IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, 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:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

GORE MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Bruce Keay for the Applicant

Philippa Samworth for the Respondent

ISSUES:

1. Is Co-operators General Insurance Company or Gore Mutual Insurance Company responsible for paying accident benefits to or on behalf of Joseph Morgan?

DECISION:

1. Gore Mutual Insurance Company is responsible for payment of the accident benefits to or on behalf of Joseph Morgan.

HEARING:

1. The arbitration was held in the city of Toronto in the province of Ontario on May 11, 2007. The matter proceeded by way of an agreed statement of facts as well as viva voce evidence.

PRELIMINARY ISSUE:

At the commencement of the hearing, counsel for the applicant called Dr. Jack Carr, a professor of economics, to testify with regard to the issues of income, expenses and dependency of the injured party, his mother and step father. While not challenging his expertise, counsel for the respondent challenged his right to testify, questioning whether his evidence was necessary to assist myself, the trier of fact.

Counsel for the respondent took the position that the witness would simply take the financial figures, whether actual or imputed, and draw certain inferences in order to arrive at a conclusion as to financial dependency. In essence, the witness would be doing no more then the arbitrator had to do in order to decide the case.

After hearing submissions and considering the case law provided to me, I ordered that Dr. Carr be allowed to testify. Dr. Carr is highly experienced in the use of Statistics Canada household expenses data as well as income and related issues. I was satisfied that his testimony could potentially be of some assistance to me in understanding the financial materials and the statistics involved in the case. The courts have generally given a fair degree of latitude in allowing such witnesses to testify and then decide what weight to give the evidence presented. In this particular case, while Dr. Carr's evidence was helpful, it did not have a significant bearing on the decision, as we will be seen from my comments below.

FACTS & ANALYSIS:

The parties submitted an Agreed Statement of Facts, which sets out the basic facts of this case. This arbitration arises out of a motor vehicle accident which occurred on July 11, 2004. On that date, Joseph Morgan, then age 19, was struck and catastrophically injured by a motor vehicle insured by Co-operators General Insurance Company ("Co-operators"). At the time of the accident Joseph Morgan lived with his mother, Kathleen Morgan , and his step father, Ron Wheller in MacTier, Ontario. Neither Joseph nor his mother had a motor vehicle liability insurance policy, however Ron Wheller owned a motor vehicle, which was insured by Gore Mutual Insurance Company ("Gore") at the time of the accident.

Co-operators received the first completed application for accident benefits, and in accordance with the provisions of the Statutory Accidents Benefits Schedule, began paying accidental benefits to and on behalf of Joseph Morgan. Co-operators, however, takes the position that Joseph Morgan was principally dependent for his financial support upon his mother and her spouse, Ron Wheller, and accordingly Gore, as insurer of Ron Wheller, should pay the accident benefits in question.

The priority for payment of accident benefits is covered by section 268 (2) of the Insurance Act, which provides:

> 2. In respect of non-occupants,
>
> (I) The non-occupant has recourse against the insurer of an automobile in respect of which the non- occupant is an insured,
>
> (II) If recovery is unavailable under subparagraph I, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant.

In terms of who is an "Insured" for the purposes section 268 (2) (I), section 2 (1) (a). of the applicable Statutory Accident Benefits Schedule states that an:

> "Insured person" in respect to a particular motor vehicle liability policy means,
>
> > (a) The named insured, any persons 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, …

Thus, in our case, if Joseph Morgan was financially dependent upon Ron Wheller or Kathleen Morgan at the time of the accident, Gore is responsible for the payment of the accident benefits. If he is not dependent, then Co-operators is responsible for the payment of the accident benefits

The criteria to be used to determining financially dependency for the purposes of the Statutory Accident Benefits Schedule was established by the Ontario Court of Appeal in Miller vs. Safeco, (1986) 13 C.C.L.I. 31. In that case the court held that relevant criteria were:

(I) Amount of dependency
(II) The duration of the dependency,
(III) The financial and other needs of the alleged dependent, and
(IV) The ability of the alleged dependent be self-supporting.

The above criteria have been applied in numerous cases by arbitrators and judges. In the final analysis, however, each case tends to come down to the particular facts of that case and this is so in the case now before me. It is therefore necessary to review the facts of this case briefly.

