a strictly mathematical approach to dependency will not be applied by the courts in all cases:

> Some of the cases emphasize the extent of financial contribution. "Principally dependant" has been taken, in some of them, to refer to meeting more than 50% of the costs of living, whether in money or money's worth. I consider relative financial contribution to be an important factor, but not the only consideration. And this is not a moralistic analysis based on whether a young person "should "or "should not" have achieved independence. Here the question is not whether the young person "should" be independent, but whether, in fact, he is so.[13]

[12] [2013] O.J. No. 5043, Corbett J.
[13] At paragraph 19.

In The *Dominion of Canada General Insurance Company v. Intact Insurance Company and Unifund Insurance Company*[14] the Arbitrator found a 19-year-old claimant principally dependent upon his father and stepmother. The claimant had completed high school and did not have any firm plans regarding his future. Notably, he did not have a plan to return to school. He was working part time and had been working part-time for approximately eight weeks before the accident. Even though an extrapolated calculation of his part-time income would have mathematically indicated he was capable of providing for more than half of his financial needs, the Arbitrator was not prepared in the circumstances to find that he had achieved independence. Some relevant passages from her decision are as follows:

> The issue of determining whether a teenager or young adult whose life is in transition is principally dependent for financial support upon someone else is always challenging. It is often an exercise in "crystal ball gazing", and arbitrators and courts are in no better position than anyone else to predict how a claimant's life would have unfolded if the accident had not happened. It is trite to say, but true, that each case must be decided on the basis of the evidence presented, applying logic and common sense.[15]

> Applying the "big picture" analysis espoused by Arbitrator Bialkowski in the *Co-operators v. Western* case, I find that (the claimant) was not on his way to financial independence at the time of the accident…He had no prospects for steady employment beyond the 15 or so hours of work at Walmart, and was contemplating various academic options.[16]

On appeal to the Superior Court, Justice Perell made it clear that it is relevant to consider in the dependency analysis what a young claimant in transition has in mind for

[14] Arbitrator Novick, July 28, 2014; affirmed on appeal, 2015 ONSC 3689, Perell J.
[15] At paragraph 42.
[16] At paragraph 47.

future plans and how those plans could affect his or her self-sufficiency. He commented as follows:

> …the evidence established that the actuality was that (the claimant) had never supported himself financially and he had never been financially independent…
>
> …I move from actuality to potentiality. If one extrapolates from the evidence…and considers the potentiality of (the claimant's) self-sufficiency as opposed to the actuality of his dependency, then I see no error or unreasonableness in the Arbitrator's analysis…
>
> …There was ample evidence that (the claimant) was in a state of transition and that he was as likely to go back to school or do something else with his life than to continue to work at Walmart.[17]

Justice Faieta continued support for the "big picture" approach to dependency cases in *Allstate Insurance Company of Canada v. Intact Insurance Company*.[18]

This case involved a 76-year-old senior citizen who lived with her daughter and the daughter's family. Justice Faieta cites and agrees with the following comments by Justice Myers in the *Allstate v. ING* case:

> In my view, the math is just part of the test that has arisen out of the seminal decision in *Miller v Safeco*. I agree with the insightful comments of Corbett, J. in *State Farm v. Bunyan*…to the effect that while math is an important factor it is not the only factor…In *Miller*, the Court of Appeal approved four factors to consider dependency. Even those four are not necessarily the exclusive considerations. A change in the math from 50.001% dependency to 49.999% dependency may or

[17] At paragraphs 40, 42, and 43.
[18] 2016 ONSC 5443.

> may not overcome other aspects of the factual dependency between the relevant parties…[19]

Justice Faeita then comments:

> Later in (the paragraph cited) Justice Myers warned that the focus should remain on the "big picture" rather than a calculation that may cross "a magic mathematical line".

Justice Faeita also emphasizes the legislative policy design of the dependency provisions in the SABS referred to in the trial decision of *Miller v. Safeco*. He states:

> Given the ordinary meaning of the words used in the phrase "principally dependent for financial support", and the remedial purpose of the statutory accident benefits provisions, it is my view that the phrase "principally dependent for financial support" refers to a person who mainly relies on another person to provide him or her with the necessities of life , including shelter…the assessment of whether someone is "principally dependent for financial support" on another person does not turn on the mathematical analysis of whether a person provides more than 50% of the needs of another (i.e. on the amount of support provided), but requires a broader consideration of the various factors approved by the Ontario Court of Appeal in *Miller*.

The Economical Insurance Group v. Desjardins Insurance[20] further legitimizes the "big picture" approach in appropriate cases. Justice MacLeod describes it as follows:

> The "big picture" approach derives from cases in which either there was insufficient evidence to apply a 50% + 1 analysis or in which it simply appeared to be too arbitrary and nuanced a cut-off when viewed against the overall circumstances or the "big picture". The need to consider the big picture also takes into account some inconsistency in the case law as to what period of time should appropriately be used to assess dependency (*State Farm v. Bunyan* is cited here).

[19] At paragraphs 49 and 50.
[20] 2020 ONSC 1363, MacLeod J.

> In reality these are not inconsistent. If most of a person's needs can be met from their own resources they are not principally dependent on the other person but a strict mathematical approach will seldom be conclusive.[21]

In *The Co-operators General Insurance Company v. Security National Insurance Company*[22] the claimant had steady part-time employment which actually produced earnings exceeding 50% of the MBM for the area where he lived. The reality of the claimant's living arrangements, however, were that he was living at home and his mother was providing for all of his necessary expenses such as shelter and food. He did not pay room and board or contribute to the household expenses. He used his money for his own purposes.

In finding the claimant dependent on his mother Arbitrator Novick concluded as follows:

> While I have often referred to (LICO and MBM statistics) in considering financial dependency in other cases, I find that the clear evidence in this case – notably the fact that (the claimant) lived rent free at his mother's house for several months before the accident, that she paid for all the groceries he consumed, and that he relied on her transfers that she sent to maintain a positive balance in his bank account – mandates that I consider the "big picture" and conclude that (the claimant) was principally dependent for financial support on her at the time of the accident. To simply compare his earnings to statistics in this case would be to ignore the reality of (the claimant's) circumstances.

I conclude that the law of principal financial dependency has evolved with flexibility to accommodate situations involving young people in transitional stages of their lives, such as students, older individuals who have simply not been able to settle effectively on

[21] At paragraph 24.
[22] Arbitration Award March 2, 2021. Arbitrator Novick.

a steady course through life, or whose circumstances do not readily fit the application of a mathematical dependency formula.

In my view, in these types of cases the proper application of the *Miller v. Safeco* analysis requires more than simply determining whether the numerator of means divided by the denominator of needs produces a quotient greater or lesser than 50%. The ability of the claimant to be self-supporting and whether they can continue to be so must be given significant weight in such cases.

The case law clearly requires a consideration of the reality of the claimant's actual circumstances, not just an extrapolation of an income stream without considering whether it is likely to continue.

For example, a young person who has just finished high school and is working to earn enough money to pay some or all of their tuition costs in contemplation of a return to full time post-secondary education likely does not have the same ability to be self-supporting as a person who has completed their schooling, moved from the family home to self-funded living arrangements, and has started work with the intention of continuing same indefinitely in pursuit of a career.

The person contemplating a return to post-secondary education is far less likely to be able to continue to generate the resources necessary to be financially independent, especially where that person's real living circumstances are that they have never lived away from their parents' home and have always had their essential needs provided for them by their parents.

I also consider it important to keep in mind that in *Miller v. Safeco* the Court emphasized that the purpose of the inclusion of dependency provisions in the SABS was remedial and designed to expand SABS coverage – especially in family type situations.

Application of the Law to the Facts

As I mentioned at the outset, without a doubt this case falls within the definition of what has been described as the "young person in transition" case.

Sometimes in these cases one of the most difficult parts of the dependency evaluation exercise is determining an appropriate period over which to examine the financial data because the financial dependency situation could swing back and forth over time. In this case, however, I do not think this issue poses the same difficulty.

One could examine only the brief three-month period from the time the claimant moved to university until the accident, or a longer period – starting, for example, in mid-August 2019 when the claimant began work at Defcon Paintball. In my opinion, the conclusion on the principal financial dependency question is the same for either of these periods.

A longer period generally gives a more fulsome assessment, especially where changes have occurred in a claimant's situation, so I will start the examination of the financial dependency issue about 15 months before the accident, when the claimant began to work part-time. Up until then, in my opinion there is no doubt that the clamant was principally financially dependent on the claimant's mother.

The key question in this case is whether there was a change in the claimant's situation from when he began to earn income around August, 2019, until the accident in October, 2020, such that he was no longer principally financially dependent upon the claimant's mother.

