

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as amended
And Ontario Regulation 283/95
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

INTACT INSURANCE COMPANY OF CANADA

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel:

Intact Insurance Company of Canada: Gregory W.J. Robson (Applicant)

Economical Mutual Insurance Company: Ashleigh Leon (Respondent)

Introduction:

This matter came before me pursuant to the *Arbitrations Act*, 1991, to arbitrate an issue between the above-noted insurers with respect to a priority dispute pursuant to the *Insurance Act* and its regulations: specifically Regulation 283/95 as amended. This claim is with respect to a motor vehicle accident that occurred on February 25, 2012. A claim for Statutory Accident Benefits was advanced arising out of injuries sustained in that accident by Mr. J (with respect to issues relating to privacy the names of these individuals will not be disclosed). The parties selected me as their Arbitrator on consent and this matter proceeded to a hearing with both oral and documentary evidence on November 10 and 11, 2015.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

- Exhibit 1: Arbitration Agreement
- Exhibit 2 (a): Joint Document Brief Volume I
- Exhibit 2 (b): Joint Document Brief Volume II
- Exhibit 2 (c): Joint Document Brief Volume III
- Exhibit 2 (d): Joint Document Brief Volume IV
- Exhibit 3: Statistics Canada Table 1: Low Income Cut Offs (1992 base) After Tax

In addition the following witnesses were called: Mr. J, his mother, Ms. B, Chris P. Gray an accountant with PriceWaterhouseCoopers and Mr. Gary Phelps an accountant with Davis Martindale.

The Issue in Dispute:

The issue for determination is as between Intact Insurance Company of Canada (hereinafter called "Intact") and Economical Mutual Insurance Company (hereinafter called "Economical") which insurer is liable to pay Statutory Accident Benefits to Mr. J as a result of the accident of February 25, 2012.

The issue in the arbitration resolved down to a determination of the following question:

"Was Mr. J principally dependent for financial support on his mother and/or father at the time of the motor vehicle accident of February 25, 2012?"

At the time this accident occurred Mr. J's father, Mr. R, owned a 1998 Honda Accord which was insured with Intact. Mr. J submitted an Application for Accident Benefits to Intact dated May 4, 2012 and Intact paid benefits to Mr. J. Ultimately there was a settlement of the Statutory Accident Benefits entered into on February 22, 2015.

Economical insures the vehicle that struck Mr. J. When this accident occurred Mr. J was riding a bicycle. Mr. J did not have a spouse, was not a named insured under any other policy of insurance and in fact was not licensed.

Therefore if Mr. J is found to be principally dependent on either his mother and/or his father then priority for the Statutory Accident Benefits rests with Intact. If Mr. J is not principally dependent for financial support on his parents then Economical is the priority insurer.

Summary of Facts

Extensive documentation was put into evidence including transcripts from Examinations Under Oath of Mr. J, Ms. B and Mr. R. In addition there were 3 accounting reports from Davis Martindale and one accounting report from PWC. PWC also provided some informational calculations that had been completed just prior to the arbitration itself. As well documents before me included the backup material that the accountants had used to determine various household expenses and income for Mr. J, Ms. B and Mr. R.

Mr. J attended to give evidence. It is important to note that in the motor vehicle accident of February, 2012 Mr. J sustained catastrophic and significant injuries. In particular he sustained a head injury and to some extent some cognitive issues and memory issues were indicated during the course of his evidence given at the hearing. However I find that Mr. J did make best efforts to provide as best a recollection as he could of the events leading up to the accident in relation to the question of principal financial dependency.

Mr. R while having given evidence under oath was not a witness at the hearing. Apparently he was incarcerated at the time. Ms. B gave evidence and I found her to be a believable witness albeit with some difficulties with accuracy in terms of timing and dates. Ms. B was credible although lacking in good recall.

There were many inconsistencies with respect to the evidence given orally before me and the evidence given under oath in the earlier EUOs. Taking all the above into consideration I find the following key facts relevant to my determination of principal financial dependency.

At the time of the accident Mr. J was 29 years of age (date of birth: December 26, 1982).

Mr. J's parents lived at 307 Arthur Road in Point Edward. One of his sisters also lived there. In terms of employment and education Mr. J had graduated from high school in 2000. He then attended Fanshawe College in the motor power diesel technology program. He was there from 2005 to 2007. During that time he received funding from OSAP and lived on his own in London.

In the fall of 2006 Mr. J did not pass one of his required courses. In the year 2007 he did not pass 3 of his required courses. Therefore his program was incomplete and he did not graduate. He was 4 courses short of completing the program requirements.

The evidence with respect to Mr. J's employment after his non graduation from Fanshawe is somewhat unclear and inconsistent. I find that Mr. J worked from March 27, 2009 to February 22, 2010 (approximately 47 weeks) with Sarnia Heating working on residential boiler systems,

furnaces and residential air conditioning. He was also ODP (Ozone Depletion Prevention) certified which did allow him to work with refrigerants. I find that Mr. J was not employed in any fashion subsequent to February 22, 2010.

From February 21, 2010 to November 22, 2010 Mr. J received employment insurance benefits. As part and parcel of his entitlement to those benefits in his agreement he confirmed he was ready, willing and available and in fact actively looking for work. Indeed Mr. J's evidence in both his examination under oath and orally before me indicated that he was actively looking for employment from February 22, 2010 (with a few exceptions) until his accident of February 25, 2012. However I find that he was not employed during that time period.

When his employment insurance was no longer available Mr. J applied for Ontario Works. In the intake detail form signed by Mr. J on January 20, 2011 he noted he had -\$88.00 in liquid assets. Mr. J's evidence before me was that he had no savings or assets over the time period noted above. His only real source of income was Ontario Works.

The Ontario Works file contained a document dated January 6, 2011 in which Mr. J indicated that he "wished to apply for second career funding". Mr. J gave evidence that he was hoping to get payment through Ontario Works so that he could take the 4 credits that he still needed to complete the power and diesel technology course from Fanshawe. In a note date January 18, 2011 when Mr. J attended the offices of Ontario Works there is the following:

"Client has stated that he did not finish due to personal issues. Client states that he did finish all of his apprenticeship hours and his book has been signed off. Client has worked since that time and has been laid off from Sarnia Heating as of July 14, 2010. Client has been job searching since that time. Client reads and speaks English only and has beginner computer skills. Client has a resume and uses a cover letter to apply for jobs. Client does not currently have a valid driver's license and has a criminal record."

Although there was some inconsistent evidence on this issue from Mr. J and his family I find that according to the Ontario Works file that he received \$5,938.00 in social assistance payments in the 12 months leading up the accident. Some of the social assistance payments during that time period were paid to his uncle (where he was required to stay it appears as part of an agreement with respect to bail). In addition payments were made to his father, Mr. R, on 4 occasions (\$400.00 a month) noting payments of rent.

Also within the Ontario Works file was a hand written note from Mr. J dated September 28, 2011. In that he notes the following:

"I have nothing no clothes no bike no transportation. I have to start all over from nothing. I was incarcerated all summer and everything I owned was thrown out by the time I was released. I am requesting community start up. My dad is now in jail. You can verify this with my mom."

In the year prior to the accident Mr. J was incarcerated for a brief period of time. He was incarcerated from July of 2011 until September of 2011. The Ontario Works file suggests that Mr. J may have lived with his uncle for a short time period in July of 2011. Mr. J gave evidence that this was somehow or other associated with some court order. Otherwise when Mr. J was released from jail he returned to his family's home at 307 Arthur Road.

In October of 2011 Mr. J attended a substance abuse program at Westover Residential Treatment Centre (October 3 to October 22, 2011). When he was released from the substance abuse program he returned to his family home at 307 Arthur Road.

Overall the evidence suggests that Mr. J had lived in his family's home for the majority of his lifetime excluding when he was attending Fanshawe College. I find that Mr. J was continuing to reside in his family's home during his period of incarceration, at the residential treatment centre and the time period he was with his uncle. I find these were simply temporary absences from his regular home. He did not move his personal belongings. His room remained there available for him to return to as indeed he did.

At some period of time (and the time period is quite unclear) there was also a suggestion that Mr. J spent some time with a Mr. Maxwell. This individual had an apartment complex and ran a restaurant in Sarnia. Ms. J's evidence on that point during the hearing was that he went to stay with Mr. Maxwell occasionally on weekends. He indicated that he was living at home and he would go to Mr. Maxwell's to have some fun. He said when he was living at home he had no private life and could not have a girlfriend over. These seemed to be weekends to have some time away from the restrictions of life in the family home. I find that Mr. J never lived with Mr. Maxwell. It also is very unclear whether the time at Mr. Maxwell's fell within any of the time periods that either Intact or Economical have suggested as being appropriate for consideration on the issue of dependency.

While Mr. J was at home he claims that he provided housekeeping services within the family home and also "worked" with his father, Mr. R.

With respect to the housekeeping both Mr. J and his mother, Ms. B confirmed that as she was fully employed that much of the housekeeping fell to Mr. J. However there was also his sister and his father to provide assistance with the housekeeping. Mr. J would wash dishes, wash floors, do some cooking, put away groceries, do laundry and do some minor repairs. He also claims that he did some painting, installed a furnace and put in an interlocking driveway. However there was insufficient evidence to establish that the more unusual jobs that Mr. J did around the house (the driveway and the furnace) were again within any of the time periods suggested by Intact or Economical as being appropriate for the determination of the dependency.

Further both Mr. J and Ms. B gave evidence that these services were not unusual and that rather it was Mr. J just being a "good kid". He was doing his best to help around the house for his mom. I did not find any evidence that there was any agreement between Mr. J and his

mother that he could live at home rent free in exchange for providing household services. These services appeared to me to be the usual services one would expect a child to provide while living at home and were not unusual or extraordinary.

With respect to the work with his father it is alleged that Mr. R ran a business from home. This business at one point operated out of Mr. R's garage and involved repairs to tractor trailers. It was described as a mobile service. However in the summer of 2011 Mr. R's garage caught fire which destroyed the majority if not all of his tools related to the work. The evidence was clear that that business was not operating throughout the remainder of 2011. It is quite unclear whether that business was even operational at the time of the accident of February 25, 2012.

Ms. B's evidence on that point was that her husband made next to no contribution to the earnings of the family. She describes him as being unemployed and the business not operational for a very long period of time. She noted that his business would involve repairing equipment on diesel trucks and as Mr. R was not licensed would have to get a ride to do that repair.

Mr. R admitted that his business did not earn any money in the 2 years before Mr. J's accident. Certainly the business could not have earned any money between the summer of 2011 and shortly prior to the accident as a result of the fire to the garage. I find that Mr. R was not employed during that time period. If Mr. R's business was not operational then similarly it would be hard for Mr. J to work for his father.

I do accept that during the year prior to the accident Mr. J may have helped his father out from time to time with various odd jobs. There is a suggestion that he may have split some wood, assisted with some car repairs and cut down trees on a reserve. Again the evidence is unclear as to when this work was done. However I do not find that this constituted employment.

Intact alleges that there was an agreement between Mr. J and his father whereby in return for working for his father and assisting with his business that Mr. J would not have to pay rent. This information seems to be generated from a letter of October 31, 2014 from Mr. J's counsel in response to undertakings given under the various Examinations Under Oath. The letter specifically states that:

"Joseph and his father had an agreement that he would either pay \$400.00 per month in rent or he would complete \$400.00 worth of labour. There was no agreed wage rate. Joseph and his father agreed on the value per job and in most cases the value of Joseph's labour exceeded the \$400.00 per month so he did not pay his father cash for rent."

This factual assertion in the letter is completely out of keeping with the evidence that has been given by Ms. B, Mr. J and Mr. R.

Mr. J's evidence at the hearing was that he did not expect anything in return for the work that he was doing either with his father or his mother. He said he was doing his part for the family in return for living there. He said his father was teaching him mechanics. It was not a job. He was helping his father to help himself. He made no reference to this alleged agreement in his Examination Under Oath.

Mr. R gave a statement dated May 7, 2012. In that statement he indicated that he used to own a business but he no longer owned one. His son was helping him in the garage and the yard cleaning up the mess that was made by the fire. He notes his son was not employed. He states:

"This work that he was doing for me, that was for living here and just for being here, just to help out with the family. He is a good family person. It was not employment for him. I gave him cash once in a while to go to the store, but nothing serious. When he worked with me when I had R's Mobile I paid him. I just paid him like \$10.00 an hour. That was a couple of years ago."

In his Examination Under Oath Mr. R stated "Joe never received any money. He was helping me because he is my son. There is your answer for everything OK and he is a good kid."

Ms. B's evidence at the hearing was that she was the only one working. Her husband had been out of work for a long time. Her son was not charged any rent. Even if he did work Ms. B would not have expected Mr. J to pay rent or to contribute. She also stated that R's Mobile was not a successful business and had not operated from the get-go. It had not been operating in the 12 months prior to the accident. Finally she gave evidence that there was no agreement with Mr. J that he would live rent free if he worked doing certain things for his father.

I therefore find that there was no such agreement between Mr. J and his father and that the preponderance of evidence indicates to the contrary.

There was also a suggestion by Intact that is relied upon by their accountant that Mr. J worked for his father prior to the accident 5 hours a day 5 days a week. While that may have possibly been the case when R's Mobile was operating I do not find that that was the case in the year prior to the motor vehicle accident. R's Mobile was not operating due to the fire even if it had been operating prior to that time. Neither Mr. R or Mr. J had driver's licenses that would have allowed them to be mobile with the self employment. Further there is simply insufficient evidence to suggest that there was any other employment that Mr. R was involved in that would provide Mr. J with work 5 hours a day 5 days a week. I do not accept that evidence and I find that that is an inaccurate assumption to be made for accounting purposes in the context of this dependency claim.

The last piece to this dependency puzzle is what happened to Mr. J in the weeks leading up to the motor vehicle accident. It seems fairly clear that in the 4 to 6 weeks prior to the accident of February 25, 2012 Mr. J went to Barrie, Ontario. I accept Mr. J's evidence that the purpose of

going to Barrie was to find a job. However the evidence is equally clear that when Mr. J left Barrie and returned home about 6 days prior to this accident he had not found a job and had not had an interview and did not have a job offer.

The evidence suggests that Mr. J's accommodations in Barrie were arranged by his father. He was staying in a boarding home owned by one K S. In return for accommodation and basic needs including groceries Mr. J was to complete some work that K S would arrange for him. Others staying at the boarding house would pay a monthly fee of \$500.00. I accept that during this 4 to 6 weeks that Mr. J was staying in the boarding house that he did some labour for K S in exchange for his accommodation.

During the hearing Mr. J said "My dad helped me while I was in Barrie; that is the 100% truth." There was some suggestion that his father may have gone to Barrie with him but that is unclear. However a gentleman named Renee took Mr. J to Barrie and drove him home from Barrie roughly 6 days prior to the accident. Mr. J gave evidence as did his mother that in order to return to Barrie Mr. J would have to get a ride with Renee. Prior to the accident occurring there had been no fixed date for Mr. J's return to Barrie.

I accept the evidence of Mr. J that one of the reasons he came home is that he did not have the necessary documentation with him to pursue any job interviews or job applications. Mr. J said he had met with a career counsellor named Gloria Evans through the Georgian College Employment Agency. He was hoping to get an interview with a company called Lars Larson. He did not have his paperwork and claims he had to come home to get a driver's abstract. I note that Mr. J had a criminal conviction and did not have a driver's license. He acknowledged that he was home for 6 days prior to the motor vehicle accident occurring. He had no specific day to go back to Barrie.

I find that while Mr. J may have gone to Barrie to get a job that there is no evidence that he had a job, was going to get a job or that there was much hope of him securing a job.

Mr. J gave evidence in the hearing that his main goal was to get full time employment and if he could not get full time employment by finding a job in Barrie then he would further his education. He made reference to the "Second Careers" and possibly going back to Fanshawe College. Considering Mr. J's inability to find employment since he last worked in February of 2010, his criminal conviction, his minimal computer skills and his background with drug abuse I cannot reach any conclusion other than it was most unlikely that Mr. J was on the verge of employment at the time of the accident whether part time or full time.

Let us now turn to Mr. J's needs at the time of the accident and other potential sources of income other than social services/Ontario Works. I accept the evidence that was given by Ms. B and Mr. R that from time to time they would give Mr. J money. However that appears to be fairly minimal. Mr. R gave evidence that his son would get at most \$20.00 a week from him. It was a situation of "Dad can I have \$20.00." There did not appear to be any expectation that he would be paid back. Considering Mr. R's lack of income/employment himself it seems more

likely that the cash given to his son was irregular. I do not accept the suggestion by Intact that it was implied that the money Mr. R gave to his son was exchanged at least in part for some labour. With respect to Ms. B she was the only fully employed individual in the home. She worked full time earning approximately \$41,000.00 per year. It is her evidence and I accept that she paid all the expenses within the home. Her husband may have contributed some money to a line of credit. However that seems to be occasional at best. Therefore Ms. B was responsible for the mortgage, groceries, hydro, internet, phone, property taxes and transportation expenses. Four individuals resided in the home getting the benefit of the accommodation and expenses paid for by Ms. B. She does suggest that her son made some contribution towards those expenses but it appears that that was more likely when he was working. However putting the evidence in its best light both Mr. J and his mother suggest that he might contribute \$20.00 per month on average. Mr. J's evidence was there may have been one time when he may have contributed \$40.00. He states on his Examination Under Oath:

"I can only ever remember handing my mom a \$20.00 bill, right?"

I therefore find that there was minimal if any contribution by Mr. J to the household expenses and that the expenses were almost entirely dealt with by his mother.

With respect to his personal expenses Mr. J's evidence was that he did not have the money to buy anything. He stated he rarely if ever bought clothes as he didn't have money to buy them. His mother might buy him a t-shirt. Any money that he received from Ontario Works appears to have been used on his personal expenses such as entertainment. He did not have a driver's license or a car so he had no expenses related to that. Ms. B bought most of the household toiletries including Mr. J's although he estimates he may have paid \$5.00 a month for toothpaste, shampoo and soap. Mr. J estimated he would spend between \$60.00 to \$80.00 a week on things such as meals away from home and contribution to gas. Mr. J claims that he did not go to a dentist, did not see a doctor, did not have a cell phone and if he needed a haircut his sister, who is a hairstylist, would give it to him. Suffice it to say Mr. J had very few personal expenses.

Evidence of the Accountants

The conclusion of Davis Martindale who provided an opinion for Economical was that Mr. J was principally dependent for financial support on his parents. Based on various assumptions and as set out in their final report of October 9, 2015 these accountants concluded that Mr. J contributed 43.6% to his financial needs while his parents contributed 56.4% of his financial needs. These findings were with respect to the 12 month period prior to the motor vehicle accident. These accountants also calculated financial dependency for the 5.82 month time period prior to the accident. During that time period they determine Mr. J's parents contributed 55.7% of Mr. J's financial needs while Mr. J contributed 44.3% of his financial needs.

By way of contrast PWC analyzed the time period covering February 25, 2011 to February 24, 2012. However within that time period they also did calculations for 4 separate time periods. Their conclusions were as follows:

1. For the 12 month period prior to the motor vehicle accident Mr. J's parents contributed 10% of his need while Mr. J and others contributed to 90% of his needs.
2. Between February 25 and July 4, 2011 while Mr. J was living primarily with his parents they contributed 11% of his needs while Mr. J and others contributed 89% of his needs.
3. Between July 5 and August 31, 2011 when Mr. J was incarcerated his parents contributed zero to his needs while the Federal Government contributed 100% to his needs.
4. During the time period of September 1, 2011 to January 13, 2012 when Mr. J was living primarily with his parents they contributed to a maximum of 12% of his needs while Mr. J and others contributed 88% of his needs. (This calculation did not break down the period in which Mr. J was at the substance abuse program in Westover).
5. Between the time period of January 14 to February 25, 2012 when Mr. J was living primarily in Barrie his parents contributed zero to his needs while Mr. J and others contributed 100% to his needs.

The analysis of both sets of accountants were relatively consistent with respect to the expenses of Mr. J's parents household. Further they were relatively consistent with respect to Mr. J's fairly minimal personal expenses. Where the two reports differ is not only with respect to time period analyzed but with respect to certain assumptions being made with respect to Mr. J's employment and imputed income.

PWC made the assumption that while Mr. J was incarcerated and living in Barrie he was no longer "living at home". Davis Martindale on the other hand took the position that Mr. J's time in jail and in Barrie was temporary. During that time he remained a resident of his family's home noting that he had not moved his clothing, he had not moved any furniture and his room remained available for him.

PWC assumed that Mr. J worked 5 hours per day 5 days a week for his father in the 12 months prior to the motor vehicle accident. They allocated \$10.00 an hour to the value of those services and assumed Mr. J's labour for his father would be valued at \$250.00 per week. PWC calculated the value of that labour for the 12 months prior to the accident at \$9,466.00. In conjunction with this assumption PWC accepted that there was an agreement between Mr. J and his father that he would either have to pay \$400.00 per month in rent or would complete \$400.00 a month worth of labour. They assumed that in most cases the value of Mr. J's labour

based on the 5 hours per day 5 days per week analysis would exceed the \$400.00 per month and therefore he did not pay his father any rent.

Davis Martindale on the other hand disagreed with PWC imputing a value for Mr. J's labour with respect to the work he did for his father's business. They noted that the information available suggested that this business generated no income and therefore provided no benefits to a household to pay for any personal expenses. Further they did not agree with PWC using an imputed wage for the value of those services for the same reason. Davis Martindale also pointed out that Mr. R's business was closed from the summer of 2011 to the winter of 2012 due to the fire in August of 2011. The majority of the tools were destroyed in the fire. Davis Martindale determined that the value of Mr. J's unpaid labour calculated by PWC for that time period is therefore inaccurate as the business would generate no income and in fact there would be no labour.

