

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,  
and Ontario Regulation 283/95

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ST. PAUL TRAVELERS

Applicant

- and -

YORK FIRE & CASUALTY INSURANCE COMPANY

Respondent

## **AWARD**

### **Counsel Appearing**

Helen D.K. Friedman for the Applicant

Mark Fonseca for the Respondent

### **Introduction**

This matter comes before me as an arbitration with respect to a priority dispute between two insurers. The dispute relates to the obligation to pay Statutory Accident Benefits in respect of Doris P.<sup>1</sup> The Applicant is the insurer of a London Transit vehicle that was occupied by the injured claimant at the time of the accident. The Respondent is the insurer of the parents of the injured claimant.

The issue between the two insurers is whether or not Doris P. was, at the time of the accident, principally dependent for financial support upon her parents. I gather that the obligations with respect to Statutory Accident Benefits will be determined by the resolution of that issue.

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<sup>1</sup> In consideration of the privacy interests of witnesses who were required to provide information about their personal affairs, I have deleted reference to surnames.

Pursuant to an arbitration agreement dated November 9, 2009, I have been requested to conduct this arbitration pursuant to Ontario Regulation 283/95 and subject to the provisions of the *Arbitration Act*, 1991.

Counsel have put before me a fulsome record of the salient facts and I am asked, on this record, to make a determination whether or not Doris P. was principally dependent for financial support on her parents at the time of the accident on June 25, 2007.

### **The Record in These Proceedings**

The record in these proceedings consists an arbitration agreement which I have marked as Exhibit #1.

Exhibit #2 to these proceedings is an Agreed Statement of Facts in which the parties have set out those facts which they have agreed upon. This documents many of the key facts that define the issue between the parties.

Exhibit #3 to these proceedings is a brief of documents which the parties have agreed can be accepted as forming the record of these proceedings but the parties do not necessarily agree with the facts recited in those documents. Those documents include employment records, statements, transcripts of examinations under oath and other materials.

In addition, each party has provided me with the expert reports of accountants. In these reports, the respective experts grapple with the financial dependency issues that arise in this case.

Also submitted to me, but not marked as Exhibits were arguments of fact and law, and authority briefs putting forward the case law relied upon by each of the counsel.

### **Background Facts**

At the time of the accident, Doris P. was a 22 year old woman who was residing in the family home of her parents. She lived there with both parents and her brother.

Until shortly prior to the accident, she had been a full time student in a nursing program at Fanshawe College. During her period as a student, she had earned income working at various part-time and summer employments. In April of 2007, she ceased her part-time employment activities in order to give full attention to her upcoming exams. She also completed a clinical aspect of her training at about this time. She had the intention of becoming qualified to work as a registered practical nurse.

She finished those exams on or about May 16, 2007. About one month later, in mid-June, she was advised that she had successfully passed her exams and was also advised that a job application that she had submitted one month before had been accepted, giving her probationary employment as a registered practical nurse. On or about June 21, 2007, she commenced her probationary employment pursuant to the contract entered into. This employment was with McGarrell Place Nursing Home. She attended for various orientation sessions and earned income which was subsequently paid to her on July 5, 2007. The pay was in the amount of \$428.64, comprised of 22.5 hours of orientation and 3 hours of professional staff development meetings.

Prior to the accident, during the probationary employment activity, Doris P. was offered full time work to commence in the first or second week of July.

She was injured in the accident on June 25, 2007 and was off work for a brief period of time and then resumed the employment with McGarrell Place Nursing Home. Post accident Doris P. did return to the employment and subsequently received hours increased to 75 hours biweekly, and an increase in pay to \$20.81 per hour.

The facts of this case raise many of the challenges associated with dealing with dependency questions under the Statutory Accident Benefits Schedule. The household financial arrangements are somewhat vague, and the status and relationships were changing at time leading up to the accident. From about June of 2006 until early April of 2007, Doris P. was a student with part-time or summer employment. From early April 2007 until mid-June of 2007, she was not employed and had no employment income. From mid-June until June 25, she was in an employment relationship but did not start work until about June 21<sup>st</sup>, and then only worked a few days until the day the accident happened.

