IN THE MATTER of a dispute between R.B.C. General Insurance Company
and Lombard Insurance Company pursuant to Regulation 283/95
under the *Insurance Act*, R.S.O 1990, I.8 as amended

AND IN THE MATTER of an Arbitration pursuant to the
Arbitration Act. S.O. 1991.

BETWEEN:

R.B.C. GENERAL INSURANCE COMPANY

Applicant

- and -

LOMBARD INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Brian Atherton for the applicant

Albert Conforzi for the respondent

ISSUES:

1.) Is R.B.C. General Insurance Company or Lombard Insurance Company responsible for paying accident benefits to or on behalf of the injured party, Atul Dhir, arising out of the motor vehicle accident of October 29, 2000?

ORDER:

R.B.C. General Insurance Company is responsible for paying accident benefits to or on behalf of Mr. Dhir.

HEARING:

The arbitration hearing was held in the city of Toronto, in the province of Ontario on June 3, 2002, before me, M. Guy Jones, pursuant to the provisions of the *Arbitration Act, 1991.*

EVIDENCE:

This matter arises out of injuries suffered by Mr. Atul Dhir in a motor vehicle accident which occurred on October 29, 2000. As a result of suffering the injuries, Mr. Dhir applied to and received various accident benefits from R.B.C. General Insurance Company ("RBC"). RBC has taken the position that pursuant to section 268 (2) of the *Insurance Act* of Ontario, Lombard Insurance Company rather than it should be paying the benefits and has commenced an arbitration pursuant to Ontario Regulation 283/95.

In order to determine who is first in priority pursuant to section 268 (2) of the Insurance Act, and is therefore responsible to pay the accident benefits, it is necessary to address two basic issues:

1.) At that time of the accident was Atul Dhir principally dependent upon his father, Mr. Ravinder Dhir for financial support or other care, and

2.) What is the effect, if any, of the OEF 28A Excluded Driver Endorsement, which formed part of the Lombard policy of motor vehicle insurance, held by Mr. Ravinder Dhir?

At the time of the accident Atul Dhir was a passenger in a motor vehicle owned by his girlfriend and insured by RBC. It is the position of RBC that at the time of the accident Atul Dhir was financially dependent upon his father, Ravinder Dhir, who held a policy of motor vehicle insurance with Lombard. As such, Atul Dhir was an "insured person" as defined by section 2 of the SABS (Bill 59) and therefore, pursuant to section 268 (2)(1)(i) of the insurance act, Lombard is first in priority and should pay the accident benefits. Alternatively, RBC takes the position by being named in the Lombard policy as an "excluded driver", this makes him a "insured person" and therefore insured under the Lombard policy.

Lombard, on the other hand, maintains that he was not financially dependent upon his father, but rather financially independent. It also argues that being listed as an "excluded driver" does not make him an "insured person".

DEPENDENCY ISSUE:

Section 2 of Bill 59 defines an "insured person" as:

> the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependent of the named insured or spouse . . .

Section 2 (6) states that:

> for the purposes of this Regulation a person is dependent upon another person if the person in principally dependent for financial support or care on the other person or the other person's spouse.

The Court of Appeal in Liberty Mutual Insurance vs. Federation Insurance Company of Canada [2000] O.J.N o. 1234 recently upheld Arbitrator Samis' position that a person could only be considered principally dependent for financial support on someone else if the cost of meeting that person's needs is more than twice that person's resources. Thus, if the person's resources are sufficient to pay 51% of the financial needs he would not be dependent on others.

I accept this as accurately reflecting the law in the province of Ontario as it relates to dependency.

In examining the question of financial dependency, it is first necessary to determine what time frame is appropriate to consider. It is clear from reviewing the decisions of both arbitrators and the courts, that this issue must be determined based upon the facts of each particular case. While the cases often speak of a "snap shot" in time, it is apparent that the duration may vary depending on the facts of each case. This is particularly so in situations where young people are involved, who are often changing their circumstances rapidly over a relatively short period of time.

The case of Atul Dhir is perhaps a good example of such a problem. Atul was approximately 21 years of age at the time of the accident. He was living in a three-bedroom condominium with his parents and sister at the time and had lived his entire life with them, with the exception of a three or four month period some three or four years prior to the accident, when he attended college.

In 1998 he started working as a "pro-active" banker with the Royal Bank, where he earned approximately $30,000 per year. In January 2000, Atul left the Royal Bank and started with the

Bank of Nova Scotia as a Personal Banking Officer, where he again made approximately $30,000 per year. He left the Bank of Nova Scotia after approximately 2 months and began receiving unemployment insurance benefits on March 12 2000. He continued to receive the unemployment insurance benefits in the amount of $346.00 gross or $297.00 net per week until October 21 2000 or approximately 8 days before the accident. During the 31 weeks he received $10,726 of benefits.

While receiving unemployment insurance benefits Atul decided to investigate going to business for himself and visited family members in India for this purpose for approximately 4 weeks commencing on March 10, 2000. Upon returning from India Atul continued to receive unemployment insurance benefits, but also set up an importing business called Indus Valley. While the exact amount of money made by Indus Valley prior to the accident is unclear, I accept that it was a functioning operation before the accident with some revenue and it took up a considerable part of Mr. Dhir's time.

Counsel for RBC argued that for the issue of dependency, I should look at the eight day period prior to the accident. At this point in time, Mr. Dhir had stopped receiving unemployment insurance benefits and was only receiving whatever monies that were being generated by Indus Valley and possibly some investment income. The rationale for this position, as I understand it, is that by October 21 2000 the unemployment insurance benefits had ceased and Atul was therefore totally dependent from then on upon his Indus Valley revenues, investments, and his father, for income.

Lombard, on the other hand, argues that a much longer time frame be used when determining the question of financial dependency. It suggested that a 1 year time frame be taken, as Mr. Dhir was living at the same place and established a pattern of employment, even though he had changed jobs and revenues varied during that year.

As noted above, each case must be determined on its' own particular set of facts. In this particular case, Mr. Dhir had established an employment pattern at least a year before the accident, however, there was, in my view, a fundamental change in his financial situation in or about late February 2000 when he left the Bank of Nova Scotia and went on unemployment insurance benefits. At that time Mr. Dhir's focus appears to have shifted towards self employment. He developed contacts, started the operation and imported some goods. While it is true that the unemployment insurance benefits stopped 1 week before the accident, the Indus Valley business was developing during that time.

To simply look at the 1 week before the accident, in my view, is too narrow a "snap shot" and does not accurately reflect Mr. Dhir's true financial situation. It is more appropriate, in my view, to consider the period from when he left the Bank of Nova Scotia and started to develop his private business. Accordingly, for the purposes of the dependency issue, the time frame to be examined is from March 12 to October 29, 2000.

ATUL DHIR'S EXPENSES:

As mentioned above, Atul Dhir was living with his parents and sister in a three-bedroom condominium. Mr. Ravinder Dhir testified that the rent was $1625.00 per month. He also testified that he spent approximately $500-$600 per month on food, the family car etc. Counsel for RBC submitted that there should be additional "deemed" expenses provided to Atul Dhir by his parents for cooking, laundry, housekeeping and chauffeuring. He also proposed an amount of $500.00 per month for Atul Dhir's using the premises to conduct his Indus Valley business.

While there was some evidence that Atul Dhir did some limiting cooking, it would appear that his mother did the vast majority of the cooking. While there is some case law that suggests that some of the things that parents normally do for their children are not to be "deemed expenses", I am prepared to include this as an expense of approximately $100.00 per month. With regard to housekeeping and laundry, however, the evidence, such as it was, suggests that Atul Dhir did his share of both these items and accordingly are not included. With regard to chauffeuring, I note that the car expenses have already been included and as there was very little evidence as to how often Mr. Dhir drove his son I am not including anything for this item

With regard to the claim for $500.00 per month to be a "deemed expense" for office space at the condominium for Indus Valley, I am not prepared to include this as a "deemed expense". The evidence was that most of the business was conducted over a cell phone owned by Atul Dhir himself. The paper work was minimal and the "stock" of the business was stored at a friend's residence. I am already allocating one quarter of the condominium costs to Atul Dhir. To include another $500.00 when he did not have separate office space or even a telephone line in the condominium would be unrealistic.

Accordingly, Atul Dhir's monthly expenses can be summarised as follows:

Rent	$1625.00
Other	$550.00
Cooking	$100.00
Total	$2,275.00

Of this I attribute one quarter of the rent and "other" to Atul. The entire cooking amount is attributable to him. Accordingly, the total amount is $643.75.

In addition to the "deemed expenses" there were a number of hard expenses incurred by Atul Dhir. Student loans amounted to approximately $111.59 per month. In addition the business cell phone cost approximately $100 per month although this may have been covered by business revenue. In addition, Atul Dhir had numerous day to day expenses which he paid for by way of two credit cards - one with the Royal Bank and the other with MasterCard. During the time frame in question both cards were used to near their limits of $5000.00 and $2,800.00 respectively. In addition, Mr. Dhir had a line of credit guaranteed by his father in the amount of $10,000.00 with Canada Trust. The line of credit was at or near its' limit throughout the time in question. What Mr. Dhir appears to have done is withdraw amounts from the various credit card accounts and use the withdrawals to make the minimum payments on the accounts. While he paid a high rate of interest for doing this, he did manage to maintain the accounts. Clearly some of the expenses on the credit cards were monthly expenses of Atul Dhir. It is difficult to quantify those expenses. While the amount owing on the credit cards and line of credit was approximately $18,000.00 were close to $450.00 per month, Atul Dhir did not pay that amount. He used the cards to make withdrawals and make the minimum payments.

The final expense to be accounted for is a payment made by Atul Dhir to his father to cover living expenses. This was estimated at between $150.00 a week to $100.00 every two weeks depending on the witness and the time when the statement was taken. I accept that the amount probably varied by week, depending on Atul Dhir's ability to pay at the time. I estimate the amount paid at approximately $100.00 per week or $400.00 per month.

Atul Dhir's monthly expenses can thus be summarised as follows;

Cell phone	$100.00
Student loan	$111.59
Deemed expenses	$643.75
Total	$855.34 per month

I have not included the monthly payment made by Atul Dhir to his father, as I have already attributed the deemed expenses to Atul Dhir. To include this $100.00 a week would count the expense twice.

Accordingly the monthly expenses are approximately $855.34 per month.

ATUL DHIR'S INCOME:

During the time frame in question, Atul Dhir has 3 potential sources of income: unemployment insurance benefits, sale of earlier acquired investments (stocks etc.) and monies earned through Indus Valley. Of those three sources the amounts received from unemployment insurance benefits is by far the easiest to calculate. The records indicate he received 31 weeks at $346.00 per week gross plus $116.00 for his first week. Counsel made submissions as to whether it was appropriate to use the gross or net figures, given that Atul Dhir was in a low enough income category that he would in all likelihood have received most or all of the tax deductions back when he filed his income tax return. When determining the issue of financial dependency, one has to look at the individual's expenses and the monies available to pay those expense. It is the actual monies available to pay those expenses which is relevant and accordingly one must look at the net income. At the time of the accident, it was by no means clear how much, if any, of the monies deducted for taxes would have been returned. Accordingly, I will consider only the net revenues. The evidence led at the hearing suggests that Atul Dhir received approximately $297.00 per week or $1,277.00 per month net, from unemployment insurance benefits.

The amount of income from Indus Valley is significantly less clear. This is due, in part, to Atul Dhir's poor memory, which appears to have been affected by the motor vehicle accident, as well as weak record keeping by him. It would also appear that Atul did some sales by way of cash and accordingly there are few records in this regard. The end result is that any conclusions with regard to the revenues from Indus Valley are at best estimates.

What we do know is that Atul Dhir decided after visiting India in March of 2000, to start a business where he imported tassels and other products that were manufactured by a relative in India. It would appear that he purchased items on consignment. That is, he paid for the items once he sold them, although it would also appear that he would have to pay for them sold or not, after six months. While it is not entirely clear, there would be at least one shipment of goods received from India prior to the accident and possibly two. While the figures vary, it would appear that the cost of the shipment of goods that did arrive was approximately $4,734.00 U.S. or $7,500.00 Canadian. In addition, there were shipping costs of approximately $5085.00. I would stress that these figures are approximate because the exact amounts tend to differ by document.

The amount of revenues generated from the roughly $12,500.00 of expenditures is considerably less clear. A report prepared by Norm McCully, chartered accountant, dated February 28, 2001 for Atul Dhir's solicitor indicates sales of approximately $12,000.00 prior to the accident with remaining inventory of approximately $6000.00. While I allowed the report to be filed, I am not prepared to give it a great deal of weight. Mr. McCully was not produced for cross-examination and his report was apparently prepared to bolster Mr. Dhir's claim for income replacement benefits. The report refers to revenues from a large number of sources, yet no receipts or other documentary evidence was produced. Bank records show very little activity for the company. When questioned about this, Atul Dhir responded that he did a great deal of cash business. While I accept that this may have been so, and his personal account does show some otherwise unaccounted for deposits, these do not come anywhere close to the figures mentioned by Mr. McCully. What the bank records produced do show is $5000.00 deposited September 20, 2000 and $5100.00 withdrawn the next day. This would appear to pay for the shipping costs of one of the shipments. In addition, there were deposits between April 19 and October 24 of $7,577.00. These were all made in the three weeks prior to the accident. This amount, combined with the $5000.00 previously mentioned approximately equals the amount spent on the business. That assumes the $5000.00 from Mr. Dhir's account spent on the shipping was received from sales, which is not entirely clear. Assuming that to be so, the business was apparently roughly breaking even and any profit would have been based on the sale of the remaining stock. Given the lack of records and the claims of cash sales, I find that at the time of the accident was essentially breaking even.

Atul Dhir also claimed that prior to the accident he was disposing of various securities that he had acquired when he was working for the banks. Atul Dhir was very unclear as to how much the sale of investments amounted to over the time frame in question. In part this may have been due to the passage of time as well as his memory problems associated with the accident. The main problem, however, again relates to the lack of records. Other than a copy of Atul Dhir's bank statement for the period in question, no records were produced to show sale of any securities or other investments. That having been said, the bank records do show various unexplained deposits throughout the time period in question. It should be noted, however, that the account is a joint account with Atul Dhir's girlfriend and it is by no means clear where the various deposits came from. While there may have been some income as a result of sales of securities, without some documentation or further explanation I am unable to assess the amount.

In summary, I find that Atul Dhir had income of approximately $1,277.10 per month. His expenses were approximately $855.34 per month before accounting for credit card expenses.

Even if I were to estimate these at $450.00 per month the expenses would still amount to only approximately $1,305.34 per month. This means that Atul Dhir was roughly meeting his expenses which is consistent with the evidence of both Atul Dhir and his father Ravinder. If one looks at Ravinder's contribution, it amounted to approximately $643.00 per month. This is clearly less than Atul Dhir's contribution to his expenses and I find that Atul Dhir was not financially dependent upon his father at the time of the accident but rather was financially independent.

EXCLUDED DRIVER ENDORSEMENT:

Counsel for RBC submitted that Lombard is also first in priority on the basis that Atul Dhir was an insured person in the motor vehicle policy held by his father, Ravinder Dhir. RBC argues that section 2 of Bill 59 defines "insured person" as:

> the named insured, any person specified in the policy as a driver of the insured automobile . . .

It further points out that Atul Dhir was listed in his father's policy on the O.P.C.F. No.28 A form and therefore meets the definition of an "insured person".

The difficulty that I have with this position is that Atul Dhir was specifically listed in the policy as an "excluded driver". It is RBC's position, as I understand it, that as long as the person is listed in the policy, it does not matter in what capacity they are listed. With the greatest of respect to counsel's very able submissions, I do not agree. To specifically list a person as an "excluded" under the policy and to allow that then to give them status and benefits under the policy would result in a situation not likely intended by the Legislature or the parties.

Counsel for both parties spent some time arguing the importance of the fact that the endorsement was not signed by either Ravinder Dhir or Atul Dhir. Counsel for RBC relied upon the decision of Director's Delegate Naylor in General Accident & Singh (AP99-00057, August 1, 2000), wherein she made it clear that in order for a driver to be "excluded" under the policy, both the insured and the excluded driver must fully understand the consequences of such an endorsement and agree to it. I am in agreement with Director's Delegate Naylor in that regard, however the facts in the Singh case are very different from the facts in this one. In Singh there was a very real question as to whether or not Mrs. Singh understood the meaning of or the consequences of the exclusion. In our case, however, it is very clear that both Ravinder and Atul Dhir were fully aware of the fact that Atul Dhir was to be an excluded driver and the consequences of this. Ravinder Dhir testified that his son had been involved in a motor vehicle accident in 1996 and that he wanted to exclude his son from the policy for premium reasons. He testified that he intended to do this and in his mind, had done so. Similarly, Atul Dhir testified that he had been in the accident and that his father had excluded him from the policy and he knew he was not to drive the motor vehicle. Accordingly, this case is significantly different from the Singh case and I find that Atul Dhir was an excluded driver and that this does not make Lombard responsible for the purposes of accident benefits.

In light of the above, I find that RBC is responsible to pay accident benefits to or on behalf of Atul Dhir arising out of the motor vehicle accident of October 29, 2000.

ORDER:

RBC is responsible to pay Mr. Atul Dhir's accident benefits arising out of the motor vehicle accident of October 29, 2000.

COSTS:

In the event that the parties can not agree upon the issue of costs, I may be spoken to.

Dated this _____ day of July, 2002.

M. Guy Jones
Arbitrator