

**IN THE MATTER OF AN ARBITRATION UNDER THE *ARBITRATION ACT*, 1991
and pursuant to the provisions of Section 268 of the *INSURANCE ACT*,
and ONTARIO REGULATION 283/95 THEREUNDER**

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

UNIFUND ASSURANCE COMPANY

Applicant

- and -

DESJARDINS INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Derek Greenside – Kostyniuk & Greenside
Counsel for the Applicant, Unifund Assurance Company
(hereinafter referred to as “Unifund”)

Robert Garay - Desjardins
Counsel for the Respondent, Desjardins Insurance Company
(hereinafter referred to as “Desjardins”)

ISSUE - FINANCIAL DEPENDENCY AND APPROPRIATE TIME FRAME FOR ANALYSIS

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. 1.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, France Louvier Viray, with respect to personal injuries sustained in a motor vehicle accident which occurred on September 28, 2018.

[2] The priority determination is dependent on findings with respect to financial dependency and in particular, the appropriate time frame for analysis.

PROCEEDINGS

[3] The matter proceeded on the basis of document briefs which included Examination Under Oath transcripts, Books of Authority and written submissions.

FACTS

[4] The claimant (France Louiver Viray) was a 21-year-old pedestrian when struck by a Desjardins insured vehicle on September 28, 2018.

[5] Policy documentation confirms that Mary Lou Barcena (claimant's mother) was the named insured under a Unifund Assurance policy at the time of the accident on September 28, 2018. The claimant was not a named insured or listed driver under the policy.

[6] According to evidence adduced on his Examination Under Oath, the claimant completed his education in the Philippines in November 2017 and worked at FedEx on a part-time basis in the Philippines between November 2017 and March 2018. The claimant was earning about 900 pesos each week at FedEx and used those earnings to help support his family (which consisted of his aunt, grandmother, two brothers and himself) in the Philippines. The claimant's mother (Mary Lou Barcena) came to Canada in 2016 and was sending a portion of her employment earnings (approximately 10,000 to 20,000 pesos) to her family (sister, mother, three sons) in the Philippines.

[7] The claimant did not work between March 2018 and August 2018.

[8] The claimant came to Canada with his two younger brothers on July 29, 2018. He was 21 years of age. The claimant did not have any money when he came to Canada and his travel was paid for by his mother. He and his brothers began living with their mother in Canada and the situation remained that way until the day of the accident. His two younger brother enrolled in high school and the claimant began looking for work. The claimant was able to secure employment about two weeks after arriving in Canada.

[9] According to a Record of Employment, the claimant secured employment in Canada working at BEX Engineering in Mississauga as a machine operator, between August 13, 2018 and the accident giving rise to his accident benefits claim on September 28, 2018. The claimant's gross earnings from BEX Engineering were \$4,076.80. Available Scotiabank records would indicate that his net earnings were \$2,775.48. Documents suggest that his net weekly earnings were \$462.58.

[10] The Examination Under Oath evidence indicates that the claimant gave the money he earned to his mother to help support his family (which consisted of his mother, two brothers and himself). The claimant's two brothers did not work. All of the expenses incurred by the

claimant, his mother and his two brothers were paid for through the earnings of the claimant and his mother.

[11] The claimant's mother has confirmed by provision of a written document that she incurred the following expenses on behalf of her family (Mary Lou Barcena and her three sons) between July 29, 2018 and the motor vehicle accident on September 28, 2018:

• Groceries	\$1,387.00 - \$1,516.00 month
• Natural Gas	\$ 82.00 - \$ 95.00 month
• Electricity	\$ 87.00 - \$ 90.00 month
• Water	\$ 87.00 - \$ month
• Cable/Internet/Home Phone	\$ 89.00 - \$ month
• Total	\$1,732.00 - \$1,877.00 month

Amount Attributable to each Member of Family \$ 435.00 - \$ 469.25 month

Amount(s) Specifically Attributable to Claimant:

• Cell Phone	\$ 74.45 month
• Clothing	\$ 27.00 - \$ 100.00 month

Total Amount(s) Attributable to Claimant \$ 534.45 - \$ 643.70 month

ANALYSIS AND FINDINGS

[12] A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the *Insurance Act*, R.S.O. 1990, c.1.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

[13] As the claimant France Louiver Viray was a pedestrian at the time of this motor vehicle accident, the priority rules with respect to "non-occupants" are applicable. They are set out in Section 268(2) of the *Insurance Act*, which is set out as follows:

In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured;

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant;

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose;

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

[emphasis mine]

[14] The bolded sections above would make the insurer of the striking vehicle responsible for the payment of statutory accident benefits, provided the claimant was not an insured under some other policy. The Applicant Unifund takes the position that the claimant was not dependent on his mother, insured by Unifund, and therefore has recourse against the insurer of the vehicle which struck him, namely Desjardins.

[15] Subsection 268(5) of the *Insurance Act*, R.S.O. 1990, c.1.8 provides that:

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

[emphasis mine]

[16] Section 3 (7) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10, as amended, reads as follows:

“a person is dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual’s spouse”.

[17] On the basis of the aforesaid legislative provisions Desjardins would be the priority insurer if found that the claimant was not principally financially dependent on his mother at the time of the accident.

[18] The Applicant Unifund claims that the claimant was clearly not principally dependent on his mother for financial support at the time of the accident.

[19] In terms of traditional legal principles, criteria for determining dependency for the purposes of the SABS were established by the Court of Appeal in *Miller v. Safeco* (1986), 48 O.R. (2d) 451 (H.C.J.) aff’d 50 O.R. (2d) 797 (C.A.). Consideration should be given to criteria as follows in determining dependency for the purposes of the *Schedule*:

- i. The amount of dependency;
- ii. The duration of the dependency;
- iii. The financial needs of the claimant;

iv. The ability of the claimant to be self-supporting.

[20] In *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* (Arbitrator Lee Samis, May 7, 1999), it was determined that a person's capacity to earn must be taken into account in measuring dependency. A person can only be principally dependent for financial support if the cost of meeting their needs is more than twice their resources. This has come to be known as the 51% rule.

[21] Early jurisprudence applied this 51% rule using a detailed analysis of the claimant's income sources in comparison to the value of that provided by the person or persons upon whom the claimant was said to be dependent. This has been referred to as the "mathematical approach". The exercise of determining the value of that provided in many cases proved to be a difficult and expensive task. In the last few years, a new approach to the analysis of dependency has emerged known as the "LICO approach". In *Allstate Insurance v. ING*, (Award of Arbitrator Vance H. Cooper, dated May 1, 2014), the arbitrator preferred to resort to an alternative approach to determine dependency, namely, to use Low Income Cut-Off measure as a qualifying number in relation to which the 51% rule is to be applied (as opposed to using actual expenses of the claimant). The LICO approach focuses on statistical average needs of an individual in the geographical area where the claimant lived, rather than an analysis of the claimant's specific individual needs.

[22] After hearing all evidence, including evidence at cross-examinations and re-examinations of the three accountants involved in that case, Arbitrator Cooper noted that all of the accountants who gave evidence and offered expert opinions acknowledged the inherent difficulty and weaknesses when trying to gather reliable information, documentation and evidence regarding a family's expenditures and individual expenditures in relation to needs.

[23] Arbitrator Cooper referred to decisions of Arbitrator Samis in *Coseco v. ING Insurance of Canada* (Award July 21, 2010) and *St. Paul Travelers v. York Fire & Casualty Insurance Company* (Award, dated August 11, 2011). In these decisions, Arbitrator Samis explained the intrinsic difficulties of trying to ascertain the needs of the claimant by attributing to the claimant a share of household expenditures. The allocated portion of the household expenditures may be greater than the claimant's needs or lesser than the claimant's actual needs. Arbitrator Samis compared this exercise to looking at the general standard of living in household – the exercise we were directed not to follow by *Miller and Safeco* appeal. Instead, Arbitrator Samis suggested we should follow a "*more objective valuation of the costs of meeting someone's needs*". The history of family setting may assist in calculating the costs of meeting a person's needs, but is not determinative.

[24] To that end, Arbitrator Samis used Canada LICO threshold statistic numbers as determined by Statistics Canada which he characterized as the "*best and most reliable approach to the evidence respecting one's needs*". The LICO approach was used by Arbitrator Cooper and formed the basis for his decision.

[25] Arbitrator Cooper's decision in *Allstate Insurance v. ING* was appealed to Superior Court on the ground that Arbitrator Cooper did not use the correct methodology. On appeal as reported at 2015 ONSC4020, Justice Myers found that mathematical calculation or application of 51% rule in relation to needs/means is an important factor, but it is not the only factor. Justice Myers dismissed the appeal after concluding that dividing or allocating estimated gross household spending to determine one's needs is not a "*particularly meaningful proxy*" and "*is no better than looking at government statistic to determine the cost of housing in a locale*".

[26] More recently and in a move toward a more statistical analysis of dependency, jurisprudence has emerged wherein information from Statistics Canada's Market Basket Measure has been employed. That data provides "the cost of meeting basic modest needs for different family sizes, for different parts of the country, segmented by size of community". In *The Wawanesa Mutual Insurance Company v. State Farm Insurance Companies* (Arbitrator Samis - September 13, 2018), the arbitrator preferred use of the statistical data of the "Market Basket Measure" or "MBM" approach to the other approaches aforesaid. Arbitrator Samis writes at p. 10 of his decision:

"In order to compare resources to the cost of meeting needs I prefer to look at statistical information from Statistics Canada as I find the statistical approach is likely to be more reliable than the evidence of the witnesses here. I also think that the components of the Market Basket Measure are more focused on the costs of meeting needs than the alternative of simply compiling an inventory of any and every expenditure.

Statistics Canada publishes the "Market Basket Measure" data which gives us the cost of meeting basic modest needs for different family sizes, for different parts of the country, segmented by size of community. Additionally, the measure is adjustable to all sizes of families.

According to information from Statistics Canada, the "basket" of goods and services measures a "specified basket of goods and services representing a modest, basic standard of living. Taken into consideration are the costs of specified quantities and qualities of food, clothing, footwear, transportation...". This is compiled by work done by Human Resources and Skills Development Canada during the 1990's.

According to Statistics Canada the Market Basket Measure is a measure more sensitive to geographical variations and other scales.

By reference to the Market Basket Measure we can credibly get a number that represents the denominator making the when making the 50% calculation that the regulation requires.

I find the "Market Basket Measure" an appropriate source for this purpose."

[27] The Applicant submits that the appropriate timeframe to apply, with respect to the financial dependency analysis, is the two month interval between the claimant's arrival in Canada to begin a new and permanent chapter in his life, and his involvement in the motor vehicle accident on September 28, 2018. During that interval, he had secured full-time employment and was earning \$560.00 gross weekly. Extrapolated, this would be \$29,120 annually. His net after tax income extrapolated annually would appear to be \$20,617. All of that income, combined with the claimant's mother's income, was used to support the claimant, his mother and his two brothers. The two month interval which preceded the accident is distinct from the claimant's life in the Philippines where he had completed his transition from student to worker and was gradually contributing more to his family's financial support and becoming less financially dependent on his mother.

[28] Should consideration be given to statistics, the following information has been published by Statistics Canada:

LICO (Low Income Cut Off)

One Person Living in CMA 500,000 inhabitants or more

2017	\$25,338.00
2018 (indexed)	\$25,920.77

MBM (Market Basket Measure) Four Person Economic Family in Toronto

2016	$\$40,595.00 \div 4 = \$10,148.75$
2018 (Indexed)	$\$42,193.14 \div 4 = \$10,548.28$

[29] The claimant's extrapolated gross income at BEX Engineering was about \$29,000.00 per annum, or a net after tax income of \$20,617. His income would, according to Unifund, exceed either of the statistical approaches which have been recognized as being appropriate where there is an absence of evidence documenting the claimant's expenses, or where such evidence is unreliable. According to Unifund, the claimant was clearly capable of providing more than 50% of his statistical needs and therefore not dependent on his mother.

[30] Alternatively, Unifund has submitted that should the two month interval between July 29, 2018 and September 28, 2018 be rejected as the appropriate timeframe to consider, the Applicant submits that the appropriate timeframe should be from November 2017 (when the claimant started working at FedEx in the Philippines), until the motor vehicle accident in September 2018. The claimant was earning about 900 pesos each week (translates to approximately 3,900 pesos per month) between November 2017 and March 2018 which, when combined with his mother's financial contributions of 10,000 to 20,000 pesos each month, supported the claimant, his aunt, his grandmother and his two brothers. The claimant's earnings/contributions were greater than (if mother's contribution was 10,000 pesos) or almost equal to (if mother's contribution was 20,000 pesos) the amount(s) his mother was contributing towards the claimant's financial support. If the claimant's mother

contributed 10,000 pesos towards the financial support of her sister, her mother and her three sons, the amount she was contributing toward the financial support of each person was 2,000 pesos. If the claimant's mother contributed 20,000 pesos towards the financial support of her sister, her mother and her three sons, the amount she was contributing toward the financial support of each person was 4,000 pesos. While the claimant had no income/made no contribution between March/April 2018 and July/August 2018 (four months), he was busy planning his permanent relocation (and that of his two brothers) to Canada and his obvious capacity to earn income (both in the Philippines and in Canada) to help support his family should be taken into consideration in the analysis. The claimant worked seven of the ten months between November 2017 and September 2018.

[31] Unifund therefore maintains that whether a two month or ten month period is considered, the claimant was able to provide for more than 51% of his needs, or had the capacity to provide more than 51% of his needs and therefore was not principally financially dependent on his mother at the time of the accident.

[32] In response, Desjardins has submitted that a much longer time frame must be used to evaluate dependency in any meaningful way. Desjardins has suggested a six month time frame back to late March 2018, during which the claimant's only employment was the 5½ weeks of work at BEX here in Canada, with insufficient net of tax income to support himself over that six month period.

[33] Desjardins has submitted that the case law calls for arbitrators to identify a time period for the purpose of evaluating dependency. It is often not useful, or even sometimes misleading, to look at circumstances in too narrow a timeframe (often referred to as a "snapshot"). To arrive at an appropriate determination of dependency status, arbitrators have to look at the status of a person's needs and resources over a time period. Then, within a selected timeframe, they can approach the issue of financial needs and resources in order to determine the person's dependency status. Utilization of a short timeframe creates a risk of error. Arbitrators cannot always be confident that a short experience is a full and fair reflection of a person's status. The legal test for selection of a timeframe is one that most fairly reflects the true status of the claimant on the date of the accident. I accept that submitted by Desjardins that there may be danger in selecting a short timeframe, but must also consider that there have been several cases where a short time frame has been selected as fairly reflecting the true status of the relationship on the date of the accident and reflective of the "new normal".

[34] Although the two month time frame of July 29, 2018 to the date of the accident represents a relatively short time for analysis, I must determine whether this represented the "new normal". There exists considerable jurisprudence where findings of a short time frame was found to be appropriate. In the August 4, 2016 Court of Appeal decision of *Intact v. Allstate* 2016 ONCA 609, the Court accepted that the seven week time period preceding the accident did not merely present a "snapshot" of the relationship between the relevant parties and was the appropriate time period to represent the true nature of the relationship where the

claimants were principally dependent. In that case, the claimant had moved from her home with her husband in Sudbury, to Sarnia with her two children and began living with another gentleman some seven weeks prior to suffering injuries in a motor vehicle accident. The arbitrator at first instance found the claimant to be a troubled woman and concluded that the new relationship was unlikely to be permanent, preferring a one year time frame for analysis. The Court of Appeal indicated that the arbitrator committed an error by importing a permanency requirement with respect to the new relationship and found that the seven week period pre-accident, however short, best reflected the relationship at the time of the accident.

[35] In *Security National Insurance Company v. Belair Direct Insurance* (Arbitrator Kenneth J. Bialkowski – July 14, 2016), the Arbitrator accepted that the 4.94 month period pre-accident was the appropriate time period for analysis. Both accountants also completed their analysis using this time frame. The claimant had been living with her parents during that time frame and had been living with her boyfriend the year before that. The residency with her parents had become the “new normal”.

[36] It was found that a three month time frame was the appropriate time to evaluate financial dependency in *Unifund Assurance Company and TD Meloche Monnex – Arbitrator Novick July 14, 2015*. In this case, a 60 year-old claimant had been living in India with her husband until his death in 2008. Prior to that time, the two of them had visited their daughters in Toronto regularly, having spent 2½ months in 2002 and 5½ months in 2006, in Canada with them. The year following her husband’s death, she spent four months with her daughters. The accident happened July 23, 2010 in Canada while the claimant was here on a six month visitor’s visa. Prior to the accident, arrangements had been made to rent an apartment in Mississauga where the claimant would live with her daughter Niti while in Canada. First and last month’s rent had been paid and \$10,000 in furniture purchased. The claimant’s plan was to spend more time in Canada. Arbitrator Novick found that the claimant’s life had changed significantly when her husband died before the motor vehicle accident and the claimant was shifting her routine to spend more time in Canada helping her daughter with laundering, cooking and cleaning, while her daughter worked full-time. It was clear she was not financially independent while in Canada. Arbitrator Novick found that the three month period the claimant was in Canada best reflected the relationship she had at the time of the accident. Arbitrator Novick stated:

“While I understand the temptation to adopt a standard and therefore predictable time frame, peoples lives and the shifts and transitions they experience often do not follow a predictable pattern. In my view, parties, accountants and arbitrators considering financial dependency cases must remain open to considering different time periods, depending on the evidence provided.”

[37] In *Waterloo Insurance Company and The Personal Insurance Company* (Arbitrator Novick – May 13, 2014), the arbitrator found a one month time period prior to the accident was the appropriate time period to evaluate dependency and concluded that the evidence of each case, in addition to the reality of the claimant’s life circumstances leading up to the accident, must be evaluated. The 16 year-old claimant had lived with his mother in Scarborough until high school. He then moved in with his father in Mississauga in September

2007 until August 2009, which was one month before the subject accident. While living with his father, he spent most weekends and holidays with his mother. The evidence indicated that he had no intention of returning to live with his father. The claimant had been living with his mother for one month prior to the accident. The claimant was found to be dependent on his mother at the time of the accident, even though he had only been living with her for this relatively short period of time.

[38] On the evidence overall, I find that the appropriate time frame for analysis, however short, is the period from the day the claimant arrived in Canada on July 29, 2018, to the date of the motor vehicle accident on September 28, 2018, which represents a period of about two months. I am satisfied that the situation which existed was representative of the “new reality” or the “new normal”. I am satisfied that the relationship during that period was not “transitory” or a “temporary aberration”. The claimant’s mother had been in Canada for several years. The evidence clearly indicates that it had always been her plan to bring her children from the Philippines to Canada. That long term plan became a reality on July 29, 2018 when her three children arrived in Canada. The two youngest were enrolled in high school and the 21 year-old claimant went out and found a job within two weeks of his arrival in Canada to assist in supporting his mother and brothers. There was no evidence the claimant planned on returning to school, having completed a college program in the Philippines. There was no evidence that the claimant’s job at BEX Engineering was in jeopardy or temporary. The reality probably was that in order to support five people comfortably, both the claimant and his mother would have to work. This was the “new reality” or the “new normal” once the family was settled in Canada. The evidence is clear that during this two month period, the claimant had sufficient income to provide for more than 51% of his statistical needs, whether LICO (Low Income Cut Off) or MBM (Market Basket Measure) is used. Accordingly, I find that the claimant was not principally financially dependent upon his mother at the time of the accident. As a result, the claimant cannot be considered “an insured” under the Unifund policy. The insurer of the striking vehicle, Desjardins, is the priority insurer.

ORDER

[39] On the basis of my findings, I hereby order that:

1. Desjardins is the priority insurer;
2. Desjardins indemnify Unifund for the benefits reasonably paid to or on behalf of the claimant, plus interest if not paid within 30 days;
3. Desjardins pay to Unifund the costs of this arbitration on a partial indemnity basis;
4. Desjardins pay the Arbitrator’s account.

In the event that issues arise with respect to indemnity or costs, I will simply re-activate my file.

DATED at TORONTO this 2nd)
day of October, 2019.)



KENNETH J. BIALKOWSKI
Arbitrator