Co-operators advances the arguments which need to be addressed in answering the question in the preceding paragraph. Co-operators agrees with Chubb that this is a "young person in transition" case, and consideration must be given to the reality of the claimant's circumstances, as opposed to just a mathematical approach to the dependency evidence. I also agree. According to the case law which I have reviewed, a holistic approach to the evidence in these types of dependency cases is what is required.

Co-operators submits, however, that even though the claimant's mother was providing him with financial support, the evidence is insufficient to establish that the claimant was principally (i.e. more than 50%) financially dependent on the claimant's mother. Co-operators argues that in any event the claimant could reasonably have provided for more than 50% of his needs with the income, savings, and the inheritance available to him.

Let us examine the evidence to see whether this is the most logical, common sense conclusion to draw.

The evidence establishes that before starting university in the fall of 2020, the claimant was a 17 year old high school student living at home in a major, Ontario city with no financial responsibilities whatsoever for his living expenses apart from some minor personal grooming and entertainment expenditures. He was preparing for the first year in

what was likely to be three or four years of schooling with some part-time work during the semesters (when he was not playing football) or in between them. This is not a person who was about to enter the workforce full time and begin earning a steady income into the foreseeable future.

From starting university up until the date of the accident, he had no source of income, and no immediate prospect of any earning income. His part-time employment income had ended several months before, and his CERB ended when he started university.

The evidence indicates that the Market Basket Measure ("MBM") for the claimant living in the Waterloo region at the time of the accident was $23,153.00. To be able to meet more than 50% of his expenses, the claimant would need available funds totalling $11,577.00.

With no ongoing source of income, the only possible way this could happen is if it is accepted that the claimant had savings of "roughly $10,000", an inheritance of $10,000, and he used both to the extent necessary to be able to satisfy more than 50% of his expenses.

Did he, or should he be considered to have, funds available to satisfy expenses from savings and inheritance? Is this even sufficient to displace the real life situation characterized by the fact that the claimant had finite financial sources at best, with no ongoing income source, and the fact that the claimant's mother was providing for more than 50%, if not all the claimant's necessary expenses right up until the date of the accident?

In my opinion, the answer to both questions is “no”.

I have serious doubts whether the claimant actually had “roughly $10,000” in savings. The only evidence of this is the claimant’s testimony on examination under oath. There is no evidence such as a bank statement to confirm this.

Perhaps more importantly, the claimant’s mother was unaware of any such savings. When she was asked if the claimant had any investments or savings at the time of the accident she replied, “no”.

I have previously indicated that I believe the evidence of the claimant’s mother to be more reliable on the issues where there is divergence with the claimant’s evidence. If the claimant did have any significant savings, I think she would have been aware of them. The claimant may have had some savings, but I consider it highly unlikely that they were anything like $10,000 by the time of the accident.

The claimant’s mother seemed to be very involved with the claimant’s life and supportive of him in all respects, not just financially. Her evidence demonstrates that she was keen to have the claimant assume more life responsibilities, including financial responsibilities, when he was able to do so, and recognized that he was anxious to do this.

To nurture her son’s desire for independence, I would have thought that if the claimant did have any significant savings available to him by the time he was starting university that the claimant’s mother would have encouraged him to use some of them to help pay his university related expenses. She could always step in, if necessary, to assist, but this would have been a practical way to help the claimant become more independent.

Instead, her evidence indicates that she continued to pay all his expenses. Although both the claimant's mother and the claimant wished for his independence, the claimant had not yet transitioned to this stage of life.

As far as the inheritance is concerned, the evidence of the claimant's mother indicates that this was not intended to be used for day to day expenses at this point in the claimant's life. The claimant himself does not mention the inheritance when discussing the personal resources he had available to fund his ongoing expenses.

If the claimant's mother, and perhaps the claimant as well, considered this inheritance more of a long term life investment as opposed to a ready source of funding for current expenses, the question is whether, in spite of this, dependency law requires this inheritance be included in evaluating the claimant's "reasonable capacity" to generate his own support.

The operative word here is "reasonable". In my opinion, an evaluation of this claimant's reasonable capacity to generate his own support ought not to require him to exhaust an inheritance, a non-renewable resource, which would not last a year when measured against the MBM bare minimum required to meet 50% of his day to day expenses.

In coming to this conclusion, I should not be taken to say that an inheritance should never, under any circumstances, be considered part of a claimant's reasonable capacity to be self-supporting. Each case must be decided on its own facts. In this case, I do not find it reasonable to require a barely 18 year old claimant who has no income stream and close to $1,000 a month of new debt from starting university to use up a small inheritance

before being considered principally dependent for financial support on a parent who was, in fact, his principal financial supporter.

