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:

AVIVA INSURANCE COMPANY

Applicant

- and -

WAWANESA INSURANCE COMPANY

Respondent

DECISION

Appearances:

Aviva Insurance Company (Applicant): Jamie Min

Wawanesa Insurance Company (Respondent): Paul Omeziri

Introduction:

This matter comes before me pursuant to the *Arbitration Act, 1991*, Section 268 of *The Insurance Act, R.S.O. 1990 (c. I.8 as amended*) and Ontario Regulation 283/95 as amended. I have been 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 February 27, 2017.

On that day R.T. was a passenger in a vehicle insured under a policy with Aviva Insurance Company (hereinafter called Aviva) bearing Policy No. 41880235. R.T. sustained injuries in that accident and applied to Aviva for Statutory Accident Benefits. Aviva has been paying benefits to R.T.

Wawanesa Insurance Company (hereinafter called Wawanesa) insures W.O., R.T.'s father, pursuant to Policy No. 7513016.

Aviva takes the position that R.T. was principally dependent for financial support on his father on the date of loss and therefore Wawanesa 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. Counsel filed the following documents:

1. Arbitration Agreement dated March 18, 2019 and April 4, 2019;

2. A joint Document Brief which included the transcripts of the EUO of R.T., an Employment Insurance Record, tax returns of R.T. and banking records of R.T.;

3. A further Document Brief filed by Wawanesa which contained excerpts from R.T.'s accident benefit file, further bank statements of R.T. and excerpts from the accident benefit file of Mr. R.T.'s brother who was also involved in the motor vehicle accident;

4. Each party filed submissions and Books of Authority.

The Issue in Dispute:

The Arbitration Agreement identifies the following issue in dispute:

- Which insurer is liable to pay R.T. statutory accident benefits under Section 268 of the *Insurance Act*?

In this particular case the issue narrows down to the following question:

> "At the time of the accident of February 27, 2017 was R.T. principally dependent for financial support on Wawanesa's insured?"

Result:

At the time of the accident of February 27, 2017 R.T. was principally dependent for financial support on Wawanesa's insureds.

Background and Summary of Facts:

R.T. was 25 years old at the time of this accident and living with his parents and brother. The evidence indicated that R.T. had always lived in his parents' home.

R.T. was born in Istanbul, Turkey and came to Canada in 1993. He was single at the time of this accident. He graduated from high school in 2010. R.T. has a history of employment. This is found in his Employment Insurance file and I set out his employment history below:

1. North American Lighting, April 16, 2012 to March 28, 2013, shipper, total insurable earnings, $14,709.29, reason for leaving is unknown;

2. North American Lighting, June 24, 2013 to January 31, 2014, shipper, total insurance earnings, $14,093.29, reason for leaving is unknown;

3. ABC Consolidators International, August 8, 2014 to September 12, 2014, warehouse worker, total earnings, $2,346.00, reason for leaving is he quit;

4. Menessentials Corporation, September 26, 2014 to December 13, 2014, sales associate, earnings, $2,997.28, reason for leaving is he quit;

5. Trillium Staffing Inc., December 15, 2014 to March 20, 2015, earnings $8,439.81, reason for leaving is shortage of work/end of contract;

6. Regional Hose Toronto Limited, March 23, 2015 to May 21, 2015, insurable earnings, $6,583.00, reason for leaving is illness or injury;

7. Cercan Tile, July 23, 2016 to September 10, 2016, total earnings, $6,055.55, reason for leaving is this was a summer job only;

8. Elte Carpets, September 21, 2016 to December 31, 2016, sales rep., total earnings, $2,907.16, part-time job, reason for leaving is he quit.

The tax returns that were produced show R.T.'s earnings as follows:

2015	T4 earnings of $14,478.00 and EI benefits of $5,625.00
2016	T4 earnings of $6,555.00 and "other income" of $2,463.00
2017 and 2018	Tax returns not filed in evidence

While clearly R.T. has a considerable connection to the work force, the evidence also supports that R.T. had decided to return to school in 2015.

In September of 2015 R.T. commenced Architectural Technology studies at the North Campus of Humber College on a full-time basis. He was therefore not employed from September, 2015 until he commenced his job with Cercan Tile in July of 2016. His evidence was that that was a summer job while he was not in school.

When school started again in September of 2016 R.T. began his job at Elte. At his Examination Under Oath he said that he changed jobs from Cercan to Elte because he "needed something part-time for school". He worked anywhere from 16 to 23 hours per week at Elte. He also continued with his schooling.

With respect to why R.T. quit his job with Elte on December 31, 2016 his evidence from the EUO was "Q.314 – It-my school was, I guess, a priority, so I started to see that it was interfering with my studies so I. I decided to completely focus on school." Therefore, R.T. was not employed at the time of the accident of February 27, 2017.

R.T.'s program at Humber was a 3 year program and R.T. eventually graduated in May of 2018 and post-accident secured employment.

With respect to the family situation neither R.T.'s father or mother were examined under oath. The evidence is a little vague about their respective employment and earnings. I find on the evidence before me that R.T.'s father was not employed and possibly had not been employed for at least three years prior to the motor vehicle accident.

On the other hand, R.T.'s evidence was that his mother worked at a local grocery store: Fortino's. She worked there full-time. She had been working there full-time for at least one year prior to the accident. There is no evidence as to how much R.T.'s mother earned.

There was also evidence before me with respect to R.T.'s brother's earnings. R.T.'s brother was also residing in his parents' home on February 27, 2017. In a statement dated April 26, 2017 R.T.'s brother testified that he was receiving employment insurance at the time of the accident. He had worked at an Audi dealership for a year up to December 16, 2016 at which point he began to receive EI. A Record of Employment that was produced indicated that from August 25, 2015 to August 8, 2016 R.T.'s brother earned $14,577.94 as a service assistant from Pfaff Motors Inc. In 2016 he also received Employment Insurance of $3,278.00. R.T.'s brother was also involved in the motor vehicle accident. In that same statement he indicated that he was also intending to go back to school although he had not been enrolled in any programs on the date of the accident. On the date of his statement, April 26, 2017, he was enrolled in George Brown College to take a Civil Engineering course starting in September.

With respect to who contributed what to this household the evidence garnered almost entirely from R.T.'s EUO and to a lesser extent some statements from his brother is as follows:

1. R.T.'s mother paid for rent and utilities which was approximately $1,400.00 per month;

2. R.T.'s tuition fees were paid by OSAP. He had received approximately $10,000.00 of a student loan up to the time of the accident;

3. R.T.'s school books were paid by OSAP;

4. If there was any outstanding tuition R.T.'s parents helped him pay for that;

5. In the year prior to the accident R.T.'s mother would pay for groceries; but, R.T. would pay for his entertainment (dining out as an example) from his savings;

6. In the year before the accident R.T.'s parents gave him money for clothing, haircuts and toiletries;

7. If R.T. could not afford to go out sometimes his friends would cover the cost of entertainment;

8. R.T. did not own a car and did not have any transportation expenses. He walked to and from school;

9. While R.T. was at Elte he did try to contribute to the household expenses. He was unsure of the amount. He also tried to contribute when he worked for Cercan. This would include buying groceries for the whole family once every two weeks, giving his parents cash of $200.00 to $500.00;

10. R.T.'s cell phone was paid by OSAP;

11. R.T.'s evidence was once he stopped employment with Elte at the end of December of 2016 he no longer made the contributions noted above to the family;

12. R.T. went on a trip to Miami in August of 2016. He paid for the flight himself and everything else was "gifted by a friend".

R.T.'s banking statements covering both pre and post-accident were put into evidence. I carefully reviewed them and did not find anything in there that provided any insight into the financial ins and outs of the family situation in the year leading up to the motor vehicle accident.

R.T. did not have his own credit card.

The last piece of relevant evidence before turning to my analysis is from the Employment Insurance file. After leaving Elte an application was made by R.T. for Employment Insurance. When asked why he left his job at Cercan Tile he indicated the following:

> "I understood at the time that my employer needed a full-time employee to continue the job. The job was not one that was suitable for part-time candidacy."

With respect to why he left the job at Elte he made the following statement:

> "I made a personal decision to go to school and I'm attending a program."

On that same form he also indicated that the days that he attended classes included Monday, Tuesday, Wednesday, Thursday and Friday and that his classes on each of those days include both morning and afternoon times. In their Record of Decision as to why E.I. was denied the file indicates that R.T. was attending full-time mandatory classes Monday through Friday all day totalling more than 25 hours a week. That he quit his job on his own initiative and as he was attending full-time school he would not be available for work and therefore did not qualify for E.I.

Position of the Parties:

A. Time Frame:

In each dependency case one of the first jobs of the arbitrator is to make a determination as to what the appropriate time frame is to analyze the dependency keeping in mind that the case law directs an Arbitrator to analyze the dependency relationship between two individuals during the "period of time which fairly reflects the status of the parties at the time of the accident". This can be difficult in transition cases. Aviva submits that the appropriate time frame to consider the dependency in this case is January 1, 2017 to the date of the accident. Aviva submits that this period marks R.T.'s transition from a part-time employee to a full-time student and that that was to be his status quo until his graduation in May of 2018.

Aviva submits that there are a number of cases where a short time frame has been considered. For example, a four week time period has been held to be appropriate: *I.C.B.C.* v. *Federated* (Arbitrator Samis, July 3, 2009) a period of over three months was found to be the appropriate time frame; *TD Home & Auto Insurance Company* v. *Co-operators General Insurance Company* (Arbitrator Samis, February 26, 2013); and, finally a case where a 2.8 month period was found to be appropriate (the decision of *Economical Insurance Group* v. *State Farm Insurance Company* (Arbitrator Bialkowski, January 13, 2014). In that latter case Aviva points out that this was similar to the facts of this case in that there was a change from a student and part-time worker to that of a full-time worker and the evidence supported that the transition had been completed. Aviva submits that R.T.'s transition from a part-time employee and student attending school to a full-time student with no income and no intention to work had occurred when this accident took place in February of 2017.

Although not specifically stated in Wawanesa's submission I understand their position to be that the one year period (February 27, 2016 to February 27, 2017 is the appropriate time period. During that period R.T.'s re-assessed tax return for 2016 was $9,018.00. Wawanesa submits that during this time period the full picture reveals a young adult committed to the work force and earning sufficient income to meet the majority of his own needs even while he was completing his studies.

Aviva further submits that during this time period his bank statements show that he was using his own funds and spending somewhere between $1,000.00 and $2,000.00 a month for various expenses albeit there is no evidence as to who was providing those funds to him. Aviva provides the following summary of the bank statements during those time periods:

1. September 23, 2016 to October 24, 2016: Deposits of $1,702.51 and withdrawals of $1,595.79;

2. October 24, 2016 to November 24, 2016: Deposits of $1,267.76 and withdrawals of $1,420.16;

3. November 24, 2016 to December 23, 2016: Deposits of $1,910.77 and withdrawals of $1,915.92;

4. January 24, 2017 to February 24, 2017: Deposits of $290.42 and withdrawals of $2,140.41.

I do note that my review of the bank statement indicates that the deposits in the fall of 2016 were payroll deposits presumably from Elte.

Aviva relies on the Ontario Court of Appeal decision in *Oxford Mutual Insurance Company* v. *Co-operators General Insurance Company* [206] 83 O.R. (3d) 591 with respect to their position in terms of the appropriate time frame. They note the following comment from the Court in that case:

"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."

B. Parties' Position with Respect to Dependency:

Both Aviva and Wawanesa agree that the decision of the Court of Appeal in *Miller* v. *Safeco Insurance Company of Canada* [48] O.R. (2d) 451 sets out the four key criteria that one must consider in determining dependency. Those criteria are as follows:

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.

Item number 2, the duration of the dependency, deals with the time frame and I have outlined the position of the parties above.

Aviva's position is that R.T. was unemployed on the date of loss and completely dependent upon his parents. He lived with his parents, they provided rent, they provided food, they provided help with expenses for clothing, haircuts and toiletries. Aviva submits that R.T.'s evidence was that once he was no longer employed with Elte that he did not make any contributions to the family finances.

Aviva submits that the LICO approach could be applied here. Aviva referenced the low income cut-off measure as having been used in previous cases. Aviva submits that the LICO data provided in the book of authorities notes that the before tax low income cut-off for 2016 for a single person family unit living in a community of 500,000 or more was $24,949.00. R.T. was not working between January and February of 2017 so would have had no earnings. Aviva submits if you take the 12 month period then his earnings were $6,555.00 which is well below 51% of the LICO measure.

Both Aviva and Wawanesa agree that the way to determine financial dependency is to look at whether or not R.T. received 51% or more of his financial resources from his parents to cover his needs. Another way of looking at it is whether R.T. would be able to cover through his own financial resources 51% or more of his needs. Aviva submits that the evidence supports that whether you look at the one year time period or the January 1, 2017 to February 27, 2017 time period that R.T. did not have the funds to cover 51% or more of his needs.

Will respect to the criteria as to whether the alleged dependent has an ability to be self-supporting Aviva acknowledges that R.T. has clearly indicated an ability to be employed and to earn. However, they submit that one cannot look at bare capacity to evaluate dependency. One must look at the fact that R.T. was a student. Aviva submits that the case law indicates that while students may have a significant ability to earn income that that ability to earn could only be used by sacrificing their educational pursuits. Aviva relies on the decision of Arbitrator Samis (as upheld by the Court of Appeal) in *Federation Insurance Company of Canada* & *Liberty Mutual Insurance Company* (decision of Arbitrator Samis, May 7, 1999) Ont. Div. Court, September 15, 1999 and Court of Appeal [2000] O.J. 1234. In that case Arbitration Samis held that where someone is reasonably exercising his or her capacity, providing for his or her needs to the extent permitted by the circumstances then it is reasonable to regard the earnings as the

amount that that person can contribute to his or her own expenses of living. In other words, R.T. having chosen to not be employed in order to give full effort to his schooling then one cannot then attribute an earning capacity to R.T. in those circumstances.

Finally, Aviva submits that in looking at dependency I must look at dependency on his parents (father and mother) and take into consideration the family earnings.

Wawanesa submits that there is insufficient evidence (Aviva having the burden of proof) to establish who R.T. may have been dependent upon, if anyone. Wawanesa submits that R.T.'s brother had worked and that he might be the main breadwinner for the family. He notes that R.T.'s brother was not insured with Wawanesa. Wawanesa submits that it's insured (the father) was unemployed at the time of the accident and with no financial resources.

With respect to the mother Wawanesa notes the evidence under oath given by R.T. that his mother worked at Fortino's but points out that in some of the accident benefit file with respect to R.T.'s brother there is reference to R.T.'s mother being a stay at home mother. While I agree that there were some inconsistencies in anecdotal medical reports that were attached relating to R.T.'s brother I am satisfied that the evidence overwhelmingly supported that R.T.'s mother was employed as a grocery clerk at Fortino's and that she was the main breadwinner as between R.T.'s father and mother. Wawanesa relies upon the earnings of R.T. in the time period leading up to January 1, 2017 to support that he had sufficient resources to cover his needs such that there was not enough evidence to establish that he received 51% or more of his financial resources from his parents.

Wawanesa also makes submissions with respect to the LICO approach. However, Wawanesa relies on the LICO statistics for a family of four in 2017. The LICO cut-off in that case was $47,084.00 which amounted to $11,771.00 per individual in the house. Wawanesa submits that that means R.T. would need to be able to provide 51% of $11,771.00 to be self-supporting. That amount comes to $6,003.21 and R.T.'s reassessed tax return for 2016 was $9,018.00 and therefore he did have those funds.

Finally Wawanesa submits that even if R.T. fell below the LICO cut-off that there is still insufficient evidence to support the proposition that his parents made more than a 51% financial contribution. Wawanesa notes that the father was unemployed and presumably had no financial resources. Assuming R.T.'s mother was employed at a grocery store, there was no evidence as to her earnings. Wawanesa submits that the evidence is just as consistent with R.T.'s older brother being the main breadwinner in the family. Therefore Aviva has not met it's burden of proof.

In reply with respect to the issue of R.T.'s brother Aviva's position is that the evidence is clear that R.T. was not dependent on his brother. Aviva notes that the LICO data suggests that the before tax low income cut-off in 2016 for a single family unit in a community of 500,000 was $24,949.00. R.T.'s brother's employment prior to receiving E.I. in 2016 was $17,728.05. Aviva

submits that R.T.'s brother barely made sufficient income to sustain his own 50% living requirements and therefore it would be unreasonable to conclude that he could have been the main breadwinner. Aviva notes that the evidence supports that the mother had been employed full-time at Fortino's since 2016.

Findings and Analysis:

A. Duration of Dependency:

I agree with Aviva that in the circumstances of this case the appropriate time period to look at the duration of dependency is January 1, 2017 to February 27, 2017. The evidence is clear that R.T. at the end of 2016 decided that he would not continue to work part-time and attend school. He wanted to focus on school. He had already quit a full-time job that he had in the summer of 2016 in order to return to school and had elected to only work part-time. He had school Monday to Friday both morning and afternoon according to the employment insurance file. His decision that he could not work part-time and as well maintain his schooling seems to be well thought out.

I find that the one year time frame does not accurately reflect the true state of affairs with respect to R.T. at the date of the accident. By December 31, 2016 he transitioned out of both full-time and part-time employment to become a full-time student.

As noted by the Court in *Oxford Mutual Insurance Company* v. *Co-operator General Insurance Company* (supra) the timeframe is dependent on the facts and the timeframe can encompass days, weeks or even years.

Arbitrator Robinson in the decision of *Saskatchewan Government Insurance* v. *Lombard Canada Inc.* (January 23, 2004) held that while transient changes over a short period of time may not reflect a general change in the nature of the relationship that shorter time frames may be appropriate if they yield a more accurate reflection of the person's circumstances at the time of the accident.

Arbitrator Bialkowski in his decision *Motor Vehicle Accident Claims Fund* & *Gore Mutual and Aviva* (decision March 3, 2017) noted that Arbitrators have considered periods as short as several weeks or as long as several years when considering the appropriate time frame to determine financial dependency (see page 9).

Arbitrator Samis in *I.C.B.C.* v. *Federated* (decision July 3, 2009) held that the four weeks prior to the accident was the appropriate time frame to determine the claimant's status.

Finally I reviewed with interest the decision of Arbitrator Bialkowski in *Economical Insurance Group* & *State Farm Automobile Insurance Company* (decision January 13, 2014). The facts of that case were the reverse facts of this case. The time frames being proposed were either one

year or a 2.8 month period. The one year time frame covered the time when the claimant was a student but earning some part-time income. The second time frame the claimant was living at home but working full-time. Arbitrator Bialkowski concluded on that evidence that the claimant had left the student stage of his life at the time of the accident behind him and had entered the full-time employment stage of his life. Therefore the 2.8 month period was appropriate. In this case I make similar findings that R.T. had transitioned from a student and part-time employee to a full-time student and therefore the time frame of January 1, 2017 to February 27, 2017 is the period that I choose to examine R.T.'s dependency.

B. Dependency:

As might be expected having chosen the time frame when R.T. was not employed I find that he was principally dependent for financial support on his parents. R.T. was not employed during this time period. He lived at home. His parents were covering his expenses. He was not making any contribution towards the family and if there was any contribution it would have been minimal. I agree with Aviva that there is insufficient evidence to support that there may have been some form of dependency on R.T.'s brother.

With no employment and no income R.T. was not able to provide for 51% of his own needs. The evidence points to his mother providing at least 51% of the financial resources to cover R.T.'s needs. While Wawanesa is correct that R.T. had the ability to earn income, I agree with Arbitrator Samis as stated in *Federation Insurance Company* & *Liberty Mutual Insurance Company* (supra) that students are a special problem. While students may have a significant ability to earn income, they could only do that by sacrificing their educational pursuits. I find that R.T. having chosen to give up employment in order to fully pursue his educational pursuits cannot be found to have any earning capacity in those circumstances.

Similarly in the decision of Justice Meyers in *Allstate Insurance Company of Canada* v. *ING Insurance Company of Canada* (2015) OJ #3282 Justice Meyers held, and I quote:

> "Being a student in my view is an important factor. Many of the decisions referred to by counsel involved adult children living with their parents while working or looking for employment. As a student particularly with athletic commitments, Janko was unable to contribute financially to his own education."

Janko was a member of a family unit. He maintained a residence with his parents while attending university away from home. Janko was not and could not become self-supporting prior to graduation. He relied on his parents. Janko in my view was in the same situation as R.T.

I therefore find that R.T. was principally dependent for financial support on his parents and therefore Wawanesa is the priority insurer pursuant to Section 268 of the *Insurance Act*.

Result:

As I have found that R.T. was principally dependent for financial support on his parents it follows that Wawanesa 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 in paragraph 3 that the unsuccessful party shall pay the Arbitrator's account subject to the discretion of the Arbitrator. Paragraph 2 provides that the parties agree that the unsuccessful party shall pay costs to the successful party subject to the discretion of the Arbitrator and in an amount to be determined by the Arbitrator.

As Aviva has been wholly successful in this matter I am ordering that the costs of the Arbitration and the Arbitrator's account be paid by Wawanesa.

I leave it up to counsel to discuss the appropriate quantum of costs and if they are unable to agree I can be contacted to schedule a costs hearing.

I would like to thank both counsel for their efforts in this matter.

DATED THIS 24th day of July, 2019 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP