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

BETWEEN:

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

DECISION

Appearances:

The Co-operators General Insurance Company (Applicant): Daniel Strigberger

Intact Insurance Company (Respondent): Christopher Whibbs

Introduction:

This matter comes before me pursuant to the *Arbitration Act, 1991, Section 268* of the *Insurance Act, R.S.O. 1990 (C.1.8 as amended)* and *Ontario Regulation 283/95 as amended.* I am retained as a private arbitrator to decide an issue between the above-noted insurers with respect to a priority dispute that arose as a result of a motor vehicle accident that took place on September 18, 2016.

On that day one William S. was a passenger on an uninsured motorcycle when it was struck by a motor vehicle insured by The Co-operators General Insurance Company (hereinafter called "Co-operators").

William S. applied to Co-operators for statutory accident benefits and Co-operators has been paying benefits to this significantly injured gentleman.

Intact Insurance Company (hereinafter called "Intact") insures Marian S. (William's grandmother) under policy No. AA3329007.

Co-operators takes the position that William S. was principally dependent for financial support on his grandmother, Marian S., at the time of the accident of September 18, 2016 and therefore Intact should be the priority insurer pursuant to Section 268 of the *Insurance Act.*

The hearing in this matter proceeded by way of written evidence only on March 27, 2019. Counsel filed written Factums but made oral submissions.

The following documents were made Exhibits:

1. Exhibit 1 – Agreed Statement of Facts dated March 4, 2019;

2. Exhibit 2 – Joint Document Brief, Tabs A through N (these contained the transcripts of an Examination Under Oath completed of William S.);

3. Exhibit 3 – Arbitration Agreement dated February 8, 2019.

It should also be noted that within Exhibit 2 were two accounting reports as follows:

1. Report, Davis Martindale (Gary Phelps) dated February 11, 2019; and,

2. BDO (Janet Olson) dated December 6, 2018.

The accountants were not called to give any evidence.

Issues in Dispute:

The issue for determination as set out in the Arbitration Agreement is "which insurer is responsible to pay the claimant's statutory accident benefits under Section 268 of the *Insurance Act*?" This narrows down in this particular case to the following question:

> "At the time of the accident of September 18, 2016 was William S. principally dependent for financial support on his grandmother, Marian S."

Result:

At the time of the accident of September 18, 2016 William S. was principally dependent for financial support on his grandmother, Marian S.

Background and Summary of Facts:

William was born on December 11, 1978, making him 37 years old on the date of loss. His grandmother, Marian, was born on July 7, 1932, making her 84 years of age. William had lived with his grandmother in Aylmer, Ontario for most of his life. He had been living with her in the five years prior to the motor vehicle accident although occasionally he would spend some time away, including spending one night a week at his father's apartment. According to a statement from Marian S., William has lived with her since he was born. While she did not have custody

of him she was considered to be his primary caregiver. She says when he became an adult he lived with her on and off throughout the years. He would move out and then move back in.

Marian's husband is deceased. She lived in and owned a detached bungalow home. At the time of the accident she was retired and had retired when she was in her 60s. Her only source of income was her old age pension. The home was the only property that she owned and she did not have any other assets.

William has never been married. He has a grade 10 education. He does have two children from a prior relationship who in or around the time of the accident would be coming to spend every second weekend with him at his grandmother's home. They had rooms there and kept clothing there. William paid $240.00 per month in child support although the evidence suggests that in the year of the accident he was not paying any child support as he did not have the financial wherewithal to do so.

For years William had worked in the tobacco industry in seasonal work. He hadn't worked in the tobacco industry for at least 10 years prior to the motor vehicle accident. His job history in the five years prior to the motor vehicle accident is sparse at best.

According to the employment insurance file the following was the history of William's employment in the years leading up to the motor vehicle accident. All the jobs were noted were through a company called HCR Personnel. This is a company that arranges for placements for employees with employers. The job is through the personnel company and is not a job directly through the employer.

1. June 6 – June 18, 2011: Earned $963.95. Reason for issuing ROE is shortage of work/end of contract or season;

2. August 13, 2011 – August 17, 2012: Earned $14,836.11. Reason for issuing ROE is shortage of work/end of contract or season;

3. August 26, 2013 – November 15, 2013: Earned $5,478.52. Reason for issuing ROE is shortage of work/end of contract or season;

4. November 16, 2013 – November 21, 2014: Earned $12,224.74. Reason for issuing ROE is shortage of work/end of contract or season.

According to William most of these jobs involved factory work.

While the IE file does not reflect any other ROEs there was evidence from William that he had been employed for some time period with Formet where he worked as a steel worker. This job ended in August of 2015 but there is no evidence as to when that job began.

The evidence also revealed that William received employment insurance from December 7, 2014 to July 18, 2015. Further, William did not report his earnings from Formet in his tax returns. There is therefore no information as to what he earned or how long he was employed there. However, I am satisfied that the evidence is clear that subsequent to August 15 despite efforts to find employment William S. was unemployed and continued to be unemployed until the accident of December 18, 2016.

William's tax returns were put into evidence for the years 2015 and 2016 and they revealed the following:

1. 2015 – EI, $10,048.00; social assistance, $1,969.00;

2. 2016 – Social assistance, $4,556.00.

William S. began receiving Ontario Works on August 19, 2015 and was continuing to receive it until the accident. He received $380.00 a month. He could have applied for a shelter allowance (cost of rent) which would have increased his monies from Ontario Works by an additional $376.00 per month. However, William did not apply for the shelter allowance as he was not paying any rent to his grandmother. Her evidence was in her statement she did not ask him to pay any rent. William also gave evidence that another reason that he did not apply for the shelter allowance was that his grandmother would then have to charge him rent and that that would affect her pension.

According to the Ontario Works file in or around August 19, 2015 William signed a "Participation Agreement". In this document William undertook to go to Employment Services Elgin and to arrange a meeting with a gentleman from Fanshawe College. This was for an assessment to gauge what would be his best route educationally with respect to a high school diploma or GED and what they deemed to be most suitable. William agreed to keep Employment Services Elgin advised of his progress or any changes to this plan.

It does not appear that much occurred in 2015 with respect to moving forward with this educational plan. William's evidence was that he had been told by his last employer, Formet, that to get a job directly with a company like Formet (rather than through a temp agency) he would need to have his GED or a grade 12 equivalency.

William's evidence is that after his job at Formet ended in August of 2015 that up until the accident of September, 2016 he was looking for work. He stated that he sent out lots of resumes. He had some interviews but he did not secure any employment. However shortly before the motor vehicle accident William reports that HCR arranged for an interview for him for a company called Presstran. This was a metal factory in St. Thomas. William did not attend the interview as he had told HCR that he was planning to go back to school as he didn't want to work through a temp agency any more and he wanted to be hired on directly.

William's evidence with respect to school was that he was enrolled in Fanshawe. He would be starting school some time in September of 2016. His paper work had not yet been completely filled out. He says he applied for the schooling in the summer time and that it was his understanding it would be paid for by Ontario Works.

Turning now to the household arrangements as between William and Marian.

Up until approximately June or July of 2016 Marian did have some health issues. In June or July of 2016 Marian had a fall that made her health issues worse. She is described as having some limited mobility and required the use of a walker. While Marian does not make reference to this at all in her statement William's evidence is quite clear that both prior to and subsequent to the fall he provided some level of care and household assistance to Marian. He reported that he cleaned the house, swept the floor, mowed the lawn, tended to flower beds, shoveled snow and took care of outdoor maintenance. He did the dishes, he fed the cat. Sometimes Marian would re-sweep and rearrange things. William did everybody's laundry. William's father assisted with the outdoor maintenance. With respect to grocery shopping Marian would shop either with William or William's father. Of note is that William did not have a driver's licence and he did not own a car. Also William would make dinners three to four times a week and Marian would make dinner the rest of the time. Marian and William were the only individuals residing in this household other than the weekends when William's two children would come in briefly. William's evidence was that he did not think Marian could live on her own before the fall.

After the fall Marian became less functional. William describes her as being mostly bedridden. She continued to use her walker and also got a wheelchair. She could not drive after her fall and she failed a driver's test. William still did the same household chores he did prior to Marian's fall but he also had a greater responsibility for cooking.

He also provided some personal care. He would bring her meals up to her in her room. She was able to feed herself. He continued to do her laundry. He would help her make her bed. He did not help her dress or undress. He did not help her in the shower or with bathing. However he would give her a sponge bath. With respect to driving for groceries William would now get his aunt and uncle to drive him into town to do the shopping.

In addition after the fall William helped Marian brush her hair in the mornings. He would also dye her hair every few months. He would walk her to the bathroom but she was able to transfer on and off the toilet herself.

William's evidence was that after his grandmother's fall he continued to look for a job. When asked what would happen to his grandmother if he found a job William's evidence was that his aunt and uncle lived right down the street and they would have come in during the day although they wouldn't have done as much as he would have. These other family members did visit and did provide care from time to time.

On his application for accident benefits William claimed that he was the primary caregiver to his grandmother.

With respect to expenses Marian paid for the mortgage, cable TV, natural gas and the internet as well as some groceries.

William contributed approximately $280.00 per month to the household expenses. He says this was mostly for food and a bit towards hydro. He paid for his own cellphone. He would buy his clothes at the Salvation Army if needed. The evidence would suggest that Marian and William lived a very frugal life.

This brings me to the two accounting reports. The Davis Martindale report concludes that based on an analysis of William and Marian's respective income and expenses and taking into consideration the Market Basket Measure for 2015 (MBM) that William was principally dependant for financial support on Marian. The one year time period prior to the motor vehicle accident was used for their analysis.

They calculated that in the 12 months prior to the accident Marian contributed to 55.9% of William's personal needs and William contributed 44.1% to his own personal needs. Reducing the various mathematical calculations done by Davis Martindale to the bare minimum they find that William's financial resources (what he received from Ontario Works and $200.00 that he had received for doing some lawn mowing) in the one year prior to the accident came to $4,760.00. The MBM statistic for 2015 for families living in an area with a population under $30,000.00 was $18,510.00. Therefore they concluded that William's income during the 12 months before the accident represented only 25.7% of this amount. Therefore William did not have sufficient income to pay for at least 50% of the expenses he would incur were he to live independently based on the MBM statistics.

BDO (Intact's accountants) agreed that if you took William's financial resources, which they also calculated at $4,760.00, and applied the MBM for a small population centre with less than 30 persons for 2015 (which they said was $18,498.00) then William would have insufficient financial resources to meet at least 50% of his financial needs. Therefore on that analysis both accountants agreed that William would be principally dependent for financial support on Marian.

However, BDO provides alternate scenarios.

In the first scenario BDO adds in the value of the shelter allowance that William could have applied for (but did not) from Ontario Works. They calculated this at $4,512.00 per year. When added to his other resources that gave William financial resources available of $9,272.00. If one then took the same MBM statistic of $18,498.00 William's financial needs would be 50%: $9,249.00. He would therefore have sufficient financial funds available to meet 50% of his financial needs. Davis Martindale did not agree with that approach noting that that was not an appropriate way to calculate dependency as William did not receive the shelter allowance and

therefore it should not be included. BDO's calculations were also based on the one year prior to the motor vehicle accident.

BDO in a second scenario made some calculations with respect to the money's worth or value of William's time in providing care to his grandmother. BDO acknowledged that the actual number of hours that William provided care to his grandmother is not known. They calculated the value of this time based on the Ontario Hourly Minimum Wage at the time of the accident ($11.25 per hour) or the Average Hourly Rate for a Homecare Provider/Personal Support Worker for the year 2018. This was $29.34. BDO then suggests that if one looked at the estimate of time that William spent with his grandmother, being just over ¾ of an hour or up to 2 and ¼ hours per day and then you multiplied that by the hourly rate that in either scenario this reduces William's own financial needs by this money's worth to result in a conclusion that he would have sufficient funds to meet all his financial needs. Taken into consideration in this calculation would be any money paid by William to his grandmother and any money paid out by William to meet his own needs.

BDO therefore estimated that the money's worth of the attendant care provided by William to his grandmother was $8,979.00. That was to be subtracted off the MBM financial needs as well as the monies that William paid to his grandmother per month ($250.00 per month) and based on those calculations William was not principally dependent for financial support on Marian. The calculation of the $8,979.00 for the money's worth of attendant care and housekeeping was based on the following analysis:

1. $29.34 per hour x 52.14 weeks per year x 7 days a week = .84 hours per day; or,

2. $8,979.00 / $11.25 per hour x 52.14 weeks per year / 7 days per week = 2.19 hours per day.

Davis Martindale did not agree with manner in which BDO took into consideration the attendant care services and housekeeping that William was said to provide for his grandmother. Their position was that William was not being paid for the services. There was no exchange of money. William was not in a better financial position as a result of providing the services to his grandmother and therefore the value of his services should not be considered when calculating in determining dependency.

Position of the Parties:

Co-operators' position is that on the facts of this case there is no other conclusion other than that William was principally dependent for financial support on his grandmother.

Co-operators, as does Intact, points to the four criteria set down by the Ontario Court of Appeal in *Miller v. Safeco Insurance Company of Canada, 48 O.R. (2d) 451* as the starting point. The four criteria are set out below:

1. Amount of dependency;

2. Duration of dependency;

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

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

I will review the parties' positions with respect to each of the four criteria.

With respect to the duration of dependency Co-operators submits that I must consider that in order to determine the true characterization of the dependent relationship I must look at that relationship over a period of time. That period of time must fairly reflect the status of the parties at the time of the accident. Co-operators submits that the appropriate time period in this case is 12 months pre-accident. During that time William's living situation with his grandmother and his income from Ontario Works was stable. Furthermore Co-operators submits that William would have continued to live with his grandmother and receive Ontario Works but for the accident.

Intact, while agreeing with the criteria when one looks at the duration of dependency suggests that a shorter time period would be appropriate. Intact does not agree that the 12 months is the appropriate time period. Intact submits that the duration of dependency should be the time of the fall of Marian to the date of the accident: A period of approximately two to three months. Intact invites me to consider that during that time period Marian was principally dependent for care on William. Intact submits that this is not a short time period nor a "snapshot". Intact points to a number of cases where periods of considerably less than 12 months were used for the duration of dependency. (See *Farmers Mutual Insurance Company v. Gore Mutual Insurance Company (Arbitrator Jones, September 27, 2007)* and *The Co-operators v. Zurich Insurance Company (Arbitrator Samis, May 11, 2005)*.

On the second criteria with regards to the amount of dependency Co-operators submits that the two accountants agreed that if one took William's total income in the 12 months prior to the accident (the Ontario Works) plus the $200.00 cash from mowing lawns that they both agreed his yearly income was $4,760.00. Further, Co-operators points out that the accountants agreed that using the Market Basket Measure was the appropriate statistic. There were some minor differences between their calculations of the 2016 MBM (Davis Martindale, $18,510.00 versus BDO, $18,498, a difference of $12.00). Finally Co-operators points out that both accountants agree using this method that William was not financially independent as the $4,660.00 would only fund approximately 25% of his needs. Co-operators suggests that this straightforward analysis in which there is agreement between both accountants is a proper way of determining the amount of William's dependency.

Co-operators submits that the other scenarios proposed by BDO are an incorrect method of analyzing dependency. They point to the following:

1. The manner in which BDO imputed a monetary amount to the services provided by William to Marian is highly questionable and must be rejected. There is no actual evidence as to the amount of time that William provided care to his grandmother. It does not take into consideration the time other family members spent caring for her. There is no estimate or comparison given of the time William spent caring for her before her fall versus after her fall. William was not a trained personal support worker and had never worked in this area. He had not moved in with Marian specifically to provide her with care and given up a job opportunity to provide her with care. Accordingly one cannot ascribe any money's worth to the services provided. Additionally, BDO imputed amount for care for the full year pre-accident rather than just post-fall.

2. BDO included in one of their scenarios (under which William was found not to be principally dependent for financial care on his grandmother) the amount that he allegedly could have but was not receiving from Ontario Works for shelter. Co-operators submits that there was no evidence that that allowance was available. The evidence was that William was not paying rent and his grandmother did not want him to pay rent. It is therefore speculative to assume that he could have claimed shelter, would have received a shelter allowance and therefore it should have been included in his income.

Intact takes the position that this is a case where one must consider the value of the personal care and housekeeping provided by William to his grandmother and that when one does so that clearly William was able to meet 51% of his financial needs. Intact points out that the care provided includes things such as cooking, cleaning, bathing, dressing, undressing and various household duties all of which were provided for free by William. Intact submits that after the fall the level of care increased considerably and that while other family members may provide some care it was not to the level provided by William. Intact provided a number of cases where other arbitrators have concluded that it is appropriate for services provided by a family member within the household to be considered as having value and for which a money's worth must be calculated. Intact submits that the "value of money's worth" is not taken into consideration by adding it to the claimant's income but by rather looking at in relationship to the household financial needs. Therefore, as done in BDO one starts with an estimate of the financial needs which in this case was the MBM of $18,498.00. One then deducts the financial resources of the claimant of $4,760.00. This is deducted as it is his contribution to the household financial needs through his resources. Then one deducts what the grandmother provides. That number was $4,760.00 in order to be equal to what the claimant provided to the household. The number that remains is $8,979.00 which Intact submits must be the value of the services that would be attributable to the care William provided to his grandmother.

Intact then submits that what one must do is look at a way of valuing the care to see whether on a reasonable analysis the $8,979.00 figure of financial needs left in the household would be covered by William's services. In this case BDO took a range from $11.25 per hour to $29.34

per hour and assumed 52.14 weeks per year, 7 days a week. This worked out to 0.84 to 2.19 hours a day which Intact submits is a conservative estimate of what services were provided by William.

Intact argues therefore that at minimum if William contributed 0.84 to 2.19 hours per day in just care to his grandmother that he would provide $8,979.00 worth of care. On this analysis this would mean he would be financially independent.

Intact also submits that it would be an absurdity to conclude in a case such as this that William could be principally dependent for financial support on his grandmother while at the same time she was principally dependent for care on him. Intact urges me to find that those two conclusions cannot co-exist.

On the other scenario from BDO Intact submits that it is appropriate to take into consideration the shelter allowance. In the BDO report if you add in the shelter allowance then William is not principally dependent for financial support on his grandmother. Intact submits that the only reason he turned down this money is that it would affect the pension income of Marian. Intact submits that the refusal of William to apply for the shelter allowance is speculative and that I should accept that that additional source of income was available to him, that he should have obtained it and that would have made him financially dependent as it would have resulted in an additional $376.00 per month which would have been annualized to $4,512.00 per year.

Intact submits that I should choose either of the scenarios put forward by BDO as more consistent with the relationship between William and his grandmother.

With respect to the financial or needs of the dependent the parties' submissions on that point are really tied up to some degree under the discussion under the amount of dependency and there were no real specific submissions or evidence directed to this heading alone. Rather, the fourth criteria seemed to be the remaining key argument and key area of disagreement between the parties. This is the ability of William to be self-supporting.

Co-operators submits that the facts support that William had a clear and demonstrated **inability to be self-supporting in the year before the accident**. They point out that he had been unemployed for almost two years. He lived in a farming town with limited job opportunities. His income was limited to Ontario Works and the $200.00 cash payment for lawn mowing. William's evidence was that he had applied for a number of jobs before the accident and had not been offered a job. While Co-operators acknowledges that William had been offered an interview for a job (as opposed to the job itself) they point out that William turned that down in order to pursue school as he wanted to upgrade his education in an attempt to improve his job prospects as supported by Ontario Works.

Co-operators submits that William had a proven history in the year prior to the accident of being unable to secure employment and had decided not to pursue employment in order to go to school and improve his job prospects. Therefore he was not able to support himself and

there should be no income imputed to him on the grounds that he could have been self-supporting.

Intact on the other hand suggests that William did have earning potential. They suggest he had the capacity to generate further income. In addition to being able to obtaining the shelter payments from Ontario Works Intact suggests that he was an able-bodied young man who could have taken temporary employment with Presstran. Intact submits that if one looks and one takes a big picture approach clearly William had the ability to earn more income.

Findings and Analysis:

I now turn to an analysis of the law and my reasons for concluding that William was principally dependent for financial support on his grandmother.

The Statutory Accident Benefits Schedule effective September 1, 2010, *Ontario Regulation 34/10* defines a dependent under Section 2(6) as someone who is "principally dependent for financial support" at the time of the accident. Therefore, in order for William to qualify as a dependent on his grandmother it must be established that he was principally dependent for financial support at the time of the accident.

There is a long line of cases and both Intact and Co-operators agree that the test for principal financial dependency is the "51% rule". To be principally dependent for financial support the individual must receive more than 50% of his financial needs from someone other than himself. If William is able to meet 51% of his financial needs then he cannot be principally dependent for financial support on others (*Federation Insurance v. Liberty Mutual (Samis, May 7, 1999),* affirmed *Liberty Mutual Insurance Company v. Federation Insurance Company (Ontario Div. Ct., September 15, 1999)* and *[2000] O.J. 1234 Court of Appeal.* There is no argument about the 51% rule being applicable in this case. Rather, it is how that rule is analyzed and the evidence to determine the 51% issue.

Both Co-operators and Intact agree that the starting point in any dependency is those four criteria from the decision in the Court of Appeal in *Miller v. Safeco (supra).* I have looked at each of those four criteria carefully and the evidence as I have reviewed it that is available to me in reaching my conclusion. Of those four criteria I find that three are of particular relevance in determining William's dependency and I will focus on those three criteria.

Duration of Dependency:

I agree with Co-operators that in this particular case the one year time period is appropriate for determining dependency. The only argument put forward by Intact with respect to the three to four month period being appropriate is that that was the time period after Marian had her fall. I agree with Co-operators that Marian's fall has little if anything to do with the dependency relationship. While it may have something to do with the degree of care provided by William it does not have anything to do with the financial arrangement. Over the course of the year there

was no change in William's financial status vis a vis his grandmother. He continued to live in her home. He continued to provide some modest contribution towards the expenses ($250.00 per month plus some grocery money plus occasional gas money). He continued to receive Ontario Works. He continued to be unemployed. Perhaps the only change over that time period is that rather than accept an interview for a potential job he chose instead to pursue the participation agreement with Ontario Works by attending school to get his GED or some sort of equivalent in the fall in order to improve his educational level and improve his opportunity to secure employment.

One of the leading cases in this area is *Intact Insurance Company v. Allstate Insurance Company of Canada, 2016 ONCA, 609 (CanLii).* In that case the Court of Appeal emphasized the prior decision from *Oxford Mutual Insurance Company v. Co-operators General Insurance Company, (206, CanLii, 37956)* in which the Court stressed that an arbitrator must look at the relationship between the two individuals where the dependency is alleged during the "period of time which fairly reflects the status of the parties at the time of the accident." The Court pointed out that the time period chosen for a dependency analysis must be reflective of the facts in the case. In this area the Court has clearly rejected a categorical one size fits all approach. The decisions in this area reflect a variety of time periods that have been chosen from as short as two weeks up to the one year. The Court of Appeal also points out that there is no permanency requirement with respect to the relationship. Rather the arbitrator must pick the time period that accurately reflects the true nature of that particular relationship at issue at the time of the accident.

I agree with Co-operators that the one year period is the appropriate time to look at the duration of the dependency. William's position vis a vis his grandmother was stable. His income status did not change. He remained unemployed. Prior to the fall he was doing some housekeeping chores and providing some care to his grandmother who had to use a walker. I acknowledge that after her fall that level of care may have increased. However, that only changed the nature of the care dependency, not the nature of the financial dependency. Therefore, I choose the 12 month period as the one that most accurately reflects the nature of the relationship between William and Marian.

Ability to be Self-Supporting:

I am unable to accept Intact's submissions that the evidence supported that William had the ability to earn more income.

Turning first of all to the shelter allowance. I do not agree that it should be included in any potential income that may have been available to William. The fact is that he had lived with his grandmother on and off for most of his life. She had never asked him to pay rent. In her statement she said she wouldn't ask him to pay rent. Whatever evidence there was with respect to his not paying rent because it may affect her pension seems to have been speculative and not thoroughly analyzed through any questioning. The evidence appears to be that if William wanted to request and receive the shelter allowance he would have to prove he paid rent. In order to prove that he paid rent his aunt would have to charge him rent. William

would then have to pay her that rent and it may very well affect her ability to contribute financially to the home as it may affect her pension. It seems to me that would not have changed what financial money was available to this very modest household but merely change the source. The fact is that William didn't get the shelter allowance and could not get the shelter allowance because his grandmother was not going to charge him rent. Therefore I reject the scenario proposed by BDO that William would be principally dependent for financial support on his grandmother by virtue of including the shelter allowance in his available income.

The other argument put forward by Intact is that I should consider in the ability to earn the fact that William had an interview with HCR that he turned down in order to go to school. I am not prepared to consider that. There is no evidence that this interview was other than with HCR. There is no evidence what job may have been generated by that interview, if any. There is no evidence as to what he might have earned from Presstran had he secured the job or for how long he might have worked there considering his intention to proceed to school as arranged with Ontario Works.

Rather, I agree with Co-operators that this gentleman's work history in the year prior to the accident reflected somebody who had chronic unemployment. William was trying to find jobs. He had been told by his last employer that he would get employment directly with a company rather than through HCR if he had a high school education or equivalent. That fact seemed to have been proven to William over the course of the next number of months where he applied for jobs and was unable to secure any employment. One must keep in mind that William's last job was with Formet in August of 2015. We have no information as to how long he was employed with Formet nor what he earned as apparently he did not declare it on his tax returns and there was no ROE. This employment could have been as little as one week. The evidence is that William did not show any earning capacity in the year prior to the accident and had wisely chosen to go back to school had this accident not occurred in order to improve his chances of securing employment in this community.

In reaching this conclusion I carefully reviewed the reasons of Justice Perell in the decision *Gore Mutual Insurance Company & Co-operators General Insurance Company (208) O.J. 3603.* In that decision Justice Perell pointed out that a person's earning capacity is a product of many things. One should look at the formal and informal education, natural and acquired talents, physical and mental abilities and external factors such as availability of employment and the supply and demand for labour. Justice Perell points out that determining a person's earning capacity involves considering these factors and their prior employment history. I have considered those factors in relationship to William who had minimal education, little if any training other than as a general labourer and that he was living in an area where there did not seem to be a significant availability of jobs, as indeed reflected in his prior employment history.

Amount of Dependency:

Under this heading I will consider the submissions of Intact with respect to placing some money's worth on the care William provided by his grandmother and to accept the calculations

made by BDO as to how that money's worth can be considered in a financial dependency case. Despite the very creative submissions of Intact I am unable to conclude that on the facts of this case whatever care was provided by William to Marian either prior to the fall or subsequent to her fall should be ascribed some money's worth. More importantly I do not find the analysis of BDO to be based on any principles set out in the case law or that is consistent with the facts of this case. In fact the BDO's analysis in this case does not in my view rely on facts but rather a creative analysis to develop a scenario where William would not be principally dependent for financial support on his grandmother.

I agree with Co-operators that one of the key facts is that William did not choose to leave a job or move from one location to another to go and live with his grandmother to provide her with care. He had been living with her for most of his life albeit more particularly in the five years or so prior to the accident. This interdependent relationship between care and finance had been going on for some time. It was a natural by-product in my view of Marian's belief that she was the primary caregiver to William and William's feelings of responsibility to his grandmother in return.

William did not give up any job opportunity or any other following in order to come and live with Marian and provide care to her. There was no agreement between Marian and William that something would be exchanged between the two of them in return for that care. Marian had provided William with a place to live for years. His provision of care to her was not in return for her continuing to provide him with a home.

Intact referred me to some cases that they submitted supported their position that the care in the circumstances of this case should be valued in some manner. The first was the decision in *Farmer's Mutual Insurance Company & Gore Mutual Insurance Company (Arbitrator Jones, September 27, 2007)*. In that case Matthew moved back into his mother's home in July of 2003 and remained there until the accident that he was involved in in October of 2003. The mother gave evidence that she only agreed to have Matthew come home on very specific terms. She said she had been drifting, was in debt and on Welfare. Therefore in return for the right to come and live at home Matthew was to feed and groom the horses, clean the stalls, groom the dogs, take care of his laundry, do the chores, cut the lawn and maintain the flowers. Matthew's mother's evidence was that Matthew was not to have a "free ride". Arbitrator Jones found that there was a plan to turn Matthew's life around. One must also keep in mind that in that case Matthew's mother ran a kennel with 35 to 70 dogs as part of a business.

Arbitrator Jones concluded that the work that Matthew did should be valued. There were estimates given about how much work he did (5 hours a day, 6 days a week). Therefore Arbitrator Jones found that Matthew agreed to work 30 hours a week in return for receiving room and board.

Arbitrator Jones in that case pointed out (and I agree with him) that some cases you should provide a deemed value for room and board versus chores performed. The value is a rough and imprecise exercise and doesn't have to be a purely mathematical calculation. In that particular

case Arbitrator Jones found that the value of the room and board was roughly the value of what Matthew provided by way of services and therefore found there was no dependency.

I also reviewed the decision of *Security National Insurance Company* & *The Personal Insurance Company*, decision of Arbitrator Bialkowski, August 9, 2011. In that case Mr. Allen claimed he performed about 60% of the household chores in the family prior to the accident. He was living in his mother's home and there were five other people there including Mr. Allen at the time of the accident. He did not receive a compensation for the services he provided. The value of these services was determined to be approximately $2,585.00 annually prior to the accident.

Arbitrator Bialkowski was provided with experts' reports where considerations were given to the value of the services and how those affected dependency. Arbitrator Bialkowski did not agree to attribute a value to services in that case. He felt the services provided by Mr. Allen to the household were not much different than the services provided by the Allen family members to him. He therefore concluded it was not appropriate to include the value of the services as part of the analysis. He noted that whether or not to do that was a particular fact to be determined in each case.

In this case, similar to Arbitrator Bialkowski, I find that on the specific facts of this case it is not appropriate to attribute a value to either the housekeeping or care that William provided to his grandmother. I have outlined my reasons for that above and therefore conclude that it is not appropriate to consider any value to be placed on the care services or housekeeping provided by William and I reject the BDO calculation in that regard.

Rather I find that in the circumstances of this case the most compelling and reasonable calculation on the issue of amount of dependency is in fact the most simple one. Both accountants agree that if one takes William's income from the Ontario Works at $4,760.00 in the 12 months prior to the accident (which includes the $200.00 cash income from mowing lawns) and take the 2016 Market Basket Measure (whether BDO's calculation or Davis Martindale's calculation at $18,510.00/$18,498.00) that William would not be able to fund any more than 25% of his needs. Therefore, if William was unable to fund 50% of his financial needs I conclude that at least 51% or more of his needs were being provided by his grandmother.

I have not spent any time going through the case law or the rationale with respect to the use of the Market Measure Analysis. A number of arbitrators have recently endorsed the use of the MBM and I agree with those arbitrators. Those cases are noted below:

> *Certas Direct Insurance Company v. Security National Insurance Company (Arbitrator Samis, August 9, 2018)*
>
> *Pembridge Insurance Company v. Western Insurance Company (Arbitrator Bialkowski, December 6, 2018)*

I therefore conclude that William was principally dependent for financial support on his grandmother, Marian.

Result:

As I have found that William was principally dependent for financial support on his grandmother, Marian, it therefore follows that Intact Insurance Company is the priority insurer pursuant to Section 268 of the *Insurance Act*.

In this arbitration there was no issue raised with respect to the quantum of accident benefits. If counsel are unable to agree on quantum I can be contacted to schedule a further pre-hearing.

Costs:

The Arbitration Agreement provides that the legal costs shall be determined by me taking into consideration the success of the parties, any offers to settle, the conducts of the proceeding and the principles generally applied in litigation before the Courts. As Co-operators was entirely successful in this matter I find that Intact Insurance Company shall pay Co-operators' legal fees and that Intact is also responsible for the Arbitrator's account.

I would like to thank both counsel for their most interesting and creative arguments in this unusual case. Counsel displayed considerable advocacy in their oral submissions.

DATED THIS 14th day of May, 2019 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP