IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF an Arbitration

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

and

STATE FARM INSURANCE COMPANY/CERTAS HOME AND AUTO INSURANCE COMPANY

Respondents

AWARD

Heard: April 27, 2021

Counsel:

Sharon C. Dagan, Van Arnhem & Associates: Counsel for the Applicant

Mark K. Donaldson, Dutton Brock LLP: Counsel for the Respondent State Farm Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction

This is a Regulation 283/95 SABS priority dispute arising out of an accident occurring May 29, 2016. The claimant, Sarah Rix, was a pedestrian when she was struck by a vehicle insured by the Respondent ("State Farm"). The claimant applied to the Applicant ("Dominion") for SABS. Dominion insured the claimant's stepmother, Efthimia Vagopoulos ("Dominion's insured"). She is the spouse of the claimant's father, Steven Rix. Dominion handled the claim as required by the Regulation and commenced this priority dispute with State Farm.

This arbitration originally included Aviva insurance Company of Canada as a Respondent. The arbitration was later dismissed against Aviva on consent of all parties.

This Award will determine which of Dominion or State Farm is ultimately responsible for the payment of SABS to the claimant.

The arbitration agreement of the parties provides that either party may appeal my Award on a question of law, or a question of mixed fact and law.

The Issue

To determine which of Dominion or State Farm is ultimately responsible for the claimant's SABS, the following issue must be resolved:

1) Was the claimant principally dependent for financial support or care upon Dominion's insured at the time of the accident?

If the answer is “yes”, then Dominion is the priority insurer pursuant to section 268 (2) 2.i. of the *Insurance Act*. The claimant would be considered an insured under Dominion’s policy because she would be a “dependant” of Dominion’s insured.

If the answer is “no”, then State Farm becomes the priority insurer pursuant to section 268 (2) ii., as the insurer of the vehicle which struck the claimant.

Evidence

The parties delivered written submissions which included several tabs of source documents which I relied upon for my summary of the facts outlined later in this Award. The parties also provided several authorities which I will refer to, as necessary in my discussion of the applicable law.

Analysis

The Facts

The claimant was 19 years of age at the time of the accident**.** She was born July 30, 1996. She lived at home with her father and stepmother in the town of Ajax. Apart from a few months when she lived with her biological mother, she lived with her father and stepmother since May, 2013. Her biological parents divorced in November, 2012. Up until the time of the accident the claimant never lived away from home.

SABS documentation confirms that the claimant was employed at Tim Horton’s as a storefront food service worker/team member between August 2014 and August 2015. This was a part-time position according to the documents; however, the claimant described it as full time work. She estimated she worked 30 to 35 hours per week.

Although the period of employment noted is approximately one year, according to the Employer's Confirmation Form (OCF-2), it appears that she worked only 12 weeks out of that year, earning about $2,919.

Additional SABS documentation confirms that the claimant worked at the Butchers Grill Restaurant Inc. ("Retro Burger") as a counter person for about 10 months from July 27, 2015 until the accident, May 29, 2016. She testified that she left Tim Horton's for this position. She worked a total of 43 weeks, earning a gross income of $17,600. This was full time employment. She worked approximately 35 to 40 hours per week.

The claimant was not attending school in the approximate one year and 9 months period leading up to the accident when she was working at Tim Horton's and Retro Burger.

The claimant's only additional source of income other than her Tim Horton's and Retro Burger employment was the Trillium Benefit. This was approximately $291 per year. The claimant also received the GST rebate. She did not know how much this was, but Dominion's forensic accountant indicates that it was $421 in 2015.

At the time of the accident the claimant had approximately $2,100 in savings.

From the time the claimant commenced living with her father and stepmother, she did not have to pay any household expenses. These were looked after by her father and stepmother. Significantly, the claimant did not pay any rent or make any room and board type contribution to the household. In other words, her father and stepmother provided her shelter and related amenities, as well as all of her meals. Her father and stepmother also paid for the claimant's personal, toiletry items.

From reviewing the transcript of the claimant’s examination under oath it is clear that the claimant relied entirely upon her father and stepmother to deal with all of the essential expenses of daily living. She had no knowledge of any details of what it cost to operate the household.

The only expenses the claimant had at the time of the accident included her cell phone bill of $47 per month, and the payment of any balance on what she described as an “emergency” credit card which had a limit of $500 per month. She also paid her own entertainment expenses although she had no idea what those were. The claimant’s evidence with respect to clothing purchases was similarly vague. She said that she would buy her clothing “if I had the money”, but if she did not, she would ask her father and/or stepmother to purchase her clothing.

The examination disclosed that she may have had some minor transportation expenses on the infrequent occasions when she would take a bus or a train, but again this was not clarified on examination. Her evidence was that her customary mode of transportation was walking.

