IN THE MATTER of the *Insurance Act,* R.S.O. 1990, c.I.18, and Regulation 664 283/95 as amended;

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 :

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

\- and –

ING INSURANCE COMPANY OF CANADA
and AVIVA CANADA INC.

Respondents

A W A R D

COUNSEL:

Jennifer Griffiths & Eric Grossman
Counsel for the Applicant, Allstate Insurance Company of Canada ("Allstate")

David Murray
Counsel for the Respondent, ING Insurance Company of Canada ("ING")

Karla Gnanasegaram
Counsel for the Respondent, Aviva Canada Inc. ("Aviva")

ISSUES:

This Arbitration involves a priority dispute between insurers with the primary issue being that of "dependency". More specifically, was Rhiannon[1] principally dependent for financial support on her mother, Joan, and her stepfather, George, at the time of the motor vehicle accident which occurred on November 18, 2005? The secondary issue, which is predicated on a finding that Rhiannon was not principally dependent for financial support on her mother and her stepfather, requires a determination as to whether Rhiannon was an occupant of the vehicle insured by ING within the meaning of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, at the time of the motor vehicle accident of November 18, 2005?

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[1] In recognition of the privacy interests of non-parties, I have deleted references to surnames from these Reasons.

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PROCEDURE:

It was agreed amongst all parties to this Arbitration that the "occupancy" issue would proceed first. The hearing was held on Thursday, December 9, 2009 and proceeded by way of written record (some facts being undisputed) without *viva voce* testimony. It was agreed by all parties that I would reserve my Award in relation to this issue until the completion of the hearing on the issue of financial dependency. It bears noting that whereas it was anticipated at that time that the financial dependency issue would be addressed in a hearing to be held in January, 2010, a multitude of events, procedural and otherwise, caused this aspect of the hearing to be adjourned and delayed such that it did not take place until April 8 and 9, 2014 (such evidence to be discussed, below).

In the course of conducting a pre-arbitration teleconference on November 26, 2009, I heard submissions from counsel for the parties and determined that Aviva would stand in the position of applicant for purposes of the hearing on this issue (since Aviva sought to prove that Rhiannon was an occupant of the ING vehicle at the time of the accident). ING stood in the position of respondent in relation to this issue. Allstate had counsel in attendance at the hearing on the occupancy issue but took no position in relation to the determination of this issue.

FACTS REGARDING OCCUPANCY (AGREED AMONGST THE PARTIES UNLESS NOTED OTHERWISE)

This Arbitration arises as a result of a motor vehicle accident which occurred on November 18, 2005 in the grass median which separates the westbound and eastbound driving lanes of Highway 407 west of Bathurst Street in the City of Vaughan in the Region of York.

Prior to anything untoward occurring, Rhiannon was a passenger in a 2002 GMC Safari van owned by Renee, driven by Brenda and insured by ING.

Brenda lost control of her vehicle while travelling westbound on Highway 407. She entered the grass median, above described, and her vehicle came to rest. As a result of this accident, Rhiannon did not suffer any injuries.

Prior to the accident described in paragraph 3 herein, Brenda had been in contact with her employer, Renee (being the owner of the vehicle), to discuss, among other things, traffic conditions travelling west on Highway 407 as Renee was either about to leave her office or had already left her office and would be travelling over the same route travelled by Brenda (though behind Brenda by something in the order of 30 minutes). [2]

Following the initial accident, Brenda exited the vehicle and performed a circle check. She came to the conclusion at that time that the vehicle was mechanically driveable and operational.

While Brenda was in the course of performing the circle check, she had a further telephone conversation with Renee. Renee advised Brenda to wait for Renee to arrive at the scene of the accident to assess the situation.

Brenda sought to re-enter the vehicle, presumably with a view toward continuing the trip, when she came to appreciate that cargo loaded behind the driver and passenger seats had become dislodged; specifically, there were turnstiles (as typically seen at sports venues) which obstructed her from taking up a position in the driver's seat and driving the vehicle.

Despite this circumstance, Brenda continued to be of the belief that the vehicle was mechanically driveable. [3] [ING disputes this fact and seeks to characterize the ING vehicle as disabled or otherwise not driveable.]

It was Brenda's intention to continue the trip. [ING disputes this fact, consistent with their position that the vehicle was disabled or not driveable.]

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[2] Interview report of Renee, Collision Reconstruction Report, page 48.

[3] Examination for discovery of Brenda held September 27, 2007, pages 144 – 145, questions 820 – 824, page 137, question 777

Brenda came to the conclusion that the turnstile could not be dislodged unless she were to access the turnstile from the rear of the van. Consequently, Brenda opened the rear cargo doors of the van. Brenda's intention was to make adjustments to the cargo with a view toward dislodging the turnstile. Either Rhiannon offered assistance to Brenda or Brenda requested assistance (though nothing turned on the difference).

While Brenda and Rhiannon were standing at the rear of the van, in close proximity to the van and either about to or in the course of adjusting cargo, a 2005 Chevrolet van owned by Annex, operated by Esmail and insured by Aviva, which had been travelling in a westerly direction on Highway 407, lost control in a manner similar to that of Brenda. The Aviva vehicle was spinning such that the rear of the Aviva vehicle struck the rear of the ING vehicle, causing very serious injuries to Brenda and Rhiannon.

Rhiannon has no memory for the events that surround the accident. Her last memory is at or about the time that she and Brenda departed from their employer's place of business. Her next memory occurs after she arrived at the hospital

LAW REGARDING OCCUPANCY

A priority dispute arises when there are multiple motor vehicle liability policies applicable to a motor vehicle accident. Section 268 of the *Insurance Act* sets out the priority rules to be determined as to which insurer is liable to pay statutory accident benefits. For purposes of the occupancy issue, the relevant sections are as follow:

> 268 (2) The following rules apply for determining who is liable to pay statutory accident benefits;
>
> 1. The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;
>
> 2. If recovery is unavailable under sub-paragraph (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;

3. If recovery is unavailable under sub-paragraph (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;

268 (5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependent, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

268 (5.2)

If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependent of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

The Insurance *Act* defines an "occupant" as follows:

Section 224(1):

"Occupant", in respect of an automobile, means,

(a) the driver;
(b) a passenger, whether being carried in or on the automobile;
(c) a person getting in or on or getting out of or off the automobile;

Aviva and ING agree that the leading and governing cases on the issue of occupancy are *AXA Insurance Company* v *Markel Insurance Company of Canada*[4] and *McIntyre Estate v Scott* [5]. In *AXA v. Markel*, the court considered an appeal from the Award of Arbitrator J.T. Fidler who found the claimant, Edward Ferguson, to be the driver and, therefore, an occupant of the vehicle insured by Markel despite the fact that his vehicle

[4] 2001, Can LII 24143 (Court of Appeal for Ontario)
[5] 68 O.R. (3d) 45 (Court of Appeal for Ontario)

was stopped outside the loading bay and that Mr. Ferguson had exited his vehicle and entered the loading bay to wait his turn to unload his truck. He was standing some 30 feet from this truck when he was struck by a piece of wood which had been propelled from the back of another tractor trailer exiting the loading bay.

Counsel before me on this Arbitration agree that *AXA v Markel* stands for the proposition that there must be some degree of physical connection to the vehicle. One's status as occupant (in *AXA*, the issue was whether Ferguson was the driver) depends on the circumstances at the time of the accident. The status does not attach permanently to the person but depends on the circumstances at the time of the accident. The appropriate test is to determine whether or not an objective observer would determine if the person met the applicable defining term for occupant.

In *McIntyre Estate v Scott,* the Court of Appeal for Ontario was called upon to address the issue of occupancy by reason of a dispute between two insurance companies over coverage. The question turned on whether Deborah McIntyre was the "occupant" of a motorcycle within the meaning of the *Insurance Act*. Ms. McIntyre had been travelling as a passenger on a motorcycle driven by her husband when a rain storm started. They stopped and dismounted under an overpass for shelter. They waited on an embankment in close proximity to the motorcycle and intended to resume the journey as soon as the rain cleared. As Ms. McIntyre was approaching the motorcycle to retrieve some clothing from a saddle bag, she was struck and seriously injured by another vehicle. At the time of the accident, Ms. McIntyre was not mounted on or operating the motorcycle and it was not clear whether she was touching the motorcycle.

Justice Sharpe, speaking for the court, followed the "objective observer" approach set out in *AXA v Markel,* for the following reasons:

a. The word "passenger", like the word "driver", identifies a status rather than a physical activity.

b. There is nothing in the plain language of the statute which dictates a different approach for the interpretation of "passenger" as compared to "driver".

c. There is nothing in the *AXA* decision that requires the court to give "passenger" a more limited reading. In the absence of statutory language mandating a different interpretation, the court should strive for consistency when interpreting the same statutory definition.

d. A finding that Ms. McIntyre was an "occupant" is consistent with the general principle that insurance legislation defining coverage should ordinarily be liberally construed in favour of the insured. The legislative intention and the general principle of liberal interpretation would be frustrated by a narrow or literal approach that insisted "passenger" is limited to those actually being physically conveyed at the time of the accident.