Therefore, I conclude that there was no change in the claimant's status from approximately August, 2019, until the accident on October 29, 2020 which made the claimant no longer principally financially dependent upon the claimant's mother.

If anything, I think the claimant may have become even more dependent on the claimant's mother during this time. Even though he had an income stream After August, 2019, part of it stopped at least seven months before the accident, and the rest stopped when he began university at least two months prior to the accident.

In addition, as of August, 2020 when he started university the claimant had added a minimum of between $800 and $900 per month to his debt responsibilities which prior to that had been virtually zero throughout his life.

In my opinion, this case is a good illustration of a situation where applying a solely mathematical approach would be entirely artificial and would lead to a result that does not reflect the "actuality of dependency", to borrow Justice Perell's terminology.

If one attributed to the claimant $10,000 in savings and said that it was reasonable to require him to use the $10,000 inheritance immediately for day to day expenses, this would well more than satisfy a 50% portion of the MBM amount of $23,153. If the analysis stopped there with a simple financial snapshot in time, then it would be possible to say that the claimant was not principally financially dependent upon the claimant's mother.

In my opinion, however, not only are these assumptions unjustified, but they do not account for exactly what these cases are all about – the fact that the young person is in transition. These claimants have not settled at the stage of life where they are independent, even though they may want to get there and are trying to make strides in that direction.

In my view, in these types of cases one cannot just consider numbers, or possible financial resources in isolation, especially non-renewable ones, without considering the claimant's life as a "going concern".

For example, to look only at the claimant's income tax return for 2020 and say that he had an income for the year which more than exceeded the MBM 50% level fails to deal with important questions such as is that income going to continue? How long? Will it increase? Will it decrease? In this case the claimant's income had stopped completely. By the date of the accident he had no income, and no known prospects of an income. If the claimant got a job, how much could he work considering the other demands on his time? How much would he make? We do know that he had several years of university ahead of him before the accident. Was he going to move home in the summers? Was he going to stay in Waterloo and pay rent? What sorts of expenses, customary and potentially significant, but necessary, would he have incurred, and how long could savings and inheritance, if he had to use it, be expected to last?

Looking just at a tax return and conflicting or vague evidence about savings and an inheritance does not help much with these questions. In my opinion, it does help, however, to look at what the claimant's life has been like up to and including the time

window under consideration, and then to try to determine what probably lies ahead for some reasonable time beyond the time window under consideration.

In this case we are dealing with a 17, going on 18 year old, who had never lived away from home, who had a part-time job for only few months, who did not have any financial responsibilities or experience in dealing with them, who was going to be a student for several years, who had no income and no immediate prospects of any income starting university, who was, by his own admission, principally financially dependent upon his mother at least up until moving to university, whose mother purchased all necessary equipment to set him up at university, whose mother paid his rent and groceries at university, and whose mother still brought him meals to school from time to time. To me this is just not the picture of someone who has reached the stage of being his own, principal financial provider.

The claimant's mother stressed that her son was motivated and was what one might describe as "a good boy". When he lived at home the claimant did chores around the house and offered to help pay for things if he had money. The claimant's mother emphasized that she did not take his money. Her main concern right up until the accident (and beyond, I expect) was ensuring that the claimant had all the support he needed financially, and otherwise, to be able to focus on pursuing his education and his athletic endeavours. She felt the time would come later in the claimant's life when he would be required to re-order his priorities and perhaps take on greater financial responsibility.

The claimant's evidence was very similar to the claimant's mother on this theme. Perhaps as a matter of pride he felt that he had progressed further down the independence path when he started university than was actually the case.

In my opinion, however, at the time the accident the claimant had not yet achieved the level of independence that both he, and the claimant's mother were looking forward to. The claimant was still principally dependent upon the claimant's mother for financial support at the time of the accident.

Conclusion and Disposition

1) The claimant was principally dependent for financial support upon the claimant's mother at the time of the October 29, 2020 accident.

2) Co-operators is the priority insurer and is responsible for the payment of SABS to the claimant.

3) Chubb is entitled to its costs of the arbitration, including its share of the Arbitrator's fees.

4) I encourage the parties to settle costs. If they are unable to do so they should contact my ADR Co-ordinator to schedule a conference to discuss a format for the Arbitrator to determine costs.

Dated at Toronto, April 29, 2024

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Arbitrator
Scott W. Densem