IN THE MATTER OF THE *Insurance Act,* R.S.O. 1990, c. I.8, Section 268 and O. Reg. 283/95 made under the *Insurance Act*

AND IN THE MATTER OF the *Arbitration Act*, 1991, S.O. 1992, c. 17

AND IN THE MATTER OF an Arbitration

BETWEEN:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing:

Norma Barron: Counsel for Certas Direct Insurance Company (hereinafter called Certas)

Krista M. Groen: Counsel for Wawanesa Mutual Insurance Company (hereinafter called Wawanesa)

Introduction:

This matter comes before me as an Arbitrator pursuant to the *Arbitration Act* 1991 to arbitrate a dispute as to which of two insurers is obliged to pay Statutory Accident Benefits pursuant to the *Insurance Act*, R.S.O. 1990 c I.8, as amended, to NC (hereinafter referred to as the claimant).

The parties selected me as their Arbitrator, on consent. This matter proceeded to a single-day hearing via Zoom on March 4, 2022.

Certas and Wawanesa are automobile insurers and the dispute before me is with respect to priority arising out of a motor vehicle accident that occurred on October 8, 2017. At that time, the claimant was involved in a single-car collision.

Certas insured the Claimant's father. Wawanesa insured the vehicle that the claimant was in when the accident occurred.

Therefore, the main issue for my determination is whether the claimant at the time of the accident was principally dependent for financial support on his father.

Record

The parties submitted a Joint Document Brief which included, inter alia, EUO transcripts of the claimant and his father, the claimant's bank records from TD, the claimant's OSAP file, Ontario Works file, and ODSP file. There were also various records included with respect to the claimant's criminal record, income tax returns, and his academic record with respect to Trebas Institute. In addition, some portions of the Accident Benefit file were also reproduced and put into evidence.

The parties provided written and oral submissions. No oral evidence was taken. The parties relied on the transcripts of the EUO proceedings.

The parties signed an Arbitration Agreement dated January 12, 2022, in which the issue for my determination was stated: which insurer is required to pay NC's Statutory Accident Benefits under Section 268 of the *Insurance Act*. However, that is a very broadly stated issue, and, in fact, I am asked to determine whether the claimant was principally dependent for financial support or care on his father on October 8, 2017.

At the outset, however, I will say that while this case is about dependency its determination ultimately revolves around the onus of proof and whether that onus has been met in the circumstances of this case.

Facts

While there are some facts that the parties can agree upon, there are an equal number of inconsistent facts relating to this dispute. In addition, what conclusions one can draw from even the agreed on facts is a contested matter.

I outline below the facts for which support is provided on the documentary evidence. Although I was not given an opportunity of hearing or seeing either the claimant or his father, a review of their respective EUO transcripts, and, in particular, the claimant's EUO suggests that one can ascribe little credibility to the evidence of the claimant.

This claimant was approximately 32 years old on the date of loss. He lived at home with his father, step-mother, one brother, and one sister. He comes from a large family. His father reports having 17 children, although, only 3 or perhaps 4 seem to be living in the family home on the date of loss. They lived in a home in Ajax. The evidence suggests that the claimant had been living there for approximately 5 to 6 years prior to the accident.

According to some of the medical reports generated through the Accident Benefit file (see Social Work Assessment Progress Report dated April 27, 2018) the claimant reported attending high school in the United States and graduated in 2001 having achieved grade 12. He then claims to have attended Centennial College and obtained a Certificate in Business and Entrepreneurialship. He claims to have gone to George Brown College and received HVAC certification. There is no evidence that he was employed in a job related to either of these two certifications.

The claimant attended the Trebas Institute taking a course in Audio Engineering and Production/DJ Art. According to the information from the institute itself, the program began on September 21, 2015. It appears the claimant attended the first term and did reasonably well securing a grade of 77%. The transcript from Trebas, however, indicates that the claimant did not attend for term 2 or term 3. The course itself was to run from September 21, 2015 to September 23, 2016. The statement from Trebas Institute indicates that the claimant withdrew on February 29, 2016. The claimant represented that he had completed the course and obtained a Certificate and that the funding to take this course came through OSAP. At the time of the accident the claimant still owed OSAP $7,300.00.

On his OCF-1 dated October 17, 2017, the claimant reports that on the date of loss he was self-employed as an audio engineer. He claims to have been doing that for 1 year. Under gross revenue and number of weeks worked he noted “TBA”.

In his EUO evidence and in many anecdotal reports provided to post-accident assessors and treatment providers, the claimant will say that he worked 6 days a week at least 10 hours per shift. He says he would make audio files or beats and also would provide DJ services. With respect to this self-employment he did not have a company set up.

He reported on his EUO that with respect to the income he earned from this business he would report it through his personal tax returns. However, according to a letter from Canada Revenue Agency dated November 5, 2019, the claimant did not file tax returns for the years 2015 through to 2018. There is, therefore, no evidence that the claimant filed tax returns as he alleges nor is there any evidence from Revenue Canada as to what declared earnings he may have had.

The claimant himself on his EUO seemed incapable of providing a straight answer or a clear answer as to how much he may have earned in his various endeavours in the year before the accident. He reported that he could spend 5 hours making a beat but then would only sell it for a certain amount of money or not be able to sell it at all. He was not able to provide any written or even oral information as to the number of beats or audio files he created from the time he stopped attending Trebas up to the time of the accident.

When asked how much he made as a DJ in the year before the accident, his answer was:

> "It's off and on. It wasn't like a consistent thing. More so the audio engineering would be more, like, tracking vocals would be more consistent".

Once again, he was unable to give an estimate as to how much he earned.

He was asked if he kept any records and undertakings were give to provide what records he had. None were entered into evidence at the hearing from which one must draw the conclusion that in fact there were no records.

Again, the claimant was asked:

> "Q. Can you give me – do you have any rough ideas as to what you were earning?
> A. No, not really.
> Q. But you filed taxes?
> A. Yes".

He was asked if he issued invoices. Once again he prevaricated never really responded simply saying he would just give the person the beat or the track.

He did not have an office space for carrying out this work. He describes it as "pretty much mobile laptop interface".

With respect to the laptop, his evidence was that he purchased it himself while his father's evidence was that his birthmother purchased it for him.

He was asked how many appearances as a DJ he made in the year before the accident. He could not even respond if it was more or less than 5.

With respect to the records of the cash he may have received which he allegedly reported to the CRA, he said he kept a record of it on and off: "Just writing it down probably. Making notes and all that".

None of these notes were produced.

The claimant did confirm that other than his self-employment he did not have any other income.

According to the Ontario Works file (note: this was generated post-accident) at the initial service plan interview, the claimant reported that he had no assets and no income at the time. His last income was just before the accident when he was working as an audio engineer. He says he was always paid in cash, business not registered, and no financial documentation is kept.

A copy of the claimant's EI file was produced (Employment and Social Development Canada) and their letter of December 17, 2020 indicates that a search of their system indicated that the claimant had never applied for EI benefits.

The claimant was asked about his bank accounts. He indicated that possibly his bank accounts may reflect cash put in or bills paid out but notes that: "I'm not really sure because I was switching banks at the time".

The records of TD Canada Trust were produced. The claimant had an account with them and the records produced covered the time period of roughly January 29, 2016 to December 30, 2016. There is no indication from a review of the bank statements that there were any significant or even modest cash deposits. Monies going out included paying for Subway sandwiches, Diamond Pizza, and McDonald's. The remainder of the account dealt with NSF cheques and overdraft interest. There was never more than $20.95 in the account. All other entries indicate that the account was overdrawn.

In addition, a credit card with TD was produced. On a statement date of January 28, 2016 the outstanding previous balance was $2,185.27. Monthly statements indicate that no payments were made and by the time of the accident on October 8, 2017, the balance still remained $2,185.27.

Turning back to the alleged earnings from the self-employment, it should also be noted that the claimant reported that he would charge anywhere from $25.00 to $50.00 an hour for tracking vocals. With respect to selling audio files the range could vary from $100.00 to $200.00 and for exclusives maybe $600.00 to $700.00. With respect to his income from his DJ work, he may have done it for free if he had previous transaction with the individual selling beats but even if he did not charge, he claims the value would be around $200.00. There is no evidence independent of the claimant himself to support any of these claims with respect to either the money he was earning or the sale value of his product.

This then brings me to a review of the claimant's criminal record. Unfortunately, the claimant has had a fairly long history of involvement with the law. In May of 2012, he was charged and convicted of a couple of offences and was sentenced to 16 months incarceration on December 8, 2014. In addition, the records suggest that he was prohibited of possessing any weapons or ammunition for a period of 10 years.

On November 2, 2016, in Windsor, the claimant was charged with possessing a prohibited fire arm (handgun) as well as ammunition, an offense in and of itself, but contrary to the terms of his previous conviction. As a result of this charge, his father agreed to act as the claimant's surety. According to his father's evidence on his EUO, his understanding of his role as surety was to make sure that his son did not break the rules or the terms of his bail/parole. He had to be home by a certain time but otherwise was free to "do his own stuff". His father reported that there was no

financial requirement as part of his role as his son's surety. The surety agreement appears to be entered into on November 21, 2016.

Fairly extensive records were produced with respect to the criminal proceedings going on with respect to the claimant in 2016 and 2017. There were numerous requirements to attend before the court in Windsor. On August 15, 2017, the Judge notes that the claimant has elected to have a preliminary hearing and that was set to proceed on October 22nd.

There were also charges flowing out of an incident in Woodstock (possession of drugs) which required the claimant to attend in Woodstock for various appearances.

When the accident occurred, the claimant had completed one of his jail terms and was on bail with respect to another charge.

Unfortunately, the claimant was charged post-accident in June of 2019 for carrying a GLOCK 22 handgun, again, not only an offense in and of itself but contrary to the terms of his probation. He was ultimately convicted on that and post-accident was incarcerated again.

There was no evidence lead that the claimant received any government assistance. In fact, as noted above, the files produced from Ontario Works, ODSP, and EI suggest to the contrary.

Before turning to the arrangement that the claimant had with his father in terms of living and contributing to expenses, it is worth noting that the claimant reported that he was not married and did not have any children. However, according to a report from his social worker dated August 23, 2018, the claimant has a daughter who was 8 years old at that time and lived with her mother in Brampton. The claimant reported he would see his daughter about 2 or 3 times a month. There was no information as to what support, if any, was provided by the claimant for his daughter.

Turning now to the expenses in the household. According to the claimant, he would pay $400.00 per month in rent to his father. However, according to his father's Examination Under Oath the claimant did not pay him any rent. The father states:

> "A. No, we would not accept that. No, we don't -- I don't -- we don't believe in that. Kids, you, you there, you there for a period of time to get yourself in order and you go out on your own because you're grown…."

However, the father did acknowledge that from time to time the claimant might put some money on the table for groceries. Occasionally his son would say "oh I left $200.00 on the counter. It can make up the grocery".

At best, the father suggests that might happen maybe every couple of months.

The claimant suggested that the way in which he would pay this "rent" could be by cheque, e-transfer, cash, or sometimes it would be paying the bill directly. For example, he might pay the Bell or hydro bill. He suggested that these transactions could be reflected in his bank statement. A review of the bank statement clearly indicates no evidence of such transactions.

By way of contrast, the father says that the claimant, and, in fact, all his children who lived with him are never charged for anything. .They're just there, he says:

> "A. you don't have to pay no bills; you don't have to do anything you don't want to do. But if you want something other than what we have, you have to get it for yourself. That's how we do it".

The father's evidence was that if his children, including the claimant, did not want to eat the food in the home then they could go and buy their own groceries. Otherwise, they had no obligation to make any contribution to the family finances.

The claimant did have his own bedroom in the home. He suggests that between October 2016 and 2017 that to the best of his recollection he paid rent every month and he was not sure whether he claimed that rent on the tax returns. We know he did not file any tax returns and his bank account does not indicate any cash withdrawals that would be consistent with the $400.00 he claims to have paid monthly.

The claimant did not have a car and had no car related expenses. If he needed to go somewhere for either his business or to attend to his criminal charges, he would get a ride or take public transit. Both the claimant and his father also gave evidence that his father would drive him many places including to attend to his criminal charges. The claimant only had a G1 license at the time.

He did own a cellphone and he says he paid $45.00 a month towards the cellphone. No evidence was produced as to how he paid for the cellphone or a copy of the cellphone contract.

With respect to groceries, the claimant reported that he would contribute about $100.00 a month to the family groceries. This is inconsistent with his father's report.

Both, however, agree that the claimant was responsible for buying his own clothes, taking public transit, socializing, and buying his own personal items.

As to the expenses of the household, the claimant gave no evidence on that point but the father said the mortgage was $1,800.00, utilities of approximately $100.00, gas $250.00, and property taxes about $3,500.00. He said he and his spouse covered these expenses.

Parties Submissions

Applicant

The position of the Applicant is that the claimant was neither principally dependent for financial support or for care on his father at the time of the accident.

Certas further submits that even if the evidence is questionable with respect to the claimant's actual income prior to the accident that there is more than sufficient evidence to indicate that he had the ability to self-support. Certas points to the fact that the claimant worked as a forklift operator back in 2009, had a number of certificates, and that there was nothing preventing him from obtaining employment as a forklift operator and to be actively employed in that capacity. Certas suggests that the claimant was educated, skilled, and capable of supporting himself irrespective of his criminal history and convictions. Certas relies on the decision of *Intact Insurance Company v. State Farm Mutual Automobile Insurance Company* decision of Arbitrator Kenneth Bialkowski from June 6, 2013, with respect to the ability of the claimant to be self-supporting.

Taking the claimant's evidence that he was paid $25.00 an hour for his audio tracks and worked 5 days a week, Certas submits that translates into $1,000.00 a week or $52,000.00 a year. If one allowed $1,000.00 a week that would be the equivalent of selling 10 tracks at the lowest price of $100.00. This is without taking into consideration the higher value beats or any monies he may have earned as a DJ.

Certas also provided information from glassdoor.ca that the average base income of an audio engineer is $49,831.00 and with the low end being around $32,000.00. Certas submits that this should be the income that one considers in determining whether or not the claimant was principally dependent on his father for financial support.

Certas further submits that whether one uses the mathematical approach, Low Income Cut-off or Market Basket Measure (all valid methods according to the case law) to determine dependency that the claimant was clearly financially independent.

Certas submits that if one takes the claimant's rent, cellphone expenses, grocery, and entertainment that his monthly expenses would be $7,400.00 per year and he clearly had more than sufficient earnings coming in to cover 51% of those needs through his self-employment.

Alternatively, if you took the Low Income Cut-off approach (LICO) considering the claimant lived in Ajax his LICO would be $7,666.66 and using the most conservative figure for his pre-accident income of $32,000.00, he would have had the means to cover 100% of his needs.

With respect to the Market Basket Measure (MBM), Certas suggests the claimant's MBM would be $8,244.80 (1 part of the combined MBM of 5 people), and, again, he would have had 100% of the funds to cover that.

Certas submits that taking into consideration the criteria set down by the Court of Appeal in *Miller v Safeco* (1984) 48 O.R. (2d) 451 (H.C.J.), aff'd 1985 50 O.R. (2d) 797 of:

- the amount of dependency;
- the duration of dependency;
- the financial and other needs of the dependent, and;
- the ability of the dependent to be self-supporting,

It is clear the claimant was not principally dependent for financial support on his father.

With respect to the claim for care, this is based on the agreement the father entered into to act as surety for the claimant arising out of his criminal charges. Certas points to *Oxford Mutual Insurance Company v. The Co-operators* [2006] CanLII 37956 (ON CA) in support of their position that merely because an individual is a surety that does not necessarily establish principal dependency for care. Certas points to the Court of Appeal's conclusions that if a surety order would be determinative of dependency for care would mean that insurance policies of all surety's would become answerable for motor vehicle accidents involving a person involved in such an arrangement. This, they suggested, could not have been the intention of the legislator.

In addition, Certas submits that when looking at the question of dependency for care one must look at the claimant's physical, social and emotional needs and what support they receive in that regard from the person in question. In this case, Certas suggests that the claimant received little, if any, physical, social, or emotional support from his father. Certas relies on the decision of Arbitrator Shari Novick in *Echelon General Insurance Company v. State Farm Automobile Insurance Company* decision from July of 2011.

As to the timeframe, Certas suggested that a reasonable timeframe would be 2 years from 2015 when the claimant started his schooling as an audio engineer up to the time of the accident.

Finally, on the issue of the burden of proof, Certas submits that the Applicant has met the burden to prove that the claimant was not principally dependent for financial support or care on his father. I take it from these submissions that the Applicant accepts that the burden of proof falls with it.

Respondent

Working in reverse order, the position of Wawanesa is that the onus is on Certas as the insurer who received the OCF-1 and the party who initiated the priority Arbitration to lead some evidence as to why the obligation to continue to pay the claimant's Accident Benefits should not

remain with them. Wawanesa submits that Certas is obliged to demonstrate on a balance of probabilities that there is sufficient evidence to support a finding that the claimant was dependent on his father and stepmother at the time of the accident. Wawanesa relies on the decisions of *Economical Mutual Insurance v. ACE INA Insurance Company* 2015 CarswellOnt 20915 in that regard as well as *Aviva Insurance Company of Canada v. Security National Insurance Company* 2017 ONSC 4924. The former is a decision from Arbitrator Shari Novick and the latter is a decision from the Superior Court of Justice.

With respect to the timeframe, Wawanesa submits that a reasonable timeframe would be 11 to 12 months pre-accident. Wawanesa submits that this is a period of time that fairly reflects the status of the parties at the time of the accident. It runs approximately 11 months from the claimant's second criminal offense in Windsor that took place on November 6, 2016 and up until the date of the accident. Wawanesa points out that 8 days after that offense was when the claimant's father was called upon to act upon as his surety and aside from spending some time with his girlfriend, the claimant resided full-time with his father and stepmother.

With respect to care, Wawanesa relies on the fact that the claimant's father had agreed to be his surety and that he relied on his father for support.

With respect to financial dependency, Wawanesa did not disagree with much of the criteria that should be applied in determining principal financial dependency. Wawanesa agrees with the criteria to be applied from *Miller v. Safeco* (supra) and the applicability of the 51% rule (*Federation Insurance v. Liberty Mutual*, Samis, May 7, 1999 Ont. Div. Ct. September 15, 1999 and [2000] O.J. 1234 C.A.).

Further, Wawanesa agreed that Arbitrators and courts have accepted the mathematical approach and statistical approaches can both be used in determining dependency but generally the statistical approach has been endorsed (either the MBM or the LICO).

Wawanesa submits that the calculation of income at $52,000.00 as proposed by Certas is "pure conjecture". Wawanesa points to the fact that there is no evidence of what income the claimant actually earned from his alleged self-employment efforts. They point to numerous inconsistences in his evidence as I outlined when I was summarizing the facts. They point to the fact that the claimant could not even provide a rough estimate of what he was earning at the time of the accident or for any relevant timeframe. Contrary to his sworn evidence, he did not file tax returns. Therefore, Wawanesa submits his evidence with respect to his pre-accident income from self-employment is wholly unreliable. Wawanesa submits that one cannot ascribe any pre-accident earnings or even any earning potential to the claimant as proposed by Certas.

Wawanesa also points to a number of negative factors that one has to consider when looking at whether or not the claimant could have been self-supporting irrespective of the lack of evidence about income. Consider he did not graduate and complete the course as an audio engineer, that he was only just starting out in this self-employment, his considerable criminal problems, and

lack of any evidence of any other employment in the couple of years leading up to the accident. Wawanesa submits that there was in fact a "clear and demonstrated inability to be self-supporting". The claimant was also not receiving any government assistance. Considering his prior criminal conviction from 2012 and ongoing charges it would have been extremely difficult if not possible for him to seek alternative employment while on bail and with a criminal record. Further, he did not have a driver's license and depended on his father for transportation. Wawanesa suggests it is highly doubtful that the claimant could have returned to work as a forklift driver and in any event there was no evidence of that presented at the hearing.

Taking into consideration the limited evidence available and applying the big picture, Wawanesa submits that if one can reach a conclusion on the evidence it would have to be that the claimant was not able to be self-supporting, had no discernable source of income, and therefore living with his father and his room, board, and expenses being covered he must therefore have been principally dependent for financial support on his father.

Analysis and Findings

Onus of Proof

As I noted at the beginning of this decision, in my view, this case is all about the onus of proof and whether or not it has been met.

I agree with both Certas and Wawanesa that the onus of proof lies on Certas who at the very least must establish that there is some evidence to support their position that the claimant is not principally dependent for financial support or care on his father.

Other Arbitrators including myself have commented in other cases that it seems unfair to ascribe a burden of proof to an Applicant insurer in a priority dispute. However, there must be some way to assess and weigh the evidence in cases such as this. I agree with Arbitrator Novick's comment on the burden of proof found in the decision *Economical Mutual Insurance Company v. ACE INA Insurance Company* (supra). Arbitrator Novick states in that case that it is incumbent upon the Applicant insurer as the initiator of the process in a priority dispute to lead some evidence as to why the obligation to continue to pay the claim in question should not remain with them. This is how it is done in most legal proceedings. She goes on to say that the Arbitrator must then apply "the balance of probabilities" test to the evidence as presented in order to determine what evidence to accept. Arbitrator Novick followed that process in her case and I follow that principle here.

In addition, there is the decision of Justice Kristjanson in *Aviva Insurance Company of Canada v. Security National Insurance Company* (supra). In that case, Justice Kristjanson concluded that the burden of proof rests with the Applicant. The court stated that as the insurer who received the Accident Benefit claim, the Applicant was the only one who had the Statutory right to seek an EUO which is a critical tool to develop evidence for use in a priority dispute.

Further, the court pointed out that if there were no burden of proof on either insurer then it would encourage insurers to simply initiate priority disputes irrespective of whether there had been adequate investigation into the case. The court suggested this would not contribute to the priority dispute process being an efficient and economic system. In that case, Aviva had taken the position that the onus of proof should rest equally between the two insurers to establish whether or not the claimant was a spouse. The court rejected that and agreed with Arbitrator Novick in the *Economical v. ACE INA* (supra) that the insurer who initiates the process must lead evidence as to why the claim in question should not remain with them.

Let us then turn to whether or not Certas has met its burden of proof in this case.

It is my finding that Certas has not met its burden of proof. Unfortunately, there was no evidence put before me that I could accept with respect to what the claimant's earning were or were not either 2 years or 11 months leading up to the accident of October 8, 2017. The claimant's evidence was inconsistent and simply not believable. He reported receiving cash but there was no evidence in any bank accounts. He said he had no credit card debts yet he had over $2,000.00 outstanding on a credit card and absolutely no payments were made towards that in the year leading up to the accident despite apparently having cash earnings. He did not file any tax returns. There was not a single document put before me that would allow me to conclude that this gentleman made anything from his self-employment job as an audio engineer. He had not even completed the required course.

On top of that, the claimant was involved in some fairly significant criminal activities. He was charged with drug possession and firearm possession, he had been in jail prior to the accident, and we know that as a result of pre-accident charges he was ultimately jailed post-accident. I agree with Wawanesa that this does not suggest that this gentleman had good prospects of employment.

There was no evidence before me as to when he had worked as forklift operator or what he had earned as a forklift operator. Certainly the last time that he was employed in that capacity was well outside the timeframe for determining dependency whether one took this from Wawanesa's 11 to 12 months or Certas' 2 years. Therefore, I cannot ascribe any amount of income to the claimant in order to determine whether he was principally dependent for financial support on his father. I cannot even begin to apply the 51% rule let alone the mathematical or statistical approach.

The same is true with respect to expenses. The claimant says he contributed $400.00 a week in rent and his father says he contributed nothing. The claimant says he would contribute monies towards groceries and/or pay bills and his father did not agree with that either, although he would admit maybe every couple of months the claimant might contribute $200.00 towards groceries. Even if I ignored the mathematical evidence with respect to expenses and relied on

the statistical approach, there is still no reasonable income that I can attribute to the claimant to determine whether he meets the test of principal financial dependency.

Absent any evidence that I can make a conclusion with respect to some income, it makes little sense to go through the process of analyzing the law with respect to principal financial dependency. A review of the parties' submissions suggests that the law was not really in dispute and they both agreed on what principles should be applied. It was the facts that were problematic and still remain problematic.

Therefore, with respect to the question of principal financial dependency I conclude that Certas has not met its burden of proof and on a balance of probabilities I am unable to determine whether the claimant was or was not principally dependent for financial support on his father on the date of loss. This is true whether I apply a 2 year time period or an 11 to 12 month time period. Therefore, I must dismiss the Arbitration for financial dependency.

Turning now to the question of care. The only evidence that Wawanesa relies upon with respect to the claimant being principally dependent for care on his father is the fact of the surety relationship. There is no evidence that the claimant had any disability that required care whether it be emotional or physical. It is simply the fact of the surety agreement. This is very similar to what was argued before the Court of Appeal in the *Oxford v. The Co-operators* (supra).

The Court of Appeal in the *Oxford* decision clearly distinguish between "control" vs "care". The court pointed out that the mere fact that a parent or an individual has control over another's conduct does not mean that results in a relationship of dependent care. The court points out that the primary objective of a surety order is to provide some degree of control over an individual's activities such as ensuring that they appear in court. The claimant here as was the claimant in the *Oxford* case able to attend to his daily needs, able to arrange his transportation, socialize with his friends, and involve himself to some degree in some form of self-employment. As his father pointed out, the nature of the surety relationship in this case was to make sure his son paid attention to the terms of his bail and that he attended in court when needed. There is no indication of any of the type of care that has traditionally been held by Arbitrator's to meet the requirement of care under the Statutory Accident Benefit Schedule.

I agree with Arbitrator Novick in her decision *Echelon v. State Farm* (supra) that when analyzing care the focus must be on what the claimant's physical, emotional, and social needs are and to what extent that the individual who is allegedly providing for care provides for those needs. In the case of the claimant here, there is no evidence that the father provided the claimant with any physical, social, or emotional care, and, in fact, there is no evidence that the claimant had any physical, emotional, or social needs to be provided for.

Therefore, on the issue of care, Certas has met its burden of proof and I conclude that the claimant is not principally dependent for care on his father.

Award

As I have concluded that Certas did not meet its burden of proof to establish that the claimant was not principally dependent on his father for financial support, priority in this matter rests with Certas. I therefore find that Certas is the priority insurer to provide Statutory Accident Benefits to the claimant arising out of the accident of October 8, 2017.

Costs

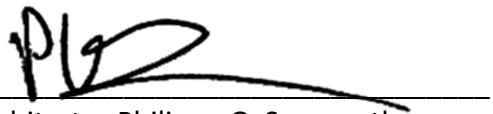
According to the Arbitration Agreement, the costs of the Arbitrator and the expenses of the Arbitration are to be apportioned as determined by the Arbitrator taking into account the success of the party, any offers to settle, the conduct of the proceeding, and the principles generally applied in litigations before the courts in Ontario.

Similarly, the Arbitration Agreement provides with respect to legal costs that it too shall be determined by the Arbitrator taking into account the success of the parties, any offer to settle, the conduct of the proceedings, and the principles generally applied in litigation before the courts in Ontario.

I am not making any specific award with respect to costs in the context of this decision as I am not aware as to whether there are any offers to settle that should be taken into consideration.

The parties have 60 days from the date of this decision to reach an agreement with respect to the expenses of the Arbitrator/Arbitration and legal costs. If they are not able to reach agreement then a further pre-hearing will be scheduled to set up a costs hearing during which any offers to settle can be presented and parties can make submissions on the issue of costs.

DATED THIS 24th day of May, 2022 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP