



BEARDWINTER LLP

RECEIVED

JAN 12 2018

Kenneth J. Bialkowski
Direct Line: 416.306.1770
kbialkow@beardwinter.com

REFER TO FILE: 86300-538

January 8, 2018

*** PLEASE QUOTE OUR FILE NUMBER ON ALL CORRESPONDENCE.**

✓
Mr. Jason Frost
Schultz, Frost LLP
151 Yonge St.,
Suite 1302,
Toronto Ontario M5C 2W7

Your Client: RBC (Rattan)/Applicant

Mr. Derek Greenside
Kostyniuk & Greenside
5468 Dundas St. West,
Suite 300,
Toronto, Ontario M9B 6E3

Your Client: TD/Respondent

Dear Counsel:

**RE: RBC (Rattan) v. TD
Arbitration
Our File No.: 86300-541**

Please find enclosed my Decision in the above-noted matter, dated January 5, 2018.

Yours very truly,
BEARD WINTER LLP

Kenneth J. Bialkowski

KJB/sd
Encls.

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, as amended,
AND *ONTARIO REGULATION 283/95* made under the *INSURANCE ACT*;**

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

RBC GENERAL INSURANCE COMPANY

Applicant

- and -

TD MELOCHE MONNEX

Respondent

DECISION

COUNSEL

Jason Frost – Schultz, Frost LLP
Counsel for the Applicant, RBC General Insurance Company
(hereinafter referred to as “RBC”)

Derek Greenside – Kostyniuk & Greenside
Counsel for the Respondent, TD Meloche Monnex
(hereinafter referred to as “TD”)

ISSUE - DEPENDENCY

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimants Baldev Rattan and Jasmail Rattan with respect to personal injuries sustained in a motor vehicle accident which occurred on April 4, 2015.

[2] Such determination is dependent on whether the claimants were principally financially dependent on their eldest son, Prabhjot Rattan (TD insured), or their younger son, Jagdeep Rattan (RBC insured).

PROCEEDINGS

[3] The matter proceeded on the basis of Document Briefs including Examination Under Oath transcripts, Books of Authority, written submissions and oral argument which took place on January 3, 2018.

EVIDENCE AND FACTUAL FINDINGS

[4] At the time of the April 4, 2015 motor vehicle accident, both claimants Baldev and Jasmail Rattan were in their 60s and passengers in a vehicle owned and operated by their younger son, Jagdeep Rattan, insured by RBC. Accident benefits claims were presented to RBC and paid by RBC. RBC claims that TD stands higher in priority on the basis that both claimants were principally financially dependent on their older son and therefore an "insured" under his policy with TD.

[5] Both claimants had emigrated from India to Canada several years earlier. When Baldev and Jasmail first arrived in Canada in 2001, they resided along with their youngest son at Prabhjot's home. In 2006, the entire family moved into Prabhjot's new home at 103 Eastway Street in Brampton and stayed there until 2011, at which point the younger son Jagdeep got married and moved out. Then, according to the sworn Examination Under Oath evidence taken by RBC before the arbitration was commenced, the claimants split their time equally between the two homes of their sons. It is this period of time (post 2011 when it is alleged that the claimants split their time equally between the homes of their two sons) that I find to be most appropriate for the analysis of financial dependency. On the day of the motor vehicle accident, the claimants happened to be residing at the home of their younger son Jagdeep. They had been there for but for a couple of days.

[6] The sworn Examination Under Oath evidence was that each son contributed equally to the needs of the claimants.

[7] Making the dependency determination difficult is the fact that information contained in the medical reports following the accident would indicate that the claimants had been living with their older son (insured by TD) for several years prior to the accident, contrary to the evidence the claimants gave on their Examinations Under Oath. Furthermore, the address given on the police report, tax return and Disability Certificates was that of the older son. Simply stated, there was what could be considered contradictory evidence as to where the claimants were residing in the pre-accident period.

[8] It was clear on the available evidence that the claimants were not financially independent while in Canada. Baldev retired in July of 2013 and indicated that he was receiving Guaranteed Income Supplement, Canadian Pension Plan and Ontario Guaranteed Annual Income System allowances in the amount of \$750 a month, however his Income Tax Return for 2014 indicated he was only receiving \$6,917 annually, which equals to \$576.42 of

income a month. In the year before the accident, Jasmail did not earn any income and was receiving a senior's government allowance of \$350 or \$4,200 annually.

[9] According to their Examination Under Oath testimony, Baldev's personal monthly expenses were \$400 and Jasmail's personal monthly expenses were \$200. The cost of their monthly life insurance premiums was \$960. Divided, their share of the life insurance would be \$480 per month.

[10] The parties have highlighted numerous other pieces of evidence as outlined in the paragraphs which follow that may or may not be relevant to the issue of financial dependency:

The bedroom provided for Baldev and Jasmail was larger in Prabhjot's home.

Baldev and Jasmail had personal items such as clothing, toothbrushes and other items like suitcases in both Prabhjot's and Jagdeep's homes.

Baldev and Jasmail would take trips to India every two years and took a trip to California in 2013. The trips were booked by Prabhjot and the cost of which was paid "equally" by both sons.

Jasmail provided evidence that the passports and seasonal clothing were ordinarily stored at Prabhjot's home. Baldev provided evidence that the address listed on the passports is Prabhjot's.

It was the evidence of Jasmail that more of her and Baldev's belongings were stored at Prabhjot's home.

Any bills, mail, documents and correspondence, including documents from the family doctor, for Baldev and Jasmail is directed to Prabhjot's home address.

Baldev and Jasmail, during multiple medical assessments completed for the purpose of their Statutory Accident Benefits claim, stated that they resided with the elder son, Prabhjot. This is indicated in several medical reports.

In particular, Baldev reported to Dr. Goodwin Lau during a Psychology Assessment, which took place on September 28, 2015, that he has been living with his wife, eldest son and his family in a house in Brampton for a period of nine years, but would often see his younger son.

Prabhjot was responsible for purchasing the trips, paying for the cellphone bill, and opening the safety deposit box for Baldev and Jasmail and was then reimbursed for half the cost of the items by Jagdeep.

Both sons owned their own homes and paid for the expenses associated with the homes. Prabhjot's home was a larger detached home, while Jagdeep's home was smaller and semi-detached. The value of Prabhjot's home is about \$200,000 more than Jagdeep's home. The monthly expenses associated with the homes, including mortgage payments, property taxes, utility bills, insurance and internet were larger for Prabhjot's home.

ANALYSIS AND FINDINGS

[11] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

[12] At the time of the subject accident, both claimants were passengers in a vehicle owned by their youngest son Jagdeep. The vehicle was insured with RBC.

[13] Since the claimants were occupants of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

- (i) *The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
- (ii) *If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
- (iii) *If recovery is unavailable under (1) or (2), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose;*
- (iv) *If recovery is unavailable under (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

[emphasis mine]

[14] Section 3(1) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10 defines an “insured person” as follows:

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

[emphasis mine]

[15] Section 3 (7)(b) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10, as amended, reads as follows:

“a person is dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual’s spouse”

[16] According to this priority hierarchy, the claimants would be considered an “insured” under s. 268(2)(i) if it were shown that they were principally dependent for financial support on one of their sons and the insurer of that son in priority to the insurer RBC of the vehicle in which they were merely “occupants” under s. 268(2)(ii).

[17] In terms of traditional legal principles, criteria for determining dependency for the purposes of the SABS were established by the Court of Appeal in *Miller v. Safeco* (1986), 48 O.R. (2d) 451 (H.C.J.) aff'd 50 O.R. (2d) 797 (C.A.). Consideration should be given to criteria as follows in determining dependency for the purposes of the *Schedule*:

- i. The amount of dependency;
- ii. The duration of the dependency;
- iii. The financial needs of the claimant;
- iv. The ability of the claimant to be self-supporting.

[18] In *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* (Arbitrator Lee Samis, May 7, 1999), it was determined that a person's capacity to earn must be taken into account in measuring dependency. A person can only be principally dependent for financial support if the cost of meeting their needs is more than twice their resources. This has come to be known as the 51% rule.

[19] Early jurisprudence applied this 51% rule using a detailed analysis of the claimant's income sources in comparison to the value of that provided by the person or persons upon whom the claimant was said to be dependent. This has been referred to as the "mathematical approach". The exercise of determining the value of that provided in many cases proved to be a difficult and expensive task. It would be difficult to apply this approach on the facts of this case as there is minimal evidence with respect to the needs of the claimants, or a detailed accounting analysis of that provided by each of the two sons. In the last few years, a new approach to the analysis of dependency has emerged known as the "LICO approach". In *Allstate Insurance v. ING*, (Award of Arbitrator Vance H. Cooper, dated May 1, 2014), the arbitrator preferred to resort to an alternative approach to determine dependency, namely, to use Low Income Cut-Off (LICO) measure as a qualifying number in relation to which the 51% rule is to be applied as opposed to using actual expenses of the claimant. In other words, the focus of the analysis of need would be the statistical average needs of an individual to live independently in the community where the claimant lived, rather than a tedious and costly analysis of the claimant's specific individual needs.

[20] After hearing all evidence including evidence at cross-examinations and re-examinations of the three accountants involved in that case, Arbitrator Cooper noted that all of the accountants who gave evidence and offered expert opinions acknowledged the inherent difficulty and weaknesses when trying to gather reliable information, documentation and evidence regarding a family's expenditures and individual expenditures in relation to needs.

[21] Arbitrator Cooper referred to decisions of Arbitrator Samis in *Coseco v. ING Insurance of Canada* (Award July 21, 2010) and *St. Paul Travelers v. York Fire & Casualty Insurance Company* (Award, dated August 11, 2011). In these decisions Arbitrator Samis

explained the intrinsic difficulties of trying to ascertain the needs of the claimant by attributing to the claimant a share of household expenditures. The allocated portion of the household expenditures may be greater than the claimant's needs or lesser than the claimant's actual needs. Arbitrator Samis compared this exercise to looking at the general standard of living in a household – the exercise we were directed not to follow by in the *Miller v. Safeco* appeal decision. Instead, Arbitrator Samis suggested we should follow a "more objective valuation of the costs of meeting someone's needs". The history of family setting may assist in calculating the costs of meeting a person's needs, but is not determinative.

[22] To that end, Arbitrator Samis used Canada LICO threshold statistic numbers as determined by Statistics Canada which he characterized as the "best and most reliable approach to the evidence respecting one's needs".

[23] Arbitrator Cooper's decision in *Allstate Insurance v. ING* was appealed to the Superior Court of Justice on the grounds that Arbitrator Cooper did not use the correct methodology. On appeal, as reported at 2015 ONSC 4020, Justice Mayers found that the mathematical calculation or application of the 51% rule in relation to needs/means is an important factor, but it is not the only factor. A change in a mathematics variable, which can alter a mathematical conclusion on dependency, does not necessarily alter the "big picture". At page 4 Justice Mayers wrote:

"A Change in math from 50.0001% dependency to 49.999% dependency may or may not overcome other factors of the actual dependency between the relevant parties".

Justice Mayers dismissed the appeal after concluding that dividing or allocating estimated gross household spending to determine one's needs is not a "*particularly meaningful proxy*" and "*is no better than looking at government statistic to determine the cost of housing in a locale*". He accepted the LICO approach as the most appropriate in the circumstances.

[24] As jurisprudence currently stands, both the "mathematical" and "LICO" approaches are being applied by judges and arbitrators. RBC in this proceeding has advanced a third approach called the "plurality approach" which it claims is the appropriate approach to use when there are several contributors to the claimant's financial needs.

[25] RBC maintains that in a situation where there is more than one individual contributing to the finances of the claimant, the decision of *Economical Mutual Insurance Company v. Aviva Canada Inc.* (Arbitrator Densem – January 2013), should apply. In *Economical*, the claimant was receiving financial support from both her father and mother. The financial support received from her father and mother, individually, was greater than her own financial contribution to her own needs. Despite this, none of the parties contributed to at least 51% of the claimant's financial needs.

[26] Arbitrator Densem found that principal dependency exists where the claimant is "chiefly, mainly or for the most part (i.e. more)", dependent on one independent source of

support, than he or she is on their self-supporting resources, and on any other single independent source of support.

[27] The claimant can have any number of independent support sources. If one of these support sources is the largest contributor to the claimant's support, then by definition that source is the principal supporter. The value does not need to be greater than 50%, it only has to exceed the value of any other independent support contribution and that of the claimant's self-support.

[28] Using this scenario, Arbitrator Densem concluded that the claimant was only able to contribute 20% to her own financial needs, while her father was contributing 45%, and her mother was contributing 35%. With these values, Arbitrator Densem determined that the claimant was principally financially dependent on her father, as he was making the largest contribution when compared separately to his wife and the claimant herself. He found the father's automobile insurer in priority even though the father did not contribute more than 50% of the claimant's needs.

[29] If this approach is accepted as being the approach which should be used in situations where there are multiple parties providing financial support, then the formula to be used by the arbitrator would be:

- Determine the amount of the claimant's dependency by examining a sufficient length of time in the claimant's life leading up to the accident that a consistent and reliable picture of the amount and duration of the claimant's financial and care needs can be ascertained.
- Determine what the needs of the claimant are with respect to such requirements as food, clothing, shelter, the basic necessities of life, social, emotional, physical, and protection needs. In making this determination, one must distinguish between the claimant's needs and enhancements to the claimant's lifestyle provided either by the claimant, or through other support sources.
- Determine whether the claimant is providing for or reasonably has the capacity to provide for 51% of the claimant's financial and care needs. If so, there can be no principle dependency. If not, determine whether there is an independent source of support that is greater than any other independent source of support, and is also greater than the value of the claimant's self-supporting resources. If so, the claimant is principally dependent upon that source.

[30] I have been advised that the decision of Arbitrator Densem was not appealed, nor has it been adapted or distinguished in any subsequent case despite the passage of several years.

[31] At risk of oversimplification, it was the position of RBC that the claimants were not in a position to provide more than 50% of their individual needs. Although the claimants may have been dependent on both sons, it was the eldest son Prabhjot that provided the greatest

contribution to their needs according to RBC. Therefore, applying the principles set out by Arbitrator Densem in *Economical* (supra), the claimants would be considered principally financially dependent on Prabhjot and TD would therefore stand in priority.

[32] RBC indicates that as the accident occurred on April 4, 2015, which is early in the year, the 2014 LICO statistics would be the most accurate, reliable and recent published statistic to use. The 2014 LICO figure, published by Statistics Canada, for one person living in a metropolitan area of 500,000 inhabitants or more, such as Brampton, is \$24,328. Baldev's 2014 Income Tax Return stated that he only received \$6,917 in total income. Without even considering any regular expenses or payments, Baldev only provided 28.4% of his financial needs according to the 2014 LICO evidence. He was, therefore, not financially independent. Jasmail was receiving \$4,200 annually in government allowances. Notwithstanding any additional costs or expenses, Jasmail only provided 17.3% of her financial needs according to the 2014 LICO evidence. Jasmail was not financially independent. As a result, neither claimant was contributing more than 50% of their statistical needs.

[33] RBC claimed that it was the eldest son Prabhjot that provided the greatest percentage toward their needs from a "big picture" approach, emphasizing the following evidence:

1. They stored most of their personal items at his home, their mail was to be delivered to Prabhjot's address and Prabhjot was responsible for setting up the Claimants' cell phone, safety deposit box, and booking their trips.
2. The Claimants treated Prabhjot's home as their main residence. Every document in each Claimant's AB file indicates they lived with Prabhjot.
3. Prabhjot's home was larger and more expensive than that of Jagdeep and accordingly, when the Claimants stayed at Prabhjot's home, the resources obtained by them through the provision of a larger, more expensive home and associated costs were more significant than the resources obtained by the Claimants while they resided with the younger brother, Jagdeep.
4. Prabhjot provided more support to each Claimant than his brother, Jagdeep.

[34] On this basis, RBC claimed that Prabhjot's contributions to his parents' needs were more than each claimant's contributions to their self-support, as well as the contributions made by the younger son, thereby making TD the priority insurer.

[35] In response, TD took the position that although both claimants were not financially independent, the financial contribution by each son was equal and therefore RBC has not

satisfied the onus upon it to prove that the claimants were principally financially dependent on TD's insured Prabhjot Rattan. Accordingly, the application ought to be dismissed.

[36] I am satisfied on the evidence before me that the claimants were equally financially dependent on each son. Since the issue is financial dependency, it matters not as to who was responsible for setting up the claimant's cell phone and safety deposit box or booking their trips, but more importantly that each son paid for half of the costs. The analysis cries out for looking at the "big picture" and not getting caught up in financial minutia such as which son had the bigger home or significantly greater household expenses. I am satisfied that the accommodation provided by each son was more than adequate.

[37] I must deal with the contradictory evidence as to where the claimants were residing in the pre-accident period. RBC has suggested that since the claimants were using the address of TD's insured as their mailing address, it would be indicative of where they were living or at least where they were spending the most time. I do not believe that the mailing address used on the tax return, police report, OCF-1 and Disability Certificates is relevant to the issue of financial dependency, nor indicative of where the claimants were spending most of their time. In my view, it would make sense that they would only use one mailing address. The family relationship was such that all mail likely ended up in the hands of the claimants, regardless as to which of the two homes the claimants were living. When the claimants immigrated to Canada in 2001, they moved into the home of Prabhjot, insured with TD. The younger son Jagdeep also lived with them. Jagdeep then got married and moved into his own home in 2011. It was at that time that the claimants, according to the evidence, began splitting their time equally between the two homes, yet obviously keeping the mailing address they had used from the outset. In my view, it would make no sense to keep changing mailing addresses every few months. I suspect that they simply continued to use the same address they had used all along, not wanting to change the address associated with any drivers' license, government payments or OHIP card. I do not find the mailing address used as indicative of the time spent at either residence.

[38] More concerning are the multiple references in the post-accident medical reports to the fact that they were residing with the older son, insured with TD, and the one reference is that had been the case for several years. Most of the references deal with living arrangements at the time of the post-accident medical assessments. Firstly, I do not consider the references to post-accident living arrangements relevant to the arrangements that existed pre-accident. The most concerning reference is that contained in the report of Dr. Lau of October 7, 2015 where it is indicated that he had been living with his eldest son for about nine years. I must weigh that reference against the Examination Under Oath testimony of Baldev Rattan where he said he spent his time equally at the home of both sons. I note that the medical report reference does not state that Baldev was living exclusively with his older son for nine years. In reviewing the subject paragraph at page 2 of the report, it is easy to see the line of questioning. Where are you currently living? How long have you lived there? Without the likely question as to whether he lived elsewhere during that period, it is difficult to find the medical report reference more persuasive than the evidence under oath. In the final

analysis, I find on the emphatic evidence under oath evidence that they spent an equal amount of time at the home of each son more persuasive than the medical report entries.

[39] I am of the view that in determining the needs of the claimants using the LICO approach would be the most appropriate on the specific facts before me given the incomplete information available with respect to needs and the lack of detailed accounting analysis. Even on the incomplete information available, the rough calculation of contributions made by each son was similar when using Jagdeep's household expenses divided by the five people residing there, or when using Prabhjot's household expenses divided by the seven people residing there. Both were in the \$550 to \$600 range per month on the limited information available.

[40] I am not satisfied that to use the Statistics Canada figure for a two person household, as suggested by the Respondent TD, and divide that amount in half is the correct approach. It is clear that Baldev and Jasmal were married and pooled their resources and shared their expenses as a couple. Even if considered, it would only be appropriate where both husband and wife were claimants and not if only one of them were a claimant. However, whether a one person or two person household is used, the result is the same on the present facts as I have found that each son contributed equally to their parents' needs.

[41] Using the two person household approach the figure would be \$30,286.00, which should then be divided in half, each half representing the appropriate LICO figure for each Baldev and Jasmal. However, even if I am wrong in finding this approach as appropriate in the circumstances, using a one person household approach the result would be the same, as the evidence does not support a finding that TD's insured Prabhjot provided more financially than his brother Jagdeep.

[42] Baldev's Income Tax Return Information Summary confirms his income in 2014 to have been \$6,917.00. If his LICO was \$15,143.00 (being one half of the combined LICO figure for two persons), Baldev would have been financially dependent on each of his sons in the amount of \$4,113.00 in 2014, the particulars of which are as follows:

LICO (half of two person household needs)	\$15,143.00
Less Income	\$ 6,917.00
Amount Dependent on Both Sons	\$ 8,226.00
Amount Dependent on Each Son	\$ 4,113.00

[43] TD submitted that the evidence does not support a conclusion that Prabhjot contributed to at least 51% of Baldev's financial needs. Alternatively, the value of the support given by Prabhjot to Baldev does not exceed the value of any other independent support contribution, or that of the claimants' self-support as both sons contributed equally.

[44] According to Baldev Rattan, his wife Jasmail was receiving approximately \$350 each month from the Ontario government during the 12 month interval preceding the motor vehicle accident on April 4, 2015.

[45] If her LICO was \$15,143.00 (being one half of the combined LICO figure for two persons), Jasmail would have been financially dependent on each of her sons in the amount of \$5,471.50 in 2014, the particulars of which are as follows:

LICO (half of 2 person household needs)	\$15,143.00
Less Income	\$ 4,200.00
Amount Dependent on Both Sons	\$10,943.00
Amount Dependent on Each Son	\$ 5,471.50

[46] This analysis does not support a conclusion that Prabhjot contributed to at least 51% of Jasmail's financial needs. Alternatively, the value of the support given by Prabhjot to Jasmail does not exceed the value of any other independent support contribution, in particular the support contribution by Jagdeep.

[47] As indicated earlier, even if LICO statistics for a one person household were used (\$24,328), since neither son contributed more than the other financially, then it cannot be said that either parent was "chiefly, mainly or for the most part" dependent on TD's insured Prabhot. Clearly, neither son contributed more than 50% to either parent's statistical needs.


[48] In the final analysis, the evidence confirms that neither claimant was financially independent and that each required financial support while in Canada from their sons. On the evidence overall, I am satisfied that each son contributed equally to their parents' financial needs. Under any of the three analytical approaches to dependency (mathematical, LICO or multiple party support as per *Economical*), Prabhjot did not contribute more than 50% to his parents needs, nor was he the largest contributor to his parents' needs even if the approach in *Economical* (supra) is found to be good law. Therefore it cannot be said that either claimant was principally financially dependent on Prabhjot, or Jagdeep for that matter, at the time of the accident. Priority would therefore rest with the insurer of the vehicle in which the claimants were occupants (RBC) pursuant to s. 268(2)(ii) of the *Insurance Act*, since the claimants would not be considered "insureds" under s. 268(2)(i) as not principally financial dependent on either the RBC or TD named insureds.

ORDER

I therefore order:

1. That the priority dispute herein be dismissed;
2. That RBC pay to TD the legal costs of this arbitration on a partial indemnity basis;
3. That RBC pay the Arbitrator's costs.

DATED at TORONTO this 5th)
day of January, 2018.)



KENNETH J. BIALKOWSKI
Arbitrator