

**IN THE MATTER OF THE *INSURANCE ACT*,  
R.S.O. 1990 c. I. 8 Section 268 AND  
REGULATION 283/95 MADE UNDER THE *INSURANCE ACT***

**AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17**

**AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N :

INTACT INSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

**DECISION**

**COUNSEL**

Michael Hochberg – Miller Thomson LLP  
Lawyer for the Applicant, Intact Insurance Company  
(hereinafter referred to as “Intact”)

Christopher Deeley – Camporese, Sullivan, DiGregorio  
Lawyer for the Respondent, State Farm Mutual Automobile Insurance Company  
(hereinafter referred to as “State Farm”)

**ISSUE - DEPENDENCY**

1. This is a priority arbitration commenced on behalf of Intact, seeking to transfer the obligation to pay accident benefits to Filiberto Morrone (“Morrone”), to State Farm.
2. The claim arises from a motor vehicle accident of October 20, 2009.
3. On the day of the accident, Morrone was driving a 1997 Subaru which was uninsured. Morrone lost control of the Subaru which resulted in a collision with a 1998 Ford dump truck owned and operated by Intact’s insured Westar Restoration Inc. (the “Accident”).
4. At the time of the Accident, Morrone’s step father, Joe Conforti, owned an automobile insured with State Farm.

5. Intact paid the claim for accident benefits as it was the first insurer to receive a completed application for benefits
6. It is the position of Intact that priority for the payment of Morrone's accident benefits rests with State Farm because, at the time of the Accident, Morrone was principally financially dependant on his step father and/or mother for financial support and/or care. As a result the claimant would be considered an "insured person" under the State Farm policy which would stand in priority to the policy of insurance on the striking vehicle. State Farm, on the other hand, takes the position that Morrone was not principally financially dependant on them nor principally dependant on them for care so that priority ought therefore rest with Intact who insured the striking vehicle.

### **PROCEEDINGS**

This matter proceeded on the basis of a transcript of the Examination Under Oath evidence of the claimant Filberto Morrone, written submissions and Books of Authority.

### **APPLICABLE LEGISLATION**

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the Insurance Act sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

As Filberto Morrone was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

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

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

- (a) "The named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured, spouse if the named insured, specified driver, spouse or dependant,

- (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile.”

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

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

## **FACTS**

Mr. Morrone was born on August 1, 1976 and was 33 years old at the time of the accident.

Morrone lived in an RV 20-foot camping trailer in the backyard of his mother’s home (“house”) located at 76 Cronsberry Road in Pefferlaw, Ontario. The trailer in which he lived had a kitchen where he cooked his own meals, but he also took main meals in the house. He was responsible for the upkeep of the trailer. Mr. Morrone paid rent in the sum of \$450.00 per month to his mother and stepfather, which included cable and electricity. He bought his own food but also, as indicated, partook in meals inside the house. He had his own drinking water supply but his mother and stepfather never hooked up a running water supply to the trailer. He showered and used the toilet in the home. Mr. Morrone did not have a bedroom in the house but sometimes slept on a pullout sofa located in the house if it was a really cold night. The trailer had no heat aside from portable heaters.

The claimant was unemployed at the time of the accident. Mr. Morrone worked odd cash jobs at a scrap yard from time to time and also collected Ontario Works at a rate of \$550.00 per month. At the scrap yard, he was paid \$10.00 hourly and would make, on average, \$300.00 per month but earned up to \$1,000.00 one month depending on how busy the scrap yard was. There were months that he did not work at the scrap yard at all. These payments from the scrap yard were “under the table” and in cash. In addition, he sometimes worked for his stepfather who would pay him cash for odd jobs. He would earn varying amounts with his stepfather, from \$50.00 to \$200.00 per month.

Mr. Morrone testified that he was “multi-traded” and could do many things, including mechanic jobs for which he was always paid varying amounts depending on the job.

Mr. Morrone never received money from his mother and stepfather, but paid them rent. Occasionally they would lend him money, but he had to pay it back. He would sometimes give them money for groceries, gas and their phone bill if he had made a long distance call.

Mr. Morrone testified that he could have lived on his own [without his mother’s financial support] at the time of the accident, but he loved his mother and helped her out, especially through her cancer treatment.

Mr. Morrone was responsible for paying child support. He has six children, ranging in ages from 3 to 18, though his eldest child has passed away. He also had debts owing on his two credit cards and his Rogers and Fido mobile phone accounts.

Mr. Morrone has had several long-term relationships with the mothers of his children and had lived with them off and on throughout the years prior to the subject motor vehicle accident. He testified that in the year before the accident he had spent one or two months with Elizabeth Barkhouse, a mother of one of his children. During the year preceding the accident he also spent some time incarcerated. Mr. Morrone was unable to recall how much time he had spent incarcerated in the years prior to the subject accident, but estimated that he was not incarcerated at all in the three months prior to the subject accident. He did state that he was incarcerated for at least 79 days in the year preceding the accident.

He did not owe his parents any money other than potentially some outstanding long distance/collect call charges that he accrued while in jail. He did state though that when he did not have money his mother would provide assistance. She forgave 20 – 30% of the monies that she lent him from time to time. Mr. Morrone had two credit cards, each with a \$5,000.00 limit. He had debts from his Visa, his Rogers and Fido bills and unemployment pay back, as well as to the Family Responsibility Office.

On the date of the accident, he owned the vehicle he was driving. There was no insurance on the vehicle. Mr. Morrone had his own bank account. Mr. Morrone had a cell phone and paid for the cell phone bill himself. He was responsible for purchasing his own clothes and for purchasing meals out. If he was doing something, he was using his own money.

He would help his mother and stepfather with housekeeping and outdoor chores if they asked him to and he was available to do so.

Mr. Morrone would not drive his stepfather's work vehicles or his personal ones. He did not have permission to do so. The only time when he would drive his stepfather's vehicles was if his mom needed to go to the eye doctor and could not drive home due to drops in her eyes. If Mr. Morrone needed to go somewhere, he would ask his mother or stepfather to drive him – if they were not at home, Mr. Morrone would call a friend or take the bus.

In his evidence, Mr. Morrone estimated that he required approximately \$1,500.00 per month to live but it varied from month-to-month. If he lacked money for something, his mother would be nice and lend him the money, but he would for the most part pay it back, either with money or with services around the house. "Once in a blue moon" his mother would assist him with one of his bills, but he often paid them as they came in. Mr. Morrone's mother would sometimes help him with his laundry, but it was rare.

## **ANALYSIS AND FINDINGS**

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

- (i) Amount of dependency;
- (ii) The duration of the dependency;
- (iii) The financial and other needs of the alleged dependent; and
- (iv) The ability of the alleged dependent to be self-supporting.

The aforesaid criteria has been adapted by several Arbitrators in the context of priority disputes involving the issue of dependency.

When looking at the question of financial dependency, the related case law provides that in order to be principally dependant for financial support, one must receive more than 50% of one's financial needs from someone other than themselves. Both counsel referred me to cases supportive of this principle.

The calculation of "50 + 1 %" requires an analysis of the claimant's monthly expenses, income, savings and assets. The concept of money's worth is also used by arbitrators to determine a claimant's financial picture at the time of an accident. This assessment is not necessarily an assessment of the exact financial snapshot on the day of the accident, but rather a consideration of the personal history of the alleged dependant over some period of time in order to reflect the true financial situation of the parties at the time of this accident.

Applying this analysis to the facts before me, I find that although the claimant may have been dependant on his mother and step father for financial support, he was not principally financially dependant upon them.

As per the facts above, Mr. Morrone's mother only paid his bills "once in a blue moon" and although she lent him money from time to time, he still had to pay her back most of the time. Further, Mr. Morrone estimated that it cost him about \$1,500.00 per month to live, including the sum that he would pay to his mother for rent. He was earning \$550.00 from Ontario Works per month and had various odd jobs at which he earned between \$350.00 and \$1,200.00 per month depending on how busy the businesses were. Even assuming the bare minimum amount of \$350.00 per month from his jobs, plus his Ontario Works income of \$550.00 per month, Mr. Morrone would earn at a minimum \$900.00 – which is much more than 50% of the \$1,500.00 that he required to live. On the evidence before me the Applicant Intact has not satisfied the "50 + 1 %" test outlined above. On the evidence before me his mother and stepfather were contributing at most \$600 monthly on average to the claimant's monthly living expenses that he estimated at \$15,000 or roughly 40%.

Furthermore, counsel for the Respondent had referred me to three cases whereby capacity to earn income is shown as an important factor in the ultimate determination of dependency.

In Co-operators v. Halifax (Arbitrator Samis December 14,2011), Arbitrator Lee Samis applied the principles as enunciated in *Miller* and held that a 22 year-old able-bodied female was not financially dependent on her mother. This was upheld on appeal. Arbitrator Samis stated that the proper question to be asked and answered was whether the claimant had the ability to be self-supporting by providing for her own needs. In a financial context, it is necessary to look at the claimant's capacity to generate an income, and it is recognized that said capacity may be greater than actual earnings in some circumstances. Similar to the fact scenario herein, the claimant in Co-operators had different jobs and earned varying amounts; she was responsible for her own clothes and personal items. However, unlike the facts herein, she did not pay her mother any rent and she would occasionally receive small amounts of money from her mother without any expectation of repayment. The claimant's mother had assumed responsibility for paying the household bills and making ends meet. Arbitrator Samis concluded that the claimant was not principally dependent for financial support from her mother at the time of the accident and stated that, "while she certainly derived a benefit from being in the household [...] she had the income and the income

earning ability to live away from her family at any point". As an able-bodied young adult, she was not a dependent.

In Insurance Corporation of British Columbia v. Federated Insurance Co. of Canada (Arbitrator Samis, July 3, 2009), dependency of a 27 year-old male (similar in age to Mr. Morrone's 33 years) was in issue. In that priority dispute, Arbitrator Lee Samis determined that the claimant was not principally financially dependent upon his parents despite his difficulties in maintaining steady employment and the fact that his parents provided him with shelter, meals, transportation and dental care as required. The claimant paid no rent, consistently asked his parents for money and racked up his credit card debt. Arbitrator Samis commenced his analysis by examining first, the costs of providing for the person's needs, and second, to determine whether or not the person was required to derive more than 50 percent of those costs from someone else (in which case they may be financially dependent).

Arbitrator Samis stated that, with respect to the person's needs, one need not consider the general standard of living in the family, but instead the costs of meeting the individual's basic needs. It was quite possible that an individual's earning capacity would not only be evidenced by his actual earnings, but may include the individual's capacity to earn additional amounts. Arbitrator Samis stated that, "if, and only if, his resources are less than 50% of the cost of meeting the needs do we look further for possible dependency on others." Furthermore, with respect to the timeframe to be examined, Arbitrator Samis used only a 4 week period prior to the accident as the individual had made various transitions in the months prior to that. Similarly, Even though a family may provide important support to an individual, it does not necessary follow that said individual is principally dependent on them in the context of the terminology of the relevant regulation.

Another similar fact scenario to the one herein was explored in The Co-operators v. Zurich Insurance Company/ING (Arbitrator Samis, May 11, 2005). In that case, the individual worked only sporadically when opportunities became available, and made some financial contribution to the household from time to time. He was expected to earn money for items he required such as clothing and entertainment expenses. He contributed some money towards food, but his contributions were "modest". Arbitrator Samis used a timeframe of about four months, over which time the individual earned \$3,500.00. Arbitrator Samis expressly stated that he must consider not only the actual earnings of the individual but his capacity to earn, which is *highly relevant* in the case of someone who is able-bodied and in the workforce. Similar to Mr. Morrone, the claimant in Zurich had indicated that he took employment opportunities that came his way. Despite his modest earnings, the claimant was found not to be principally financially dependent upon any other person.

I accept the principles outlined in the three cases outlined above. I find that the appropriate time frame for analysis is the period of several months preceding the accident when he was living in the trailer, collecting Ontario Works benefits and working odd jobs for cash. As stated earlier I have found that Morrone's mother and step father did not provide financially for more than 50% of his basic needs. Furthermore, I found that he had capacity to be self-supporting. The evidence before me indicates that the claimant Mr. Morrone was a 33 year-old, "multi-traded" male with a knowledge of mechanics. In my view, he was able-bodied and quite capable of working and supporting himself. He even indicated in his testimony on his examination under oath that he thought he could have lived independently. On the evidence before me I believe that he was quite capable of working at a job such as a labourer had he chosen to do so. There is no evidence before me of a physical or emotional condition that would prevent such type of work. There was no evidence before me of some alcohol or drug

addiction that would prevent such type of work. In the circumstances, I find that he had the capacity to support himself with basic needs and was therefore not principally dependant on his mother or step father for financial support.

As a result of these findings, the claimant is therefore not an “insured person” under the State Farm policy issued to the step father and he must therefore look to the insurer of the striking vehicle Intact for payment of statutory accident benefits by reason of Section 268(2)(iii) of the Insurance Act as set out above.

### **ORDER**

I hereby order that this Application to transfer priority be dismissed. I order that Intact pay State Farm it’s cost of the arbitration on a partial indemnity basis. I order that Intact pay the Arbitrator’s costs.

DATED at TORONTO this 6<sup>th</sup> )

day of June, 2013. )

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KENNETH J. BIALKOWSKI  
Arbitrator