

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8 Section 268 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:

CHUBB INSURANCE COMPANY OF CANADA

Applicant

- and -

SECURITY NATIONAL INSURANCE

Respondent

DECISION

COUNSEL

George Kanellakos
Counsel for the Applicant, Chubb Insurance Company of Canada

Riva Minhas
Counsel for the Respondent, Security National Insurance

ISSUE

This Arbitration involves a priority dispute between insurers with the primary issue being that of "dependency". More specifically, was the claimant Adriano Marrello principally dependent for financial support on his father, Raffaello Marrello, or his mother, Christina Marrello, at the time of the motor vehicle accident on July 23, 2009.

On July 23, 2009 Adriano Marello was a pedestrian that was struck by a motor vehicle insured with Security National Insurance (hereinafter referred to as "Security National"). He was 34 years of age. At the time he was living with his parents who owned a vehicle insured with Chubb Insurance Company of Canada (hereinafter referred to as "Chubb")

If I were to find that the claimant was principally financially dependent on either of his parents, then the parents' insurer, Chubb would be responsible for the payment of statutory accident benefits. If I were to find the claimant was not principally financially dependent on either of his parents, then the insurer of the striking vehicle, Security National, would be responsible for payment of statutory accident benefits.

LAW

A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the Insurance Act, R.S.O. 1990, c.1.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

As Adriano Marrello was a pedestrian at the time of this motor vehicle accident, the priority rules with respect to “non-occupants” are applicable. They are set out in Section 268(2) of the Insurance Act, which is set out as follows:

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;

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose;

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

The bolded sections above would make the insurer of the striking vehicle responsible for the payment of statutory accident benefits, provided the claimant was not an insured under some other policy. The Respondent, Security National, takes the position that the claimant was dependent on his parents and therefore an insured under their policy with Chubb.

Subsection 268(5) of the Insurance Act, R.S.O. 1990, c.1.8 provides that:

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

Subsection 2(6) of the Statutory Accident Benefits Schedule - Accidents On or After November 1, 1996 provides that:

(6) For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person’s spouse [emphasis added].

There is considerable jurisprudence on the issue of dependency.

As I have held in several of my other decisions regarding the issue of dependency, I am satisfied that the criteria to be used in determining financial dependency, for the purposes of

the Statutory Accident Benefits Schedule, was established by the Court of Appeal in Miller v. Safeco 1986, 13 C.C.L.I. 31. In that case, the court held that the 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 to be self-supporting.

The aforesaid criteria has been adapted by several Arbitrators in the context of priority disputes involving the issue of dependency.

FACTS

On Thursday July 23, 2009, Mr. Adriano Marrello was involved in a pedestrian/motor vehicle accident at or near the intersection of Dundas Street West and Spadina Avenue, Toronto, Ontario. Mr. Marrello was struck by a 1998 Nissan motor vehicle which was insured by Security National.

Mr. Marrello was born on January 28, 1975. He was 34 years old at the time of the pedestrian /motor vehicle accident. Mr. Marrello is not married. He has no children.

At the time of the accident Mr. Marrello's father, Raffaello Marrello, was the named insured under a motor vehicle insurance policy issued by Chubb. Significantly, Adriano Marrello was not named and/or listed on the Chubb policy.

Mr. Marrello reported that he was physically injured in the subject accident. He was taken to St. Michael's hospital by ambulance. Mr. Marrello made a claim for statutory accident benefits to Chubb. Chubb continues to pay statutory accident benefits to or on behalf of Adriano Marrello.

As part of his claim for accident benefits, Mr. Marrello submitted an "Activities of Normal Life (OCF-12)" form, dated September 1, 2009. Mr. Marrello reported, inter alia, that he was independent with all "personal care", "functional ability", "shopping", "meals", "cleaning", "laundry", and "home maintenance activities" before the subject accident.

The Claimant, Mr. Adriano Marrello

Mr. Adriano Marrello gave evidence at an Examination Under Oath on November 10, 2009 as part of his accident benefits claim pursuant to section 33 of the SABS.

Mr. Adriano Marrello also gave evidence at an Examination Under Oath on November 15, 2010 as part of the within priority dispute arbitration proceedings.

Mr. Marrello testified that he lived with his girlfriend, Lisa, for between 6 months to 1 year before the subject accident. He had moved in back with his parents [because Lisa's lease expired] about 3 months before the subject accident. Mr. Marrello further testified, inter alia, that he worked in construction and as a chef in the year before the subject accident. He also

turned down various “commercial” acting jobs and had an offer available to him to teach karate. Mr. Marrello largely worked for cash. Mr. Marrello also testified that he was able-bodied and responsible for all of his personal care, housekeeping and cooking before the subject car accident.

Education

There is conflicting evidence as to whether Mr. Morello formally graduated from high school.

After high school, Mr. Marrello had extensive training in film, T.V. and theatre. He has attended “Claude Watson School for the Arts”, “Young Peoples Theatre”, “Lifetime Learning Centre”, and “Lee Strausberg Theater Institute”. In fact, he attended the “Lee Strausberg Theater Institute” in New York for two years.

Mr. Marrello also underwent “Chef Training” at George Brown College in 2006. Mr. Marrello also took “Hospitality and Tourism” at George Brown College in 2006.

Mr. Marrello has also pursued a Real Estate Association Course.

It is noted that he did not complete either his chef training or real estate courses.

Employment and Income

There was evidence before me that while attending school in New York and while in Los Angeles Mr. Morello was dependent on his parents. In determining dependency I believe the appropriate time frame consider is the year or so immediately prior to the date of loss.

By letter dated March 19, 2010, the Canada Revenue Agency advised that Mr. Adriano Marrello had not filed income tax returns for the 2006 to 2009 tax years. This letter does not confirm that Mr. Marrello did not earn income during for the 2006 to 2009 tax years. I find that the letter from the CRA simply confirms that Mr. Marrello did not file his income tax returns for the specified periods.

Of note, as a result of the subject accident Mr. Marrello has commenced a court action against the Defendants, Justin Brien Trencio and Beck Taxi Ltd.. Of note, at paragraph 14 of the Statement of Claim, Mr. Marrello alleges: “As a result of his injuries, Adriano has been unable to continue with his pre-accident employment. *Further, Adriano is presently disabled from obtaining any other employment for which he is reasonably suited by means of his education, training and experience* [Emphasis added].”

For the purpose of a “Social Work Assessment, conducted on September 3, 2010, Mr. Marrello reported, in part:

Financial Distress /Employment ... Mr. Marrello reports he has become financially compromised as a direct result of the index MVA. He is not earning the money he used to earn.

Mr. Marrello states he was in the construction business and he was also a chef. Both forms of employment require physical strength, however the duties of chef require multi-tasking as well. Mr. Marrello has not returned to work.

Renovations of the Family Business

Mr. Marrello testified that he has helped his parents with two sets of renovations at their family business/salon. The second renovation was maybe three or four months before the subject accident. The second renovation(s) took about two weeks.

Mr. Marrello testified that he was never on the payroll of his parents' family business /salon. However, he did do construction work and contracting work for his father. In fact, Mr. Marrello was responsible for two instances of renovations that took place at the salon. The most recent renovation took place in the year before the subject accident. Mr. Marrello hired people and they did the demolition, floors and electric stuff. Mr. Marrello made sure that it got done. Mr. Marrello personally did "some demolition stuff" and painted, but he mostly acted like a subcontractor.

Construction & Chef Work

Mr. Marrello testified that he did some demolition "stuff" with friends in the year before the accident and that he was paid for the demolition work. This was short lived.

Apart from demolition work, Mr. Marrello testified that he did other construction work, including concrete work, brick work, driving, paving, asphalt, renovations, and "carpentry stuff" before the subject accident. Initially, Mr. Marrello was not certain when he did the construction work but he guessed that it was in the period of the last ten years. Mr. Marrello did recall doing construction work in 2008 on the Danforth.

Mr. Marrello also specifically remembered doing construction work in the early or cold part of 2009. Mr. Marrello worked from January 2009 through to March 2009. Mr. Marrello was doing construction/renovations of houses for various friends, including Frank and Gabe.

Mr. Marrello testified that his friend, Frank, paid him at least \$100 a day. He subsequently stated that in a typical day he earned \$160, \$200, up to \$250 per day.

Mr. Marrello testified that he also worked in January or March 2009 doing heating work.

Mr. Marrello testified that he worked doing concrete in the summer of 2008.

Mr. Marrello testified that his construction job was "paying good" and that he was good at it.

Despite the aforesaid he did state on his examination under oath on November 10/09 that he did not do construction work other than a day of demolition work in the year before the accident.

What can be said is that there is no clear picture as to the actual total income the claimant earned from construction in the year before the accident.

Mr. Marrello admitted that he worked in restaurants ("cooking and stuff") in addition to his construction work in the year before the subject accident. Mr. Marrello stated that he was doing "a lot of restaurant work". Mr. Marrello specifically stated:

Q. Okay. So, I asked you the year before the accident ---

A. I was doing more restaurant also, you know, a lot of restaurant work.

Q. So, you worked in the year before the accident, that was the restaurant work?

A. And, then I also do construction jobs, also, so I was doing actually two jobs.

Mr. Marrello testified that he worked at Cuccina on King Street in the year before the accident. He also worked at a restaurant called Sassy. He worked at Sassy's four days a week and earned approximately \$500 to \$ 600 a week. He also worked for Mr. Thai restaurant, he was not certain, but he believes that it was in 2006 or 2007. He worked for Mr. Thai for six to eight months and he earned about \$100 per day. Aside from Cuccina, Sassy and Mr. Thai, Mr. Marrello testified that he worked at many more restaurants, but he could not remember the names of the restaurants.

Significantly, Mr. Marrello testified:

Q. So, why did you stop working in construction?

A. Well, I never stopped, well my accident that's why I stopped.

Q. Okay.

A. You mean why ---

Q. Were there any other reasons besides the accident that you stopped working in construction?

A. You mean since my accident?

Q. You stopped -- you're not currently working in construction.

A. Yes, no, I'm not.

Q. Correct, so you said you stopped because of your accident, now I'm asking you are there any other reasons you stopped doing construction aside from the accident?

A. No.

Q. So, is it your evidence if not for the car accident, you would still be working in construction?

A. Yes.

Q. Would you still be doing -- working as a chef?

A. Yes.

Q. What? Integrate the two jobs?

A. Well I could always, you know, yes, integrate the two jobs if I wanted to, like depending on that.

Acting

Mr. Marrello testified that he had an acting job four to five years prior to his Examination Under Oath.

Mr. Marrello testified that he was a member of ACTRA, a union for actors, for about 22 years.

Mr. Marrello testified that he signed an acting agent right before his accident. He had some resumes with new pictures.

Mr. Marrello admitted that he was looking for acting work in the year before the accident. He had an agent for this purpose a few days before the accident.

Mr. Marrello testified that he was offered some corporate jobs in the year before the accident, but he did not take them because he was not interested in the jobs, those auditions and what it involved. They were show-type events.

Mr. Marrello testified that in addition to his agent, Christine, he was looking for acting jobs through Craigslist. He was also looking for construction jobs through Craigslist. He was also looking for writing jobs.

Despite the aforesaid the ACTRA records do not support any significant past income from acting.

Performing Arts & Karate

Mr. Marrello admitted that he continued to work in the performing arts up until the time of his accident. Mr. Marrello clarified that this meant gymnastics, stunt work, dancing, mime, clown and anything involving performing.

Mr. Marrello testified that he was at Northern Karate in the year before the accident. Mr. Marrello testified that Northern Karate wanted him to teach there and to instruct classes. Mr. Marrello said that he moved through the ranks very quickly.

Real Estate Course

Mr. Marrello testified that he was taking his real estate course in early 2000.

Mr. Marrello testified that after he failed his third real estate course exam, his father wanted him to go back to work to make cash. Mr. Marrello had to start working and that is when he started doing construction work.

Pre-Accident Health

Mr. Marrello described his health before the accident as "a hundred percent". Mr. Marrello stated that he was in perfect health physically and mentally. There was no reason from a health perspective why he could not work. Mr. Marrello testified that he was 100% able to work before the accident. Mr. Marrello stated that he was able to work in construction with no problems. He was able to work in acting with no problems. He was also able to work as a chef with no problems.

Pre-Accident Living Accommodations and Housekeeping

At the time of the accident the claimant was living with his parents. For a few months in 2009 he did live with his girlfriend.

For the purpose of a "Social Work Assessment, conducted on September 3, 2010, Mr. Marrello reported, in part:

Social Activities /Family Relationships

Mr. Marrello reports he has been in a relationship with his girlfriend since October 2009. They met in an online dating site. He seems to be ambiguous about this relationship. Despite spending all their spare time together, he feels she is bothersome.

Mr. Marrello reports he had a previous relationship with a girlfriend, with whom he resided. This relationship had terminated one month prior to the index MVA. After the accident, Mr. Marrello reports he moved back to his parents as he was unable to provide for himself [Emphasis added].

Mr. Marrello continued to work in the performing arts until his accident.

Mr. Marrello testified that he was living in a loft with his girlfriend, Lisa, before the subject accident; however the girlfriend was paying the rent. Mr. Marrello lived at the loft between 6 months and 1 year. Mr. Marrello testified that his girlfriend's lease expired and that they both moved into his parents' house roughly three months before the subject accident. Mr. Marrello's girlfriend stayed at his parents' house for a couple of weeks. Mr. Marrello testified that he broke up with his girlfriend over and around the time that her lease expired.

Mr. Marrello did not pay anything relating to the loft. However, he would take care of all of the groceries and cooking "and stuff like that" while living at the loft with his girlfriend. Mr. Marrello also took care of the garbage, bathrooms/toilets and whatever needed to be cleaned.

Mr. Marrello was responsible for all of the cooking when he lived with his girlfriend, Lisa. Mr. Marrello also did all of his laundry and the cleaning when he lived with Lisa.

Mr. Marrello testified that when he was living with his girlfriend, Lisa, his expenses were paid from both the money that he earned and money that he got from his parents. Mr. Marrello testified that he occasionally relied on his parents to provide him with money while he lived with his girlfriend.

Mr. Marrello testified that he would go to his parents once every few weeks for money. He was not making that much and his parents would help him out.

When living with his girlfriend, Mr. Marrello would get money from his father and mother. His mother would give him money sometimes. However, he would [also] use the money that he earned from construction and chef jobs to pay for his expenses.

On his examination under oath Mr. Marrello could not say who paid for the majority of the expenses when he lived with his girlfriend. He testified that he was paying his expenses with the money that he earned and the money that he was getting from his parents.

Mr. Marrello was not clear as to the amount that his parents contributed to his expenses while he was living with his girlfriend. It appears that his parents' contribution ranged from 30% to 70% of his expenses. Mr. Marrello testified:

Q. When you were living with your girlfriend for about nine months --

A. Yes.

Q. -- eight or nine months, we don't know exactly, were you primarily supporting yourself?

A. Primarily, I would say sharing it 50/50 with my parents.

Q. What are you basing the 50/50 on though?

A. What am I --

Q. Okay.

A. I'll tell you how. Because I have a certain amount of money that I would make and then if I have like a certain amount that I'm being helped out with, you know, I use the money that, you know. Do you understand?

Q. Okay. But the 50/50 number because we've asked you sort of the same question, you have no numbers that you're basing it on, it's a guess more 50/50, is that correct? Because if ---

A. I don't even understand the question.

Q. If you're saying 50/50, I want the formula, how are you telling us now that it's 50/50, right? How do you know that while you were living with your girlfriend ---

A. Well, because I keep my own, I try to keep my own money as far as like I lengthen it out as far as I can and when something is very urgent and if I have a credit card or my mom, like, I have money from my parents --- I'll do that and I try to lengthen my own money out for important things also like, you know. Do you understand, so I'm not try.

Mr. Marrello further testified:

Q. Now, you're saying 50/50 ---

A. Could be 60/40 --

Q. Okay.

A. -- depending on or could be 70/30, it could be 65/45.

Q. That's why I'm asking because 50/50 is a very ---

A. Fifty-five whatever, 45.

Q. Okay. So there is no formula, you're guessing what the split was basically?

A. There's no fixed formula, no.

Living Accommodations with His Parents

Mr. Marrello confirmed that he moved into his parents' home about three months before the subject accident. He moved into his own room; however he did not pay for anything while he lived with his parents.

Aside from the brief period of two weeks that his girlfriend lived at his parents' house, Mr. Marrello lived with his father and mother. No one else lived at the Marrello home.

When he lived with his parents Mr. Marrello did a lot of the cooking; however his mother would also help. He would cook for himself and the whole family.

Mr. Marrello testified that in the year before the accident he was responsible for the cleaning. More particularly, he was dusting, vacuuming, bleaching, sanitizing, sanitizing the kitchen counters, sanitizing the floor, cleaning the floor, making his bed, as well as shoveling, raking, gardening, sweeping the outside steps and painting. Mr. Marrello testified that he, not his mother, was doing the housekeeping in the year before the accident.

Mr. Marrello testified that he did the odd vacuuming when he lived with his parents. He also cleaned his room. Mr. Marrello also cleaned his own toilet and shower. Mr. Marrello would do all of his own laundry and ironing. He was responsible for cleaning the kitchen. He would also take out the garbage.

Mr. Marrello testified that he did the laundry and ironing before the accident. He also testified that he did all five bathrooms in the home before the accident.

Expenses

With respect to his gym expenses, phone bills and transportation expenses, Mr. Marrello testified that he had paid both with the money that he earned and the money that his parents gave him. Mr. Marrello testified that he would borrow money every three weeks and sometimes every week; it varied.

Mr. Marrello testified that he had different jobs before the accident. For example, he would do a construction job and when that ended he would do another job and in between he needed some support [from his parents]. Mr. Marrello described the support from his parents as "comforting" just like a cushion. Significantly, Mr. Marrello confirmed that when he was working he could support himself. Mr. Marrello testified:

Q. But when you were working, you can support yourself?

A. Yes, yes.

Evidence of the Claimant's Father, Raffaello Marrello

The claimant's father gave evidence at an Examination Under Oath on February 23, 2011. Mr. Raffaello Marrello confirmed that his son lived with a girlfriend for a couple of months before the subject car accident.

With respect to his son's health, Mr. Raffaello Marrello testified that his son's health was "unbelievable health, very good" before the subject car accident. Mr. Marrello did not have any limitations.

Significantly, Mr. Raffaello Marrello testified:

Q. So as far as you are aware, was your son physically capable to act, do construction work, cook, and do real estate work before the accident?

A. Oh yes, yes.

Q. When I use the word physically, but I also mean mentally, was he mentally capable of doing all these jobs or acting?

A. Absolutely, yes.

Mr. Raffaello Marrello confirmed that his son was looking for acting jobs before the accident. Mr. Raffaello Marrello stated: "Yes, he was always on the lookout for things to happen".

Mr. Raffaello Marrello also confirmed that his son did odd construction jobs before the accident. Mr. Raffaello Marrello confirmed that his son was paid for these construction jobs; however he did not know what his son's earnings were from the construction jobs.

Mr. Raffaello Marrello confirmed that his son was a trained chef. He also confirmed that his son was working at a couple of restaurants in the year before the subject accident and that he was paid for the most part. Mr. Raffaello Marrello did not know what his son earned from his chef jobs.

Mr. Raffaello Marrello confirmed that his son helped with the renovations of the family business/salon. Mr. Raffaello Marrello testified that his son was basically the subcontractor and that he did not do much of the work. The most recent renovations at the family business/salon took place in the fall of 2008.

When questioned as to why Mr. Adriano Marrello was not working full time in the year before the accident, Mr. Raffaello Marrello testified that his son was trying to find his way and to find a career; he was searching for the thing that he could be happy with and make a living. He was looking to do real estate work, acting work, construction work or chef work. Mr. Marrello stated: "From what I knew he was making money temporarily with things that -- friends that he knew that he would help out."

Mr. Raffaello Marrello testified that even when living with his girlfriend, his son would ask his mother for cash. Mr. Marrello could not provide the particulars of the requests for money (i.e. quantum or dates of the requests).

Mr. Raffaello Marrello testified that he did not pay towards the rent of the loft when his son was living with his girlfriend, Lisa.

Mr. Raffaello Marrello testified that he did not pay any bills or expenses directly related to the loft.

Mr. Raffaello Marrello testified that his son did not have a fixed allowance; however he and his wife would help him out. His son would ask his mother directly; he would not ask his father for money. Mr. Raffaello Marrello testified that 99% of the time it would be his wife that would give his son money.

Mr. Raffaello Marrello testified that he and his wife did not keep track of the money that they gave their son. Mr. Marrello testified that he and his wife had a shared bank account. They would pool their money together and it was both of their money. Significantly, Mr. Marrello testified that he cannot distinguish from the "pooled" money as to what amount was his money and what amount was his wife's money.

Significantly, the claimant's lawyer, Mr. F.J. Burns refused to allow Mr. Raffaello Marrello to disclose what he earned in the 2008 tax year. Mr. Burns also refused to disclose what Mr. Raffaello Marrello's spouse earned in the 2008 tax year. Mr. Burns took the position that the earnings of Mr. Raffaello Marrello and his spouse are irrelevant to the priority dispute. In view of Mr. Burns' refusal to provide this information the earnings/income of the claimant's parents remains unknown.

Evidence of the Claimant's Mother, Tina Marrello a.k.a. Christina Marrello

The claimant's mother gave evidence at an Examination Under Oath on February 23, 2011.

Mrs. Marrello confirmed that her son lived with his girlfriend, Lisa, the year before the subject accident. She did not believe that it was more than a couple of months. She did not remember the precise date that he returned home.

Mrs. Marrello testified that her son did not have any physical limitations before the accident. Mr. Marrello was "very into exercising". He exercised four or five times a week.

Mrs. Marrello confirmed that her son was looking for acting jobs in the year before the accident. He would go for "go-see's" for auditions from time to time. Sometimes she knew about them and sometimes he would go without telling his mother.

Mrs. Marrello testified that before the accident her son was actively trying to get his life guard certificate. He was in the middle of it when the accident happened. He was hoping to get a job in that field. Mrs. Marrello also confirmed that her son had offers to teach karate in the year before the accident.

Mrs. Marrello confirmed that her son had some cooking/chef jobs in downtown Toronto restaurants in the year before the accident.

Mrs. Marrello confirmed that her son was paid for the cooking jobs and that he earned close to minimum wage.

Mrs. Marrello confirmed that her son was involved in construction work in the year before the accident. With respect to the family salon, she believes that the construction took place four or five years ago [which is inconsistent with the testimony of her husband and the claimant]. Mrs. Marrello confirmed that her son was paid for the renovations at the salon. Mrs. Marrello confirmed that her son was doing both physical labour as well as subcontracting. Mrs. Marrello also confirmed that her son was paid for the construction work, but he never told her what he earned.

With respect to her son's work aspirations, Mrs. Marrello testified:

Q. Okay. In terms of career or work aspirations, did you ever discuss that in the year before the accident? Do you know what your son's plans were?

A. We regularly had discussions, yes.

Q. So, what were his plans in the year before the accident, as far as you know them?

A. As far as I know, he was looking into becoming a personal trainer at one point. He was looking at the real estate. He was looking at trying to get something in the acting field or television.

Q. How about the cooking?

A. The cooking, yes, he was thinking of that, but he -- I think he wanted to maybe get a serious job in the culinary arts.

Q. You mean at a prestigious restaurant or something?

A. Yes.

Mrs. Marrello further testified:

Q. Okay. As far as you're aware, and you are aware, why was your son not working full-time in the year before the accident?

A. I think he tried. He tried a few things and we were just waiting for him to find the right thing.

Q. So, he didn't find the job he wanted?

A. That's right. He was looking and he also excelled as a child. He was very passionate about whatever he did and we were patient, waiting to see where he would find his niche.

Q. With respect to the construction, was it a temporary vocation or would he have future plans, as far as you're aware?

A. It was temporary while he was working, but I think he always had something ...

Mrs. Marrello admitted that she had no idea how much money she had given her son in the year before the subject accident. She testified:

Q. ...In the year before that accident, was there a fixed amount that you or your husband would give Adriano?

A. No, there was no fixed amount.

Q. How did it work when he came for money from you?

A. Basically he would ask and if I had something on me, I'd gave it to him and there were times when I -- yes, I gave him ---

Q. Would he identify a specific expense?

A. What do you mean by specific ---

Q. Like 'I need money for this item' or he would just ask 'Mom, I need money'.

A. Yes, no, just he would ask if he wanted, you know, basically he wanted something or he needed to go somewhere or you know ---

Q. Did you give me money on a weekly basis, on a daily basis, in the year before the accident?

A. I would say pretty much weekly.

Q. Were there any ground rules? Was there any understanding as to when or why you would give him money?

A. He would always say that once he started working he'd pay us back.

Q. Okay. Did you keep any record of the money that you gave your son?

A. No.

Q. It's my understanding that when he came for money he asked you directly most --

A. Yes.

Q. --- of the times?

A. Most of the times.

Q. He -- your ---

A. I was the softy.

Q. Okay. Your husband said earlier that 99 percent of the time he would come to you?

A. That's right.

Q. In the few months before the accident of July 23rd, 2009, do you have any idea how much money you gave him?

MR. BURNS: Don't guess.

THE DEPONENT: A Guess?

MR. BURNS: No, don't guess.

MS. MINHAS: Don't guess.

THE DEPONENT: No, I couldn't tell you; just has he needed it.

Mrs. Marrello further testified:

Q. When he went out on his dates with his female friends, how would he pay for the dates?

A. Sometimes he would ask for an advance as he called it.

Q. With the money he earned from being a chef and construction ---

A. Um-hmm.

Q. Yes?

A. Yes.

Q. Was he required to use that money first before he asked you?

A. Yes.

With respect to her son's living expenses while he was living with his girlfriend, Mrs. Marrello testified:

Q. Okay. For the two or three months that he lived with Lisa in the year before the accident, I understand the loft, the apartment they were renting, was in Lisa's name, correct?

A. Yes.

Q. Okay. Did Adriano, did he pay towards the rent?

A. I'm not sure. I wasn't involved.

Q. Okay.

A. With him at that time and I didn't know.

Q. Okay. So, the two or three months he was living with Lisa, you didn't give him money?

A. I didn't, no.

Q. Did your husband give him money in the two or three months?

A. That I'm not sure.

Q. Okay.

A. I'm not -- I don't think so.

Q. Okay. When he was living with you -- during the periods he was living with you in the year before the accident, did he every pay rent?

A. No.

Finally, Mrs. Marrello testified:

Q. ...When he was living with Lisa you never paid for groceries for him, correct?

A. No.

Q. Okay.

A. I used to give him groceries.

ANALYSIS AND FINDINGS

On the basis of the evidence before me, I find that Adriano Morrello was not principally financially dependent on either of his parents, or both of his parents for that matter. At the time of the accident, he was a healthy 34 year-old without physical, cognitive or psychological impairments. I find that he was educated both in the Arts and in the culinary field and capable of working full-time, should he have chosen to do so.

I have considered numerous statements made by Mr. Morello that he relied on his parents for accommodation and food as outlined and referenced in the Respondents Factum. I am satisfied that his parents provided accommodation, food and occasional spending money. I have specifically considered the fact that the evidence of Mr Morello on his examination under oath of Nov 10,2009 would indicate that his father was taking care of him, but the evidence as to what he was earning or capable of earning in construction and as a chef in the year or so before the accident leads to a different conclusion with respect to dependency when one considers the relevant criteria as set out in Miller v. Safeco (supra). In my view this is a case which more appropriately deals with what the claimant was capable of earning rather than what is annual income might have been. There is no doubt that there was some dependency but the Respondent has not satisfied me that there was a need for the parents contributions or that the claimant was unable to be self supporting should he have chosen to do so. The relevant criteria in Miller v. Safeco (supra) are:

- (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 to be self-supporting.

On balance I find that the evidence supporting dependency is far outweighed by the evidence with respect to criteria (iii) and (iv) above suggesting an absence of financial dependency.

I have considered the arguments advanced by the Respondent that Adriano Morello was in a state of transition and had never established that he could work consistently. It was suggested that he simply did not have the life skills to accomplish that. I am not prepared to accept such arguments. I have laboriously outlined the evidence before me in the paragraphs aforesaid and am completely satisfied that this young man was capable of earning sufficient income either on a part time basis or full time basis to be self-supporting. I also note the absence of any medical or expert evidence to suggest that his lifeskills, character, physical or psychological makeup was such that he could not reasonably be expected to be self-supporting.

There is no doubt that the claimant was receiving financial benefit from his parents in the form of occasional cash contributions, meals and the provision of accommodation, but there is insufficient evidence before me to demonstrate that such contribution was more than 51% of his overall needs. Although the Respondent has argued that his employment was always casual and that he earned very little money it strikes me that he earned good money when he did work and even on a part time basis would have been sufficient to live independently, although perhaps not in the same comfort as the surroundings provided by his parents. The wages that he did make when working construction or as a chef were considerable as noted above.

I am of the view that the facts of this case are very similar to those in Allstate Insurance Company of Canada v. Allianz Insurance Company of Canada (Arbitrator Samis, March 7, 2005) and should have the same result. In his decision, Arbitrator Samis commented,

Analysis

The unusual facts of this case challenge me to find whether or not Joseph Burgess was, in August of 2003, principally dependent for financial support on his mother and/or stepfather.

*There was ample evidence that Joseph Burgess was a physically capable person, perfectly capable of performing heavy labour and in fact he had experience in doing various kinds of jobs. He had worked in business associated with mining. He had experience with line cutting and core cutting, but there was ample evidence that his work habits were poor. He was clearly disinterested in employment. Some parties described him as unreliable. There were suggestions, albeit hearsay, that he had been fired from some employment. In total the evidence about Joseph Burgess's employment is quite unclear. How much he worked, when, where, and for what remuneration, is not established with any certainty. **Tax returns were filed, but much of his income was "under the table".***

There was ample evidence that he was capable of earning significant income. He had the experience and the physical capability to do work that was readily available in the community. He could have derived income of more than \$100 a day from this activity. For the most part, he chose not to.

The law is clear that the relevant dependency is principal dependency. Joseph Burgess can only be considered a "dependent" on Angela and/or Gerry Huetler if they were his principal source of support, more than any other

sources. When looking at sources of support we need to carefully consider Joseph Burgess' capacity to meet his own needs.

Amounts received by a person, and the personal expenditures of the person may be useful evidence of dependency, but it is not a complete analysis in every case.

In my view, this case turns on this issue of the unexercised capacity to earn income. The Respondent relies on the previous award given by me in the case of Federation Insurance Company of Canada v. Liberty Mutual Insurance Company. The Federation v. Liberty case did raise directly the issue of a young person who was not working to his full capacity. In that decision, I referred to the earlier Ontario Court of Appeal decision in Miller v. Safeco ...

The Federation v. Liberty case very clearly applied the Miller v. Safeco precedent to analyse dependency in terms of a person's capacity to earn income, not only their actual earnings.

Furthermore, in a discussion weighing the benefits received against the needs of the individual, the same decision concludes that the mere fact that someone is receiving assistance does not mean that he is a dependant for that assistance. If the person has the means or resources to provide for himself from his own earnings or capacity, the fact that a family member is generous to him does not make the person "dependent" on the family member.

These principles are important when we are considering Joseph Burgess' circumstances. I point out that the Federation v. Liberty case was appealed to the Ontario Superior Court and upheld. The decision was further appealed to the Ontario Court of Appeal and again upheld. These principles are firmly entrenched in the law of Ontario as applicable to determining principal dependency for financial support in the context of priority disputes between insurers.

However, most importantly, in the context of the case law in Ontario, it is abundantly clear that Joseph Burgess did indeed have the ability to earn income and to be self-supporting. In the years prior to the accident, he demonstrated the fact that he lived without assistance from his mother and stepfather, whatsoever. The contribution that they gave to him in the last weeks before the accident was quite minimal. He was capable of doing physical work and there was much physical work available, which was very remunerative.

In my view, the evidence in this case overwhelmingly points to the fact that Joseph Burgess had little employment and little income by choice. He was content to live a lifestyle with very little money. However, he had the capacity to earn money and he lived in an environment where those opportunities were available to him. In my view, he had the ability to be self-supporting. Indeed, he had the ability to have a very comfortable living with higher than average income, if he so chose.

On both analyses, I conclude that on August 4, 2003, Joseph Burgess was not principally dependent for financial support upon Angela Huetler and/or Gerry Huetler.

Just as in Allstate Insurance Company of Canada v. Allianz Insurance Company of Canada (supra), Adriano Morrello's income was "under the table". He too, did not file tax returns. The evidence establishes that he was capable of earning significant income. He had the experience and physical capability to work. In my view, he had an unexercised capacity to

earn income. He clearly established that in the jobs that he had in the year or so prior to the subject motor vehicle accident. I am satisfied that he had the earning capacity to live independently, should he have chosen to do so.

As I have in previous decisions involving dependency, I also accept the principles set out in Federation Insurance Company of Canada v. Liberty Mutual Insurance Company (Arbitrator Samis, May 7, 1999). This decision also deals with the issue of earning capacity as opposed to actual earnings. I accept the proposition that the ability to be self-supporting must be taken into account in measuring dependency. An intelligent, able-bodied individual fully capable of employment, who chooses to live at home with his parents ought not to be considered dependent upon them. I also accept the proposition that "dependency" implies something more than receipt of financial benefit. It requires some kind of need on the part of the person alleged to be dependent. As noted in the Federation v. Liberty (supra) decision, a very wealthy person might receive food, shelter and other financial benefits from family, but this would not support a conclusion that the person is principally dependent upon the family structure. I am not saying on the facts before me that Morello was a "very wealthy person" but do find that he was capable of supporting himself had he chosen to do so and was not dependent on the family structure.

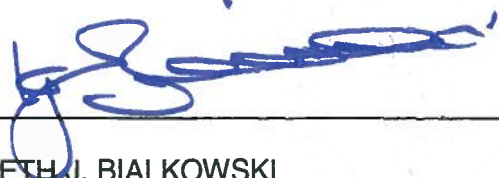
On the evidence before me, I reconfirm my finding that Adriano Morrello was not principally financially dependent on either parent, or even both parents, at the time of the subject motor vehicle accident. He was therefore not an insured under his parents' policy of insurance with Chubb. The insurer responsible for paying statutory accident benefits to Adriano Morrello is the insurer of the striking vehicle, Security National.

ORDER

I hereby order that:

1. Security National reimburse Chubb for statutory accident benefits reasonably paid to or on behalf of Adriano Morrello;
2. Security National assume the obligation to adjust and pay those statutory accident benefits to which Adriano Morrello is entitled;
3. Security National pay the costs of this Arbitration on a partial indemnity basis;
4. Security National pay the Arbitrator's costs.

DATED at TORONTO this 22nd
day of December, 2011.



KENNETH J. BIALKOWSKI
Arbitrator