IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, section 275 and Regulations 664 and 283;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

OXFORD MUTUAL INSURANCE COMPANY

Applicant

AND

THE CO-OPERATORS

Respondent

AWARD

COUNSEL:

Matt Duffy and Jacqueline Emerton for the Applicant

Philippa G. Samworth for the Respondent

ISSUES:

1. Was Joshua Williams principally dependent for financial support or care upon Ulrike Williams and/or Grant Huigenbois at the time of the accident?

ORDER:

1. Joshua Williams was not principally dependent for financial support or care upon Ulrike Williams or Grant Huigenbois at the time of the accident and accordingly Co-operators Insurance is responsible for paying accident benefits to or on behalf of Joshua Williams.

HEARING:

The arbitration was held in the city of Toronto, in the province of Ontario on June 21, 2004 before me, M. Guy Jones, pursuant to the provisions of the Arbitration Act. The matter proceeded by way of a limited agreed statement of facts. No witnesses were called.

FACTS AND ANALYSIS:

The dispute in this matter arises out of a motor vehicle accident which occurred on July 7, 2002. On that date, Mr. Joshua Williams was severely injured in a single vehicle accident. At the time of the accident Mr. Williams was operating a motor vehicle owned by Mr. Trevor Kittmer, who had a valid motor vehicle liability policy with Co-operators. Mr. Williams at the time of the accident was residing with his mother, Ulrike Williams, and her common-law spouse, Grant Huigenbois, who held a valid motor vehicle liability policy with Oxford Mutual Insurance Company.

Joshua Williams submitted an application for accident benefits to Oxford who commenced payment of accident benefits to Mr. Williams. Oxford subsequently sent a Notice of Intent to

Dispute to Co-operators, claiming that Mr. Williams was not a dependent of Ms. Williams or Mr. Huigenbois and therefore Co-operators ought to be responsible for payment of accident benefits to or on behalf of Joshua Williams.

THE LAW:

Section 268 (2) of the Insurance Act provides that, in determining priority for payment of accident benefits in respect of an occupant of an automobile, the occupant has first recourse against the insurer of an automobile in respect at which the occupant is an insured. If no recovery is available from that source, then the next recourse is against the insurer of the automobile in which the claimant was an occupant.

Section 2 (1) of Bill 59, the Statutory Accident Benefit Schedule in effect at the time of the accident, defines an "insured person" as "the named insured, any persons specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependent of the insured or spouse, 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".

Mr. Williams did not have a valid policy of motor vehicle liability insurance at the time of the accident. Accordingly, in order for him to be considered a "named insured" for the purposes of the S.A.B.S., he must fit within the definition of a dependent of a named insured. Pursuant to section 2(6) of Bill 59, for an individual to be a "dependent" that person must be "principally

dependent for financial support or care on the other person or other person's spouse or same sex partner".

FINANCIAL DEPENDENCY:

While many of the considerations for financial and care dependency are similar, and the facts overlap, I will deal first with the issue of financial dependency and then with care.

It is important to note that it is not sufficient that the claimant simply be dependent upon another in order to be considered an insured but rather must be **principally** dependent. That term has been likened to "chiefly", "mainly", or "for the most part" (see: Towsley and Royal Insurance Company of Canada, (1996), O.I.C. file no. A-010196 and 010717). Generally speaking, a person will only be considered principally financially dependent for financial support on someone else if the cost of meeting the claimant's needs are more than twice the claimant's resources. In other words, if the claimant had sufficient resources to fund 51% of their financial needs, then the person could not be dependent upon others (Liberty Mutual Insurance Co. vs. Federation Insurance Company) unreported decision of the Honorable Mr. Justice O'Leary, dated September 15, 1999 and upheld by the Ontario Court of Appeal on April 10, 2000).

The criteria generally considered when determining the issue of dependency were set out by the Ontario Court of Appeal in Miller vs. Safeco (1986) 13 C.C.L.I. 31, and include:

(i) the duration of the dependency

(ii) the amount of the dependency

(iii) the financial or other needs of the alleged dependent

(iv) the ability of the alleged dependent to be self supporting

As has been often noted in the case law in this area, each case is factually driven and accordingly I will now turn to the facts of this particular case and discuss them in relation to the criteria set out above.

