IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

THE WAWENESA MUTUAL INSURANCE COMPANY

Applicant

- and -

THE COMMONWELL MUTUAL INSURANCE GROUP

Respondent

DECISION

Appearances:

The Wawanesa Mutual Insurance Company (Applicant): Kathleen O'Hara

The Commonwell Mutual Insurance Group (Respondent): Linda Matthews

Introduction:

This matter comes before me pursuant to the *Arbitration Act, 1991, Section 268, R.S.O. 1990 (C. 1.8 as amended)* and Ontario Regulation 283/95, as amended. I have been retained as a private arbitrator to make a decision with respect to an issue as between the above-noted insurers concerning a priority dispute that arose out of a motor vehicle accident that took place on April 13, 2015.

On that day Stephanie T. (the claimant) was struck by a motor vehicle while crossing the street in Shelburne, Ontario. The vehicle that struck her was insured with The Commonwell Mutual Insurance Group (hereinafter referred to as "Commonwell"). However, an application for accident benefits was submitted by the claimant's legal representative to The Wawanesa Mutual Insurance Company (hereinafter referred to as "Wawanesa") who insured Stephanie's mother: Ms. Cathy T.

On May 4, 2015 Wawanesa sent Commonwell a Notice to Applicant of Dispute Between Insurers dated May 4, 2015.

On March 9, 2016 Wawanesa served Commonwell with a Notice to Participate and Demand for Arbitration dated March 8, 2016.

Stephanie's accident benefit claim is still open and Wawanesa continues to adjust this matter.

Wawanesa takes the position that on April 13, 2015 Stephanie was not principally dependent for financial support or care on her mother, Cathy. Commonwell takes the opposite position thus resulting in the need for this arbitration.

This arbitration proceeded by way of both written and oral evidence as well as written and oral submissions. On October 16, 2018 both Stephanie and Cathy attended to give evidence. In addition the following were made as exhibits:

1. Exhibit 1A – Joint Document Brief, Volume 1 (Tabs 1-14);
2. Exhibit 1B – Joint Document Brief, Volume 2 (Tabs 15-19);
3. Exhibit 1C – Joint Document Brief, Volume 3 (Tabs 20-26);
4. Exhibit 2A – Supplemental Document Brief filed by Commonwell: Volume 3;
5. Exhibit 2B – Supplemental Document Brief filed by Commonwell: Volume 4;
6. Exhibit 3 – Agreed Statement of Facts dated October 16, 2018.

In addition counsel attended to make supplementary oral submissions on December 12, 2018.

Issue in Dispute:

While the Arbitration Agreement dated October 8, 2018 sets out some fairly broad issues in dispute dealing with priority as between Wawanesa and Commonwell the key issue that I am asked to decide is "At the time of the motor vehicle accident was Stephanie principally dependent for financial support or care on her mother, Cathy."

Result:

For the reasons that follow I find that Stephanie was not principally dependent for financial support or care on her mother, Cathy, on the date of loss, April 13, 2015.

Background and Summary of Facts:

Stephanie was born on February 26, 1994 and was therefore 21 years old at the time of the accident. At the time of the accident she was living with her mother. Her boyfriend also lived with them.

In the Agreed Statement of Facts the parties also agreed that at the time of the accident Stephanie was employed and working full-time through Adecco Employment Services. She had been working as a production associate/machine operator in the automobile assembly at KTH since June 2, 2014. Her last day of work was April 10, 2015. She earned $17,331.93 gross while working for Adecco over the course of approximately 10 months.

The parties also agreed with respect to the claimant's pre-accident earnings set out below:

2012:	$ 985.00
2013:	$ 1.00
2014:	$14,283.00
2015:	$ 6,000.00

However, this employment at the time of the accident and in the year prior to the accident was a new experience for Stephanie. She had an unhappy history of minimal employment, school absences and no high school credits.

Commonwell urges that I must look at a very big picture with respect to Stephanie's history in order to determine dependency. I will spend some time reviewing Stephanie's background although I note that for the purposes of my conclusion that I did not consider this evidence to be relevant as it does not ultimately fall within the time frame that I have chosen in order to determine the dependency issue.

In grades 9 and 10 (2008 to 2010) Stephanie was unable to secure a single high school credit. Her school records which formed part of Exhibit 1 and the evidence of her mother confirmed that Stephanie did not do well at high school. Her high school records are replete with numerous suspensions (counsel for Commonwell calculated those at no less than 18). She was described in the school records as having anger issues and not responding to authority or discipline. There were some questions with respect to possible drug use.

As an example, in her school records there is a note dated June 3, 2011 to the guardian indicating that her daughter had been identified as having chronic attendance issues and a referral had been made to the counselling and attendance department. It was noted that at that stage she had missed more than 60 consecutive days and as a result had been moved from the school register at that particular high school. The records suggest that officially Stephanie stopped attending high school in October of 2010 but because of her absenteeism it looks as if the last time she actually tried to take a course was in the spring of 2010.

Her school transcript which was also produced showed between January, 2009 and November, 2011 that she did not receive a single credit. Her marks varied from a high of 27 to a low of 0.

Commonwell also pointed out that these records showed what in other case law has been described as "negative prognosticators for employment". For example, in October of 2009 there is a Youth Options Social Work report indicating that Stephanie's school records are full of "swearing, disobedience, fighting and attendance issues." A meeting was held on October 9th in which she was accompanied by her mother and at that time it appeared Stephanie was under the influence of alcohol. Stephanie was described as someone who does not want to accept any rules or limits to her behaviour. This report was completed by a social worker. It was noted she could get angry over the smallest incident. In one program she had attended to provide some youth options for her Stephanie had been segregated from the class due to her poor attitude and her refusal to do homework. The report states and I quote:

> "Unfortunately it is difficult to have a positive prognosis for this young lady. She appears unwilling to reach out to anyone or even accept responsibility for her actions. The team recommends a supervised learning environment with immediate accountability."

Stephanie refused to attend.

Finally counsel for Commonwell pointed out that there were some potential criminal issues that arose during Stephanie's high school years. In a meeting that took place on September 11, 2009 the notes indicate she had been involved in a robbery/B&E. Her mother during her evidence in this arbitration explained that that was a misunderstanding and that another girl in fact had been responsible and had tried to pin the blame on Stephanie. Either way, it did not speak well to Stephanie's potential for either completing school or employment. There was a recommendation that she be put on probation.

Subsequent to Stephanie being formally removed from the school register in the fall/winter of 2011 and up until she commenced employment through Adecco Employment Services on June 2, 2014 Stephanie still seemed to be lost.

With respect to employment there is some evidence that she did some babysitting. However, her tax returns do not disclose any income from babysitting. Other than the income from her employment with Adecco that I have already noted, the only other earnings reported was social assistance payments of $985.00 in 2012 and social assistance payments of $3,594.00 in 2014.

In July of 2012 Stephanie applied for and was approved for Ontario Works. The Ontario Works file suggests that Stephanie had moved in with a boyfriend in March of 2012 but that did not work out and she moved back in with her mother in July of 2012. Stephanie's mother on her examination in her evidence (and I found Cathy to be a credible witness) was of the view that Stephanie had never actually moved away from home. There were some suggestions that there had been an application for Welfare based on Stephanie's residence with her boyfriend's family. Cathy was of the view that that might have been Welfare fraud perpetrated by the boyfriend's family albeit involving her daughter. In any event, the relationship with this

particular boyfriend was one that was fraught with disaster. There appear to be allegations, in addition to the Welfare fraud, of parents involved in drug abuse and both Stephanie and the boyfriend involved in drugs as well. This relationship finally culminated into an assault when the boyfriend attacked Stephanie. The clinical notes and records of Stephanie's family doctor later suggest that this assault resulted in head trauma. It is suggested that Stephanie was punched in the head several times; and, as well be discussed later, this resulted in Stephanie later developing seizures. Although the timing is not abundantly clear, it would appear that some time in approximately 2013 this assault took place and the relationship ended.

In 2014 Stephanie registered with a skills upgrading program. In a letter dated May 21, 2014 Geoff Smith, the skills upgrading teacher, notes that Stephanie is attending the program to upgrade her skills in order to obtain her Ontario Secondary School Diploma or equivalent. It is noted she will be working on her material at home to help her achieve her goal. While I am satisfied from the evidence that Stephanie started at the skills upgrading program, she did not complete it. By the time the accident occurred Stephanie was still without any high school credits at all. However, it is Stephanie's evidence and her mothers and it is supported by the facts, that she quit the skills upgrading program in order to work full-time.

The evidence indicates that Adecco is an employment agency through whom Stephanie secured the job with KTH. I also accept the fact as pressed upon me by Commonwell that there was no evidence before me that prior to the accident that Stephanie was offered a full-time position directly with KTH. Her employment remained through the employment agency, not as a KTH employee. Stephanie started work with her placement at KTH on June 2, 2014. This in my view was Stephanie's first real job.

Stephanie worked for Adecco for 10 months and earned $17,331.93. She worked a 40 hour week.

Counsel for Commonwell elicited significant evidence through her review of the employment records and her examination of Stephanie's mother with respect to Stephanie's absences from work, some due to sick leave and some unauthorized. Stephanie's employment at Adecco was complicated by the development of a seizure disorder. On July 15, 2014 Stephanie was found in the woman's washroom experiencing convulsions. An ambulance was contacted and she was taken to hospital where it was determined she had undergone a Grand Mal Seizure. She was placed on Dilantin. She continued to experience some further seizures particularly while she was adjusting to the proper dosages of the medication. The notes for Stephanie in the employer's file certainly indicate a number of absences due to her seizures. However, there was no evidence that Stephanie's job was at risk or that there had been any decision to terminate her employment for whatever reason prior to the accident of April 13, 2015.

The same is true with respect to the unauthorized absences that are noted in the file that do not appear to be related to seizures. When she first began her employment there are a number of days where it is noted that Stephanie had an unapproved absence. These absences were not indicative of missing an entire day's work but rather that she was getting into work

late. Stephanie did not have a driver's licence and therefore was reliant on getting a ride into work. In her evidence in her examination under oath she noted that the time that she arrived at work would be dependent upon the ride she got. Clearly she was late and clearly the employment file shows that she was counselled and given a verbal warning on June 25, 2014 with respect to her absences and her failure to notify the company that she would be late.

Stephanie's mother was asked about this during her evidence. Her take on this was that it was Stephanie's first job and she didn't fully understand the importance of being on time. Cathy also gave evidence that this was an old-fashioned employer (she was familiar with them because she had also worked there) and they expected people to be not only be on time but to come into work early. Cathy's evidence was that she spoke to her daughter about this.

After Stephanie's significant seizure on July 16th there continued to be a number of absences which are noted either for illness or unapproved absences. The unapproved ones again are generally due to her being late into work. Her mother's evidence was that during this time Stephanie was trying to adjust to her medication. The Dilantin made her sleepy. She was working the night shift/the late shift which would begin at around 4:30. Their evidence was that the Dilantin made Stephanie tired and sleep and particularly at this time of day and she found this shift particularly difficult. This also seemed to reflect in her performance at work. On February 10, 2015 there is a note that she was counselled about "keeping up on the line". However, on February 20, 2015 the employer accommodated Stephanie and moved her to what is known as "the bench". This was easier work and was also day work. The records do suggest that having been moved on to days Stephanie's attendance improved. There was only one notation thereafter when she was late which was in April, 2015.

However, despite Stephanie's days off for illness, the issues with respect to attendance and the one note about "keeping up on the line" there is no evidence before me that Stephanie's job was in jeopardy. On the date that the accident occurred, Stephanie remained employed with KTH through Adecco. In fact, in the employment file there is a reference that when Stephanie's mother called on April 14th to advise them about her accident she was told to "tell Stephanie when she is ready to give Adecco a call." I interpret this as indicative of a job continuing to be available for Stephanie. In addition, her mother's evidence was that after the accident occurred a lady had come to her place who was the lead hand at KTH. Ostensibly this attendance was to say that they wanted to start a fundraising charity event for Stephanie because they really liked her. However, during the course of that conversation Cathy's evidence was that "her job was safe and she could come back once she was ready." There was no evidence to the contrary despite the negative prognosticators for regular and full-time employment that stem from Stephanie's failed high school career and earlier poor decisions with respect to school/life/work choices. I therefore find that but for the accident of April 13, 2015 Stephanie would have continued to be employed by Adecco.

Stephanie had also applied for Ontario Works and the Ontario Works file was part of the evidence before me. She received Ontario Works between January and May, 2014 at $626.00

per month. However, that was terminated once she started earning at KTH. Stephanie received an income replacement benefit from Wawanesa in the amount of $250.59 per week.

In terms of negative prognosticators counsel for Commonwell also raised Stephanie's use of marijuana. Prior to commencing her employment at Adecco and certainly when she was involved with the abusive boyfriend Stephanie was clearly involved with marijuana. Whether there were any other drugs it is unclear. There is also evidence that she continued to smoke marijuana and that her boyfriend (whom she was with at the time of the accident and lived with at her mother's home) was also a heavy marijuana smoker. There was evidence that Stephanie and/or her boyfriend spent fairly excessive funds on marijuana. There is one estimate given that over $1,200.00 per month was spent. However, that appears to be a one-off incident. Stephanie's evidence was that her boyfriend smoked most of it and that otherwise they would spend up to $600.00 a month in marijuana. According to a note from her treating neurologist dated October 2, 2014 Stephanie acknowledged that she smoked three to five cigarettes a day and 1 to 2 grams of marijuana a week. I could not find any evidence in the employment records or in any of the medical records provided as evidence in this arbitration that suggested Stephanie's use of marijuana caused any issues for her at work.

Turning now to the home situation as between Stephanie and her mother. Stephanie's mother was employed as a truck driver. Her evidence was that she had been so employed for many years. She worked the night shift. She would generally leave the home around 4:30 in the afternoon and go to the depot where she would pick up her load. She would make her deliveries and could return home at a number of varying times depending on the distance she had to travel. She might come home at 2:00 a.m., 5:00 a.m. or later that morning. Once Stephanie began to work the day shift at KTH she and her mother had less interaction as Stephanie would be working during the day and her mother would be working during the night. The evidence suggested that there was about one and a half to two hour time periods when they might connect between Stephanie coming home and her mother leaving for work.

Stephanie and her mother's evidence was that once she started at Adecco she paid her mom $400.00 in rent per month. She paid for her own cell phone, she paid for her own Netflix, she paid for her own marijuana and cigarettes. She also would sometimes buy her own groceries and she looked after her clothes. She had a credit card and she paid her own credit card.

Mom covered the rent, most of the groceries and the expenses in the home. She also would drive Stephanie to various places, including medical appointments as Stephanie was not allowed to drive. Mom earned approximately $60,000.00 a year. The home that they were living in was rented and was a five bedroom farmhouse.

As there is also a claim being made by Commonwell that Stephanie was principally dependent on her mother for care it is also important to review the evidence in relationship to care that Cathy provided to Stephanie. The claim for dependency in relationship to care arises primarily out of Stephanie's development of the seizure disorder. The evidence is that Cathy would take Stephanie to most of her medical appointments. The hospital records which were put into

evidence in the year prior to the motor vehicle accident certainly indicate that on most occasions Stephanie's mother was present. On one occasion the employer called Stephanie's mother and asked her to come and pick her up because Stephanie was concerned she might be having a seizure. There is no doubt that if Cathy was available and Stephanie needed to go to a specialist, a doctor or to the hospital that Cathy would take her. Cathy's evidence at the hearing on this point was that she went to the majority of the appointments. She would not go into the room with Stephanie all the time but certainly some of the time she would accompany her daughter into the actual appointment.

In addition, Cathy reported that she was concerned because of Stephanie's seizures and she would check in with her by text. She described this as monitoring her "to a degree". She would text her daughter and say "how are you doing". Her daughter would write back. These texts appear to have occurred occasionally and when Stephanie was out with friends.

In addition, Cathy gave evidence that she did concern herself with Stephanie's seizure medication. At the hearing Cathy's evidence was that if Stephanie had had a seizure before she went to sleep she would tell her to take her medication. Generally Stephanie took her medication every day but there are some days that she "messed up". Cathy's evidence was that she got her a dosette to try to help her remember if she had taken her pills. Her evidence was that Stephanie would not remember the next morning if she had taken her pill that night. Stephanie didn't like the dosette so she started using a calendar on her phone. I accept that Cathy would keep an eye on whether her daughter was taking her medication. There was evidence in the medical documents before me that some of Stephanie's seizures may have been caused because she was low on Dilantin levels. For example, there is a discharge note of February 20, 2015 in which it indicates that Stephanie is on Dilantin. However, her Dilantin levels were low and Stephanie reported that she misses doses occasionally but no more than once a week.

Stephanie's evidence on this point at her EUO was that she did not feel that she needed additional care because of her seizures. She said when she first got out of the hospital that she wasn't allowed to be alone for long periods of time. She also said that she did feel insecure about leaving her home because of her seizures. She said that the main reason she stayed at home was due to this insecurity. Her mother also agreed with that. When asked on her EUO whether Stephanie felt she could live on her own her answer was "I could, I just didn't want to. I don't like being by myself."

Both Stephanie and her mother's evidence were consistent that Stephanie was capable of getting herself up in the morning, getting dressed for work, handling her own bank account, managing her own finances, feeding and grooming herself, and doing her own shopping. She did not need to be prompted in any way other than with respect to her medication as summarized above.

Position of the Parties:

A. Dependency for Care:

Commonwell takes the position that Stephanie was principally dependent on her mother for care due to her seizure disorder. Commonwell asked that I look at the financial, residential, physical and emotional circumstances in making that determination. Commonwell submits that by examining Stephanie's life holistically it is clear that she relied almost totally on her mother for her emotional needs. This included having her mother attend with her on medical appointments not just taking her there but participating in the appointment itself, communicating with the doctors and nurses when she felt Stephanie was not capable of doing it herself, keeping in touch with Stephanie about taking her medication and monitoring her when she is not at home. Commonwell submits that while the supervision was not in the form of physical contact every minute, one can liken it to 24 hour attendant care supervision done remotely. Commonwell also submits that the level of monitoring and care provided is unique and outside the normal realm that a mother may provide to a 21 year old. As her seizures were unpredictable and frightening Stephanie relied upon Cathy's care and did not want to leave the home.

Wawanesa on the other hand submits that it is not sufficient if care is provided because of love, affection or the existence of a familial relationship alone. There must be an actual need for care. The fact that Stephanie was diagnosed with a medical condition, that she continued to live with her mother and that her mother provided some level of care as outlined in the evidence is not sufficient to support a finding that Stephanie was principally dependent for care on her mother. Wawanesa points to the fact that Stephanie held down a full-time job for 10 months prior to the accident. They point out that her mother had an opposite work schedule and they didn't spend a great deal of time together. Wawanesa points to Stephanie otherwise functioning normally and independently including having a relationship with her own boyfriend, dressing herself, feeding herself, getting herself to various places, arranging rides to work, walking into town, having an independent social life. Finally Wawanesa submits that the relationship between Stephanie and her mother was a typical mother-daughter relationship and did not rise to the level of care dependency as outlined in the case law.

B. Analysis and Findings re: Dependency For Care:

Having carefully reviewed the evidence relating to the claim for dependency of care I am satisfied that Cathy did provide some level of care to her daughter. This was in the form of some check-ins from time to time with respect to how she was feeling due to concern about her seizure activity. I also agree that Cathy checked from time to time as to whether or not Stephanie was taking her medication. I also agree with Commonwell that Cathy more often than not accompanied her daughter to her medical appointments particularly once she developed these seizure disorders and that she did play a role in advocating for her daughter during these appointments and assisting her daughter in understanding the implications of her condition.

However, I do not find that the level of care provided was such that one could say Stephanie was "principally" dependent for care upon her mother. Stephanie was able to work a full-time job without any help from her mother. Stephanie was able to dress herself, choose her own clothes, feed herself and handle all her own self-care. There was no evidence that she was unable to handle her own bank account or her own finances. The nature of the care provided by her mother was very limited. While Stephanie may have felt safer being at home with her seizure disorder that did not amount to a principal dependency for care upon her mother.

In reaching this conclusion I have carefully reviewed the case law that counsel provided to me.

In the case of *Wawanesa Mutual Insurance Company v. Lloyds of London Insurance Company, 2004 CanLii, 22694 (Ontario Superior Court)* Justice Rady agreed with Arbitrator Jones that when one assesses dependency for care it cannot be determined on the same basis as financial dependency. It requires a quantitative and qualitative analysis. Qualitative factors will include social and emotional support. While Stephanie did receive some emotional support from her mother it was not anything beyond what one would find in a normal mother and daughter relationship. There was no evidence that Stephanie could not have in fact lived on her own without significant support. There was certainly no evidence that Stephanie required any physical support from her mother. It appears to be limited to emotional support or monitoring.

In the case of *Co-operators General Insurance Company & TD Home and Auto, 2014 ON Sc. 1604 CanLii* Justice Brown heard an appeal from Arbitrator Lee Samis which involved an issue of care. In that case the care that was being examined was not dissimilar to the type of care that is in dispute here. The claimant was an able-bodied young man who was able to get around using his own transportation, he attended school and dealt with his own banking. However, he was in a vulnerable position because of prior abuse with his father who was an alcoholic. As a result of this abuse he began to have issues at school. He did not have proper clothing and he was undernourished. At the time of the accident he had been removed from his father's home and placed in the home of others who provided him with a bedroom and bathroom and other assistance. Arbitrator Samis concluded that the claimant provided almost all of his own care and that the relationship that had resulted due to the claimant being placed in this particular household and the care and shelter that they provided for him there did not result in him being principally dependent for care upon those individuals. Justice Brown agreed with Arbitrator Samis. She noted that while the claimant felt more secure living in this home as opposed to the abusive environment he had lived in before that that did not constitute principal dependency for care. The fact that they provided him with a safe place was not sufficient for there to be dependency for care taking into consideration that the claimant did not have any physical need for care. She found he had the ability to attend physically and emotionally to his own needs. I find the same for Stephanie.

Commonwell referred me to the decision of *Echelon v. State Farm* a private arbitration decision of Arbitrator Shari Novick from July of 2011. In that case the claimant was a 34 year old schizophrenic who relied on his mother for care. There was evidence that he had exercised

poor judgment in the past due to his illness and developmental deficits. There were also references to his abusing alcohol, drugs and being exploited by others. While he was able to remain home unattended while on medication his mother would call at least once a day to check in on him. He had to take medication daily to control his condition and his mother purchased it for him and reminded him to take his medication every evening. The claimant qualified for Canada Pension due to his disability. He participated in an incentive earnings program that allowed him to do piece work on a casual basis a few days a week if work was available. Counsel in that case argued that the insured was not capable of living on his own and provided expert reports to support that position. Arbitrator Novick found that there was principal dependency for care based on the fact that the insured's mother purchases medication, drove him to places, attended medical appointments, made decisions about his care, had complete control over his finances and provided a supervision at a level of oversight that was critical given his poor judgment. I find the circumstances of that case to be quite different from the facts in this case. The degree of care provided by the claimant's mother in the case before Arbitrator Novick was significantly greater and more controlling than that for Cathy with her daughter, Stephanie.

Commonwell also relied on the decision of Arbitrator Jones as upheld by Justice Rady in the *Wawanesa* & *Lloyds* case (supra). In that particular case the insured had Parkinson's Disease. He lived with a friend who cared for him. While there were other service providers it was held that the claimant could not have lived on his own and needed significant support, including physical support, social and emotional support. The decision was upheld on the grounds that the friend provided significant physical support in terms of meal preparation, dressing, housekeeping, running personal errands such as banking as well as emotional support and a sense of companionship. This is a far different case than the level of care provided by Cathy to Stephanie.

I therefore conclude having taken into consideration Stephanie's physical, social and emotional needs and the support that she was given by her mother, mainly from an emotional perspective that it does not reach the level of care that can bring one to a conclusion that Stephanie was principally dependent for care on her mother.

C. Financial Dependency and the Relevant Time Frame: Positions of the Parties:

Wawanesa takes the position that the relevant time frame for determining financial dependency is either one year prior to the accident or the 10 months and 8 days prior to the accident that Stephanie had been employed through Adecco. Wawanesa submits that the evidence with respect to the insured's problems at high school, difficulties with relationships and lack of employment prior to June of 2014 are not relevant.

Wawanesa submits that on the date of the accident Stephanie had been actively and regularly employed working 40 hours a week and earning initially $11.75 per hour but increasing at the time of the motor vehicle accident to $12.75 per hour. Wawanesa submits that this is evidence of someone who is employable, working and has the ability to be self-supporting. Wawanesa

points to Stephanie's earnings of $17,331.93 in the ten month period prior to the accident. Wawanesa also relies upon the fact that despite Stephanie's negative prognosticators, seizure disorders and some absentee issues that there is no evidence that KTH was intending to terminate her employment. They suggest that the evidence is to the contrary and that I should find that her job continued to be available to her and that they liked Stephanie as an employee.

Wawanesa submits that this is not a case of transition but rather a case where the transition had already taken place. Wawanesa says that Stephanie had established herself in the work place and had the means to live independently. While she developed a seizure condition she did not let that condition overshadow her life or impact her ability to work as reflected on her continued employment irrespective of the seizures up until the time of the accident.

Wawanesa makes reference to the four criteria set out by the Court of Appeal in *Miller v. Safeco (1984) 48 O.R. (2d) 451* as applied to priority dependency cases through the decision of the Court of Appeal in *Federation Insurance v. Liberty (O.J. #1234 (CA)*. Wawanesa asked me to find that the evidence supports that at the time of the accident that not only did Stephanie have a capacity to earn but she had a proven earning capacity such that she was capable of providing for at least 51% of her basic needs.

Alternatively Wawanesa submits that relying upon LICO statistics that there is evidence that Stephanie had sufficient financial means to meet 50% of her needs prior to the accident. The LICO statistics indicate that the township where Stephanie resided was considered a rural area with a population density of less than 400 people per square kilometer. The applicable LICO for 2014 for a single person household was $16,747.00 and for 2015 was $16,934.00. Looking at Stephanie's gross income during her employment at KTH at $17,331.93 this gross income exceeds the applicable before-tax LICO statistics. Wawanesa also points out these earnings were not even a full year's earnings and the income would have been higher for a total annual income but for the accident. If one added in the $626.00 that she received from Ontario Works then her gross annual income would increase to $18,583.93.

Therefore Wawanesa submits that either based on the criteria of the ability to be self-supporting or whether she had sufficient financial means to meet 51% of her needs prior to the accident that either way Stephanie cannot be found to be principally dependant on her mother for financial support.

Commonwell on the other hand while not urging any specific timeframe on me suggests that I need to look at the big picture. Based on Commonwell's submissions the time frame for this big picture would run from 2009 up to the date of the accident. Commonwell submits that I must take into consideration all the negative prognosticators with respect to Stephanie's background including no high school credits, dropping out of high school, her behaviour and high school records with respect to oppositional behaviour and the alleged quasi-criminal activity. Commonwell also submits that I have to look at her lack of employment from dropping out of high school up until 2014. Commonwell points to both pre and post-accident medical records suggesting that Stephanie's high school behaviour was still problematic. They point to nursing

notes where she is described as being verbally abusive towards staff in 2015, a capacity assessment from April of 2018 which discusses personality traits, unpredictable tempers, and asks me to find that these did not bode well for Stephanie in terms of employment and financial independency.

Commonwell agrees with Wawanesa with respect to the criteria that I am to examine in making this determination being drawn from those four factors set out in the seminal case of *Miller v. Safeco*. However, Commonwell's view is that Stephanie was in transition. They submit that the true characterization of her relationship in terms of dependency must require a look further back in time than is suggested by Wawanesa and that this is particularly so in the case of young adults. Commonwell suggests that I look particularly at the decision of Justice Perell in *Gore v. Co-operators [2008] OJ #363*. In that case Justice Perell noted that a person's earning capacity is a product of not just what they are shown to be able to earn but the following factors:

- Formal and informal education;
- Natural and acquired talents;
- Physical and mental abilities and disabilities;
- Availability of employment;
- Supply and demand for labour.

Commonwell points out Justice Perell's comments as follows:

> "Just as the fact of having once scored a hole in one is not necessarily a demonstration of a person's golfing capacity, a person's earning capacity is not simply demonstrated by a past occasion or series of occasions where the person earned money. Standing alone, the prior history of a person's earnings may or may not provide an adequate basis for determining a person's earning capacity."

For reasons that follow I am unable to agree with Commonwell and I find that irrespective of what may have been some considerable negative prognosticators that at the time of the accident of April 13, 2015 Stephanie had transitioned into employment. She had maintained such employment and had demonstrated a reasonable earning capacity such that she was not principally dependent for financial support on her mother.

D. Analysis and Findings re: Principal Financial Dependency:

The Statutory Accident Benefit Schedule effective September 1, 2010, Ontario Regulation 34/10 Section 3 defines a dependent as follows:

> "A person is a dependent of an individual if the person is principally dependent for financial support."

Section 268 of the *Insurance Act* directs us to consider financial dependency "at the time of the accident".

There is a long line of cases that have set out the test for principal financial dependency. To be principally dependent for financial support an individual must receive more than 50% of his financial needs from someone other than himself. If it is found that an individual is able to meet 51% of his financial needs then that individual is not principally dependent for financial support on others (*Federation v. Liberty Mutual* (supra)).

Both counsel relied on and I accept the four criteria that have been outlined in *Miller & Safeco* (supra) set out below:

1. The amount of dependency;

2. The duration of dependency;

3. Financial or other needs of the alleged dependent; and,

4. The ability of the alleged dependent to be self-supporting.

In this particular case the most relevant criteria from *Miller & Safeco* (supra) although not the only criteria to be considered is the ability of Stephanie to be self-supporting.

In addition to the criteria set out in *Miller & Safeco* (supra) when conducting a dependency analysis an arbitrator is also required to look at the "period of time that fairly reflects the status of the parties at the time of the accident." (*Intact Insurance Company v. Allstate Insurance Company*, 2016 ONCA 609 CanLii at paragraphs 67 and 69.) Therefore in selecting this time period one must be satisfied that that time period fairly reflects the status of the parties at the time of the accident.

Turning first of all to what is a reasonable time period for Stephanie's case. I find that the 10 month and 8 days or indeed the one year suggested by Wawanesa is appropriate. I do not accept Commonwell's suggestion that I should look at Stephanie's life starting in 2009. While I have spent some time going through the evidence that was put before me by Commonwell and I recognize that Stephanie had a less than stellar high school career and employment history prior to June of 2014 I do not accept that that evidence overcomes or impugns on the fact that Stephanie despite all odds found employment in June of 2014 and continued to maintain that employment despite developing a seizure disorder and other issues up until the time of her accident on April 13, 2015. In my view this time period reflects most clearly as to Stephanie's ability to be self-supporting at the time of the accident.

Stephanie was working a 40 hour week albeit with absences due to illness in part and was able in 10 months to earn over $17,000.00. Whether I look at the ability to be self-supporting or I look at the LICO statistics as put forward by Wawanesa I am satisfied that Stephanie had the

ability to be self-supporting and was not therefore principally dependent for financial support on her mother. I do not believe this requires an analysis of Stephanie's financial needs. She chose to live with her mother for good reasons. She paid her mother some rent and paid some of her own expenses. Her mother provided her with shelter and support. However, that does not translate into principal financial dependency.

I agree with Wawanesa that on the facts of this case it is clear that Stephanie was fully employed and working at the time of the accident and had maintained that work for 10 months. This represented a significant change in Stephanie's life and reflected a completed transition from her more unhappy days between 2009 and through to 2013. There was no indication that her employment was not stable. There was no evidence before me that she was going to be laid off or lose her job. Despite having no high school degree and no employment history Stephanie managed to secure and hold onto employment earning slightly above the minimum wage.

I believe my conclusion is consistent with the decision in *Federation & Liberty* (supra). In that case Arbitrator Samis examined the dependency of a young man who had had significant periods of lay-off but also had periods of employment and earnings. In the 19 weeks prior to the accident he earned $5,700.00. He was living at home with his parents. They provided him with free board and some cash. In the days prior to the motor vehicle accident he was not employed.

Arbitrator Samis found that in looking at whether that young man was dependent that one should look at whether he was "reasonably exercising his or her capacity by providing for his or her own needs to the extent permitted by the circumstances". Arbitrator Samis noted that while earnings were evidence of capacity that many individuals may not be earning up to their full capacity. In that case Arbitrator Samis concluded that the young man was young and able-bodied, regularly employed and while at the time of the accident he was not providing for his own basic needs that he had the reasonable ability to do so. This decision was appealed and upheld by Justice O'Leary and the appeal to the Court of Appeal was dismissed.

Commonwell relied upon the decision of Justice Perell in the case of *Co-operators General Insurance Company v. Gore* an appeal from the decision of Guy Jones dated February 8, 2008 [2008] O.J. 3603.

This was a case where once again there was an interplay between the capacity to earn and the actual earnings versus the need of the individual. Justice Perell noted that the determination of dependency is a factual one and each case must be analysed on his own particular facts. As noted earlier in this decision Justice Perell noted that in looking at one's earning capacity one must look at formal and informal education, natural and acquired talents, physical and mental abilities as well as external factors. While I accept Justice Perell's comments with respect to earning capacity, I do note that the facts in that case were quite different from those before me.

In that case Joseph had been living at his mother's and step-father's home at the time of the accident. The year before the accident he had just completed grade 10. He worked in the summer for about a month at a construction company. He then came home and started grade 12 but dropped out a month later. He earned some money from his cousin shoveling snow. However, a month prior to the accident he began work at a blasting company. He worked three out of the four weeks earning $10.00 an hour ($1,430.00 gross). In looking at the question of earning capacity Arbitrator Jones in the initial decision noted that the claimant had a weak work history and in the 9 month time frame had only averaged $149.00 per week. It was only in the month before the accident that he began to earn any reasonable funds. He noted that that individual was someone who had done little work prior to the accident and concluded that he would probably have continued to do little work but for the accident. Arbitrator Jones chose the 9 month period rather than the four week period to determine dependency. Justice Perell agreed with Arbitrator Jones and concluded that other than the one month employment history that the claimant had little more to say for himself than having completed grade 10 and was able-bodied. This is a case that is factually different from Stephanie. Again, in the 10 months leading up to this motor vehicle accident Stephanie was fully employed and there was no indication that that would not continue on.

Commonwell also asked me to look carefully at the decision of *Co-operators General Insurance Company & AXA*, a decision of private Arbitrator Ken Bialkowski of August 13, 2015. This was another case in which there were a number of "negative prognosticators" that were put before Arbitrator Bialkowski as part of the bigger picture to support the proposition that the claimant was principally dependent for financial support on his parents. These included:

- Minimal education;
- Lack of computer skills;
- Behavioural problems;
- Having been previously fired for attendance;
- Substance abuse;
- Rural geographic location;
- Probation history;
- Not bondable;
- Lack of a car;
- Lack of a driver's licence;
- Minimum and sporadic work history.

Counsel for Commonwell pointed out that almost all of those criteria can also be applied to Stephanie. However, despite many similar negative prognosticators Stephanie in fact did find employment and did hold down a job despite having minimal education, some behavioural problems, not owning a car, not having a driver's licence and having almost no employment history. In that case as well the insured was contributing minimally to household expenses. In this case Stephanie was contributing rent to her mother as well as handling many of her own expenses. Arbitrator Bialkowski concluded that in his case there was a 19 year old who

contributed minimally to household expenses and had only worked sporadically since leaving high school. He had never held down any long term employment. He concluded that he was hampered in finding and maintaining employment because of a number of negative prognosticators but most importantly he had a substance abuse addiction. There was some expert evidence before Arbitrator Bialkowski that the individual's issues with drug and alcohol impacted his ability to maintain employment. In Stephanie's case there was no indication of any issues with alcohol and in fact her evidence was she did not drink. There is no evidence that the marijuana use resulted in a substance addiction that affected her ability to be employed. Again, I find the facts in this case to be significantly different than those before Arbitrator Bialkowski.

Taking into consideration all the evidence and despite the excellent submissions of Commonwell I conclude that there is overwhelming evidence to support that Stephanie was an able-bodied individual who was employed at the time of the accident and had been so employed for 10 months and that there was no evidence to support a finding that she was principally dependent for financial support on her mother.

Decision:

Accordingly I find that the Commonwell Mutual Insurance Group is the priority insurer with respect to Stephanie's statutory accident benefits.

Award:

The Commonwell Mutual Insurance Group is the priority insurer with respect to the statutory accident benefits payable to ST with respect to motor vehicle accident of April 13, 2015.

Costs:

The Arbitration Agreement provides that the costs of the arbitration are in my discretion. I am not aware of any offers to settle that I should take into consideration. Wawanesa has been completely successful in this matter and accordingly I find that Commonwell will pay Wawanesa's legal costs and will also be responsible for the cost of the arbitrator.

If counsel cannot agree on the quantum of costs in the next 60 days I would ask them to let me know and I will arrange a further pre-hearing.

If any issue arises with respect to the quantum of accident benefits to be reimbursed by Commonwell to Wawanesa then counsel can advise and a further pre-hearing will be scheduled.

DATED THIS 8th day of May, 2018 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP