

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:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

SECURITY NATIONAL INSURANCE COMPANY

Respondent

## **AWARD**

### **Counsel Appearing**

Shelley Khan for the Applicant

Benjamin Lee for the Respondent

### **The Loss Circumstances**

2-year-old RB<sup>1</sup> was injured in a car accident in June 2012. The circumstances of the accident are that he was struck by vehicle insured by the respondent Security National Insurance Company. RB was not the occupant of an automobile at the time of the incident.

The Applicant, Certas Direct Insurance Company, is the insurer of RB's grandparents, more precisely, Certas is the insurer of vehicle with respect to which the grandparents were the named insured on the policy at the time of the accident. Accordingly, on these facts, there is a priority dispute as to which insurer has the responsibility for payment of Statutory Accident Benefits with respect to RB. If RB is an insured under a policy then section 268 of the *Insurance Act* would require that such insurer respond and deal with his claims. If he is not an insured

---

<sup>1</sup> In consideration of the privacy interests of non-parties who were required to provide information about their personal affairs, I have deleted reference to their names.

person then the insurer of the involved automobile, here Security National, would be required to deal with the claims.

RB would be an insured under the Certas policy if he is principally dependent for financial support upon one or both of his grandparents, SB and DB, at the time of the accident.

At the material time, RB resided with his mother KB in the household of the grandparents, SB and DB. All of the adults played some role in the life of RB.

After the accident an Application for Accident Benefits was submitted to Certas. Certas adjusted the claim with respect to RB. This priority dispute is for the purpose of determining whether or not in fact Security National is the higher ranking insurer for the purpose of the obligation to deal with Statutory Accident Benefits.

This controversy raises a number of contentious issues.

### **The Agreed Statement of Fact**

The parties have entered into an Agreed Statement of Facts which forms part of the record in this proceeding. That agreed statement recites the role of the respective insurers involved in this dispute. It also offers significant particulars with respect to the household arrangements with respect to RB, prior to the accident and at the time of the accident.

The parties have agreed that at the time of the accident RB resided with his mother KB and his grandparents SB and DB, and an uncle, at residential premises in Whitby, Ontario. This is described as having been SB and DB's home. KB did not pay rent to SB or DB, nor did she pay for any household bills.

In these household circumstances in the preceding two years, KB was attending employment or school. In KB's absence RB was regularly cared for by DB. The Agreed Statement of Facts indicates that in the one year prior to the accident RB was primarily cared for during the day by DB. Both KB and DB seem to have had a role in providing care for RB before KB left for work or school in the mornings.

KB paid for all of RB's medical expenses. She also contributed solely to RB's registered education saving plan.

The grandparents, SB and DB paid for all of the household expenses. This included the mortgage, household bills, home maintenance bills, family vacations, and groceries for the entire family including KB and RB.

The Agreed Statement of Facts gives considerable pre-accident background about KB's employment and educational activities. It is reported that she worked on a full time basis a rate of approximately \$13 per hour from August 2009 to May 2010. She was on maternity leave from June 2010 to June 2011. She returned to work for 2 months, July and August in 2011.

In September 2011, KB took on educational pursuits and started a three-year law clerk program at Durham College. She commenced employment as a co-op student on April 26, 2012 and was employed as such on the date of the accident. KB worked as a clerk earning between \$13.50 and \$15 per hour. She worked 37.5 hours per week from April 26, 2012 to August 30, 2012.

In September 2012, about 3 months after the subject accident, KB commenced her second year of the law clerk program.

In addition to the employment income, KB also received funding from OSAP in the amount of \$21,615. This is related to the 2011/2012 academic year. The Agreed Statement of Facts points out this included a provision for students from low income families and students with a dependent.

The parties have noted in the Agreed Statement of Facts that KB completed her law clerk program in April 2014 and was accepted to start further educational pursuits in September 2014. It is noted that in September 2014, RB started daycare which was supported by government subsidies fully except for the first two weeks at \$250 per week.

In addition to the Agreed Statement of Facts the parties have put before me a joint document brief in two volumes. The document brief includes the employment insurance file of KB, personal bank account history for KB, the OSAP file, and the Durham College file. In addition there are two expert reports from accounting firms and three transcripts of Examinations Under Oath of KB, SB, and DB. Finally, the joint document brief includes an exchange of emails which evidences the effort made by counsel to narrow down various financial issues by determining who paid for a crib, stroller, a playpen, a high chair, a change table, etc.

### **Review of the Transcripts of Examinations Under Oath**

Part of the record before me is transcripts of Examinations Under Oath of KB, SB and DB. These documents are found at Tab 7 of the Joint Document Brief.

KB's evidence indicates that she lived with her parents for two years before the accident and continued to live there after the event. That seems to go back to May 2010.

She gave evidence about her pre-accident work history. It appears that she has had a variety of employment positions, prior to going on maternity leave from about June 2010 to July 2011. After that time she went back to work for two months and then ceased work in order to return to school in September 2011. She testified that during her employment she had earned about \$13 per hour.

The school program at Durham College was funded through an OSAP grant. She estimated the grant at about \$20,000. Her evidence was that she took care of all of her books herself and that her parents did not help to pay for any of her tuition or school expenses.

When she moved in with her parents, she and her child each had their own room in the family house. She never paid any rent for those rooms. She did not contribute to the mortgage, to property taxes, house insurance or any other normal household utilities. She did have her own cell phone which she paid for.

At the time of the accident she was working. It was the summer. Prior to that she had been in school from September to April. School was five days a week. She indicated that she usually came home from school between 3:00pm and 5:00 pm.

At the time of the accident she owned a Honda Civic which she paid for out of her own pocket. It appears that the car may have been in her father's name.

While she was at school her mother would take care of her child and sometimes, very rarely, her brother would take care of the child. On some days she would do the morning routine with her child before she went to school. She estimated that she did this about half the time.

When she returned home from school she would spend her time with her child. She would do her homework after the child had gone to bed. The evidence seems clear that both her mother and father offered some assistance with attending to the child's needs.

With respect to the child's expenses it seems that much of these were accepted by KB herself. She testified that there was a small amount of medical expenses that she paid for. She also said that she paid for formula and baby food but that her parents paid for meals.

As for his clothing, KB estimated that she paid about 85% of those costs for her son. She also indicated that she paid for hygiene products.

Much of this evidence, as it tackles estimating the costs of diapers, creams, shampoos, toys, formula, baby food, milk, illustrates the challenges that are faced in trying to reconstruct household expenses for the purpose of these priority disputes. The parties make their best effort, and even with knowledgeable cooperating witnesses there is much uncertainty.

The evidence also branched out into examination of car expenses for KB, bus transportation for school, travelling with the grandparents.

The evidence also explored non-cash contributions to the household such as performing chores, helping with kitchen cleaning, preparation of family lunches, week end meal preparation, dishwashing, vacuuming, taking out the garbage, babysitting. There is an explanation of who paid for meals during the travelling. Counsel addressed the question of who paid for some odd babysitting here and there. The parties fully explored the cost of swimming lessons. Counsel also explored the witness' gym membership, who paid for it, the value of, how much it was used, how long she had it, the cost of a trainer, and the number of sessions that she went to. In addition there is evidence about the cost of daycare while she was at the gym.

In their efforts to try and understand some of the expenses counsel elicited evidence about what percentage of the internet usage could be attributed to the two year old child. Similarly the witness was asked to estimate the child's use of the cable TV. In their search for precision counsel tried to sort out whether KB used the home phone 2% of the time or 5% of the time.

There is a fulsome exploration of expenditure for a zoo membership and associated parking costs. Similarly there were questions and evidence about going to toddler day movies, the cost of the ticket, and the frequency.

In exploring expenses, attention was turned to the child's soap, and how long an eight dollar container would last.

It was duly noted that there was that savings plan set up for the child to which \$20 per month was contributed.

I must remark that this testimony was elicited over about two hours, comprises almost 500 questions transcribed into 78 pages. On top of that there is significant documentary production, and the testimony was supplemented by eight undertakings for further documentation.

Evidence was also elicited from KB's father, SB. This testimony took almost 2 hours, comprised almost 450 questions and was supplemented by eight undertakings. As far as I can discern almost all of this evidence was directed at figuring out the household finances and contribution thereto. This evidence included an exploration of the incomes of SB and his wife, the interdependencies between all of the family members, the household mortgage payments, property taxes, auto insurance expenses and more.

There is fulsome discussion about who did what in the household. The parties sought to understand the work schedules of the parents and how all this impacted providing for the family. Household activities were explored in considerable detail. The parties sought understanding of who prepared meals, who did bathing for the child, who spent time with the child watching television, who played with the child. His perception of how the Internet usage was allocated was elicited. And estimates were made about how long the child watched the cable TV.

Counsel questioned SB about household utility expenses and went through the costs of the gas, the electricity, water.

It was his evidence that there was a shared responsibility in the household for putting the child to bed he also thought that clothing expenses for the child had been shared throughout the family including grandparents but he did think that KB probably paid for 50%. SB thought that he and his wife perhaps paid for a quarter of the child's clothing needs. SB thought that predominantly he and his wife were looking after the food bills in the household. He acknowledged that KB would buy the occasional thing.

There was extensive discussion about care for the child before and after the accident. There was discussion about care provided by KB on the weekends and the care that she was able to provide during the week while she was in school.

SB was asked to estimate the cost of the child's clothing on a monthly basis at the time of the accident but was unable to do so. In further exploration of this an undertaking was requested to produce the credit card records for the family. Similarly there was a request for bank statements for the family bank accounts.

SB was asked estimate household food expenses which he did.

There was discussion about KB's car expense and insurance costs and how that was allocated. There was an estimate about how much money was spent on gas and how much KB had paid for her car.

Part of the examination involved understanding who was doing the laundry in the household it got down to the details of who put in how many loads of laundry at a time and who did the folding the next day. Some evidence was elicited about who did the household cleaning and how much time each person contributed to household cleaning. There is also an effort made to sort out a sibling's responsibility for gardening and snow shoveling.

There were some interesting information elicited about the household. They home was a four-bedroom home. KB's brother lived there at times. The parents lived there. KB lived there. Her son lived there. The brother apparently only lived in the home intermittently. He also had employment at times.

There is examination about the household chores and who performed those chores. Some of the evidence got into a surprising level of detail. An effort was made to understand who was bathing the young child, how frequently, and how long it would take. Similar estimates were solicited with respect to dinner preparation, household vacuuming, babysitting,

KB's mother, DB, was also examined under oath. This was a comparatively brief examination supplementing the other examinations on a few points. DB made the important observation that, from her point of view, that the child was not their child. He is KB's child so that KB was ultimately responsible for him.

### **Time Frame**

In evaluating dependency at the time of the accident, it is necessary to look at the information about a period of time, a window. Then we need to look at the needs and resources during that time window.

Often there will be disagreement about the most appropriate window for a particular case. But I consider it well settled that I should select the time frame that most fairly reflects the status of the parties at the time of the accident.

The KB and RB household at the time of the accident was very clearly one built around the efforts of KB to advance her education. The timespan of the educational pursuit was multiple years. In part the education was to be funded by income earned during summer time off from classes. During the periods of classes there would be less opportunity to earn money, and greater reliance on family for various forms of assistance.

To fairly reflect the status of RB or KB on the date of the accident, it is preferable to use a time window that incorporates all of these components. To do otherwise would neglect the true status of the family on the day of the accident. Therefore I conclude that use of a 12-month window most fairly reflects the status at the time of the accident.

Therefore I will consider the information about the circumstances in the 12 months prior to the accident.

### **The Dependency Unit**

In submissions, the parties have addressed the issue of RB's dependency vis-à-vis his mother versus his grandparents. The starting point is not controversial, RB must be principally dependent for financial support and or care on somebody. At an age of just under 2 years, he cannot have been independent on either score.

But I think it is important for us to reflect upon the difficulties in taking into account indirect dependency. By "indirect" I mean looking at RB's dependency upon his mother KB, who in turn might be dependent upon SB and DB as a situation where RB is therefore necessarily dependent on SB and DB This might well be the facts in some case, but I do not believe that such indirect dependency is contemplated by the regulation that we are challenged to administer. We must resolve whether or not RB is dependent on SB and/or DB It is irrelevant whether RB is dependent upon someone who is in turn depend upon SB and/or DB It is a subtle but important distinction.

Looking at indirect dependency exponentially complicates the essential question. It changes the inquiry. We need to choose. Was RB principally dependent on his mother, or was he principally dependent upon someone else because his mother was dependent on them? I conclude that RB was principally dependent for financial support and care on his mother.

It is very important to recall that dependency means that there is an existing need. The mere fact that a person benefits from the generosity or comfort of another does not mean that the person is dependent upon that other individual.

It is quite clear from the testimony of DB and all of the other circumstances that KB, RB's mother, is the person that RB de facto was reliant upon at the time of the accident. Other support, particularly babysitting which might be characterized as an aspect of "care", seems to be more relevant as a benefit to KB to enable her to continue her scholastic pursuits, more than as a benefit to RB who would have received such "care" from his mother, but at the cost of depriving her of the academic opportunities.

One might be inclined to look at the status of KB and RB as a single unit -- an un-severable family within which one cannot realistically distinguish dependency as between the family unit members. If mother and son are dependent, then both are dependents. On the facts of this case, I conclude that KB would make provisions for RB and would sacrifice other opportunities if necessary. RB's dependency is on KB unless KB is incapable of providing for this two-person family unit's needs. That is probably the end of the question before me, giving a plain reading to the regulation.

But I appreciate that the facts in this case might call for a broader look at the RB/KB household as a singularity. I will consider the joint family unit of KB and RB and whether or not that family unit is principally dependent on SB and/or DB.

### **Use of Household Expenses as a Measurement of Needs**

Dependency is determined by looking at two factors: needs and resources.

In many cases, like this one, litigants explore the pre-accident household expenditures in order to reach some conclusion about the cost of meeting needs.

Looking at the household expenses as some kind of measurement of a person's needs is fraught with risk of inaccuracy. Firstly, this necessarily includes expenditures that go towards the general standard of living in the household, the criteria that the Court of Appeal has told us not to address. Secondly, household expenses may include costs that are not necessary for meeting a person's needs such as that part of mortgage payments that reduce debt. Thirdly, taking the total costs for household and then attributing some portion of that cost to represent cost for a particular individual within the household is, at best, a stab in the dark.

The facts of this case show yet another reason why this is a risky approach to this process. The evidence revealed that KB's brother was intermittently in and out of the house and perhaps had variable income as well. Hence when we start to look at the household finances there is this extraneous variable associated with the brother. When he is in the house presumably some of the expenses rise.

If we are going to accurately look at household finances for the purpose of determining dependency of a single member, we would have to somehow control for the variability

associated with changing circumstances for the other members of the household. This puts an entirely new dimension on the exercise of finding an appropriate time window for determination of dependency. We would have to find a time window that not only fairly reflected the status of the individual claimant at the time of the accident, but also search for a time window that reflected the status of the household and its members at the time of the accident. This seems to me to be a completely extraneous and wasteful diversion.

Furthermore, it is quite unlikely that a given family's expenses represent precisely the cost of meeting needs, and no more. Hence when we go through this troubling process the output is a number which probably is wrong to some degree. To the extent that it includes costs that go beyond strictly meeting needs we will overstate dependency.

For many reasons we should be open to a better way to make a realistic calculation of needs, whenever possible.

In my view these disputes are best analyzed by returning to first principles, looking at the costs of meeting a person's basic needs, and comparing the person's resources. As we address the first item we are really taking on a difficult challenge to extrapolate a sense of needs from looking at the dynamics of a larger family unit that supports a number of individuals with a number of income sources all of which might be flexible and variable.

### **Recourse to Statistical Information**

In a case of this kind it is very attractive to attempt to find some external statistical information that would allow us to answer the question about the cost of meeting an individual's needs.

Data collected by Statistics Canada looks at family economics in numerous categories. For the purpose of formulating government policy this information would seem to be quite important.

A review of publicly available information suggests that the collection of data is extensive and that much thought is given to how that data is organized and analyzed. Most importantly, the data has the credibility of being collected in a neutral manner, free from bias or inappropriate influences.

When dealing with dependency disputes, there is a well-deserved skepticism about the accuracy of the information that is available before an arbitrator for evaluation. As has been observed repeatedly, this information is very difficult to obtain, is probably incomplete, and its true meaning is difficult to evaluate. For the most part this is a problem that is more prevalent when looking at household and family expenses. Income and resource evaluations are not free from difficulty, but are generally less controversial than the expense side of the evaluation.

Since the decision of the Court of Appeal in *Miller vs. Safeco*<sup>2</sup> it has been known that dependency is not to be determined by looking at the particular standard of living of the family. If we were to look at family specific living standards, we would find that dependency costs would be highly variable and would track with income. But for the purpose of dealing with dependency in this insurance context the Court of Appeal has told us not to look at that family specific standard.

---

<sup>2</sup> *Miller v. Safeco Insurance Co. of America*, 1985 CanLII 2022 (ON CA)

In that brief endorsement the court approved of the trial judge's selection of relevant factors to consider in determining financial dependency for the purposes of insurance coverage. But the court made this specific exception:

**"We agree with the criteria set out by O'Brien J. in this respect, with the exception of "the general standard of living within the family unit", which in our view is not an appropriate consideration."**

Accordingly dependency disputes are determined by looking at the cost of meeting person's needs without adjusting for possible higher or lower standard of living that might have prevailed in the person's personal circumstances. The result is that we look to the cost of meeting a person's needs independent of what their pre accident family unit standard of living was, which points us to determining the cost of meeting needs in the community generally.

The effort to determine the cost of meetings someone's needs in any particular case can be quite significant. Very often parties look at household spending patterns on some historical basis. It is risky to equate existing spending patterns with the cost of meeting needs. Indeed the household spending patterns might be going much further than meeting basic needs, or in some cases might not be getting to that level. And in other ways looking at household expenditure is a questionable approach. Mortgage payments are an example. Such payments are very much part of household expenditures but they are not necessarily reflective of the cost of shelter since such mortgage payments may be much larger than rental rates for similar accommodation. But of course we yield to temptation to look at the data that is available as a proxy for data that is not available. Hence a further uncertainty is injected into the process.

And of course we find that there are case specific issues that emerge. What do we do with the household with a very high Internet and cable expense? How do we approach families where a large amount of money is spent on travel or recreation? There are many other examples.

Hence, doing a careful evaluation of the cost of meeting somebody's basic needs in individual cases is a costly and time-consuming distraction. Furthermore, it involves an imposition on injured individuals and their family members. It is more than inconvenience; it is an intrusion into private financial matters.

In many cases insurers find it necessary to engage in costly legal processes simply for the purpose of collecting information. In those cases there is no crystalized dispute but neither is there confidence about whether or not there is a dependency issue that would result in transfer of a claim. It is highly undesirable that we find ourselves forced into using legal processes as an information collection tool.

I view the practice of collecting case specific information about cost of meeting needs as often unnecessary and wasteful.

In my view, in the absence of compelling evidence to the contrary, I should accept statistical evidence as a reasonable, probably better, indication of costs of meeting household needs for various family units.

I hasten to observe that there may be, in a very small number of cases, particular circumstances that would make use of statistical information inappropriate. An example might be a situation where a person has a health issue that requires extraordinary care and treatment that must be paid for out of their financial resources. In such cases, it might be desirable to spend the time and money to look at the case specific household or individual needs, provided we do not offend

the rule in *Miller v. Safeco*. Even in such a case it would be attractive to look at statistical data and then apply an appropriate adjustment.

The case before me involves a family unit with three generations. The injured claimant is a two year old infant. The claimant and his mother live together with the grandparents and, sometimes, the mother's brother. The household finances are not formally structured. The mother is a student with limited income and has support in the form of government grants as well as family support in the form of accommodation shelter and assistance with her son.

Unbundling this arrangement to assign some value specifically to meeting the needs of the son is a complicated process with much uncertainty. Like many family situations it is a Gordian knot of interdependencies.

And what would be the point of trying to trace and allocate the costs and expenses in this household? At best it would show us the cost of meeting the expenses of that household with its "general standard of living" which might be very different than the cost of meeting the basic needs of the claimant or the claimant and his mother as a unit. We could spend a lot of time and money trying to analyze the finances of the household and in the end have information which is not directly useful in applying the legal test of financial dependency.

Hence, in this case, it is very attractive to look at credible statistical information for the purpose of determining the cost of meeting needs. In the dependency equation this is the denominator. The financial resources are the numerator.

There is much which commends the use of statistical information from a business point of view. I am mindful of the fact that these priority disputes are disputes between insurers. They are disputes which raise issues which must be investigated in some depth very early in the course of a claim. There is a notice requirement that makes it necessary for an insurer to have identified a possible priority dispute within 90 days of a claim. To have very difficult factual issues underlying this process exacerbates the challenges of management of these claims in a cost-effective manner. Hence, if we can substitute statistical information for other more difficult to derive information, we can alleviate some of the resource issues and move these cases forward more quickly, and insurers can give more attention to the needs of the injured individuals.

Additionally, there is much concern about the accuracy of the information that is used for making case specific dependency evaluation. But use of statistical information may also be inaccurate in some instances. Not every case is statistically average. But when I weigh this concern I am compelled to observe that the parties to these disputes are insurance companies who encounter these issues repeatedly. There is no industry better suited to adapt to statistically valid criteria. To the extent that some case on the margins might be differently decided by not referring to statistics, an insurer can expect to have cases going both ways over time. Hence the possible risk of statistical approaches being inaccurate is moderated by the likelihood that insurers will be on all sides of all types of cases. Sometimes they may benefit and sometimes they may not, but on average the results would be appropriate and those results will be achieved at much less cost.

For these reasons I do not fear use of statistical information that is credible in place of case specific information which is dubious. The associated reduction in transaction costs for insurers, and the reduced drain on claims resources for this type of investigation and evaluation are bonuses.

But most importantly, I find that the statistical information available is credible information precisely focused on the denominator in the dependency equation, the cost of meeting basic needs.

Having recourse to statistical information is a benefit for claimants, insurers and the premium payers.

The parties have put before me several thoughtful suggestions about statistical information that might be applicable here. Counsel and their experts have given some useful insight.

## **LICO**

As we have been making the first tentative approaches towards use of statistical information in priority disputes, repeated reference has been made to LICO the “low income cut off” statistic. This has been mentioned in some decisions and applied, although it does not seem that alternatives have been canvassed.

It seems that LICO is sometimes viewed as a marker of a “poverty line” of some sort. Review of the Statistics Canada materials shows that this is not quite accurate. In fact, it is portrayed as an indicator of families in “straightened circumstances”.

The LICO number actually represents an income threshold for families that are spending larger proportions of their income on food, shelter, and clothing. According to published information government has set this threshold to represent individuals that are spending 20 percentage points more than the average family on food, shelter, and clothing.

While I do not doubt that this is an important and useful statistic for government policymaking, I do not think that this equates with “the cost of meeting basic needs”. Most obviously, LICO is a measurement of income not costs. The LICO number represents the family income (before tax or after-tax) of families that are considered to be in that “straightened circumstance”. But what we need to know for our dependency calculation is the amount which represents the cost of meeting basic needs.

The LICO formula would yield different benchmarks as average household income changes, whether or not the cost of meeting basic needs has changed. LICO is a measure of resources relative to others, but not directly a measure of the costs that create dependency for basic needs.

I also have concerns about how LICO is designed with the 20 percentage point factor. This may well give an indication about how the community is doing economically, particularly as we observe these numbers as they evolve. But it is not a measure of the cost of meeting basic needs. Rather those costs are an input in the larger process of arriving at LICO.

Mr. McQuaid, in his report at Tab 5 of the Applicant’s Supplementary Submissions observed that “As the LICO is derived from the average consumption behaviours of Canadian families, it may not represent the financial requirements for basic needs and shelter.”

Mr. Edwards, in his supplementary report, has pointed out that LICO numbers are quite dated and have been adjusted by applying inflationary adjustments over many years since 1992. He notes that there is uncertainty about how relevant these numbers continue to be.

## Market Basket Measure

In my view a more relevant statistic is the Market Basket Measure which is a published dataset under the authority of Statistics Canada.

According to their publication 75F0002M:

**“The Market Basket Measure (MBM) is based on the cost of a specific basket of goods and services representing a modest, basic standard of living. It includes the costs of food, clothing, footwear, transportation, shelter and other expenses for reference family of two adults aged 20 to 49 and two children (aged nine and 13).”**

This is precisely what we need to know to understand the cost of meeting basic needs.

Another document<sup>3</sup> describes the design and development of the Market Basket Measure. This portrays a robust and informed development process.

The MBM and the MBM disposable income were designed by a working group of federal, provincial and territorial officials, led by Human Resources and Skills Development Canada (HRSDC) between 1997 and 1999 (Hatfield 2002; Michaud, Cotton and Bishop 2004). During 2009 and early 2010, it underwent a comprehensive review of both content and methodology (Hatfield, Pyper and Gustajtis 2010). The consultation process, led by HRSDC, involved officials from provincial and territorial governments, other federal government departments and agencies, including Statistics Canada, and a panel of experts in low-income measurement. This review process led to a rebased series of thresholds (MBM, 2008 base), revised historically to 2000, the beginning of the MBM time series. Among the changes to the MBM resulting from the comprehensive review was the revision of the shelter component to include the costs of homeowners without mortgages. This revision recognized that, in a given year, homeowners without mortgages may pay less for shelter than they would if they were renting.

During 2012, HRSDC officials re-examined the methodology for including homeowners without mortgages in order to better implement the conceptual decision to reflect these costs in the MBM. Following this re-examination, a revised methodology was adopted that adjusts the MBM disposable income of homeowners without mortgages to account for the potential differences in their shelter-related expenses.

The NHS uses this 2012-based MBM.

While HRSDC was responsible for defining the components of the basket, Statistics Canada collects the data on the cost of goods and services in the basket to calculate thresholds and produce low-income statistics.

A more detailed statement of what is included in the basket identifies the following:

- A nutritious diet as specified in the 2008 National Nutritious Food Basket;
- A basket of clothing and footwear required by a family of two adults and two children;
- Shelter cost as the median cost of a two or three bedroom units including electricity, heat, water and appliances;
- Transportation costs, using public transit where available or costs associated with owning and operating a modest vehicle where public transit is not available;
- Other necessary goods and services

---

<sup>3</sup> <http://www12.statcan.gc.ca/nhs-enm/2011/ref/dict/pop165-eng.cfm>

In its materials, Statistics Canada indicates that this measure is more sensitive to geographic variations than other measures. That is particularly useful for priority dispute cases that must evaluate cases from many regions with different economic characteristics.

It is also very useful to see that the MBM data is presented for various family configurations, persons not in an economic family as well as those in 2 person to 5 person economic family size.<sup>4</sup> Furthermore Statistics Canada offers instruction on convert the data for consideration in relation to other size families:

**“To convert to other family sizes, multiply the amount for persons not in economic families by the square root of the desired family size.”**

Thus the data can be applied to all family unit sizes. I noted Mr. Edwards’ observation that the accuracy of these numbers depend upon the accuracy of the mathematical formula used to derive the amounts for differently sized families. In the absence of evidence to the contrary, I am prepared to accept that the Statistics Canada approach is a reasonable approach to this derivation. It strikes me as far more nuanced than the approach that we have otherwise used in these priority decisions when looking at household expenses for multi person households.

Additionally the numbers are capable of adjustment to reflect changes in costs at different historical dates. By applying a form of indexation or other approach it is possible to focus on a particular point in time that coincides with the most appropriate time window for making a dependency determination.

In summary, the MBM is an evidence-based measure of actual cost of “moderate basic” needs that is adjustable by family unit size, geographical considerations, and temporal factors. It is a very appropriate statistic that is preferable to using questionable case specific data. I would be inclined to prefer this evidence unless a particular case has compelling and significant atypical characteristics that are not captured by “general standard of living in the family unit”<sup>5</sup>. It is this approach which will best inform whether a person can meet most of the cost of needs in their community and thus comply with the prescribed task of determining whether a person is or is not principally dependent for financial support on another.

### **Other Data**

The parties have put forward materials which discuss some other benchmarks that might be used for determining the cost of meeting needs.

The *Ontario Works Act* is a statutory scheme that provides a benefit for individuals who have needs in our society. Certainly the amount of a benefit under this scheme would be somewhat reflective of what is presumed to be the cost of meeting needs in a person circumstances in a community. One would hope that benefit levels are determined in a process that takes into account actual costs of meeting needs. Hence that information about benefits level is useful. But as compared to the other information available and in particular the Market Basket Measure, I would regard the Ontario Works benefit as secondary information that may well be derived from

---

<sup>4</sup> <http://www12.statcan.gc.ca/nhs-enm/2011/ref/dict/table-tableau/t-3-5-eng.cfm>

<sup>5</sup> An example of such a case might be where the person has costly care needs pre accident. But even in such a case one might find the best approach would be to start with MBM and make an adjustment to reflect the additional cost burden.

some view of the cost of meeting needs, but also is subject to policy decisions by government about funding, resources, and perhaps other issues.

Accordingly I would look at the Ontario Works benefit as a secondary source and would generally tend to prefer the Market Basket Measure.

In Mr. Edwards' helpful report on these issues he has also mentioned a statistic known as Low Income Measure. This is a number based on 50% of adjusted median household income. This may be yet another statistic which is useful for policymaking, but it is not a direct measure of the cost of meeting someone's needs. It is an indication of income, not costs, and it is based on a mathematical formula (50% of median household income) which may bear little relation to the costs of meeting basic needs. I would not use this statistic for the purpose of determining the denominator in the financial dependency evaluation in preference to the Market Basket Measure.

### **Conclusion re Cost of Meeting Needs**

For reasons of efficacy and accuracy, as discussed, I will use the Market Basket Measure for the purpose of determining needs in this case.

From my review of the expert reports, I conclude that the MBM number relevant here is either \$24,708 or \$24,463 per year as the Market Basket Measure for this two person family unit.

### **Resources of the Two Person Family Unit**

KB had a variety of resources available to her in the year prior to the accident that I have determined to be the appropriate time window for evaluation.

Much of this emanates from assistance available to her as a student (OSAP). The aggregate value of that is set at \$21,615.00. Within that component, some of this is intended as support for RB's living expenses and KB's living expenses. A relatively small component is for tuition and books (about \$5,000). This is set out in the Matson Driscoll report.

Including the OSAP and employment income and bursaries, Universal Child Tax Credit, Child Tax Benefit, GST Tax Credit and EI benefits it appears that KB's financial resources in the year preceding the accident exceeded \$30,000. She might have had the option to access further resources such as Ontario Works. The applicant's factum puts it at \$31,921.

### **Consideration of Principal Dependency**

To be principally dependent there must be dependency for more than 50% of needs. The needs are no more than \$25,000 per annum. The mother and son family unit's resources are greater than 50% (\$12,500) by a very wide margin.

The family unit of KB and RB is not principally dependent for financial support on any other person.

### **The Big Picture Approach**

In submissions counsel suggested possible application of the "big picture" approach. I have discussed my concerns about this approach in other decisions. In this case I do not consider

that there is any lack of clarity on the dependency issue. There is a vast amount of information to allow us to address the dependency issues directly on the known information about the nature and extent of dependency.

In *State Farm v. Aviva and Certas*<sup>6</sup>, I discussed the prospect of determining “dependency” by looking at the “Big Picture” in preference to a mathematical analysis.

**In a few recent cases there has been discussion about evaluating priority cases that involve dependency by looking at the “Big Picture”. I do not see this as a clearly articulated concept, but understand it to be an expression of desire to not slavishly follow a mathematical process to determine financial dependency.**

**I understand, and am sympathetic to, the view that there are many problems with the mathematical approach to determining financial dependency. The key problem is that it is very difficult to get complete and accurate information about household financial arrangements, needs, and, occasionally, accurate income information. The process undertaken by the insurers that are engaged in the controversy necessarily involves marshaling evidence from witnesses, assembling documentary records from various sources, and sometimes applying expert evaluation to that array of evidence.**

**When one becomes engaged in adjudicating these cases, it is not hard to conclude that the information on these issues may well be imperfect, inaccurate, or incomplete. I have seen this first hand for more than 25 years. I hasten to add that the problems here are not usually associated with the credibility of the witnesses. At the root of the challenge is the difficulty in attempting to analyze the intricacies of household finances, years after the fact, without complete records.**

**So when working with this evidence in the record of an arbitration, adjudicators will often be making findings of fact that have underlying uncertainty. The mere fact that there is such uncertainty shouldn’t be surprising. In any dispute resolution process somebody has to be the “trier of fact” and make those findings. Even if the “trier of fact” finds that evidence is not 100% conclusive, the rules of evidence and fact-finding compel the adjudicator to come to conclusions. Most commonly, in these cases, this is on the balance of probabilities.**

**The mere fact that we adopt a rule based on “balance” is an acknowledgement that findings may not be completely free from doubt.**

**In financial dependency cases, where we work our way towards a mathematical calculation that is often a “close call” between dependency and non-dependency, the underlying uncertainty may be highly relevant to the outcome. In other words, if some of the evidence moved from the category of “uncertain” and into the category of “less likely than not” a different outcome could result. So naturally, there is a sense of discomfort making decisions based on a “close call” when the underlying evidence is believed to be less than 100% conclusive.**

**But, in my view, this discomfort does not absolve the adjudicator from the task of making appropriate findings of fact and applying the law.**

**Some discussion of the “big picture” approach suggests that the mathematical approach is somehow prone to being inappropriate. I point out that the mathematical approach has evolved over two decades to take into account many**

---

<sup>6</sup> Decision April 20, 2018

different family and household circumstances. Determination is not made by blindly totaling up numbers, but involves many concepts that reflect the nuance of true dependency relationships. Some of these are:

- Distinguishing between beneficial, but not needed, support and support that was needed;
- Taking into account capacity to earn as part of a person's resources;
- Consideration of assets as resources;
- Selecting a time window that fairly reflects a person's status on the date of an accident;
- Evaluating contribution of household services;
- Understanding and parsing out household costs in multi-occupant situations;
- Consideration of services provided as a contribution towards support;
- Applying the 50% rule in order to determine "principal" dependency

As noted above, some of these criteria mirror the factors that the Court of Appeal applied in *Miller v. Safeco* and later applied to modern priority disputes in *Liberty v. Federation*. Those criteria import considerable nuance into the evaluation.

When adjudicators take these factors into account, and then make findings about the financial aspects, the final mathematical determination of principal dependency is a simple and uncontroversial step. Truly, the challenge for the adjudicator is to identify and quantitatively evaluate the relevant factors based on the evidence in any particular case. Hence, the mathematical approach really is an examination of a "bigger picture" rather than a blind application of numbers.

It concerns me that making conclusive findings as a result of some undefined sense of the "Big Picture" entails a danger of straying from the legal principles that the regulations and case law dictate. For example, it is naturally understandable that someone thinking "Big Picture" would say "this person could not possibly get by without the support of this other person, therefore there is dependency". But that is not the legal environment that we operate in. We must look for principal dependency -- where a person derives most support, not just some critical support. That hypothetical observation illustrates that a visceral view of dependency courts the risk of ignoring legally mandated criteria and features<sup>7</sup>.

I am also concerned that a "Big Picture" approach leaves the parties with very little guidance in the way of precedent about whether any future case does or does not involve financial dependency. An adjudicator may be very comfortable in a particular case with applying his or her "Big Picture" impression to make the determination. Where does that leave the parties who are trying to understand more generally which cases do or do not involve principal dependency for financial support or care? It provides them with no guidance or analysis. Are the parties to put every such fact situation in front of an arbitrator and roll the dice of how that arbitrator senses "The Big Picture" on that day? This would be a very unsatisfactory state of affairs.

The parties, insurers who confront these problems repeatedly day in and day out, deserve an understanding of the analysis which allows them to properly investigate cases and to resolve dependency issues without going through expensive and uncertain arbitration proceedings.

---

<sup>7</sup> During the course of submissions one counsel did frame the dependency issue as to whether the claimant could not get by without the support of others. That is an erroneous approach that reads out the "principally" qualification and substitutes "in any part".

We have to be mindful that the arbitration of these cases is merely the endpoint of a claims administration process that overwhelmingly results in priority issues being worked out without the need for arbitration. If we migrate our approach to some undefined visceral concept such as “Big Picture”, we leave the parties without a clear understanding of the rules with the result that the large number of cases that today are resolved become uncertain cases that move through into dispute resolution processes.

This is not a minor consideration. We have been dealing with these significant Statutory Accident Benefits cases for 27 Years in Ontario. Roughly 60,000 of these cases come to insurers every year. The system has dealt with more than 1.5 million of these claims. It is truly remarkable that the number of priority disputes that have gone through to arbitration determination is so low, probably numbered in the hundreds. So while arbitrators and adjudicators may find the mathematical approach to financial dependency cases to be troublesome in some aspects (and I agree) the approach has commendable value in allowing the parties to understand the logic of determination and to resolve disputes in a businesslike manner without frequently resorting to arbitral processes.

Having said that, I do not discount completely the value of looking at the “Big Picture” when an arbitrator or adjudicator is testing the credibility and feasibility of the mathematical approach in a particular case. If the arbitrator’s view of the household circumstances or other factors suggests that the mathematical evidence misses the mark, then that is something that must be taken into account in evaluating the credibility or completeness of the mathematical evidence. Of course the arbitrator should clearly describe those concerns. But always, we must come back to the principles that the regulations and case law set out. It should not be open to us to deviate from those principles and mask that as looking at “The Big Picture”. That might be easier, but it is not better.

In the Ontario Court of Appeal case, *Intact Insurance Company v. Allstate Insurance Company of Canada*<sup>8</sup>, the arbitrator had made a decision based on “The Big Picture”. On appeal the parties could not agree on what the arbitrator had done. This certainly signals a lack of transparency about the decision making methodology. Ultimately, the Court of Appeal found that the concept of adopting the “Big Picture” had, in that instance, taken into account the permanence of the relationship which was an improper consideration, not in accord with applicable legal principles. The decision was found to be unreasonable. In traditional parlance, this was a question of selecting the appropriate timeframe.

In the case of *State Farm v. Bunyan*<sup>9</sup>, Justice Corbett observed that:

“I consider relative financial contribution to be an important factor, but not the only consideration. And this is not a moralistic analysis based on whether a young person “should” or “should not” have achieved independence. Here the question is not whether the young person “should” be independent, but whether, in fact, he is so.”

Justice Corbett went on to observe that the person’s short lived recent independence was not reflective of his true dependence or independence. So while this case has been cited as precursor to the use of the “big picture”, this is

---

<sup>8</sup> 2016 ONCA 609 (CanLII)

<sup>9</sup> 2013 ONSC 6670 (CanLII)

actually a “time window” case. In effect, Justice Corbett applied the mathematical analysis to a different time frame.

One Superior Court case has found some favour with “The Big Picture” approach. In *Allstate Insurance v. ING Insurance et al*<sup>10</sup>, Justice Myers actually ruled that there was no error by the arbitrator, but went on to make some comments about the mathematical approach to dependency evaluation.

In my view, the Arbitrator made no reviewable error in his decision. The appeal is therefore dismissed.

[3] One point deserves note at the outset. There are some mathematical calculations required to consider aspects of the applicable legal test. The case law recognizes that if a person has the means to provide for more than 50% of her own needs, then she cannot be dependent. Conversely, where one person provides more than 50% of the needs of another, then the other is financially dependent upon the provider. See *The Dominion of Canada General Insurance Company v. Intact Insurance Company*, 2015 ONSC 3689 (CanLII) at para. 10. The Arbitrator found that even using inputs favourable to Allstate, the relevant mathematical calculation came out against it – but just barely. Therefore, on the appeal, counsel for Allstate made a number of points which resolved to arguing, that had the Arbitrator changed just one input number, even by a very small amount, the outcome would have been different. This approach, while compelling to read and hear, is based upon two false premises.

[4] First, it assumes that the mathematical result necessarily and solely determines the outcome. In my view, the math is just a part of the test that has arisen out of the seminal decision of *Miller v. Safeco*, 1985 CanLII 2022 (ON CA), 50 O.R. (2d) 797 (C.A.). I agree with the insightful comments of Corbett J. in *State Farm v. Bunyan*, 2013 ONSC 6670 (CanLII), at paras. 19 to 22 to the effect that while the math is an important factor it is not the only factor. The legal issue is whether R was principally dependent on her mother and her mother’s spouse. In *Miller*, the Court of Appeal approved four factors to consider dependency. Even those four are not necessarily the exclusive considerations. A change in the math from 50.001% dependency to 49.999% dependency may or may not overcome other aspects of the factual dependency between the relevant parties. All of the accountants before the Arbitrator agreed that the math that they were performing was artificial. I would say highly artificial and necessarily inaccurate is a better description. A change of \$8, while perhaps crossing a magical mathematical line, does not alter the “big picture” on the facts in the context of this specific case as found by the Arbitrator. (Emphasis added)

Justice Myers was not persuaded that the arbitrator had erred and did not accept the appellant’s arguments that different findings should be made to push the dependency factor over the mathematical threshold. But it is clear that Justice Myers was looking at the “Big Picture” here because the numbers were close and the evidence was “highly artificial and necessarily inaccurate”. In this case the “Big Picture” was that “The Arbitrator found that even using inputs favourable to Allstate, the relevant mathematical calculation came out against it – but just barely.”

Evidently “The Big Picture” approach was simply a way of saying that there was low confidence in the evidence that the mathematics was based upon, and no comfort with changing the disposition based on some other interpretation of the evidence. Underlying the decision was the mathematical approach that the arbitrator adopted and the mathematical calculations that Justice Myers said were “required to consider aspects of the applicable legal test”. So the outcome was, in fact, determined by the mathematical approach.

---

<sup>10</sup> 2015 ONSC 4020 (CanLII)

**In my view the mathematical approach, coupled with careful consideration of associated factors such as capacity, contribution by services, appropriate time frame is what is required by the regulations and the case law.**

**There might be better approaches that could be adopted by regulation. But, for now, we should avoid any temptation to create a new test without being sure that it is clear and appropriate to address the regulation requirements as they exist.**

Accordingly, I do not attempt to analyze dependency for RB by reference to the "Big Picture".

### **Dependency for Care**

It is clear that family members in the household were involved in RB's life. Typical family assistance such as babysitting and meals etc., was available to RB and KB. In my view this is not dependency. It is helpful to KB and RB but it does not amount to dependency and it certainly does not rise to the level of being "principal". As confirmed by the evidence of DB, RB was a dependent of KB and the assistance of others was not understood to indicate dependency on others.

KB had the capacity to provide all of the care if there had been need.

The facts of this case do not come close to establishing that RB was dependent on someone other than his mother for care.

### **Conclusions**

I find that RB was not principally dependent for financial support or care upon either of his grandparents at the time of the accident.

As a result, priority for payment of accident benefits rests with Security National.

The parties are invited to consider their positions with respect to costs. If costs become contentious please contact me and let me know so that we can take the necessary steps to resolve those issues. In that event please let me know within the next 30 days whether that will be necessary or not.

Dated at Toronto this 9<sup>th</sup> day of August, 2018.



---

LEE SAMIS  
Arbitrator