At paragraph 19 of the decision, Justice Sharpe made the following observation:

> "I would apply the *AXA* "objective observer" test. In my view, an objective observer of the accident would describe Deborah McIntyre as a passenger of the motorcycle at the time she was struck by the uninsured driver. Her presence at the scene of the accident was entirely explained by the fact that she was a passenger on the motorcycle. She and her husband had stopped by the roadside to avoid the rain. She intended to resume the journey as soon as the rain stopped. She remained in close proximity to the motorcycle and did not leave it for any other purpose. Finally, she did not engage in any other activity except to wait for the rain to abate."

Counsel for ING has referred me to the decision of Abbey J. in *Kryiazis v Royal* Insurance *Company of Canada* [1991] O.J. No. 1189 (affirmed on appeal to the Court of Appeal for Ontario, [1993] O.J. No. 3029). This decision was made with reference to a prior version of the *Insurance Act* and the statutory policies made thereunder with a prior definition of occupant. It does not alter my view on the law following *AXA* and *McIntyre*.

Counsel for ING has also referred me to the decision of Hoilett J. in *Rose v Beaven et al.* (1998), 39 O.R. (3d) 476. Counsel for ING submits that this case stands for the proposition that an individual in casual contact with a vehicle does not meet the definition of occupant where his actions at the time of contact do not make him an occupant (as

that term is defined and interpreted). I accept this observation but distinguish the applicability of the case from the facts and circumstances of the accident which gives rise to this Arbitration.

I accept the principles as set out in *AXA v Markel* and in *McIntyre Estate v Scott* as governing this Arbitration.

ANALYSIS AND FINDINGS REGARDING OCCUPANCY

I find that Rhiannon was an "occupant" of the ING vehicle at the time of the motor vehicle accident of November 18, 2005. Rhiannon enjoyed the status of "passenger".

I find that it was, at all material times, Brenda's intention to resume her trip with Rhiannon as a passenger in the ING vehicle.

I find, considering the totality of Brenda's evidence adduced through the filing of her transcript of her examination for discovery, that she believed that the ING vehicle was mechanically fit and driveable once the turnstile, which temporarily obstructed her ability to occupy the driver's seat and operate the vehicle, was returned to its original position or, at minimum, dislodged from its position following the first accident but before the second accident involving the Aviva vehicle.

I find that it was the mutual intention of Brenda and Rhiannon, when standing at the rear of the ING vehicle with the rear cargo doors open, to move the cargo with a view toward moving the turnstile so that the two women could continue the trip. It matters not whether they would have or should have waited for Renee to arrive at the scene of the accident as the trip would have continued thereafter.

Rhiannon's presence at the scene of the accident is entirely explained by reason of her being a passenger in the ING vehicle. It should be noted that Highway 407 is a controlled access highway which prohibits, among other things, pedestrian traffic.

It is conceded by counsel for ING that if the ING vehicle were to be disabled and if Rhiannon were to be sitting in the passenger seat of the ING vehicle when struck by the Aviva vehicle, Rhiannon would be an occupant despite the fact that the ING vehicle was disabled and not driveable.

I find that Rhiannon remained in close proximity to the ING vehicle, did not leave it for any other purpose and did not engage in any other activity, other than to seek to make adjustments to the cargo within the ING vehicle and possibly to wait for Renee, before continuing the trip.

ORDER REGARDING OCCUPANCY

On the basis of my finding that Rhiannon was an occupant of the ING vehicle at the time of the motor vehicle accident of November 18, 2005, I hereby order that ING has the higher priority (as compared to Aviva) to respond to the priority dispute initiated by Allstate (assuming, without deciding as yet, that Allstate can "shift" the Rucas claim to ING by reason of Rhiannon not being principally dependent for financial support on either her mother, Joan, and her stepfather, George).

EVIDENCE REGARDING FINANCIAL DEPENDENCY

The financial dependency aspect of this Arbitration proceeded with the following introduced into evidence at the Arbitration hearing:

Exhibit 1 Joint Document Brief consisting of 42 tabs.

Exhibit 2 Curriculum Vitae of Janet L. Olsen (H&A Forensic Accounting)

Exhibit 3 Curriculum Vitae of Jeffrey C. Smith (BDO Canada LLP)

Exhibit 4 Curriculum Vitae of D. Melissa Joynt (NDB Forensic Accountants)

Exhibit 5 Spending Patterns in Canada – 2003, Statistics Canada catalogue #62-202-XIE

Exhibit 6 Survey of Household Spending in 2005, Statistics Canada tables, 2005 62FPY0034 Household Type.xls – Canada

Exhibit 7 Survey of Household Spending in 2005, Statistics Canada tables, 2005 62FPY0035 Size of Area of Residence

Exhibit 8	Survey of Household Spending in 2005, Statistics Canada tables, 2005 62FPY0032 Income Quintiles (2).xls – Canada
Exhibit 9	Survey of Household Spending in 2005, Statistics Canada tables, 2005 62FPY0032 Income Quintiles(2).xls – Ontario.
Exhibit 10	On-line apartment rental information from websites: www.viewit.ca and www.rentersnews.ca
Exhibit 11	Letter of Thompson Rogers to PricewaterhouseCoopers LLP, dated September 28, 2006 (without copies of enclosures)
Exhibit 12	Information obtained from the websites: 222.cra-arc.gc.ca, www.bankofcanada.ca, www.toronto.ca, www.mapquest.com, and www.yorkregiontransit.com
Exhibit 13	Information obtained from the websites: www.ccsd.ca, www.thebankofcanada.ca, www.thestar.com, www.therenter.ca, and www.toronto.en.craigslist.ca
Exhibit 14	Canada Mortgage and Housing Corporation – Rental Market Report; Greater Toronto Area 2007

It should be noted that Exhibit 1 included, inter alia, a transcript of an examination under oath of Rhiannon held on November 28, 2007, a transcript of an examination under oath of Rhiannon's mother, Joan also held on November 28, 2007, the transcript of a telephone interview conducted on December 30, 2005 by an adjuster of Mr. Alan B., C.A., the spouse of Renee, who was the proprietor of An Affair to Remember [the putative employer of Rhiannon], the transcript of a telephone interview conducted on January 31, 2006 by an adjuster of Rhiannon and the transcript of a telephone interview conducted on January 31, 2006 by an adjuster of Joan.

In addition, I heard the *viva voce* evidence, and cross-examination, of each of the accountants who offered expert reports in this matter: namely, Janet Olsen, Jeffrey Smith and Melissa Joynt.

FACTS REGARDING FINANCIAL DEPENDENCY AS AGREED UPON AS DERIVED FROM THE JOINT DOCUMENTS BRIEF (AS REFLECTED IN THE FACTA DELIVERED BY COUNSEL FOR THE PARTIES)

The three parties to this Arbitration are insurers, licensed to carry on business in the Province of Ontario. This proceeding arises as a result of a motor vehicle accident which occurred on November 18, 2005 in the Province of Ontario and resulted in very serious injuries to Rhiannon (born on March 23, 1985) who was 20 years of age at the time of the accident.

As at November 18, 2005, Rhiannon was not licensed to drive in the Province of Ontario. She was not a named insured or a named driver in respect of any policy of automobile insurance.

As at November 18, 2005, Allstate insured Joan jointly with GMAC Leasing in respect of a 2005 Chevrolet Uplander automobile. This vehicle was not involved in the subject accident.

As at November 18, 2005, Aviva insured a 2005 Chevrolet EXP vehicle owned by Annex which was being driven by Esmail.

As at November 18, 2005, ING insured a 2002 GMC Safari owned by Rene (the proprietor of An Affair to Remember).

Rhiannon submitted a claim for statutory accident benefits to Allstate, claiming benefits as a dependent of Allstate's insured, Joan.

Allstate initiated the priority dispute as against ING premised on the assertion that Rhiannon was an occupant of the ING vehicle and was not principally dependent for financial support upon Joan.

Allstate asserts the priority dispute as against Aviva premised on the alternative assertion that if Rhiannon was not an occupant of the ING insured vehicle at the time of the loss but was not principally dependent for financial support on Joan, then Aviva, as the insurer of the striking vehicle, has the higher priority to respond to this claim.

As a result of the accident, Rhiannon sustained serious injuries, including the amputation of her left leg above the knee as well as serious injuries to her right leg (including muscle damage and a right open tibial fracture). As a result of these injuries, together with ongoing issues relating to infection and skin impairment, Allstate accepted that Rhiannon qualified for the designation of “catastrophically impaired” for purpose of the SABS.

Rhiannon is the biological child of Tom and Joan (who had been separated from one another for a number of years prior to the accident).

While not agreed upon, I heard no evidence to contradict the assertion that Tom ceased to pay any child support to or for the benefit of Rhiannon as at one month prior to Rhiannon reaching the age of 18 and that he was not supporting her financially after that date.

At the time of the accident, Rhiannon was 20 years of age and was residing with her mother and stepfather in a single family dwelling located in Richmond Hill, Ontario. At the time of the accident, this dwelling was occupied by Rhiannon, her mother Joan, her stepfather, George, her younger sister, Sabrina (born August 19, 2001) as well as her maternal grandmother, Doris. All of the foregoing had lived in this dwelling since its acquisition in October 2003.

In addition, George’s two children from a previous marriage would spend time in the Joan/George dwelling on Wednesdays and for approximately one or two nights every weekend or thereabouts.

The Joan/George home had four bedrooms and three bathrooms on the second floor. George and Joan occupied a bedroom with an en suite bathroom. Doris had a bedroom with an en suite bathroom. Rhiannon had a bedroom with a spare twin bed and her sister, Sabrina, occupied a bedroom with two spare twin beds (so that the children of George could be accommodated on weekends). There was a third bathroom on the second floor for the use of all of the children.

While residing with the Joan/George family before the accident, Doris did not contribute to the expenses of the household, apart from occasionally purchasing a meal out for the family.

Similarly, Rhiannon did not contribute to the expenses of the household.

Joan would drive Rhiannon to work on a regular basis before the accident.

Rhiannon completed her grade 12 education in June 2004, having been delayed by one year. She had experienced some difficulty completing her high school courses which contributed to this delay.

There is agreement, by virtue of the documents filed and as reflected in the facta of counsel for the parties, as follows:

(a) Annual mortgage payments made on the Joan/George home totalled $8,788.00.

(b) Annual property taxes were $3,965.05.

(c) Insurance on the dwelling was $408.00 per year.

(d) Utility costs consisted of Enbridge ($2,809.56), Power Steam ($983.76), Bell Express Vu ($1,062.60), Bell ($873.12) and Town of Richmond Hill ($496.32).

Joan estimated the costs incurred for groceries for the family in the year prior to the accident to total some $12,000.00. Joan estimated that some $7,000.00 was spent on clothing for the family in the year before the accident. She estimated that 10% of this amount, or $700.00, was spent on Rhiannon.

Joan estimated:

(a) $5,000.00 was spent on family vacations in the year before the accident;

(b) Her annual costs associated with her vehicle amounted to $8,194.00.

(c) Her annual cost of dry cleaning was $250.00, some of which was attributable to cleaning for Rhiannon.

(d) The cost of eye care for the family was $450.00 per year of which some $150.00 would be attributable to Rhiannon.

(e) Rhiannon was covered under George's extended health care plan.

George's income tax return for 2005 reflects total earnings of $62,852.00 and taxable annual income, after RSP deductions, of $56,846.00. After considering deductions, his net income available to him and the household, net of his RSP contribution, was some $47,341.10.

While not agreed upon, I heard no evidence to contradict the suggestion that George paid amounts on account of support in relation to his two older children (who did not permanently reside in the Joan/George residence) in the order of $1,100.00 per month.

Joan worked as a waitress at Wimpey's Diner during part of 2005. She worked part time and earned a base wage of $7.00 per hour plus tips. She did not declare her tip income on her 2005 income tax return. The income tax return she filed for 2005 reflected only $1.00 in income from employment.

EVIDENCE OF JANET OLSEN

In order to determine financial dependency, the critical question is whether Rhiannon's needs are more than two times her means. The first question is to determine the appropriate timeframe. Typically, one year is utilized if this represents a true picture of living arrangements. A shorter period would be appropriate if there are changes in circumstances that warrant such a change. Ms. Olsen utilized one year (though she did proffer shorter periods (post tree-planting and for the 6 weeks or so immediately before the accident) as it appeared that Rhiannon's hours of work at An Affair to Remember were increasing).

Ms. Olsen did not consider Rhiannon's expressed intention to return to school in 2006. This was viewed as a possibility, but remote, as there was insufficient evidence to address this consideration.

If one looked at the period commencing June 23, 2005 to November 18, 2005, this produced an annualized financial resource or means of $10,612.40. If one looked at the period commencing November 19, 2004 to November 18, 2005, and included 100% of income from PRT, a company which employed Rhiannon to plant trees in Northwestern

Ontario in the spring of 2005, of $3,523.48, this produced an annualized resources or means figure of $10,385.18.

As an aside, this may overstate Rhiannon's means, in my view, as she did not receive $3,523.48 from PRT. Rather, they deducted amounts for food, gave her advances for incidental purchases such as alcohol, and the number was inflated to an extent to allow for the value of accommodations provided to or for the benefit of Rhiannon. To be fair, I should look at the net amount received by Rhiannon from PRT and, at the same time, eliminate the amounts notionally received or expended by Rhiannon on account of needs when living in the family household for the same time period (44 days or approximately 6.29 weeks).

Ms. Olsen's evaluation of needs is found at Schedule 3 to her report found at Tab 38 of Exhibit 1. She attributed 25% of the communal or family needs to Rhiannon as Rhiannon occupied one of four bedrooms. Where possible and reliable, Ms. Olsen utilized the actual expenditures as provided by Rhiannon or her mother or their counsel. This was supplemented by the use of statistics where data was not supplied or where data seemed unreasonable or unreliable. Consequently, clothing expenses were increased from $700.00 to $1,200.00 and personal care, possibly included in grocery expenses but not otherwise stated, was increased from $0 to $685.00. Conversely, transportation, as per information supplied by Joan at $8,194.00, was not divided by 4 and attributed to Rhiannon. Rather, Ms. Olsen utilized the monthly cost of an adult York Region transit pass and came to an annual figure of $1,200.00.

Ultimately, Ms. Olsen came to a figure of $11,900.60 for Rhiannon's annualized financial needs. Ms. Olsen repeatedly referenced "basic needs" in course of giving her evidence.

Ms. Olsen seemed to acknowledge that reference to statistics can be helpful when looking at one-person household expenditures for those living independently. By the same token, when provided with actual spending data, this allows one to focus on spending on needs rather than statistics which address spending (without drilling down further on whether this is spending on needs or otherwise).

Exhibit 13 consists of a document published by the Canadian Council on Social Development. This document references LICO's (low income cutoffs) which are income thresholds, determined by analyzing family expenditure data whereby families will

devote a larger share of income to the necessities of food, shelter and clothing than the average family would. In order to reflect differences in the costs of necessities among different community and family sizes, LICO's are established for 5 categories of community size and 7 categories for family size. The LICO's are more popularly known as Canada's poverty lines.

LIM's (low income measures), on the other hand, are strictly relative measures of low income set at 50% of adjusted median family income.

According to Exhibit 13, the before tax low income cutoff for 2005 for a single person family unit living in a community of 500,000+ was $20,778.00. Income refers to pre-tax household income.

Ms. Olsen focused on the family's shared accommodations and actual expenses (dividing same by 4 to account for Rhiannon's needs). She pointed out that Rhiannon used one of four bedrooms and, thus, this was reasonable. She disapproved of the approach of Mr. Smith to look at the cost of a 2 bedroom apartment and divide such costs by 2.

As mentioned, above, Ms. Olsen utilized the family's food costs (both dining outside of the house and in the house). She utilized statistics for personal care. She appeared to ignore things like jewellery, tattoos, piercings and make-up as being choices rather than necessities or basic needs.

Any allowance for internet expenses was disallowed as it appears the family only acquired internet access in 2006. Pet expenses were ignored as the family did not acquire a dog until after the accident. However, no allowance was made for expenses for the family pets (turtle and rabbit). Vacation expenses were ignored as Ms. Olsen viewed that as an enhancement to lifestyle rather than a basic need.

Ms. Olsen and the other accountants noted that the family's expenditures/needs significantly exceeded the family's income. This could be explained by deficit financing, an overstatement of expenses or an understatement of income (particularly on the part of Joan who was working as a waitress and earned considerable sums through cash tips which were not declared). As I recall Ms. Olsen's evidence, she preferred the explanation that family expenses were more likely to be overstated.

Ms. Olsen gave evidence in relation to the allowance, or lack thereof, for recreation and entertainment. In general, she shied away from an allowance for this category as it was beyond basic needs. She took issue with the approach taken by Mr. Smith and Ms. Joynt (the former driven by statistics and the latter driven by the conclusion that if Rhiannon spent the money, it was a need). Rather, Ms. Olsen pointed out that there was a "buffer" of some $7,000.00 in relation to needs. In other words, if I found that Rhiannon's needs, by reason of recreation, entertainment or otherwise, increased from the figure expressed by Ms. Olsen ($11,900.60) by some additional $7,000.00, Rhiannon's means would be at least 50% or more of this amount and Ms. Olsen's conclusion would remain the same, namely, that Rhiannon was not principally dependent for financial support on her parents.

Cross-Examination

Ms. Olsen conceded that the period for making calculations should be one that best reflects the reality of Rhiannon's life. She conceded that the business of An Affair to Remember was seasonal. She exercised her judgment to disregard the possibility that Rhiannon might return to school in 2006 (though, if she did, presumably she would have fewer hours available to work and her means would be reduced).

Ms. Olsen appears to have included in Rhiannon's earnings the cheques which were deposited to Rhiannon's bank but not necessarily reflected in the notebook of hours. These cheques were in the amount of $440.00 and $898.50. This amount is reflected in Schedule 2(b) of her report.

Similarly, Ms. Olsen included the payment from Randy River Inc. in the amount of $12.93. Ms. Olsen believes this work was performed in December 2004 and, thus, should be included.

Ms. Olsen included the GST credit.

PRT income was included in the full amount of $3,523.48 and includes a taxable benefit for accommodations. Rhiannon only deposited some $1,700.00 into her bank as she had to pay for meals and accommodation. As a result, she did not have the benefit of the $3,523.48 to meet her other needs over the course of the year. There was no deduction made for the cost of train travel from Toronto to Long Lac and return.

Ms. Olsen acknowledged that the data provided regarding the family's expenditures seemed reasonable and, where back-up documentation could be provided, accurate. She did have concerns about the accuracy of the income figures (particularly so for Joan).

By the same token, Ms. Olsen had access to the recorded telephone interview of Joan which occurred on January 31, 2006. Joan indicated, in that interview, that at or around the time of the accident, she was working 25 hours per week and earned an average of $29.00 per hour when considering her tips. This would produce a weekly figure of $725.00 and an annualized figure of $37,801.50 (as compared to the income she declared on her 2005 income tax return of approximately $5,000.00). This could explain the family shortfall.

Ms. Olsen conceded that "needs" is not found in nor defined in the SABS in relation to financial dependency. She conceded that an alternative would be to look to objective data. Her approach was to look at the spending patterns of Rhiannon and her parents and utilize statistics on occasion. She was questioned on the distinction between needs and wants. She acknowledged that a 20 year old female would consider her appearance and socializing as important. Consequently, if someone such as Rhiannon spends money on her appearance and socializing, they consider it important.

Ms. Olsen conceded that there is an aspect of artificiality to take the family's expenses and divide by 4 rather than focussing on Rhiannon's needs.

Rhiannon received extended health care coverage through her father's collateral benefits through employment. This had a value to Rhiannon but was not costed in Ms. Olsen's analysis.

There was no allowance made in Ms. Olsen's analysis for the cost of repairs or maintenance to the home. There was no allowance made for the increased equity in the home (which was part of the mortgage payment but which benefit did not enure to Rhiannon). There was no allowance made for furniture or utensils.

Ms. Olsen was questioned in relation to the statistical survey (Exhibit 5). In the survey, there is an allowance made for tobacco products and alcoholic beverages. Ms. Olsen would not characterize those expenditures as needs but seemed to acknowledge that

might depend on the person. She did acknowledge that the breakdown of expenditures was more exhaustive than her analysis as per Schedule 3 to her report.

Ms. Olsen acknowledged that there would be a higher cost for food if one were to live alone as compared to being one person in a family unit.

Ms. Olsen was questioned about tab 25 of Exhibit 1 which seemed to suggest that Joan estimated Rhiannon's use of public transportation at $950.00 per year (over and above the benefit she derived from riding in the family vehicle).

On cross-examination, Ms. Olsen seemed to acknowledge that her approach ignores enhancements to lifestyle and focuses on basic needs necessary to keep a person alive. It was demonstrated to her that her adjusted figure of $13,691.00 (premised on certain assumptions put to Ms. Olsen in the course of her cross-examination) for annual needs was some $7,000.00 less than the LICO figure. This did not cause her to change her opinion in this regard though, at a later point in her evidence, Ms. Olson seemed to acknowledge that a consideration of LICO statistics could be applicable to the analysis of financial dependency in an appropriate case.

Ms. Olsen acknowledged that if Rhiannon were to live independently, she would need certain predictable income in order to meet her needs and financial responsibilities as they come due. At the time of the accident, she had less than $250.00 in the bank and was not in a position to make a deposit for first and last month's rent.

When Ms. Olsen resorted to non-family data, she looked at the cost for Rhiannon to rent a room in a house as an aspect of shared accommodation. She came up with possibilities in the range of $350.00 - $500.00 per month. Apparently, the $350.00 room was furnished. There was no information one way or the other in relation to the $500.00 room.

Re-Examination

On re-examination, Ms. Olsen pointed out that the earnings from Randy River of approximately $12.93 were included in the analysis of means by Mr. Smith (BDO). Similarly, Mr. Smith included the full figure of some $3,500.00 earned from PRT.

If one focused on Rhiannon living independently, she would have less money to spend on discretionary items. Thus, Ms. Olsen focused on basic needs and ignored enhancements to lifestyle.

EVIDENCE OF JEFFREY SMITH

Mr. Smith utilized the time period of one year for an analysis of means and felt this was appropriate unless there was a reason to do otherwise. He found Rhiannon's income earned from An Affair to Remember to be $6,859.43. This involved an analysis of the books or ledgers maintained by Rhiannon to record her hours, considered as against cancelled cheques and bank statements. He included the two deposits in the amount of 440.00 and $898.50 despite the fact that the cancelled cheques were missing,

With respect to income earned from PRT, there was a T4 slip issued in the amount of $3,523.48. However, there were deductions made for food and advances made to Rhiannon for spending money such that she was only in a position to deposit $1,740.90 to her bank account upon her return.

Ms. Olsen did not make deductions for CPP or EI. Rhiannon had an obligation to make these payments but did not do so.

Mr. Smith came to a figure of $24,488.00 to $27,734.00 for needs. This was predicated on the fact that Rhiannon spent all of her monies earned to maintain a reasonable lifestyle. Mr. Smith found the dollar value of support from her parents had a value of at least $14,514.00. The higher figure of $27,734.00 came from the average expenditures of a one-person household. Mr. Smith preferred the use of statistics (as compared to the actual expenditures by Rhiannon and her family) as a family's record keeping in relation to expenditures was undoubtedly imperfect.

Mr. Smith included all of Rhiannon's spendings as "needs". He noted her various bank withdrawals of cash in the order of $50.00 or $100.00 and acknowledged that he had no idea as to how or why or where she spent the money. However, he found that Rhiannon was not leading a high life and that these were not huge sums to consider. Mr. Smith believes that an analysis of needs is more than simply food and water.

Mr. Smith used a figure of $550.00 per month for accommodations (one half of the cost of a 2 bedroom apartment). This figure should be compared to Ms. Olsen's figure of $350.00 - $500.00 per month.

Mr. Smith looked at the family's expenditure on transportation of $8,214.00 and attributed 28.57% to Rhiannon (on the basis that her younger sister, Sabrina, received less than a full share of benefit). This came to a figure of $2,341.00 (compared to Ms. Olsen's figure of $1,200.00).

Mr. Smith discussed the LICO figure for needs of $20,778.00. This is for a single person household living in "straitened circumstances". By comparison, Rhiannon and her family lived a modest life.

Mr. Smith noted the artificiality of dividing certain expenses, such as heat, light and mortgage costs, by 4.

Mr. Smith came to a figure for means of $9,974.00. Considered as against his figures for needs ($24,488.00 or $27,734.00), Rhiannon was not able to provide for more than 50% of her needs.

Cross-Examination

Mr. Smith believed that there was under-reporting of income by Joan. He acknowledged that it was possible that the family's expenses were overstated. He did not think it likely that the family's expenses were understated or materially understated. His view was that the family's standard of living was comfortable but, ultimately, this was a factor for me, as the Arbitrator, to consider.

He acknowledged that the family's expenditures on transportation included some element for the ownership of the vehicle which did not enure to Rhiannon's benefit. Similarly, expenditures on the mortgage, to the extent that the family increased its equity in the house, was a benefit that did not enure to Rhiannon's benefit.

As for accommodations, it was pointed out to Mr. Smith that Ms. Joynt came to a figure of some $3,900.00. Ms. Olsen came to a figure of less than $5,000.00 and Mr. Smith came to a figure of $6,600.00.

Efforts were made to demonstrate the reasonableness of the Olsen approach to Mr. Smith. It was pointed out that she lived in a house with 4 house mates (her mother and stepfather, her sister and her grandmother). Thus, the approach taken by Ms. Olsen, looking at the cost to rent a room in a house in the order of $350.00 - $500.00 per month, was suggested as reasonable. Mr. Smith did not agree.

Similarly, an effort was made to have Mr. Smith acknowledge that transportation costs and needs should ignore the standard of living of the family. He pointed out the practicality of the family generally, or Rhiannon specifically, making exclusive use of public transportation (as per the Olsen analysis).

Mr. Smith was questioned about his deduction of EI and CPP liabilities on the part of Rhiannon. Income tax was calculated to be $249.00. CPP premiums were calculated to be $312.00. EI premiums were calculated to be $191.00. The total of these deductions made from Rhiannon's income amounted to $752.00. Mr. Smith acknowledged that she did not make these contributions and that this money was at her disposal.

The net result of this line of questioning was to suggest to Mr. Smith that on his approach, Rhiannon's means were $10,726.00. This would include full credit for PRT income of $3,523.00, credit for Randy River earnings of $12.93 and credit for the GST refund of $226.00 and the 2004 income tax refund of $105.00.

From another perspective, Mr. Smith agreed that if one were to ignore Rhiannon's income tax, EI and CPP obligations, as per Ms. Olsen, then Rhiannon's income or means would be $10,385.18.

Mr. Smith was questioned about the family's standard of living. He acknowledged that when considering Rhiannon's needs, it is not entirely relevant to establish needs so that she can live as well alone as was the case as a member of a family unit. He described this as not entirely relevant but modestly relevant as his approach to needs was not to establish a figure such that she could merely survive. Thus, he felt some modest allowance for entertainment would be an appropriate consideration of needs. Similarly, an allowance for Rhiannon's actual expenditures on tattoos, piercings and jewellery, given the modest nature of these expenditures, would be an appropriate consideration as a need.

Mr. Smith pointed out that if one utilized the figure of $27,734.00 as needs, this included an allowance for payment of taxes of $1,920.00. Thus, the after tax figure for needs was $25,814.00.

EVIDENCE OF D. MELISSA JOYNT

Ms. Joynt was the third accountant to testify at the hearing. Consequently, and by virtue of the evidence which preceded her, her evidence, while thoughtful and considered, did not materially add to my understanding of the concepts, issues and evidence in dispute and under consideration by virtue of my “learning curve”.

Ms. Joynt looked at the family’s expenditures when determining needs. She divided those expenditures by 5 as there were 5 people living permanently and regularly in the house.

Ms. Joynt allowed for expenditures for tattoos and piercings as Rhiannon, as a young woman who she described as artistic, would view those as needs.

Ms. Joynt found the cost to rent a bachelor apartment in the Richmond Hill area to be $793.00 per month if Rhiannon were to live independently. She rejected the notion of Rhiannon renting a room in a house as she believed the exercise was to determine the needs for Rhiannon to live independently.

Ms. Joynt, when looking at income or means, preferred to look at Rhiannon’s earnings net of taxes that were payable (rather than actually paid). This would diminish the means figure for Ms. Joynt.

Cross-Examination

Ms. Joynt agreed that it would be fair to include the two deposits as made by Ms. Olsen (despite the fact that cancelled cheques could not be located).

Ms. Joynt conceded that if Rhiannon did not pay the taxes, CPP or EI amounts, there would be “more cash in her jeans”. She conceded that there is no evidence that this tax liability has materialized to date. The same applied to CPP and EI remittances.

Ms. Joynt acknowledged that the income or means figure produced by Ms. Olsen, namely, $10,385.18, is representative of the real income available to Rhiannon. Similarly, the figure of $9,974.00 as found by Mr. Smith, augmented by the notional deduction for taxes, CPP and EI (which remittances were not made), would be accurate.

Ms. Joynt acknowledged that actual amounts spent, if reliable, would be preferable when determining needs as compared to usage of data from Statistics Canada. She seemed to acknowledge that one cannot look blindly at expenditures; rather, one needs to distinguish as amongst needs, wants and enhancements to lifestyle.

Ms. Joynt believed that monies spent by Rhiannon for tattoos and piercings were a need for Rhiannon.

She acknowledged that the use of the figure of $4,800.00 for meals out of the house was clarified in Joan's examination under oath such that the figure of 2,400.00 should be in play as amongst the family members. If this figure were divided by 5, this would produce a figure of $480.00 per year for Rhiannon.

Internet expenses should no be considered.

Ms. Joynt came to a figure for accommodations of $3,617.00 as Rhiannon's share of this need. She acknowledged this included some payment on account of principal as part of the mortgage payments. Ms. Joynt's research in relation to a bachelor apartment produced an annual expenditure of $9,516.00. This could be compared against Mr. Smith's use of 50% of a 2 bedroom apartment which produced an annual expenditure of $6,600.00.

Ms. Joynt seem to acknowledge that Rhiannon's expenditures in relation to coffee and other beverage products and fast food could be characterized as an item of discretionary spending rather than needs. However, Ms. Joynt seemed to return to the notion that I should consider Rhiannon's needs as a 20 year old female.

Ms. Joynt was asked to assume that Mr. Smith's approach on accommodations was correct (as against her approach for a bachelor apartment). If this amount and a further $260.00 (for Government remittances, as I recall her evidence), were to be deducted from Ms. Joynt's figure for needs ($22,260.00), this would reduce Ms. Joynt's figure for needs to $19,084.00. If one accepts Ms. Olsen's figure for means of $10,384.00, then

Rhiannon was capable of providing some 54.4% of her needs and, thus, would not be principally dependent for financial support on her parents.

Re-Examination

Ms. Joynt noted that her analysis made no allowance for furniture, other home furnishings, utensils, etc. This would increase the figure for needs.

LAW REGARDING FINANCIAL DEPENDENCY

The parties are in agreement that any analysis of financial dependency starts with the decision of O'Brien, J. in *Miller v Safeco*.[6] As will become evident when reviewing more recent decisions, this decision, as modified by the Ontario Court of Appeal, remains one of the leading and governing authorities.

Justice O'Brien was charged with the task of determining whether Robert Miller was a dependent relative so as to access what was then "no-fault" coverage. Justice O'Brien stated:

> "In my view, it would be preferable to approach the question of this interpretation on the basis the legislation was of a remedial nature, intended to broaden insurance coverage to include members of family units as person insured under the policy.
>
> Obviously, cases of this kind will be approached on their own particular facts. In my view, however, in considering who is an "insured person", the legislative intent should be kept in mind and, in addition, matters such as the amount and duration of the financial or other dependency, the financial or other needs of the claimant, the ability of the claimant to be self-supporting, and the general standard of living within the family unit should be considered.

[6] Miller v Safeco Insurance Company of America, 48 O.R. (2d) 451 [O.H.C.J.]

The Ontario Court of Appeal considered *Miller v Safeco* [7]and agreed with the analysis and criteria set out by O'Brien, J. with the exception of "the general standard of living within the family unit, which in our view is not an appropriate consideration".

Significantly enhanced "no-fault" benefits came into being on June 22, 1990 with the passage of OMPP (the first of several enhanced first party benefit schemes under automobile insurance legislation). Consideration of dependency was dealt with by Arbitrators at what is now known as the FSCO (previously known as the OIC). Arbitral awards from FSCO/OIC have not been put before me by counsel as relevant to the issues which I must decide.

In *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company*,[8] Arbitrator Lee Samis was required to make a determination about dependency. He noted that it is necessary to establish a timeframe during which to examine income, expenses and other matters. The evaluation should be made by examining a period of time which fairly reflects the status of the parties at the time of the accident. He also noted that a distinction can be drawn between earnings versus capacity to earn. In some cases, where individuals may not be earning up to their capacity, he stated:

> "If the individual alleged to be dependent is reasonably exercising his or her capacity by providing for his or her own needs to the extent permitted by the circumstances, then it is reasonable to regard the earnings as the amount that the person can contribute to his or her own expenses of living."

Mr. Samis also discussed the distinction between a person's receipt of financial benefit from others as compared to a person's financial needs. He states:

> "Dependency" implies something more than receipt of a financial benefit. It requires some kind of need on the part of the person alleged to be a dependent. A very wealthy person might receive food, shelter and other financial benefits from family, but this would not support a conclusion that the person is principally dependent upon the family structure".

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[7] Miller v Safeco Insurance Company of America, 50 O.R. (2d) 797 [O.C.A]

[8] Federation Insurance Company of Canada v Liberty Mutual Insurance Company, Arbitral Award of Lee Samis (May 7, 1999)

Mr. Samis noted that the Ontario Court of Appeal's admonition that one should not consider the "general standard of living within the family unit" in dependency cases (as per Miller v Safeco). Mr. Samis continues his analysis by noting that a person is not principally dependent on someone else unless that other person provides for most of the individual's needs. Thus, a person can only be considered principally dependent for financial support on someone else if the cost of meeting that person's needs is more than twice the person's resources.

Mr. Samis' Award in *Federation v Liberty Mutual* was appealed to O'Leary, J. In reasons dated September 15, 1999, O'Leary, J. stated that he understood Mr. Samis' analysis of principal dependency to mean that if the individual's resources were sufficient to pay for 51% of the individual's financial needs, then such individual would not be dependent on others. O'Leary, J. viewed that as a correct statement.[9]

Federation v. Liberty Mutual was further appealed to the Ontario Court of Appeal which appeal was dismissed. The court noted that the Arbitrator followed *Miller v Safeco* and that there was nothing in the language of the legislation under consideration which would dictate a different approach to measuring of dependency.[10]

Counsel on the matter before me agree that the mathematical analysis does not require Rhiannon to be able to provide 51% of her needs, as I find them, through her own financial means, as I find them. Rather, if Rhiannon is capable to meet 50% of her needs plus $1.00, that is sufficient and she is not principally dependent for financial support on another.

Counsel have provided me with a number of decisions from fellow Arbitrators. All of those decisions pay homage to and follow the decision in *Miller v Safeco*, as qualified by the Ontario Court of Appeal, and the decision in *Liberty Mutual v Federation Insurance.* All of the decisions of fellow Arbitrators acknowledge the fact specific inquiry which must be undertaken. While I have carefully read and reviewed these decisions, they will only be referenced as necessary.

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[9] Federation Insurance Company of Canada v Liberty Mutual Insurance Company, Reasons of Justice O'Leary dated September 15, 1999 (as found at www.ZTGH.com)

[10] Federation Insurance Company of Canada v Liberty Mutual Insurance Company, [2000] O.J. No. 1234

In *Co-Operators v Halifax Insurance Company*,[11] a decision of Arbitrator Lee Samis, he discussed the inquiry necessary to determine needs. The financial dependency test requires some understanding about the person's basic needs for food, shelter and the other necessities of life. The actual circumstances at the time of the accident may provide some important evidence about a person's needs. However, the Court of Appeal cautions, in *Miller v Safeco*, that one is not to give consideration to the "general standard of living within the family unit". Thus, it is not appropriate to measure a person's needs by the family standard of living but we must measure their needs in a more objective context. [Quaere whether reference to data from Statistics Canada is a preferred path].

Mr. Samis' decision, in *Co-Operators v Halifax Insurance*, was appealed to and upheld by Madam Justice E.M. Macdonald. Madam Justice Macdonald noted that the determination of dependence is essentially a factual issue. Each case must be approached and analyzed based on its own particular facts and then applied to the relevant statutory standard. To be principally dependent for financial support on another person, the individual claimant must "chiefly or for the most part derive his or her financial support" from that other person. Each case of dependency must be decided on its own facts, "based on a realistic assessment of the party's actual financial circumstances at the time of the accident". [12]

In *Co-Operators v ING Insurance*,[13] Arbitrator Samis received evidence from an accountant who considered not only the actual household expenses but data from Statistics Canada which constituted the borderline for a person living alone at the poverty line. On the facts before him, he found the individual under consideration to not be principally dependant for financial support on another person under all of the scenarios. He did consider the data in relation to the "poverty line" but found that it was not appropriate, in the circumstances of this case, to look at the individual's dependency status on a hypothetical fact situation. He states as follows:

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[11] Co-Operators General Insurance Company v Halifax Insurance Company, Arbitral Award of Lee Samis [Dec. 14, 2001]
[12] Co-Operators General Insurance Co. v Halifax Insurance Co, 39 C.C.L.I. (3d) 250, Tab 12 in Joint Brief of Authorities, paragraph 14.
[13] The Co-Operators Insurance Company v. ING Insurance Company of Canada, Arbitral Award of Lee Samis [May 2, 2006]

> "While we should not become overly focused on looking at the general standard of living in the household at the time of the accident as a guide to dependency, **in this particular circumstance**. I believe that the family situation at the time of the accident was a reasonable indication of the needs …" [emphasis added]

In *Oxford Mutual v Co-Operators*, the Ontario Court of Appeal, when considering the issue of principal dependence for financial support, noted that "the true characterization of a dependent relationship at the time of the accident will usually require consideration of that relationship over a period of time, particularly in the case of young adults whose lives are in transition. The parameters of that period will depend on the facts of the case. The timeframe chosen will also be influenced by the nature of the relationship between the person providing the care and the person receiving the care. The analysis may also consider the degree of care provided to the individual at certain times as well as the individual's need for care.[14]

The Ontario Court of Appeal approved of the comments of Arbitrator Samis in *Liberty v. Federation* such that the evaluation should be made by examining a period of time which fairly reflects the status of the parties at the time of the accident.

Arbitrator Samis, in *TTC Insurance v The Co-Operators* (July 23, 2007), analyzed the distinction between earnings and capacity to earn. He examined basic needs as distinguished from the lifestyle enjoyed within a family unit (which should be ignored as per the Ontario Court of Appeal in *Miller v. Safeco*).

He made the following observation which bears noting:

> "Establishing dependency relationships has been a troubling issue for automobile insurers for more than a decade. Numerous reported decisions illustrate the challenges that are faced in these cases. Almost invariably the evidentiary record is weak. Individuals do not keep comprehensive, careful records of their personal expenditures, their income and their needs. Precise determination of these issues is impossible or impractical. When

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[14] Oxford Mutual Insurance Company v Co-Operators General Insurance Company (2006), 83 OR (3d) 591, Tab 14 in Joint Brief of Authorities, paragraph 26.

> a dispute is brought before an Arbitrator pursuant to the Regulation, the Arbitrator is asked to make a determination based on the material before the Tribunal with the full recognition that the evidentiary record is likely to be incomplete. Necessarily, the Arbitrator is required to make inferences in order to arrive at some conclusion about dependency."[15]

Later, in the same Award, Arbitrator Samis observes:

> "The household expenses are expressed in some respects in ranges. I have considered the various components of the household expenses. Firstly, I should observe that it is not clear to me that in every case we should simply total household expenses and divide those expenses by the number of people in the household to measure the basic needs of the people in the household. Such calculation would assume that the household circumstances met the person's basic needs, and no more. I am not convinced that this is the case in this circumstance or in most circumstances. Nor am I convinced that the expenses should be apportioned equally between the members of a household".

Arbitrator Samis discussed examples in relation to automobile expenses, mortgage payments and food expenses. His analysis continues such that he observed "it is instructive to initially analyze the figures on the assumption that a per capita share of household expenses may be a good approximation of the maximum cost of meeting the claimant's basic needs." [Quaere why this analysis should produce the maximum cost of meeting basic needs. Since the Ontario Court of Appeal, in *Miller v Safeco,* directs us to ignore a person's standard of living within the family, why should we look at the individual's per capita share of family expenses and assume that this represents a maximum cost or need?].

[15] TTC Insurance Company v The Co-Operators, Arbitral Award of Lee Samis, July 23, 2007, Tab 15 of the Joint Brief of Authorities, pages 4 – 5.

In *Gore Mutual v Co-Operators*, Perell. J. considered an appeal from a decision of Arbitrator Jones. Perell, J. upheld Arbitrator Jones' decision and noted, in relation to earning capacity, the following:

> "A person's earning capacity is a product, amongst other things, of his or her formal and informal education, natural and acquired talents, physical and mental abilities and disabilities, and external factors such as the availability of employment and the supply and demand for labour. Determining a person's earning capacity would involve considering these factors and also a person's prior employment history….The determination of dependency is essentially a factual issue and each case must be analyzed based on its own particular facts and the applicable law".[16]

In *Coseco v ING Insurance*, Arbitrator Samis returned to the subject of determining the costs of a person's needs. He stated the following:

> "In many cases, the litigants have focused on trying to make a determination of the actual costs of operation of a household, and then make some kind of attribution of those costs in respect to the claimant. **The logic is to suggest that the allocation represents the cost of meeting the person's needs. I disagree. It does not logically follow that the actual expenditure in favour of the person is equivalent to the cost of meeting the person's needs. The actual expenditures might be greater than their needs, or less than their needs**. [emphasis added]
>
> The leading decision of the Ontario Court of Appeal in Miller v Safeco instructs us not to look at the general standard of living in the household. This means that we should be looking at a more objective evaluation of the cost of meeting somebody's needs and not looking at the costs incurred as necessarily equivalent.

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[16] Gore Mutual Insurance Company v Co-Operators General Insurance Company (2008), 93 OR (3d) 234, Tab 16 of Joint Brief of Authorities, paragraphs 20 – 21.

As we are directed not to take into account the general standard of living in the household, this causes us to consider whether or not we should be taking into account factors particularly applicable to the claimant, or whether we should turn our minds to evaluating statistics, market averages and other measures devoid of any relationship to the injured claimant. It is my view that we should not adopt an inflexible rule of applying averages in order to ascribe a value to living costs for this exercise. One can readily recognize that an individual living with some sort of physical disability or health issue might have different needs than the average. Clearly, the process of calculating the cost of meeting needs must reflect the personal characteristics of the claimant.

Necessarily, a fair evaluation requires us to look at each claimant individually, to have regard to the statistics that speak to the cost of living in the community, and to make a finding that fairly reflects the cost of meeting the claimant's needs taking into account these factors.

Extensive evidence about the cost of living in the claimant's circumstances at the time of the accident may or may not be helpful in this exercise. A person with an extremely high standard of living might easily demonstrate a high cost of living but this does not necessarily equate to the cost of meeting the person's needs. At the other end of the spectrum, someone who is living in dire circumstances might not have actually incurred the costs required for meeting basic needs.

In my view, there is a balance to be drawn which requires us to give appropriate emphasis to each of the relevant factors. We should avoid blindly applying rules which, with rigidity, offer certainty but cause us to stray from fact-sensitive analysis."[17]

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[17] Coseco Insurance Company v ING Insurance Company of Canada (21 July 2010), Arbitrator Samis, Tab 19 of the Joint Brief of Authorities, pages 2 – 3.

In *St. Paul Travellers v York Fire & Casualty Insurance*, Arbitrator Samis was, once again, called upon to determine the question of financial dependency. He observed that the development of caselaw on dependency has established 3 principles that are germane to the case that was then under consideration.

> "1. Capacity to earn and actual earnings are both worthy of evaluation. If a person could reasonably exercise his/her capacity and earn a greater amount, it is that amount that represents the financial resources available to the person.
>
> 2. The cost of meeting a person's needs must be calculated, and is not necessarily equivalent to the cost that he/she habitually incurred before the accident. The history of the family setting may assist in providing some evidence of what that cost is, but that is not determinative.
>
> 3. A person's dependency must be determined by comparing his/her resources (capacity or otherwise) with the cost of meeting his/her needs and determining whether the resources exceed 50% of the costs. Hence a person may well be in need of other resources to meet the full cost of his/her needs, but this does not create "dependency" for SABS priority purposes.
>
> In this case, the financial history of the family has been exhaustively probed and considered. The parties have engaged forensic accountants to review these components of the dependency question. As in all cases, there are difficulties in understanding fully the pre-accident household expenses, the relative contributions, and the proportionate dependencies."[18]

Later, in the same decision, Arbitrator Samis observes:

> "In dependency cases we commonly see two approaches taken. In the traditional approach, the litigants look at the pre-accident living arrangements as an indication of what is involved in meeting a person's needs. Considerable effort is then made to determine the costs of those living arrangements, and the

[18] St. Paul Travellers v York Fire & Casualty Insurance Company (11 August 2011), Arbitrator Samis, Tab 21 of the Joint Brief of Authorities, page 6

> monetary and non-monetary contributions of members of the household. To the extent that looking at the family household expenditures involves looking at a higher standard of living, this methodology is in defiance of the Court of Appeal's admonition in *Miller v Safeco* that we should not take into account the general standard of living in the family unit.
>
> An alternative methodology is to objectively establish the cost of meeting reasonable, basic needs of a person in his/her community. This line of inquiry stands alone, independent of pre-accident household budgetary minutiae, and might be established by reference to various statistical evidence, or market analysis etc.
>
> There is much to be said for this approach. First and foremost, it is in accordance with the legislation and the caselaw.
>
> Furthermore, it reduces the intrusive inquiries often made into household financial arrangements in these cases. These inquiries, if necessary, are an imposition on the families, and are costly for the parties, usually resulting in requests for undertakings, documents, old files and bills, etc. In addition, the Arbitration and claims process becomes diverted and delayed while these family financial issues are pursued, documented, analyzed by experts, and finally adjudicated upon.
>
> Finally, I entertain considerable doubt about the accuracy and completeness of the evidentiary picture painted in the traditional approach. The families do not keep careful records that document household expenditures or contributions. And the monetary value of contribution (in kind) is highly debateable in family situations. Such efforts are best viewed as giving a "ballpark" insight only."

Mr. Samis noted that one of the accountants, in the case before him, looked past the family's mortgage arrangements and took an alternative approach by reviewing prevailing market costs for similar premises. He endorsed this approach as the recommended primary approach to the analysis. He endorsed the same approach with

respect to food, clothing, healthcare or other personal necessities and suggested that only when there is some circumstance which distinguishes the "dependent" from other individuals in the community should one embark on the costly traditional household financial analysis.

In *Economical Mutual v Aviva Canada et al.*, Arbitrator Densem conducted a comprehensive review of the case law for purposes of determining the question of principal dependency for financial support such that he postulates the decision maker must do the following:

> "A. Determine the amount of the claimant's dependency by examining a sufficient length of time in the claimant's life leading up to the accident that a consistent and reliable picture of the amount and duration of the claimant's financial and care needs can be ascertained.
>
> B. Determine what the needs of the claimant are with respect to such requirements as food, clothing, shelter, the basic necessities of life, social, emotional, physical and protection needs. In making this determination, one must distinguish between the claimant's needs, and enhancements to the claimant's lifestyle provided either by the claimant or through other support sources.
>
> C. Determine whether the claimant is providing for or reasonably has the capacity to provide for 51% of the claimant's financial and care needs. If so, there can be no principal dependency. If not, determine whether there is an independent source of support that is greater than any other independent source of support, and is also greater than the value of the claimant's self-supporting resources. If so, the claimant is principally dependent upon that source."[19]

[19] Economical v Aviva et al., January 29, 2013, decision of Arbitrator Scott Densem, pages 42 - 43

ANALYSIS AND FINDINGS REGARDING FINANCIAL DEPENDENCY:

In order to determine this issue, I must make a finding of Rhiannon's financial means (which includes her capacity to earn income to the extent this may be different than her actual income earned) and, thereafter, make a finding as to Rhiannon's needs. If her needs are more than twice her means and if that shortfall is comprised of financial support from her mother, Joan, and her stepfather, George, then Rhiannon is principally dependent for financial support on her mother and stepfather (insured by Allstate) and Allstate remains the insurer with the highest priority to respond to Rhiannon's claims for statutory accident benefits.

As has been stated by a number of Arbitrators and courts, this is necessarily a fact-driven exercise. Generally speaking, one should consider one year prior to the accident as a starting place for the means analysis. If that does not accurately reflect the true state of affairs, then one could reduce or expand the timeframe to better reflect the financial circumstances of those under consideration.

I find a consideration of one year prior to the accident (November 19, 2004 to November 18, 2005) to be appropriate in this case. I accept the opinion of Janet Olsen, the accountant who gave evidence for Allstate, that Rhiannon's earnings and financial means over this period amounted to $10,385.18.

Arguably, this figure may overstate Rhiannon's means to an extent as it includes earnings from Randy River of $12.93 (which may have been earned in December 2003 as the evidence is less than perfectly clear on this point). In addition, this figure may overstate Rhiannon's means as it includes 100% of income earned from PRT of $3,523.48. Rhiannon worked for this company while planting trees in Northwestern Ontario in the spring of 2005. This figure includes an amount for a housing allowance (which was not paid to Rhiannon). Moreover, Rhiannon incurred what I would characterize as extraordinary needs during this time such that by the time she returned from this 6 week sojourn, she was only in receipt of some $1,700.00 which she deposited to her bank account.

Moreover, Rhiannon did not pay income tax or remit other statutory deductions to government authorities in relation to her earnings from An Affair to Remember.

In other words, my finding of Rhiannon's means in the amount of $10,385.18 represents, in my view, the high water mark for her means earned in the 12 months preceding the accident.

The more challenging issue for me to determine is that of Rhiannon's needs. The opinions offered by the accountants in this regard varied greatly. At the low, Ms. Olsen proffered a figure of $11,900.60 per year. Ms. Olsen frequently referenced the need to ascertain Rhiannon's "basic needs" in the course of giving her evidence. Ms. Olsen's approach was principally driven by a consideration of the expenditures of the family unit with what se believed to be an appropriate attribution to or for the benefit of Rhiannon. This was supplemented, as necessary, by Ms. Olsen's consideration of other sources of information (an example being the cost of a monthly mass transit pass in Richmond Hill).

At the other end of the spectrum was the opinion of Mr. Jeffrey Smith, the accountant relied upon by ING. Mr. Smith came to a figure for Rhiannon's needs of as much as $27,734.00 per year. This was based to an extent on the family's expenditures, to an extent on Rhiannon's expenditures and to an extent on evidence and information gleaned from statistics and market pricing for various items.

All of the accountants who gave evidence and offered expert opinions in this matter acknowledged the inherent frailty and weaknesses when trying to gather reliable information, documentation and evidence regarding a family's expenditures and an individual's expenditures in relation to needs. There are inequalities when considering expenditures on rent of a family dwelling (since 100% of the expenditure relates to the cost of occupancy) as compared to mortgage payments (where a portion of the payment adds to the equity which inures to the owner of the family dwelling rather than to the individual whose means and needs are being assessed). A similar example arises in relation to automobile expenses. When considering an individual's ability to be independent (or principally dependent for financial support on their own means), is it necessary for the trier of fact to make some allowance for furniture and other home furnishings? If so, should the trier of fact look at the capital expenditures or amortize

those expenditures over a period of time and, if the latter, what period of time is appropriate?

As can be demonstrated from the foregoing, the analysis and determination of an individual's needs is fraught with difficulty. Mr. Smith, the accountant for ING, described his approach in relation to one particular aspect of this exercise as "fair, reasonable and wrong".

It is my view that it is inappropriate, as a starting place, to look at a family's financial needs and then attempt to attribute some portion of those financial needs to the individual under consideration. One need go no further than the statement made by the Ontario Court of Appeal in *Miller v Safeco* as the court rejected any consideration of "the general standard of living within the family unit" as an appropriate consideration for the analysis of dependency.

Moreover, if the parties proceed down the path of investigating and attempting to ascertain a family's expenditures in relation to needs, this gives rise to a very intrusive exercise and, as was acknowledged, produces an inherently unreliable body of evidence. Recall that each of Rhiannon and Joan were interviewed by telephone at length within a few months of Rhiannon suffering very serious injuries. Subsequently, each was required to undergo an examination under oath. Each were under Summons to appear at the Arbitration hearing before me (though, ultimately, counsel decided this was not necessary).

I find the best and most reliable approach to the evidence respecting needs, considering the admonition of the Ontario Court of Appeal in *Miller v Safeco*, is to look to statistics and, in the case before me, the LICO (low income cutoffs). These statistics are established for five categories of community size and for seven categories by family size. This data establishes a figure for needs which is essentially living in poverty. Exhibit 13 provides that the data deals with people living in "straitened circumstances". "Straitened circumstances" is defined in an online dictionary (thefreedictionary.com) as "not having enough money to pay for necessities". Synonyms are "hardup, impecunious, penniless, penurious, pinched, poor". The compact edition of the Oxford English dictionary defines "straitened circumstances" as "inadequate means of living, poverty".

The appropriate figure for a single person, living in a community of 500,000 people or more (as would be applicable to Rhiannon), is $20,778.00. This is a gross earnings figure and is established before consideration of income taxes paid or payable and other statutory deductions or remittances; thus, it compares favourably with the amount I have found for Rhiannon's means which ignores taxes that could or perhaps should have been paid but were not.

I find this approach to be the preferred methodology of establishing needs with a view toward smoothing out or eliminating the individual peculiarities or predilections of a family's spending or of an individual's spending. Moreover, this should eliminate the intrusive and unreliable exercise of trying to establish the spending patterns and needs of a family unit. This approach follows the approach endorsed by the Ontario Court of Appeal in *Miller v Safeco*.

There is some support for this approach in the law which I have reviewed, above. Arbitrator Samis, in *Co-Operators v ING Insurance*, heard and considered evidence from Statistics Canada on a person living alone at the poverty line. Ultimately, he found that evidence not to be applicable to the matter before him on the particular circumstances of that matter.

Arbitrator Samis returned to this subject in *Coseco v. ING Insurance*. While I quoted extensively from his reasons in my review of the law, above, Arbitrator Samis' comments are re-stated here as they are particularly appropriate to my analysis:

> "In many cases, the litigants have focused on trying to make a determination of the actual costs of operation of a household, and then make some kind of attribution of those costs in respect to the claimant. **The logic is to suggest that the allocation represents the cost of meeting the person's needs. I disagree. It does not logically follow that the actual expenditure in favour of the person is equivalent to the cost of meeting the person's needs. The actual expenditures might be greater than their needs, or less than their needs**. [emphasis added].

The leading decision of the Ontario Court of Appeal in Miller v Safeco instructs us not to look at the general standard of living in the household. This means that we should be looking at a more objective evaluation of the cost of meeting somebody's needs and not looking at the costs incurred as necessarily equivalent.

As we are directed not to take into account the general standard of living in the household, this causes us to consider whether or not we should be taking into account factors particularly applicable to the claimant, or whether we should turn our minds to evaluating statistics, market averages and other measures devoid of any relationship to the injured claimant. It is my view that we should not adopt an inflexible rule of applying averages in order to ascribe a value to living costs for this exercise. One can readily recognize that an individual living with some sort of physical disability or health issue might have different needs than the average. Clearly, the process of calculating the cost of meeting needs must reflect the personal characteristics of the claimant.

Necessarily, a fair evaluation requires us to look at each claimant individually, to have regard to the statistics that speak to the cost of living in the community, and to make a finding that fairly reflects the cost of meeting the claimant's needs taking into account these factors.

Extensive evidence about the cost of living in the claimant's circumstances at the time of the accident may or may not be helpful in this exercise. A person with an extremely high standard of living might easily demonstrate a high cost of living but this does not necessarily equate to the cost of meeting the person's needs. At the other end of the spectrum, someone who is living in dire circumstances might not have actually incurred the costs required for meeting basic needs.

In my view, there is a balance to be drawn which requires us to give appropriate emphasis to each of the relevant factors. We should avoid blindly applying rules which, with rigidity, offer certainty but cause us to stray from fact-sensitive analysis."

Arbitrator Samis had more to say on this subject in *St. Paul Travellers v York Fire & Casualty Insurance*. Once again, his analysis bears repeating here:

> "In dependency cases we commonly see two approaches taken. In the traditional approach, the litigants look at the pre-accident living arrangements as an indication of what is involved in meeting a person's needs. Considerable effort is then made to determine the costs of those living arrangements, and the monetary and non-monetary contributions of members of the household. To the extent that looking at the family household expenditures involves looking at a higher standard of living, this methodology is in defiance of the Court of Appeal's admonition in *Miller v Safeco* that we should not take into account the general standard of living in the family unit.
>
> An alternative methodology is to objectively establish the cost of meeting reasonable, basic needs of a person in his/her community. This line of inquiry stands alone, independent of pre-accident household budgetary minutiae, and might be established by reference to various statistical evidence, or market analysis etc.
>
> There is much to be said for this approach. First and foremost, it is in accordance with the legislation and the caselaw.
>
> Furthermore, it reduces the intrusive inquiries often made into household financial arrangements in these cases. These inquiries, if necessary, are an imposition on the families, and are costly for the parties, usually resulting in requests for undertakings, documents, old files and bills, etc. In addition, the Arbitration and claims process becomes diverted and delayed while these family financial issues are pursued, documented, analyzed by experts, and finally adjudicated upon.
>
> Finally, I entertain considerable doubt about the accuracy and completeness of the evidentiary picture painted in the traditional approach. The families do not keep careful records that document household expenditures or contributions. And the monetary value of contribution (in kind) is highly debateable in

> family situations. Such efforts are best viewed as giving a "ballpark" insight only."

Thus, I have found Rhiannon's means to be $10,385.18. This figure, when doubled, amounts to $20,770.36. I have found Rhiannon's needs to be $20,778.00. Consequently, her means are less than 50% plus $1.00 of her needs and, as a result, I find Rhiannon to be principally dependent for financial support on her mother, Joan, and her stepfather, George.

I appreciate that the foregoing mathematical analysis suggests that if Rhiannon had increased means by something in the order of $4.00, she would not be principally dependent for financial support on her mother and stepfather. I wish to reiterate my findings, above, such that the finding I made in relation to Rhiannon's means ($10,385.18) represents what I believe to be the high water mark. Arguably, the income from Randy River ($12.93) could have been excluded. Arguably, I should have considered only the net earnings from PRT which were available to Rhiannon and which were deposited into her bank account. Arguably, I should have made deductions from Rhiannon's gross earnings to take into account income tax and other statutory remittances which were properly payable.

In the event that my Award comes under review by an Appellate Court in relation to my findings and analysis on needs, I make these additional findings. I reject the figure for needs as offered by Ms. Olsen in her report in the amount of $11,900.60 as reflective of Rhiannon's "basic needs". This figure is unduly low and cannot withstand scrutiny, whether with reference to statistical data or the evidence offered by Mr. Smith and Ms. Joynt. The possible concessions made by Ms. Olsen, in cross-examination, which would increase her figure for needs to some $13,691.00 is still exceedingly low (some 67% of a figure established for living in poverty under straitened circumstances).

I prefer the evidence of Mr. Smith whereby he comes to a figure of $24,488.00 for means. However, I would adjust this figure downward as he accepted Rhiannon's various bank withdrawals of cash in the order of $50.00 or $100.00. He acknowledged that he had no idea as to how or why or where she spent the money but accepted that as Rhiannon was not leading a high life, these were not large sums requiring further investigation or consideration. Consequently, I have reduced the figure of $24,488.00 by an amount approximating the withdrawals found at tabs 14, 15 and 16 over the time

period under consideration (November 19, 2004 through November 18, 2005) by a total of $2,500.00 and find, for the alternative reasons expressed, Rhiannon's needs to be $21,988.00. On this alternative analysis, Rhiannon's means remain less than 50% of her needs.

THOUGHTS AND OBSERVATIONS REGARDING PRIORITY DISPUTES/FINANCIAL DEPENDENCY GOING FORWARD:

The determination of an individual's means must remain fact specific. One must consider not only an individual's actual earnings but their income earning potential or capacity. The individual's needs, on the other hand, should start with a consideration of statistics applicable to such individual living in their community. This could be viewed as a coarse assessment followed by an adjustment for fine tuning to the extent that the facts of a particular case warrant such adjustment.

The alternative, and currently popular methodology, whereby the individual's needs and expenses are invariably considered and evaluated in the context of a family's financial needs and expenses produces an intrusive and inherently unreliable record. Moreover, it seems to run afoul of the Ontario Court of Appeal's admonition in *Miller v Safeco*.

On a practical level, priority disputes arise amongst all insurers who issue policies of automobile insurance in Ontario or applicable to accidents which occur in Ontario or to individuals residing in Ontario. Those who may criticize the approach I have taken in this matter may find some solace in the notion that "what goes around, comes around". Insurers seek predictability and the approach I have taken offers greater, albeit not perfect, predictability. In addition, this approach tends to minimize the inherently intrusive exercise of drilling down on the spending and needs of an individual and of a family, frequently at a time of crisis, which produces and inherently unreliable body of evidence with significant expenditures of time, energy and expense on the part of insurance adjusters and examiners, accountants and counsel.

By comparison, loss transfer disputes typically involve certain insurers who, by reason of their books of business, typically find themselves making demands for indemnification (those who insure motorcycles) as compared to those who find themselves on the receiving end of demands for indemnification (those who insure heavy commercial vehicles).

ORDER REGARDING FINANCIAL DEPENDENCY:

On the basis of my findings, above, I find that Rhiannon was principally dependent for financial support on her mother, Joan, and her stepfather, George such that Joan's insurer, Allstate, remains the highest priority insurer responsible for Rhiannon's statutory accident benefit claims.

I am indebted to all counsel for their professionalism, thoroughness and expertise which was demonstrated time and again throughout the course of this arbitration.

I remain seized of this matter to receive, consider and decide issues of costs as amongst the parties. I propose to convene a teleconference to discuss how and when those submissions should be made to me (unless the parties are able to resolve this issue amongst themselves).

In accordance with the terms of the Arbitration Agreement and by reason of the Orders I have made, my account for services rendered as Arbitrator will be provided to counsel for Allstate. A copy will be provided to counsel for ING and Aviva for record keeping purposes.

Dated at Toronto, this   day of May, 2014.

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Vance H. Cooper, Arbitrator