

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,  
and Ontario Regulation 283/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

STATE FARM INSURANCE COMPANIES

Respondent

## **AWARD**

### **Counsel Appearing**

Donald G. Cormack for the Applicant

Mark Donaldson for the Respondent

### **Introduction**

This matter comes before me as an arbitration between two insurance companies who are disputing priority with respect to payment of Statutory Accident Benefits.

This claim arises out of an accident which occurred on November 30, 2006. At that time the claimant Mariela M.<sup>1</sup> was involved in a motor vehicle accident when she was a pedestrian. She was struck by a vehicle which was insured by the respondent State Farm.

It is understood that she did not have access to any policy of insurance in her own name or where she was a listed driver. She applied for benefits from ING Insurance Company. ING was the insurance company of her father.

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<sup>1</sup> In consideration of the privacy interests of witnesses who were required to testify about their personal affairs, I have deleted reference to surnames.

This priority dispute comes before me to determine which of the two insurers, ING or State Farm, is the highest priority insurer for the payment of statutory accident benefits. This turns on a question of dependency.

### **Legal Framework**

The parties to this arbitration are very familiar with the operation of the Statutory Accident Benefits Schedule and the priority regime applied by the *Insurance Act*. In effect, the compensation scheme in place in Ontario provides numerous opportunities for an injured person to claim Statutory Accident Benefits if they have been involved in a motor vehicle accident.

The person can claim benefits from the insurer of the vehicle they were an occupant of, the insurer of a vehicle involved in the accident, the insurer with whom they have a relationship as a named insured, and the insurer of persons upon whom they are dependent, amongst others. These numerous relationships which give rise to insurance entitlement are a safeguard to increase the likelihood that an accident victim will have somewhere to turn for these benefits, regardless of the person's direct relationship with any particular insurer.

Of course, this leads to the very common situation that a particular individual may have recourse for Statutory Accident Benefits against more than one insurer. Section 268 of the Insurance Act sets that a scheme of priority to allow the insurers to determine which of the insurers has the obligation to pay those benefits.

Under Ontario Regulation 283/95 a procedure is set out to allow insurers to resolve a dispute about that priority. The procedure calls for arbitration in accordance with the *Arbitrations Act*, 1991 and this is the proceeding that has been followed in this particular case.

### **The Issue**

At this juncture the critical issue is stated in Item 2 (d) of the Arbitration Agreement entered into by the parties as follows:

**"At the time of the November 30, 2006 accident was the claimant, Mariela M., a dependent of ING's named insured, Vicente M., as per the definition found in s. 2 of the Statutory Accident Benefits Schedule?"**

This comes down to a question of determining whether Mariela M. was principally dependent on Vicente M., her father, for financial support at the time of the accident. In accordance with Section 2 of the Statutory Accident Benefits Schedule, Ontario Regulation 403/96, dependency has a very specific meaning as follows:

**"[6] For the purpose of this regulation, a person is a dependent of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse."**

### **The Evidence**

Exhibit 2 to the proceeding is an Agreed Statement of Facts which forms the core of the record of this proceeding. That Agreed Statement of Facts confirms that Mariela M. came to Canada from Ecuador on September 9, 2006 and she was sponsored by her father Vicente M. for that purpose.

It is confirmed that the accident in which the claimant was involved on November 30, 2006 was an accident in which she was a pedestrian. The operator of the vehicle involved was insured by the respondent State Farm. Accordingly State Farm was the insurer of an involved vehicle and the claimant can, in certain circumstances, have recourse to State Farm for the payment of Statutory Accident Benefits.

At the time of the accident the claimant lived with her family in a three-bedroom apartment in the Toronto area. The nature of that household arrangement is pertinent to understanding whether or not it is evidence of a dependency relationship between the claimant and Vicente M.

At the time of the accident Vicente M. was a named insured on the policy with the applicant, ING Insurance Company of Canada.

Mariela M. did not have her own motor vehicle policy, which eliminates the possibility of a higher ranking coverage than the coverage that may be available to her from either the applicant or respondent in this matter.

In the Agreed Statement of Facts, Exhibit 2, it is confirmed that at the time of the accident this claimant was 20 years old and was employed on a full time basis at Custom Wire and Bar Limited as a machine operator earning a gross income of \$369.00 per week.

In addition to the Agreed Statement of Facts the parties submitted a document brief which was marked as Exhibit 3 to the proceedings which includes the motor vehicle accident report, excerpts from transcripts of examination of Mariela M. and Vicente M., the Application for Accident Benefits dated December 20, 2006, and the employer's confirmation form dated December 11, 2006.

I was also provided with transcripts of the examination under oath of Mariela M. which took place November 25, 2010. At that time Mariela M. testified that at the date of the accident she was living in an apartment on Victoria Park Avenue with her father, his wife, Mariela M.'s half-sister, and her stepmother's three children. She testified that she came to Canada on September 9, 2006 and she arrived here with her half-sister, Jenny. They came to Canada from Ecuador where they had lived their entire lives prior to that transition. They came to Canada with the intention to stay here permanently and they were sponsored to do so by her father Vicente M.

At the time that she arrived she could speak no English. She did not know anyone in Canada other than her father.

Prior to coming to Canada she had been a student in Ecuador. She was doing some kind of university work with computers but only finished one year of that program as she immigrated.

As soon as she arrived in Canada she came to live in the apartment on Victoria Park with her father. She did not live anywhere else prior to the accident.

She described the apartment as being a three-bedroom apartment.

She quickly found employment in Canada at Custom Wire. Her father was a foreman there. It was a full time job that she had there. The testimony indicated that she started in early October

and continued there until the day of the accident. Documentary evidence suggests that she probably started the job a little earlier than that.

She worked regular hours Monday to Friday and did not take any time off prior to the accident. She described her job as cutting wires in different sizes. Her father, who worked at the same location, provided transportation for her to and from work.

The following exchange is found at Question 62:

**Question: Did you give your father any money for rent or food when you were staying with him?**

**Answer: He paid for everything.**

**Question: And was that the case right up until the time of the accident?**

**Answer: Yes.**

**Question: Now the trip from Ecuador, who paid for that when you came to Canada in September?**

**Answer: He did.**

Mariela M. also testified that prior to her departure from Ecuador her father had provided her with financial support in the form of a regular monthly payment of about \$200.00 U.S.

Mariela M. deposed that her pre-accident health was good. She didn't have any medical conditions which required her to take any medicine. She was a normal healthy person.

When she came to Canada she was unable to speak any English at all. She immediately became involved in a program to learn English through something known as the Link course. It was an evening course that took place from 6:00 p.m. to 9:00 p.m. every night. Her normal work day at Custom Wire started at 7:00 a.m. and she finished at about 4:30. She would then go home, have something quick to eat and then go to the course.

She did also do some household chores on Saturdays, with her sister. She described this as doing things like sweeping, mopping, sometimes cooking, helping do the laundry and going to the grocery store.

Vicente M. was not charging her any rent to stay in the apartment after she came from Ecuador. She kept the money that she earned she did not give any to him. She used it for her own expenses.

She also testified that her father gave her some money from time to time. The record is a little unclear on this as to whether or not that payment of money continued at the same pace both prior to her finding work as it did after. The witness was unable to remember how much money it was. She has volunteered "He would give me money for the bus." When pressed on the issue of this money flowing from her father, Mariela M. indicated that she was provided with a Metropass which she valued at \$100.00. I understand that to be a monthly expense. In her testimony she volunteered that her father may have given her money "for the weekends" -- b\$100.00 or more, or something like that. The witness testified that prior to the accident she was accumulating money in her bank account. She thought that the savings would have accumulated to something like \$800.00 at the time of the accident.

In terms of expenses she acknowledged having a cell phone that she paid for. Her father had provided her with a phone but she was paying the monthly fees. She was pressed to recall the monthly cost for the cell phone and thought it was about \$60.00.

There was an exchange at Question 170 of the examination which is illuminating with respect to the nature of financial contribution coming from Vicente M. to Mariela M. The witness was queried as to why she was still getting money from her father when she had money in her bank account from her job. She answered:

**"Well, I think in personal opinion because my dad left when I was seven, so a long time he doesn't went there and he doesn't send me money for a long time. I think he was giving me, I don't know. To – how can I say that?"**

**Question: To try to maybe make up?**

**Answer: Yes. Exactly.**

**Question: And would you be asking for it or would he just give it to you?**

**Answer: No. He was just giving to me."**

The witness also testified that she purchased a lot of her own personal items such as cosmetics and so forth.

She was questioned about whether or not she had the intention to leave that household arrangement that she was in at the time of the accident. She had been there since arrival to Canada, but that was only a few months. In her testimony she indicated an intention to stay in that arrangement for the foreseeable future while she got herself settled.

On the same date that Mariela M. testified, the father, Vicente M., was subject to examination under oath by counsel for the parties.

He testified about the family arrangement. He confirmed that at the date of the accident he was living in an apartment at 1690 Victoria Park, Apartment 102. In that apartment he was living with his wife and three children, including Mariela M. He confirmed that he had sponsored her to immigrate to Canada and that she had been in Canada for 60 or 90 days at the time of the accident.

He confirmed that she arrived from Ecuador in September of 2006 and that she had lived with him and not elsewhere, until the time of the accident.

He was instrumental in helping Mariela find employment. Vicente M. describes himself as a manager at Custom Wire and Bar Limited. He did not have a job arranged for her at the time she arrived in Canada but he subsequently took her to the factory so she could help there. That happened at about one month after her arrival. He confirmed that he obtained a full time job for Mariela M. and that she worked the same hours as he worked. He thought that his daughter had worked for about \$9.00 or \$9.50 an hour. His testimony was that she only had three to four weeks of work by the time of the accident on November 30, 2006.

He confirmed that he provided her transport to and from work free of charge. He also confirmed that he didn't charge Mariela M. any money for living in the apartment and didn't charge her for food or anything else.

Vicente M. gave a breakdown of the household expenses. This assists in understanding the cost of meeting Mariela's needs. He testified that the rent for the apartment (shared by seven people) was \$1,250.00 per month and the food expenses were \$250.00 per week. He was asked whether that included his utilities and he indicated that everything was included because it was a condominium.

Vicente M. testified that Mariela M. had not given him any money to help out with expenses prior to the accident. Vicente M. had an interesting perspective on the informal pocket money being given to Mariela M. He said:

**"If she asked me for \$10.00 or \$20.00, I would give her \$10.00 or \$20.00 as she didn't have enough money, she arrived at the end of the month with shorter money, I would also help her."**

In the documentary brief marked as Exhibit 3, I found the following items of interest.

At Tab 2 there is an Application for Accident Benefits completed by or on behalf of Mariela M. on December 20, 2006. She indicates that she is making her claim as a pedestrian, against the policy of the person upon whom she was a dependant. One could infer that Mariela was defining herself as a dependant of her father by that form submission. I don't put too much weight on this description as this is simply completion of a form by somebody who probably had very little sense of the highly technical meaning of dependency as that term is used in the Statutory Accident Benefits priority scheme. Aside from language issues, the SABS concepts of dependency and the significance of the concept would be completely opaque to Mariela and most any other person completing such a form.

At Tab 6 of Exhibit 3 is an employer's confirmation form with respect to pre-accident income for Mariela M. That form indicates that she commenced employment on September 25, 2006 and appears to have worked steadily until the date of the accident and indicates that she last worked on November 30, 2006. Her gross income in the ten weeks that she worked was \$3,600.00. This information seems entirely in order. It is consistent with the testimony of the witnesses and is entirely reasonable. I accept this.

At Tab 7 of Exhibit 3 are banking records which appear to be banking records for the claimant. At Page 3 of these records it appears that the bank balance in the claimant's account at about the time of the accident would have been approximately \$1,000.00. This is a little more than recalled by Mariela in her testimony. I don't put any significance on the slight discrepancy between the records and the witness's recollection.

## **Analysis**

The legal principles in play are well established, and not in dispute.

In short, if Mariela M. was principally dependent for financial support on her father at the time of the accident, ING is the highest ranking insurer. If she was not principally dependent for financial support on her father at the time of the accident, State Farm is the highest ranking insurer.

At the time of the accident Mariela M. had only been in the country for about three months. She came to Canada from Ecuador on September 9, 2006. She was sponsored to come by her

father and he paid for her airfare to travel here. Prior to her arrival in Canada he had been giving periodic financial support to her while she was in Ecuador. It seems that that support was sporadic.

When she came to Canada she moved in with her father and lived with him and her stepmother, their son, and two of the stepmother's children from a previous relationship. Her sister also lived there. They all lived in a three bedroom apartment in the Toronto area.

Mariela M. was a young woman. At the time of the accident she was 20 years old.

Although she had only come to Canada a few months earlier, the claimant was employed full time. At Tab 5 of Exhibit 4 there is a letter from Custom Wire and Bar Limited dated December 14, 2010.

This letter confirms that Mariela was employed by Custom Wire and Bar Limited from September 25, 2006 to November 30, 2006 as a general laborer. She worked a total of 400 hours during that time at an hourly wage of \$9.00 per hour. This seems to indicate a work week of approximately 40 hours per week.

Attached to the letter is a schedule of insurable earnings which shows weekly wages generally in the range of \$369.00 per week. The employment seems to have been remarkably steady and consistent. There doesn't seem to have been any issue with attendance, sick absences or other problems. As far as can be determined she was a good employee. There is nothing transitory about her employment relationship that I can discern from the record.

Clearly Mariela M. was being supported by her father in many respects. Evidently he had assisted her in finding the job. He drove her to and from work. (I gather that he worked at the same location.) He welcomed her into his household. She was provided for as a member of the family. No doubt it would have been difficult for Mariela M. to get by in Canada without this extended range of assistance from her father.

However, the question which I need to address is whether or not she was principally dependent for financial support at the time of the accident.

In order to make that evaluation it is important to determine a timeframe that can be examined as a reasonable representation of her status at the date of accident. She was a young person in a state of considerable transition, moving from her life in Ecuador to a new life in Canada.

The case law is clear that the selection of an appropriate window for evaluation requires identification of the timeframe that is reasonably reflective of the status on the day of the accident. In this regard I note that on the date of the accident she was employed on a full-time basis, she was living in her father's household. She was attending night school in Canada. She had limited entertainment expenses which seem to have consisted of attending restaurants on the weekend. She contributed her labor to the household by performing some limited amount of chores on Saturdays around the house.

In my view, the household and personal circumstances of Mariela M. for the period September 26, 2009 to the date of the accident is the time period which best reflects her status. This is a period of time during which she was employed, residing in the household, contributing her labor, attending school and so forth. Therefore that is the most appropriate timeframe to consider for the purposes of evaluating her financial dependency.

It is important to bear in mind that Mariela was a new resident in Canada. She was sponsored to come to Canada by her father. In the materials before me, at Tab 4 of Exhibit 4 is an application to sponsor and undertaking in respect of Mariela's entrance to in Canada. By that document her father has essentially sponsored her to enter the country. Critically, at Section G of the document there is an undertaking wherein her father has undertaken to provide for the basic requirements of the sponsored person if she is not self-supporting. He promises to provide food, clothing, shelter, fuel, utilities, postal supplies, personal requirements, and other goods and services, including dental care, eye care, and other health needs not provided by public healthcare.

This is a rather rigorous undertaking as part of the sponsorship process. It certainly indicates that the father has accepted a responsibility for providing for the needs of his daughter.

This is not an irrelevant fact. However, as things turned out, his daughter quickly became fully employed and remained steadily employed earning about \$370.00 per week.

Therefore, discharge of that undertaking was considerably moderated by the fact that Mariela M. had resources to put towards meeting her own needs. Mariela did not have to call upon her father's commitment to backstop the cost of meet her needs.

Understanding the nature and extent of Mariela M.'s needs is a nebulous process, as it is in all of these cases.

We can estimate the cost of meeting a person's needs by looking at household circumstances. In this particular instance the parties have put to me the figures of the budget of the household which is understood to be \$1,250.00 per month for shelter expenses, inclusive of utilities and further an additional \$1,083.00 per month for groceries. Mariela M. did not contribute to these costs but received the benefit of these expenditures. This is the total cost for providing for four adults and three children.

It is truly an imprecise science to attempt to allocate those costs to any particular individual member of the household. Counsel suggested to me that we should view Mariela M.'s share as being 25 percent of that cost, essentially treating the children as having no draw on that expenditure. This is a concession that tends to err in favour of Mariela M. being found dependent, but even then, it is submitted, she has sufficient assets to meet those needs. The position of the applicant is that Mariela M.'s share of the household expenses would be \$583.00 per month. Since she was earning \$369.00 per week, she had more than adequate resources to meet 51 percent of her needs.

In addition to those household expenses she had personal expenses with respect to her cell phone that varied between \$55.00 and \$100.00 per month. She also had her personal entertainment expenses.

Certainly based on those figures, it is hard to conceive of Mariela M. as being a person principally dependent for financial support on her father. She had the wherewithal to meet her share of the household expenses to a very large extent, and certainly more than 50 percent. Principal dependency implies that she would have required someone else to contribute 50 percent or more of the cost of meeting her needs. She did not have that requirement based on these numbers.



There are ancillary issues with respect to the dependency relationship which affect the evaluation, at the margins. What should we do about the fact that the father provided transportation to and from work? He was going to work anyway, but it alleviated Mariela M. from having an expenditure for that transportation. Does this factor into the dependency situation since it is essentially a benefit flowing from the father to the daughter? Furthermore, what shall we make of the fact that she was being provided with a bus pass. That would have a value of \$120.00 or so a month.

In my view it is clear that Mariela had financial resources from her employment which amount to about \$1,600.00 per month. She may have had the capacity to earn more if she hadn't been distracted with her English as a second language course or if she had been paid for work on the weekends which she otherwise contributed to the household, although I see this as being a minor component.

When I contrast the financial resource of \$1,600.00 a month associated with Mariela M.'s labour force attachment, against the total costs of meeting her needs, which are much less than that amount, there's no question that she's not principally dependent for financial support on her father. She has more than adequate resources to meet 50 percent of her needs.

I am not unmindful of the fact that she is a new person in the country and has enjoyed other forms of assistance and support from her father as she came into the country. He assisted her before she left Ecuador, he assisted her in traveling to Canada both with the traveling expenses and with the undertaking for the government. All of these things are important in the family context and are a great benefit for Mariela flowing from her father. However, for the purpose of dealing with the priority scheme for accident benefits, I need to regard the question of financial dependency and whether or not there was principal dependency on her father at the time of the accident.


### **Conclusion**

Having selected a timeframe that is representative of the date of the accident as being a period of time during which she was employed, I cannot come to the conclusion that she was principally dependent for financial support on her father at the time of the accident.

Therefore I conclude that priority for this case rest with State Farm Insurance Companies.

If the parties wish to make submissions with respect to cost, please let me know within the next 30 days.

Dated at Toronto this 26<sup>th</sup> day of May, 2015.



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LEE SAMIS  
Arbitrator