Having finished school in mid-May and having been apprised of her successful completion of all her qualifying exams in mid-June, it is my view that Doris P.'s status on the day of the accident was markedly different than the status of being a student with part time employment. By the date of the accident she had passed several milestones in her transition from a student to a person in full time employment in the workforce. Not only had she commenced employment, but the brief engagement had already yielded positive signs in the form of a commitment to increase her working hours to full time hours. That proposition was put to her before the accident but did not come to fruition until a couple of weeks after the accident.

### **Selecting an Appropriate Timeframe for Analyzing Dependency**

The law with respect to dependency cases has evolved over the past two decades to recognize the challenges associated with applying the dependency principle to real life fact situations. Amongst the most challenging situations are those where the recent pre-accident history shows a changing environment. The case law calls for us to identify a time period for the purpose of evaluating dependency. It is often not useful, or sometimes even misleading, to look at circumstances in too narrow a timeframe (often referred to as a "snapshot"). To arrive at an appropriate determination of dependency status, we have to look at the status of a person's needs and resources over a time period. Then, within a selected timeframe, we can approach the issue of financial needs and resources in order to determine the person's dependency status.

Utilization of a short timeframe creates risk of error. We cannot always be confident that a short experience is a fair reflection of a person's status.

The legal test for selection of a timeframe is that I should choose a timeframe that most fairly reflects the true status of the claimant on the date of the accident.

The first challenge before is to make a selection of an appropriate timeframe on the facts of this case. Clearly, selection of an appropriate timeframe is important, perhaps determinative, with respect to the dependency question. In this case it is a critical finding.

The parties, in their materials and in their arguments, have identified five different timeframes that might be suitable for this analysis:

1. The preceding year timeframe, commencing June 25, 2006 and ending with the date of the accident.
2. The post part-time employment timeframe, commencing April 3, 2007, when Doris P. ceased her part-time jobs, and ending with the date of the accident.
3. The post education timeframe, approximately May 14, 2007 to June 25, 2007, representing the period commencing after she had completed all of her schooling and exams and ending with the date of the accident.
4. The contract of employment timeframe from approximately June 14, 2007 to June 25, 2007, representing the interval commencing with the offer and acceptance of employment, and ending with the date of the accident.
5. The working timeframe, from approximately June 21 to June 25, 2007, representing the interval during which Doris P. was employed up until the time of the accident.

On the facts of this case, these five options include every reasonable possible selection in the circumstances. In considering which of these choices is most reflective of the claimant's status on the date of the accident, I have given careful consideration to a variety of circumstances which point toward recognizing an evolving transition towards full time gainful employment and associated financial independence.

Looking back one year prior to the accident, Doris P. was a student. She had courses to take and to complete. She had examinations to write. She had practical course requirements. Following successful completion, had to seek out and obtain suitable employment and commence that employment. She had to obtain the proper qualifications and certifications to work as a registered practical nurse. Looking at her position a year prior to the accident, she had many milestones to pass before she would arrive at the point of full time employment and complete financial independence. Her life was clearly in a transition. Her educational efforts were coming to an end and she was moving on to a new phase in her life.

It is at the end of this transition that this accident took place. She was no longer a student, but neither was she fully established in full time employment with complete financial independency.

It is important to give careful consideration to her true status at the date of the accident. At that point she had finished her education, taken and successfully completed her examinations and had become authorized to commence practice as a registered practical nurse. She was living at home and taking advantage of the comfort and support of the family household. She had applied for a position in her chosen field and had been offered that position. She had commenced work, although the work to that point consisted of participating in orientation on a paid basis.

Also, the level of work was less than full time. The documentation suggest 30 hours bi-weekly although there may have been evidence to the effect that she was working 30 hours per week. The employment records indicate 22 hours actually worked prior to the accident and that was less than one full week. She was earning slightly less than \$20.00 per hour. The evidence also

indicated that, prior to the accident, the employer proposed that she should commence working at full time hours within the next couple of weeks and Doris P. agreed. At the date of the accident she had not yet received any money from her new employment. Her savings were minimal, less than \$10.00, although there is some indication of an RRSP as an asset.

She also had a sizeable student loan to pay off, and continued to enjoy the benefits of living at the family home, largely cost free.

With this understanding, and supported by the records before me, I have considered the various timeframes proffered by the parties.

The 12-month timeframe is the longest timeframe in the array. When dealing with changing circumstances there is a temptation to regard the longest timeframe as the one which is most representative of the true status of the individual. While that might be so when dealing with a person with intermittent or even erratic employment, I don't consider it appropriate in this case. While the history shows a changing environment, Doris P. was clearly on a steady progressive development towards full-time employment. She met and surpassed each milestone along the way, without diversion from her goal to work as a registered practical nurse. The 12-month window overwhelmingly represents an examination of her time as a full time student. As of the date of her accident she was well past this part of her life. I do not consider the 12 month window as a fair reflection of her status on the day of the accident.

The post part time employment timeframe, commencing April 3, 2007 up to the date of accident, June 25, 2007, represents a time period where Doris P. was essentially finishing up her education. She had left her part time employment of long standing. She was dealing with examinations and associated steps in her transition into the full time labour force. During this time frame, Doris P. was only employed a few days out of about 3 months. As of the date of the accident, Doris P. was past all of this. She no longer had examinations to write or employment to seek out. This proposed time window does not fairly reflect her status on the date of the accident.

The post education timeframe, approximately May 14, 2007 to June 25, 2007, is a slight variation on the previous timeframe. For the same reasons, I do not consider this an appropriate time frame to select. It consists largely of a time frame in which Doris P. was not employed, and not in the workforce. This is not fairly reflective of her status on the date of the accident.

The contract of employment timeframe from approximately June 14, 2007 to June 25, 2007, is, in my view, a more realistic representation of status than the other, aforementioned, choices. It takes into account her completion of her educational efforts, and the attainment of a possible employment. But again it represents a time frame during which Doris P. was largely not working, and had no income earned. Even though I would look at her capacity to earn income if I were evaluating her dependency status for this time frame, I do not find this to be the preferred time frame for evaluating Doris P.'s status on the date of the accident.

The working timeframe, from approximately June 21 to June 25, 2007 seems to me to be the time frame which most fairly represents Doris P.'s status on the date of the accident. This conclusion is based on the fact that she had started the employment, and had succeeded to the extent that she was offered full time employment. This is entirely a timeframe post graduation, and post commencement of employment. This is the timeframe which most accurately represents her status at the time of the accident. Admittedly, there is some reluctance to put too

much weight on such a narrow window. The danger of inaccuracy that might flow from selecting such a short time frame is mitigated here by having the benefit of post accident events: the continuation with the employment, the increase in her hours, and the increase in pay. She clearly was fully into the labour force, although still in early days. In this instance, the date of loss status of the claimant is most fairly reflected by choosing the working timeframe for the purpose of analysing dependency.

### **Consideration of Dependency in the Selected Timeframe**

The development of case law on dependency has established three principles that are germane to this case.

1. Capacity to earn and actual earnings are both worthy of evaluation. If a person could reasonably exercise his/her capacity and earn a greater amount, it is that amount that represents the financial resources available to the person.
2. The cost of meeting a person's needs must be calculated, and is not necessarily equivalent to the costs that he/she habitually incurred before the accident. The history of the family setting may assist in providing some evidence of what that cost is, but that is not determinative.
3. A person's dependency must be determined by comparing his/her resources (capacity or otherwise) with the cost of meeting his/her needs and determining whether the resources exceed 50% of the costs. Hence a person may well be in need of other resources to meet the full cost of his/her needs, but this does not create "dependency" for SABS priority purposes.

In this case, the financial history of the family has been exhaustively probed and considered. The parties have engaged forensic accountants to review these components of the dependency question. As in all cases there are difficulties in understanding fully the pre accident household expenses, the relative contributions, and the proportionate dependencies.

Davis Martindale, on behalf of the Applicant, argues that the use of the selected timeframe is inappropriate. In their report of March 10, 2010, they question such an approach. Their concerns are in part a reflection of the concern about the use of a short time period, the lack of any capital, and the fact that Doris P. had not yet actually received any money at the time of the accident. However, they do agree with the PWC (on behalf of York Fire) report's calculation of an annualized earning capacity estimate of \$38,522, gross or \$29,816 net.

Davis Martindale asserts that, at the time of the accident, Doris P. would not have had the ability to independently obtain a bank loan, purchase a car, rent an apartment or purchase furnishings or household goods. But it is clear that this is a question of cash flow, not capacity vs. needs.

Similarly, there is evidence from the testimony of Doris P's' father, Rinaldo, that he and his wife considered their daughter to be a dependant at the time of the accident. She was living in the household. She did not yet have her first pay cheque. And it is certainly likely that this is so in the sense that she still benefited by having something from them to enable her to ease her transition to independence. But this commonly heard parental refrain is not the same as establishing principal dependency for financial support in a SABS context.

As I have concluded that the June 21 to June 25 time frame is the time frame that most fairly reflects the status of Doris P. at the time of the accident, I am able to establish from the two accounting reports that the annualized value of her earned (not received) income at the time of the accident was \$38,522 gross or \$29,816 net. Arguably this number should be increased to reflect capacity. In this time frame she was not working full hours, nor was she receiving the higher hourly rate that was soon assigned to her. Parenthetically, I observe that examination of Doris P's' capacity to earn for the June 14 to June 25 time period would likely yield a similar number. At that time she had all of the requisite attributes to earn the income, and the opportunity existed in her locale, and she had proven her marketability by obtaining an initial employment commitment.

Given these findings, the financial resources available to Doris P. for her to meet her needs were, at the time of the accident, quite significant, at least \$29,816, and would mean that she was not financially dependent on her parents. But for the sake of completeness, I will address the cost of needs.

In dependency cases we commonly see two approaches taken. In the traditional approach, the litigants look at the pre-accident living arrangements as an indication of what is involved in meeting a person's needs. Considerable effort is then made to determine the costs of those living arrangements, and the monetary and non monetary contributions of members of the household. To the extent that looking at the family household expenditures involves looking at a higher standard of living, this methodology is in defiance of the Court of Appeal's admonition in *Miller v. Safeco* that we should not take into account the general standard of living in the family unit.

An alternative methodology is to objectively establish the cost of meeting reasonable, basic, needs of a person in his/her community. This line of inquiry stands alone, independent of pre-accident household budgetary minutiae, and might be established by reference to various statistical evidence, or market analysis etc.

There is much to be said for this approach. First and foremost, it is in accordance with the legislation and the case law.

Furthermore, it reduces the intrusive inquiries often made into household financial arrangements in these cases. These inquiries, if necessary, are an imposition on the families, and are costly for the parties, usually resulting in requests for undertakings, documents, old files and bills, etc. In addition, the arbitration and claims process becomes diverted and delayed while these family financial issues are pursued, documented, analyzed by experts, and finally adjudicated upon.

Finally, I entertain considerable doubt about the accuracy and completeness of the evidentiary picture painted in the traditional approach. The families do not keep careful records that document household expenditures or contributions. And the monetary value of contribution "in kind" is highly debateable in family situations. Such efforts are best viewed as giving a "ball park" insight only.

In this case, Mr. Bruce Webster of PWC has, in part, looked beyond the family finances to determine the cost of meeting needs. In particular he has challenged the fact that this family's financial burden is in part driven by the mortgaging arrangements on the premises. I note this as a clear example of how household budgetary information can easily lead us astray in these dependency cases. Mr. Webster's alternative to looking at the family's actual expenditures is to

turn to a review of prevailing rental market costs for similar premises. I endorse this approach, but not only as a secondary approach. This should be the primary approach.

Similarly with respect to food, clothing, health care or other personal necessities we should primarily have recourse to basic statistical information such as may be available to guide us in establishing those components of basic needs. Only when there is some circumstance that distinguishes the "dependant" from other individuals in the community do we need to embark on a costly traditional household financial analysis.

The experts in this case have done their work and come to different conclusions. Two reports from each expert were provided to me. In large part these reports evidence an effort to quantify needs based on the traditional method. But it is clear from the reports that the cost of meeting Doris P's' needs is, annualized, in the range of \$14,000 to \$18,000, no more. For Doris P. to be a dependant as defined in the SABS, she would have to have financial resources of less than \$9,000 per year. In view of her status on the date of the accident, as a graduate, registered practical nurse with employment in a market paying more than \$20 per hour, Doris P. easily passes the threshold of SABS dependency.

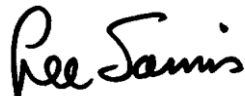
### **Conclusion**

I conclude that at the time of the accident, Doris P. was not principally dependent for financial support on her parents.

Counsel advised me that they have an understanding with respect to costs.

If there are any matters that counsel wish to put before me with respect to costs or any other unresolved issues, please let me know within 30 days.

Dated at Toronto this 11<sup>th</sup> day of August, 2011.



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LEE SAMIS  
Arbitrator