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

GORE MUTUAL INSURANCE COMPANY and CERTAS HOME AND AUTO INSURANCE COMPANY

Respondents

AWARD

Written Submissions Completed: September 23, 2021

Counsel:

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Benjamin Lee and Melanie Lopo, Desjardins Legal Counsel: Counsel for the Respondent Certas Home and Auto Insurance Company

Mark K. Donaldson, Dutton Brock LLP: Counsel for the Respondent Gore Mutual Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction

This is an Ontario Regulation 283/95 priority dispute arising from an accident occurring July 21, 2017. Alyssia Lafontaine Greenwood ("the claimant") was 17 years old at the time of the accident (DOB: October 8, 1999).

The claimant was a passenger occupant in a vehicle insured by the respondent, Certas Home and Auto Insurance ("Certas"), when it was involved in a single vehicle accident.

A claim for Statutory Accident Benefits pursuant to the *Insurance Act* RSO 1990 c. I.8 and its Regulations ("SABS") was filed on the claimant's behalf by her mother, Heather Lafontaine, who was insured at the time of the accident with the Applicant, The Dominion of Canada General Insurance Company ("Dominion"). Dominion has dealt with the claimant's SABS claim, subsequently commencing a Regulation 283/95 priority dispute against Certas, and the respondent, Gore Mutual Insurance Company ("Gore"). Gore insured the claimant's father, Jason Greenwood, at the time of the accident.

This Award will determine priority for the claimant's SABS claim amongst Dominion, Gore, and Certas.

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

According to the priority hierarchy in subsection 268 (2) of the *Insurance Act*, if the claimant was principally dependent for financial support or care upon one or both of

Dominion's and or Gore's insureds (her parents) at the time of the accident, then one or both of Dominion and or Gore will be the highest priority insurer.

If the claimant was not dependent on either Dominion's or Gore's insured at the time of the accident, then Certas will be the highest priority insurer.

Therefore the priority issue will be resolved by determining whether or not the claimant was principally dependent for financial support or care upon one or both of her parents at the time of the accident.

Evidence

The parties delivered written submissions and a Joint Document Brief ("JBD"), the contents of which I relied upon for my summary of the facts outlined later in this Award. The parties also provided several Briefs of Authorities ("BOA") which I will refer to as necessary in my discussion of the applicable law.

Analysis

<u>The Facts</u>

In my view, a proper examination of the dependency issue requires a consideration of the claimant's situation within her family unit before and after the separation of the claimant's parents, and the circumstances of that separation insofar as the claimant is concerned.

Jason Greenwood and Heather Lafontaine were in a common-law relationship. The claimant was a child of that relationship and spent just over 12 years of her life with her parents when they were living together in Woodstock, Ontario.

According to Jason Greenwood, he and Heather Lafontaine separated in January 2012. Although separated, Mr. Greenwood, Ms. Lafontaine, and the claimant continued to live in Woodstock until July 2015.

From the outset, it appears that whatever their differences, Mr. Greenwood and Ms. Lafontaine were prepared to work together to ensure that the claimant was properly looked after.

By July 2013 there was a court order in place addressing issues of custody and other matters. From the time they separated until July 2015, the arrangement between Mr. Greenwood and Ms. Lafontaine with respect to the claimant was essentially that the claimant would alternate spending two weeks with her mother, and two weeks with her father. During this time, whichever parent the claimant was residing with was responsible for whatever expenses were involved in taking care of the claimant (EUO Greenwood, page 85, EUO Lafontaine, page 5, Tabs 4 and 5 JBD).

In July 2015 Mr. Greenwood moved to London with his fiancée and his fiancée's son. The claimant moved to London with her father.

At that time there was a consent amendment to the court-approved arrangements between Mr. Greenwood and Ms. Lafontaine. The tenor of the arrangements however, remained the same. Joint custody was confirmed, but the claimant was permitted to decide which parent she would live with. Child support was to be paid to the parent with whom the claimant was living by the other parent. Since the claimant had elected to live with her father, Heather Lafontaine was obliged to pay approximately $200 per month child support to Jason Greenwood (Court Approved Minutes of Settlement, Tab 16 JBD).