The third major difference in assumptions is that PWC accepted that Mr. J had installed a furnace at his parent's home and that a value should be imputed for that labour. PWC assumed that the installation of the furnace would be valued at \$2,400.00. Mr. J did not charge his parents for this work.

Davis Martindale on the other hand disagreed with that approach and did not consider the furnace. They noted that if one were to attribute a value to the installation of the furnace (a labour estimate) it would not be \$2,400.00. It could vary from \$300.00 to \$1,000.00. At the hearing Mr. Phelps gave evidence as did Mr. J that the value of the labour to be attributed to the installation of the furnace is a percentage of the value of the furnace and in this case it would work out to approximately \$800.00. In any event Davis Martindale did not think that the value of the labour in putting in the furnace should be included at all. They noted that the information with respect to that was ambiguous and it would then create a need to value all the work performed by all household members not just the work of Mr. J.

While there were some minor variations in some of the other assumptions with respect to both these accountants the above are the key ones and result in the different conclusions. Perhaps the most important assumption with respect to dependency is the PWC allocation of \$9,466.00 in the one year period prior to the accident for the value of labour performed in lieu of rent plus the \$2,400.00 allocated for the installation of the furnace. These 2 numbers total \$11,866.00 of imputed "income" for value for services to Mr. J in the time period from February 25, 2011 to January 13, 2012. None of that is imputed to Mr. J during the period of January 12, 2012 to February 24, 2012 as he is in Barrie and according to PWC no longer living at home. In the 5.82 month period that value drops to \$1,636.00 for PWC but remains zero for Davis Martindale.

PWC also attributes (while Davis Martindale does not) a certain value of housing and meals during that 12 month period provided by others. This includes Westover and the Ontario Government while in jail. Davis Martindale attributes zero to those individuals taking the position that in essence no value should be assigned to that as Mr. J continued to receive the

value of the expenses being paid for him in his family home while temporarily residing in these other locations.

As noted these different assumptions by and large account for the different conclusions of each accountant both with respect to the 12 months, 5.82 months and 4 to 6 week period.

Finally note should be made of the informational calculations that were completed by PWC just before the arbitration. They reworked the numbers from all the reports and analyzed the 5.82 month period on a comparative basis. This shows areas in which both accountants reached agreement which I note as follows:

1. Both agree the value of social assistance during that time period is \$3,338.00.
2. Value of the services provided by Mr. J to the individual in Barrie at \$577.00.
3. Value of personal expenses paid for by parents at \$1,513.00.

Again the differences show in the valuation for Mr. J's labour with his father. There is also a difference in the value of the housing provided by parents (\$3,467.00 from Davis Martindale versus \$2,693.00 from PWC). This is due to the fact that PWC reduced the value of the housing provided by the parents during the time period that Mr. J was not home and allocated that value to the others (Westover and the Government of Ontario).

As a result according to PWC's calculations for the 5.82 month period Mr. J was able to contribute 54.3% to his needs and his parents contributed 40.7% to his needs while "others" contributed 5%. By way of contrast PWC calculated Davis Martindale numbers for the same time period that Mr. J could provide for 44.3% of his needs and 55.7% by his parents. Nothing was allocated to others.

I believe these highlight the differences in the approach of the 2 accountants.

There was some statistical evidence presented. I did not find the statistical evidence helpful and instead I rely upon the oral evidence and documentary evidence with respect to the expenses and the analysis provided by the accountants of the actual expenditures, income or imputed income available to this family.

Position of the Parties

Intact relies on the PWC report and takes the position that Mr. J was not principally dependent for financial support on his parents. They press upon me to accept the analysis of the imputed value of Mr. J's labour with his father, value of his services within the household together with his social assistance and to accept that Mr. J could meet more than 51% of his needs with his available income and imputed income. Further Intact submits that the proper time period that

I should accept for the analysis of dependency should be the time period when Mr. J was in Barrie. Intact submits that this fairly reflects the situation at the time of the accident and that the time periods proposed by Economical of approximately 6 or 12 months would not reasonably reflect the true status of Mr. J at the date of the accident. They suggest that Mr. J's time in Barrie was a significant one showing a change in circumstances. They suggest that he more likely than not would have secured employment had the accident not happened. He would have gone back to Barrie and have secured employment and remained in Barrie. Mr. J had put behind him his criminal issues and drug related issues and was ready to move forward. Intact submits that the "big picture" is more properly reflected by the time period of the 4 to 6 weeks leading up to the accident as opposed to any lengthier time period.

Intact submits that if the 4 to 6 weeks pre accident is not appropriate then similarly the 5.82 months suggested by Economical is not appropriate. Intact submits that if I do not accept the 4 to 6 weeks pre accident then I must also reject the 5.82 months and use the 12 month time period. However inherent in Intact's submission is that with respect to whichever time period I pick, their position is that the result will remain the same. Mr. J was not principally dependent for financial support on his parents.

With respect to principal dependency Intact urges me to accept the analysis by PWC. Lengthy submissions were made with respect to calculations of expenses, the assumptions made by the accountant and in particular the evidence to support the assumption that Mr. J had an agreement with his father that either he paid rent or he worked to the value of the rent (at least \$400.00 a month). Intact points out the Ontario Works file which shows payments within that 12 month period directly to Mr. R in the amount of \$400.00 per month at the direction of Mr. J. They say this supports their position that Mr. R had an agreement that rent of \$400.00 a month should be paid.

Intact submits that even if one ignored the time periods when Mr. J was incarcerated, living in Barrie or attending the residential rehabilitation centre that he was not principally financially dependent upon his parents. Intact submits that the reason for that is that one must take into consideration the value of Mr. J's services provided including the household services over and above those normally provided by the family unit and the specialized labour provided to his father. Intact alleges that when you take that into consideration that the value of those services was greater than or at least equal to the value of the accommodation provided by his parents. Intact submits that even if I find that there was no express or implied agreement with respect to the performing of services in lieu of rent, that I should still value those services and reach the same conclusion.

Economical, on the other hand, with respect to the time period, submits that the time that Mr. J was in Barrie does not reasonably reflect his circumstances at the time of the accident. Economical submits I should choose either the 5.82 month period prior to the accident (after he was released from incarceration) or the 12 month time period. Economical submits that this time period would be a better characterization of the relationship in the circumstances of a young adult whose life is in transition. Economical submits that I need to look at the

dependency relationship over a period of time. Economical submits that relationships can change from time to time and transient changes may alter matters for a short period but in order to fully understand the general nature of the relationship I should look at a larger time period.

With respect to the issue of dependency Economical submits, relying on the Davis Martindale approach, that I should give no consideration to any imputation of income for the value of services allegedly provided by Mr. J to his father and/or to the household. Economical submits that if I choose to assign such a value that I must also then look at the services provided by other members of the household and that was ignored in the PWC approach.

Economical submits that the services provided by Mr. J for housekeeping and home maintenance or whatever assistance he provided to his father were gratuitous in nature with no expectation of income and no promise of income. Rather he was assisting his family as a son and a “good kid”.

Finally Economical submits that I have good reason to question whether Mr. J actually did any work with his father considering the fire that occurred in August of 2011, no income having been reported by Mr. R, Ms. B’s evidence that her husband was unemployed and his business had never got anywhere and the fact that Mr. R himself was incarcerated in September of 2011. At best Economical submits Mr. J may have been doing some odd jobs for friends or family with his father which might have resulted in the receipt of some nominal payment. This is not the same as a case where an individual was actually providing a service to a family business who would otherwise have had to hire someone else to pay them to fulfill that role.

Economical urges me to find that Mr. J is principally dependent for financial support on his parents and that Intact should remain the priority insurer.

Analysis, Relevant Statutes and Case Law

In determining priority one must first look at 268 of the *Insurance Act*. The relevant provisions are as follows:

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

2. In respect of non-occupants,

- i. The non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant an insured,
- ii. If recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant.

Therefore if Mr. J is found to be a dependent of his parents then pursuant to Section 268 he must claim Statutory Accident Benefits from Intact. If Mr. J is not found to be a dependent on his parents then not having access to any other insurance and not being an occupant of a motor vehicle he must claim against Economical which is the insurer of the vehicle that struck him while on a bicycle.

The key to this is the definition of dependency found under the Statutory Accident Benefits Schedule as follows:

For the purposes of this Regulation, a person is a dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse."

In reaching my conclusion I have been guided by a number of principles relating to determination of financial dependency that have developed over the course of the years that this issue has been litigated.

First and foremost I am guided by the decision of the Court of Appeal in *Miller v Safeco* (1984) 48 O.R. (2d) 451; affirmed 1985 50 O.R. (2d) 797. In that case the Court of Appeal upheld the trial judge's decision that the following criteria are to be considered by an adjudicator when looking at the question of dependency:

1. The duration of the dependency;
2. The amount of dependency;
3. The financial or other needs of the alleged dependent;
4. The ability of the alleged dependent to be self-supporting.

These principles were applied to the more current Statutory Accident Benefit Schedule by the Court of Appeal in the decision of *Liberty Mutual Insurance v Federation Insurance Company* (an appeal from Arbitrator Samis) Ontario Divisional Court September 15, 1999 [2000] O.J. No. 1234 (Court of Appeal). This case typified the more difficult cases that arbitrators and judges must deal with in terms of financial dependency. That is those case of individuals who are younger and in transition. Individuals who may not be earning up to their capacity either because their ability to do so is foreclosed by the unavailability of work or by their efforts to further their education. Students typify this particular problem although Mr. J was no longer a student when this accident occurred.

Arbitrator Samis in that case held that it was not appropriate to look at bare capacity to evaluate dependency. If an individual alleged to be dependent is reasonably exercising his or her capacity by providing for his or her own needs to the extent permitted by the circumstances, then one can reasonably consider the earnings that that person can contribute

to his or her own expenses of living as evidence of capacity. I agree with Arbitrator Samis and many arbitrators and judges who have reached the same conclusion that while capacity must be considered, one of the ways of analyzing the ability of the individual to be self-supporting is to look at earnings.

The case law also supports that the determination of the nature and degree of dependency is a finding of fact. It requires an assessment of the individual's particular circumstances at the time of the accident. However the case law is also clear that that cannot be determined based on a "snap shot" of the person's circumstances as of that date. Recent cases suggest that one must not look at the snap shot but rather "the bigger picture".¹

I am also directed by the Court of Appeal decision in the case of *Liberty Mutual Insurance Company v Federation Insurance Company* (supra) to determine principal dependency for financial support on the basis of whether the claimant receives more than 50% of his financial needs from someone other than himself. The court accepted that if the claimant is able to meet 51% of his expenses then he is not principally dependent for financial support on others.

I also find merit in the approach to calculating dependency by not just reviewing a purely mathematical analysis and a purely statistical analysis but rather looking at the big picture that emerges from the evidence. Arbitrator Novick makes reference to this approach in her decision *Unifund Assurance Company v TD Meloche Monnex* (decision July, 2015) where she looked at both the mechanical exercise of calculating the claimant's means and comparing them with her financial needs as well as looking at the family circumstances in a more holistic or general way. Similarly Arbitrator Bialkowski in his decision *Co-operators General Insurance Company v AXA Insurance Company of Canada* (decision August, 2015) noted the following:

"Arbitrators must be attuned to the totality of the circumstances and the "big picture" of the claimants lives."

I have applied and analyzed all these principles in relation to Mr. J's situation both with respect to my decision as to what is the appropriate time period to be considered and with respect to my decision as to financial dependency.

The Timeframe

I am given a choice of 3 timeframes to consider: 12 months, 5.82 months or the brief period of time that Mr. J was in Barrie 4 to 6 weeks. I am satisfied that the latter period of time is too short and does not fairly reflect Mr. J's circumstances at the time of this accident. I am not convinced by the evidence that this was to be considered any real change in Mr. J's circumstances. I am aware that the case law does not require me to make a finding that the stay in Barrie would have been permanent in order to consider its relevance. I find that the sojourn in Barrie was just another example of Mr. J's efforts that was evidenced over the

¹ *Allstate Insurance Company of Canada v Intact Insurance Company* (Private Arbitrator Novick) October, 2015

previous years to find some form of employment. His evidence was and he reported to Ontario Works that he was looking for work, sending out resumes and applying but not getting any responses. While I accept that Mr. J was consulting with an employment counselor of some sort in Barrie there is no evidence that I can accept on a balance of probabilities that Mr. J was offered a job, had a job interview or that that was likely to occur at any time in or around the accident. If Mr. J's intentions had been to seek employment on a serious basis I query why he would not take the necessary documentation with him to Barrie in the first place. One also cannot help but take notice of the fact that Mr. J could not get back to Barrie without the assistance of his friend, Renee, as he was unlicensed. I therefore do not find that the timeframe while Mr. J was in Barrie is a fair reflection of his relationship and status at the time of the accident and that I need to look at a larger time period in order to understand the "big picture".

Which then of 12 months or 5.82 months is the better timeframe to choose? I do not see a great deal of difference between either timeframe. Considering that Mr. J was incarcerated, had to attend drug rehabilitation and had not been employed in any formal fashion since February of 2010 I find that the fairer and more comprehensive time period that would allow me to develop the "big picture" is the 12 month period. I note that my finding in that regard is consistent with the conclusions of the Court of Appeal in the decision of *Oxford Mutual Insurance Company v Co-operators General Insurance Company* 2006 Canlii 37956 (Ontario Court of Appeal) where the court stated the following:

"In contrast, under Section 2 (6), the true characterization of a dependent relationship at the time of the accident will usually require consideration of that relationship over a period of time, particularly in the case of young adults whose lives are in transition. The parameters of that period will depend on the facts of the case."

Dependency Analysis

In looking at Mr. J's employment history in the year prior to the accident I am struck by the fact that he is never employed. He reports that he is seeking employment but is unable to secure employment. He is reliant on Ontario Works for any source of income. He clearly had some issues that would prevent him from being employable in that year prior to the accident. We know that Mr. J was incarcerated from July, 2011 to September, 2011. Similarly he was in Westover Residential Treatment Centre for apparent drug addiction problems between October 3, 2011 and October 22, 2011. This suggests to me considering his employment, his education and one relatively brief time of formal employment well before the one year period that Mr. J had little capacity to earn. Taking into consideration the *Miller v Safeco* criteria I find that Mr. J in the year prior to the accident had little capacity to earn due to his failure to complete his education at Fanshawe, his unfortunate run-ins with the law and drug addiction issues and what appears to be an unavailability of work or an unwillingness of employers to hire this young man despite efforts to secure employment: if we accept the information from the

Ontario Works file as accurate. No evidence was offered by Mr. J of efforts to secure employment other than the time in Barrie in the year prior to the accident.

I find that the only income Mr. J had available to him in that year prior to the accident was through Ontario Works. I do not accept Intact's submissions and the argument of PWC on 2 key issues. I do not accept that Mr. J was "working" for his father in any significant capacity in the year before the accident. We know he would not be working for his father while he was in jail. He would not be working for his father while he was in the rehabilitation program. He would not be working for his father when his father was in jail. We also know he could not be working for his father in any significant capacity between August of 2011 and January of 2012 as there was no business to work for as the garage had burned down and the tools has been destroyed. At best then there may have been some type of working arrangement with Mr. J and his father between February of 2011 and his incarceration in July of 2011. However I find that unlikely as well. I accept the evidence of Ms. B that her husband was in essence unemployed. His business never took off and she was the sole income earner. I also find more compelling the evidence given by Mr. R in his initial statement that "This work that he was doing for me, that was for living for and just for being here, just to help out with the family...it was not employment for him...when he worked with me I paid him I just paid him like \$10.00 an hour. That was a couple of years ago." I find based on Mr. R's statement and on what appears to be the most consistent information provided both through the oral evidence, examinations under oath and documents that Mr. J was not working to any significant degree for his father in the year prior to the accident. If he was doing any work with his father it was on a gratuitous basis and he did not expect to be paid nor did he expect that in return for his labour that any obligation to pay rent would be eliminated.

On that latter issue I also do not accept Intact's submissions with respect to there being an agreement between Mr. J and his father that either Mr. J had to pay rent of \$400.00 a month or he had to work off the value of that rent. I find the only evidence with respect to that was in a letter from McLeish Orlando, solicitors for Mr. J, subsequent to some undertakings given at the Examination Under Oath. All other evidence does not support that proposition. Neither Mr. J nor Mr. R nor Ms. B gave that evidence in their Examinations Under Oath. In the oral evidence before me neither Mr. J nor Ms. B supported that position.

I therefore find that those 2 assumptions that were relied upon by PWC in reaching the conclusions in their report cannot be relied upon. I accept the calculations at least from a mathematical perspective and the assumptions that were made by Davis Martindale on the issues noted above. As well I accept their analysis from an accounting perspective that the value of the furnace labour included by PWC should not have been included. Mr. J gave evidence that the \$2,400.00 was the price of the furnace. His evidence at the arbitration and indeed on his Examination Under Oath was that the value of the labour would be a percentage of the cost of the furnace which he estimated at \$800.00. At best PWC should only have allowed \$800.00 allocated over the 12 month period and not the full \$2,400.00. However in my view nothing should have been allocated for the furnace. I agree with Mr. Phelps that once you allocate value for those types of activities on the part of Mr. J toward the household you must

also then do an analysis, seek evidence and allocate the value of similar services by the other members of the household. That was not done. I find of all the accounting reports submitted that the most persuasive analysis was the report of October 9, 2015 from Davis Martindale. Just looking at the purely mathematical perspective I accept their analysis that in the 12 months prior to the accident Mr. J's parents contributed 56.4% of Mr. J's financial needs while he contributed 43.6% of his financial needs. As noted there was really not a lot of disagreement between the accountants with respect to the household expenses, both agreed that of the household expenses 25% should be attributable to Mr. J. He had minimal if any personal expenses. The accountants also appear to accept the evidence as do I that Mr. J took all his money from Ontario Works and used it for his own personal needs. He contributed little if any money to the household itself.

This then takes me to the bigger picture. Arguably this case is one where you would not even need any accounting evidence to determine financial dependency. It seems to be fairly obvious that an individual who in the year prior to the accident earned no income, was not offered any jobs, did not earn income other than the money from Ontario Works which he spent on himself, must have been principally dependent for financial support on someone else. During that 12 months with the exception of the brief sojourn in Barrie I find that Mr. J lived at home with his parents. While he may have been incarcerated, visited his friend Adam Maxwell for weekend excursions and was briefly in a rehabilitation facility I find that during that time period he continued to reside at and have the benefit of his family home. His parents provided everything for Mr. J. While mathematically the numbers suggest a close call in dependency (56.4% versus 43.6%), in fact in looking at the bigger picture it seems to be far more obvious. That may very well be one of the downfalls of just looking at a dependency case from a pure accounting perspective.

There is absolutely no doubt in my mind that whether I look at the 12 month period or indeed if I look at the 5.82 month period or even the 4 to 6 weeks prior to the accident that when looking at the bigger picture Mr. J was principally dependent for financial support on his parents primarily his mother.

This case has some considerable similarity to the case of *Co-operators General Insurance Company v AXA Insurance Canada* (decision private Arbitrator Bialkowski August, 2015). In that case the insured had had some problems with drugs and alcohol which impacted his ability to maintain employment in the 12 month period predating the accident. Medical records there disclosed that the claimant was being medically treated through formal rehabilitation. He had been in detox.

Arbitrator Bialkowski stated:

"What we have here is a 19 year old who was living with his parents rent free and only most minimally contributing to household expenses. He had only worked sporadically since leaving high school some 3 years earlier. He had never held down any long term employment. He was hampered in finding and maintaining employment by reason of a

number of negative prognosticators and most importantly a substance abuse addiction. On the evidence before I cannot help but conclude that C.H. remained principally financially dependent on his parents on a mathematical/accounting analysis, the ability to live independently approach and the "big picture" approach."

The very same words could be used, in my view, to describe Mr. J. I cannot help but conclude that Mr. J in the one year prior to the accident remained principally dependent for financial support on his parents on a mathematical/accounting analysis, the ability to live independently approach and the big picture approach.

I therefore find that Intact Insurance Company of Canada is the priority insurer with respect to Mr. J.

Order/Conclusion

With respect to the question, as between the parties, which insurer is responsible to pay Statutory Accident Benefits to or on behalf of Mr. J arising from the motor vehicle accident of February 25, 2012 I find Intact Insurance Company of Canada is the insurer responsible to pay those benefits.

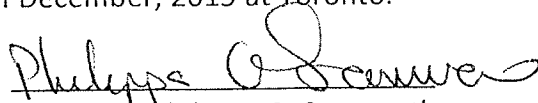
Costs

According to the Arbitration Agreement the costs of the arbitration including the Arbitrator's fees, court reporter fees, expenses and disbursements shall be borne by the unsuccessful party or parties, subject to the discretion of the Arbitrator. While certainly Intact had an argument to make with respect to the issue of principal financial dependency the fact is that Intact was unsuccessful in this arbitration. In accordance with paragraph 10 of the Arbitration Agreement I see no reason to exercise any discretion to the contrary and I order that the cost of the arbitration including the Arbitrator's fees, the court reporter fees, expenses and disbursements shall be paid by Intact.

Similarly the costs of the arbitration of Economical will be paid by Intact.

If counsel are unable to agree on costs within the next 30 days I can be contacted to schedule a further prehearing for the purposes of setting up a cost hearing.

Dated this 14th day of December, 2015 at Toronto.



Arbitrator Philippa G. Samworth

DUTTON BROCK LLP