

IN THE MATTER OF the *Insurance Act* R.S.O 1990, c1..8, Section 268
AND IN THE MATTER OF the *Arbitration Act, S.O.1991, c.17*, as amended
AND IN THE MATTER OF an Arbitration

AVIVA INSURANCE COMPANY OF CANADA

- and -

Applicant

TD GENERAL INSURANCE COMPANY AND SONNET
INSURANCE COMPANY

BETWEEN:

Respondent

AWARD

COUNSEL APPEARING

Catherine H. Zingg: Counsel for Aviva Insurance Company of Canada: Applicant (hereinafter called Aviva)

Michael Huclack: Counsel for TD General Insurance Company: Respondent (hereinafter called TD)

Jessica Meyerovich: Counsel for Sonnet Insurance Company: Respondent (hereinafter called Sonnet)

INTRODUCTION

This matter comes before me as an Arbitrator pursuant to the *Arbitration Act* 1991 to arbitrate a dispute as to which of three insurers is obligated to pay statutory accident benefits pursuant to the *Insurance Act* R.S.O. 1980 c. I.8, as amended, to the claimant who was involved in a motor vehicle accident on June 10, 2018.

The parties selected me as their arbitrator on consent. This matter proceeded to a written Arbitration Hearing.

Counsel submitted an Agreed Statement of Facts, a Joint Book of Documents, Written Submissions and various Books of Authority.

The claimant had no insurance of his own when this accident occurred on June 10, 2018. The claimant, hereinafter referred to as Tony, was driving a motorcycle that had been insured with

TD. Tony's mother was the named insured under a policy with Aviva and his father was a listed driver under that policy.

Sonnet insures Tony's sister.

Tony applied to Aviva for statutory accident benefits. Aviva takes the position that Tony was not principally dependent for financial support on his mother or father on the date of loss. Aviva takes the position that TD had a valid policy on the date of loss and as Tony was an occupant of the motorcycle that TD is the priority insurer. Alternatively, Aviva says Sonnet is the priority insurer on the basis that Tony was principally dependent for financial support on his sister.

TD denies that its policy would respond to this accident and Sonnet takes the position that Tony is not principally dependent for financial support on their insured (sister).

This background resulted in this matter proceeding to the Arbitration before me.

RECORD

As noted the parties submitted a Joint Document Brief which included, *inter alia*, the transcripts of the EUO's completed of the claimant, his sister the claimant's mother and also of the alleged owner of the motorcycle that was involved in the accident. There was also a police report, the OCF-1, various Auto Plus reports, some bank statements a copy of Tony's driver's licence, a licence plate search conducted on the motorcycle, and a bill of sale dated June 9, 2018.

Counsel also signed an Arbitration Agreement dated May 26, 2021. The Arbitration Agreement sets out the following issues for my determination:

1. Did TD insure the Yamaha motorcycle that Tony was riding on June 10, 2018 or had ownership been effectively transferred from the TD insured to Tony before the date of loss?
2. On June 10, 2018 was Tony principally dependent for financial support on his sister or his parents?

ISSUE #1: THE YAMAHA MOTORCYCLE

I will deal with the questions revolving around the ownership of the Yamaha motorcycle first.

The following are the relevant facts as I have found them.

On June 9, 2018 Tony attended at the house of a Mr. Q who at the time was the owner of a Yamaha motorcycle bearing plate number 1725V. It was insured by TD.

Tony was responding to an advertisement on Kijiji that had been placed by Mr. Q and was interested in purchasing the motorcycle.

Tony negotiated an agreement with Mr. Q for the purchase of the motorcycle. According to the evidence of both Mr. Q and Tony, an agreement was reached that Tony would pay somewhere

between \$2,500 and \$3,000 in cash for the motorcycle. However the bill of sale which was dated June 9, 2018 and signed by both Tony and Mr. Q showed the listed price as \$500.

The evidence of Mr. Q and Tony was that the reason for this was to reduce the price of the vehicle in order to reduce the cost to Tony when he had to register the vehicle.

These negotiations took place on a Saturday. There does not appear to be any doubt that on that day Tony, while having a driver's licence, did not have a licence with an M designation. He had not been asked about that by Mr. Q.

When the negotiations were complete, Mr. Q allowed Tony to drive the motorcycle home. He did not remove the plates that were affixed to the motorcycle. However, the arrangement was that Tony was to come back the next day and return the plates. Mr. Q did sign over the ownership to Tony and gave him that document.

The next day was Sunday. Mr. Q was aware that Tony would not be able to transfer the ownership of the motorcycle on the Sunday as the Ministry of Transportation offices were closed. The motor vehicle accident occurred on the Sunday: June 10, 2018.

When the accident occurred, the motorcycle still had the motorcycle plate no. 1725V affixed to it. These plates were registered to Mr. Q at the time the accident occurred. Mr. Q is listed as the owner of the Yamaha motorcycle on the police report.

There is no evidence that prior to this accident occurring, and after allowing Tony to take the motorcycle away, that Mr. Q cancelled his policy with TD.

Tony had not registered transfer of ownership of the vehicle at the MTO prior to the accident occurring.

Position of the Parties

Aviva argues that ownership of the vehicle on the date of loss remained with Mr. Q and that no change in ownership had occurred and therefore there remained an insurable interest. Aviva says that the TD policy was not cancelled and accordingly covered Tony as an occupant of the motorcycle on the date of loss and is properly the priority insurer.

Aviva submits that there are a number of criteria one should look at to determine whether a change in ownership has occurred. They note the following:

1. Had the licence plates been removed from the vehicle?
2. Was ownership of the registration signed over to the new owner?
3. Was there an Agreement of Purchase and Sale?
4. Was the price of the agreement paid and was there a receipt?
5. Was a safety check conducted?
6. Were the keys, the owner's permit and the vehicle delivered to the new owner?

Aviva provided a number of decisions which suggested that if any of those criteria outlined above were not completed, then transfer of the ownership had not been properly effected. The original owner remained the registered owner and thus had an insurable interest, even though the new owner may also be considered a legal owner. Aviva argues that as the licence plates had not been removed from the motorcycle, the policy of insurance had not been cancelled and the vehicle had not, and in fact could not, be registered at the MTO, these three criteria lead inexorably to the conclusion that ownership had not transferred from Mr. Q and there remained an insurable interest with TD. Therefore, TD's policy should respond.

TD argues that the sale was in fact completed. Tony had been given the motorcycle and he had the keys. The sale had been completed, money had been exchanged and there was a bill of sale. Ownership had been signed over to Tony. TD therefore submits that ownership had effectively been transferred and that Tony was the legal owner and the fact that it had not been registered at the MTO was merely because it was a Sunday. Tony was, in essence, the legal owner of the vehicle and Mr. Q no longer had an ownership interest that would allow him to have an insurable interest, and therefore his policy of insurance should not respond. TD also submits that whether or not it continued to insure the motorcycle is not relevant as it takes the position that Tony was principally dependent on either his sister or his parents.

Decision and Analysis

Having carefully considered the submissions and the case law, I conclude that Mr. Q remained the registered owner of the said vehicle on the date of loss and that the TD policy should respond.

Key factors in my reaching this conclusion is the fact that Mr. Q did not remove the licence plates from the vehicle. He allowed Tony to drive off with the licence plate intact, knowing that those licence plate, was registered to Mr. Q and not to Tony. Mr. Q was also aware that there could be no change in the registration the next day, as the MTO office was closed. There was really no evidence as to how Tony was going to return that plate. We know he was operating the motorcycle with the plate still attached on the date of loss.

While ownership was signed over to Tony, again that fact had not been registered with the MTO. According to the Ministry, Mr. Q remained the registered owner of the motorcycle and the motorcycle remained associated with the plates registered to Mr. Q.

There are provisions under the Highway Traffic Act with respect to how to properly transfer ownership of a vehicle.

Section 11(1) of the *Highway Traffic Act* R.S.O. 1990 c. H.8 provides as follows:

"Where transfer of ownership or end of lease

"11(1) Upon the holder of a permit ceasing to be the owner or lessee of the motor vehicle or trailer referred to in the permit, he, she or it shall,

- (a) remove his, her or its number plates from the vehicle;
- (b) retain the plate portion of the permit; and
- (c) on delivery of the vehicle,

- (i) to the new owner, complete and sign the transfer application of the vehicle portion of the permit including the date of the delivery and give that portion of the permit to the new owner; ..."

11(2) Every person shall, within six days after becoming the owner of a motor vehicle or trailer for which a permit has been issued, apply to the Ministry, on the form provided therefor, for a new permit for the vehicle. ...

