

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c.1.8
SECTION 268(2) AND *REGULATION 283/95***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL INSURANCE COMPANY

Applicant

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, AS
REPRESENTED BY THE MINISTER OF FINANCE**

Respondent

DECISION

COUNSEL:

Mark K. Donaldson for the Applicant

John Friendly for the Respondent

BACKGROUND:

LS and AB were both seriously injured when the car in which they were travelling was involved in a single-vehicle accident on February 25, 2011. The two Claimants are sister-in-laws: LS's brother is AB's husband. They were travelling from Toronto to Niagara Falls with several members of their extended family at the time of the accident.

AB arrived in Canada from Guyana with her husband in September 2000, some six months before the accident. LS had immigrated to Canada several years earlier. Neither of the women have driver's licences and were not listed drivers or named insureds under any auto policies. The vehicle that they were travelling in was uninsured at the time of the accident.

Both Claimants submitted applications for the payment of benefits under the *SABS* to State Farm, on the basis that they were financially dependent upon Prakash Dudrem, a State Farm insured. Prakash is LS's son and AB's nephew.

State Farm has paid benefits to both Claimants. It disputes that either LS or AB were principally dependent upon Prakash for financial support or care at the relevant time. It asserts that the Motor Vehicle Accident Claims Fund ("the Fund") is therefore in priority to pay the claims.

ISSUES:

1. At the time of the accident, was LS principally dependent for financial support or care upon her son Prakash Dudrem, the State Farm insured ?
2. At the time of the accident, was AB principally dependent for financial support or care upon her nephew Prakash Dudrem, the State Farm insured ?

RESULT:

1. Neither of the Claimants were principally dependent for financial support or care on Prakash Dudrem at the relevant time. State Farm is therefore not the priority insurer.

EVIDENCE:

1. Before summarising the extensive evidence put before me, I will clarify the relationships between the various family members involved. LS has five children, one of whom is Prakash Dudrem, the State Farm insured. She has two other sons, and two daughters, one of whom is Devi Dudrem. Her daughter Devi and her son Prakash played central roles in the lives of both Claimants prior to the accident.

2. LS and AB were both seriously injured in the accident. Their counsel provided medical documentation advising that they were not capable of providing evidence under oath or testifying at a hearing. As a result, none of the evidence before me comes from the Claimants themselves.

3. Devi Dudrem, LS's daughter, attended an Examination Under Oath on behalf of both Claimants in November 2014. She also provided *viva voce* evidence at the hearing. Her evidence was fundamental in establishing the basic facts surrounding the family, the accident and the financial circumstances of the parties involved. Her brother Prakash was also examined under oath in January 2016, as part of this proceeding. He had also provided sworn testimony at an examination in March 2014, in the context of a claim arising from an accident that he was involved in in late 2013. Transcripts from all of these EUOs were produced and relied on at the hearing.

4. In addition, four large volumes of documents were filed, containing hospital records and medical reports relating to both Claimants, notes from various State Farm adjusters involved in adjusting the files, the ODSP file relating to LS and AB's Ontario Works file.

The above evidence can be summarised as follows:

Claimant LS

5. LS arrived in Canada from Guyana in 1993. The evidence suggests that while she and her husband had separated before he left Guyana to move to Canada, he sponsored the family

to come to Canada some years later. One of her sons bought a home in 2000, and she and her daughter Devi moved in with him and his family.

6. Devi got married and bought a home with her husband a few years later. LS underwent surgery in 2008, and moved into Devi's home after that, so that Devi could care for her. Devi has two young sons and was married to Maheshwar Singh at the time. They all lived together in a home at 11 Via Torre Drive in Toronto.

7. The pre-accident medical records filed provide that LS suffered from severe depression, anxiety and schizophrenia before the accident. She attended monthly counselling sessions with her doctor, and was always accompanied by Devi. Devi testified that someone needed to be with her mother at all times, and that she was her primary caregiver both before and after the accident. LS qualified for and received ODSP payments for several years prior to the accident. Devi was her trustee for ODSP purposes, and they had a joint bank account to which the benefit payments were deposited.

8. Prakash Dudrem, Devi's brother and the State Farm insured, lived in a home around the corner from where Devi lived. He lived with his wife Bibi, their two daughters and a stepson. The two homes were described as being a "one minute walk from each other". While there were some inconsistencies between Devi's evidence and that of her brother Prakash regarding which home their mother lived in in the year prior to the accident in February 2011, the evidence suggests that LS spent some time at each of these two homes until December 2010. Given her close relationship with Devi, she was primarily based at her home.

9. Devi testified that her husband was an alcoholic, and that that caused difficulties in their marriage. She considered leaving him in September 2010, and began the process of applying for social assistance to see if she would qualify. She explained that as she was considering what to do, she heard that her aunt AB and her husband were moving to Canada. When it turned out that their plans to live with their son had fallen through, she invited them to move into her house. She explained that she had hoped that if they were living with her, her husband would limit his drinking and behave better.

10. Things came to a head with Devi and her husband in December 2010, after which Devi moved out of the home with her two sons. She stated that she took her mother LS and her aunt AB with her, and that they both moved into a room in the basement of Prakash's home. She explained that she spent most nights at her brother Harry Lal's home, which was also nearby, as there was not enough room for her and her two boys to sleep at Prakash's house.

11. Devi stated that while she was sleeping at Harry's, she spent her days at Prakash's home looking after her mother. Both Prakash and his wife worked outside of the house during the day, and she explained that she did most of the cooking and cleaning for her mother.

12. Devi testified that she did not work outside of the home in the period leading up to the accident. When asked how she and her husband had supported their family, she stated that her husband received WSIB benefits as a result of a workplace accident several years earlier, and that they borrowed money from a family friend against the equity in their home.

13. As stated above, LS was in receipt of ODSP payments for several years before the accident. Her monthly payments at the time of the accident amounted to approximately \$1,150, or \$13,800 per year. She did not work and had no other source of income. Both Devi and Prakash testified that they provided room and board for their mother at their homes without charge, and that she did not contribute any money to their household expenses. She apparently spent the funds she received from ODSP at the casino, on travel and on small items she would purchase at the mall.

14. The ODSP records indicate that LS lived at 11 Via Torre Drive (Devi's house) from August 1, 2008 to October 31, 2010, and that she moved to 187 Touchstone Drive (Prakash's home) on November 1, 2010, where she lived until March 1, 2012. This does not accord with Devi's evidence that her mother lived with her until some time in mid-December 2010 when she separated from her husband and left the matrimonial home. It is also inconsistent with the evidence provided by both Devi and Prakash that their mother moved back into Devi's home

in March 2011 after she was discharged from hospital following the accident, so that she could care for her. Accordingly, I place little weight on these records.

15. Counsel referred to a letter dated April 5, 2011 from Prakash, setting out that LS and AB had moved into his house “in the beginning of the year because of family issues”. While the letter is addressed “to whom it may concern”, it was provided by the Claimant’s former representative along with some information related to the applications for benefits submitted, and was clearly intended for the State Farm adjuster adjusting the claim. The letter also states that “my mother is financially dependent on me and I personally take care of her with assistance from my sister once in awhile”.

16. Finally, when questioned further at the hearing about where her mother had been living in the months preceding the accident, Devi testified that she and her mother had spent approximately six weeks in Guyana in the spring and early summer of 2010, caring for her mother’s sister who had taken ill. LS’s passport was provided at the hearing. It confirmed the dates of that trip, but also indicated that LS had returned to Guyana later that year. The dates of this second trip were December 30, 2010 to February 1, 2011. Devi explained that Bibi’s sister had passed away unexpectedly in Guyana at the end of the year, and that her mother had traveled there with Prakash and Bibi.

Claimant AB

17. AB arrived in Canada with her husband in early September 2010, approximately six months before the accident. While their initial intention was to stay with their son who lived in Kitchener, something occurred that caused a rift in the family, and they both moved into Devi’s home at 11 Via Torre Drive instead.

18. As noted above, when Devi left her husband a few months later in December 2010, AB left the home with her. She and LS moved to Prakash’s home, and shared a bedroom in his basement. I note that at his Examination Under Oath, Prakash initially stated that AB had lived in his house for approximately one year prior to the accident, and would occasionally

spend weekends at Devi's home. Given that AB only arrived in Canada in September 2000, six months before the accident, this is not possible.

19. The hospital records relating to AB's admission to hospital after the accident indicate a home address of 11 Via Torre Drive (Devi's house). Devi testified that her husband Maheshwar, the driver of the vehicle involved in the accident, had provided this information to the police and hospital staff, but that it was incorrect.

20. AB did not work while she was in Canada. She was provided with room and board while staying at both Devi's and Prakash's homes, and did not contribute any funds to either household. She applied for and ultimately received Ontario Works benefits, in the amount of \$620 monthly. The documents filed indicate that her first assistance cheque was issued three days prior to the accident.

21. Devi testified that prior to that, when AB was living at her home, Devi had covered all of her expenses and bought her some winter clothing. She also testified that once AB began receiving cheques from Ontario Works, she would go with her to the bank. AB would cash the cheque, and give the money to Devi. Devi estimated that she would then give approximately \$150 back to AB, and would use the rest to buy groceries and cover other household needs.

22. Prakash testified at his EUO that he occasionally gave AB varying amounts of cash while she was living at his home, in recognition of the assistance she provided in caring for his children.

23. A review of the social assistance files and the log notes from the State Farm file reveals that false information was routinely provided by many of the family members. There are various references in AB's Ontario Works file to her having moved into the basement apartment at 11 Via Torre Drive (Devi's home) on January 1, 2011, approximately two months before the accident. The notes indicate that she advised that the "landlord" had initially requested monthly rent of \$650, but had subsequently agreed to a reduction to \$400.

She received benefits to cover the cost of her accommodation on this basis. There is no mention of the fact that her niece owned this home, or that she had been living there rent-free for six months.

24. The above records are inconsistent with the evidence provided by both Devi and Prakash that AB left the home on Via Torre Drive when Devi left her husband in December 2010, and had moved into Prakash's house. When shown these records at the hearing, Devi explained that AB's husband had continued to live at the home on Via Torre Drive with her husband after the women moved out, and that her husband insisted that if he continued to stay there, he would have to pay rent. For reasons that are not clear, AB apparently agreed to apply for Ontario Works so that Maheshwar would receive some money as rent. Devi suggested in her evidence that the family hoped that AB's application for social assistance would put pressure on her own son to live up to his commitment to support his parents in Canada, but that that did not happen.

25. The State Farm notes filed provide a record of various conversations held with both Claimants and with Devi, in the aftermath of the accident. There are many references to the Claimants telling the adjuster that neither of them knew the driver of the van that was involved in the accident, or any of the other passengers. There are also references to Devi having said this to the adjuster as well. This is clearly not true, as the adjuster subsequently learned when she was able to review the Police MVA Report. Maheshwar Singh, Devi's husband, was driving the van, and the other passengers included AB's husband, Devi and her two children. In her evidence at the hearing, Devi explained that the family had decided to travel to Niagara Falls together for the weekend, in the hope that she and her husband would reconcile. She could not explain why they had advised State Farm that they did not know the other occupants of the vehicle.

26. The notes also refer to discussions between Devi and the adjuster on April 5, 2011, in which Devi is reported to have told the adjuster that her mother and aunt were financially dependent on Prakash. I note that the letter from Prakash referred to above is also dated April

5, 2011. There are further notes in the same time frame that refer to a RBC policy issued to Devi and her husband that was cancelled prior to the accident.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act-

268(2) *The following rules apply for determining who is liable to pay statutory accident benefits:*

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

Statutory Accident Benefits Schedule

3. (1) *In this Regulation,*

“insured person” means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

i. if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

3. (7) For the purposes of this Regulation,

(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

PARTIES' ARGUMENTS:

State Farm's submissions

27. Counsel for State Farm contended that it is difficult to conclude on the evidence before me that either of the Claimants were principally dependent for financial support or care on Prakash or his wife at the time of the accident, and asserted that neither of them would accordingly meet the definition of an "insured person" under the State Farm policy. As no other insurers have been identified, he submitted that the Fund is in priority and must repay State Farm for all benefits that it has paid out on both claims.

28. Counsel acknowledged that the evidence suggests that the Claimants spent time at both Devi and Prakash's home in the months leading up to the accident, and that neither of them made any financial contributions to either household. He also acknowledged that both Claimants moved into Prakash's home in December 2010 when Devi left her husband and moved out of 11 Via Torre Drive. He noted, however, that LS's passport clearly indicates that she spent five weeks in Guyana in early 2011, and contended that she therefore could have only spent a few weeks at Prakash's home before the accident took place in late February.

29. Mr. Donaldson also contended that LS was in need of significant care before the accident, given her diagnosis of schizophrenia and depression. He noted that both Prakash and his wife Bibi worked full-time outside of the home, and that LS had always had a very close relationship with Devi. He also noted that Devi was her mother's trustee for ODSP purposes, and that they had a joint bank account into which the benefit payments were deposited. Based on these factors, he urged me to conclude that LS was dependent for care upon Devi.

30. Mr. Donaldson noted that LS received \$1148 per month from ODSP at the time of the accident. He referred to Prakash's evidence that his monthly household expenses were between \$3,000 and \$3,200. He argued that if that amount is split among the six inhabitants of

the household at the time of the accident (Prakash, Bibi, their two children and the two Claimants), the pro-rata share for each person would be between \$500 and \$533. He contended that LS's monthly ODSP earnings were more than twice this figure, and that this analysis did not therefore support a finding of principal financial dependency on Prakash.

31. Counsel also noted that the address provided for AB on most of the official documents completed at the time of the accident was that of Devi's home on Via Torre Drive, including her application to Ontario Works in early February 2011. He suggested that this raises some doubt about whether she was in fact residing with Prakash's family at the time of the accident.

32. Finally, in response to my question about the appropriate time frame to apply to the dependency analysis, Mr. Donaldson suggested that as AB had been in Canada for six months at the time of the accident, that was an appropriate time frame to use. He suggested that a longer period should be used in assessing whether LS was principally dependent upon her son.

Fund's submissions

33. Counsel for the Fund contended that State Farm must show on a balance of probabilities that the two Claimants were not principally financially dependent on its insured, and submitted that they had failed to do so. He noted that State Farm's arguments were based solely on the evidence relating to where LS and AB lived at various times before the accident, and on the inconsistencies in Devi's evidence. Counsel contended that without an accountant's report or other compelling evidence disproving dependency, State Farm had failed to support its argument that the Fund is responsible to pay the claims.

34. Mr. Friendly urged me to find that Devi was a credible witness, and that her evidence should be accepted. He suggested that there was no reason for her to lie, noting that both AB claims have been resolved on a full and final basis. He submitted that she testified about her difficult and painful personal circumstances in an open manner, and that she has no interest in the outcome of this proceeding.

35. Counsel acknowledged that Devi and her brother Prakash shared the burden of caring for their mother, and later for their aunt, and that the two women went back and forth between the home on Via Torre Drive and Prakash's home prior to the accident. He claimed, however, that given the difficulties in Devi's marriage, and the fact that she had moved in and out of the home on Via Torre Drive on a few occasions during the relevant period, Devi would have been unable to provide adequate care or financial support to the Claimants.

36. Counsel also noted that Devi did not work outside of the home, and had no source of income. Mr. Friendly contended that in the circumstances, Prakash's home provided a 'safe sanctuary' for Devi as well as the two Claimants. Given that none of them contributed toward the household expenses, counsel contended that Prakash clearly must have been the principal source of financial support for them all. He also noted that State Farm did not provide any evidence to counter what Prakash had written in the letter to State Farm in which he stated that both Claimants lived with him, and were each financially dependent upon him prior to the accident.

37. Mr. Friendly noted that AB received approximately \$620 per month in benefits from Ontario Works, but that the first cheque was only issued to her three days prior to the accident. He noted that this amount represents less than one-half of the Low Income Cut-Off (LICO) amount indicated in the statistics compiled, and that she clearly could not have been financially independent on the basis of these earnings alone.

38. Mr. Friendly acknowledged that LS received \$1148 per month in ODSP benefits, almost double the amount that AB received. It was clear, however, that these funds were not used by her to pay for food, shelter or other living expenses – despite her assertion that she was required to pay rent - but rather for luxuries such as travel and food. He argued that these funds were received in error, or as a result of a fraud, and should not therefore be attributed to LS or be included in the dependency calculations. He suggested that when the "big picture" approach to the evidence is considered, LS's basic needs were provided by Prakash.

39. Finally, counsel for the Fund forwarded an email to me the day following the hearing to provide his position on the appropriate time frame to use for the analysis. He contended that three months prior to the accident is the time frame that accurately reflects the status of the parties at the time of the accident. While he acknowledged that LS's trip to Guyana fell within this period, he submitted that her time there did not reflect her status at the time of the accident and should therefore not be considered.

ANALYSIS & FINDINGS:

40. There are a few questions to answer in this case. To start with the simplest - were either of the Claimants dependent for care on Prakash, the State Farm insured, before the accident in February 2011? On the evidence before me, I find that they were not. The evidence is undisputed that AB was generally healthy before the accident and did not require any care.

41. LS, on the other hand, did require care as a result of her pre-existing diagnoses of schizophrenia and severe depression. The evidence is compelling, however, that it was Devi, rather than Prakash, who provided that care. The medical records are replete with references to Devi accompanying her mother to appointments and tending to her needs. Devi testified that she cooked for her mother, drove her to the bank and accompanied her on outings. She was her trustee for ODSP purposes. Prakash, on the other hand, worked outside the home doing home renovations and denied that there was anything wrong with his mother.

42. Counsel made submissions on whether LS was principally dependent for care on Devi. While the evidence certainly leans in that direction, I need not make a finding on that point, as the focus of the analysis here is on whether she was dependent on Prakash, the State Farm insured. Nothing would turn on a determination that LS was dependent for care upon Devi. Given the wording of the definition, Prakash, as the State Farm insured, is the "target". I find that there is no support in the evidence presented for a finding that LS was principally dependent for care on Prakash or his wife.

43. I turn now to the more complicated question of whether either of the Claimants were principally dependent for financial support on Prakash.

44. The evidence tendered was confusing and inconsistent on various points. Both Devi and Prakash were questioned closely on various issues, and many of their statements are at odds. To the extent that Prakash's evidence differs from Devi's, I prefer that of Devi. She was more closely involved in both Claimants' lives and care both before and after the accident, and had a clearer recollection of the timing of various steps and events.

45. Prakash's evidence was often vague, and he seemed reluctant to divulge information on certain issues when questioned at his Examination Under Oath. When asked why his mother was in receipt of ODSP payments before the accident, he stated that there was nothing wrong with her and that she was "perfectly alright", but could not provide a reason for her receiving these benefits. This flies in the face of the pre-accident medical records filed that indicate that she had a serious psychiatric condition that required management through a variety of medications. This leaves me to doubt the veracity of his evidence.

46. What emerges from the evidence as a whole is that the Claimants were part of a close, extended family. Devi, Prakash and their brother Harry all lived very close to one another, enabling family members to wander between the homes on a regular basis. The evidence also suggests that some family members were clearly intent on availing themselves of public funds through social assistance or ODSP under false pretences. They also presumably did not fully understand the complicated world of insurance coverage and accident benefits, and were suspicious of certain questions asked. As a result, false information was provided to authorities and to State Farm about many issues.

47. For example, I note that both Claimants reported on various occasions that they did not know any of the other passengers in the van that was involved in the accident, when that was clearly not true. Without any testimony from the Claimants themselves, it is difficult to understand the reason for providing that clearly false statement. Devi's evidence at the hearing, which was subject to close and thorough cross-examination, revealed that inaccurate

information was also provided about who lived where at what point in time, and the financial arrangements between the parties. I therefore approach the written records before me with the proverbial “grains of salt”.

48. Certain facts are not in dispute. Devi and her mother have been close all of their lives. The notes from Dr. Kirstine, LS’s doctor since 1994, paint a picture of Devi being her mother’s primary caregiver, who not only attended appointments with her, drove her to wherever she wanted to go, cooked for her and managed her ODSP benefits, but was also the only one who was able to manage her labile emotional states.

49. Devi stated that her mother lived in her home from 2008 until mid-December 2010. While she may have regularly spent time at Prakash’s home during that period, the evidence suggests that Devi’s place was her ‘home base’. When Devi finally decided to leave her husband because of an incident in December 2010, she stated that she “took my mother and aunt with me”. She then slept with her sons at her brother Harry’s home, and the two Claimants shared a bedroom in the basement of Prakash’s home. While Devi could not pinpoint when in December they had all moved out, the evidence suggests that it was some time in the middle of the month or later, given Devi’s statement that she worried that her husband would not behave well over the approaching Christmas period.

50. LS then spent a couple of weeks living at P’s house before leaving on her second trip to Guyana. Her passport indicates that she traveled to Guyana on December 30, and returned on February 1, 2011. The accident occurred on February 25th, just over three weeks later. After spending some time in hospital as a result of the injuries suffered, LS moved back into Devi’s home on Via Torre Drive so that Devi could provide care for her.

51. The above evidence indicates that in the twelve months prior to the accident in late February 2011, LS primarily lived at Devi’s house for approximately eight months. She stayed at Prakash’s house for just under six weeks (two weeks in December before going to Guyana and not quite four weeks after returning). She spent extended periods in Guyana twice – once for six weeks in the spring, and then five weeks in late December and January, 2011.

While she collected ODSP payments of approximately \$1,150 per month, she did not contribute any of these funds to either Devi's or Prakash's household, and the evidence from both Devi and Prakash was that when their mother was living in each of their homes, they covered her expenses. There was no evidence to suggest that Prakash paid for his mother's food or other expenses when she was living at Devi's house prior to December 2010.

52. Considering the above, I am not persuaded that LS was principally dependent for financial support on Prakash at the relevant time. The four factors endorsed by the Court of Appeal in the seminal decision in *Miller v. Safeco*, (1985) 50 O.R. (2d) 797 direct me to assess the duration and amount of dependency, the financial and other needs of the Claimant, and her ability to be self-supporting. I must also choose the appropriate time frame for the analysis, by examining "a period of time which fairly reflects the status of the parties at the time of the accident" (*Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.* [2006] O.J. 4518 (Ont. C.A.)).

53. Counsel for the Fund submitted that I should consider the parties' status for the three months before the accident, but exclude the five weeks that LS spent in Guyana. I do not agree with this approach. I find that a period of twelve months is more in keeping with the court's direction in the *Oxford Mutual, supra*, decision. The evidence suggested that while LS spent some time at Prakash's house throughout 2010, it would not be accurate to state that she lived more at Prakash's home than Devi's, save for the six-week period identified above. That period is an anomaly, and in my view, does not reflect the reality of the family's circumstances.

54. While the evidence suggests that Devi and her husband experienced marital difficulties over an extended period, Devi had not actually left the home with her two sons until mid-December 2010. It is difficult to predict what would have occurred with her living arrangements had the accident not happened, but a retrospective view of the period preceding the accident suggests that the six weeks spent at Prakash's house was an unusual event.

55. While Prakash undoubtedly provided for most of her needs for the six weeks that she lived at his home, that is not sufficient to ground a finding of principal dependency. The courts have directed us to use a “big picture” approach to determining principal dependency (*Allstate Insurance v. ING Insurance Co. of Canada* [2015] O.J. No. 3282 (Ont. Sup.Ct.), *Allstate Insurance v. Intact Insurance* [2016] O.J. No. 5651 (Ont. Sup.Ct. of Justice, *State Farm v. Bunyan* [2013] O.J. No. 5043 (Ont. Sup.Ct. of Justice)). I agree that this approach is most useful in determining financial dependency cases. I find that given the evidence in this case, this approach would result in the same outcome as a straight application of the *Miller v. Safeco* factors, namely that LS was not principally dependent on Prakash for financial support at the relevant time.

56. While LS was close to both Devi and Prakash, Devi was clearly the more central character in her mother’s life and the one who provided the most support. Bearing in mind the questions the court in *Miller v. Safeco* directed us to focus on, I find that she provided more support for LS’s financial and other needs, for the longer period of time. Counsel for the Fund contended that given Devi’s changing circumstances and domestic difficulties, Prakash’s house provided the “safe sanctuary” for his mother and aunt, and also for Devi. This may well have been true. It does not, however, result in a finding of principal financial dependence. Devi testified that while she did not earn any income at that time, she and her husband owned the home on Via Torre Drive and were able to borrow money from a family friend against the equity in the home to operate their household. As noted above, there is no evidence that Prakash funded his mother’s living expenses while she was staying at Devi’s home.

57. I therefore conclude that State Farm is not the priority insurer responsible for LS’s claim.

58. The same basic analysis applies to AB’s claim. The evidence indicates that this Claimant arrived in Toronto less than six months before the accident occurred. There was some suggestion that her son had sponsored her and her husband for immigration purposes, but the evidence was unclear on this point. When the arrangements to live at her son’s home

fell through, she and her husband moved into Devi's house. This further supports the contention that Devi was the primary "support provider" in the family.

59. AB applied for social assistance benefits in late February 2011, and it appears that the first cheque was issued to her a few days before the accident. Devi testified that the impetus for her application was that Devi's husband was demanding rent payments in exchange for AB's husband remaining to live in the house in Via Torre Drive. It is not clear whether any benefit cheques were cashed before the accident took place. Given the facts surrounding this issue, I find that these funds should not be considered in the analysis.

60. My findings may have been different if AB was in receipt of assistance a month or two after arriving in Canada. The fact that she may have received these funds a few days prior to the accident, if at all, and that they were sought so that Devi's husband could receive rent in exchange for AB's husband remaining to live in the Via Torre Drive home persuades me that they should be excluded from the analysis.

62. The evidence indicates that AB lived at Devi's home from early September 2010, when she arrived in Canada, to mid-December, a period of just over three months. She then left with Devi and LS, and moved into a bedroom in Prakash's basement with LS. She did not return to Guyana when LS did, and presumably stayed at Prakash's home until the accident occurred the third week of February. In total, she would have lived there for a period of just over two months.

63. In these circumstances, I find that the appropriate time frame to consider for the question of whether AB was dependent on Prakash is the full six months that AB was in Canada. I am not persuaded that the evidence indicates that she was principally dependent for financial support on Prakash during this period. Devi testified that when AB lived with her, she provided for all of her needs. She received free room and board, but Devi's evidence suggested that she also provided winter clothing and a heavy coat for this Claimant, who had not spent a winter in Canada before. Given the lengthier time that she lived with Devi, and the

assistance provided, the application of the *Miller v Safeco* factors does not result in a finding of principal financial dependence on Prakash, the State Farm insured.

64. In its submissions, counsel for the Fund pointed to the letter that Prakash wrote in April 2011, that accompanied the Claimants' applications for benefits to State Farm. The only reference to AB is that she shares a basement room in his home with LS, and that "my basement contains all of my mother and aunt's personal belongings". The letter is consistent with the indication on the applications that they are being submitted to State Farm on the basis that the two Claimants were dependent on Prakash.

65. I find that the letter does not add anything to the picture, other than Prakash's confirmation of what is being alleged on the applications. Prakash was not questioned about the circumstances surrounding his writing this letter at his Examination and I have no information about why he chose to write it. In any event, the statements cited above were not true as of April 5, 2011, when the bulk of the evidence confirms that both Claimants had gone back to live at Devi's home so that she could provide care to them. In any event, the case law is clear that a broader period should be used for the dependency analysis, rather than a "snapshot" of a claimant's circumstances on a certain day.

66. The result of my findings above is that the Fund must assume priority for both claims. I appreciate that the Fund is the payor of last resort under the 'priority ladder' in section 268(2) of the Act. Usually, a finding that LS was principally dependent for care on Devi and / or that the two Claimants were principally dependent for financial support on her, rather than on Prakash, would result in another insurer assuming priority from State Farm. Devi and her husband had a policy insuring their vehicle with RBC at one time, and RBC was a party to this arbitration at the outset. The parties determined, however, that the RBC policy was validly cancelled before the accident by the time we got to the hearing stage. Consequently, section 268(2)1(iv) of the Act applies in these circumstances, and the Fund is responsible for both claims.

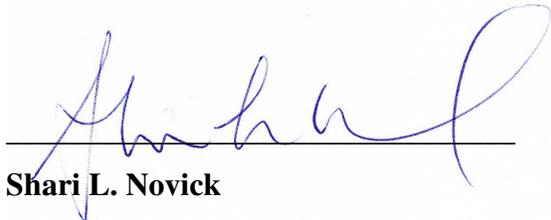
ORDER:

67. For the reasons provided above, the Fund is the priority insurer for both claims pursuant to section 268(2)1 of the *Act*. I therefore Order the Fund to repay State Farm for all benefits paid to LS and AB, subject to any arguments it may have that the payments made were not reasonable.

68. The Fund shall also pay State Farm's legal costs associated with this arbitration, on a substantial indemnity basis. If the parties cannot agree on the quantum of costs payable, I invite them to contact me and a process for resolving that issue will be arranged.

69. Finally, the Fund is also responsible for all fees and disbursements incurred in the course of the arbitration proceeding. I will render my account to counsel for the Fund under separate cover.

DATED at TORONTO, ONTARIO this __23rd__ DAY OF JUNE, 2017.



Shari L. Novick
Arbitrator