At the time of the accident, Joshua Williams was twenty-two years of age. Over the few years leading up to the tragic accident, Joshua had been in the process of creating an independent life for himself. Individuals at this stage of their lives often create a special challenge in attempting to determine whether they were dependent upon their parents at the time of the accident or not. It therefore becomes particularly important to decide what the relevant time frame is when deciding this type of case. The courts and arbitrators have generally agreed that one does not simply look at a "snap shot" of the actual day of the accident to determine the issue of dependency. The time frame to be looked at may encompass days, weeks, months or even years. In Joshua's case, his situation may be briefly summarized as follows. In later 1998 or early 1999, Joshua left home and lived in British Columbia for approximately seven months and shared accommodation with two friends. During that time he was employed by Prestige Glass, earning $10 per hour for a 40-hour week. It would appear that Joshua found himself short of cash on occasion while in British Columbia and his mother, Ulrike Williams sent him small

amounts of cash to help him with the rent. Upon his return to Ontario, Joshua lived with his mother and her common law spouse, Grant Huigenbois, for a period of one to two months. He had disagreements with his mother and accordingly he and his girlfriend, Ashley Hoffman, moved into the basement of her parent's home for a period of approximately eight months. During that time they did not pay rent. In late 2001 Joshua and Ms. Hoffman moved into a two-bedroom apartment which they shared with a friend. During that time Joshua was employed at MCQ Handling on a part-time basis and then full-time, earning approximately $10 an hour. After approximately two months, Joshua and Ms. Hoffman moved into a home owned by a friend, Andrew Fennell. During that time Joshua obtained a job with Treadway Tires earning approximately $10 per hour. Joshua and Ms. Hoffman each paid $150 a month rent to Mr. Fennell.

In February or March of 2002 Joshua and Ms. Hoffman broke up and Joshua continued to reside at Mr. Fennell's, paying $300 a month rent. In March 2002 Joshua was charged with assault and uttering death threats against Ms. Hoffman. At the time of his bail hearing on April 8, 2002 his mother, Ulrike Williams, put up Joshua's bail and undertook to be Joshua's surety. The court ordered that he reside with his mother and Grant Huigenbois while he was on bail and accordingly he moved in with them in April 2002 and remained there until the time of the accident. While he lived there, he contributed between $30 and $50 every other week towards groceries or the cable bill. He paid for his own clothes, personal hygiene products, and entertainment as well as his transportation to and from work every day. He made his own lunches and dinners when he was working. He did not pay rent but did help out around the

house doing various chores and his own laundry and had one or two meals a week with the family.

At the time of the accident Joshua was employed at Treadway Tires and had been so employed since January or February of 2002 working from 4:00 p.m. until 2:00 a.m., three to four days a week at roughly $10 an hour. While he had been employed part-time, his employer had spoken to him prior to the accident about starting full-time with the company as early as the Monday following the accident. Prior to the accident while working at Treadway he had averaged approximately $332 a week or if annualized, approximately $17,000 per year.

Counsel for the respondent submitted that when looking at the overall picture, Joshua Williams was still essentially [principally dependant for financial support upon his mother and had never really become independent. Counsel pointed out that on numerous occasions Joshua had been forced to borrow money from his mother to make ends meet and had returned home on a number of occasions. He was not even paying rent at the time of the accident.

Counsel for the applicant, on the other hand, points to the fact that Joshua moved out of the family home as far back as 1998 or 1999 and while he may have required some occasional financial assistance from his mother, as many children do when starting up, he was essentially independent and self supporting since late 1998. As mentioned above, in attempting to determine the appropriate time frame in which to view the issue of dependency, it is very much dependent upon the facts of each case. Upon reviewing the facts of this case, I am struck by the

fact that, for the most part, since late 1998 Joshua was living independently with some limited support from his mother. As will be seen, from a financial dependency point of view I do not think that it really matters if one takes from January 2002 when he started working at Treadway or the time frame from April 2002 until the accident when he lived with his mother or, for that matter, from late 1998 when he first moved out.

On balance, I am of the view that the appropriate time frame is back to at least early 2001 when Joshua moved back to Ontario. While counsel for the respondent has suggested that the appropriate time frame would be from April 8, 2002 until the time of the accident, I am not in agreement with this position. I am of the view that this was, to a large degree, a brief aberration in Joshua's living arrangements and should not be looked at in isolation. Joshua only chose to live with his mother as an alternative to jail, while he awaited the disposition of the charges against him. The documents filed at the hearing suggested that he intended to leave his mother's residence as soon as the surety was over and as he was earning something in the neighbourhood of $17,000 annualized per year, at the time of the accident. Thus he had the financial ability to live on his own, even if he occasionally required limited financial assistance from his mother due to his poor spending habits.

If one examines the period from early 2001 it becomes clear that financially, while Joshua did receive some limited support from his mother, it did not reach the level to constitute 51% of his expenses, as required by the case law to be principally dependent upon his mother.

Even if one were to take the six months prior to the accident, as set out in the agreed statement of fact, the Williams' household had total expenses of approximately $1,457 per month or approximately $485 per person. At that time Johsua was making approximately $1,328 a month or annualized, $17,000 per year. While he was not paying rent at the time, he was contributing to groceries and doing some chores around the house. He clearly had the capacity to pay rent although it may have interfered with his spending money on other items.

As Arbitrator Samis noted in Federated Insurance Company of Canada and Liberty Mutual Insurance Company (May 7 1999, O.I.C.) the ability to be self-supporting must be taken into account in measuring dependency.

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

While I am not suggesting that Joshua was wealthy, for clearly he was not, he did, however, have the financial resources to support himself.

Counsel for the respondent pointed out that Ms. Williams and especially Mr. Huigenbois had grave reservations about Joshua's abilities to successfully run his own finances. He clearly had a

desire to spend any money that he had and he did not always do so wisely. While Joshua, with the financial assistance of his parents, chose to spend some of his earnings on other things, this does not alter the fact that he had the capacity to be essentially self supporting at least to the level of 51%.

There is little doubt that Ms. Williams and Mr. Huigenbois had a greater income than Joshua and had the capacity to support Joshua. While that is one of the criteria used by the courts, it is not the only one. On balance, I find that Joshua was primarily financially dependent upon himself and was not financially dependent upon Ulrike Williams or Grant Huigenbois at the time of the accident.

PRINCIPALLY DEPENDENT FOR CARE:

I now turn to the issue of whether Joshua Williams was principally dependent for care upon his mother, Ulrike Williams at the time of the accident.

While the issue of care dependency cannot be determined with the same mathematical precision as the issue of financial dependency, the same general criteria apply.

Counsel for the respondent submits that Joshua was dependent upon his mother care due to the fact that she was acting as his surety pursuant to a court order made April 8, 2002, or approximately three months prior to the accident.

As mentioned above, in March 2002 Joshua was charged with assault and uttering death threats against Ms. Hoffman. On April 8, 2002 the court approved Ms. Williams acting as surety for Joshua. Pursuant to that surety, Joshua Williams agreed to the following:

1. not to have any contact with Ashley Hoffman or his father, Kimball Gallant
2. not attend at her residence
3. reside with Ulrike Williams and obey the written rules of the surety
4. not possess any firearms or weapons or apply for same

The written rules set out by Ms. Williams and approved by the court included:

1. I expect Joshua to go to work daily from 4:00 p.m. to 2:30 a.m. and return straight home. Should Joshua not have transportation home I will have Joshua call Ingersoll taxi.
2. On the days that Joshua does not work his curfew will be 11:00 p.m.
3. I expect Joshua to refrain from the local bars in Ingersoll and Woodstock.
4. I expect Joshua not to associate directly or indirectly with any of Ashley's family or friends.
5. I expect Joshua to work together with me to seek counselling – possibly through "LEAC".

Ms. Williams testified at the bail hearing that she was prepared to enforce the rules and would turn him into the authorities should he not comply with the rules. I accept this.

In order to determine if Joshua, in having Ms. Williams as his surety, was principally dependent upon her for care, it is useful to review the nature of a surety and what it entails.

Section 763 and section 764 of the Criminal Code of Canada state:

> 763. where a person is bound by recognisance to appear before a court, justice or provincial court judge for any purpose and the session or sittings of that court or the proceedings are adjourned or an order is made changing the place of trial, that person and his sureties continue to be bound by the recognisance in like manner as if it had been entered into with relation to the resumed proceedings or the trial at the time and place at which the proceedings are ordered to be resumed or the trial is ordered to be held.

> 764. (1) where an accused is bound by recognisance to appear for trial, his arraignment or conviction does not discharge the recognisance, but it continues to bind his and his sureties, if any, for his appearance until he is discharged or sentenced, as the case may be.

A surety is not of defined term under the Criminal Code. The classical notion of the surety was that of a "constructive jailor". That is to say, instead of being held in a jail, the accused was said to be in the custody of the person who secured his release (see: "The law of bail in Canada", second edition, Gary T. Trotter, Carswell, 1999, c.7 Sureties, page 278-80).

The obligation of the surety is to ensure that the person attends at court for trial and also to ensure the prevention of further offences. In order to ensure that the surety has the powers to effectively carry out those tasks, the law contemplates some measure of physical control over the accused by the surety. The surety has the legal power to prevent the accused from disappearing and from doing things that are illegal. If the accused does not comply with their obligations to the surety, the surety can commit the accused to jail.

Having reviewed the nature and obligations as it relates to sureties, let us now turn to the requirements for "care dependency" as set out in the S.A.B.S. The term "care" is not itself defined in Bill 59. A person "in need of care" for the purposes of section 13 caregiver benefits is defined in section 2 of the S.A.B.S. as:

> In respect of an insured person, another person who is less than sixteen years of age or who requires care because of a physical or mental incapacity.

While this is of some assistance, I think that it is a fairly restrictive definition and is not comprehensive.

"Care" is defined in the New Shorter Oxford Dictionary as "charge, protective guardianship, an object or matter of concern, a thing to be done or seen to, to provide for, look after". The Random House Dictionary of English Language defines "care" as:

> worry, anxiety, concern, solicitude, serious attention, protection, charge, to watch over, be responsible for.

Up to this point, the courts and arbitrators of Ontario have tended to look at care in the physical or emotional sense. In Weiler vs. Personal Insurance (April 1, 1996) O.I.C. File No. A95-000259, arbitrator Renehan set out the test as follows:

1. The nature of the emotional and physical care provided; and
2. whether the claimant was in fact principally dependent on the insured for care, having regard for the amount and duration of the dependency for care, the needs of the claimant and the ability of the claimant to be self supporting.

I am prepared to accept that care for the purposes of the S.A.B.S. can go beyond the physical and emotional care that have been dealt with by the courts and arbitrators in the past. I am also prepared to accept that in some instances a person may be principally dependent for care upon

their surety. In this particular case, however, I do not think that Joshua Williams was principally dependent upon his surety, Ulrike Williams. I come to this conclusion for two reasons.

As stated above, one of the criteria in determining dependency in S.A.B.S. cases is the time frame to be examined. I have already found for reasons previously given, that the applicable time frame was at least from the time of Joshua's return from British Columbia and not simply the time when he was on bail as was submitted by counsel for the respondent. I accept that the period of the surety went for a period beyond April 8, to July 7, 2002 and but for the accident would have continued until the charges were dismissed or Joshua was convicted and sentenced. This was not a short period of time, however, it did not, in my view, fully reflect Joshua's circumstances at the time of the accident. It is, I believe, more accurate to look at the period from when he arrived back in British Columbia in 2001 until the accident. When viewed in this manner Joshua was not principally dependent for care upon his mother.

Even if one were to take the period during which Ms. Williams acted as surety for Joshua I am not satisfied that Joshua would have been principally dependent for care upon Ms. Williams during that time frame. When one reviews the terms of the surety, it is clear that Ms. Williams exercised a degree of supervision and control over Joshua. She controlled when he stayed at the

residence and to a limited degree, where he could go and who he could see. Nonetheless, Joshua was, to a large degree, independent of his mother for his own care, whether it be physical,

emotional or otherwise. Outside the few important limitations, he could do as he wished. While she exercised some degree of control this did not amount to making him principally dependent upon his mother. Rather at the time of the accident he was primarily independent and principally dependent for care upon himself.

In light of the above I find that Joshua Williams was not a dependent upon Ulrike Williams or Grant Huigenbois and accordingly Co-operators is responsible for payment of accident benefits to or on behalf of Joshua Williams.

COSTS:

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

I would like to take this opportunity to thank all counsel for their well prepared and able submissions in this novel area.

Dated this _____ day of July, 2004.

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M. Guy Jones
Arbitrator