IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, as amended, Section 268 AND REGULATION 283/95 THEREUNDER

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

- and -

TD GENERAL INSURANCE COMPANY operating as TD HOME AND AUTO and the MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondents

B E T W E E N:

ALI DORRE by his Litigation Guardian ASHA DORRE

Applicant

-and-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and TD HOME & AUTO INSURANCE COMPANY

Respondents

DECISION

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ISSUE

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 claimant Ali Dorre with respect to personal injuries sustained in a motor vehicle accident which occurred on October 15, 2009. In order to make such determination, it is necessary to deal with the issues of whether the vehicle insured by TD was the vehicle that ran over the claimant and whether the claimant was, at the time of the incident, principally financially dependent on his sister Asha Dorre, insured with State Farm. Those same issues, as well as the issue of whether the claimant was "residing" with his sister Asha, are to be determined in the context of the above-styled tort action so as to determine the insurance coverage available to satisfy any Judgment that may be obtained by the Plaintiff in tort.

PROCEEDINGS

The Arbitration proceeded in London, Ontario, over a period of nine hearing days commencing January 30, 2017. It involved some 20 witnesses and 49 exhibits.

FACTS AND EVIDENCE

In the following paragraphs to follow, I will provide a general overview of the evidence adduced and then deal with specific details of evidence and documents in the analysis which follows.

This arbitration originates from an incident that occurred on October 15th, 2009. Early that morning, the claimant Ali Dorre was struck by a motor vehicle and suffered catastrophic injury. He was born on November 12th, 1988 and was 20 years of age at the time of the accident. His family consists of his mother ("Faduma"), eldest sister ("Asha") and remaining siblings, ("Leyla"), ("Hawa") and ("Abdullahi"). They originated from Somalia and after spending several years in Germany, they came to Canada. The claimant was a child when they arrived in Canada.

The claimant's sister Asha was insured by State Farm. Initially Ali made claim for Accident Benefits as against the State Farm policy on the basis that the claimant was "principally financially dependent" on his sister. State Farm has been paying statutory accident benefits for more than seven years, but claims in this proceeding that it is not the priority insurer as the claimant Ali Dorre was not principally financially dependent on their insured Asha Dorre, at the time of the accident.

TD is the insurer for a green 4 door Honda automobile bearing license marker BCWC042 ("Green Honda") and owned by Ahmad Warsame. It is asserted that the Green Honda was involved in this incident which fact is denied by TD. It is asserted that the claimant was with the sons of Ahmed Warsame (Ali and Mohammed Warsame) in the early morning hours of October 15, 2009 and was being driven home by them from a club when last seen. It is asserted that it was the Warsame vehicle insured with TD that ran over the claimant.

Initially, the claimant and his family lived in a four bedroom townhouse at 46 Ivy Court ("Ivy") in London, Ontario. This was government subsidized housing controlled by London Housing. In December of 2007, the three sisters moved out to 80 King Edward Street, Apartment 406 ("King Edward"), in London, Ontario. This was a two bedroom apartment and not government subsidized. All three sisters signed the lease. There is evidence from the family that Ali was living at King Edward at the time of the incident but there is also other evidence to suggest that he was not.

The evidence of where the claimant resided is controversial, as is the financial support he

received from his sister Asha, insured with State Farm. The residency of the claimant Ali Dorre is a factor to be considered in the financial dependency analysis and possible coverage under State Farm's OPCF 44R (underinsured coverage) issued to Asha Dorre.

The evidence must be viewed from the perspective of the of the three crucial issues in these disputes:

1. involvement of the vehicle insured by TD;
2. residency of the claimant;
3. the claimants financial dependency on his sister Asha.

POLICE EVIDENCE

The police evidence consisted of a two volume police file, the videotape interviews of three individuals who had been with the claimant in the hours leading up to the subject incident and the oral evidence of Sergeant Poustie, Sergeant Van Der Klugt and Sergeant Orchard.

Oral evidence of Sergeant Poustie and police file

Sergeant Poustie of the Major Crimes Investigation Unit of the London police force was the supervisor of the investigation of the incident herein as it was thought initially to be a potential homicide. He was called at 4:40am on October 15, 2009 and immediately proceeded to the station where he co-ordinated the investigation.

The police had received a 911 call at 4:03am from a witness by the name of Crystal Ramdharry, indicating that she had witnessed the subject incident. She stated that a man was on the ground and a vehicle ran over the man. It was a dark car.

The police file shows that when police arrived at the scene the victim, now known to be Ali Dorre, was found on the road bleeding from the head with a tire mark impression across his chest. He had no shirt on. His pants were down around his knees. What was described as a crime scene was secured.

A police officer attended the residence of the 911 caller Crystal Ramdharry and took a statement at 4:09am. She told the officer that she had stepped out for a cigarette and heard some yelling. She indicated she saw a man on the ground and saw the car run him over. The

vehicle involved was a dark coloured car The vehicle then proceeded north and then south making a turn at Cleveland.

A further statement was taken from this witness at 9:35am that morning by Detective Constable Orchard. She confirmed that she had heard male voices and saw the car hit the man. She later indicated in the statement that she didn't actually see the car hit the person but pretty sure it did. She could not remember if she saw the car go up and over the body. She felt sick to her stomach because she believed the car hit him. She described the vehicle as being a medium sized car, with two brake lights and with plates that she thought were as low as the bumper, but modified her answer as to the location of the plates with the words "probably" and "think so".

Later that morning Sergeant Poustie interviewed a friend of the claimant's, Chris Mason. Details of the videotaped interview are set out below. He had been with Ali and the Warsame brothers on the night of this incident. They went downtown in the Warsame vehicle. After leaving a club called Billy Bob's, Chris was dropped off about 3:00am, leaving Ali in the car with the Warsame brothers with Ali (aka "Juvi") Warsame driving. They were driving a green Honda. The officer thought Chris Mason was co-operative and spoke freely. He had no reason to disbelieve him.

The police file also contained video interviews of two other friends of Ali Dorre taken on October 15, 2009, details of which are found below and also confirming the involvement of the Warsame brothers in the day's activities.

Once information was obtained that Ali had last been seen with the Warsame brothers, attempts were made to locate them and the green Honda being used that night. It was determined that the Warsame brothers had left the country and the vehicle owned by their father was never located.

The police file contained information from the Canada Border Services Agency that Mohamed Warsame tried to enter the United States on October 15, 2009 and was denied entry. Ali "Juvi" Warsame was allowed entry claiming he was on his way to Columbus, Ohio for a flight to Atlanta and then on to Dubai. They and their vehicle have never been found.

The police file contained information from a neighbour, Darryl Moyles, who saw a dark car at about 3:30 – 4:00am, driving fast. It was a new car over 2000 or late 90's.

The police file also contains information from a neighbour, Timothy Harvey, who claims that he woke up at about 3:00am to the sound of screaming. Males were in a heated argument yelling in Arabic. He later heard a vehicle spinning out. It was a small car.

The police file contained information from the police reconstructionalist, P.C. Riley, indicating that there was a tire mark across the chest of the claimant, indicating he was laying on the road when he was run over.

Sergeant Poustie in his investigation placed significant weight on the fact that the Warsame brothers immediately left the country. It was suggestive to him of a guilty mind. Similarly, he placed significant weight on the fact that the Warsame vehicle had disappeared, leading him to believe that they got rid of it or it would have turned up by now. Although no charges were laid, it was concluded that all information pointed to the Warsame brothers having been involved in this incident. If one of the Warsame brothers were to return to Canada and refuse to speak to the police, then Sergeant Poustie's concluding report indicates that the appropriate charge may be aggravated assault with the vehicle being intentionally driven over Dorre. The concluding report indicated that the investigation would be coded as an aggravated assault.

With respect to the "residency" issue in this proceeding, Sergeant Poustie testified that all of the information they had indicated that Ali Dorre resided at 46 Ivy Court. No one ever suggested he lived anywhere else. If told that he may have been residing elsewhere or sleeping elsewhere, that location would also have been searched. The police only searched 48 Ivy Court for belongings that would have assisted them in their investigation.

Oral evidence of Sergeant Van Der Klugt and police file

This witness was a detective in the Major Crimes Unit called in at 4:34am on the morning of October 15, 2009.

He later attended the hospital where he took a taped statement from Ali Dorre's mother, Faduma Aden ("Faduma"). He thought her English was fine. She was fully co-operative. She said she lived at 46 Ivy Court with her two sons. It was never suggested that Ali lived anywhere else. She indicated that she supported her son Ali financially. She gave him money. When asked who might do something like this to him she advised of three men in the neighbourhood that he was afraid of and that she was considering moving to Denmark for the boys' safety.

None of the men described matched the description of the Warsame brothers. Faduma last saw her son at about 8:30am on October 14, 2009 before she left for work. He was sleeping in his bed.

Faduma consented to a search of the property to see if any clues could be found as to what might have happened the previous night. They attended 46 Ivy Court. Faduma could not find his passport or keys. She indicated that he kept his passport under the cable box on the TV unit. It was not there. No other address was searched. It was never suggested to the sergeant that his belongings might be elsewhere.

Sergeant Van Der Klugt spoke to Faduma once again on October 20, 2009 informing him that she had heard that the Warsame brothers had returned to Somalia.

The Sergeant also testified about an e-mail from the OPP in Cambridge indicating that they had stopped and seized a vehicle operated by Warsame on September 30, 2009, a couple of weeks prior to the subject incident. It was noted that Ali Dorre had been a passenger.

Oral evidence of Detective Orchard and police file

This witness was a field investigator with the Major Crimes Unit and involved in the subject investigation.

Detective Orchard attended 46 Ivy Court at 7:01am on October 15, 2009 and spoke with the claimant's mother Faduma. He would have been the first person to have spoken to her about the incident. She provided the information outlined above. She was co-operative. He then drove her to the hospital. He later went with Faduma, who had consented to a property search, to see if there were any clues as to what happened the night before. They attended 46 Ivy Court. They were unable to find his passport or keys. The passport was normally kept under the TV cable box in the living room. The townhouse looked lived in with furniture in both living room and kitchen. It was never suggested to him that he look elsewhere for his belongings, keys and passport. Only 46 Ivy Court was searched.

Detective Orchard took the statement from the 911 caller, Crystal Ramdharry, at her residence at 9:35am on October 15, 2009. The information provided has been outlined above. He believed she was truthful and reliable.

Videotape police interview of Chris Mason - October 15, 2009

Chris indicated in his interview that he was an acquaintance of Ali, knowing him from "the hood". He was with Ali the night of the subject incident. They dropped off another friend, Dustin Craig, about 11:00pm. Dustin was drunk and it was his birthday. Chris and Ali were driven downtown by Juvi and his brother ("the Warsame brothers"). They stopped at a 7-Eleven. They went to a club called Jim Bob's where Ali got into a fight with Juvi and his brother in the parking lot. Only Juvi's brother went into the club. All three were drunk. Juvi was driving a green Honda owned by his parents. Ali continued arguing once they got back into the car. Chris did not know what they were arguing about. They were arguing in both English and Somalian. Chris was dropped off about 3:00am. Juvi was driving when they pulled away with Ali in the car. The 911 call came in at 4:09am from Crystal Randharry.

