IN THE MATTER OF THE *INSURANCE ACT,*
R.S.O. 1990, C. I.8, SECTION 268 AND
REGULATION 283/95 MADE UNDER
THE *INSURANCE ACT*

AND IN THE MATTER OF THE ARBITRATION ACT
S.O. 1991, c. 17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

UNICA INSURANCE INC.

Respondent

AWARD

Counsel Appearing:

Jessica L. Rogers: Counsel for Aviva Insurance Company of Canada (hereinafter called Aviva)

Mark H. Fonseca: Counsel for Unica Insurance Inc. (hereinafter called Unica)

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 arbitrate an issue between the above noted insurers with respect to a priority dispute that arose due to a motor vehicle accident that took place on July 21, 2016.

On that day, OA was riding an e-bike on his way back from work when he was struck by a motor vehicle. Aviva insures OA's father: EA. OA was not licenced to drive, not a named insured on

any automobile policy on the date of loss and accordingly he applied to Aviva for Statutory Accident Benefits.

Unica insures the vehicle that struck OA.

Both Aviva and Unica agree that on the date of loss OA was not principally dependant for financial support on his parents. However, Aviva takes the position that OA was also not principally dependant for care on his parents on the date of loss and accordingly Unica is the priority insurer pursuant to Section 268 of the *Insurance Act*. This dispute arises because Unica takes the position that OA was principally dependent for care on his parents on the date of loss.

This case has been a difficult one to decide. There is no doubt that OA was dependent to some degree on his parents for care but the key issue is whether he was "principally" dependant for care on the date of loss.

The hearing proceeded by way of written evidence and oral submissions that took place on May 12, 2020. No witnesses were called.

The following documents were put into evidence:

Exhibit 1: Arbitration Agreement dated April 21, 2020

Exhibit 2: Agreed Statement of Facts dated April 17, 2020

Exhibit 3: Joint Document Brief (Tabs 1 – 12)

Exhibit 4: Unica Insurance Document Brief (Tabs 1 – 4)

Generally speaking the two Document Briefs included two sets of transcripts from an Examination Under Oath of OA that had taken place on August 30, 2017 and November 14, 2018. It also contained his OCF-1, OCF-2 (Employment Certificate), the ODSP file, some student records, tax returns, a vocational assessment (post-accident) and a letter from OA's employer on the date of the accident.

Issue in Dispute:

The issue for my determination, as set out in the Arbitration Agreement, is "was OA a dependent on EA and/or his spouse on the date of loss". However, the issue of dependency revolved around the question of care only.

Result:

At the time of the accident of July 21, 2016, OA was not principally dependent for care on his father and/or mother.

Background and Summary of Relevant Facts:

OA was born on May 6, 1992 and was 24 years old at the time the accident occurred.

OA has lived his entire life with his parents and siblings in a home in Mississauga.

At an early age OA was diagnosed with a mild intellectual disability. The evidence suggests that this disability resulted in OA having difficulty taking exams, had some trouble with reading, difficulty with time and difficulty with math.

OA did not have any physical disability. According to the ODSP file, his disability was described as psychological.

OA attended high school but was directed into vocational programs. Unica submitted a great deal of documentation with respect to the vocational program that OA attended at Gordon Graydon. According to the Peel District School Board website, this program is designed for students who have ongoing and significant difficulty with academic success for many years in elementary school and require modification and accommodation to ensure success at the secondary level. The website also indicates that these students have been identified as having communication, intellectual, physical or behavioural problems. Most students in the vocational program take a pathway directed to the workplace from secondary school. OA successfully completed this program.

OA attended an adult school in an effort to obtain college level English and mathematics. In the fall of 2010 he enrolled in George Brown College and obtained a vocational program certificate which consisted primarily of English and math courses. He did not pursue any further education or training. This vocational program was completed in April of 2011.

After completing the college vocational program at George Brown, OA worked in several restaurants. According to a vocational assessment completed after the accident by OA's case manager/vocational counsellor, OA's first full-time employment was January of 2013. He worked as a server/cook with Ali Baba in Toronto. He was responsible for opening and closing the restaurant, serving customers, handling the cash register, cleaning the restaurant and food equipment. OA claims that he left this position to secure alternate employment with improved management.

From May 2013 to May 2014 OA worked at Shawarma Alnbulse as a manager. His hours were 7:30 a.m. to 5:00 p.m. or 6:00 p.m. He was responsible for opening the restaurant, preparing

and setting up, ordering groceries, managing inventory, stocking, serving customers and handling the cash. This restaurant closed at the end of one year. However, his tax returns for 2013 show no earnings other than ODSP. OA's actual employment history is somewhat unclear until 2015.

OA worked at the Dunk'n Dip as an assistant chef/prep manager/line cook. He worked 9 to 10 sometimes 12pm. The vocational report suggests he was employed there for two years. We do not have his 2014 tax returns but according to his 2015 tax returns he earned $21,437.00 from Dunk'n Dip.

Although the evidence in this is somewhat inconsistent, just prior to this motor vehicle accident OA ceased his employment with Dunk'n Dip and secured employment with Two Bros Cuisine. This was a restaurant owned by his brother-in-law. The evidence suggests that OA chose this employment as there would be a better opportunity. Although I take this with a grain of salt, the letter from his brother-in-law, after the accident, suggests that OA was going to be promoted to a managerial role after a three month probationary period. He was to work 5 days a week, 8 hours a day earning $14 per hour.

Relevant to the inquiry of care is how OA secured the various jobs I have outlined above. According to his Examination Under Oath, prior to January of 2013, he had worked at Pizza Pizza. He saw a sign that said "Now Hiring" and he applied with a resume and got the job. At the Ali Baba restaurant where he worked in 2013, OA claims that it was a walk-in. He spoke to the owner, said he was looking for a job, handed over his resume and a couple of weeks later secured the job.

There is no evidence that there were ever any complaints from any of OA's employers. There is no evidence that he was ever fired from these jobs. There was no evidence before me that he was unable to perform his duties or that there was ever concern by his employers with respect to the performance of these duties.

OA's tax returns for the year of the accident reflect T4 earnings of $10,139.00.

OA did not have a driver's license at the time of the accident; however, he drove an e-bike. OA claims that before the accident he drove his e-bike everywhere. He drove it to and from work. His father had assisted him with the purchase.

OA was also independent in transportation outside of the e-bike. Before he secured the e-bike he took the bus. He would take the bus to and from Mississauga to his employment in downtown Toronto. However, his parents would frequently drive him to the bus and there was also evidence that his parents would regularly drive him to go shopping.

OA's evidence was that he was able to understand the road signs in order to travel on his e-bike.

At the time of the accident, OA was living with his parents and some siblings in their home in Mississauga. His evidence was that he could be left alone in the home but he was instructed not to use the oven. He was rarely left alone overnight although the evidence suggests that he would be capable of being left home overnight. I surmise that it is the circumstances of his family living that resulted in him not being left home alone rather than a concern that OA would not be able to cope.

OA shared a joint bank account with his father and consulted his father on all large purchases. Smaller purchase such as less than $300.00 OA transacted on his own by way of e-transfer. He felt more comfortable consulting his parents on issues with money as he was very bad with money and did not feel he knew how to manage his money properly.

With respect to his driver's license OA says he was unable to get a license due to his disability. He would get very nervous when it came to exams and he would find it hard to do tests and he failed the written portion of the license test.

OA would pick out his own clothing, dress himself and handle all his self-care.

OA had been taught to do and could do the laundry but most of the time his mother would help him do it.

OA felt he would be able to cook for himself but generally his mother did the cooking.

OA had friends with whom he would go out often two to three times a week to play basketball, watch a basketball game, go for lunch and go to a movie.

OA's evidence is that on one occasion he organized with his friends a trip to Vancouver. This was in the year of the accident. He travelled with three or four friends. He stayed in Vancouver for a week and two days. According to the Examination Under Oath, OA made arrangements for accommodation with his friends and booked it together. OA did not have his own credit card but used a debit. He did seek approval from his parents about the trip.

OA was never supervised on his trips to and from work nor is there any evidence that he had extra supervision while at work.

OA relied on his parents for advice about money. He may have purchased groceries occasionally but mostly he would attend grocery shopping with his mother. He relied on his parents to assist him with managing money and paying taxes. His mother also attended all medical appointments with him. When asked whether he could live alone, OA said before the accident he does not think he could live alone because he was bad with money and didn't know how to manage his money properly.

His response is set out below:

> "I do need them in the day to day activities and things that I do because they are always there to support me. And things as in working or as in doing things in general in life, so I need my parents. But if one day my parents are not there, I have to do it on my own, but at this moment I always need my parents."

There was no power of attorney appointed to handle OA's finances prior to the accident.

The ODSP file indicates that OA qualified without further review based on a psychological disability. He was receiving ODSP in 2013 but he attended the office of ODSP with his father to advise them that he wanted to be independent. He had a job at Dunk'n Dip and he did not need to be on ODSP any further.

I also reviewed the Insurers Section 44 Vocational Evaluation that took place post-accident. This showed that OA's reading was below average, sentence comprehension below average, spelling was extremely below average and math was average. The vocational testing results suggested that when taken at face value, that OA demonstrated a functional literacy and numerous problems compared to his age cohort. He is likely capable of reading and comprehending intermediate tests such as instruction manuals or directions. He is likely capable of cash handling and inventory counting. However, he is in the bottom 10% of the working population and this score confers little occupational compatibility and suggests he is best suited to training on the job in applied settings. Despite scoring poorly on vocational testing, I note OA was able to hold down a number of jobs prior to this accident and jobs that would seem consistent with his vocational results.

Onus of Proof:

The parties have a different position with respect to the onus of proof in this matter.

Aviva submits that while they are the applicant and the paying insurer that case law supports the position that it is not in any better position to lead evidence on the dependency issue than Unica. Aviva submits that the onus of proof ought not to be any different than it would be if the Arbitration had been commenced by OA himself against both insurers. Aviva relies on the decision of Arbitrator Samis in the case of The Dominion of Canada General Insurance Company v Motor Vehicle Accident Claims Fund (Samis, November 10, 1997).

Unica submits that there is conflicting case law on this issue and to that end relies on an earlier decision of mine in Unica & Wawanesa, May 9, 2019. In that case I found that the moving party had the onus of proof to establish that another insurer is the priority insurer. I noted in that case:

> "I struggle with the concept that neither Unica nor Wawanesa has the burden of proof in this case. Somebody has to establish on a balance of probabilities that RO was or was not principally dependent for financial support on his step-mother or her spouse.
>
> Unica commenced this Application as against Wawanesa and in my view they have the onus of proof to establish that Wawanesa is the priority insurer. To do so Unica must prove that RO was not principally dependent for financial support on his step-mother or spouse. I am satisfied that Unica has met it's onus in that regard."

I continue to struggle with the concept that there is an imaginary applicant whom the burden of proof falls on while that individual is not a party to this Arbitration. I therefore rely on my earlier decision and conclude that Aviva has the onus of proof in this matter as it commenced the Application as against Unica. Aviva therefore must prove on a balance of probabilities that OA was not principally dependent for care on his parents.

I am satisfied that Aviva has met its burden of proof in that regard. Alternatively, if neither party has the onus of proof as suggested by Arbitrator Samis and the imaginary applicant has the onus of proof with respect to dependency then again I am satisfied that onus of proof has been established.

In other words, I am satisfied that on a balance of probabilities OA was not principally dependent for care on his parents.

Timeframe for Analysis:

There is no dispute between the two insurers with respect to the timeframe that I am to apply to this analysis. Both Unica and Aviva agree that the year prior to the accident fairly reflects the status of the relationship between OA and his parents at the time of the accident.

Accordingly, I am focusing on the one year prior to the motor vehicle accident to determine the issue of dependency.

Position of the Parties:

Aviva's position is that although OA did have a mild intellectual disability and may as a result of that required support and guidance in some aspects of his life from his parents that overall he was able to take care of his basic needs, access the community and work full-time. Aviva submits that this does not result in a principal dependency for care.

Aviva acknowledges that OA relied on support from his parents. However, Aviva submits that while that support may have made his life easier, it was not at the level to make him principally dependent for care.

Aviva submits that the following facts support their position:

1. OA was capable of self-care;
2. OA could prepare his own meals;
3. OA could perform some household chores;
4. OA worked full-time in an unsupported environment and had done so on a consistent basis for at least two years prior to the motor vehicle accident;
5. OA drove an e-bike and was able to drive on the road and follow the rules of the road;
6. OA was able to take public transit and navigate the public transit system independently;
7. OA was social with friends, seeing them approximately three times a week for lunch, play sports or watch a movie;
8. OA had a friend who lived alone in downtown Toronto with whom he would stay once or more a month;
9. OA was capable of travelling alone with friends and planning a vacation to Vancouver; and,
10. OA did not have anyone with a power of attorney over his finances and had full access to a joint bank account with his father and able to make purchase as he saw fit. Generally seeking guidance from his parents for purchases over $300.00.

Aviva does not dispute that OA's parents provided him with social and emotional support, supervision and care and created a sense of security or a security net for him. However, Aviva submits that there is a distinction between requiring some assistance in the way of care and being principally dependent for such care. Finally, Aviva submits that one must distinguish between care that is provided for love and affection from parents as opposed to need. Aviva submits that while OA's parents structured his life in a way that allows him to function well and provides him with a sense of security that that level of care was not required and was not needed and does not constitute principal dependency for care.

Unica submits that OA would not be able to function alone and independently. Unica submits that OA is only able to do what appears to be independent actions because of the level of care provided by his parents. Unica submits that one cannot assume that OA would be capable of living on his own or capable of maintaining the degree of independence demonstrated unless he had the level of support provided by his parents. Unica submits that the evidence suggests that OA would not be able to live independently without significant support and points to the following facts as being indicia of principal dependency for care:

1. OA is not able to secure a driver's license and failed his test twice;
2. The vocational assessment prepared by the insurer post-accident found that OA's vocational options were extremely limited and he was functioning in the lower 10% of the population;
3. OA has trouble with finances and relies upon his parents to provide him with financial advice, assisting with larger purchase, managing his money and filing his tax returns. While he has a joint bank account, he only accesses it for smaller purchases;

4. OA has an intellectual disability which results in significant difficulty with reading and writing and he relies on his parents to assist with this;
5. OA does not understand the concept of time. While he may set an alarm for himself in the morning to get up for work he relies on his mother to check on him;
6. OA's mother attends all his medical appointments with him;
7. OA's mother cooks almost all of his meals, does most of his laundry, drives him where he needs to go;
8. OA's evidence was that he looks to both of his parents for advice and for supervision all of the time and that they provide him with emotional and social support on a daily basis giving him a sense of security. OA needs his parents rather than simply likes to have their assistance noting that if he were to live on his own, he would need help from a program or something to help him learn about how to live on his own.

Relevant Statutory Authority and Analysis of the Law:

Section 268 of the *Insurance Act* sets out the priority Rules to be applied to determine which insurer is liable to pay Statutory Accident Benefits when there are a number of motor vehicle liability policies that may be available to the insured person.

At the time of this accident, OA was on an e-bike and accordingly not an occupant of a motor vehicle. In accordance with 268 of the *Insurance Act* his recourse is either against the insurer of the automobile that struck him or the insurer of an automobile in respect of which he is an insured.

The Statutory Accident Benefit Schedule – September 1, 2010 defines an insured person as follows:

> 3. (1) "the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse."

As OA is not a named insured, a person specified as a driver of the insured automobile or a spouse of a named insured then his only recourse other than to the striking vehicle is as a dependent of the named insured.

Section 3. (7)(b) of the Statutory Accident Benefit Schedule – September 1, 2010 provides that a person is dependent on another individual if the person is "principally dependent for financial support or care on the individual or the individual's spouse."

The parties have conceded that OA was not principally dependent for financial support on his parents leaving the issue of care. Care is not a defined term under the Statutory Accident Benefit Schedule.

Both Unica and Aviva agreed that the starting place in this analysis is with the Court of Appeal's decision in *Miller v Safeco Insurance Company of America* (1984) 9 C. C.L. I. 1 48 O. R.(2d) 451.

Generally *Miller v Safeco* is cited as the key case with respect to financial dependency but it is also applicable to cases of care and has been applied by other Arbitrators considering this issue.

The Court of Appeal laid down 4 factors to be considered when deciding dependency:

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

The Court of Appeal in the decision *Oxford Mutual Insurance Company v Co-Operators General Insurance Company* [2006] O. J. 4518 when considering a priority dispute with respect to a dependency for care argument concluded that the principles in *Miller v Safeco* were applicable.

Therefore, when considering this case I have looked at the following:

1. The amount of and duration of care dependency;
2. The care needs of the claimant; and,
3. The ability of the claimant to be self-supporting for care.

I agree with Arbitrator Densem and Arbitrator Jones who pointed out that contrary to looking at a question of financial dependency that care dependency cannot be determined by doing mathematical calculations. Rather, one must be do both a quantitative and qualitative analysis. Arbitrators have concluded that the following factors are relevant in that analysis:

- Social Support
- Emotional support
- Companionship
- Protection and services such as feeding, clothing, cleaning and transporting
- Ability to be self-supporting for care

See *Economical Mutual Insurance Company v Aviva* (Scott Densem, January 7, 2013) and *North Waterloo v Unifund* (Guy Jones, October 11, 2018)

As with financial dependency an analysis of dependency for care revolves around the facts of each case. Each case is to be approached based on its own particular facts keeping the legislative intent in mind (*Miller v Safeco* supra).

Counsel referred me to a number of cases where it was appropriate to analyze whether or not the caregiver played a critical role in providing sufficient care for that individual to live

independently and to perform fundamental tasks that the individual was unable to do. (See *Liberty Mutual v Kaur* (2000, 1447239: Arbitrator Shari Novick) and *Aviva Canada Inc. v State Farm Mutual Automobile Insurance Company* (Scott Densem, April 24, 2012).

One other fact to consider is whether or not the care being provided is because of love and affection or because of the existence of the familial relationship alone. It is clear that there must be a need on the part of the claimant to have the care being provided. It is not enough that the care is simply because of love and affection (see *Aviva Canada Inc. v State Farm Mutual Automobile Insurance Company* Densom supra and *Echelon General Insurance Company v State Farm Mutual Automobile Insurance Company* Shari Novick, July 2011).

The last piece of the puzzle is with respect to the meaning of "principal". Again this is not a defined term under the Statutory Accident Benefit Schedule. There does not appear to be any dispute in looking at the definition of "principally" dependent that these words mean "chiefly" "mainly" or "for the most part". (See *Kaur v Liberty Mutual Insurance Company* supra).

Therefore, in my view in assessing dependency for care in order to find an individual to be dependent, it must be established that that individual chiefly or for the most part derives support for care from another source and that he/she must be more dependent on that person than on any other source including themselves.

It is the issue of principal <u>dependency</u> that drives this case and the dispute between the parties.

As I have indicated it is abundantly clear from the evidence that OA received some level of care from his parents. They provided him with guidance, assisted with financial issues, helped with his taxes and were a source of advice to him. I agree that OA's parents provided him with a safety net.

However, while there is no doubt that OA has some dependency on his parents for care due to his learning disability, I cannot ignore the fact that he has was capable of finding and maintaining employment, socializing independently, conducting financial transactions, handling his self-care, arranging holidays, staying overnight with a friend, conducting e-transfers and transporting himself to and from work and elsewhere by way of e-bike or the transit system independently.

Therefore, while OA relied on his parents for guidance more than most 24 year old individuals and while they clearly provide some level of care and direction to him on a daily basis I cannot reach the conclusion that OA was "principally" dependent for care on his parents.

OA's ability to be completely self-supporting and live independently for care has never been tested. I do not find OA's assessment of his ability as to whether he can live independently to be overly helpful. However, OA recognizes that at some point he is going to have to live on his own and thinks he will be able to if he gets some training and some assistance. I also note that

the ability to be self-supporting for care is only one aspect that I have to consider in determining dependency. OA can clearly learn and adhere to a routine as indicated by his successful employment in the years prior to the accident.

I reviewed carefully the many cases that counsel have provided to me on the issue of care. This case was somewhat different as there was no issue that OA needed any physical care. His care was more in the area of emotional support and guidance. Having carefully reviewed all those cases particularly those referred to by Unica I am satisfied that the fact of this case are different. OA has a level of independence with respect to care that was not reflected in the facts of the cases relied upon by Unica where dependency for care was found. Particularly, this was a case in which there was no evidence that OA had ever made any poor decisions, exercised poor judgement or needed to be "protected" from his own actions by a significant level of supervision. The key factor for me was OA's ability to search out, secure and maintain employment, to choose to go off of ODSP, to conduct all his self-care, travel, socialize and transport himself on his e-bike. I therefore conclude that OA was not principally dependent for care on his parents and accordingly Unica Insurance Inc. is the priority insurer in accordance with Section 268 of the *Insurance Act*.

Award:

OA was not a dependent of his father or his mother. Unica is the priority Insurer for payment of Accident Benefits for OA arising out of the motor vehicle accident of July 21, 2016.

Costs:

The Arbitration Agreement provides that I have discretion with respect to costs including the power to require one party to pay more than one half or all of the Arbitrator's fees and disbursements plus HST.

As Aviva was entirely successful in this Arbitration, I order that Unica pay the legal costs of Aviva with respect to the Arbitration and that Unica is also responsible for paying the Arbitrator's fees including any disbursements plus HST.

If counsel are unable to reach an agreement with respect to the legal costs I can be contacted to schedule a further pre-hearing.

DATED THIS 18th day of August, 2020 at Toronto.

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Arbitrator Philippa G. Samworth
DUTTON BROCK LLP