

IN THE MATTER OF O. REG. 283/95 AND SECTION 268
OF THE *INSURANCE ACT*, R.S.O. 1990, C.1.8

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

Appearances:

Douglas A. Wallace
For the Applicant

James R. Adams
For the Respondent

Issue:

Was Nageeb Abdulkarim "principally dependant for financial support or care" upon his father, Mohamed Abdulkarim, at the time of the motor vehicle accident of September 7, 2004.

Result:

Nageeb Abdulkarim was principally dependant for financial support or care upon his father, Mohamed Abdulkarim at the time of the accident of September 7, 2004.

Hearing:

This Arbitration was conducted in the City of London, in the Province of Ontario on March 6, 2007, before me, Bruce R. Robinson, Arbitrator.

Witness:

Sheri Gallant.

Exhibits:

1. Agreed Statement of Facts
2. Report of Sheri Gallant dated January 30, 2007
3. Updated Schedule 1
4. Statistics Canada – Survey of Household Expenses for the year 2005.

Background:

On September 7, 2004, Nageeb Abdulkarim was operating a 1992 Toyota Tercel owned by Mohamed Omar when it was involved in a motor vehicle accident. He sustained personal injuries.

As a result of his injuries he submitted an Application for Accident Benefits to ING Insurance Company of Canada ("ING") dated October 6, 2004. ING made payments in accordance with Ontario Regulation 283/95, section 2.

Wawanesa Mutual Insurance Company ("Wawanesa") issued a standard Ontario Automobile Policy (OAP 1) to Nageeb Abdulkarim's father, Mohamed

Abdulkarim. This policy was in force at the time of the accident on September 7, 2004. Nageeb Abdulkarim was listed as an excluded driver under that policy pursuant to an OPCF 28A Endorsement. ING served a Notice to Applicant of Dispute Between Insurers upon Wawanesa on December 14, 2004.

At the time of the accident, ING insured York Auto Sales Limited ("York Auto"), a used car dealership, pursuant to a standard Ontario Garage Policy (OAP 4). York Auto owned several dealer plates including one bearing number "408 DJE".

In the summer of 2004, Nageeb Abdulkarim and his brother Taleb Abdulkarim, "rented" dealer plate number "408 DJE" from York Auto for approximately \$1,400.00 for the purpose of buying and selling automobiles privately for profit. Neither Taleb nor Nageeb Abdulkarim were employees of York Auto. Nageeb Abdulkarim was not registered to buy and sell vehicles as required by the Ontario Motor Vehicle Industry Council (OMVIC).

On September 7, 2004, Nageeb Abdulkarim attached dealer plate number "408 DJE" to an uninsured and unplatd Toyota Tercel owned by Mohamed Omar.

Nageeb Abdulkarim was born on May 19, 1983. At the time of the accident, he lived with his parents and his younger brother, Omar, in a house

located at 20 Shasha Crescent in London, Ontario. He was unemployed at the time of the accident and had not worked since May 26, 2004. He had applied to attend Georgian College in the fall of 2004 but had not yet received a response to his application when the accident occurred.

Nageeb Abdulkarim did not regularly pay for rent, utilities or groceries. He gave his parents \$100 to \$150 probably once a year to assist with expenses if he had extra money. His parents gave him approximately \$100 per month for spending money. His parents purchased approximately 25 percent of his clothing.

Nageeb Abdulkarim cleaned his own room, shovelled the driveway and washed dishes. He also shared the responsibilities of cutting the grass, exterior home maintenance and assisted his mother in vacuuming and cleaning around the house a few times per week.

Nageeb Abdulkarim's T4 earnings in the 52 weeks before the accident were as follows:

1. Costco Wholesale: October 1 to November 10, 2003
\$1,308.91
2. Home Depot: March 6 to April 1, 2004
\$552.51

3. Spherion Staffing: April 5 to May 26, 2004

\$3,201.12

Total

\$5,062.54

His income tax returns indicated the following gross annual earnings:

1999	\$5,198
2000	\$5,229
2001	\$8,562
2002	\$1,738
2003	\$5,058
2004	\$3,753

Since May of 2004, Nageeb Abdulkarim and his brother had been involved in buying and selling used automobiles for profit. In that period of time they bought and sold one vehicle, a Dodge Stratus, using the dealer plate supplied by York Auto Sales. The scheme was to purchase vehicles privately, arrange to have the necessary repair work done on the vehicles, and sell them to private individuals. Nageeb Abdulkarim received a profit of approximately \$500 from the sale of the Stratus. They had purchased but had not yet sold a second vehicle, a Mazda MX-6, which was in for repairs when the accident occurred.

Nageeb Abdulkarim also had savings of approximately \$5,000.00 from a job he had at a call centre (Spherion Staffing). He used that money for general spending money. Nageeb Abdulkarim attended school at Fanshawe College in March or April of 2004. He had paid his own tuition through an installment plan.

He also planned to pay his own tuition if he was accepted into Georgian College in Barrie for the fire fighting program in September of 2004 or January 2005.

Mohammed Abdulkarim, Nageeb Abdulkarim's father, had not worked since July of 2003 as a result of an injury sustained at work. From that time until the date of the accident he was receiving WSIB benefits in the amount of \$2,000.00 per month. His wife did not work outside the home in that period. He had no other source of income in 2004. He had approximately \$38,000 in savings. He made mortgage and tax payments monthly of at least \$500.00 in addition to monthly hydro and gas payments which averaged approximately \$300.00. He estimated that in the six months before the accident his son, Nageeb gave him about \$200.00 towards utilities.

It is agreed that if Nageeb Abdulkarim was "principally dependent for financial support upon his father", Wawanesa Mutual Insurance Company is required to pay benefits. If he was not "principally dependent for financial support upon his father", ING Insurance Company of Canada is required to pay statutory accident benefits.

Law:

Ontario Regulation 403/96

- 2(1) "insured person" in respect of a particular motor vehicle liability policy means,
- (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse or same sex partner of the named insured, and any dependant of the named insured, spouse or same sex partner, if the named

insured, specified driver, spouse, same sex partner or dependant,

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

2(6) For the purposes of this regulation, a person is a dependant upon another person if the person is principally dependent for financial support or care on the other person of the other person's spouse or same sex partner.

Evidence and Findings:

Sheri Gallant, CMA, is the vice-president of Matson, Driscoll & Damico Ltd. and specializes in insurance claims and forensic accounting. Ms. Gallant has a Bachelor of Mathematics, Management Accountancy, Information Systems Option, University of Waterloo, 1994. She is a member of numerous professional memberships and has given evidence in courts and at Arbitrations. She has lengthy experience with regard to insurance matters. For the purposes of the arbitration, she was accepted as an expert witness.

She stated that her approach to the issue of financial dependency was based on the criteria as set out in the decision of Mr. Justice O'Brien in *Miller v Safeco Insurance Company of America* (1984), 48 O.R. (2d) 451;(affirmed at 50 O.R. (2d) 797 by the Ontario Court of Appeal). The case set forward the following five criteria:

- a) amount of dependency;
- b) duration of dependency;
- c) financial or other needs of the alleged dependent;
- d) the ability of the alleged dependent to be self-supporting;

e) the general standard of living of the family.

The Court of Appeal agreed with the first four criteria but removed the "general standard of living within the unit component". I concur and find that these criteria have been adopted by judges and arbitrators for determination of "principal dependency" under the SABS approval from the Ontario Court of Appeal. [*Federation Insurance Company of Canada v. Liberty Mutual Insurance Company of Canada*, Arbitrator Samis, May 7, 1999, affirmed September 15, 1999, affirmed (2000) O.J. 1234 (C.A.)].

Ms. Gallant indicated that in Schedule 2 of her report she set out a summary of potential expenditures that would be necessary for Nageeb Abdulkarim to maintain an independent residence in London, Ontario. She assumed the use of a bachelor apartment in the City of London at \$486.00 a month. This was based on the Rental Market Report published by Canadian Mortgage and Housing Corporation. She estimated the cost of cable and telephone, (utilities not in rent) in the amount of \$100 per month; clothing, \$91.00 a month (average Ontario expenditure); household food in the amount of \$229 a month and entertainment in the amount of \$100 a month. The total of the expense being \$1,006.00. In arriving at these approximations she used information from Statistics Canada – Average Household Expenditures. The Statistics Canada – Household Expenditures for 2005 was based on a total expenditure of \$75,920. In her calculations, she divided by a factor of 2.7 for the number of people in the house and again by 12 months to arrive at a monthly figure. It is clear from the information before me that this family did not have that amount of money for total

expenditures. Mohamed Abdulkarim was only receiving \$24,000 per year. While he did have savings of \$38,000 there is no evidence before me as to whether or not that was being utilized. The Abdulkarim family consisted of the father, mother and two sons. The evidence lacked precise quantification of expenses in this household.

Based on the assumptions derived from the Statistics Canada information, Ms Gallant arrived at her analysis of the dependency of Nageeb Abdulkarim based on a 3 month, 6 month, 12 month and 24 month period.

In her Revised Schedule 1 she set forward four scenarios for analysis of his dependency.

Per January 30, 2007 Report	SCH	Monthly Expense	3	6	12	24
Expenses	2	<u>\$1,006</u>	\$3,018	\$6,036	\$12,072	\$24,143
Gross Income	3		\$0	\$3,754	\$5,083	\$8,697
Income as a % of Expenses			0.00%	62.19%	41.94%	36.02%

Reported Income Reduced For CPP And EI

Expenses	2	<u>\$1,006</u>	\$3,018	\$6,036	\$12,072	\$24,143
Net Income	3		\$0	\$3,580	\$4,885	\$8,440
Income as a % of Expenses			0.00%	59.31%	40.47%	34.96%

Including Unreported Income of \$500

Expenses	2	<u>\$1,006</u>	\$3,018	\$6,036	\$12,072	\$24,143
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Net Income	3		\$500	\$4,080	\$5,385	\$8,940
Income as a % of Expenses			16.57%	87.60%	44.61%	37.03%

Only in the six month scenario is Nageeb Abdulkarim not financially dependent upon his family.

The Ontario Court of Appeal in *Miller v Safeco*, removed "the general standard of living within the family unit" from consideration. I wish to look at the remaining four criteria as they relate to the evidence in this case.

DURATION

Arbitrator Samis, in *Federation v Liberty Mutual*, stated at p. 3,

"When examining the financial and other arrangement of a family or household it is necessary to set some time frame during which to examine income, expenses and other matters which necessarily occur over a period of time. Relationships change from time to time, perhaps suddenly. Transient changes may alter matters for a short period, but not change the general nature of a relationship. A momentary snapshot would not yield any useful information about these dependent relationships."

"Choosing the appropriate timeframe could be critical. 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."

I find on the evidence in this case that Nageeb Abdulkarim was continuing to live at home with his parents and younger brother. His past employment earnings were very modest and involved short-term jobs. He received free room and board, as well as monthly spending money from his parents. His parents continued to purchase some of his clothing and I find his

household responsibilities to be of a minor nature consistent with tasks expected of a young man still living in his parents' home.

He had attended college in the spring of 2004 and had planned in the future to attend college in the fall of 2005. He would have required money to attend school. I find the period of 52 weeks prior to the accident would be the appropriate time frame to adequately reflect his status in the family.

He had not embarked upon a full time job and his activities in that year were consistent with what had gone on before. While a three-month period would also reflect dependency, I find that in this particular situation, it is too short a period. I do not find the six month period to be of assistance here, as it does not adequately reflect what a stable ongoing course of conduct was for Nageeb Abdulkarim.

AMOUNT OF DEPENDENCY:

Senior Arbitrator, Susan Naylor, reviewed the dependency issue in *Raffoul* and *State Farm Insurance Company*, O.I.C. No.A-004476 in her decision of September 21, 1994. The Director's Delegate, David R. Draper upheld her findings, in his decision of April 25, 1996. This statutory test, of course, is a financial test, but not one "limited to purely numerical calculations". The Directors Delegate states at paragraph 3:

"In a case where goods and services are provided by a family member otherwise than for payment, and the facts are relatively straight forward, a detailed

evaluation of such goods and services is a largely academic exercise, and is not necessary.”

The Regulation is remedial legislation and as such should receive a fair, large and liberal construction and interpretation. Each case, of course, must be decided on its own individual facts. Arbitrator Naylor, in *Raffoul* and *State Farm* stated at page 8,

“The decisions above make it clear that each case must be decided on its own. While the test requires that support be financial and primary, the entirety of the applicant’s circumstances must be looked at to determine if these conditions are met. The statutory test set out in section 3(2) is a financial test, but is not limited to a purely numerical calculation.”

At page 9 she goes on to state:

“The actual circumstances of the applicant must be looked at, and not in an imputed earning capacity. Where, as here, an applicant works part time, her financial circumstances should be measured based on her part time earnings, and not on the income she might have earned had she worked full time.”

On appeal, the Director’s Delegate Draper stated as paragraph 18:

“The court did not state that dependence should be evaluation based on the plaintiffs ability to support himself at a subsistent level. It upheld the trial judges conclusion that the plaintiff was a dependent relative even though at the time of the accident he had a full time job and was earning \$700 per month.”

Paragraph 19:

“Mr. Justice O’Brien considered the Court of Appeals guidance in the latter case of *Pagliarella v Di Biase Brothers Inc.*, [1989] O.J. No. 2463 (2d) 193. The plaintiff in *Pagliarella* was a 27-year-old woman who

had always lived at home with her parents and two sisters. Although she had been working full time for almost ten years, she did not pay any room and board, or contribute to any household expenses. Her parents expected her to live with them until she was married. The plaintiff used her income for her own clothing, entertainment and cosmetics, but saved the rest. At the time of her accident, she had an annual income of more than \$18,000, plus investment income of \$1,500, and nearly \$45,000 in savings. Mr. Justice O'Brien concluded that she was a "dependent relative, although he made it clear that he was not considering the more restrictive test of principally dependent...for financial support".

I find the report of the accountant to be helpful only to the extent that it does set forth a generalized view of expenses of this young man and his income. The 51 percent test set forward by Justice O'Brien in the *Liberty Mutual Company v Federation Insurance Company* (2000) O.J. 1234 at p. 2 is a matter that must be considered when assessing the issue of a principally dependent child upon his parents for financial support. I accept the general approach taken by Sheri Gallant in her analysis; however, it is just one of the four factors to be considered. I find the evidence to show that this is a unique factual situation. The Court of Appeal has directed that the modest means of this family are not to be considered in determining financial dependency. As such, I rely on the expert evidence of Sheri Gallant as it relates to the quantification of the income and expenses of Nageeb Abdulkarim. He does not reach the 51 percent factor in three of the four scenarios, and he is therefore financially dependant on his parents in these scenarios.

FINANCIAL OR OTHERS NEEDS OF THE DEPENDENT:

Again, I find the report of Ms. Gallant to be of general assistance reflective of the inability of Nageeb Abdulkarim to meet his own personal needs in the 52 weeks prior to the accident and to be at least 51 percent self-supporting.

ABILITY TO BE SELF-SUPPORTING:

I find on the Agreed Facts and the evidence of Ms. Gallant that he was not in a position to be self-supporting either within the family unit nor in a separate rental unit in London, Ontario in the 52 weeks prior to the accident.

I rely on the evidence that Nageeb Abdulkarim lived in his parents home continuously up until the time of the accident with no major changes in his or his family's situation. I rely on the criteria set forward in *Miller and Safeco*. I find that Nageeb Abdulkarim was principally dependent for financial support on his father and therefore Wawanesa Mutual Insurance Company is required to pay statutory accident benefits to Nageeb Abdulkarim. I find that his parents supplied a large proportion of his needs. I find that Nageeb Abdulkarim did not have the ability to be self-supporting by providing for more than 51 percent of his own needs.

I have set forward in Appendix A the list of cases, which have been considered in this arbitration.


Costs:

The parties have agreed that costs in this matter will follow the event. I may be spoken to at a later date with regard to both quantum and the content of what is to be included in those costs.

Order:

1. It is ordered that Wawanesa Mutual Insurance Company is responsible for payment of accident benefits to Nageeb Abdulkarim arising out of a motor vehicle accident on September 7, 2004.
2. It is further ordered that Wawanesa Mutual Insurance Company will pay to ING Insurance Company of Canada their costs of the arbitration herein.

DATED at Toronto this 30 day of March, 2007



Bruce R. Robinson, Arbitrator

Appendix "A"

1. *Miller v. Safeco Insurance Co. of America* (1984), 48 O.R. (2d) 451: aff'd 50 O.R. (2d) 797 (C.A.)
2. *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* (May 7, 1999) per Arbitrator Samis; aff'd Unreported,(September 15, 1999) (S.C.J.);aff'd [2000] O.J. No. 1234 (C.A.)
3. *Economical Mutual Insurance Company v. Wawanesa Mutual Insurance Company* (November 26, 2003) per Arbitrator Robinson
4. *Dominion of Canada General Insurance Company v. Zurich Insurance Company* (September 27, 1999) per Arbitrator Robinson
5. *Pagliarella v. DiBiase Brothers Inc.* [1989] O.J. No. 2463 (H.C.)
6. *Raffoul v. State Farm Mutual Insurance Co.* [1994] O.I.C.D. No. 103 (Arbitration); aff'd [1996] O.I.C.D. No. 58 (Appeal)
7. *Ray v. Wellington Insurance Company* (August 23, 1995, Arbitrator Evans, FSCO File No: A-007555)
8. *Krusto v. Allstate Insurance Company* (November 1, 1996, Arbitrator Miller, FSCO File No: A96-000016)
9. *Pafco Insurance Company Limited v. Economical Mutual Insurance Company* (October 18, 2000, Arbitrator Glass; appeal to Ontario Superior Court of Justice, August 28, 2001)
10. *The Co-operators v. Halifax Insurance Company* (December 14, 2001, Arbitrator Samis; appeal to Ontario Superior Court of Justice, April 18, 2002)
11. *Laforme v. Wabisa Mutual Fire Insurance Company* (2004), CanL 11 26330 (ON S.C.)