

IN THE MATTER OF the *Insurance Act* R.S.O 1990, c1..8, Section 268
AND IN THE MATTER OF the *Arbitration Act, S.O.1991, c.17*, as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

PORTAGE MUTUAL INSURANCE COMPANY

- and -

Applicant

CERTAS DIRECT INSURANCE COMPANY & PAFCO
INSURANCE COMPANY

Respondent

DECISION

COUNSEL APPEARING

Jessica Rogers for the Applicant, Portage Mutual Insurance Company (hereinafter called "Portage")

Catherine Zingg for the Respondent, Certas Direct Insurance Company (hereinafter called "Certas")

Jeffrey R. Goit, counsel for the Respondent, Pafco Insurance Company (hereinafter called "Pafco")

INTRODUCTION

This matter comes before me pursuant to the *Arbitration Act* 1991, s. 268 of the *Insurance Act*, R.S.O. 1990 (c1.8 as amended) and Ontario Regulation 283/95 as amended.

I have been retained on consent as a private arbitrator to decide an issue between the above-noted insurers with respect to a priority dispute that arose due to a motor vehicle accident that took place on June 23, 2017.

On that day JP (date of birth, July 17, 2006: Nearly 11 years old) was riding his bicycle in Hamilton when he was struck by a car. The car that struck JP was insured by Portage. JP applied to Portage

for statutory accident benefits.

Portage commenced this arbitration pursuant to s. 268 of the *Insurance Act* alleging that JP was principally dependent for financial support on either his mother (insured by Pafco, policy number 558421992) or that he is principally dependent for financial support on Steven T. {who is insured by Certas under policy number D0291892).

If JP were found to be principally dependent for financial support on both Steven T. and his mother, it was agreed by the parties that Certas and Pafco policies would rank equally. Therefore, JP's mother was put to an election pursuant to s. 268(4), (5) and (5.1) of the *Insurance Act*. JP's mother elected Certas.

Given that election, the issue before me comes down to two questions:

1. At the time of the accident of June 23, 2017 was JP principally dependent for financial support on Steven T.; and
2. Alternatively, at the time of the accident of June 23, 2017, were JP's mother and Steven T. spouses as defined under the *Insurance Act*.

PROCEEDINGS

This matter proceeded to both an oral hearing and written submissions.

JP's mother gave evidence on June 27, 2023 and Steven T. gave evidence also on June 27, 2023. In addition, the parties provided a Joint Book of Documents which included the following:

1. EUO transcripts of JP's mother taken virtually on April 7, 2022;
2. EUO transcript of Steven T. taken virtually on April 7, 2022;
3. Various bank statements from JP's mother's bank account covering the relevant time period;
4. An email from counsel for JP dated June 14, 2023 outlining information with respect to expenses as well as a response to undertakings from the EUO;
5. Population statistics for Hamilton for 2017;
6. Statistics Canada – Low Income Cut-Offs (LICOs) before and after tax by community and family size;
7. 2017 tax returns of JP's mother; and

SUMMARY OF FACTS

The facts are really not in dispute. Rather, it is what one draws from the facts that is in dispute between the parties.

JP at the time of this accident was nearly 11 years of age. His mother was born on December 17, 1970. She had three older sons from a previous relationship who were in their 20s.

JP's mother had had two previous marriages. One to the biological father of JP. This had ended in divorce. She had a subsequent marriage to another individual which also ended in divorce. JP had an older brother.

JP's mother began dating Steven T. in August of 2016. From August 2016 until June 1, 2017 JP's mother and Steven T. lived in separate residences. JP lived at 36 James Street South in an apartment with his mother and brother. Steven T. lived in a rented room in a house in Dundas. The evidence is clear that from when they first met in August of 2016 until June 1, 2017 that they managed their own expenses. Each paid their own rent. Neither of them appeared on each other's lease. There does not appear to be any issue that during this time period that JP would be principally dependent for financial support on his mother.

The critical time period begins on June 1, 2017. At that point JP, his brother and his mother moved into a new residence with Steven T. This was at 5 Empire Court in Hamilton. JP's accident happened 23 days later. It is important to note that JP's mother and Steven T. subsequent to the accident got engaged on December 17, 2017 and later married on May 26, 2018. There was also no dispute that at the time of the accident of June 23, 2017 that JP's mother and Steven T. did not have any biological children together.

The evidence also suggests that JP did not have a significant relationship with his biological father. JP's mother says that he had not seen his biological father for approximately two years. The father did not pay any child support, did not provide gifts or presents to JP. No argument was made in this arbitration that JP was principally dependent for financial support on his biological father. In fact, both JP's mother and Steven T. confirmed during the hearing that Steven T. was the primary father figure in JP's life at the time of the accident of June 23, 2017.

With respect to the new arrangements as of June 1, 2017, Steven T. paid approximately 75% of all the household expenses including groceries and utilities and JP's mother paid about 25% of those expenses. Steven T. earned significantly more money than JP's mother did. JP's mother was in fact not working and her source of support was CPP in the amount of \$1,692.39 per month and child tax benefits in the amount of \$1,126 per month for a total monthly income of \$2,818.39.

By way of contrast, Steven T. worked at the Ford Motor Company and depending on the hours that he worked would earn roughly \$700 to \$800 per week. His evidence under oath was he believed that he was working a lot of overtime at that time.

With respect to the expenses in this newly-merged household, a review of JP's mother's banking statement shows the following:

- | | | |
|----|-----------------|------------|
| 1. | Rent | \$ 1800.00 |
| 2. | House insurance | \$ 40.14 |
| 3. | Netflix | \$ 11.99 |
| 4. | Rogers | \$ 375.00 |
| 5. | Cogeco | \$ 192.56 |
| 6. | Union Gas | \$ 46.08 |

7.	Shaw Direct	\$ 278.19
8.	Rogers	<u>\$ 22.00</u>
	Total	\$2,766.05

In addition, JP's mother would pay her own car insurance with Pafco. She owned a Dodge Dart. Steven T. would pay his insurance with Certas. He owned a 2011 Ford Flex.

According to the evidence, Steven T. would e-transfer his paycheque to JP's mother. The bank statement supports that. She would then pay the expenses from that bank account. The evidence is also that JP's mother had some significant credit card debt to the point that there was "no way she would have feasibly been able to afford to pay half of everything so Steven paid more like 75% and she paid more like 25% of the household expenses." (See transcript of JP's mother, page 34, question 188).

Both parties point to a discrepancy in the evidence as between Steven T. and JP's mother with respect to the percentage that they each contributed to the family expenses when they moved in together on June 1, 2017. At their examinations under oath both parties indicated that contribution would be 50/50. Subsequent to the EUO taking place JP's mother submitted her bank statements. These statements were put to both parties during the hearing. Both parties acknowledge that the information in the bank statements suggested that it was not a 50/50 split. Rather, it was a 75/25 split. My review of the transcripts and having heard the parties give evidence there appear to be little doubt that that was a more accurate assessment of the relative contribution as between Steven T. and JP's mother of their income to the parties' expenses.

At the time the accident occurred, JP's mother and Steven T. did not have a joint bank account. That was arranged sometime later. With respect to food or groceries, both their evidence was that Steven T. would pay about 75%. If they went out to restaurants Steven T. would pay. With respect to expenses for JP and his brother such as clothing, shoes or schoolbooks, Steven T. would give JP's mother that money because she could not afford it.

In addition, when the two moved in together on June 1, 2017 Steven T. paid for the first and last month's rent (a total of \$3,600). He also e-transferred money into her bank account to cover moving expenses (\$983.95).

The evidence is also clear that other than JP's mother and Steven T. there was no other source of income in his family that contributed towards JP's daily expenses in June of 2017.

JP's mother also gave evidence that she had sold a previous house. However, there was no evidence with respect to what that sale was, and when it took place and to what extent that made any contribution to the family expenses as of June 1, 2017.

With respect to the relationship between Steven T. and JP's mother it is clear that they were not formally married until 2018. In addition, the evidence is clear that they did not live together prior to June 1, 2017.

Steven T. did have a strong father-figure relationship with JP at the time of the accident. Steven T. was JP's emergency contact at school. While there had been no formal adoption by Steven T. of JP there were many indicia of a parent-child style relationship, both with respect to being a father figure as well as providing for the child.

Both parties gave evidence as to certain facts that occurred subsequent to the accident of June 23, 2017 vis-à-vis JP and his biological father. JP after the accident for some time continued to live with his mother and Steven T. However, from 2020 to 2023 he went to live with his biological father. At the time of the hearing JP was living with his brother. JP did not have a relationship with Steven T. at the time of the hearing. Steven T.'s evidence was "they don't talk to me anymore".

POSITION OF THE PARTIES

A. Dependency

It is Pafco's position that JP was principally dependent for financial support on Steven T. at the time of the accident.

Pafco submits that the appropriate time period to be considered for determining dependency is June 1, 2017 to June 23, 2017. Pafco submits that this time period establishes a "new normal" and this three-week period is the time that accurately reflects the relationship between JP, Steven T. and JP's mother.

Pafco submits that this was not a transient or a relationship that was of a short time period. We know that this couple married on May 26, 2018 and were still married at the time of this hearing. Pafco submits that there is no permanency requirement in determining the duration of dependency. Rather, one must look at the time period which fairly reflects the status of the parties at the time of the accident. (See *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609).

Pafco also refers to the seminal decision of *Miller v. Safeco Insurance Company of Canada*, 1984 CanLII 2019, where the Ontario Court of Appeal laid down the often-quoted four criteria one must analyze in determining whether an Applicant is principally dependent for financial support on an individual. Those four criteria are:

- a) Amount of dependency;
- b) Duration of dependency;
- c) Financial or other needs of the alleged dependant; and
- d) The ability of the alleged dependant to be self-supporting.

Pafco submits that criteria D is irrelevant as clearly JP had no ability to be self-supporting as he was 11 years old. He received all his financial support from his mother and Steven T. at the time of the accident. He had no financial support of his own.

Therefore, Pafco submits the two key criteria that should be looked at to determine the dependency issue is the duration of dependency and the amount of dependency. With respect to the amount of dependency Pafco submits that there is no dispute on the evidence that Steven T. was responsible for at least 75% of the household expenses and JP's mother only managed 25%. Pafco points to the fact that during the period of June 1, 2017 to June 23, 2017 Steven T. incurred significant additional expenses for the family including the first and last month's rent, moving expenses and there was also evidence that he purchased furniture for the house. Pafco submits that there is no need to apply a mathematical formula or use arbitrary Canadian poverty standards such as the low income cut-off or market basket measure to fill in gaps of evidence to determine what JP's financial needs were as of June 23, 2017. Pafco submits that those types of approaches need to be used in cases where claimants have some level of self-support which is not the case here.

Pafco submits that there is evidence from the two individuals who were providing financial support to JP and they both ultimately confirmed that Steven T. provided 75% of JP's financial support. This clearly establishes that Steven T. was therefore paying 51% or more of JP's needs.

B. Position of Certas on Dependency

Certas takes the position that JP was not principally dependent for financial support on Steven T. on the date of loss.

The main thrust of Certas's position is with respect to the criteria involving the "duration of the dependency". Certas submits that the time period proposed by Pafco is not only too short but is not the time period that fairly reflects the status of the parties at the time of the accident. Rather, one must look to a longer time period such as six months or even one year. If one looks either one year or even six months prior to the motor vehicle accident Certas submits that the evidence supports that JP was principally dependent for financial support on his mother. Certas relies on the decision of the Court of Appeal in *Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, 83 O.R. (3d) 591. In that case the Court of Appeal stated that a snapshot approach in looking at dependency was inappropriate. Rather, the Court stated, "*Only by looking at the relationship as a whole over a reasonable period of time is an Arbitrator able to determine the nature of the relationship at the time of the accident.*"

Certas points to the fact that for the year prior to June 1, 2017 the evidence is overwhelming that JP was principally dependent for financial support on his mother. She covered all the expenses in the home that they lived in with his brother. Steven T. made minimal contribution to the expenses at that time and rather Certas submits it was more money to increase JP's enjoyment of life such as paying for a vacation. Steven T. did not contribute to the rent, did not pay expenses relating to the home, did not live with them, and they were not on each other's rental agreements. Steven T. would pay for dinners for everyone. He took them to the Dominican Republic in 2016 and paid for everyone's trip but that does not constitute the type of principal financial dependency that is contemplated under the *Insurance Act*.

Certas submits that it "would be rash" considering the facts of this case and JP's mother's

previous relationships to suggest that a three-week timeframe would constitute a “new normal” in her life or for that of her son. She had been married and divorced twice and had had another relationship from which she had had three other sons. Therefore, Certas submits one cannot rely on the three-week timeframe and must look at the six months to one year prior to June 1, 2017 which clearly establishes all the relevant criteria in *Miller and Safeco* that JP would be principally dependent for financial support on his mother.

SPOUSES

Position of Pafco

Pafco takes the position that if I find that JP was principally dependent for financial support on JP’s mother that is not the end of the enquiry that I must then go on and determine whether on the date of loss JP’s mother and Steven T. were common-law spouses as defined under the *Insurance Act*. If they were common-law spouses on June 23, 2017 then implicitly Pafco submits JP must be found to be principally dependent for financial support or care on his mother as well and as the claimant has elected Certas pursuant to the provisions of the *Insurance Act* that Certas would then be the priority insurer.

On the issue of spouses, Pafco submits that under s. 224(1) of the *Insurance Act* that JP’s mother and Steven T. would qualify as spouses. S. 224 of the *Insurance Act* is set out below:

“Spouse” means either of two persons who,

- (a) are married to each other,
- (b) have together entered into a marriage which is voidable or void, in good faith on the part of the person asserting a right under this Act, or
- (c) have lived together in a conjugal relationship outside marriage
 - i. continuously for a period of not less than three years, or
 - ii. in a relationship of some permanence, if they are the parents of a child.

Pafco relies on the provision of the definition under s. 224(1)(c) that JP’s mother and Steven T. have lived together in a conjugal relationship outside marriage in a relationship of some permanence as they are the parents of a child. There does not appear to be any issue that these two individuals were on June 23, 2017, in a conjugal relationship. Pafco argues that it was a relationship of some permanence. Pafco submits that the use of the words “relationship of some permanence” is intended to be a flexible alternative to the requirement of ongoing cohabitation which is set out in the other part of the definition requiring individuals to live together continuously for a period of not less than three years. The requirement that the relationship be of some permanence reflects the modern relationships between various families and how we look at people as parents.

Pafco submits that one must look not only at whether they were actually cohabiting but what their intentions were. Here Pafco submits these parties were starting to build a life together by

moving in on June 1, 2017. They continue to have a relationship and expressed their intentions to the outside world by getting engaged and later on married. There were no periods of separation. Pafco submits that s. 224(1)(c)(ii) of the *Insurance Act* does not specify a required time period for there to be a relationship of some permanence. Therefore, it submits a minimal period of time of living together such as three weeks can be sufficient where there are other indicators of spousal status.

On the final part of the definition, Pafco submits that Steven T. and JP's mother would be considered "the parents of a child" on June 23, 2017. Clearly JP's mother was his parent. The question is whether Steven T. would also be considered his parent.

Pafco submits that the definition of "spouse" was amended on January 1, 2017 by striking out the terms "the natural or adopted parents" and substituting that with the term "the parents".

Pafco submits that this amendment must be given its legislative intent and that was to expand the classes of individuals who would be considered parents. It was designed to remove the rigid requirements of biological parenthood or legal adoption and to recognize the realities and dynamics of modern spouses.

Pafco submits that Steven T. was in effect the only father of JP. He had not seen his biological father for about two years. Steven T. was his emergency contact and provided shelter, food and clothing. Therefore, as of the date of loss, he would be considered a parent.

Certas's Submissions Re Spouse

Certas submits the facts do not support a finding that Steven T. and JP's mother were spouses as defined under the *Insurance Act*.

Certas is prepared to accept that as of the date of loss that they were in a relationship of some permanence. However, Certas submits they did not live together in a conjugal relationship outside marriage prior to June 1, 2017. More importantly, Certas submits that the third part of the test simply cannot be met as Steven T. was not a parent to JP. Steven T. was not JP's biological father. He had not formally adopted the child. They had no children together of their own. Certas argues that this relationship is not the type of relationship intended to qualify as a parent due to the short timeframe involved.

Certas also submits that even if I find that JP's mother and Steven T. were spouses as defined under the *Insurance Act* that Pafco would still have to establish that JP was a dependant of Steven T. during an appropriate timeframe. Certas again notes that that timeframe is not three weeks but should be six months to one year and there is simply no evidence of dependency of JP on Steven T. during that timeframe.

FINDINGS AND ANALYSIS

A. Was JP principally dependent for financial support on Steven T. at the time of the accident?

The Statutory Accident Benefit Schedule Ontario Regulation 34/10 defines a dependant under s. 2(6) as someone who is

“principally dependent for financial support” at the time of the accident.

There is a long line of cases with respect to financial dependency. Both the parties here agree that the test for principal financial dependency is the “51% rule”. To be principally dependent for financial support an individual must receive more than 50% of his financial needs from someone other than himself or as here if there are potentially two individuals contributing to a minor support that one of those individuals must contribute 51% or more in order to be principally dependent for financial support.

Both parties also agree on the starting point for determining dependency is the four criteria set out in the Court of Appeal in *Miller v. Safeco (supra)*. Both parties have addressed their attention to two main criteria: Duration of dependency and amount of dependency.

B. Duration of Dependency

The duration of the dependency is key in this case.

Both parties agree that I must consider the time period that best reflects the relationship between the various individuals and their status at the time of the accident. (*Oxford Mutual vs. Co-operators (supra)*). Both parties also agree that there is no permanency requirement with respect to the relationship that is being analyzed. I must pick the time period that accurately reflects the true nature of that particular relationship at issue at the time of the accident.

A snapshot approach on the day of the accident is inappropriate. One must look at the relationship as a whole over a reasonable period of time. (*Intact Insurance Company v. Allstate Insurance Company (supra)*).

There are many cases that find shorter time periods are appropriate and an equal number of cases that determine longer periods such as one year are appropriate. Each case must stand on its own facts.

In this case I agree with the submissions of Pafco that the appropriate timeframe for determining dependency is from June 1, 2017 to June 23, 2017. While I appreciate that is a relatively short period of time, I find that all the evidence suggests that that time period reflects the true nature of JP’s financial needs and dependency on to June 23, 2017. I agree with Pafco that a “new normal” was established.

JP’s mother and Steven T. moved in together. Both their names were on the lease. While they did not have joint bank accounts JP’s mother’s account shows that there were regular e-transfers identified as being from Steven T. to provide support for paying the rent and paying expenses. There was no significant difference between the two parties’ evidence as to who paid for what. Clearly Steven T. was the most significant breadwinner in the family bringing at least \$800 a week with JP’s mother only receiving income from CPP and child tax benefits.

The evidence establishes that these two families merged into a new household on June 1, 2017. This was not a temporary move such as one child moving to live with one parent having lived with another parent previously. Both JP's mother and Steven T. gave up their prior residences to move in together. I am also mindful of the fact that there is no permanency requirement that I must review when looking at recent relationships. While it is not relevant to my decision, I cannot help but note that Steven T. and JP's mother became engaged December 17, 2017, married May 26, 2018 and were still together when they gave evidence at their hearing in this matter.

I therefore conclude that the appropriate time period for determining dependency is the three weeks from June 1, 2017 to June 23, 2017.

I now turn to the second criteria which is the amount of the dependency. The evidence is overwhelming that Steven T. was the primary breadwinner and payer of expenses to this family unit from June 1 to June 23, 2017. Both parties agree he paid 75% of the expenses. JP had no income and made no contribution to the expenses. He was only 11 years of age.

I agree with Pafco that I do not need to resort to any mathematical calculations or review any statistics. The evidence is quite clear that Steven T. paid more than 51% of this family's finances and covered more than 51% of JP's needs. There is no evidence before me as to what capital was available to JP's mother from the sale of her home which apparently took place before the accident. There was no other individual making any contribution towards JP's financial needs other than Steven T. and JP's mother. I found that JP was principally dependent for financial support on Steven T. on June 23, 2017.

SPOUSAL ISSUE

It was unclear from the parties' submissions whether they required a decision on the spousal issue if I concluded that JP was principally dependent for financial support on Steven T. Having made that finding that puts Certas as the priority insurer.

However, as the parties made submissions on the spousal issue I am going to address it.

In this case I agree with Certas that Steven T. and JP's mother were not spouses on the date of loss.

I carefully reviewed the definition under s. 224(1) of the *Insurance Act* with respect to spouse.

The first criteria that must be met is that Steven T. and JP's mother must have "lived together in a conjugal relationship outside marriage". As I have taken the three-week time period for the purposes of dependency I am going to use that time period as well on this issue. There is no specific time period set out under s. 224 for the individuals under this criteria as to how long they have to live together. The legislature did not see fit to require that an individual who was qualifying under 224(1)(c)(ii) can only do so if there is some specific time period met when they have been living together in a conjugal relationship. I conclude that as with dependency I must pick the timeframe that most fairly reflects the relationship between the parties at the time of

the accident. As with dependency I conclude that Steven T. and JP's mother had moved in together and established a "new normal" in terms of their conjugal relationship. I therefore find that on the date of the accident they were living together in a conjugal relationship outside marriage.

Neither party strenuously argued that the relationship between Steven T. and JP's mother was not one of some permanence. I find that it was a relationship of some permanence. JP's mother and Steven T. had been together since August of 2016 with the relationship ultimately culminating in a permanent change when they moved in together on June 1, 2017.

The key issue in my view is whether they would be considered "the parents of a child" on June 23, 2017. Here I conclude that Steven T. was not "the parent of JP" on June 23, 2017. While I appreciate "parent" is not a defined term and as Pafco points out the requirement that they be a natural or adoptive parent has been removed but I still conclude that while there was certainly a relationship between Steven T. and JP it had not reached the point where I can conclude that Steven T. would be the "parent" of JP. He was involved in his life. He was certainly a father figure. However, I find that the requirement under s. 224 that these individuals be the "parents of a child" in order to be spouses requires something more than there is on the facts before me. Steven T. and JP had only lived together for three weeks. From August 2016 to June 1, 2017 they did not live in the same house. They lived in different cities. I do not find that taking someone's child on a trip to the Dominican would be enough to move them up to the status of "parent".

Accordingly, I find that Steven T. was not a parent to JP and accordingly Steven T. and JP's mother were not spouses on the date of loss.

AWARD

I find that JP was principally dependent for financial support on Steven T. on June 23, 2017 and it therefore follows that Certas Direct Insurance Company is the priority insurer for payment of statutory accident benefits to JP pursuant to s. 268 of the *Insurance Act*.

I also find that JP's mother and Steven T. were not spouses pursuant to s. 224(1) of the *Insurance Act* on June 23, 2017.

COSTS

The parties submitted an Arbitration Agreement dated June 23, 2023.

This Agreement confirmed that the arbitrator's fees relating to the issue as between Certas and Pafco will be shared equally between Certas and Pafco only. This also includes the account of the court reporter.

Accordingly, the arbitrator's account as well as the cost of the court reporter will be split 50/50 as between Certas and Pafco.

With respect to costs paragraph 6 of the Arbitration Agreement provides that costs are in the

discretion of the arbitrator. This requires that I take into consideration any formal offer to settle, the conduct of the parties, any conduct that may have led to any unnecessary costs or delay.

No submissions have been made as yet on costs and nor am I aware as to whether I should be considering any formal offer to settle. Therefore, I am reserving on the issue of costs. I ask the parties to see if they can reach an agreement on the issue of costs in the next 30 days and if not they are to contact me so that we can arrange a further pre-hearing to deal with costs.

I would like to thank all counsel for their hard work in this matter and their most helpful submissions.

DATED THIS 5th day of January, 2024 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', with a long horizontal line extending to the right.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP