

**IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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:

JEVCO INSURANCE COMPANY

Applicant

and

TD GENERAL INSURANCE COMPANY/PRIMUM INSURANCE COMPANY

Respondents

AWARD

Heard: November 11, 2014

Counsel:

Dominic D. Nicassio for the Applicant, Jevco Insurance Company

Derek Greenside, for the respondents, TD General insurance company/Primum
Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction¹

This arbitration involves a Statutory Accident Benefits Schedule (“SABS”) priority dispute between the applicant (“Jevco”), and the respondents (“TD”). The dispute arises out of an accident occurring on April 22, 2011. Sikander Khalid (“the claimant”) was a passenger in a vehicle insured by Jevco. He submitted a SABS application to Jevco. Jevco paid SABS to the claimant. The total SABS paid amount to \$15,825.88.

Jevco commenced a priority dispute pursuant to Regulation 283/95² against TD. There is no issue with respect to the timeliness or the form of the priority dispute notice. Jevco alleges that TD is the priority insurer pursuant to section 268 of the *Insurance Act* on the basis that the claimant was principally dependent for financial support on TD’s insured, Haseena Bano (“the claimant’s mother”). This would make the claimant an “insured person” under TD’s policy, and above Jevco’s policy on the section 268 priority hierarchy.³

TD does not dispute this legal analysis, but takes the position that the claimant was not principally dependent on the claimant’s mother for financial support. Therefore, the claimant would not be an “insured person” under TD’s policy, and Jevco’s policy would remain responsible for the payment of SABS to the claimant.

The parties agree that, without leave of the court, they have the right to appeal this Award on questions of law, or on questions of mixed fact and law.

¹ The information in the Introduction is based on facts that are either agreed between the parties or which are not in dispute.

² Pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

³ See *Insurance Act*, SABS section 3, definition of “insured person”, SABS subsection 3 (7), definition of dependant, and subsection 268 (2) 1. i. and ii.

The Issues

1. Was the claimant principally dependent for financial support on the claimant's mother?

The Evidence

The arbitration proceeded by way of documentary exhibits and both written and oral submissions by counsel.

1. Exhibit 1: Arbitration Brief of the Applicant Jevco Insurance Company, Volumes 1 & 2, Tabs 1 to 93.

Analysis

The claimant's evidence confirms that he did not receive financial support from any other family member, or any external source apart from the claimant's mother. Neither party disputes this evidence.

Jevco's position may be summarized as follows: The claimant was principally dependent for financial support on the claimant's mother. He had insufficient personal resources to live independently. He resided in a rental housing unit paid for by the claimant's mother. In addition, the claimant's mother provided his food, and contributed towards both his necessary and discretionary expenses. The claimant had significant debts that he was not servicing, and to which the claimant's mother contributed payments. The claimant was a student at the time of the accident. His part-time earnings were insufficient to satisfy more than 50% of his expenses. Based on his examination under oath evidence, the claimant perceived himself to be dependent upon

the claimant's mother, and did not believe that he had sufficient means to live independently.

TD's position may be summarized as follows: The claimant was not principally dependent upon the claimant's mother. Although he resided in a rented unit paid for by the claimant's mother, the unit was occupied by other family members and was a larger, more expensive unit than would have been required by the claimant to live on his own. The claimant made a steady, year around income in the year before the accident while employed with a division of Bell Canada. At the time of the accident he was only on leave from this employment for a short period of time to complete his schooling. He returned to this employment not long after the accident in June, 2011. He also had other part-time income at the time of the accident for which he was paid in cash, so he paid no income tax on that income. The portion of the claimant's debt for an OSAP loan was not due and payable until at least six months after he completed his schooling, which would have been well after the date of the accident. Therefore, he was not required to make payments on this loan before the accident. Although he owed money on a credit card or cards, the claimant's mother contributed very little to assisting with this debt. Shortly after the accident the claimant gave a statement to an insurance representative. He stated that he was not dependent on the claimant's mother. The claimant had sufficient funds to satisfy at least half of his necessary and discretionary expenses. He had some, but not principal support from the claimant's mother.

I will review the law relevant to cases where the issue is principal financial dependency. The law has been substantially the same since the Court of Appeal's decision in *Miller v. Safeco Insurance Co. of America*.⁴

The Court stated that the following factors should be taken into account in determining whether principal financial dependency exists:

- The amount of, and the duration of any financial dependency
- The financial needs of the claimant
- The ability of the claimant to be self-supporting

Each case must be decided on its own facts when applying these criteria.

Subsequent cases have established interpretive features for the principal dependency analysis set out in *Miller v. Safeco*.

Cases over many years have stipulated that the decision maker must examine a period of time in the claimant's life leading up to the accident that provides a consistent, and reliable picture of the amount and duration of the claimant's dependency, if any. This period of time must necessarily be longer than a mere "snapshot" to properly evaluate these factors.⁵

⁴ (1985) CanLII 2022 ON CA ("*Miller v. Safeco*").

⁵ See, for example, *State Farm Mutual Automobile Insurance Co. v. Non-Marine Underwriters, Lloyds, London* [1997] O.J. No. 3402 (Gen. Div.) and *Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, 2006 CanLII 37956 (ON CA).

In *Liberty Mutual Insurance Company v. Federation Insurance Company*⁶ the Court of Appeal upheld an arbitrator and the Superior Court with respect to their conclusions on the law of principal dependency.

At first instance Arbitrator Samis held that dependency implies more than receipt of a financial benefit. It requires some kind of need on the part of the person alleged to be a dependent. Money contributed by a supporter that funds enhancements to lifestyle, as opposed to life necessities, does not create principal dependency.

Arbitrator Samis further held that to determine the claimant's ability to be self-supporting, the decision-maker must examine more than the "bare capacity" of the claimant. It must be determined whether the claimant is reasonably exercising his or her capacity to self-support in the circumstances.

Finally, Arbitrator Samis held that a claimant can be considered principally dependent for financial support only if the supporter is providing for more than twice the claimant's needs.

In the Superior Court, Justice O'Leary interpreted this last point by saying that if Arbitrator Samis meant a claimant is not principally dependent if he or she has sufficient resources to meet 51% or more of his or her needs – that is a correct statement of the law.

Without getting into detail, the Court of Appeal stated that the approach taken by the arbitrator and by the Superior Court conformed to the proper analysis mandated by *Miller v. Safeco*, and affirmed the decisions.

⁶ [2000] O.J. 1234, Ont. C.A. ("*Liberty v. Federation*").

The significance of the "51%" analysis is that a claimant can be partially dependent on a supporter to meet some of his or her needs, but if the claimant is able to meet more than half his or her needs through the claimant's self-supporting resources, the claimant is not principally dependent on the supporter. This approach has been repeated many times in court and arbitral decisions since *Liberty v. Federation*.⁷

Applying the principles of law discussed, my first task is to select a reasonable period of time within which to examine the amount of any dependency the claimant may have had upon the claimant's mother, and the duration of such dependency. To do this, it is necessary to examine the claimant's history to identify a period of time that presents a sufficiently consistent picture of the claimant's circumstances at the time of the accident.

As with many of these types of cases, the evidence in this case bearing on the issue of dependency is not always consistent. It also ranges from less than optimal to non-existent in places, which makes the decision maker's task a difficult one. I say this not as a criticism of any witness, the parties, or their counsel. It was my impression that everyone did their best to try to present as much evidence as possible, and to make that evidence as clear as possible within the limitations presented by what was available, and the fading memory of a key witness – the claimant.

⁷ See, for example, *Economical Mutual Insurance Company v. Insurance Corporation of British Columbia*, Arbitrator Jones, Award, February 25, 2002, ("*Economical v. ICBC*").

In addition to completing various SABS application documents, the claimant gave a statement⁸ to an insurance representative, and he was examined under oath as part of the proceedings in this arbitration.⁹ The claimant's statement was taken on July 5, 2011, about 2 ½ months after the accident. His examination under oath was conducted January 22, 2014, about 2 ¾ years after the accident. There are some differences between the claimant's statement and his evidence on his examination under oath. I will deal with these as I go through my analysis.

The claimant is a single male, born April 4, 1988 he was born in Pakistan. He came to Canada in 2002. At the time of the accident he was 23 years old. He resided at 101 Franklin Boulevard, Cambridge, Ontario, townhouse unit #17 ("the Cambridge townhouse").

The claimant's father had died 5 years prior to the date of his statement, so that would be in 2006. In his statement the claimant advised that he resided at the Cambridge townhouse with his mother and his two brothers. In his examination under oath there is some additional information concerning his sister and his sister's husband living at the Cambridge townhouse for several months, possibly overlapping the accident date. His evidence indicates that he does not clearly remember.

In his statement the claimant indicated that he had lived at the Cambridge townhouse for the past six or seven years. In his examination under oath he stated he had been living at the Cambridge townhouse for about 11 years. Although on these estimates there is some discrepancy in how long the claimant had been living at the

⁸ Exhibit 1, tab 9.

⁹ Exhibit 1, tab 91.

Cambridge townhouse, I do not think it is significant enough to impact the issue in dispute. On either version, the claimant had been living at the Cambridge townhouse with several family members for a number of years prior to the accident.

On his examination under oath the claimant testified that the Cambridge townhouse was a four bedroom unit. He had his own room. If his sister and her husband were living with the family at the time of the accident, and if he, his mother, and his brothers had their own rooms, it is not clear to me how his sister and her husband were being accommodated in the four bedroom unit. Perhaps his brothers shared a room during this time, or other arrangements were made.

It is not necessary however, for me to resolve this question for the purposes of the arbitration. The relevant information that comes out of this evidence is that the Cambridge townhouse was a four bedroom unit.

The Cambridge townhouse was a publicly subsidized housing unit. According to his examination under oath, the amount that the claimant's mother paid for the rental of the Cambridge townhouse varied depending on whether she was working. The claimant testified that the claimant's mother was a call centre representative. At the time of the accident he believed that she may have been working at a company called Iqor. When she worked the rent was approximately \$500 to \$600 per month. Utilities added approximately \$400 more.¹⁰ In summary, the claimant's best estimate was that when the claimant's mother was working the total cost for rent and utilities of the Cambridge townhouse was between \$900 and \$1,000 per month.

¹⁰ According to the claimant this included regular utilities such as heat and hydro, as well as cable television and Internet.

The claimant's mother was not working at the time of the examination under oath. She had not worked for about 2 ½ years. At the time of the examination under oath the rent for the Cambridge townhouse, according to the claimant, was about \$200 per month since the claimant's mother was not working.

Some documentary evidence regarding the cost of rent at the Cambridge townhouse was provided in the form of an Internet printout entitled "Co-Op Locator", for Region of Waterloo Community Housing.¹¹ This document was printed January 22, 2014. This is close to three years after the accident, so the information about rental cost for the Cambridge townhouse is not concurrent with the accident. This document shows the rental cost (not including utilities) in January, 2014 for a four bedroom townhouse to be \$1,027 per month. I do not think it would be undue speculation on my part to find that the rents stated in this document are in all likelihood higher than they were just less than 3 years before in 2011 when the accident occurred. Absent evidence to the contrary, I will take judicial notice of the fact that the cost of living, the cost of housing in particular, has increased in southern Ontario over the past several years.

I conclude that the estimate provided by the claimant regarding the total rent and utility cost in April, 2011 for the four bedroom Cambridge townhouse as being between \$900 and \$1,000 at the time of the accident while perhaps on the low side, is probably in the range.

In 2007 the claimant, age 19, began attending Mohawk College as a full-time student, between September, 2007, and April, 2008. He did not like his course at

¹¹ Exhibit 1, tab 20.

Mohawk so, at age 20, he switched to a business accounting program at Conestoga College in September, 2008. His first year of classes started in September 2008 and continued until April, 2009.

After completing his first year at Conestoga College in April, 2009 the claimant commenced employment with Nordia Inc., a division of Bell Canada. He was employed as a telephone agent receiving customers' calls concerning Bell satellite television. According to the Employers Confirmation Form ("OCF 2")¹² he commenced his employment on May 12, 2009. At that point he had just turned 21. He was a part-time, hourly paid employee working 20 hours per week. He was paid \$11.50 per hour.¹³

There is no documentary evidence to enable me to make a finding with respect to exactly how much money the claimant earned in 2009. The only document available that relates specifically to 2009 is the Canada Revenue Agency 2009 Personal Tax Credits Return.¹⁴ This does not assist with determining the claimant's income. It only indicates the income tax deductions available to the claimant that he wanted his employer to consider for the purposes of deducting income tax from his paycheques.

On his examination under oath the claimant testified that when he was working part time at Nordia Inc. between May, 2009, and January, 2011 he generated a net income of approximately \$300 to \$350 every two weeks. His employment file indicates that he was being paid \$11.50 per hour. He worked 20 hours per week when working part-time. Mathematically this would generate a gross income of \$460 biweekly. Allowing for deductions, which would be modest, the claimant's estimate of his net

¹² Exhibit 1, tab 86 (Nordia Employment File).

¹³ Exhibit 1, tab 86.

¹⁴ Exhibit 1, tab 87.

income is reasonable. Allowing for an average of 4.33 weeks per month, the claimant would have a net income of approximately \$700 per month (using an average biweekly net income of \$325) while working part-time at Nordia Inc.

The claimant commenced his second year at Conestoga College in September, 2009. From the available evidence, it would appear that the claimant continued to work part time at Nordia Inc. during the school year.

The evidence is more complete concerning the claimant's income in 2010. In 2010 the claimant turned 22 in April. He continued his employment at Nordia Inc. part-time during his second year at Conestoga College which concluded in April, 2010. There is some evidence on his examination under oath that would suggest he may have worked full time hours in the summer of 2010 between his second and third years at Conestoga College. This is not entirely clear however, because the claimant also testified that he took a summer course either during the summer of 2010, or the summer of 2011 (which would be after the accident), and while doing so he only worked part-time.

In any case, there is an income tax return available for the claimant for the 2010 tax year.¹⁵ It confirms T4 income of \$12,738.

In September, 2010 the claimant commenced his third and final year of his business accounting course at Conestoga College. By December, 2010 the claimant decided to seek a leave of absence from his employment with Nordia Inc. since he was in his final year of school, and he wanted to ensure that he had adequate time to study.

¹⁵ Exhibit 1, tab 88.

His employment file contains a voluntary resignation of his position effective December 8, 2010, although the OCF 2 in the file indicates that he commenced a leave of absence effective January 15, 2011. In his Leave of Absence Request form, the claimant states that he would like to return to his position on April 15, 2011, after completing school.

The claimant did not work at Nordia again until after the accident. The evidence indicates that he returned to Nordia in June, 2011.

The evidence also indicates that the claimant had another part-time job after he took his leave of absence from Nordia in January, 2011, up until the time of the accident. The claimant was employed in a family business known as Shah Caster Inc. This is confirmed in the claimant's OCF 1, and in his evidence from examination under oath.

Once again the evidence is not entirely certain with respect to how much money the claimant was earning from his employment with Shah Caster Inc. He was candid on his examination under oath that he did not declare his earnings from this employment to the Canada Revenue Agency so there is no income tax return confirming this income.

The claimant's evidence on examination under oath is that he was working 10 to 12 hours per week at Shah Caster Inc., being paid approximately \$15 per hour. He was paid in cash, without any statutory deductions. The claimant estimated that he earned in the range of \$150 to \$180 per week from this employment.

Accepting the claimant's evidence about his employment with Shah Caster Inc. as accurate (and I have no reason to conclude that the claimant was not being truthful about this employment), his Shah Caster Inc. earnings would have effectively replaced

his net part-time earnings from his job at Nordia Inc. for the period from his leave of absence from the Nordia job in January, 2011, up to the date of the accident.

From this review of the claimant's history leading up to the April 22, 2011 accident, I conclude that a reasonable period of time to consider in determining the issue of principal dependency is the one year period leading up to the accident starting approximately April, 2010.

I would say that the picture of the claimant's circumstances is sufficiently consistent and clear going back almost 2 years to May, 2009 when he first commenced employment with Nordia Inc. that a decision-maker would be justified in choosing this longer period of time for the principal dependency analysis. The only reason I have selected the shorter period of time indicated is that there is some uncertainty about the claimant's earnings in 2009, and the evidence about his expenses for this longer period is incomplete.

I find that the approximate one year period leading up to the accident is an appropriate period to choose for the principal dependency analysis because by this time the claimant had matured into a stage of his life where he had settled in to pursue long term education and employment goals. Having entered his twenties, the claimant had shown the intention to pursue several years of education, while at the same time demonstrating the responsibility necessary to take care of himself by maintaining employment during that time. Although he chose to briefly interrupt his Nordia Inc. employment to complete the last part of his schooling, it is clear from the evidence that his intention was to resume that employment as soon as possible after his Conestoga

College course was complete. In any case, he continued to work part time at Shah Caster Inc. immediately after taking a leave of absence from the Nordia Inc. position, right up until the time of the accident.

I do not think it would be appropriate to go further back in time than May, 2009 for the principal dependency analysis because, in my view, that would be going into an earlier stage of the claimant's life that was not representative of his circumstances at the time of the accident. Before that time he was just concluding his teenage years, and trying to find his way in the world of postsecondary education. He had not commenced any regular employment, and he was not long removed from the loss of his father. The evidence indicates that in the summer of 2008, after his first year of aborted studies at Mohawk College, rather than work, he returned to his native Pakistan for at least a couple of months.

In the course of reviewing the claimant's history I have already analyzed the claimant's circumstances respecting his living arrangements and his employment. I will now review the other matters which are relevant to the principal dependency issue.

One of the matters to be addressed is the fact that the claimant was in receipt of government assistance in the form of loans and grants in connection with his education ("OSAP"). On his examination under oath the claimant testified that OSAP began when he first attended Mohawk College from September 2007 to April, 2008. He received between \$6,000 and \$7,000 OSAP. Out of this amount he spent between \$5,000 and \$5,500 for tuition, books and parking. This would have left him with between \$500 and \$2,000 for other expenses.

When the claimant began his first year at Conestoga College from September, 2008, to April 2009, he received \$6,000 OSAP. His tuition for the year cost \$4,000. He estimated the cost of books and parking to be \$700 to \$1,000. This would have left him with between \$1,000 and \$1,300 to put towards other expenses.

In his second and third years at Conestoga College (2009 - 2010, 2010 - 2011), the claimant testified on examination under oath that OSAP only covered his tuition which remained in the range of \$4,000 per year. He paid for his books and parking from his own resources.

The claimant has been left with a significant debt regarding OSAP. It is in the range of \$21,000 to \$22,000. Also of significance however, is the fact that this debt was not considered due and owing until six months after the claimant completed his education at Conestoga College. Therefore, the claimant was not required to make any payments regarding OSAP until after the accident. Neither he, nor perhaps more importantly for the principal dependency analysis, the claimant's mother, made any payments on this loan at any time before the April 22, 2011 accident. On his examination under oath the claimant indicated that he was at that time making payments of \$122 per month to OSAP.

The issue, for the purposes of the principal dependency analysis, is how the OSAP received by the claimant should be treated in evaluating the claimant's resources compared to his expenses. There is authority for the proposition that government loans or scholarship assistance received through an educational institution ought not to be

attributed to claimants as income or employment type resources for the purposes of a principal dependency analysis.¹⁶

That is not to say however, that their value can be ignored for the purposes of considering what expenses a claimant may have to meet.

In effect, a government loan/grant, or scholarship money received that is applied in satisfaction of the cost of education related expenses is really a neutral factor because it removes from the dependency calculation an expense that does not have to be incurred by the claimant, or anyone on behalf of the claimant who is being considered as a principal supporter.

In this case, it would be unfair to consider the \$21,000 or \$22,000 OSAP received by the claimant as income, without considering the fact that the money was used to offset an educational expense that would otherwise have been incurred by the claimant.

I believe it is relevant to consider however, that based on the claimant's evidence there was some money left over from the OSAP received by the claimant, at least in the first two years he received assistance, which was available to the claimant to pay other expenses apart from those connected with his education. Depending on which of the claimant's estimates is relied upon, the additional available amounts could have ranged between \$1,500 and \$3,300 over two years. It should not be forgotten however, that in the last two years of his schooling the claimant paid for his books and parking out of his

¹⁶ See *Personal Insurance Co. v. Allstate Insurance Co.*, [2009] O.J. No. 5021, (Ont. Sup. Ct.) ("*Personal v. Allstate*").

own resources, so ultimately, the claimant's OSAP could be seen as income/expense neutral.

For the purposes of the principal dependency analysis, it is more important to take note of the fact that the claimant testified at his examination under oath that he alone was responsible for the payment of virtually all of his education expenses through a combination of OSAP, and his own resources. On the claimant's examination under oath the following exchange occurred:

Q. Okay. Did you receive any money from your mom during the period of time you were going to school?

A. No...

Q. ...with the exception of maybe a couple of hundred bucks a year, you – you were the one that was responsible for paying all of this (education expenses)?

A. Yes.

For the purposes of my analysis I am not taking literally the suggestion in this evidence that the claimant's mother contributed exactly \$200 per year to the claimant's education for each of the four years the claimant attended a postsecondary institution. It is clear from the import of this evidence however, that the claimant's mother did not make any significant contribution to the claimant's education expense, and there is certainly no evidence to suggest that she contributed more than half of the cost of his education expenses not covered by OSAP.

This can be contrasted with the situation in *Personal v. Allstate* where the evidence was that the claimant's parents paid for at least one full term of his university

education - a cost in excess of \$6,500. The rest of the cost was defrayed by the scholarship received by the claimant.

I should also point out at this stage that the claimant testified later in his examination under oath with respect to the total contribution made by the claimant's mother towards all of his expenses. My understanding of his later evidence is that he intended to include in his total estimate of the contribution to his expenses made by the claimant's mother any estimate of what was paid towards his education expenses. This is discussed at page 26 and 27 of this Award.

Having reviewed the claimant's self-supporting resources, I will now consider the support the claimant received from the claimant's mother during the material time I have specified, and evaluate that in the context of whether the claimant's mother was providing 51% or more of the claimant's needs.

In discussing the claimant's circumstances leading up to the time of the accident I have described his living arrangements and the financial details respecting the costs for rent and utilities for the Cambridge townhouse. In the one year period up to the time of the accident the claimant was not making a consistent, and specific contribution towards the rent and utility costs for the Cambridge townhouse.

The claimant's examination under oath evidence is that he did make periodic contributions to what I will term "room and board" by giving the claimant's mother money from time to time. This money was to help pay any expenses associated with the Cambridge townhouse such as rent, utilities, groceries, and similar living expenses. He estimated that in a year he would contribute between \$500 and \$1,000 in this way.

There is no question that living at the Cambridge townhouse with his family was a benefit to the claimant. The evidence available to assign a monetary value to this benefit is unfortunately sparse. The inquiry is made more difficult because the evidence as to the cost to the claimant's mother for rent and utilities at the Cambridge townhouse indicates that it varied significantly depending on whether she was working or not working at any given time.

In trying to determine the value to the claimant of living at the Cambridge townhouse, it must also be remembered that the claimant was a single male, who had only one room of the townhouse to himself. There were either four or six other residents living there. Presumably the claimant had shared use of other, common rooms in the unit with the other residents. He would not however, have needed a four bedroom townhouse if he had been required to live independently.

One way to try to determine the value to the claimant of living with the claimant's mother and his family in the Cambridge townhouse is to try to determine what the reasonable cost to the claimant would have been had he been required to live independently in the year leading up to the accident. This is the approach advocated by Jevco. Once again, the evidence that might assist in answering this question is very limited.

A document from the Canada Mortgage and Housing Corporation entitled Rental Market Report, Ontario Highlights, was introduced into evidence.¹⁷ This document contains a comparative chart outlining the cost for various types of accommodation in

¹⁷ Exhibit 1, tab 92 ("Rental Market Report").

several areas of Ontario as at October, 2010, and October 2011. The purpose for which the Rental Market Report was prepared appears to have been to contrast changes in vacancy rates in different areas of the province over this one year interval. In other words, the document does not appear to have been prepared principally for the purpose of confirming rental costs for certain accommodation at these times. Nevertheless, it does contain information on that subject. For the Kitchener – Cambridge – Waterloo area, the rental cost for a bachelor apartment in October, 2010 was \$589 per month. In October, 2011, the cost was \$608 per month. There is no indication as to which, if any utilities might be included in these amounts.

In my view the information contained in the Rental Market Report is of limited value for the purposes of the issue before me. It relates to the cost of private apartment accommodation. It does not speak to the cost of government subsidized accommodation of the nature occupied by the claimant and his family at the relevant time.

Since the claimant was considered a full-time student during the material time, had the claimant been required to live independently it is a reasonable inference to draw from his circumstances that he may have attempted to find, and have been qualified to obtain some type of subsidized accommodation. He may also have had the option of seeking residence accommodation through Conestoga College which in all likelihood would have been less expensive than a private apartment. Finally, the claimant may also have been able to secure shared accommodation either in residence or privately that would have been less expensive than living on his own in private accommodation.

There is no evidence before me on the cost for these possible alternatives, and I do not want to speculate on what the cost of such alternatives may have been for the claimant. Doing so would also not account for the "board" value of living at home and having the claimant's mother provide at least some of his meals. On the other hand, I am not prepared to find that the cost to the claimant of living independently during the material time would necessarily have been in the range of \$589 to \$608 per month based solely on the Rental Market Report.

The claimant was living in shared accommodation and he was classified as a full-time student during the material time. These factors may well have influenced his accommodation options had he been required to live independently. To attribute a cost of living to him based solely on individual, private cost accommodation would fail to take into account these circumstances.

Counsel for TD included in his written submissions the argument that an allocation of between \$100 and \$250 per month should be made to the claimant for the value of rent and utilities on the basis that the cost of between \$600 and \$1,000 per month for rent and utilities for the Cambridge townhouse should be divided amongst either 4 or 6 residents, depending on whether the claimant's sister and husband were living at the Cambridge townhouse during the material time.

This approach is really the other side of the coin advocated by Jevco's counsel. I do not believe that this approach adequately accounts for the reality of the probable costs of maintaining even a single person household in a moderate size city in southern Ontario in 2010 – 2011. This approach requires extremely favourable assumptions

regarding the likelihood the claimant could have obtained inexpensive or subsidized accommodation to equal what he was residing in with his family.

This argument also does not account for the value of "board". The evidence indicates that the claimant's mother provided at least some food and meals to the claimant. I previously mentioned the claimant's evidence that he contributed between \$500 and \$1,000 per year to the general living expenses associated with the Cambridge townhouse. Assuming a yearly average contribution of \$750, this would generate a monthly average contribution of \$62.50. This amount would provide some offset against the value of "board" the claimant received in the form of meals/food, but in my view it would still leave a significant monthly shortfall between what it would likely have cost the claimant to live independently and purchase food on his own.

All things considered, I think it would understate the cost of independent living for the claimant to value it in the \$100 to \$250 per month range. Even allowing for a modest \$150 per month amount for food (barely \$5 per day), and taking an average of the \$100 to \$250 value suggested by TD for rent and utilities (\$175), the total would still come out to \$325 per month. I suspect the cost of independent living would have exceeded even this amount and it would have been difficult for the claimant to maintain without some support from another source. I think this point is recognized by TD. TD's counsel, in his written submissions, concedes that it is likely the claimant could not have afforded to live on his own without assistance.

A compromise of the two approaches to valuing the "room and board" the claimant received living with his family at the Cambridge townhouse is in my view the

most reasonable approach to the issue. Even doing that however, makes it difficult to come up with a value that does not involve some speculation, due to the lack of evidence on the issue.

Therefore, I will deal with this issue by reaffirming what I have previously stated is an important principle to be observed by decision makers dealing with principal financial dependency cases. The question is not whether the claimant could or could not have lived independently without some assistance. It is whether the claimant's mother was providing for more than 50% of the claimant's needs. As the case law indicates, a claimant may be receiving some support from another source to meet his needs, but unless that source is providing for more than half of the claimant's needs the claimant is not principally dependent upon that source.

With respect to the issue of room and board, without trying to assign it an exact value, it is my impression that in this matter the claimant's mother, as lessee of the Cambridge townhouse, was making a significant contribution to the claimant's needs in the sense that he was able to take advantage of the subsidized housing available to his family through this arrangement. I think it is unlikely that the claimant would have been able to maintain an independent living arrangement solely with his own resources. He likely would have required financial assistance from another source.

This is only one of several factors which must be considered however, in deciding whether the claimant's mother was providing for more than 50% of the claimant's needs.

On his examination under oath the claimant testified that he spent approximately \$100 to \$200 per month for clothing/accessories, toiletries, and cigarettes.

The claimant testified that he incurred cellular phone expense in the year before the accident in a range of \$40 to \$60 per month. Annually this totals between \$480 and \$720 per year. There was evidence to the effect that he received periodic assistance from his mother to pay his cellular phone bill. As with his education expense, the claimant's later evidence included in his overall estimate of the contribution to his expenses made by the claimant's mother any amount she periodically contributed to the payment of his cellular phone bill.

For entertainment expenses such as restaurant meals and movies the claimant testified that he would spend between \$150 and \$200 per month. Annually this totals between \$1,800 and \$2,400 per year.

The claimant did not own his own vehicle. He made use of the claimant's mother's vehicle. He testified that he contributed \$150 to \$250 per month for gasoline and maintenance expenses with respect to that vehicle. Annually this totals between \$1,800 and \$2,400 per year.

The claimant testified with respect to credit cards he had and the debt he had accumulated with respect to those credit cards. His evidence was difficult to follow from the transcript, but it would appear that he had a credit card with TD Bank that he obtained several years before the accident, perhaps as early as 2006. He failed to make timely payments on the balance so TD canceled his credit card. This appears to have occurred sometime in either 2006 or 2007.

The accumulated debt and interest on the TD credit card had grown to about \$9,000 by the time of his examination under oath. He made inconsistent monthly payments of approximately \$70 to \$100 on this credit card debt. Sometimes he would receive assistance from the claimant's mother to make payments, but any contributions made by the claimant's mother were included in the claimant's estimate of her overall, annual contribution to his expenses.

The claimant testified that he also had an MBNA credit card. He could not recall when he obtained that card. He estimated monthly payments on that credit card to be approximately \$30 to \$40. At the time of the accident the card was close to its limit of \$1,000. After the accident this debt increased to \$2,500. In 2013 he paid half of this amount and testified at his examination under oath that he intended in the next month to pay the remaining half.

When asked if his mother assisted him with any payments on the MBNA credit card he stated that he could not remember.

After reviewing the claimant's various expenses, at page 39 of the examination under oath transcript the claimant was asked the following question:

Q. So, let – let us include everything together then, including the – the tuition, the books, the subsidy for the cell phone, everything, all of your expenses, how much would you say Mom contributed to your expenses between April 2010 and April 2011?

After a bit of a digression about the claimant's mother contributing to the cost of parking tickets, the following exchange occurred (at page 40):

Q. Okay. So factor in those tickets and give me an estimate as to how much she contributed towards your expenses...(between April, 2010, and April, 2011).

...A. ...the whole year? So you're asking me how much she contributed the whole year including everything, parking tickets, anything like that?

Q. Correct.

A. You can say anything – anywhere from a thousand to \$2,000. You guys are making me think too much.

I interpret this sequence of questions and answers from the claimant's testimony on his examination under oath to mean that apart from whatever room and board value the claimant received from living at the Cambridge townhouse, the claimant's mother contributed a total of \$1,000 to \$2,000 towards all of the claimant's expenses in the one year period leading up to the accident.

I have set of below a chart outlining in summary fashion what I find is a reasonable interpretation of the evidence with respect to the claimant's self-supporting resources, the claimant's expenses, and the financial contribution to the claimant's expenses made by the claimant's mother. I have not attributed any value in the claimant's expenses category for room and board, since the evidence on the issue is uncertain. I have addressed that issue on pages 29, and 30.

<u>Claimant's Resources</u>	<u>Claimant's Expenses</u>	<u>Claimant's Mother's Contribution</u>
\$700 per month*	\$670 per month**	\$125 per month***

*Based on the claimant's average monthly net income, as discussed at pages 11 – 14 of this Award

****Based on the total of the mid-ranges of the claimant's estimates for his monthly expenses for clothing/accessories, toiletries, cigarettes, cellular telephone, entertainment, vehicle use, and credit card payments, as discussed at pages 25 – 26 of this Award**

*****Based on a monthly average of the mid-range of the claimant's estimate of the claimant's mother's contribution to his total expenses in the year before the accident, as discussed at pages 26 – 27 of this Award**

Considering that the evidence indicates that the claimant was in debt at the time of the accident, and that there was some evidence his bank account was in an overdraft situation of approximately \$500, it may well be that taking an average of the claimant's estimate of his monthly expenses understates those expenses. He certainly does not seem to have been making financial progress at the time the accident occurred. Even with the contribution to the claimant's financial needs attributed to the claimant's mother, it can be seen that he was just barely getting by.

Of course it could be argued as well that the claimant, having a secure living arrangement with his family, was able to spend a good deal more money on items that would not be considered necessities of life. As the case law discusses, if he was incurring expenses for what amounted to enhancements to his lifestyle knowing that he had minimal out-of-pocket expense for room and board, then one should not include in the principal dependency analysis expenses which can be identified as relating to lifestyle enhancements.

There was no specific evidence introduced to address this issue so once again, I decline to speculate on which of, or how much of the claimant's expenses might be considered enhancements to lifestyle as opposed to life necessities. I believe however,

that a consideration of this point justifies taking an average of the claimant's estimates for his expenses, rather than assuming that they are all for life necessities, and understated because of his debt situation.

Conclusion

The critical question for the purposes of the principal dependency analysis is not whether the claimant was able to satisfy 100% of his expenses, it is whether he was able to satisfy more than 50% of his expenses from his own resources. If he was, then he is not principally dependent on any other source of support.

If the claimant was not able to satisfy more than 50% of his expenses from his own resources, then the next question in this case is: did the claimant receive financial support from the claimant's mother satisfying more than 50% of his expenses? If so, then he is principally dependent upon the claimant's mother. If the claimant received some financial support from the claimant's mother, but it was less than 50% of his expenses, he is not principally dependent upon the claimant's mother.

In my opinion, it can readily be seen that even allowing for some upward fluctuation in his monthly expenses as estimated by the claimant, he had sufficient self-supporting resources through his income from his employment at Nordia Inc. and Shah Caster Inc. to satisfy more than 50% of his financial needs during the time period relevant to the principal dependency analysis.

If one were to attribute a value to the room and board and include that in the claimant's expenses, based on the calculations in my chart this value would have to exceed \$730 per month before the claimant's self-supporting resources would fall below

meeting 50% of his expenses (*i.e.* it is not until the claimant's expenses exceed \$1,400 per month that his self-supporting resources of \$700 per month fall below 50% of his expenses).

Though there may be an argument available to suggest that the room and board value which should be attributed to the claimant's expenses should be greater than the \$250 per month maximum amount suggested by TD, there is no evidence to support a finding that it ought to be in excess of \$730 per month.

Considering the totality of the evidence relevant to the one year period leading up to the accident, in my opinion the reasonable conclusion to draw is that while the claimant may have fallen short from time to time on satisfying 100% of his expenses, he had sufficient self-supporting resources to satisfy more than 50% of his expenses throughout the relevant time period.


The claimant had financial support from the claimant's mother. He relied on this support to meet some of his expenses. In my opinion however, the evidence falls short of establishing that the claimant's mother provided financial support exceeding 50% of the claimant's financial needs.

Therefore, for the foregoing reasons I conclude as follows:

- 1) The claimant was **not** principally dependent for financial support upon the claimant's mother.
- 2) Jevco is the priority insurer, and remains responsible for the payment of SABS to the claimant.

3) TD, as the successful party, is entitled to recover from Jevco its arbitration costs, including its share of the arbitrator's fees and disbursements. Should the parties be unable to agree on the quantum of costs, or if there are other matters in connection with the quantum of costs about which the parties wish to make submissions, I invite them to contact my Coordinator to schedule a telephone conference to discuss arrangements to deal with the costs issue.

Dated at Toronto, this 16th day of October, 2015



Scott W. Densem, Arbitrator