According to Heather Lafontaine, in addition to the child support paid directly to Mr. Greenwood, she also contributed some money for the purchase of the claimant's health products and school related expenses (EUO Heather Lafontaine pp. 7 – 9). Mr. Greenwood, in combination with his fiancée, looked after all of the other expenses with respect to the claimant residing in his household in London. Apart from a small contribution to cell phone expense, the claimant made no contribution whatsoever to her financial needs.

This arrangement lasted until the fall of 2016. In November 2016 the claimant was admitted to the hospital in London as a result of an overdose of medication. According to Heather Lafontaine, it was around that time that the claimant began talking about returning to live with her mother in Woodstock in a house owned by her grandmother (EUO Heather Lafontaine p. 24).

It seems that over time the claimant's relationship with Mr. Greenwood's fiancé became strained, which in turn seemed to affect her relationship with her father. This situation ultimately led to the claimant's decision to move back to Woodstock (Claimant EUO p. 38).

The balance of the evidence on this issue seems to indicate that this was a permanent move on the part of the claimant. Whether or not the relationship with her father was repairable, it certainly appears as if the claimant did not intend to live in the same household as her father and his fiancée from that point onward (EUO Jason Greenwood p. 16, 20), EUO Heather Lafontaine p. 24). Post-accident events confirm this. The claimant returned to school in London, Ontario, but elected to live in residence, and has subsequently started living with a boyfriend. She has not returned to her father's residence (EUO Jason Greenwood p. 18).

The claimant left London to return to Woodstock in March 2017. The home she moved into was owned by her grandmother, Margaret Lafontaine. Her mother was residing in the basement level of this home with her boyfriend. When the claimant moved in, she resided on the main floor the residence with her grandmother.

The financial arrangements were almost a mirror image of what had been the case when the claimant was living in London with her father and her father's fiancé. Jason Greenwood now paid $300 per week support directly to Heather Lafontaine for the claimant's benefit. Once again, apart from a contribution to cell phone expense, the claimant did not make a significant contribution to towards her own financial needs. These were taken care of by a combination of support from her mother, the benefit of living under her grandmother's roof, and the contribution coming from Jason Greenwood.

The one difference in the claimant's situation when she moved back to Woodstock is that she commenced working at McDonald's in April, 2017. This was a part-time, minimum wage or less job. She was still attending school so she was working evenings and weekends. Her hours fluctuated. She worked an average of 19 hours before school ended in June 2017, but then increased to about 29 hours per week after that for a short time up until the accident in July (BDO Report, Tab 6 JBD).

Much has been made of the value of the claimant's earnings from this job in terms of its potential for her to be self-supporting. Her earnings in the 2.9 months from April 24, 2017 until July 21, 2017 (the date of the accident) totalled $2,845 (Davis Martindale

Report, p. 15, Tab 8 JBD). Although this has been extrapolated to have an annual value of $11,638 (BDO Report, Schedule A-1, Tab 6 JBD), the reality is that on the evidence it is far from clear whether the claimant would have been able to maintain this employment had she commenced college level courses in the fall of 2017 as she had planned.

What is clear from the evidence however, is that the claimant used the majority of her earnings to enhance her lifestyle. As of June 30, 2017, she had a grand total of $304.84 in her bank account (Simplii Financial Bank Statement, Tab 11, JBD). Her bank statement indicates some purchases which may or may not have been for needs (*e.g.* Shopper's Drug Mart and Zehrs). The majority of the entries seem to be for restaurant or entertainment expenses.

The evidence as to what the claimant would have done in the fall of 2017 had the accident not intervened is mixed, and to some extent contradictory. In some accounts it is noted that the claimant had completed her high school diploma but was registered to return to high school in Woodstock in the fall of 2017 to obtain some upgrading credits required to be admitted to the Personal Support Worker program at Fanshawe College in Woodstock (Claimant's Statutory Declaration, para. 5, Tab 13, JBD).

In other accounts however, the claimant indicated that she did not require any upgrading credits and hoped to go to Mohawk College in Hamilton in the fall of 2017 to pursue a course in forensic science. She did not anticipate receiving any support from either her father or mother, but intended to apply for OSAP support and live in residence in Hamilton. There was also mention of the possibility of the claimant pursuing a journalism course at Mohawk (Claimant's EUO, pp. 43 – 46, Tab 2, JBD).

The evidence indicates however, that as of the date of the accident the claimant had not applied to any postsecondary institution. It is unclear whether attending college in the fall of 2017 was a viable prospect for the claimant, and whether there would have been any significant change in her circumstances at all come the fall of 2017.

Jason Greenwood's comments when questioned about his daughter's prospects offer some insight into the uncertainty of the claimant's intentions at that time, which is not entirely surprising given her age and rather limited life experience. He said: "*She was an aspiring kid. One day it would be a vet tech, the next day a PSW. I do not think she really knew at the time*" (EUO Jason Greenwood, p. 17).

<u>The Law</u>

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 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]

The Court of Appeal approved of Arbitrator Lee Samis' 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 meet the claimant's needs, without considering enhancements to lifestyle. Notably 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

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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.

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 45% of the claimant's needs, another independent source provides 30% of the claimant's needs, and the claimant provides 25% of their needs, the claimant could be found to be principally dependent on the source providing 45% of the claimant's needs.[6]

Measuring a claimant's needs is a difficult exercise which has traditionally been fraught with a great deal of uncertainty. The parties to these disputes, their experts, and ultimately, the arbitrator, are often faced with limited and not very reliable evidence based on "guesstimates" of expenses 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

[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).

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]

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 later refer 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.

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[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 to 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 finding of dependency in this case was made in the context of the claimant having no other recourse against any other insurer. The Court found that State Farm was estopped from terminating benefits because it had paid for years.

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

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 other words, in the "persons in transition" cases, the proper question to ask is: "is the claimant capable of being self-supporting given the reality of the claimant's circumstances?"; not: "should the claimant be capable of being self-supporting if they were more responsible in their economic behaviour."

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

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[13] At paragraph 19.
[14] Arbitrator Novick, July 28, 2014; affirmed on appeal, 2015 ONSC 3689, Perell J.

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 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…

[15] At paragraph 42.
[16] At paragraph 47.

> …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 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

[17] At paragraphs 40, 42, and 43.
[18] 2016 ONSC 5443.
[19] At paragraphs 49 and 50.

> 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). 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 claimant's living arrangements were that he was living at home and his mother was providing for all his necessary expenses such as shelter and food. He did not pay room

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

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 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.

<u>The Time Frame for the Dependency Analysis</u>

As is evident from the submissions and the expert reports delivered by the parties, the selection of the time frame to consider whether the claimant is or is not principally dependent could be of crucial importance to the outcome in this case.

If a strict mathematical analysis of estimated needs, or the MBM/LICO figures are used, and compared to the claimant's income (or lack thereof) at different points along the way, dependency in this case would be determined by how one "moves the needle" on the calendar.

For example, two expert reports appear to confirm that if the mathematical calculations focus on a period of time up to a year or more before the accident, then the conclusion is that Jason Greenwood made the greatest financial contribution to the claimant's support and therefore the claimant would be principally dependent upon him (BDO Reports, Tabs 6 and 7, JDB).

On the other hand, if a time period is mathematically examined starting with when the claimant commenced employment in April 2017 up until the time of the accident, then the expert reports appear to conclude that the claimant was able to provide for the majority of her needs (*i.e.* she was not principally dependent upon anyone (BDO Reports, Tabs 6 and 7, Davis Martindale Report, Tab 8, JDB).

In my opinion, the time period which best reflects the claimant's circumstances at the time of the accident commences with her moving to Woodstock to live with her mother at her grandmother's house. The evidence indicates that she had made a permanent break with her father in so far as living arrangements were concerned. She had left her father's home and did not have any intention of returning. Subsequent events ~~have~~ confirmed that this was not a temporary departure.

This time period also sees the commencement of the claimant beginning work. Although it if far from clear whether she would have maintained employment had she returned to college in the fall of 2017, it was her intention to do so, and further, there is some indication that she had hopes of becoming independent of both her parents by seeking OSAP assistance and moving into residence at college. This does mark another stage in the claimant's development as a young adult – getting out into the working world and beginning to make plans to be independent of her parents.

Although the claimant was still a young woman in transition, her move to Woodstock in 2017 was the prelude to commencing a new stage in her development and in my opinion best reflects where she was ~~at~~ in life when the accident occurred about three months later.

Conclusion on Principal Financial Dependency

I conclude that the claimant was principally dependent for financial support upon both her parents equally at the time of the accident.

It could be asked why I do not adopt the conclusions of the experts that if the three month period before the accident is used to examine dependency, the claimant was not principally financially dependent upon anyone because she had an income sufficient to provide for the majority of her needs.

The main difference in my approach to that of the experts is that in my opinion, it is unrealistic to compare the claimant's earnings from a three month, part-time, after school, minimum wage job with an uncertain future, to the financial needs the claimant had throughout her life until she started part-time work and would undoubtedly continue in the future. Therefore, in determining dependency in this case I give weight to the reality of the claimant's circumstances. The evidence indicates that she used little of her part-time earnings from McDonalds to service her needs.

I make no criticism of either of the experts for their calculations, or their conclusions based on those calculations. Both experts very competently conducted what is essentially a mathematical analysis comparing either estimated expense values, or MBM/LICO statistics, to the full value of the claimant's part-time job income, based on time periods they were instructed to use by the party retaining them.

I am of the view however, that the facts of this case come within the class of cases for which courts and arbitrators have held that a strictly mathematical, MBM or LICO analysis is not appropriate to determine dependency. In my opinion, a "big picture" approach to the facts in this case, particularly with respect to the *Miller v. Safeco* "ability to be self-supporting" factor", is what is required.

As I have indicated, the claimant was in transition. She had plans to attend college in the fall of 2017, but had not done very much to further those plans. In fact, it is unclear whether she was going to attempt college or return to high school for additional credits. Her ability to continue working and earning an income, what her living arrangements were going to be, what expenses she would have to meet, and how she was going to accomplish this – were all factors that were completely undetermined at the time of the accident. The only thing that was clear is that at the time of the accident virtually all her financial needs were being met by a combination of support from her father, her mother, and her grandmother.

In my opinion the most significant factor militating against using a strictly mathematical, MBM or LICO approach is that whatever the claimant's earnings were, actual or extrapolated, she had a total of $304.84 in her bank account at the time of the accident. This is not indicative of a person who has the financial wherewithal to be independent. This is not just the "big picture" – it is the "real picture".

I thought this point was put quite fairly in the Davis Martindale report where, after very competently conducting a mathematical analysis, they said (Davis Martindale Report, Tab 8, p. 15, JBD):

> …Alyssia was a 17-year-old recent high school graduate at the time of the accident and resided with her mother and grandmother who paid for all of her basic needs. In order to live independently and provide for more than 50% of her basic needs, Alyssia would have had to change her lifestyle and spending habits as a high school student.
>
> Although we have provided calculations using LICO and MBM, we question the reasonableness of using the statistics in calculating the financial needs of a 17-year-old recent high school graduate who, at the time of the accident, was dependent on others to provide for her.

As Justice Corbett said in *State Farm v. Bunyan,* it is not a "moralistic analysis". The question is not, should the claimant have been financially independent, but was she in fact financially independent? The answer in this case is most definitely, "no".

If the claimant's earnings from her part-time job are not given much weight in the analysis since in reality she was not providing for the majority of her needs, the question becomes: Is there anyone upon whom the claimant is principally dependent?

I will concede that depending on how one calculates the value of housing/utility costs, there is an argument that the claimant's grandmother was the single, largest contributor to the claimant's financial support at the time of the accident because the claimant was living rent and utility expense free in her grandmother's home.

The claimant's grandmother's insurer, if any, is not, however, a party to this priority dispute arbitration. According to the Arbitration Agreement, it is only relevant to compare the contributions to financial support made by the claimant's parents to the claimant's own contribution, and to determine whether the claimant was principally dependent for financial support or care upon her mother, her father, or neither of them. (Arbitration Agreement, 2 (b) (i), (c) (d), Tab 18, JBD). Therefore, I make no findings in respect of the claimant's grandmother's support of the claimant.

Based on the evidence, the claimant's parents were making larger contributions to the claimant's financial support at the time of the accident than the claimant herself.

Like the analysis of whether the claimant was providing for more than 50% of her needs at the time of the accident, I do not think a strictly mathematical approach is appropriate to determine whether the claimant's father or her mother was her principal supporter. The "real", or "big picture" needs to be considered.

Here I return to what I emphasized in the beginning of my analysis. In my view it is important to consider how, from the outset, the claimant's parents approached the issue of having a divided family. What did they think was fair and reasonable as to a division of time with, and financial responsibility for their daughter, and how did they deal with those factors in their arrangements between themselves?

I think the answer to this question is that Jason Greenwood and Heather Lafontaine intended all along to contribute equally to the upbringing and support of their daughter and made best efforts to do so. Both the informal and formal arrangements for custody and financial responsibility support this conclusion. They persevered in those efforts despite them both having relationship difficulties at various times with the claimant – not surprising with any teenager, especially one in a divided family. In my view, those efforts should be respected.

In the beginning when they were living in the same city, they shared custody two weeks on and two weeks off. Whomever the claimant was living with dealt with her expenses. Later, when Jason Greenwood moved to London, the claimant was allowed to decide with whom she wished to live. Financially, if the claimant was living with Jason Greenwood, he dealt with her expenses and Heather Lafontaine paid $200 per month to him to help out. When the claimant moved in with her mother in Woodstock, Heather Lafontaine was responsible for seeing to the claimant's needs, and Jason Greenwood sent her $300 per month to help out.

This $100 difference is, in my opinion, *de minimus* in the scheme of things. It is reflective of the fact that Jason Greenwood had, at least at one time, a better income than Heather Lafontaine and was able to afford a bit more. It really makes little difference if we examine the approximate three month period leading up to the accident, and from a mathematical standpoint, as will be seen from the scenario I will set out, it actually comes close to equalizing the financial contributions of the claimant's parents in those three months.

Dominion expressed some concern in its submissions that using a “big picture” approach and “ignoring” the math, would create uncertainty in these dependency cases. The parties would end up with decisions based on the arbitrator’s “visceral feeling”, as opposed to empirical analysis.

I would emphasize that in my view, the “big picture” approach, at least as I am employing it here, is not simply a “visceral feeling” as to what the outcome should be. Both methods require mathematical analysis. It seems to me that the essential difference in the analysis in this and many of the other dependency cases is the decision to include or not to include all, some, or none of a claimant’s self-generated resources in the mathematical calculation.

The strict mathematical approach is effectively to include any claimant generated resources, without a broader consideration of the evidence to determine whether the claimant is actually using the resources for needs or will be able to sustain the resource generating activity. In my opinion, this imports the “should” value judgment into the *Miller v. Safeco* ability to be self-supporting factor. If the numerator of resources divided by the denominator of needs exceeds 50%, then the claimant “should” be self-supporting.

The “big picture” approach does not ignore the math, it just does not import the “should” factor into the calculation of what is included in the means divided by needs fraction. It looks at the reality of whether a claimant is actually using available means to satisfy needs or can continue to do so. With respect to minors, students, persons in transition, vulnerable persons, or others who are special cases, as Justice Corbett said, the big picture approach is not a moralistic analysis. It considers a claimant’s situation for what it actually is, not what it should be. Deciding dependency in these cases really becomes a question of what level of financial responsibility it is appropriate to impose on a particular claimant in their particular circumstances.

Although my conclusion is not dependent on establishing mathematically that Heather Lafontaine and Jason Greenwood made identical financial contributions to the support of their daughter in the three months leading up to the accident, I invite the reader to consider the following interesting exercise:

I would refer to the Davis Martindale report (Tab 8, JBD). In schedule 3, based on data obtained from examinations, the report outlines an estimated contribution to household expenses by Heather Lafontaine attributable to the claimant in the three months leading up to the accident.

Dominion has objected to the level of assumed expense for cable and internet as being vastly over estimated, and to the inclusion of motor vehicle and fuel expenses because there is little evidence of the claimant's use of Heather Lafontaine's vehicle.

Accepting that these expenses are over-stated, if the cable-internet expense is reduced by half (to $212.50 - $53.12 attributed to the claimant), and only 10% of the motor vehicle expense is attributed to the claimant as opposed to 25% (reducing it to $33.50), the total contribution to household financial expenses by Heather Lafontaine attributable to the claimant in the three months leading up to the accident is **$239.62**.

In schedule 2-3 Davis Martindale outlines Heather Lafontaine's contribution to the claimant's personal expenses (which for the purposes of this analysis I accept as "needs") in the approximate three months leading up to the accident. The total is **$631.00**

Combining the revised amounts from schedule 3 with the amount in schedule 2-3, Heather Lafontaine's total financial contribution to the claimant's support in the approximate three months leading up to the accident would be **$870.62.**

Over the same three months leading up to the accident, Davis Martindale values the contribution made by Jason Greenwood to the claimant's support at **$870.00** (2.9 months X $300 per month).

I appreciate that there may be other ways of analyzing the data. Different assumptions could be used as to the validity of expense guesstimates. There could be other ways to allocate or apportion expenses which might in turn lead to the conclusion that one parent contributed slightly more than the other.

My point however, is that it is reasonable to conclude from the evidence in this case that the financial contributions made by the claimant's parents in the three months leading up to the accident were sufficiently close both in intent and practice, that they should be considered equal, principal supporters of the claimant.

Stating it in terms similar to Justice MacLeod's explanation of the "big picture" approach in *Economical v. Desjardins* (*supra*, footnote 20), in my opinion, any difference in the financial contributions made by Jason Greenwood and Heather Lafontaine to the financial support of the claimant at the time of the accident was insignificant, and it would be too much of an arbitrary cut-off to conclude one truly supported the claimant more than the other. It was clearly their joint intention to be equal supporters of their daughter, and the evidence indicates that they were essentially successful in achieving this intention.

Therefore, for the foregoing reasons I conclude that Jason Greenwood and Heather Lafontaine were equal, principal financial supporters of the claimant at the time of the accident.

Disposition

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

2) Dominion and Gore are jointly the priority insurers and are responsible for the payment of SABS to the claimant.

3) Dominion is entitled to 50% reimbursement from Gore for SABS paid or payable to the claimant in an amount to be agreed upon or determined.

4) With respect to costs, Dominion commenced this arbitration against Gore and Certas. Dominion argued that the claimant was solely, principally dependent on Gore's insured, leading evidence seeking to establish that Gore was the priority insurer. In the alternative, Dominion argued that the claimant was not principally dependent on anyone, leading evidence to establish that Certas was the priority insurer.

Dominion partially succeeded on its first argument, but did not succeed on its second argument.

Gore did not dispute that the claimant was principally dependent. It argued only that the claimant was solely, principally dependent on Dominion's insured, and not Gore's insured. Gore did not lead any evidence seeking to establish that Certas was the priority insurer.

Therefore, Dominion is entitled to partial recovery of its costs of the arbitration insofar as they relate to Gore, in an amount to be agreed upon or fixed by the Arbitrator.

Certas is entitled to recover its costs of the arbitration from Dominion, in an amount to be agreed upon or fixed by the Arbitrator.

5) 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, May 5, 2022

Scott W. Densem

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Scott W. Densem, Arbitrator