

**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:**

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

THE PERSONAL INSURANCE COMPANY / CERTAS INSURANCE

Respondent

**AWARD**

**COUNSEL**

Derek Greenside  
Counsel for the Applicant, Security National Insurance Company

Todd McCarthy  
Counsel for the Respondent, The Personal Insurance Company / Certas Insurance

**ISSUE**

This Arbitration involves a priority dispute between insurers with the primary issue being that of "dependency". More specifically, was Miguel Allen principally dependent for financial support on his mother, Donnette Allen, at the time of the September 5, 2008 motor vehicle accident?

**FACTS**

Miguel Allen was born on November 3, 1988 and would have been 19 years of age at the time he was involved in a motor vehicle accident on September 5, 2008.

Miguel Allen was not a named insured, listed or named driver under any automobile policy of insurance. He was driving a vehicle owned by his friend's mother, at the time of the accident, and that vehicle was insured with The Personal Insurance Company/Certas Insurance (hereinafter referred to as "The Personal") under policy P2249575.

Miguel Allen completed and sent an Application for Accident Benefits (OCF-1) to Security National Insurance Company (hereinafter referred to as "Security National"). Security National insured a vehicle owned by the claimant's mother, Donnette Allen, under policy 71042754.

The Applicant, Security National, processed the Application for Accident Benefits and paid Miguel Allen and his treatment providers Statutory Accident Benefits.

Security National put The Personal on notice with respect to this priority dispute, within 90 days of having received the OCF-1.

Miguel Allen had been living with his older sister for 3 to 4 months sometime in 2008, but was living in his mother's home at the time of the accident. There were five people living at his mother's home, including Miguel Allen, at the time of the accident.

Miguel Allen's biological father died when he was young and he began to receive CPP child benefits in January 1995.

Miguel Allen worked at Swiss Chalet as a line cook for the period from October 22, 2007 to July 12, 2008. The tax returns would indicate that he earned \$5,159 in employment income over the nine month period that he worked at Swiss Chalet. This amounts to about \$575 per month or \$6,878 on an extrapolated annualized basis.

Miguel Allen worked at Wee-Cycled for one week immediately prior to the accident, and was paid \$200 cash.

Miguel Allen, on his Examination Under Oath, stated that he was searching for employment that would provide him with 30 to 34 hours of work each week.

Miguel Allen had attended a job interview at the Cassie Campbell Community Centre the day of the accident.

Miguel Allen had not yet completed his high school diploma and planned to attend school and complete the necessary credits in the fall of 2008. He was still seven credits shy of a high school diploma.

Miguel Allen contributed to the household duties of the Allen family and estimated that he performed approximately 60% of the household chores prior to the accident. He did not receive an allowance/compensation for the services he provided. The value of the services provided by him was approximately \$2,585 annually prior to the accident.

Miguel Allen did not receive any financial support from his stepfather prior to the accident.

Prior to the accident according to the calculations of Security National's accounting expert Daniel Edwards, Miguel Allen's living expenditures were approximately \$11,000 annually.

Donnette Allen's net annual income prior to the accident was approximately \$44,700 per annum.

Miguel Allen's grandmother, who also lived in the Allen home, received approximately \$10,000 per year in OAS/ CPP Pension Benefits.

## LAW

A priority dispute arises when there are multiple motor vehicle liability policies applicable to a motor vehicle accident. Section 268 (2) of the Insurance Act sets out the priority rules to be applied to be determined which insurer is liable to pay statutory accident benefits.

As Miguel Allen was operating a motor vehicle owned by his friend's mother, the following rules with respect to priority of payment apply:

- (i) *The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
- (ii) *If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
- (iii) *If recovery is unavailable under (1) or (2), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose;*
- (iv) *If recovery is unavailable under (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

Section 2 (1) of the Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, Ontario Regulation 403/96, as amended, defines an "insured person" as follows:

- (a) "The named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured, spouse if the named insured, specified driver, spouse or dependant,
  - (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile."

Section 2 (6) of the Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996, Ontario Regulation 403/96, as amended, reads as follows:

*"For the purposes of this regulation, a person is a dependant of another person if the person is principally dependant for financial support or care of the other person or the other person's spouse."*

The criteria to be used in determining financial dependency, for the purposes of the Statutory Accident Benefits Schedule, was established by the Court of Appeal in Miller v. Safeco (1986) 13 C.C.L.I. 31. In that case, the court held that the relevant criteria were:

- (i) Amount of dependency;
- (ii) The duration of the dependency;
- (iii) The financial and other needs of the alleged dependent; and

- (iv) The ability of the alleged dependent to be self-supporting.

### PROCEEDINGS

This Arbitration took place on July 19, 2011. The matter proceeded on the basis of the Examination Under Oath transcripts of Miguel Allen and Donnette Allen, a joint document brief and the expert reports and oral evidence of Daniel Edwards and Frank Lekivetz.

### ANALYSIS AND FINDINGS

It was the position of the Applicant, Security National, that Miguel Allen was not principally financially dependent upon his mother, Donnette Allen, at the time of the September 5, 2008 motor vehicle accident. Support for this position was provided by the evidence of Daniel Edwards, a chartered accountant with Soberman LLP. His evidence was adduced through the filing of two reports, dated September 8, 2010 and July 15, 2011, together with his oral evidence. This evidence will be summarized in the following paragraphs.

The income tax returns of Miguel Allen demonstrated the following incomes:

	<u>2007</u>	<u>2008</u>
<i>Total Employment Income (T4)</i>	\$1,087	\$4,072
<i>CPP Benefits</i>	<u>818</u>	<u>1,878</u>
<i>Net Taxable Income</i>	<u>\$1,905</u>	<u>\$5,950</u>

Daniel Edwards extrapolated what the Plaintiff's income would have been over the entire year of 2008 as follows:

<i>Wage income – Swiss Chalet and Wee-Cycled</i>	\$4,800
<i>CPP Child Benefits</i>	<u>2,088</u>
<i>Total Annual Income</i>	<u>\$6,888</u>

Daniel Edwards calculated the estimated annual expenditures of Miguel Allen as follows:

<u>Expense Item</u>	<u>Amount</u>	
<i>Living accommodation</i>	\$ 3,224	<i>Biweekly payments of \$620 annualized and 1/5 allocated to Miguel</i>
<i>Hydro</i>	360	<i>Paid by Miguel, assume household average of \$150 per month, 1/5 consumed by Miguel</i>
<i>Food</i>	2,600	<i>No amount stated, mother paid groceries but Miguel paid for special grocery items. Annual amount is estimated based on \$50 per week for 52 weeks.</i>

<i>Internet</i>	144	<i>Paid by mother, assume \$60 per month, 1/5 consumed by Miguel</i>
<i>Cell phone</i>	720	<i>Paid by Miguel at time of motor vehicle accident (when working)</i>
<i>Clothing</i>	600	<i>Paid by Miguel, avg \$40-60 per month, assume \$50 per month</i>
<i>Personal toiletries</i>	480	<i>Paid by mother, assume \$40 per month allocated to Miguel</i>
<i>Educational expenses</i>	100	<i>Paid by Miguel</i>
<i>Meals &amp; Entertainment</i>	1,300	<i>Remainder of personal money Miguel spent dining out, video games, etc.. Estimated at \$25 per week for 52 weeks</i>
<i>Transportation</i>	500	<i>Miguel usually paid his own bus fare when required; mother sometimes drove him or gave him fare</i>
<i>Travel</i>	1,000	<i>Mother paid for family trip to Jamaica in year before the motor vehicle accident - assume \$1,000 per person</i>
<b>Total Estimated Annual Expenditures</b>	<b><u>\$11,028</u></b>	

On the basis of the aforesaid analysis, Daniel Edwards concluded that the Plaintiff's extrapolated annual income of \$6,888 was 62.5% of his annual expenditures of \$11,028 and therefore not principally financially dependent upon his mother. This calculation was based on the following:

Annual income of \$6,888 ÷ annual expenditures of \$11,028 = 62.5%

If the Applicant's position were accepted, Miguel Allen would not be an "insured person" under his mother's policy of insurance with Security National, as he would not be found to be principally financially dependent on her. In such circumstances, the only insurance available to the claimant would be the insurance on the vehicle that he was operating with such coverage provided by The Personal.

The Respondent, The Personal, took the position that the annual net income of Miguel Allen was less than 50% of his annual expenditures and therefore, he was principally financially dependent on his mother. In support of this position, The Personal relied upon the evidence of Frank Lekivetz, being a filed report, dated July 12, 2011 and his oral evidence. His evidence will be summarized in the following paragraphs.

Frank Lekivetz calculated Miguel Allen's annual expenditures for 2008 as being \$15,610, as per the chart below. He calculated that his mother was responsible for paying \$10,150 as per the chart

below. His conclusion was that the support provided by his mother represented 65% of Miguel Allen's annual expenditures.

<u>Mr. Allen's Annual Expenditures</u>	<u>Amount</u>	<u>Paid by Mother</u>	
Living accommodation	\$ 3,224	\$ 3,224	Based on mortgage payments of \$620/2 wks. - 1/5 allocated to Mr. Allen
Hydro	360		Paid by Mr. Allen - assumed household average of \$150/mo.- 1/5 allocated to Mr. Allen
Food bought by Miguel	2,600		Assumed to be \$50/wk.
Internet	144	144	Assumed to be \$720/yr. - 1/5 allocated to Mr. Allen
Cell phone	720	720	Assumed to be \$720/yr. Per Ms. Allen's Examination for Discovery, we have assumed that she paid for her son's cell phone
Clothing	600		Assumed to be paid by Mr. Allen
Personal toiletries	480	480	Mr. Allen's share of this expense assumed to be \$480/yr., paid for by his mother
Educational expenses	100		Assumed to be paid by Mr. Allen
Meals & Entertainment	1,300		Assumed to be paid by Mr. Allen
Transportation	500		Assumed to be paid by Mr. Allen
Travel	1,000	1,000	Assumed to be paid by Mr. Allen's mother

Items Omitted by  
Soberman

<i>Food bought by mother</i>	1,638	1,638	<i>Calculated based on Canadian Centre for Policy Alternatives guidelines regarding cost of nutritious diet</i>
<i>Home phone</i>	144	144	<i>Assumed to be \$720/yr. – 1/5 allocated to Mr. Allen</i>
<i>Heat</i>	480	480	<i>Assumed to be \$200/mo. (\$2,400/yr.) – 1/5 allocated to Mr. Allen</i>
<i>Cable</i>	120	120	<i>Assumed to be \$50/mo. (\$600/yr.) – 1/5 allocated to Mr. Allen</i>
<i>Insurance</i>	500	500	<i>Assumed to be \$250/mo. (\$3,000/yr.) – 1/5 allocated to Mr. Allen</i>
<i>Car</i>	1,000	1,000	<i>Assumed to be \$5,000/yr. – 1/5 allocated to Mr. Allen</i>
<i>Property taxes</i>	700	700	<i>Assumed to be \$3,500/yr. – 1/5 allocated to Mr. Allen</i>
<b><i>Household Expenses including food</i></b>	<b><u>\$15,610</u></b>	<b><u>\$10,150</u></b>	

Support Provided by Mother (%) 65%

Based on this calculation, Mr. Allen was principally dependent on his mother for financial support at the time of the accident. As a result, he would be an "insured person" under his mother's policy of insurance with Security National and would stand in priority to other available insurance by reason of Section 268(2)(i) of the Insurance Act priority scheme as set out at page 3 of this decision.

Both experts also made calculations as to the dependency if the value of services was to be considered. On the basis of the evidence before me, I am satisfied that the services provided by Miguel Allen to the Allen household were not much different than the services provided by the Allen family members to him. I therefore do not find it appropriate to include the value of services as part of my analysis. In Farmers Mutual v. Gore Mutual (Arbitrator Guy Jones, September 2007), it was determined that whether or not it is appropriate to attribute a value to services provided by a person when deciding a dependency issue, is a particular fact to be determined in each case. As indicated, I do not find it appropriate in the present fact situation.

The cross-examination of Frank Lekivetz revealed numerous flaws in his calculations. For example, he failed to take into consideration the fact that the claimant was paying for his own cell phone expenses when he was working. He attributed 1/5 of the estimated operation costs of his mother's vehicle to him, wherein the available uncontradicted evidence indicated that he had use of his mother's vehicle, but on rare occasions. He attributed a \$700 component as the claimant's share of

property taxes when, as the evidence indicated, property taxes may have been included as part of the bi-weekly mortgage payment. He admittedly overstated the mother's contribution to the food consumed by Miguel Allen. In the circumstances, I cannot rely on his calculations. I accept the calculations of Daniel Edwards with respect to the claimant's extrapolated 2008 annual income at \$6,888. I accept, for the most part, the calculation of Daniel Edwards with respect to the claimant's annual expenditures. The component that I cannot accept is the component for living accommodation. Daniel Edwards calculates this at \$3,224 per year, based on the fact that this represents 1/5 of Donnette Allen's bi-weekly mortgage payments of \$620 annualized. I am not satisfied that this represents the appropriate approach in determining the benefit to Miguel Allen of his mother's provision of living accommodation, even though it was the approach used by both of the financial experts. Equally dividing the mortgage payments by the number of people in the household is not, in my view, appropriate. If there was no mortgage, would there be no value in the accommodation provided by the mother? In my view, one must look at the value of the accommodation provided and what that would likely cost on the open market. This 19 year-old was living in a house in the GTA with his own room, with kitchen facilities, with laundry facilities, t.v., cable and internet. One would be hard pressed to find even modest accommodation of a similar type in the GTA for \$750 per month. Even at \$525 per month, the Plaintiff's annualized income would still be only 48.8% of his overall expenditures.

When one removes the living accommodation expense component from Daniel Edwards' estimated annual expenditures, the total of the other items comes to \$7,804. If one were to assume living accommodation costs of \$750 per month (\$9,000 annually), the estimated annual expenditure would increase to \$16,804. At \$650 per month (\$7,800 annualized), the total annual expenditure would increase to \$15,604. Even at \$525 per month (\$6,300 annualized), the estimated annual expenditures would increase to \$14,404. The calculations below indicate that even at these modest accommodation expense figures, the percentage of the Plaintiff's annualized income over annual expenditures remains at less than 50%:

1. Assuming Rent of \$750 per month:

\$750/mo. x 12 mos. = \$9,000, then \$16,804 total expenditures

$\frac{\$ 6,888}{\$16,804} = 40.9\%$

2. Assuming Rent of \$650 per month:

\$650/mo. x 12 mos. = \$7,800, then \$15,604 total expenditures

$\frac{\$ 6,888}{\$15,604} = 44.1\%$

3. Assuming Rent of \$525 per month:

\$525/mo. x 12 mos. = \$6,300, then \$14,104 total expenditures

$\frac{\$ 6,888}{\$14,104} = 48.8\%$



On a purely mathematical calculation, I find that Miguel Allen's annualized income was less than 50% of his annual expenditures. He was therefore, in my view, principally financially dependent on his mother at the time of the motor vehicle accident. He therefore meets the first criteria set out by the Ontario Court of Appeal in Miller v. Safeco (1986) 13 C.C.L.I. 31, namely the "amount of dependency".

The second criteria set out in Miller v. Safeco (supra), is the "duration of the dependency". In this case, Miguel Allen appears to have lived with his mother, save and except for a few months in 2008 when he lived with his sister. At the time of the accident, he had returned to live with his mother. At 19 years of age he appears to have spent most of his time dependent on his mother. I therefore find that he meets the second criteria, namely the "duration of dependency".

The third criteria adapted by the Ontario Court of Appeal in Miller v. Safeco (supra), is the "financial and other needs of the alleged dependent". On the basis of the factual findings aforesaid, I am of the view that such needs were largely provided by his mother.

The final criteria adapted by the Ontario Court of Appeal in Miller v. Safeco (supra), is "the ability of the alleged dependent to be self-supporting".

Daniel Edwards calculated the Plaintiff's annualized income for 2008 at \$6,888. This is based on Miguel Allen's 2008 tax return, which represents a period where the Plaintiff was working part-time and going to school. The evidence shows that he was working more than 30 hours per week on average. With his time at work, the Plaintiff was failing miserably at school. He passed only half of the courses that he was taking. In my view, to succeed, Miguel Allen would likely have had to reduce his working hours while attending school and if so, would have been more dependent on his mother. The evidence clearly indicates that the Plaintiff was planning to return to school in the fall of 2008 to complete his seven credits.

What we have here is a 19 year-old who had yet to complete high school. His tax returns show total income in 2007 to be \$1,905. In 2008, his declared income was \$5,950. I cannot conceive of an individual living independently in the GTA with such an income, or even the extrapolated annual income estimated by Daniel Edwards at \$6,888. In my view, on a "big picture" basis, I find the facts herein clearly lead me to conclude that Miguel Allen did not have the ability to be self-supporting. He was a youth in transition. He was merely a student with a part-time job. Until such time as he had completed high school or found work paying a sustainable annual income, he, in my view, remained dependent on his mother.

Overall, considering the four criteria set out by the Ontario Court of Appeal in Miller v. Safeco (supra), I find that Miguel Allen remained principally dependent on his mother for financial support.

## **ORDER**

On the basis of my finding that Miguel Allen was principally financially dependent upon his mother Donnette Allen, at the time of the September 5, 2008 motor vehicle accident, he would be considered an "insured person" under her policy with Security National. He would fall into the category set out in Section 268(2)(i). Only if recourse was unavailable under Section 268(2)(i) would Miguel Allen have recourse against The Personal who insured the vehicle in which he was an occupant. I therefore find that Security National stands in priority to The Personal with respect to the payment of statutory accident benefits.

I hereby order that this Application be dismissed. I order that Security National pay The Personal its costs on a partial indemnity basis. I order that Security National pay the Arbitrator's costs.

DATED at TORONTO this 9<sup>th</sup> )

day of August, 2011. )

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KENNETH J. BIALKOWSKI  
Arbitrator