Used vehicle information package

11.1(1) Every person who sells, offers for sale or transfers a used motor vehicle shall provide a valid used vehicle information package in respect of the vehicle for inspection by proposed purchasers or transferees and shall deliver the package to the purchaser or transferee at the time of sale or transfer of the vehicle. ...

(3) The purchaser or transferee of the used motor vehicle shall deliver the used vehicle information package mentioned in subsection (1) to the Ministry before obtaining from the Ministry a new permit for the vehicle."

When applying those duties and obligations outlined above to Mr. Q and Tony, I note the following deficiencies:

1. Mr. Q, contrary to s. 11(1), did not remove his number plate from the vehicle.
2. Mr. Q, contrary to s. 11.1 did not provide a valid used vehicle information package to Tony.
3. Tony failed to comply with the following: He failed within six days after becoming the owner of the motor vehicle to apply to the Ministry for a new permit. That is understandable as the accident occurred less than 24 hours after he became owner. In any event, it still did not take place.

Counsel submitted a great deal of case law standing for the proposition that there can be two owners of a motor vehicle. There can be the registered owner and there can be a legal owner (see *Regina v. Zwicker*, 1994 CanLII 1221 (ONCA), *Trudeau v. Cavanagh*, 2017 ONSC 4314.) I have reviewed those decisions and I accept that in this case, while Tony had some indicia of ownership in that he had possession of the motorcycle, had completed a sale and had the ownership transferred over, that that only established him as a legal owner and did not make him the registered owner. Mr. Q remained the registered owner with an insurable interest and the TD policy was still in place.

Counsel for Aviva also provided a number of cases quite similar on the facts to these where the requirements of the *Highway Traffic Act* had not been complied with in terms of removal of the plates or the registration of the new ownership and it was found that the insurance was not cancelled by the registered owner remained in effect. I found helpful in my analysis the following cases: *Westrop-McKay v. Barrett*, 2001 ABQB 81, 9510-01030 and 9710-00168: February 1, 2001, *Liu v. The Personal Insurance Company*, 2017 ONSC 4232 and *Martin v. Zivkovic*, 20100 ONSC 2427: April 26, 2010.

In the *Westrop-McKay* case (*supra*) a gentleman was the owner of a GMC truck which he offered to sell for \$3,000. Mr. Barrett decided he wanted to purchase the vehicle but only if he could get a loan. While the loan was being facilitated, the owner of the vehicle gave a conditional bill of sale, turned the car over to him leaving his licence plates and insurance with the vehicle, and made no attempt to cancel his insurance policy. A week later, Mr. Barrett, while driving the truck, was involved in a motor vehicle accident.

The court held that the registered owner, despite having received full payment for the truck, had taken no other steps to terminate the remaining vestiges of his ownership. He did not remove his licence plates or take the valid insurance card from the vehicle, nor did he make any effort to cancel his insurance policy. Therefore, he remained the registered owner. While this is an Alberta case their legislation is very similar to the *Highway Traffic Act* in Ontario.

In the *Liu* decision (*supra*), the court set out the following list of actions or circumstances that can indicate the change of ownership of a motor vehicle:

1. Removal of licence plates from the vehicle;
2. Transfer of ownership by agreeing to sell the motor vehicle either verbally or supported by a written bill of sale;
3. The signing of the registration of ownership of the motor vehicle.
4. No longer having an insurable interest in the motor vehicle.
5. Not being responsible for certification or repairs.
6. No longer having possession of the vehicle.
7. Acknowledgement of ownership by the other person.
8. Accepting the proceeds of sale of the motor vehicle.

I reviewed these criteria in making my decision.

Most helpful was the *Martin* decision (*supra*). In that case, the court noted, when looking at the question of ownership, that the police report still showed the registered owner as the owner of the vehicle and the insurer was that of the registered owner. There was no receipt. The plates had not been removed even though the registered owner reported that they were to be returned to her sometime later. There was no evidence that any steps had been taken to remove the vehicle from the registered owner's policy. Finally, the fact that the registered owner permitted the alleged new owner to take possession of the vehicle, plated and insured, at a time when she knew that the claimant would not be able to transfer the vehicle with the MTO suggested ownership remained with the original owner.

The court in that case described the individual who had allegedly purchased the vehicle as a "guest driver". While both parties understood that the ownership would be transferred at the MTO when it could be, the fact that the licence plates remained on the vehicle for the benefit

and use of the guest driver meant that the insurance remained in place.

I find that Tony was a guest driver of the motorcycle on the date of loss and that the registered owner remained Mr. Q and the TD policy was in full force and effect.

ISSUE #2: DEPENDENCY

Relevant Facts

Relevant to some of the issues relating to dependency is the nature of the injuries that Tony sustained in this motor vehicle accident. Unfortunately, he suffered severe brain damage with a GCS score at the scene of 6. He was unconscious and unresponsive for some time. He also had fractured ribs, a fractured clavicle, forearm and hand fractures. He underwent several surgeries. He has been accepted as catastrophically impaired. Some parties argue that even though Tony was examined under oath, that that evidence should be considered unreliable due to the nature of his injuries. I have taken this into consideration in reaching my conclusions.

Tony was born on May 4, 1993 making him nearly 25 when this loss occurred.

At the time of the accident, Tony lived with his parents and two sisters in the family home in Brampton. They had lived there for at least seven years prior to the accident occurring.

Tony was single. He was working but there was some considerable dispute between the parties with respect to the nature and extent of his employment and what he earned.

Tony's sister, the Sonnet insured, was an IT administrator earning approximately \$75,000 per year. The evidence suggests that his sister Sarah was the prime income earner in the family. Tony's other sister was 17, was not working and was at school.

Tony's father was not employed and had not been working for some 25 years due to an injury at work. Tony's mother was also not working. They received ODSP of \$2,107.81 per month. That included a \$500.00 allowance for the younger daughter.

The facts suggest from reviewing all the transcripts and the bank records that Sarah contributed around \$2,100 per month to the family expenses. This was to cover food, internet, hydro and mortgage. It appears she gave this money to her mother who was then responsible for paying the expenses out of the money given by Sarah and the ODSP received by her and her husband.

If you look at Sarah's salary of \$75,000 versus the parents' total from ODSP of \$25,293.72 (including the money for the younger sister), clearly Sarah was bringing in the most significant income to this family.

The evidence appears to be consistent that Tony did not pay any rent and did not contribute to any expenses. He paid for his own cell phone. He had a credit card, but often he could not pay for his credit card and his sister Sarah would help him with that. Some of the evidence suggests that Sarah would give Tony cash from time to time. Otherwise, Tony supported himself on whatever earnings he made, keeping in mind that he lived rent-free and more or less expense-free in his family's home.

The key issue in this case is to what extent Tony was working on the date of loss. The evidence about that is inconsistent. There is clear evidence that Tony was employed in some capacity but it is not clear what his actual earnings were. No tax returns were filed before me. There were no employment records filed. There were no OCF-2s (employment certificate for the purposes of statutory accident benefits). The evidence of Tony's employment is based entirely on the EUOs of the various parties.

I will attempt to summarize that evidence below.

TD suggests that the evidence of Tony must be taken with a grain of salt due to his cognitive problems. However, some of Tony's evidence is consistent with other family members. I note the following from his EUO which took place on March 11, 2022:

Tony

1. Tony says he worked as a mechanic in Vaughan and in Brampton the year prior to the accident. At one point he says it is a couple of days a week, at another time he says it is six days a week. He believes he worked Monday to Saturday, eight hours a day. He claims to have been paid \$100 a day in cash. He says two of the companies he worked for were Ray's Tires and a Tesla dealership.
2. He also worked as a bouncer. He worked at the Luxy nightclub Friday, Saturdays and Sundays. He believes he would work roughly four hours and would get \$80 a shift. He did not get any tips.
3. He would help neighbours fix their cars. However, he would not charge them any money for that.
4. In the summers, Tony would cut down trees. He would drive around and look for trees that were dead or dying, go to the owner and offer to cut the tree down. This would start in April and typically run through to the fall. The cost for a small tree would be around \$200 and the bigger the tree, the higher the cost. He was paid in cash for this.

With respect to the cash he received for all his employment, Tony says he would not put it into the bank, he would go clubbing with it and spend most of it fixing his car.

Tony's Mother, EUO, March 6, 2020

1. Prior to the accident, Tony worked as a mechanic. His mother could not remember how many days a month, but knows he was working. He worked more than two days a week.
2. Tony worked as a bouncer on weekends, Fridays and Saturdays and sometimes on Sundays. She does not know where he worked or what he made.
3. Tony would take a car that was broken down, fix it and then sell it. He would also sell extra tires and would make money buying and selling cars.
4. Tony made money cutting trees. She could not say how often or what he earned but

sometimes he would borrow her car and his friends would help him.

5. Sometimes Tony needed money and she would help him by giving him maybe \$50 or \$100. She never paid his credit card for him.

Tony's Sister, EUO March 6, 2020

1. Tony was working at the time of the accident doing odd jobs here and there. He would put ads in Kijiji and "stuff like that".
2. Tony would support himself with odd jobs but his sister would help him whenever needed.
3. Tony cut down trees. These were deals that he would make with the homeowner and he would get paid cash. Her estimate was that he would cut down trees a few days in the month and be paid cash.
4. Tony would also do casual work. For example, if someone had their tire punctured or their key stuck in their car, Tony had an ad in Kijiji about that and people would call him.
5. Tony worked at different garages. He was good with cars. She was not sure if he worked anywhere regularly nor could she come up with the names of any of the garages. However, he did get money doing odd jobs for them.
6. Sometimes Tony would be driving down the road and would see a disabled vehicle and he would pull over and say I can change your tire for you instead of paying money for a tow, and he would get cash on the spot.
7. Tony worked as a bouncer between June 2017 and June 2018. At one point he was doing it every weekend from 10:00 at night to 3:00 in the morning. The Luxy was one of them. She could not recall any others. He received cash for these jobs. She believes he made between \$300 to \$400 per weekend.
8. Tony's sister describes him as coming up with "creative ways to make money".
9. Tony did ask for his sister to help him with money. Prior to the accident, his requests were higher than usual. He would ask for \$200 here and \$500 there. She would give it to him. He promised he would pay back but she had not yet been paid back.
10. Tony had owned a Cadillac CTS that he paid for and was insured but it was stolen in May of 2018.
11. Tony had two credit cards: A Scotiabank Visa and a MasterCard. She would help him pay them off.

In addition to the facts noted above, all parties provided information with respect to the Market Basket Measure (MBM) for 2018 for cities in Ontario with a population over 500,000. This would be consistent with the population of Brampton. For 2018 the Market Basket Measure for a family

was \$44,851.

The parties also provided information about the LICO (low-income cut-off) for families of five in 2018 for cities of a population over 500,000. This was \$46,247.

Position of the Parties

Aviva takes the position Tony was not dependent on his parents, the insureds of Aviva. They were on ODSP. While they did contribute monies to the family through their ODSP, the overwhelming financial support from this family came from Tony's sister. Aviva submits that Tony was either principally dependent for financial support on his sister, or alternatively there was sufficient evidence put forward that Tony was an able-bodied young man and was able to provide for himself. Aviva points to the fact that he had numerous jobs including cutting trees, working as a bouncer and advertising on Kijiji. He had a bank account, credit cards, had owned a car and covered insurance and had been able to pay Mr. Q \$2,500 to \$3,000 in cash for the motorcycle.

TD takes the position that Tony is principally dependent for financial support on either his parents or his sister. TD submits that Aviva has the burden of establishing on a balance of probabilities that Tony is not dependent on the parents and submits that Aviva has not met their burden of proof in that regard. Alternatively, TD submits that Tony was principally dependent for financial support on Sarah. TD notes that there was very little reliable evidence to support the fact that Tony was working at the time of the accident and even if he was, it was only odd jobs a few days a month and no reliable evidence as to what he actually earned. On the other hand, Tony's place of residence, his food at home, utilities, spending money and often his credit cards were paid principally by Sarah. This is consistent with the level of her income relative to the other family members. TD also points to the fact that no tax returns, T4 slips, notices of assessment, employment records or any other evidence with respect to Tony's employment was produced. Sarah's evidence is that she completed his tax return after the accident and as she did not know what he earned, she simply allocated zero earnings.

Sonnet, the insurer of Sarah, takes the position that Aviva has not proven that Tony was principally financially dependent for support on any one person. Any alleged dependency is multifaceted involving a mother, father as well as sister, all of whom contributed to the family earnings. Further, Sonnet submits that the evidence is clear that Tony had the ability to be self-supporting. He was paid cash under the table. He worked as a mechanic, cutting trees and as a bouncer. There is some evidence to suggest that he worked as a mechanic at least six days a month eight hours a day. He also worked as a bouncer on weekends earning between \$300 and \$400. He worked cutting trees using his own tools. He sold various items on Kijiji and would buy cars, fix them and sell them. Tony not only had the ability to work at various jobs as outlined above, but further had the ability to be self-supporting. He had a capacity to earn and actual earnings should not be the only criteria to look at. He was a young 25-year-old male with no criminal convictions, a natural talent for mechanical work and a formal education fixing cars. He had no physical or mental impairments. He had a high school diploma and did not collect ODSP or WSIB prior to the accident. Therefore, he had the ability to be self-supporting.

There was really no dispute between the parties with respect to the applicable law. Dependency is a defined term under the Statutory Accident Benefit Schedule under s. 3(7)(b) which states:

"A person is a dependant of an individual if the person is principally dependent for

financial support or care on the individual or the individual's spouse."

In this case, the argument is limited to principal financial dependency.

The parties all referred to the seminal decision of *Miller v. Safeco Insurance Company* (1986) 48 O.R. (2d) 451 (H.C.J.) affirmed 50 O.R. (2d) 797 Court of Appeal. *Miller v. Safeco* set out that the following criteria should be considered when determining dependency:

1. The amount of dependency.
2. The duration of dependency.
3. The financial needs of the claimant.
4. The ability of the claimant to be self-supporting.

All the parties also agree that a person can only be principally dependent for financial support if the cost of meeting their needs is more than twice their resources. In other words, a person must depend on another individual for at least 51% of their financial needs (see *RBC General Insurance Company and TD Meloche Monnex* 2018 Carswell Ont. 45 para. 18 (decision of Arbitrator Bialkowski).

Also relevant is the decision of Arbitrator Samis, May 7, 1990 in *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company*. Arbitrator Samis's decision was upheld on appeal. Arbitrator Samis put forward what has become to be known as the 51% rule in that decision. However, that decision also stands for the proposition that the ability to be self-supporting is an important criteria to look at in terms of dependency.

In his decision, Arbitrator Samis (see paragraphs 20 to 22) analysed the issue of capacity versus earnings. He noted that earnings are evidence of capacity but many people are not earning up to their capacity. This may be because there is a lack of work available or that a person who has an ability to earn simply chooses not to. That latter individual could not be regarded as a dependant in the sense that the need for financial support is not imposed on that person but is chosen by that person.

Arbitrator Samis goes on to say that it is not appropriate just to look at bare capacity when evaluating dependency. If a person is reasonably exercising his or her capacity to earn by providing for his or her own needs to the extent permitted by the circumstances, then those earnings may fairly reflect that individual's capacity.

The decision of Arbitrator Samis in *Co-operators v. Halifax Insurance Company*, Arbitrator Samis, December 14, 2021, affirmed on appeal, 2002 O.J. No. 2459 (Ontario Superior Court) is also helpful. This again was a case involving the issue of the claimant's capacity to earn. Arbitrator Samis in that case noted that it is appropriate to measure dependency by examining the individual's capacity to provide for their own needs. In a financial context, it is necessary to look at the individual's capacity to generate an income. In the case before him, Arbitrator Samis pointed out that that person may have an actual income but that income may only partially reflect their capacity. In fact, an individual may have an ability to earn more than their actual earnings.

These comments of Arbitrator Samis have been taken forward by a number of arbitrators, including myself, to look not just at whether if someone is dependent on another individual, but

whether that person is capable of earning more. One must look at their employment history, their earnings prior to the accident, any education or training they may have had, and any mental or physical disabilities that may affect their ability to earn.

Lastly, all parties agree that when making my decision about dependency, I must determine whether there is principal dependency. I must be satisfied that Tony was at least 51% dependent on his sister for financial support. That would activate the Sonnet policy. Alternatively, I must look at whether Tony was at least 51% dependent on his mother and father for support, in which case the Aviva policy would be activated. However, if Tony is not principally dependent on either one of those individuals, but jointly, then principal dependency cannot be found.

Lastly, it was most helpful that all counsel agreed that the appropriate time period to consider the issue of dependency was the one year prior to the motor vehicle accident.

This has been a difficult case to determine. Some of the difficulty revolves around the insufficiency of evidence with respect to Tony's earnings or even earning capacity. While overall there appeared to be evidence that Tony made cash under the table cutting down trees, working as a bouncer, did some creative projects on Kijiji and even working for a garage, there was absolutely no evidence as to what he earned. I am satisfied that he earned enough to, as Tony himself said, go clubbing and deal with his car. However, it appears he did not earn enough to contribute anything towards this family's expenses as his sister did nor did he earn enough to pay off his own credit cards. While I suspect that Tony certainly had the ability to earn money and possibly earn a fair amount of money, there was just not enough evidence before me to reach the conclusion that Tony had the ability to be self-supporting to the point that he could cover 51% of his expenses. I accept in terms of expenses that using either LICO or the MBM approach for either a family or for Tony alone, that if Tony could earn more than approximately \$11,000 per year, he would be able to cover his expenses. This is assuming that in Brampton in order to support oneself, a single individual would need \$20,998 to support oneself and 51% of that would come to \$10,499. I have no evidence that Tony ever worked full-time anywhere. I have no evidence as to what Tony earned. While there is evidence of employment, I simply cannot draw any conclusions from the evidence before me that Tony was able to cover 51% of his expenses through his own earnings.

In reaching this decision on the question of earning capacity I did carefully review other arbitration decisions and particularly those of Arbitrator Samis in *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company*, supra and *Co-Operators & Halifax Insurance Company*. In addition I had an opportunity to review a recent decision of Arbitrator Bialkowski in *The Wawansa Mutual Insurance Company v. SGI Insurance* (Decision Arbitrator Bialkowski October 16, 2023). In these cases the arbitrators concluded that the individual had sufficient earning capacity to be self supporting. The individuals were described as able bodied and having demonstrated an ability to work either full time or part time in a variety of jobs. While certainly Tony on the evidence had demonstrated the ability to do work the difference between this case and the other arbitration decisions is that there was no evidence before me as to what Tony had actually earned. For example in the recent decision in *Wawanesa & SGI* the evidence was that the claimant was making \$18.50 per hour working 8 to 10 hours per day and taking home about \$1,000.00 weekly. Arbitrator Bialkowski translated this into a capacity to earn \$30,000.00 a year if the claimant just worked a standard 40 hour work week. Similarly in Arbitrator Samis' cases there was evidence presented of actual employment and actual earnings that the arbitrator's could rely upon to extrapolate an ability to be self supporting. That evidence does not exist in this case. The evidence is inconsistent and not supported by any documentation that I can reliably use to extract any accurate or even semi accurate earning capacity.

The next question for me to look at is whether Tony was principally dependent for financial support on his mother or father. I conclude he was not. While certainly Tony's mother and father made a contribution to the overall expenses of this family, their contribution pales in comparison to Tony's sister. The two parents received ODSP of \$2,107.81 per month. However, you must deduct from that the \$500 that was specifically paid for the support of the younger sister. This meant that the joint contribution of the mother and father was \$1,607.81 per month which comes to \$19,293.72 per year. The mortgage on this house is \$16,968.24 per year. The money received by the two parents is barely enough to cover the mortgage, let alone food for five people, hydro, internet, car expenses and insurance.

On the other hand, Tony's sister earned \$75,000. She provided support to cover all the expenses in the home that were not covered by her parents' ODSP. She paid for hydro, internet, food, car insurance and as well her money would have gone to contribute towards the mortgage. Tony only paid for his phone, his expenses for clubbing and his car when he had one. Sarah bailed Tony out, paying his credit card off for him. Those were some considerable sums based on the bank statements provided. She would also lend him money when needed.

Based on all the evidence and the law I have outlined above, I conclude that Tony was principally dependent for financial support on his sister: Sonnet's insured.

AWARD

Taking into consideration s. 268 of the *Insurance Act*, I conclude that as Tony was principally dependent for financial support on his sister who was insured by Sonnet, that Sonnet is the priority insurer for the purposes of paying statutory accident benefits to the claimant, Tony.

While I have found that the TD policy was in full force and effect and ownership remained with the TD-insured on the date of loss, TD is not the priority insurer as Sonnet ranks ahead of TD pursuant to s. 268 of the *Insurance Act*.

COSTS

According to the Arbitration Agreement dated May 26, 2023, both the arbitrator's account and the legal costs are in the discretion of the arbitrator.

No submissions were made on the issue of costs. I am not aware whether there were any offers to settle that I should take into consideration. I defer my decision on the issue of costs until the parties have an opportunity to see if they can resolve the issue of costs between them and if not, we can schedule a costs hearing and any offers to settle can be presented at that time.

DATED THIS 13th day of November, 2023 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP