

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, section 268,
Regulation 38/10 and Regulation 283/95;

AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c. 17;

AND IN THE MATTER of an arbitration;

B E T W E E N:

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

-and-

DEFINITY INSURANCE COMPANY
(FORMERLY ECONOMICAL MUTUAL INSURANCE COMPANY)

Respondent

DECISION

COUNSEL

Amanda Lennox for the Applicant, The Co-Operator's General Insurance Company (hereinafter called "Co-operators").

Veronica Gorrell, counsel for the Respondent, Definity Insurance Company, formerly Economical Insurance (hereinafter referred to as "Definity").

INTRODUCTION

This matter comes before me pursuant to the *Arbitrations Act* 1991 to arbitrate an issue between the above-noted insurers with respect to a priority dispute pursuant to the *Insurance Act* and Regulation 283/95, as amended.

This matter arises out of an accident that occurred on October 31, 2022. The claimant was a cyclist travelling on Steeles Avenue when he was struck by a car insured by Definity.

Co-operators insures the claimant's son.

The claimant sustained some injuries in this accident and presented an OCF-1/Application for Accident Benefits to Co-operators.

Co-operators takes the position that the claimant was not principally dependent for financial support or care on his son at the time this accident occurred and accordingly they are not the priority insurer. Co-operators claims that priority lies with the striking vehicle: Definity.

ISSUES IN DISPUTE

1. Was the claimant principally dependent for financial support on his son at the time of the accident?
2. Which insurer is higher in priority to pay statutory accident benefits to and on behalf of the claimant as a result of the accident of October 31, 2022?

PROCEEDINGS

The parties chose me on consent to act as the arbitrator in this matter.

We held a number of pre-hearings. Ultimately this matter was set down for a written hearing. There was no oral evidence called.

The parties filed Written Submissions with various Books of Authorities. They filed a Joint Book of Documents which included the following:

1. Application for Accident Benefits dated November 17, 2022;
2. Various letters between Economical and Co-operators;
3. Statutory declaration of the claimant dated December 14, 2022;
4. Certificate of Divorce dated May 26, 2026;
5. Statutory Declaration of the claimant's son dated January 17, 2023;
6. Various bank statements from October 2022 to December 2022 of the claimant;
7. Notices of Assessment of the claimant for 2021 and 2022.

No EUOs were conducted so there was no transcripts filed.

The parties also submitted a signed Arbitration Agreement dated May 22, 2024.

AWARD

Having reviewed all the materials, the case law and the submissions of the parties, I conclude that the claimant was not principally dependent for financial support on his son on October 31, 2022 and accordingly Definity is the priority insurer responsible for paying statutory accident benefits.

SUMMARY OF FACTS

The claimant was approximately 72 years old on the date of loss. He was not employed. He was

divorced from his wife in approximately May of 2016.

On the date of loss he was residing with his son, his son's common-law partner and his two grandchildren in Markham.

The claimant has lived in Canada for 19 years and five months. He has lived with his son for slightly over 12 years.

He does have another child but that child lives in Richmond Hill and it does not appear that he has ever resided with his other child.

While the claimant was not employed, he did have sources of income.

He received \$1,682.38 per month from Old Age Security.

He received \$55.56 per month from Canada Pension Plan.

There does not appear to be any dispute between the parties that the claimant did not have access to any other Canadian or non-Canadian income, pension or government income. He does report that his other child gave him \$500 one year for Chinese New Year.

There is no evidence that he received any money from friends or family on a monthly basis in the year prior to the accident. He did not have access to any extended health care benefits. There is no evidence that he owned any property in Canada.

The claimant did not have a driver's licence. He did not own a car. He was not covered under any automobile policy of insurance in his name.

The claimant's son indicated that his father would help with some child care, housekeeping and some cooking while living in the home.

With respect to expenses, the evidence from primarily the Statutory Declarations indicated that the claimant contributed rent to the family household of \$250 a month. He also paid his monthly expense relating to his phone bill of \$28.25. He did not contribute any other money to the household.

According to the son, the household had the following expenses:

1. \$453.16 for property taxes
2. \$163.70 for hydro
3. \$69.60 for heating and cooling expenses
4. \$67.79 for the home phone and the internet

According to the son's Statutory Declaration, three family members are responsible for contributing to these expenses: the son, his wife and the claimant. There is no breakdown with respect to who contributes what. There is no evidence as to whether this family had a mortgage and if so who paid it.

The son himself has the following expenses that he shares with his spouse:

1. Car insurance \$183.50
2. Gas \$200
3. Public transportation \$128
4. Car maintenance and repair \$50

Lastly, the son's Statutory Declaration indicates that he and his spouse share in the expenses of groceries per month estimated at \$1,500 and entertainment estimated at \$100.

The claimant, when asked to list all his monthly expenses, he only listed the phone and the rent that I have noted above. There is no reference to any mortgage, heating, hydro, parking, insurance etc. I take it from the question that that was asked because he did not consider those to be his monthly expenses. I accept the son's evidence that the father, through his contribution of rent of \$250 a month, was making a contribution to the joint family expenses as outlined.

It appears that the claimant's son and his daughter-in-law work in a restaurant. There is no information about their earnings at this restaurant, no tax returns were filed.

The Notice of Assessment for the claimant for 2021 showed income of \$19,689 and for 2022 showed income of \$20,798.

The bank statements of the claimant were produced for a relatively limited period (October 2022 to December 2022). These showed the deposits for Old Age Security and for the Canada Pension Plan benefits. There was also indication of income being received from the guaranteed annual income system (GAINS). This was shown on these returns at \$56 per month. The bank statements also showed payment for goods and services tax of \$116.57 for the month of October and \$233.57 for the month of November.

I agree with counsel for the Applicant that while no other bank statements are shown, that a reasonable inference is that the claimant received the standard GST credit for single adults for quarterly payments of \$467 and the climate action incentive for quarterly payments of \$373 for a single adult.

It should be noted that the grandchildren with whom the claimant lived were ages 12 and 11 approximately at the time this accident occurred. The claimant also reports in his Statutory Declaration that he had no household responsibilities or childcare responsibilities that he undertook in the home in exchange for income. I take this to mean that the claimant was not

paid for any housekeeping and childcare services as he did but rather as suggested by his son that they were done in return for accommodation instead of remuneration.

The claimant's mode of transportation was primarily a bicycle although his son would drive him to some appointments.

On the date of loss, the claimant was on a bicycle.

He applied to Co-operators for statutory accident benefits submitting an OCF-1 dated November 17, 2022 and received by Co-operators that same day.

Co-operators served a Notice to Applicant of Dispute Between Insurers dated November 24, 2022. This arbitration was then commenced on September 14, 2023.

POSITION OF THE PARTIES

Co-Operators

It is Co-operators' position that the claimant was not principally dependent on Co-operators' insured: his son at the time of the accident.

Co-operators submits that the claimant's living situation had been stable for some 12 years prior to the accident. His total income reported for 2021 was \$19,689 and for 2022 it was \$20,798 without taking into consideration any quarterly payments for CAI or GST.

Co-operators submits that an appropriate time period to look at the question of dependency would be the 22 months prior to the accident (January 2021 to October 31, 2022). This, submits Co-operators, is a time period that fairly reflects the status of the parties at the time of the accident as well as the facts of this case.

Co-operators submits that there are numerous approaches that have been used with respect to determining principal financial dependency.

The common test that is used in determining principal dependency is the 50% + 1 test. As enunciated by Arbitrator Samis in *Federation Insurance Company of Canada v. Liberty Mutual Company*, decision May 7, 1999 (upheld by Justice O'Leary and the Court of Appeal April 10, 2000), the question to ask is, is the insured 51% dependent on another person for financial support? If the answer to that is yes, that establishes a principal dependency.

Co-operators points out that some of the criteria to look at in determining dependency as set out by the Court of Appeal in *Miller v. Safeco* (1985 Carswell ON 787) are:

1. Amount of dependency
2. Duration of dependency

3. Financial or other needs of the alleged dependent
4. The ability of the alleged dependent to be self-supporting

Co-operators also points to the fact that in recent years arbitrators have found new and different ways to try to determine financial dependency that do not rely on the old mathematical approach in order to calculate the 51% issue. The mathematical approach generally involves taking the claimant's sources of income and what the claimant's expenses are and then determining if the claimant is able through his sources of income to cover 51% of those financial needs or whether someone else provides for those needs and that is above 51%. Many arbitrators have commented that the mathematical approach is fraught with inaccuracies due to the lack of information available in many of these cases.

The newer approach that has been adopted is to use some government statistics rather than make guesstimates of various expenses. Some arbitrators have used the low income cut off statistics from Statistics Canada and others more recently, particularly Arbitrator Samis, have preferred to use the statistical data in the Market Basket Measure (MBM). Arbitrator Samis endorsed this in his decision *Wawanesa Mutual Insurance Company v. State Farm Insurance Company*, 2018 Carswell ON 1648. Co-operators point out to the fact that many arbitrators subsequent to arbitrator Samis's decision have adopted the same approach.

Co-operators specifically makes reference to Arbitrator Bialkowski's decision in *North Waterloo Farmers Mutual v. The Guarantee Company of North America*, 2019 Carswell ON 16484 wherein he used statistical information from Stats Canada based on an individual in a one-person household as opposed to adding up everyone in the household and then relying on the statistical measure for that size of household and dividing it up per person to determine the MBM that would relate to the insured. For example, if there were four people in the home, some arbitrators would look at the MBM statistics for a four-person home and then divide that by 25% to determine an individual's needs. Arbitrator Bialkowski endorsed a better approach as being taking an individual in a one-person household and comparing that statistic in terms of needs to the income available to the insured person.

Co-operators submits that this approach by Arbitrator Bialkowski is the best approach to use in the circumstances of this case and that if one adopted that approach, that clearly the claimant would not be principally dependent for financial support on his son.

Co-operators submitted that the MBM for an individual not in an economic family in 2020 in a large urban population between 100,000 and 499,999 people was \$22,170. If one adjusted that for inflation for the year 2021, Co-operators calculated the MBM at \$22,412.03 and for 2022 at \$23,686.72. Co-operators submits the category of an individual in a non-economic family for the large urban population noted above is the appropriate statistics for this claimant.

Co-operators then submits that if you take the total income that the claimant reported for 2022 of \$20,798 (exclusive of GST and CAI payments) then the claimant meets 166% of the 2022 MBM of \$23,686.72. Similarly if one takes the year 2021 with the claimant's income of \$19,689 he

meets 175% of the 2021 MBM \$22,412.03. This, Co-operators argues, means that the claimant has well over 51% of the income needed to meet the needs based on the MBM statistical data.

Co-operators submits that the same result comes about if you use the LICO (low income cut off). The low income cut off before tax for 2021 for an individual in the same urban population numbers was \$23,696. Adjusted for inflation for 2022 Co-operators calculates this at \$25,043.72. If one applies the claimant's income as was done with the MBM the result is that he meets 166% of the 2021 LICO and 157% of the 2022 LICO.

Co-operators submits that there is no need to go any further than this as that clearly indicates the claimant is not principally dependent for financial support on his son. Co-operators submits that the fact he lived with his son and his son chose to pay for the household expenses and only seek rent of \$250 from his father does not establish principal dependency.

Lastly, Co-operators addressed the “big picture approach”. This is another choice that arbitrators have used in the past to assess financial dependency. Co-operators points out that generally this has been used where the available evidence is insufficient or is contradictory as to what the actual needs or resources were of a claimant at the time of the accident. Co-operators submits that in this case there is clear evidence with respect to the claimant's earnings, that the use of statistical data with respect to his needs is appropriate and consistent with the case law and that that analysis results in a finding that there is no dependency.

With respect to their position on when the “big picture” argument should be made, Co-operators relies on the *Dominion v. Allstate* decision of Arbitrator Bialkowski, 2023 Carswell ON 1338.

Definity

Definity's position is that the claimant is principally dependent for financial support on his son.

Definity points to the fact that Co-operators has the burden of proof. Co-operators chose not to conduct any EUOs and to rely on two Statutory Declarations, bank statements and Notices of Assessment.

Definity submits that this is a case where there is insufficient evidence with respect to the claimant's monthly expenses. Definity points to the Statutory Declaration where the claimant did not fill in any information about expenses relating to mortgage, heating, hydro, parking or transit. Definity submits that these were left blank because the son was responsible for paying for them.

Definity also submits that one should not include in any calculation of the claimant's income anything for GST or climate action incentive other than the single payments shown on the monthly bank statements produced. Definity submits that those should not be converted to a yearly amount as there is no evidence to support that. Definity points to the fact that the Notices of Assessment for the tax returns for 2021 and 2022 do not include amounts received for these

benefits and therefore there is no documentation to substantiate that they were received. The bank statements are for a period post-accident and not pre-accident. Definity also submits that I should not draw an inference that these amounts were received.

With respect to the time period to assess dependency, Definity really does not disagree with Co-operators and notes whether you choose a period of one month, one year or 12 years (the latter being the time that the claimant lived with his son) that the result will be the same as the facts are the same. Throughout whatever time period you pick, the claimant was principally dependent financially on his son.

Definity points to the fact that the son paid for the majority of the living expenses relating to his father. He paid for the mortgage, he paid for groceries, he drove him, he paid for the hydro, he paid for the internet. Definity submits that this is a big picture case. Definity submits that there is a lack of evidence available particularly with respect to the claimant's expenses and how things were handled in the household.

Definity submits that the analysis of dependence in this case should be practical and functional and to look at the overall circumstances of this family. Definity makes reference to the decision of Justice Faeita in *Allstate v. Intact*, 2016 ONSC 5443. That case involved a 76-year-old who lived with her daughter and daughter's family. Justice Faeita used the big picture approach in that case. Definity relies on the following comment from Justice Faeita:

“It is my view that the phrase ‘principal dependent for financial support’ refers to a person who mainly relies on another person to provide him or her with the necessities of life including shelter.”

Definity also relies on an earlier decision of mine in the case of *Intact v. Economical* (December 14, 2015) wherein I commented that there is merit to approaching a dependency case not just by reviewing a purely mathematical analysis or a purely statistical analysis, but to look at the big picture. I suggested that one must look at the family circumstances in a holistic and general way and we should be “attuned to the totality of the circumstances and the big picture of the claimants’ lives”.

Definity submits that taking that approach then clearly the claimant would be found principally dependent for financial support on his son. Definity notes that the son was paying for 50% or more of his father's expenses and it is irrelevant as to whether or not the claimant had the income to do that himself.

Definity therefore submits that looking at the big picture a conclusion should be clearly drawn that the claimant was principally dependent for financial support on his son.

Co-operators’ Reply

Co-operators submits that this is not a case where there is an absence of reliable evidence about

the claimant's financial means. There is consistent documentary evidence with respect to the claimant's income as declared to Revenue Canada. That income is clearly sufficient to meet his statistical needs or his declared expenses should you rely upon those.

Co-operators submits that the use of statistics in this case is not arbitrary. There is no dispute of what time period to consider for dependency and therefore there is no dispute over that issue which could otherwise suggest the big picture approach may be helpful.

With respect to *Allstate v. Intact (supra)*, Co-operators submits that Justice Faeita only supported the big picture case in that case because of the facts before him. In that case Co-operators notes that there was a question as to the reliability of the income reported on the claimant's tax returns and that the facts surrounding that claimant's circumstances with her family were quite different.

Co-operators submits that there has been an evolution in the application of the big picture approach and more recent case law suggests it is only reserved for those cases with insufficient evidence to apply the 50% plus 1 analysis based on statistical means and known income.

Co-operators refers to Arbitrator Bialkowski's decision in *Dominion v. Allstate*, 2023 Carswell ON 1338 where Arbitrator Bialkowski points out that where there is clearly solid available evidence with respect to statistical needs and available resources, that the big picture approach should not be applied.

Lastly, Co-operators submits that the test of principal financial dependency is not whether the claimant could live in a different setting by himself but rather the test is whether the claimant had sufficient income to cover more than 51% of his statistically determined needs.

DECISION AND ANALYSIS

The key to determining dependency in the context of a priority dispute is found within the Statutory Accident Benefit Schedule where dependency is defined as follows:

“For the purposes of this Regulation, a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse.”

Both Co-operators and Definity agree that the lead case which should guide my deliberations is the decision of the Court of Appeal in *Miller v. Safeco (supra)*. I set out those criteria earlier and I have the following comments.

With respect to the duration of dependency the parties all agree that it does not matter whether I pick 12 years, 22 months or one month, that the argument would be the same. Therefore, for the purposes of my analysis I have picked the period of one year prior to the accident.

With respect to the ability of the claimant to be self-supporting again the parties all agree that this gentleman was in his 70s, was not employed on the date of loss and was not capable of earning any income. His ability to be self-supporting flowed solely from his government pensions, notably his 2021 income of \$19,689 and 2022 income of \$21,638.

While it is unusual to hear a case on dependency that does not include either oral evidence or transcripts from an examination under oath, I do find that there is more than sufficient evidence before me to make a determination of the claimant's financial resources. This claimant's resources were relatively limited and clear. He was receiving primarily Old Age Pension of \$1,682.38 per month as well as CPP of \$55.56 per month. I also find that he was likely receiving some amounts for GST and HST. I do not agree with the Respondent that I should not take these payments into consideration and that I cannot draw certain inferences from the bank statements.

The first bank statement we have covers the time period September 29, 2022 to October 31, 2022. It clearly shows a payment for GST of \$116.75 on October 5 which predates the motor vehicle accident. Similarly there is a payment for CAI on October 14 in the amount of \$93.25. This payment also predated the accident. I agree with the Applicant that it is a reasonable inference to draw that this reflected quarterly payments for GST credit and CAA payments for the amount of a single adult. I do note that there was another payment for GST on November 4 for \$233.50. However, even if I exclude these payments I still find that the claimant's income for 2021 or 2022 was more than sufficient to cover 51% of his statistical needs.

With respect to how to calculate dependency I agree with my fellow arbitrators that resorting to the mathematical approach should be avoided if possible. In my view, rarely as an arbitrator have I seen clear and consistent information with respect to various household expenses supported by relevant documentation. I accept that the statistical analysis provided by the MBM far better reflects a reasonable analysis of an individual's expenses even though it is not personalized and is done on a statistical basis. I do not see Definity arguing against this approach in the right case. Rather, Definity takes the position that this case is better for an application of the big picture approach.

My preference is to use the Market Basket Measure. I agree with Arbitrator Samis that it best represents the statistical information about an individual's or a household's needs. I also agree with Arbitrator Bialkowski that when applying the statistical analysis that you should not take the statistics for the whole household and then divide that up equally between the various members of the household to determine what the statistical needs of an individual are. The question is whether or not an individual can provide for 51% of his needs. Therefore it should be an individual's needs that we analyze.

Therefore, I accept the submissions of Co-operators that in this case I should look at the claimant's financial resources and see whether he is able to cover 51% of his statistical needs as shown by the MBM for an individual not in an economic family. I accept Co-operators submissions that the indexed amount for the MBM for the year 2022 will be \$20,686.72 and for the year 2021 will be \$22,412.03.

If you take the claimant's income for either 2021 or 2022 and compare that to his statistical needs, there is no doubt that he has more than 51% of income available to cover those needs.

As is evident from my conclusion above, I disagree with Definity that this is a case where the big picture should be applied. There is more than enough evidence available to me to make a decision based on the evidence surrounding the claimant's available income and his statistical needs to determine principal financial dependency. I do not need to resort to the more nebulous "big picture approach".

I also point out that the factual situation in this case is one where an elderly gentleman's family has chosen for cultural reasons or otherwise to have the father live with them. This is not an unusual set of circumstances. I accept that the claimant probably contributes something towards housekeeping and helps with the children. We know he makes a financial contribution to the family of \$250 a month. There is no evidence before me as to how that sum of money was chosen. There is certainly no evidence that the family had to take in the father and cover his expenses as he was unable to live otherwise. Rather, this seems to be a set of circumstances where the claimant is, on a voluntary basis, being cared for by his family who have chosen to cover his expenses whether due to cultural implications or out of love and the claimant has not been forced to expend his own income on his own needs. As I have remarked in other cases where ostensible dependency is voluntary, it does not necessarily flow that it constitutes principal financial dependency under the Statutory Accident Benefits Schedule.

As has often been given as an example in other cases, if a millionaire chooses not to work and lives with his family and have them cover all his expenses and makes no contribution to the family, one cannot say that that individual is principally dependent for financial support.

Taking all the case law that was submitted to me into consideration and the excellent arguments made by both counsel I conclude that the claimant is not principally dependent for financial support on his son. I reach this conclusion whether I apply a statistical analysis based on MBM or LICO and I also conclude that that would be the result even if I applied the big picture approach.

ORDER

In response to the question in the arbitration posed by the parties I find that the claimant is not principally dependent for financial support on his son and therefore Definity as the striking vehicle is the priority insurer responsible for paying statutory accident benefits with respect to the accident of October 31, 2022.

COSTS

According to the Arbitration Agreement both legal costs and arbitration costs should be awarded to the unsuccessful party.

In this case Co-operators has been entirely successful and therefore I order that Definity pay the costs of the arbitrator as well as the legal costs.

With respect to legal costs I ask the parties to make best efforts to reach an agreement on those legal costs and disbursements. If they are unable to do so they are to notify me within 60 days and we will schedule a further pre-hearing.

DATED THIS 17th day of October, 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
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