As stated above, Joseph Morgan was 19 years of age, when, on July 11, 2004 he was struck by a motor vehicle. In June of 2003, he had finished grade 10. In July 2003 he went to Quebec and worked for a construction company for approximately 1 month. He became tired of this and decided to return home to his mother and stepfather's house in MacTier, a small Ontario town. He did not work from then until his return to high school in September 2003. He then commenced his studies in grade eleven, however, he was absent from school approximately 26 days between the start of school and when he dropped out in October 2003.

Between October and Christmas 2003, it would appear that his only income was approximately $20 from helping his cousin shovel snow off roofs. In early 2004, Joseph began working for Myles MacLeod and his company, MacLeod Tree Services. This involved cutting and splitting wood as well as cleaning debris, for which he was paid $9 per hour, in cash. According to Mr. MacLeod, Joseph worked for approximately five days, in two time frames in January and June 2004. He was paid approximately $250 - $300 for the work. While Joseph Morgan appears to recall working longer and earning more money from Mr. MacLeod, there are no records and I accept Mr. MacLeod's statement filed at the hearing, that Joseph made approximately $250 - $300 for what was at best casual labour.

Joseph also received an allowance of anywhere from $20 - $50 each two weeks from his mother, although he did not receive this when working for Mr. MacLeod.

On June 14, 2004, or approximately one month prior to the accident, Joseph commenced work at BSC Blasting. For the week of June 14th he worked 39.5 hours, and for the week of June 21st, 44 hours. He did not work the week of June 28th, but worked 46.5 hours during the week of July 5, 2004. He was paid $10 an hour plus four percent vacation pay. His total gross earnings from BSC Blasting before the accident amounted to one thousand four hundred and thirty dollars.

In terms of expenses, Joseph, when questioned prior to the hearing, indicated that he agreed to pay fifty dollars each two weeks for room and board, but only while working. He apparently only actually paid this on two occasions prior to the accident. Mrs. Morgan, at the examination under oath, testified that prior to the accident she was responsible for paying the hydro, phone, groceries, and Joseph's expenses. This included Joseph's cigarettes, clothing, socks, shoes and spending money.

At the time of the accident, Mrs. Morgan was employed as the deli manager at the Foodland store in MacTier, earning approximately $22,000 net of taxes per year. She was paid ten dollars per hour and worked forty eight to forty nine hours a week.

Ron Wheller, Jospeh's stepfather, was working as a marine technician at the time of the accident and making $19 per hour for a forty-four hour week. His net income was approximately $1,000 to $1,100 each two weeks.

In determining questions of financial dependency, arbitrators and judges have accepted that the parties can have deemed benefits and expenditures. This is particularly the case where a young adult such as Joseph was living at the family home. Such an approach is appropriate in this case.

Dr. Carr, in his testimony indicated that Kathleen Morgan and Ron Wheller had a combined income of $55,200 in 2004 dollars or $44,302 in 1992 dollars. He testified that the Statistics Canada Survey of the Household Expenditures indicates that a family of two or more persons earning between $40,000 and $49,000 in 1992 dollars consumed $35,065 in 1992 dollars or $43,691 a year expressed in 2004 dollars.

Based on the expenditures statements given by Kathleen Morgan and Ron Wheller, their household expenses amounted only to $1,458 dollars per month or $17,496 dollars a year in 2004 dollars.

Counsel for the respondent, when cross-examining Dr. Carr, made the point that Statistic Canada Survey of Households was only an average and that the reality of the Morgan household could be quite different. I accept this completely. The point made by Dr. Carr, however, which I accept, is that the household expenditures listed by Kathleen Morgan and Ron Wheller were fairly conservative. There were, undoubtedly some discrepancies such as the monthly expenditure for heat or the amount paid for groceries, I find, however, that the total expenditure estimate provided by Ms. Morgan and Mr. Wheller was probably on the conservative side.

Arbitrators and judges have also allocated a monetary amount for the household services provided both to and by the potentially dependent person. This is, at the best of times, an in exact science, as one tries to allocate a value to such things as cleaning, cooking, maintaining the house and other day-to-day activities that people do, but seldom keep track of in precise terms. This is particularly difficult in cases such as this, where one tries to reconstruct something that occurred years before.

Dr. Carr provided Statistics Canada data regarding contributions to household services by females in Ms. Morgan's age group (23.8 hours per week) and Mr. Wheller's (21.7 hours). A per hour rate of $10 to these services resulted in a service of $657 per month. While Dr. Carr's analysis was interesting, I did not find it particularly helpful. It did not particularly reflect the reality of the Morgan household.

The limited evidence provided at the hearing with regard to household services revealed that Ms. Morgan made the lunches and dinners, while Joseph would make his own breakfast. Ms. Morgan also did the dishes although Joseph would do them only once or twice a week. Ms. Morgan did most of the vacuuming and Joseph did it less often. Ms. Morgan did the laundry, and Joseph cut the grass occasionally. Ms. Morgan did the grocery shopping and cleaning the house including Joseph's bedroom. She also weeded the garden and raked the leaves. All members of the family shared the task of taking out the garbage and Joseph and Ron Wheller shared the task of shovelling the snow.

While one would normally attempt to determine the amount that each family member contributed to the household services and put a value to it, I do not think that this is a particular useful exercise in this case. Upon reviewing all the evidence one is left with the impression that Joseph did very little in the way of household work and certainly less than his mother and stepfather did. To attribute values to these services would, at best, be very imprecise, and simply reinforce the conclusion, which I will expand upon below, that prior to the accident Joseph provided in actual dollar terms, less then fifty percent of his own financial support.

Having reviewed the facts of the case, one must now turn to the appropriate time frame to consider when determining the issue of financial dependency for the purposes of the Statutory Accident Benefits Schedule. Numerous arbitrators and judges have noted that one should not take a simple "snapshot" as of the day of the accident, but look at a larger time frame that more accurately reflects the true financial situation of the parties. Counsel for the applicant has suggested the period from October 2003 to July 11, 2004, a period of approximately nine months. This would cover the period of when Joseph left school and began his somewhat limited working career. Counsel for the respondent did not take serious issue with this time frame and I find, on all the facts, it is an appropriate time frame.

One must then look at the income and expenses of Joseph Morgan, Kathleen Morgan and Ron Wheller during that time frame. This has already been reviewed, above. Joseph's income during that time frame was approximately $1,750 or $194 per month. Kathleen Morgan and Ron Wheller had a combined income of $41,400 for nine months or $4,600 per month.

In terms of expenses, when looking at the household expenses, I accept the overall expenses were $13,122 for the nine-month period or $1,458 per month. These are, in all likelihood, conservative figures.

If one then compares Joseph's income of $194 per month with his share of the household expenses of $486 per month, one can see that he did not see that he did not contribute fifty percent to his own expenses. I note that this does not include an allocation for household services, which would only make Joseph more financially dependent upon his mother and stepfather.

If this were the end of the exercise one would conclude that Joseph Morgan was not financially dependent upon himself but rather was financially dependent upon his mother and stepfather at the time of the accident. One must, however, examine another of the criteria set out in Miller vs. Safeco, namely the ability of the alleged dependent to be self supporting.

Counsel for the respondent submits that in assessing the ability of the individual to be self supporting one must look not only look at the actual past earnings, but also their reasonable capacity to earn income. In support of this proposition she cited a number of cases including: Federation Insurance Company of Canada vs. Liberty Mutual Insurance Company (award of arbitrator Samis, dated May 7, 1999, upheld on appeal by the Honourable Mr. Justice O'Leary, dated September 15, 1999 and by the Ontario Court of Appeal, unreported decision dated April 10, 2000); Co-Operators vs. Halifax Insurance Company, (unreported decision of arbitrator Samis dated December 14, 2001 and upheld on appeal by the Honourable Madam Justice MacDonald dated June 21, 2002); Co-operators vs. Zurich, (unreported decision of arbitrator Samis dated May 11, 2005).

In <u>Federation Insurance Company of Canada vs. Liberty Mutual Insurance Company</u>, arbitrator Samis was dealing with a question of whether a young man, Jonathan Sebastian, was principally financially dependant upon his parents at the time of the accident. Jonathan had not been working for the last few days before his accident of February 13, 1998. He had, however, been employed on an essentially full time basis since July 1997 and arbitrator Samis took this as an appropriate time frame to use. Jonathan earned approximately $5,700 in the nineteen weeks before the accident, or $300 per week. In considering the issue, arbitrator Samis stated:

> Earnings are evidence of capacity. But many individuals may not be earning up to their capacity. If this is because earnings are foreclosed by the unavailability of work, then the person may become a dependent, even with a very high earning capacity. On the other hand, a person who could earn significant income, but simply chooses not to, can't be regarded as a dependent in the sense that a need for financial support is imposed on the person… In my view, it is not appropriate to look at their capacity to evaluate dependency. If the individual alleged to be dependent is be reasonably exercising his or her needs to the extent permitted by the circumstances, then it is reasonable to regard the earnings as the amount can contribute to his or her own expenses of living.

Even though Jonathan Sebastian earned an average of $300 per week over the nineteen weeks before the accident, had he been working full time at the same $13 per hour, he would have earned approximately $450 per week. Arbitrator Samis therefore held that Jonathan Sebastian had a "reasonably exercised capacity" to earn $450 per week and was therefore not a dependent.

Arbitrator Samis's decision was upheld on appeal although I note that Justice O'Leary found that arbitrator Samis had found that Jonathan Sebastian, with gross earnings of $300 per week, was not financially dependent upon his parents.

In <u>Co-operators vs. Halifax,</u> arbitrator Samis was dealing with a twenty-two year old woman who had been living with her mother and two sisters. She had been living with her mother approximately four years before the accident. Prior to the accident she had been working at two restaurants. Arbitrator Samis stated:

> In my view, it is important to measure dependency by examining the individual's capacity to provide his or her own needs. In a financial context, it is necessary to look at the individual's capacity to generate income. As with Sherri Pallister, an individual may have actual income but that income may only be partially reflective of her capacity. I conclude that income is evidence of capacity but that capacity to earn may be somewhat greater then actual earnings in some circumstances. This is very relevant to Sharri Pallister's situation in view of the evidence put before me to indicate that more work hours were to be given to her which would have resulted in greater income. In short, her capacity to work was larger then her earnings prior to the accident.

Arbitrator Samis found even though Sherri Pallister's income prior to the accident was approximately $250 per week she would have been able to earn about $500 per week if the restaurant did follow through on their intended offers of additional hours etc. He therefore found that she had a capacity to earn income of greater than $400 per week and therefore she was not dependent on her mother. Arbitrator Samis's decision was upheld on appeal.

In <u>Co-operators vs. Zurich</u> arbitrator Samis was dealing with a nineteen-year-old youth, Trevor Harrison, who had been living with his mother at the time of the accident. Trevor had dropped out of grade eleven approximately three years prior to the accident. In those three years he had held numerous temporary physical jobs such as stocking shelves etc. These jobs were obtained through placement agencies and generally paid approximately $10 per hour. Between January and April 2001 or approximately five months prior to the accident, Trevor took a Heating and Air-conditioning technicians course to upgrade himself, although he ultimately failed the course. Shortly before the accident, Trevor received a job placement with Canadian Tire. By the time of the accident he had completed two weeks of paid orientation and one week of full work. Arbitrator Samis found that Trevor had worked about as much as he could work. He concluded that the appropriate time frame for considering the question of dependency was from the completion of the technician's course until the accident. This resulted in his income averaging approximately $1,000 per month.

Arbitrator Samis stated:

> This indicates earnings of nearly $1,000 per month. I am mindful of the fact that I should consider not only the actual earnings of Trevor Harrison, but his capacity to earn. This is in accordance with the case law of Ontario and in particular, the decision of Miller vs. Safeco, and the subsequent decision of the Ontario Court of Appeal in Liberty vs. Federation. Capacity to earn income is a highly relevant consideration when we are dealing with such a person as Trevor Harrison who is able to be in the work force. The income he actually earned is certainly evidence of his capacity but it is probable that his capacity was greater then his earnings. Certainly if he had been called out for further employment, he would have earned more and there was certainly no evidence that he refused available employment at any time. To the contrary, he indicated he took the employment opportunities that came his way.

Counsel for the applicant submits that the dependency issue should be determined based on a realistic assessment of the party's actually financial circumstances, not his imputed earning capacity. In support of this proposition it relies on the decision of Arbitrator Naylor, in Raffoul vs. State Farm [1994] O.I.C.D.No.103, upheld on appeal by Director's Delegate Draper [1996] O.I.C.D.No.58. In that case, Dianne Raffoul was twenty-two years of age, single, living with her mother at the time of the accident. Prior to the accident Dianne led a very comfortable life living at her mother's house. Her mother cared for her and paid almost all the bills. Dianne had completed her education approximately two years before the accident. She worked two part time jobs prior to the accident. She did not work full prior to the accident. The arbitrator noted that Dianne had started to work longer hours prior to the accident and nothing was stopping her from seeking full time employment. Counsel had agreed that if she had worked full time she would not have been financially dependent on her mother. Arbitrator Naylor rejected this approach, stating:

> In my view, section 3(2) requires a realistic assessment of an applicant's actual financial circumstance to determine whether they are in fact relying on others for support. The actual circumstances of the applicant must be looked at, and not an imputed earning capacity. Where, as here, the applicant works part time, her financial circumstances should be measured based on her part time earning, and not on the income she might have earned if she worked full time.

Arbitrator Naylor's decision was upheld by Director's Delegate Draper.

Counsel for the applicant further submits that even if one accepts that the actual income is not determinative of the person's income capacity, there must be evidence before the arbitrator that there would be more hours available which would have resulted in more income (see: Co-operators vs. Halifax Insurance Company, decision of arbitrator Samis dated December 14, 2001).

Counsel for the applicant also submits that the focus for the financial dependency must be on the time of the accident and looking at the future plans for the insured parties should only be done with great caution (See: Bogdan vs. Royal, (FSCO file A-014959, decision of Director's Delegate Naylor).

As was pointed out by Mr. Justice O'Brien in Miller vs. Safeco, each case must be approached on its own particular facts. Indeed, a review of the facts in that leading case is helpful in deciding in the case before me. In Miller, the injured party was twenty-three years of age at the time of the accident. He was living with his parents at the time, working full time for three months at $5.50 per hour and earned $2,560 in those three months. However, during proceeding the eleven months he had been employed only on two separate occasions in the total of seven weeks, earning about $800. He was held to be a dependent of his father.

Turning to our case, I am in agreement with the proposition that one can look at earning capacity rather than the actual earnings, in the appropriate circumstances. One must keep in mind, however, that we are attempting to determine financial dependency at the time of the accident and not in the future. Depending on the facts of each case, one may give lesser or greater weight to earning capacity.

In our case, Joseph Morgan had, at very best, a weak work history prior to the accident. In the approximately nine-month time frame he had only averaged $149 per week. It was only in the month before the accident that he began to earn roughly $440 per week, and even then he earned nothing during one of the four weeks immediately preceding the accident.

It would appear, based on the evidence before me, that Joseph Morgan had been doing very little work in the nine months since leaving school. He had a grade 10 education and absolutely minimal work experience. In terms of his work with BSC Blasting, and his future there, as an indicator of his income capacity, an investigator spoke with the owner of BSC who indicated that Joseph was hired as a helper, with no contract, at $10 per hour. He was unsure if he would have kept Joseph on when the particular project ended, until he knew what kind of worker he was. The company bookkeeper, Jennifer Swindlehurst, was interviewed in 2006 and her statement was filed at the hearing. She indicated that the company BSC was no longer operating and had been replaced by another company. She confirmed that Joseph was hired at the rate of $10 per hour for approximately forty hours per week on a temporary basis. He was hired for one particular project and he was laid off for one week, as they did not have enough work for him.

Earning capacity is undoubtly one of many considerations to take into account when determining the financial dependency issue. In some cases, potential verses actual earnings may be appropriate, and in other cases it may not be. In this particular case, we have an individual who had clearly done very little work prior to the accident. When asked at the examination under oath why he started to work for the blasting company, he answered:

> So the reason why I left him is because the blasting was…they were going to pay me more money, and plus I was going to be on the books too.
>
> Q. Why did you want to be on the books?

> A. Just so I could, I don't know, get some hours for pogey.
>
> Q. When you say, "pogey", you mean unemployment insurance?
>
> A. Unemployment, yes.

One is left with the impression that Joseph probably would have continued to do very little in terms of work but for the accident.

While Joseph Morgan may well have been physical capable of working more hours than he did in the nine months prior to the accident, it is not apparent that the work would have continued to have been available and that he would have continued to work for a particular period of time.

One cannot simply say that he earned $1,430 in the month before the accident and therefore he has a capacity to earn that in the future and should therefore be deemed to earn that.

Based on all the evidence, while I accept that one takes into account the earning capacity, I am of in the view in this particular case it is appropriate to put greater emphases upon on the nine months prior to the accident. As such, Joseph Morgan was financially dependent upon his mother and stepfather at the time of the accident. This is, in my view, consistent with a review of his entire financial situation prior to the accident. Accordingly, the respondent, Gore Mutual Insurance Company is responsible to pay benefits to and on behalf of Joseph Morgan.

In the event that the parties are unable to agree with the respect to the issue of costs, I may be spoken to.

Dated at Toronto, this _________ day February 2008.

M. Guy Jones
Arbitrator