The claimant did give some evidence about a matter which I consider significant in evaluating the issue of dependency. She testified that at the time of the accident it was her intention to return to school in September, 2016. She had been accepted and enrolled in Durham College. The claimant stated that she had been working to save enough money to pay half of the tuition cost, and that her father and stepmother were going to pay the other half of the cost. She estimated the annual cost of her program at approximately

$4,000. Unfortunately, the evidence is incomplete with respect to what course the claimant was undertaking and how many years it would take to complete.

The claimant did say that she was not planning on applying for a government loan such as OSAP to assist her with school. Again, the evidence is lacking in detail in terms of what, if any plans the claimant may have had with respect to continuing to live with her father and step mother, or possibly moving into residence at Durham College.

I would have thought that if the claimant had been planning to move out of her father's and stepmother's home, and move into residence at Durham College, this would have come up during the discussion of her return to school plans. The cost of living in residence would also have been 100% higher than living at home, virtually expense free.

The fact that the claimant did not intend to apply for government assistance creates a reasonable inference that her plan was to remain in her father and stepmother's home for the foreseeable future even after she began her program at Durham College.

Certainly, there is no evidence that the claimant had given any consideration to what would have been involved in moving out of her parents' home in terms of finding and paying for alternative accommodation, and then dealing with the associated expenses of living on her own.

The record is also silent on whether the claimant would have worked part-time when she started her course at Durham College. As other arbitrators have recommended, applying logic and common sense it seems highly unlikely that the claimant would be able to perform any more than some part-time work at most while pursuing a full-time program at Durham College. Therefore, her resources in the form of income from working probably would have declined significantly from what she had been earning working 35 to 40 hours per week at the Butcher's Grill.

My overall impression of her evidence is that at the time of her accident, the claimant was a rather typical young teenager whose life planning had not progressed beyond deciding to enrol in post-secondary education.

There is no evidence that she considered or was even inclined to live independently of her parents. There is no indication that she had developed an understanding of financial matters, or the rather onerous demands of managing one's living expenses in the Greater Toronto Area. All of this was being looked after by her father and stepmother. She was working minimum wage type jobs to help with her tuition cost, and to provide herself with "pocket money" as she was about to start another education phase of her life.

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

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

- 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 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 of time 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 of time 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 her father and stepmother. No arguments were advanced suggesting that the claimant was dependent upon her father and stepmother 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

[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").*

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 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

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

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

Although not true in every case, generally speaking 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.

[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).

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]

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

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

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 – 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.

[10] *Allstate Insurance Company of Canada v. ING Insurance Company of Canada*, 2015 ONSC 4020, Myers J.

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

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 sum total of the claimant's means.

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

[12] [2013] O.J. No. 5043, Corbett J.

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]

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:

[13] At paragraph 19.

[14] Arbitrator Novick, July 28, 2014; affirmed on appeal, 2015 ONSC 3689, Perell J.

> 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 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]

[15] At paragraph 42.
[16] At paragraph 47.
[17] At paragraphs 40, 42, and 43.

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 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

[18] 2016 ONSC 5443.

[19] At paragraphs 49 and 50.

> 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). 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 very recent case of *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.

[20] 2020 ONSC 1363, MacLeod J.
[21] At paragraph 24.
[22] Arbitration Award March 2, 2021. Arbitrator Novick.

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 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.

The Time Frame for the Dependency Analysis

In my view, the appropriate period of time to consider for the financial dependency analysis in this case is the approximate one year and nine month period between August 2014 and the accident date of May 29, 2016.

Although I do not have any specific evidence on the point, up until shortly before August 2014 the claimant would have been under 18 years of age and in all likelihood was a full-time high school student. There is no evidence that she earned any income before August 2014 so I think it is a reasonable inference to draw that the claimant was undoubtedly principally financially dependent on her stepmother and father at least until August 2014. The question is, did the claimant's circumstances change sufficiently between August, 2014 and May 29, 2016 so that she was no longer principally financially dependent upon her step mother and her father?

Although the claimant had entered a new phase of her life by August 2014 and seemed to be looking ahead to her future beyond high school, in my opinion her principal financial dependency on her parents did not change over this period.

The evidence indicates that the purpose for the claimant commencing work at Tim Horton's and then changing jobs to work at the Butchers Grill (because it paid more) was to earn sufficient money to contribute towards the cost of becoming a student again when she commenced her program at Durham College in the fall of 2016, and to fund some personal, incidental expenses. The jobs she held were not career building moves or designed to establish economic independence from her parents – they were simply an interim means to an end.

Recall as well that the evidence is her stepmother and father were going to pay half of the tuition cost for the claimant's course at Durham College while she was expected to earn enough in the time between high school and starting Durham College to pay the other half of the tuition cost.

Therefore, I conclude that it is a reasonable inference from the available evidence that the claimant intended to work a sufficient amount following high school to achieve her objective of earning enough to at least partially fund her Durham College tuition, and to provide herself some pocket money for minor expenses. She would pay for her cell phone and entertainment while her parents provided for all her essential needs such as lodging and food.

Dominion submitted that the appropriate period to consider for the dependency analysis would be the 12 months leading up to the accident. This effectively coincides with the claimant's highest period of earnings during her employment at the Butcher's Grill. In my view, limiting the dependency inquiry to this period would give an artificially inflated perception of the claimant's means. Before working at the Butcher's Grill, she only earned $2,919 in the almost one year period that she was employed at Tim Hortons, because she only worked 12 weeks out of that year.

I have already emphasized that evidence is clear that the claimant was going to return to school in September, 2016. Therefore, it was extremely unlikely that she was going to continue with full time employment hours either at the Butcher's Grill or anywhere else. What she might have been able to generate as income when she started at Durham College, if anything at all, would more likely have resembled what she earned at Tim Hortons from August 2014 to August 2015.

It is for these reasons and in this context that I conclude the one year and nine months leading up to the accident is an appropriate time period to consider when comparing the claimant's means against her needs and evaluating her ability to be self-supporting.

Conclusion on Principal Financial Dependency

In my opinion, when the law as I have outlined it is applied to the facts of this case as I have summarized them, on a balance of probabilities the claimant was principally financially dependent on her stepmother and father at the time of the accident.

Dominion emphasized that in the 52 weeks prior to the accident the claimant had a net income of $17,793.01, the MBM applicable to the claimant at the material time was $18,436, and the LICO was $17,485.00.

On a strict mathematical calculation, using the 12 month net income of the claimant before the accident as the numerator, and either the MBM or LICO amounts mentioned as the denominator, the claimant would appear to have been able to provide for well more that 50% of her needs.

This analysis changes however if the period of time is expanded to the one year and 9 month period I have concluded is appropriate. Looking at it this way, in the 21 months prior to the accident, the claimant earned a total of $20,712.01. That equates to an average of $986.28 over the 21 month period. Annualized it comes to about $11,835.

Taking 50% of the MBM and LICO amounts mentioned above yields $9,218 and $8,742.50. The claimant’s earnings would still technically exceed the 50% of needs level, but now the differential is much less, and is in the range of many of the cases which have found dependency based on the factors I have noted in my discussion of the case law.

I have performed this mathematical analysis to ensure that it could not be said that I had failed to consider the means divided by needs valuation which the case law indicates must be given deference in the appropriate situation.

The facts of this case bring it within the line of authority supporting a broader consideration of the *Miller v. Safeco* factors. To state it succinctly, this case requires a "big picture" approach. In my opinion significant weight should be given in the analysis to the *Miller v. Safeco* "ability to be self-supporting" factor.

The claimant was still a teenager. She lived at home and had never lived anywhere else. She had no demonstrated intention of doing so. She was not responsible for any fundamental living expenses and had no idea what they might be. Her earnings in the 21 months leading up to the accident were not a demonstration of an effort to become financially self-sufficient. Her work at Tim Hortons and the Butcher's Grill was part of a plan to fund a return to school. At the time of the accident the claimant had about $2,100 in savings, and she estimated the tuition cost at Durham College to be $4,000 per year. Realistically, whatever savings she had were probably going to be exhausted to partially fund her tuition costs at Durham College.

This intention to resume educational pursuits was not vague or uncertain. The claimant had enrolled at Durham College with a starting date in the fall of 2016. To further her plan, she made an agreement with her stepmother and father that she would fund half her tuition and they would fund the other half.

As for the rest of her living circumstances, the evidence indicates that nothing in this regard was going to change. There is no evidence that she was planning to move out of the family home to live in residence at school. She was not even planning to seek any government assistance to pursue her program at Durham College.

In my opinion, the reasonable inference to draw from this is that the claimant was going to continue to live at home with her parents who would take care of all of her essential needs. She would attend Durham College. She may have worked, but it would not have been more than part-time hours to accommodate her school workload. In other words, the claimant did not have the ability to be self-supporting. She needed her stepmother and father to provide the majority of her living support. Whatever earnings she may have been able to generate when she returned to school in the fall of 2016 would have been used by her to pay for incidental expenses and to fund some of her tuition.

On the facts before me, and considering all of the relevant *Miller v. Safeco* factors in the context of how the case law has applied them, I find that the claimant in this case was principally financially dependent on her stepmother and father at the time of the accident.

Disposition

1) The claimant was principally dependent for financial support upon Dominion's insured at the time of the accident.

2) Dominion is the priority insurer and is responsible for the payment of SABS to the claimant.

3) State Farm 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 telephone conference to discuss a format for the Arbitrator to determine costs.

Dated at Toronto, January 31, 2022

Scott W. Densem

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Scott W. Densem, Arbitrator