Videotape police interview of Mike Nguyen - October 15, 2009

Mike had been a friend of Ali for about five years and would see him six days a week. He had been with the claimant the day before the subject incident. He went to Ali's house that morning. Another friend, Dustin Craig, was there. It was Dustin's birthday and they were drinking beer. When Mike left, only Dustin was there. Mike went home, smoked some weed, watched a movie and fell asleep.

He knew Ali hung with Juvi and his brother. They would often drink together. They too were Somalians.

Ali did not work. He believed his mom gave him money. He was lazy.

Videotape police interview of Dustin Craig - October 15, 2009

Dustin was a good friend of Ali and would see him about four times each week.

On the morning preceding this incident, Ali phoned him about 11:00am and asked him to come over. Dustin took the 1½ hour bus trip to Ali's. They sat in the backyard of 46 Ivy Court. Mike Nguyen was there but leaving. The cops walked by with a police dog around 2:00pm. They had a brief conversation with the two them. The police were looking for two suspects who had abandoned a stolen car nearby. While the police were there, they called in on their radio

indicating that they were at 46 Ivy Court. Dustin and Ali then went to Mike's and played one X-box game. After leaving, they went to the park to play some basketball before returning to Ali's backyard where they sat from about 6:00pm to 11:00pm. It was at that time that Juvi called and drove over a short time later. They drove Dustin home, stopping at a 7-Eleven on the way. No one entered the 7-Eleven. The Warsames were driving a green Honda. He understood that after dropping him off they were going out for a good time.

EVIDENCE OF CLAIMANT AND FAMILY

Ali Dorre May 4th, 2011 EUO/Discovery Evidence

The EUO/Discovery evidence of Ali Dorre indicates that Ali lived with his mom until he got kicked out. He thinks he was about 18 at the time. He went to live with his sisters on King Edward. Although he was in receipt of Ontario Works, his sisters paid for everything at King Edward. He would receive money from Mike Nguyen ("Asian Mike"), his mom and Asha. Asha would give him $20-40 per month. His mother would leave him $5 each day. Mike would give him $200 per month. He received $217 per month from Ontario Works.

The claimant did not work since moving to King Edward. He had worked previously but quit because it was boring and he just needed enough money for the summer.

On the night of this incident, his last recollection was being driven from Billy Bob's and waking up in hospital. Ali Warsame was driving. He was told by a local kid by the name of Kelly Tyler that he saw him being beaten up by two black guys and run over. It should be noted that Kelly Tyler has never been located. The claimant believes the Warsame brothers did it. He believes they took his house key, went to his house and took his passport. He believes the Warsames are back in Somalia. Ali Warsame tried to contact him by Facebook about a year after the incident but Ali would not communicate with him.

Oral evidence of Ali Dorre

Ali is currently 28 years of age and presented his evidence if a fashion clearly indicating serious cognitive deficits.

He described the difficulties he had with the law but stated he was acquitted of all charges. The police records indicate that the charges were actually withdrawn. He denied that he ever sold drugs.

When asked by his lawyer in direct examination as to where he resided in the two years leading up to this, he answered 46 Ivy Court. He said he remembered that and it was not something that other people had told him. He explained where he slept and that he kept his clothes in a closet. It was not until several minutes later that he stated that he was actually living at 80 King Edward in the two years before the incident. His body language and facial expression was such that it suggested he suddenly realized what he was supposed to say. Thereafter he maintained that he had been living at King Edward during that period.

Ali was questioned as to his attendance in school in 2009. He registered for two courses once he applied for Ontario Works. The Lifelong Learning records confirm that he registered for two courses but only attended one and even then only attended 17.4% of the classes and never completed the course. He said he got the flu and then the accident happened. The reality is that the course was to finish in mid-June 2009 and his last class attended was May 6th. While attending the classes he said he spent the monthly Ontario Works benefit of some $216 on school supplies and some clothes. He reported his address to Lifelong Learning as 46 Ivy Court. He admitted in cross-examination that he was told by Ontario Works that he would have to either go to work or go back to school in order to get benefits. When approved for Ontario Works he set up a bank account with Scotia Bank showing 46 Ivy Court as his address.

In cross-examination, he admitted that he was in amazing health before this accident being skinny and having a "six–pack". He says he was mentally healthy as well. In his testimony he claimed that he played basketball.

He indicated that if his mother said he was a student in 2006 and 2007, which was not the case, she would have just forgotten dates and would not have lied.

In cross-examination, he described Mike Nguyen as a neighbour who lived next door. When advised that Dustin Craig and Mike Nguyen told police he lived at 46 Ivy Court, he indicated "they could have lied."

Ali did recall being questioned by police while sitting in his back yard at 46 Ivy Court on October 14, 2009, the day before the subject incident, while they were looking for suspects with respect

to a stolen car. A note in the police file authored by P.C. Yovicic indicates that he spoke to Ali Dorre and was told that he lived there and had nothing to hide. Ali admitted telling them that.

In cross-examination, he testified about a hospital record that showed he attended hospital on August 19, 2009, having suffered a laceration to the head as a result of a fall. The hospital record showed his address as 46 Ivy Court. He believed that someone had stolen his OHIP card and passport and was using them. He had no explanation as to how the individual stealing such documents that would know that the person to notify was his sister Asha and would have her phone number.

When discussing the contents of the Ontario Works file, he admitted that he never worked in Toronto or lived with his girlfriend there as he reported to them in 2009.

Ali admitted that he had never been to Ohio, Minnesota or Atlanta as he reported to police while in jail in Sudbury in 2006. He said he gave them that information when asked where he would go if he tried to run away.

While in Parkwood following this incident, he signed a consent to immunization on November 3, 2009 showing 46 Ivy Court as his address. He said he did not recall telling them that. This was prior to his retaining counsel. Similarly, the hospital records include records on November 18 and 20, 2009 with respect to eye examinations where his address is indicated as 46 Ivy Court.

EUO of Asha Dorre July 6th, 2012

The EUO/Discovery evidence of Asha Dorre indicates that within three weeks of the move to King Edward in late 2007, Abdullahi, brother of the claimant, moved in with the sisters. The same month the sisters moved, Ali ended up coming as well and staying about five days a week. From December of 2007 until December of 2008, Ali spent roughly five nights a week at King Edward and two nights a week on Ivy Court on average. She claimed he left a lot of clothes at her apartment. She admitted giving a statement to police after the accident which suggested she had not lived with him for two years, but claimed they misinterpreted what she said and what she meant was she had not lived at Ivy for two years. She further indicated that as a result of Ali's previous dealings with the law, a bail condition was that he was to reside at Ivy Court, but he did not follow this.

Asha indicated that Ali did not work nor contribute to the household expenses. Asha would give Ali money. She estimated that it would be small individual sums, but it would add up to $100 or $150 from each bi-weekly paycheque. She was later questioned about her $100 to $150 week contribution and never corrected the examiner. She stated that once Ali was approved for Ontario Works, this reduced to about $80 every two weeks. The rent was normally split equally among the sisters. The rent was between $675 and $702 per month. Asha would pay for the internet/tv/phone at about $150 per month and received $35 per month by each sister for contribution. She would also still pay some utilities for Ivy Court. Asha would buy the household goods and share in the groceries for King Edward. Asha would buy clothes for Ali and Abdullahi at $50-$60 every six months. She stated that she has been pretty much a parent for Ali all his life.

Asha owned a vehicle insured with State Farm. She worked for Sterling and made a little less than $11 per hour at the time.

Oral evidence of Asha Dorre

Asha is presently 36 years old and the oldest of the five Dorre siblings and is now working at London Health Sciences. She agreed with the answers she gave on her EUO and confirmed that by the end of 2007, the whole family had moved from 46 Ivy Court to 80 King Edward. She claims they left Ivy Court because it was noisy and busy and all wanted to feel like grownups. When asked why her mother would keep Ivy Court, she said that her mother always thought they would move back or that we would get sick of paying rent.

Asha entered the work force in 2001 and has remained in the workforce through to the present time. Until the preparation for the arbitration hearing, she was unaware that her mother was telling London Housing that she was no longer living at 46 Ivy Court in 2001, 2002, 2003, 2004 and 2006. Asha first entered the workforce in 2001. She admitted that such statements would have been inaccurate, later conceding when pressed that they would have been lies, but claims not to have known that by reporting her income, rent for the townhouse may have increased.

Asha recalled that Ali had enrolled in Lifelong Learning in 2009 to upgrade his high school credits but does not know if he completed any courses.

She now recalls Ali facing charges in Sudbury in 2006 and spending some time in jail pending

bail, but added that all charges were eventually dropped. She was also aware that he was charged with robbery in October 2008. She acted as his surety and was in the courtroom when the conditions of release were read out, with one of the conditions being he reside at 46 Ivy Court. She did not recall hearing that specific condition but agreed that it was stated in court if the transcript said so. She admitted signing the Recognizance of Bail with respect to the incident of October 2008 which showed Ali's address as 46 Ivy Court and hers at 80 King Edward, yet never telling anyone that his address was inaccurate. In fact, the entire bail hearing file showed Ali's address as 46 Ivy Court. Asha did not know if he gave them that address or why he would have given them that address. She testified both the charges from 2006 in Sudbury and the 2008 charges in London were eventually dropped. As far as she knows Ali does not have a criminal record.

She had no recollection of him ever travelling to Ohio, Minnesota or Atlanta.

On the morning of October 15, 2009, Asha drove to Ivy Court to pick up her mother and drive her to work. When she arrived, the police were there and she was advised that her brother was in hospital. She and her mother were driven to the hospital by police. In a statement given at 10:47am that morning, she advised that she last talked to him by phone on Tuesday (the accident having happened in the early morning hours of Thursday October 15, 2009). She called him by phone. When asked how long ago she last lived with him, she answered by saying "I think I have lived at my current address it will be two years in December". She claims that her answer only applied to her, but it is clear that she did not say ""I think we have lived at our current address it will be two years in December". She also indicated in the statement to police that he had told her that he planned to look for a job and start working.

In cross-examination, she was referred to a hospital note indicating that she met his lawyer on November 9, 2009. Although stating in an Affidavit that his tax information showed him at 80 King Edward, she admitted that his Notice of Assessment for 2007 filed on April 15, 2009 showed him residing at 46 Ivy Court. She admitted that the tenancy agreement signed by the three sisters required no one else was to reside there without management approval.

EUO of Abdullahi Dorre February 8th, 2016

The EUO/Discovery evidence of Abdullahi Dorre indicates that he moved in with his sisters by

January 1st, 2008, along with his brother Ali. So did his mom. He spent about 90% of his time at King Edward. Once or twice per week his mom would stay at Ivy Court. Abdullahi did not pay for anything for Ali but he would get money from Asha. His mom would also give him $5 here and there. Asha would buy Ali clothes and also help out Abdullahi including toiletries. Ali contributed nothing to the household expenses. His mother would go to Ivy Court once or twice a week to check on it and sleep over. The longer they were at King Edward, the less frequent his mother returned to Ivy. Asha was given respect because she was the family's second mom.

Abdullahi was aware that Ali was arrested for robbery in 2008 but had no knowledge of his incarceration in Sudbury in 2006. He had no knowledge of Ali living in Toronto or travelling to Atlanta, Minnesota or Ohio. He was unaware of Ali ever having worked construction in Toronto. He was unaware of Mike Nguyen ever giving him money.

Oral evidence of Abdullahi Dorre

Abdullahi is presently 29 years of age and just finishing a four year program in sociology at the University of Guelph. He agreed with the answers given on his EUO.

On the morning of October 15, 2009, Abdullahi received a telephone call from his mother at Ivy Court and immediately ran over. By the time he got there she was no longer there. He ran back to King Edward and drove Asha's car to the hospital. At hospital he was interviewed by the police. He texted Dustin, a friend of Ali's, to learn that Ali had been with him, Chris Mason and the Warsame brothers the previous night. Abdullahi had met the Warsame brothers before and recalled them driving a dark coloured Honda Civic. Dustin advised that they had dropped him off at his home and the four of them carried on.

Abdullahi does not recall being at 46 Ivy Court while the police were completing a search on the day of the incident. He did remember seeing a police officer while taking out some garbage that day.

Tax records revealed the following yearly incomes:

2006 $5,049
2007 $3,768

2008 $33,210
2009 $3,612

Abdullahi did not know why his mother kept the townhouse at Ivy Court.

Abdullahi testified that he was close with Ali when they were younger but not that close at the time of the incident. They had different friends. He did not know what Ali did during the day. He stated that his brother was not a drug dealer. He was aware that his brother had been arrested at one point, but denied knowing that he was incarcerated in 2006 in Sudbury between December 21, 2006 and January 16, 2007 pending bail.

The witness admitted that if Ali told Ontario Works that he lived in Toronto in 2008 and had worked construction he would have been lying. He was unaware of his brother being attacked with a baseball bat shortly before the subject incident or anyone else threatening his life.

Like the other siblings, it was confirmed that Asha was like a second mother to the family.

Abdullahi confirm that Ali did not go to school in 2009.

EUO of Faduma Aden February 8th, 2016

The EUO/Discovery evidence of Faduma Aden indicates that the family had lived at Ivy Court. The three daughters moved out in 2007 and Abdullahi also went over to King Edward in 2007. Ali moved to King Edward at the end of 2007 or beginning of 2008. She also lived at King Edward coming back to Ivy once or twice per week. Faduma never told the housing co-op that her sons had moved from Ivy. Asha paid hydro, cable and internet for Ivy at $200 per month total. She also bought Ali most of his clothes and bought most of the food. Ali may have slept at Ivy once or twice per week. Faduma would give Ali $5.00 on various occasions. The only other person she knew that gave him money was Asha.

Oral evidence of Faduma Eden

Faduma is the mother of Ali and presently 61 years of age. She came to Canada from Somalia via Germany.

She maintained that in the months before the incident, she was living with her family at 80 King Edward. She testified that Asha was like a second mother to the other siblings and as much as a caregiver to them as she was.

In dealing with her involvement with London Housing, she admitted that they would have to know her income and who she lives with. When she removed Leyla's name as who she lived with in 2001, 2002 and 2003, she said she did it because Leyla was no longer on welfare. The form merely asked for the names of others living in the home. She denied that it was an attempt to ensure that her rent would not increase since Leyla began working in 2001. She advised London Housing that she had moved to her father's, but admitted in the arbitration that she never moved out of her home. She admitted that she meant to say that Leyla was planning to move to her father's. Faduma maintained throughout that she thought her rent was based on only what she was making, despite being referred to provisions that aggregate residence income was considered. She admitted never telling London Housing that Ali and Abdullahi left in December 2007, as she now claims, because she was the only one paying the rent. In cross-examination regarding the London Housing file numerous discrepancies were highlighted, but she maintained that she never did any of this so that her rent would not be increased. She ultimately admitted it was a lie to tell them that Leyla had moved to her father's. In April of 2008 she finally told London Housing that Leyla and Hawa had moved out, but that Abdullahi was still living at 46 Ivy Court and so was Ali, but planning to move to live with his father. The records from her employer Paramed including the pay stubs as contained in the London Housing file, all show her address as 46 Ivy Court.

Tax information revealed the following incomes:

2006 $14,939
2007 $14,202
2008 $15,638
2009 $15,685

Her employer Paramed records showed her to live at 46 Ivy Court and the telephone number that they had was the one at Ivy Court. It was not until December 14, 2009 (after the incident) that she changed her phone number to the one at Asha's. She was an "elective employee" where they would phone her to offer her hours and she could "elect" to accept or reject the hours offered.

Faduma recalled police officers attending Ivy Court on the morning of this incident and being advised as to Ali's condition. She testified that due to her mental state after being advised of Ali's condition she has no memory as to what she may have told police, but that if the police notes contain such information then she has no doubt she said it. She would not disagree with what they wrote. She recalls signing a consent to a search of property at 46 Ivy Court and went there with police to search for various items such as passport, keys and clothing items. She never told them that he was living at some other address.

On the crucial issue of residency, the statement to Sergeant Van Der Klugt on the morning of October 15, 2009 indicated that she lived at 46 Ivy Court with her two sons and that her other children lived nearby. She admitted that such statement was given when she did not know that residency would be a factor in a legal dispute.

Faduma admitted telling Abdullahi and Asha on the morning of October 15, 2009 to go clean the house. When asked why, she said in case relatives visit. She denied it was to remove drugs. Throughout she denied he was a drug dealer "as far as she knew". During the property search by police the next day, she told them that he kept his passport under the cable box above the TV but it could not be found. Again, she never suggested they should search elsewhere.

Faduma testified that she did not contribute to the grocery bills at 89 King Edward where she claimed she was residing pre-incident and only bought minimal groceries for 46 Ivy Court. She was taken in cross-examination through her bank records which showed far more than minimal grocery purchases. Her explanation was that relatives had visited and food had been donated to the Salvation Army food bank. She said her aunt had visited for 15 days in 2009 yet the grocery purchases spanned several months.

Faduma recalled Dustin telling her that Ali was with Chris Mason and the Warsame brothers when he last saw them on the night of the incident.

She gave evidence that about three months after the incident a guy from Somalia told her that the father of the Warsame brothers wanted to talk to her. She met him at a Tim Horton's where he admitted that it was his children that hit Ali with the car. He said the car was at the Scarborough house. She claims that she provided this information to the police and officer named Jerry or Gary.

Faduma described Ali pre-accident as being happy, outgoing and enjoyed playing sports. She admitted that he was not working and had never moved to Toronto. When asked why he was not working she said because he was going to school. She admitted he did not go to school in 2008. She claims he tried to find work but that it was difficult to find work in London. She understood that he had to go to school in 2009 as part of Ontario Works requirements.

EUO of Hawa Dorre February 10th, 2016

The EUO/Discovery evidence of Hawa Dorre indicates that she initially moved to King Edward with her sisters. She could not remember why. Shortly thereafter the balance of the family moved in as well. Everyone would sleep wherever they could. Ali would sleep at King Edward five or six nights per week. Once in a while he and her mother would sleep at Ivy Court in order to check the house and for her mother to clean. Hawa would attend occasionally at Ivy Court with her mother. Her mother would clean while she relaxed. Hawa could not remember if there was a phone or computer at Ivy Court at that time.

Hawa indicated that Asha would help Faduma financially but Hawa was not aware of the details. Asha would also help Ali out financially and with household items and clothes. Hawa observed this about ten times. Ali would not ask his mom for money. Hawa is not sure about Ali seeking money from anyone other than Asha. While rent was split evenly, Hawa and Leyla paid $35 each per month for internet, phone and TV and contributed on rare occasion for groceries.

Oral evidence of Hawa Dorre

Hawa is presently 33 years of age and has been working at London Health Sciences as nurse since 2012. She confirmed the evidence adduced on her EUO and the financial contributions made by family members to the household. She maintained that the whole family had moved into 80 King Edward in December 2007. She had no idea why her mother kept the townhouse at 46 Ivy Court or why they moved.

In the years leading up to this incident, Hawa was working part-time at Paramed as a PSW while going to school at Fanshawe. Her T4's disclosed the following incomes:

2006 $5,658.10
2007 $3,190.66
2008 $7,534.12
2009 $25,234.64

Hawa confirmed that Ali never moved to Toronto in 2008 or worked construction as he advised Ontario Works and stated that if he told them that it would be inaccurate.

Hawa was aware of an incident in 2008 involving Ali and a break and enter charge. She had no memory of him being arrested in Sudbury in 2006 and charged with possession of cocaine for the purposes of trafficking, possession of money from the proceeds of crime, possession of cannabis and breach of probation among others. She had no memory of him being absent from the family for about a month between December 2006 and January 2007 when he was incarcerated in Sudbury pending bail. She claims she was busy.

Like the other siblings she described Asha as a second mother and detailed all the things that she did for the family while they were growing up.

EUO of Leyla Dorre, February 10th, 2016

The EUO/discovery evidence of Leyla Dorre indicates that within two weeks of moving out with her sisters, the balance of the family moved to King Edward. King Edward was a two bedroom apartment. People would sleep wherever whoever got there first. Asha would write the rent cheques and the sisters would pay her. The three sisters shared the rent equally. In 2009 rent was $684 per month. The sisters also paid $35 per month for cable/phone/internet. Asha would pay the balance as she was the only one working full-time. Leyla would eat out or eat the food her mother made or the food that Asha would buy. Overall, Asha bought the most food but Leyla would spend about $10 to $30 per week. Asha would buy toiletries for the family, clothes for Ali, as well as give Ali money. Ali never worked while they lived at King Edward. Ali paid no household expenses.

Her mother would spend one or two nights per week at Ivy Court. Ali would go with her.

in a statement given to police immediately following the incident, she indicated that Ali lived with his mother at 46 Ivy Court. On the EUO she said she was in shock and that was a mistake. In

the statement she also indicated that she last spoke to Ali by phone the previous Tuesday.

Oral evidence of Leyla Dorre

Leyla Dorre is presently 31 years of age and employed as an educational assistant in London.

She agreed with the answers given on her EUO as outlined above.

She testified that she earned $8,539 in 2006 and $8,311 in 2007 while working for Sterling and going to school. In 2008 she was finished school and made $10,024. She made $9,722 in 2009. She would not concede that money was tight but claimed they had enough despite occasionally having to borrow from Asha and the fact that bank records show she was in overdraft on four occasions in 2009 and had an NSF cheque.

There were many things she could not remember. She could not remember if there was a phone at Ivy Court or ever calling there. She could not recall any discussion with any family member about the move from Ivy Court to King Edward. She did not remember or know that Ali had been arrested in London and Sudbury. She did not know that Ali had been charged in 2006 with possession and trafficking in cocaine, possession of proceeds from an indictable offence, possession of cannabis, wilful obstruction of a police officer and failure to comply with court orders. She was unaware that he was in custody between December 20, 2006 and January 16, 2007 until granted bail. She testified that she could not remember Ali being missing for a month. She had no memory of Ali ever having travelled to Atlanta, Minnesota or Ohio. She had no memory of Ali moving to Toronto between October 2008 and March 2009 as reported to Ontario Works. She stated that it would be inaccurate if he had said that he spent such time in Toronto.

She confirmed that Asha helped Ali out financially but could not say how much. She did not know if Mike Nguyen ever gave him money but she would not have thought so. She denied that Ali may have been dealing drugs.

Leyla testified that between 1997 and 2007, the five family members lived together at 46 Ivy Court. She had not moved out in 2003 when working at Sterling as reported to London Housing by her mother. Asha did not move out in 2003 and 2006 as reported by her mother to London Housing. She candidly admitted that if her mother was reporting that, they would be lies.

Leyla gave a statement to police on October 15, 2009. She indicated she was living with her sister and that her brother Ali was living at 46 Ivy Court. In the statement she indicated that she had last spoke with him on Tuesday by phone. She now says she cannot remember if she last spoke to Ali when she said she did and the information given as to his address was inaccurate. She claims to have been in shock. She said that her memory now was better than it would have been then in the circumstances.

Leyla described her sister Asha as a "second mom" who assumed greater duties than one would expect from a sister five years older. Since her mother was working she often watched the younger siblings, cooked, helped with homework and would also discipline. She would refer to her brothers as her babies. Leyla said she would go to Asha for advice even before her mother.

INVESTIGATION EVIDENCE WITH RESPECT TO RESIDENCY

Counsel for State Farm retained a private investigator to determine where the claimant was residing at the date of this incident. John Rivard testified that he asked each witness an open ended question as to where they believed Ali Dorre lived at the time of the incident in October 2009. These interviews took place in 2013.

John Craig, father of Ali's friend Dustin Craig, signed a statement indicating that he dropped him off at Ali's residence at 46 Ivy Court where he lived with his mother a couple of times in 2009.

Jamal Farah provided Mr. Rivard with information that that he had known Ali since 2004 or 2005. Farah advised Rivard that prior to the motor vehicle accident, Ali was residing with his mother at 46 Ivy Court.

Natasha Keats had known the claimant for 15 years and claims to have been a friend and neighbour. She advised Mr. Rivard that the claimant at the time of the accident was residing with his mother and older brother at 46 Ivy Court.

Mike Nguyen advised Mr. Rivard that he knew the claimant for six or seven years and considered him to be his best friend. Mike indicated that Ali always lived with his brother and mother at 46 Ivy Court. Ali's sister lived nearby and he would visit her from time to time.

HOSPITAL EVIDENCE AND RECORDS

Maureen McKenzie testified on behalf London Health Sciences with respect to the hospital file of Ali Dorre. On arrival to hospital he was identified as an unknown patient until such time he could be identified. The records indicate that at 10:05am on October 15, 2009, Ali was identified by his mother who was sent to admitting to register. Ms. McKenzie testified that hospital protocol would require the admissions clerk to ask for the patient's address rather than asking to confirm a previous address which may have been given to the hospital. The addressograph stamp prepared showed 46 Ivy Court presumably on information provided by Faduma. Throughout his hospital stay, there is nothing to indicate any other residential address was provided to the London Health Sciences.

Ms. McKenzie also gave evidence as to a hospital attendance by Ali Dorre on August 19, 2009, just a few months before the subject incident. He had walked in with a head laceration at 11:02pm. The address given by Ali, assuming hospital protocols were followed, was 46 Ivy Court.

Ali was transferred from London Health Sciences to Parkwood. He was discharged from Parkwood on November 26, 2009. Susan Davis-Bailey, a social worker at Parkwood, testified that she met with Faduma on October 30, 2009 to complete certain forms and Faduma gave her address and phone number, as well as Ali's, as being 46 Ivy Court. Notes of an interaction with the family on November 17, 2009 indicated that they had yet to retain a lawyer. A sister of Ali's attended the hospital on November 26, 2009 to get accident benefits forms executed. Ali was discharged the same day. Ms. Bailey understood even at the time of discharge that prior to the accident, Ali and his mother were living at 46 Ivy Court. Ms. Bailey recalled at some point the family telling them that they were afraid to return to their residence for fear of further assaults.

ONTARIO WORKS FILE AND EVIDENCE

Jennifer Downie testified that she was the caseworker with respect to Ali Dorre. He first contacted Ontario Works by phone in March 2009. He indicated he lived at 80 King Edward but had been living in Toronto since October 2008 with his girlfriend. He was now staying with his sister. He indicated that he had difficulty finding work and would like to go back to school.

Ms. Downie met the claimant on March 30, 2009. He reported that he had been living with and supported by his sister for the past month.

The Application for Benefits indicated that he was not living with a parent and living at 80 King Edward since March 1, 2009. It also indicated that he was last employed February 1, 2009.

Some of the documents provided showed an address at 46 Ivy Court but was not a concern to the caseworker as many applicants are transient and she had a note from Asha Dorre indicating he was living with her.

Ali's claim was approved and he began receiving benefits retroactive to March 24, 2009.

An Ontario Works Directive was entered into evidence with respect to the impact of a claimant living with a parent.

STATE FARM ADJUSTER

Kelly Wonch testified on behalf of State Farm, insurer of Asha Dorre. She was the adjuster handling Ali's claim accident benefits claim. She first was notified of the claim November 19, 2009 in speaking with Asha. She received the application for benefits and a CAT application by letter dated November 24, 2009. The two documents gave different addresses for the claimant. Ms. Wonch testified that she really did not notice that, being more concerned with the serious nature of the claimant's injuries. She admitted that the Explanation of Benefits gave the address of the claimant at 80 King Edward. A housekeeping clam that was presented and denied was eventually settled on what Ms. Wonch claims was a "without prejudice basis" leaving the issue of "residency" to the priority dispute rather than a FSCO arbitrator which would have been the case if not resolved. The log notes confirm discussion of the without prejudice basis but the closing documents make no reference to this.

In cross-examination, Ms. Wonch indicated that Ali's address was provided by Asha and she had no reason to doubt it, until she heard about the evidence adduced on the discoveries in May 2011. It was at that time it became clear that residency was an issue and there was evidence that he may well have been living at 46 Ivy Court at the time of the incident. She maintained that there had never been an admission as to residency as housekeeping would have to be paid regardless of where he lived if he so qualified.

ACCOUNTING EVIDENCE

Three accountants testified in this proceeding with respect to the issue of financial dependency. It was clear that the determination of financial dependency will depend on the factual findings made in this proceeding, so at risk of oversimplification, I will only set out the general conclusions of the accountants.

The accountant retained by TD is Daniel Edwards from Crowe Soberman. On the assumption, among others, that Ali resided primarily or fully at 80 King Edward, he concluded that Ali could not provide more than 50% of his own needs and that Asha was the largest contributor. With application of the "plurality approach" established by Arbitrator Densem in *Economical Mutual Insurance Company v. Aviva Canada Inc.* (January 2013), he concluded that Ali was dependent on Asha. He found that Ali did not provide more than 50% of his needs and that Asha was the largest contributor although not exceeding 50%.

The accountant retained by State Farm (AB) was Jessy Hawley of Davis Martindale. Again, at risk of oversimplification and on the assumption that Ali was residing at 46 Ivy Court, she concluded that Ali was not dependent on any one person for more than 50% of his needs and therefore he was not financially dependent on Asha.

The accountant retained by State Farm (tort) was Karen Dalton of Hoare, Dalton. She too concluded that Ali was not dependent on his sister Asha whether living at King Edward or Ivy Court. Whether at either residence, she was not contributing more than 50% of his needs.

In addition, Ms. Dalton testified that it would have been very difficult for her to have been giving Ali the money she claims she did, given her own expenses.

Ms. Dalton further testified that even working minimum wage 75% of the year, Ali would have been able to provide more than 50% of his needs.

ANALYSIS AND FINDINGS

PRIORITY DISPUTE

With respect to the accident benefits priority dispute, there are many situations which arise where an individual injured in a motor vehicle accident has access to more than one policy of insurance with respect to payment of statutory accident benefits. Section 268 of the *Insurance Act*, R.S.O. 1990, c.I.8, is a legislative scheme to determine which insurer must pay statutory accident benefits when more than one policy is potentially accessible. If a dispute arises with respect to the application of s.268, commonly known as a priority dispute, then the Dispute Between Insurers regulation (Ontario Regulation 283/95), sets out the specific details that govern how a dispute is to be processed and provides for an Arbitration with regards to this dispute, to be in accordance with guidelines set out in the *Arbitrations Act*, 1991, S.O. 1991, c.17, as amended.

As the parties have agreed that the claimant was a non-occupant and was allegedly struck by an automobile the following rules with respect to priority of payment apply, under Section 268(2)(2):

> 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. [underlining emphasis mine]

Section 2 of the *Statutory Accident Benefits Schedule — Accidents On or After November 1, 1996*, ("SABS") defines an "insured person" as:

> (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,
>
> i. is involved in an accident in or outside Ontario that involves the insured automobile or another automobile
>
> . . .

> (b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile
>
> . . .

Section 2(6) of the SABS states that a person is a dependent on another person if the person is **principally dependent for financial support** or care on the other person or the other person's spouse.

On the basis of the aforesaid, the Fund would stand in priority if it could not be proven on the balance of probabilities that the vehicle insured by TD was the striking vehicle and the claimant was not principally financially dependent on his sister Asha at the time of the accident. If it were proven on the balance of probabilities that the claimant was struck by the vehicle insured with TD and the claimant was principally financially dependent on his sister Asha, then State Farm would stand in priority by reason of s.268(2)(2)(i). If it were proven on the balance of probabilities that the claimant was struck by the vehicle insured by TD and the claimant was not principally dependent on his sister Asha, then TD would stand in priority for the payment of statutory accident benefits pursuant to s.268(2)(2)(iii).

TORT INSURANCE COVERAGES

Now with respect to insurance coverage in tort, State Farm's policy contains uninsured automobile coverage, as required by the *Insurance Act* and contained in the Ontario Automobile Policy (OAP 1), as well as underinsured and unidentified automobile coverage, as per the Family Protection Endorsement ("OPCF 44R").

The Plaintiff, Ali Dorre, is not entitled to coverage under State Farm's policy unless he qualifies as a "dependent relative" of his sister, Asha Dorre, as defined in the statutory and policy provisions discussed below.

Statutory Provisions – Uninsured Automobile Coverage

Section 265 of the *Insurance Act* provides for uninsured automobile coverage:

> 265. (1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,
>
> > (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;

> (b) any person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile; and
>
> (c) a person insured under the contract is legally entitled to recover from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile,
>
> subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations

The definition of "person insured under the contract" includes, in respect of a claim for bodily injuries or death, the insured and his or her spouse and any "dependent relative" of either who is struck by an uninsured or unidentified automobile.

Uninsured Automobile Coverage under the Ontario Automobile Policy (OAP 1)

With respect to the OAP 1, coverage for uninsured automobile coverage is available for the following individuals:

> **5.3 Claims for Bodily Injury or Death**
>
> **5.3.1 Who is Covered?**
>
> The following are insured persons for bodily injury or death:
>
> ...
>
> You, your spouse, your same-sex partner, and any dependent relative of you, your spouse or your same-sex partner,
>
> ...
>
> when not in an automobile, streetcar or railway vehicle if hit by an unidentified or uninsured automobile.

OCPF 44R – Family Protection Coverage Endorsement

The OPCF 44R provides that the insurer shall indemnify an "eligible claimant" for the amount that he is legally entitled to recover from an inadequately insured motorist as compensatory

damages in respect of bodily injury of an insured person arising directly or indirectly from the use or operation of an automobile.

Section 1.3 of the OPCF 44R defines "eligible claimant" as:

> (a) the insured person who sustains bodily injury; and
>
> (b) any other person who, in the jurisdiction in which an accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.

"Insured person" is defined in s. 1.6 of the OPCF 44R as:

> (a) the named insured and his or her spouse and any dependent relative
>
> of the named insured and his or her spouse, while
>
> ...
>
> (iii) not an occupant of an automobile who is struck by an automobile.

The definition of "dependent relative", as per Section 1.2 of the OPCF 44R, includes "a relative of the named insured or of his or her spouse, who resides in the same dwelling premises as the named insured" or "a relative of the named insured or of his or her spouse, who is principally dependent on the named insured or his or her spouse for financial support".

The term "resides" is not defined in the *Insurance Act*, the OAP 1, or the OPCF 44R.

On the basis of the aforesaid, the determination of tort insurance coverage will also be dependent on the findings as to the involvement of the vehicle insured by TD, the residency of Ali Dorre at the time of the accident and whether he was principally financially dependent on his sister Asha at the time.

THE THREE ISSUES TO BE DEALT WITH

1. Involvement of the Warsame vehicle insured with TD

TD takes the position that the Applicant State Farm, the Plaintiff Ali Dorre, State Farm and the Fund cannot prove on the balance of probabilities that the Warsame vehicle, which they insured, was the vehicle that struck the claimant on October 15, 2009.

TD takes the position that the bulk of evidence suggesting it was the Warsame vehicle involved is hearsay to which no weight ought be given. TD claims that when one discards the hearsay evidence there is simply insufficient credible evidence to conclude that on the balance of probabilities it was the Warsame green Honda that struck the claimant.

However, I am satisfied that the legislation and jurisprudence allows me in an arbitration proceeding such as this to consider evidence which may not be considered if applying the strict rules of evidence.

Section 268 of the Insurance Act sets out the hierarchy as to which insurer stands in priority to pay statutory accident benefits to a claimant. If the insurers cannot agree as to which insurer stands in priority, as is the case here, O. Reg 283/95 sets out the mechanism for resolving such disputes:

> **7.** (1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed. [underlining evidence mine]

With respect to the evidence to be admitted, the *Arbitration Act, 1991* states:

> **Evidence**
>
> 21. Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications.

Section 15 of the *Statutory Powers Procedure Act* ("SPPA") speaks to the admissibility of evidence at a hearing:

> **Evidence**
>
> **What is admissible in evidence at a hearing**
>
> 15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.[underlining emphasis mine]

What is inadmissible in evidence at a hearing

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Conflicts

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(4) Where a tribunal is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Photocopies

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

Certified copy admissible in evidence

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document. [emphasis added]

Section 15(1) of the SPPA permits the admission of hearsay evidence, subject to reliability, with the weight to be accorded to such evidence being a matter that is left to the discretion of the Arbitrator.

In *Duan v. Boutros*, 2013 ONSC 2451, the Ontario Divisional Court was hearing an appeal from the Landlord and Tenant Board. One of the issues which arose was the introduction of repair estimates without calling the individuals who prepared them. Lederer J. on behalf of the three Judge panel and dismissing the appeal, stated at paragraph 4:

> "This proceeding was governed by the Statutory Powers and Procedure Act,R.S.O.1990, c. S 22. Hearsay evidence is permitted (see s. 15(1))."

The Supreme Court of Canada has confirmed the admissibility of hearsay evidence before administrative tribunals. In *Starson v. Swayze*, 2003 SCC 32 at paragraph 115, the Court indicates that there is no doubt that such evidence is admissible before the Board by reason of s.15(1) of the *Statutory Powers and Procedure Act*. The weight to be given left to the discretion of the Board with a caution to avoid undue emphasis on uncorroborated evidence that lacks sufficient indicia of reliability.

Section 15 allows documents to be accepted as evidence of the statements recorded therein even if the author of those statements is not available for cross-examination. This was confirmed by the Ontario Labour Relations Board by way of an appeal from a decision of the *Toronto Police Services Board in Toronto Police Association v. Toronto Police Services Board,* 2008 CanLii 17121 (ON LRB).

The jurisprudence supports the proposition that so long as hearsay evidence is relevant and can be regarded as fairly reliable, it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law. The British Columbia Court of Appeal so found in *Cambie Hotel (Nanaimo Ltd.) v British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2006 BCCA 119 and included a quote from Lord Denning in its decision:

> "A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is not reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law."

Further support for the admissibility of hearsay evidence is found in the decision in *Tetu v. Criminal Injuries Compensation Board*, 2011 ONSC 782, where the Ontario Divisional Court considered an appeal of a decision of the Criminal Injuries Compensation Board. The Court noted that the Board was not bound by the strict rules of evidence and could choose to accept and rely upon hearsay evidence, as per Section 15(1) of the SPPA. The appellant argued that the hearsay evidence was so inherently unreliable that it amounted to a breach of procedural fairness and natural justice to admit it since there was no way that the appellant could refute it.

The Court disagreed. The Court found that there was "ample circumstantial evidence" before the Board that supported the reliability of the hearsay evidence, and indeed would have supported the inference that the appellant attended the premises for the purpose of selling drugs even without admitting the hearsay evidence. The testimony of a police officer, which included hearsay evidence, had been "central" to the Board's decision.

In terms of priority dispute jurisprudence, Arbitrator Densem's decision in *MVACF v. Jevco* (August 4, 2011), is particularly on point. In that case, the issue was whether the claimant had been struck by the Jevco-insured vehicle. One of the key pieces of evidence was a business card on which a missing witness had written the license plate number of the Jevco-insured vehicle. Jevco objected to the admission of the business card on the basis that it was hearsay. Arbitrator Densem admitted the business card. He found that the business card satisfied both the common law test for admissibility of hearsay evidence and "certainly" the evidence admissibility requirements of the *Arbitration Act*. Beginning at page 12, he stated:

> "With respect to the common law test, hearsay evidence is admissible if it is reliable and necessary. Reliability is determined by the circumstances. Relevant factors vary from case to case, but the key question is whether the evidence sought to be adduced derives from circumstances that substantially negate the possibility it comes from an untruthful or mistaken source. With respect to the "necessary" requirement, the evidence sought to be introduced does not have to be the only evidence available to prove the case. The test is flexible and may be met where evidence of the same value cannot be expected from another source.
>
> I am satisfied on the totality of the evidence that the license plate number recorded on the business card which is Exhibit 2 was accurately recorded as the license plate number of the vehicle belonging to Mr. Palmer, and that this evidence meets the common law reliability and necessity test discussed above. If I am wrong with regard to this evidence meeting the common law admissibility test, I find nevertheless that the evidence is admissible by operation of section 21 of the *Arbitration Act*, and section 15 of the *Statutory Powers Procedure Act*."

Despite the arguments advanced by TD, I am satisfied that on the balance of probabilities it was the Warsame vehicle insured with TD that ran over the claimant. This finding can be reached without reference to what might be considered hearsay or unchallenged evidence as contained in the police file and involvement of the TD vehicle is clearly established if any weight is given to the evidence of Dustin Craig, Chris Mason, Mike Nguyen and the eyewitness Crystal Ramdharry.

Although Ali Dorre's memory post-incident may have been affected by the injuries sustained he seems to have maintained his past memories and in particular specific details of the events on the evening preceding this incident. He recalls the Warsames coming over after he phoned them to help celebrate Dustin Craig's birthday. He recalled they drove a green Honda Civic. He recalled attending Billy Bob's. His last memory was being driven from Billy Bob's in the Warsame vehicle. Ali was driving. The physical evidence confirms that the claimant was run over by a vehicle. There was a tire mark found running across his chest. The Warsames left the country immediately and their vehicle was never found leaving the inference of a guilty mind and that the vehicle disappeared as it may have displayed physical evidence confirming contact with Ali's body whether it be blood, clothing remnants or scuff marks. On this evidence alone I am satisfied on the balance of probabilities that it was the Warsame vehicle that ran over Ali Dorre.

The proceeding included evidence that was unchallenged yet reliable and corroborated that I have considered. It also contained evidence that I have found to be unreliable and uncorroborated that I have ignored.

I find the evidence of Dustin Craig, Chris Mason, Mike Nguyen and the eyewitness Crystal Ramdharry, although they were not cross-examined, reliable and relevant so as to reinforce the findings I would have made in the absence of such unchallenged evidence. Furthermore, there was consistency in their evidence giving it the ring of truth and reliability. In fact, the police investigation obtained information from several witnesses that were also consistent with the ultimate findings of police investigation implicating the Warsame vehicle.

I accept the evidence of Dustin Craig and Chris Mason that the claimant was with and last seen with the Warsames in the hours leading up to this incident. A review of the video of their interview by police depicted individuals who actually trying to provide information to assist their friend Ali who they knew was in hospital with serious injuries.

No one disputes that the Plaintiff was struck by a motor vehicle. In my view, the evidence of the various witnesses is consistent and pointing to the fact that the Plaintiff was struck by the TD insured vehicle.

In the paragraphs to follow I will highlight the evidence I attached some weight and the evidence upon which I attached no weight.

The Plaintiff gave very detailed evidence on his Examination for Discovery on May 4, 2011 regarding his actions on the day preceding the accident and that evening. There did not appear to be an issue with his memory of the events the evening before.

On his Examination for Discovery, the Plaintiff told Counsel for State Farm Tort that he was hanging out in his backyard with Ali [Warsame], Ali's brother Mohammed [Warsame], and Chris Mason. The Plaintiff was 100% sure that Ali was the driver that night.

The Plaintiff said that he was familiar with the TD vehicle, having ridden in it on a number of occasions, including the night of the accident. About two weeks prior to the accident, the Plaintiff had gone to Toronto with Mohammed in the Honda Civic.

On the night of the accident, the Plaintiff said that he went to downtown London with the Warsame brothers and Chris Mason. After leaving downtown, Ali Warsame was driving and the Plaintiff was sitting in the front passenger seat. Mohammed Warsame was in the back seat. Chris Mason gave the same evidence as to where they were sitting in the vehicle, as per his statement to police.

The Plaintiff said on his Discovery that he knew that it was the Warsames that hit him with their vehicle. However it is clear he had no direct memory of that occurring so I take this as merely his opinion.

The Plaintiff said on his Discovery that Ali Warsame tried to talk with him through Facebook following the accident, apologizing for what they had done. The Warsames' uncle apologized to the Plaintiff for what the Warsames had done. The owner of the vehicle, Ahmed Warsame apologized to the Plaintiff's mother and tried to work out a deal with her. I do not attach weight to this evidence and particularly the evidence that Faduma met with the father of the Warsame boys. There is no record of the latter in police file and I found the evidence of Faduma on this point, like so much of her evidence overall, impossible to accept and just another example of saying whatever to assist the family in their legal disputes.

A review of the London Police makes it clear that they were certainly convinced that the TD vehicle struck the Plaintiff. Sergeants Poustie, Van der Klugt, and Orchard testified that their investigation was thorough.

Sergeant Poustie was the primary investigator. Sergeant Poustie interviewed Chris Mason. Sergeant Van der Klugt interviewed the Plaintiff's mother, Faduma Aden and the Plaintiff's

friend, Mike Nguyen. Sergeant Orchard interviewed an independent eyewitness, Crystal Ramdharry. Sergeants Orchard and Van der Klugt executed a search at the Plaintiff's residence at 46 Ivy Court.

Constable Pinkney interviewed Asha Dorre and Leyla Dorre. He has since retired however and could not be located. As well, I was advised by counsel that Crystal Ramdharry, Mike Nguyen, Natasha Keats and Jamal Farhan Farah could not be located for the purposes of the arbitration hearing.

The police and medical professionals involved in this matter were recording information in the course of their duties. In my view, they were attempting to help the Plaintiff and had no reason to be anything but truthful. I find their evidence is reliable.

Sergeant Poustie was responsible for completing a thorough investigation into what he initially thought was potential homicide. Fortunately the Plaintiff survived. In his concluding report, Sergeant Poustie indicated that there was no doubt that the Plaintiff was hit by a motor vehicle. He believed the vehicle that struck the Plaintiff was the green Honda vehicle owned by Ahmed Warsame. There was no other vehicle of interest, according to London Police.

The Plaintiff's account of the events that night is corroborated by Chris Mason. Chris Mason reported to police that, when he was dropped off, Ali Warsame was driving the vehicle. One of the brothers convinced the Plaintiff to get into the front seat of the vehicle. Chris Mason understood that the Warsame brothers were going to drop the Plaintiff off at "home" after Chris Mason was dropped off. The Plaintiff's "home" was 46 Ivy Court. The accident occurred close to 46 Ivy Court.

Sergeant Poustie described Chris Mason as cooperative. He found Chris Mason to be truthful. He believed that there was no reason to disbelieve what Chris Mason said. Having reviewed his video statement and as I have stated I must agree with this assessment.

Sergeant Poustie specifically noted that there were no objective facts to disprove Chris Mason's version of events. Sergeant Poustie stated as follows:

> "It is a constellation of facts that point to the veracity of the facts and considering all the other evidence in totality he [Chris Mason] is being truthful about what happened."

According to Chris Mason's statement, the Plaintiff and the Warsame brothers were still arguing when they dropped Chris Mason off. Crystal Ramdharry told police that she witnessed an altercation, consistent with the version of events that Chris Mason reported to police.

Sergeant Orchard spoke to Crystal Ramdharry, an eyewitness to the incident. Sergeant Poustie stated that, of the witnesses, he found Crystal Ramdharry to be more truthful than Darryl Moyels. Sergeant Poustie explained that Crystal was more engaged. She used specific language. She spoke about her feelings and the fact that she was sick to her stomach. In contrast, Darryl Moyels used language like, "I want to say". Darryl Moyels was also likely picked up in a door-to-door canvass, unlike Crystal Ramdharry, who had called 911 after being a witness to the incident.

Ultimately, Sergeant Poustie gave evidence that he gave significant weight to the fact that the Warsame brothers fled the country within 24 hours of this accident. The Warsame brothers fleeing, according to Sergeant Poustie, "spoke to a guilty mind, not wanting to co-operate with the investigation and not wanting to be held accountable."

Sergeant Poustie put even more weight on the fact that the vehicle has never been recovered.

As I have stated I too give significant weight to the fact that both Warsames left the country and the vehicle has never been found. The inescapable inference from this is they and the vehicle being operated by one of them was involved which, in my view, is corroborative of the evidence that is claimed to be unchallenged. I find that the inference to be drawn from their immediate departure and their vehicle not being found makes this challenged evidence reliable and relevant as with great consistency it totally corroborates the ultimate findings.

In reaching my conclusion of the involvement of the green Honda, I have considered the arguments advanced by TD. I considered that no charges were laid but concluded that would have been difficult if they were not in the country and as far as driving offences, there was no evidence beyond a reasonable doubt, to determine who was driving at the very moment of the incident. I realize that police only required reasonable grounds to lay charges but can clearly see why they did not given the circumstances outlined above.

I have also considered that Crystal Ramdharry was equivocal in her statements as to whether she actually saw contact between the vehicle and the body on the ground and the vehicle. Her 911 call said "male was on the ground and a vehicle ran over the male". In her initial statement

she said "I seen the car run him over". In the second statement she initially said she saw a man on the ground and the car hit the man. But later in the statement she said:

> "didn't actually see the car hit the person but pretty sure it hit but don't recall body moving or car jumping up, felt sick to my stomach because believed car hit"

I take from this that it was certainly her impression that there was contact. This impression together with the evidence that there were tire marks across the chest of the claimant satisfies me that there was contact even though Randharry's evidence was somewhat equivocal with respect to contact.

I have also considered her description of the vehicle involved contained some elements inconsistent with a Honda Civic. TD claims that Ramdharry said that the license plate was lower than the brake lights. She said it was a medium car dark in colour and could have been blue. The balance of her description was consistent with the Honda Civic. I note that when describing the location of the plate she used modifying words "probably" and "think so" which demonstrates to me some doubt as to that part of her statement. As for her description of size and colour, photographs were introduced as evidence as to green Hondas of that vintage and it is easy to see how an individual might describe it as medium size and maybe blue. The information given to police by Tim Harvey confirmed that the people were yelling in Arabic and the car may have been a small Honda. Witness Darryl Moyles confirmed it was a dark car and he wanted to say it was a Grand Prix or something. I would not expect an individual making such observations from a distance at night to be totally accurate and am satisfied the descriptions overall that they were either consistent or not significantly inconsistent with the dark Honda Civic owned by Warsame.

TD highlighted the fact that Ali attempted a return to North America after this incident through Atlanta but he was refused entry. TD says the attempted return is not indicative of a guilty mind but there is no specific evidence of a planned return to Canada or the specific identification he would use.

I have also considered that the evidence discloses three individuals in the neighbourhood of Ivy Court that Ali was concerned about, none of them meeting the same description as the Warsames. There is simply no evidence that any of these gentlemen operated a dark green Honda or observed in the area where this incident took place.

In my view the theories advanced by TD do not change the "big picture" and evidence overall which clearly implicates the Warsames. All sources confirm that the vehicle was a dark coloured

small to medium sized car. Men were heard arguing. One witness had them arguing in Arabic. The Warsames left the country the same day and the Warsame vehicle was never found. The natural inference is they got rid of it for, if found, there may have evidence of contact with the body of Ali Dorre - blood, clothing remnants, tire marks consistent with the size of tire marks on Ali's chest, undercarriage scuffing or whatever. No evidence was introduced to provide an explanation for their disappearance and that of their vehicle.

2. Residency of Ali Dorre at the time of the incident

The term "resides" is not defined in the *Insurance Act*, the OAP 1, or the OPCF 44R.

The jurisprudence with respect to "residency" establishes that residency is highly flexible and will depend on the context. The jurisprudence establishes various principles that I am prepared to accept. Residence with the named insured does not need to be longstanding. Coverage is provided for those who "recently" move in with the named insured. It is possible to reside at more than one location for the purposes of the OPCF 44R. Visitation is not enough to find that the relative was residing with the named insured. In determining whether an individual qualifies as a dependent relative, it is necessary to consider the factual intentions of the individual involved regarding the attachment of the relative to the household. In order for residency to be established, there must be a present intention to remain permanently. The issue of residency is factual and so does not rely on any legal entitlement to reside at a particular location: "Legal residency and de facto residency are not necessarily the same." When examining the evidence related to residency, the trier of fact will also look at any legal documents which list the applicant's residence. These documents could include employment files, student files, OSAP loan documents, bank accounts, credit cards and driver's license.

The decision of *Gardiner v MacDonald Estate*, 2015 ONSC 227, establishes that in determining whether an individual qualifies as a dependent relative, it is necessary to consider the factual intentions of the individual involved regarding the attachment of the relative to the household. The Court found the evidence established that the claimant considered his mother's home to be his permanent residence. Therefore, the claimant was found to reside with his mother for the purpose of the OPCF 44R.

As indicated in *Tanas Estate v Wawanesa Mutual Insurance Co*, 1990 CarswellOnt 628, generally, "residence" means a person's permanent place of abode and not his temporary place of abode. The mere physical presence of a person in a place does not constitute his residence. He must have the present intention of remaining there for some time but not necessarily for all time. Although the relative seeking coverage may have lengthy visits with the named insured, this is insufficient to find coverage under the OPCF 44R if the relative had no intention of remaining with the named insured. Visitation is not enough to find that the relative was residing with the named insured.

It was held in *Boilard v Morozuk*, 1995 CarswellOnt 4439, that in order for residency to be established, there must be a present intention to remain permanently. The claimant was the named insured's brother. He had come to stay with his brother for the summer months for employment purposes and was involved in a motor vehicle accident. The Court found that the claimant did not have the required intention to stay with his brother permanently or for a considerable time. His intention was to stay there only for the summer and to reside permanently in Quebec where he intended to return following the summer to resume his studies. Therefore, the claimant was not a dependent relative as defined in the Family Protection Endorsement.

In *Harris (Guardian of) v Pilot Insurance Co*, 1997 CanLII 4436 (ON CA), the Plaintiff's parents were divorced and the Plaintiff spent time at each of his mother's and his father's residences. Approximately eight months prior to the accident, this pattern ended and the Plaintiff did not return to his mother's place. He had quit school three months prior to the accident and became an adult two months prior to the accident. He had obtained a full-time job. The Court of Appeal found that the Plaintiff's actions no longer afforded a basis for concluding that he lived with both his father and his mother. There was no positive evidence that the Plaintiff intended to return to his mother's residence, taking into account the change in his pattern of life and the significant difference between it and that which had existed before. Therefore, the Court of Appeal held that it would have been unreasonable to hold that the Plaintiff had a dual residence at the time of the accident. The Plaintiff was not entitled to coverage under the Family Protection Endorsement issued to his mother as he did not reside in the same dwelling premises as his mother.

There exists a great discrepancy in the evidence as to where the claimant resided at the time of the accident. The evidence adduced by the family on their respective EUOs and their oral

evidence at the arbitration hearing would suggest that Ali spent most of his time at 80 King Edward and was therefore residing in the same dwelling as his sister Asha. The pre-incident documentary evidence, save and except for the Ontario Works file, indicates the claimant resided at 46 Ivy Court. The documentary evidence prepared in the immediate aftermath of the accident and the information provided by family members in the immediate aftermath of the accident indicates he resided at 46 Ivy Court and therefore not residing in the same dwelling as his sister Asha.

I am of the view that the evidence provided in the pre-accident records, the evidence contained in the immediately post-accident records and the information provided by the family to police and hospital immediately post-accident is by far the most reliable. I find that Ali Dorre was resident of 46 Ivy Court at the time of the accident. At no time in the immediate aftermath of the accident was it ever suggested that Ali lived anywhere other than Ivy Court. This is what the family told both the police and hospital staff.

It was not until long after that the family took the position that Ali was resident at 80 King Edward. There may have been motivational issues involved. In the situation where residency with or principal financial dependency upon Asha could not be established, then tort recovery may have been limited to $200,000 as that would be the amount recoverable from the Fund or from TD if it were able to be successful on its off-coverage position. By establishing residency with and/or financial dependency upon Asha, then State Farm's $1,000,000 limits could potentially be exposed. In reaching my finding on "residency", I have considered the fact that both the mother Faduma and the claimant Ali were prepared to provide false information to London Housing and Ontario Works to enhance and make available benefits from those sources.

I will attempt to review in detail the available evidence supporting my finding as best I can in chronological order:

The Plaintiff was arrested in connection with a robbery on October 7, 2008. According to the London Police Services Information, the Plaintiff resided at 46 Ivy Court. According to the Recognizance/Conditions of Release relating to these charges, the Plaintiff agreed to reside at 46 Ivy Court.

For the school year in 2009, the Plaintiff was enrolled in an English class at Lifelong Learning Centre from April 16 to May 6, 2009. His address was listed as 46 Ivy Court.

Ali Dorre attended the Emergency Room on August 19, 2009, less than two months prior to the accident. We heard from Maureen McKenzie of LHSC that the Plaintiff would have been a walk-in. He would have had to confirm his address upon admission. He confirmed that he lived at 46 Ivy Court.

As to the question as to where was Ali Dorre in the days leading up to this accident, based on Faduma Aden's statement to police which was taken by Sergeant Van der Klugt, she testified the Plaintiff was at Mike Nugyen's on Tuesday. He "*came home*" to 46 Ivy Court from Mike Nguyen's at approximately 9:30pm.

This information is corroborated by Mike Nguyen's statement to police that the Plaintiff was at his house on Tuesday with Dustin Craig. We know that the Plaintiff was last seen by his mother on Wednesday morning, October 14, 2009 at 8:30am when she left for work that day. We know from Mike Nguyen's statement to police that he arrived at 46 Ivy Court at approximately 11:00am or noon on October 14, 2009.

At this Hearing, Ms. Aden said that she saw the Plaintiff at 80 King Edward on the morning of October 14, 2009. I find that this is simply not credible.

When Ms. Aden spoke to police while standing in her living room at 46 Ivy Court, she explained that she had last seen the Plaintiff in bed in the living room wearing black pants before she left for work that day. The police notes accurately reflect what Ms. Aden told them. Sergeant Orchard testified that Ms. Aden had last seen the Plaintiff prior to the accident at 46 Ivy Court. She left 46 Ivy Court that morning and told the Plaintiff to lock the door behind her.

The police statements from every family member until long after the incident confirm that the Plaintiff lived at 46 Ivy Court.

Leyla Dorre confirmed her brother Ali lived at 46 Ivy Court. Asha Dorre confirmed that she had last lived with the Plaintiff two years prior to the accident. Her evidence to suggest she did not understand the questions posed to her is not credible in my view. The inference to be drawn from the question and answer is that she had not lived with her brother in two years.

I did not find Leyla Dorre's evidence with the issue of residency on this arbitration to be credible. In my view she was evasive in her testimony. Of her entire police statement, Leyla Dorre asserted that the only fact that she says the police got wrong was her statement that the Plaintiff lived at 46 Ivy Court. I cannot accept this as being believable.

Asha Dorre has attempted to explain away her statement by indicating that she did not understand the only question that is really the crux of this legal dispute. However, in looking at her police statement, Asha Dorre was asked, "How long did you last live with Ali at 46 Ivy Court?" She was then asked, "Do you know what Ali did to put in the time at home since you *moved out?*" The Plaintiff's home was not her home. I find that she understood this question and answered without difficulty.

Asha Dorre specifically told Sergeant Orchard that it was "unusual for Ali to stay overnight somewhere else".. Sergeant Orchard testified that he thought Asha Dorre was referring to 46 Ivy Court. Sergeant Orchard described Asha Dorre's demeanour that morning as "matter of fact". He testified that Asha seemed sincere and honest.

Sergeant Orchard gave evidence that, when he arrived at 46 Ivy Court that morning at 7:00am, Ms. Aden was inquisitive of the police but she was not distraught. Sergeant Orchard testified that Ms. Aden was able to coherently listen to police and answer their questions. He described Ms. Aden as co-operative.

Sergeant Van der Klugt testified that he believed what Ms. Aden had told him during her police statement. He found her to be forthcoming and she attempted to assist with providing information. She had made phone calls to assist in their investigation.

In cross-examination, Sergeant Van der Klugt confirmed that Ms. Aden was upset but composed. It is clear from the medical records that Ms. Aden would not have seen her son prior to giving her statement to Sergeant Van der Klugt.

During her interview, Ms. Aden identified herself to Sergeant Van der Klugt and immediately told him that she lived on Ivy Court with her two sons, Ali and Abduhalli. Ms. Aden explained that Abduhalli went to UWO and the Plaintiff stayed home and was financially supported by her.

Ms. Aden also explained that her daughters, Asha, Hawa, and Leyla lived on King Edward. Ms. Aden indicated that her daughters had moved away from 46 Ivy Court because their townhouse had been broken into previously.

In addition to explaining who the Plaintiff may have feared in the neighbourhood, Ms. Aden specifically stated, "Ali asked me if we could move somewhere else". If the Plaintiff had already moved from 46 Ivy Court to 80 King Edward, there would be no reason for him to move from 46 Ivy Court.

Ms. Aden told police and confirmed at this hearing that her friend called her at 46 Ivy Court between 11:30pm and 12:30am on the night of this incident. Why would Ms. Aden's friend call her late at night at 46 Ivy Court if she was supposedly living at 80 King Edward? As well, how could Ms. Aden have known that the man from Unit #56 who she claims came to 46 Ivy Court almost every night at midnight, unless she was present at 46 Ivy Court?

At 10:49am on October 15, 2009, Ms. Aden signed a Consent to Search her home at 46 Ivy Court. Ms. Aden gave evidence that, immediately after signing the consent, she advised her son, Abduhalli and her daughter, Leyla to go and take out the garbage at 46 Ivy Court. She denied that her request was made because she knew she had drugs or illegal items in her home. She tried to tell us that she was worried her house was not clean and that relatives might visit. At the hospital, Ms. Aden thought that her son could be dead in a matter of hours. A person who was in grief would not, in my view, have been worrying about the state of her home. Abduhalli Dorre gave evidence that he took the garbage out because he is a neat freak. In re-examination, he attempted to suggest that he doesn't remember what he was thinking with respect to taking out the garbage. It certainly raises suspicion and fits with the overall evidence as to the type of individuals that Ali was associating with.

At no point did Ms. Aden indicate to police that she lived anywhere but 46 Ivy Court. Sergeant Van der Klugt was asked "Was there any suggestion that Ali lived anywhere else?" He responded, "Not in my mind."

When Sergeant Orchard attended at 46 Ivy Court the following day, he made observations that the townhouse "certainly looked lived in". Sergeant Orchard testified that there was no suggestion that the London Police should look elsewhere for Ali's wallet, passport or other belongings.

Sergeant Van der Klugt and Sergeant Orchard attended at 46 Ivy Court with Ms. Aden to search for the Plaintiff's belongings, which included his house key, passport, grey jacket, black hoodie, and a Toronto Maple Leafs ball cap. Ms. Aden searched the living room and could not find his passport or his wallet. Ms. Aden searched 46 Ivy Court in an effort to locate the Plaintiff's belongings. Ms. Aden did not suggest to either Sergeant that the Plaintiff's belongings could be anywhere other than 46 Ivy Court.

London Police confirmed that they did not search anywhere but 46 Ivy Court. Sergeant Van der Klugt confirmed that, had they been provided with information to suggest the Plaintiff was residing somewhere else, they would have followed up and conducted a search of that area.

Sergeant Poustie confirmed that according to his recollection, there was never a suggestion that the Plaintiff lived anywhere but 46 Ivy Court. He stated "46 Ivy Court is where Ali lived". Sergeant Poustie confirmed that he was not aware of any other location other than 46 Ivy Court where the Plaintiff kept any of his belongings. Sergeant Poustie indicated that had he lived somewhere else, a search would have been conducted of that residence too and there was never one conducted of 80 King Edward..

The police statements given by the Plaintiff's immediate family members are the most reliable to determine where, in their minds, the Plaintiff resided at the time of the accident. There was never any suggestion or indication that any of the family members considered 80 King Edward to be the Plaintiff's residence, either primary or secondary.

The London Police also interviewed the Plaintiff's friends.

Mike Nguyen considered the Plaintiff to be his best friend. Mike Nguyen had no reason to lie to police or to John Rivard about the Plaintiff's residence at the time of the accident. Mike Nguyen was clear: the Plaintiff lived at 46 Ivy Court.

Mike Nguyen made reference to Ms. Aden putting a roof over the Plaintiff's head and she supported the Plaintiff. This information supported what Sergeant Van der Klugt had been told by Ms. Aden. Sergeant Van der Klugt found Mike Nguyen's statement to be "absolutely truthful".

Mike Nguyen saw Ali Dorre every day for at least 1 -1½ hours each day. Mike Nguyen would see the Plaintiff "early in the morning when they both woke up". Mike Nguyen and the Plaintiff would call each other on the phone. Mike Nguyen would call the house line at 46 Ivy Court or he would just walk over. Interestingly, the Plaintiff indicated that he smoked a joint at the "start of every morning". Mike Nguyen said he gave the Plaintiff money because the Plaintiff was a loyal friend.

When Mike Nguyen went to the Plaintiff's home at 46 Ivy Court the day of the accident at 1:00pm and knocked on his door and no one answered, he stated, "That was weird". Without calling first, Mike Nguyen had an expectation that the Plaintiff would be present at 46 Ivy Court. Mike Nguyen and the Plaintiff were "tight". They were so close that they would tell others they

were "brothers or cousins". They were so close that Mike Nguyen told police he would know if the Plaintiff robbed someone.

The Plaintiff also stated on his Examination for Discovery that his next door neighbour, his friend, could vouch for him because he used to walk over to "my house" and get me in the morning. He was referring to Mike Nguyen.

Dustin Craig also confirmed that he was the Plaintiff's best friend. Dustin Craig gave a statement to police. He confirmed that he had known the Plaintiff for 7-8 years. He called the Plaintiff every day. Dustin Craig saw the Plaintiff four days per week. On October 14, 2009, Dustin Craig recalled receiving a telephone call from the Plaintiff at 10:30am. Dustin Craig told police that the Plaintiff resided at 46 Ivy Court.

Dustin Craig described in detail how well he knew Ms. Aden and he even knew her likes and dislikes. Dustin called Ms. Aden Faduma "Hoya", which means mom in Somalian. Dustin Craig reported that he hung out inside 46 Ivy Court for a period of time on October 14, 2009, but once Ms. Aden returned home from work, they could no longer go inside. Dustin Craig recalled the Plaintiff telling him that they could not go inside because Ms. Aden "was making food and when she's making food she doesn't like people around".

The police records and Dustin's police statement confirm that at 4:43pm on October 14, 2009, Constable Yovicic was investigating another incident that day involving a stolen vehicle and he arrived in the backyard of 46 Ivy Court where he found Ali Dorre and Dustin Craig. In his evidence at this arbitration, the Plaintiff also recalled this incident. He agreed that he identified himself and that he told the police officer that he resided at 46 Ivy Court.

John Craig gave a statement to police on October 15, 2009. John Craig indicated that he took his son to Boston Pizza for lunch and then he dropped his son off at the Plaintiff's residence. From what his son said, the Plaintiff lived there—the low rent townhouses at 146 or 46, behind Kimberly (*Ivy Court*).

John Craig signed a statement on April 19, 2012. John Craig indicated that the Plaintiff was a friend of John Craig's son, Dustin Craig. He met the Plaintiff a couple of times in 2009 when he dropped his son off at the Plaintiff's residence where he lived with his mother at 46 Ivy Court.

Jamal Farhan Farah gave a statement to police on October 15, 2009. Mr. Farah reported that he became good friends with Ali Dorre when he moved into the neighborhood. When he was

asked what he thought had happened to the Plaintiff, he responded: "I don't know, but he doesn't even walk through where the crime scene was even to go home. He always walks up towards Cleveland through the basketball courts because thats [sic] the fastest way to his house."

Mr. Farah also spoke with Investigator, John Rivard on March 22, 2012. Mr. Farah advised that he had known the Plaintiff since late 2004 or early 2005. Mr. Farah reported that, prior to the subject accident, the Plaintiff lived with his mother at 46 Ivy Court.

John Rivard also spoke to Natasha Keats, who had known the Plaintiff for 15 years. She was a friend and neighbour. She said that the Plaintiff lived with his mother and brother at 46 Ivy Court at the time of the accident.

The Plaintiff's friends and neighbours were unanimous: the Plaintiff lived at 46 Ivy Court at the time of the accident.

Following the subject accident, the Plaintiff was admitted to hospital. The hospital records consistently indicate that he resided at 46 Ivy Court at the time of the subject accident.

We heard from Maureen McKenzie that the general practice for admitting patients is to have the family identify the patient and then proceed to admitting to register the patient.

We heard from Beverly Lewis from London Health Sciences. Ms. Lewis gave evidence that she was told that the Plaintiff resided with his mother and brother at 46 Ivy Court.

It is clear from the evidence of Susan Davis-Bailey that she verified with Ms. Aden that the Plaintiff's address was Ivy Court, as found on the addressograph that had been used at London Health Sciences.

This coincides with Social Work Case Aide, Ms. Pilon's written note dated November 26, 2009, wherein one of the Plaintiff's sisters advised that the health records department would need to be notified of a new address and phone number for the Plaintiff.

Ms. Davis-Bailey explained in the Integrated Discharge Summary dated November 26, 2009, and confirmed by her evidence at this Arbitration, that she knew the family had expressed great concern about returning to live at 46 Ivy Court. The family was fearful and had difficult memories associated with the incident and the townhome the Plaintiff had previously lived in.

According to Ms. Davis-Bailey, upon discharge, the Plaintiff and his family were all going to stay with his older sister in her apartment.

The fact that Ms. Davis-Bailey misstated the "townhouse" as an "apartment" does not persuade me that that Ali was being released from where he lived pre-incident to his sister's apartment, which was why his address and telephone number needed to be updated.

Physiatrist, Dr. Delaney, completed an OCF-19 for the purpose of the Plaintiff's accident benefits claim. When completing the form, Dr. Delaney noted the Plaintiff's address as 46 Ivy Court.

According to the report of Nicole Ferreira dated January 25, 2010, the Plaintiff's mother reported that, subsequent to the incident, the Plaintiff, his siblings, and his mother moved into his sister's apartment, as the family's prior home is associated with negative memories of the incident, and the family no longer feels safe there. The Plaintiff had three sisters and one brother.

On his Examination for Discovery, Ali described 46 Ivy Court as "home" on numerous occasions.

When discussing his activities on the day of the accident, the Plaintiff stated that he was hanging out in "my backyard" at 46 Ivy Court. There would be no backyard at his sister's apartment.

In describing the events of that evening, the Plaintiff said that he was on his way "home" from downtown London. 46 Ivy Court was where he "lived". His exact evidence was "I dropped, I asked them to drop me off *at home, like that's where I live, Kimberly, Ivy Court, home*". That was the last thing that the Plaintiff remembered before waking up in the hospital.

The Plaintiff was asked about his ID that he had left at home that evening. His answer was "That's why *I went home*... and they took probably my house key and went in *my house*."

Ms. Aden said to the police that the Plaintiff's passport was kept under the cable box in the living room at 46 Ivy Court.

When confronted with the numerous references that the Plaintiff reported living at 46 Ivy Court pre-accident, the Plaintiff would say that whoever said or wrote that was lying.

The Plaintiff went as far to say that his family members lied to the police about where he was living when the police spoke with his family in the immediate aftermath of the accident, despite his family having no motivation to subvert a police investigation. Rather, his family would have been extremely motivated to help the Plaintiff, as he was fighting for his life in hospital.

It is clear to me that Ms. Aden will provide false information when it is financially beneficial for her or her family members. As I have indicated earlier, there may have been motivational issues as to where Ali lived.

Ms. Aden's theory that she kept the townhouse because she expected or wanted all of her family members to return is difficult to accept. On March 28, 2008, she attempted to submit an Internal Joint Tenancy Request Form for the purposes of adding her two sons, the Plaintiff and Abduhalli, to her lease at 46 Ivy Court.

In a letter from London Housing to Ms. Aden dated April 17, 2008, Ms. Aden was advised that she had completed the wrong form. She was asked to complete a transfer form indicating that she wanted to stay in the same area but she was reassured that she would likely not be transferred to a two bedroom apartment because these units did "not come up often". Ms. Aden was told that she would be placed on a waiting list for a unit to come available.

Ms. Aden then wrote a letter indicating that her daughters, Leyla and Hawa did not live there any longer but that her two sons continued to live with her and therefore, she needed a two bedroom apartment. That is in my view entirely inconsistent with her alleged motive to maintain the four-bedroom townhouse in case her children returned home.

As of April 9, 2009, Ms. Aden confirmed with London Housing that the Plaintiff and Abduhalli continued to live with her at 46 Ivy Court. She listed them both as students so that it would not affect her rent.

Ms. Aden lied to London and Middlesex Housing Corporation throughout the history of her tenancy. Her explanation about her understanding of her reporting requirements is simply unbelievable. I cannot help but find she lied to keep her rent as low as possible.

Ms. Aden indicated that the food was at 80 King Edward as she did not cook at 46 Ivy Court. When asked if there was any food at 46 Ivy Court, she said, "No. Sometimes I put burgers in the, in the, in fridge." Why did Ms. Aden say that? Likely because the Plaintiff had given evidence that sometimes he took burgers from his mom's house and cooked them at his

neighbour's. There was no milk or eggs, but there were burgers. According to Ms. Aden, the family members who slept at 46 Ivy Court ate "burger and bread" for breakfast. This would be difficult to accept and is contradicted by her banking records which would indicate that she spent far more on groceries than she was prepared to admit.

At this arbitration, despite earning below the poverty line, Ms. Aden denied that keeping 46 Ivy Court empty for one year and 10 months was a waste of money. She indicated that money was not important to her. When asked if she was making a donation to the government, she answered, "Yes it could be". She denied that paying ¼ of her earnings towards an empty townhouse in a subsidized housing complex was a waste of money.

Ms. Aden also testified that she donated food to the Salvation Army. She denied purchasing any more than $10 to $20 per month for food, which is not consistent with her bank records hence her explanation that she gave food to the Salvation Army. I do not accept this explanation. It is clear from the evidence overall that this was a family barely making ends meet. Furthermore, no other family mentioned that her mother was giving food to a food bank of the Salvation Army.

I find that the available evidence overwhelmingly supports a finding that the claimant resided at 46 Ivy Court at the time of the accident. Based on what I believe to be the credible evidence of the neutral parties (the police, the investigators, medical professionals) the Plaintiff clearly cannot establish that he resided with his sister at the time of the accident.

3. Financial dependency

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.

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.

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. 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 measure as a qualifying number in relation to which 51% rule is to be applied (as opposed to using actual expenses of the claimant).

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.

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 household – the exercise we were directed not to follow by *Miller and Safeco* appeal. 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.

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*".

Arbitrator Cooper's decision in *Allstate Insurance v. ING* was appealed to Superior Court on the ground that Arbitrator Cooper did not use the correct methodology. On appeal as reported at 2015 ONSC4020, Justice Mayers found that mathematical calculation or application of 51% rule in relation to needs/means is an important factor, but it is not the only factor. A change in mathematics variable, while 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*".

As jurisprudence currently stands, both the "mathematical" and "LICO" approaches are being applied by judges and arbitrators. TD 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.

TD 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.

In deciding what to include as part of a claimant's self-supporting resource, one should consider the claimant's own efforts, capacity or status. According to Arbitrator Densem support emanating independently of the claimant should not be classified as his or her self-supporting resource. Arbitrator Densem also took from other arbitrations that personal resources are generated by the person or entitled to receive them in the person's own right as an individual.

They do not derive from another person. Including support received from another person as part of the claimant's personal resources for determining financial dependency is not consistent with the definition of self-supporting.

Arbitrator Densem found that principal dependency exists where the claimant, is chiefly, mainly or for the most part (i.e. more), dependant 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.

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.

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.

I have been advised that the this decision of Arbitrator Densem was not appealed, nor has it been referred to or distinguished in any subsequent case despite the passage of four years.

Before applying one or more of these approaches to the financial dependency analysis, it is necessary to decide on the appropriate time frame for analysis. The parties have proposed either the 12 month period pre-incident or the 7 month period pre-incident. The latter time frame would represent the period the claimant was receiving Ontario Works.

As established in *Dominion of Canada General Insurance Co. v. Ontario (Minister of Finance)* (2013) OJ No.3345, the relevant time period to review in determining dependency is not legislated. However, the period should not be a snapshot. The Court has found that the "snapshot" approach on the day of the accident is inappropriate. Instead, the time frame

considered must be one that provides a fair picture of the relationship at the time of the accident. The relationship must be looked at as a whole over a reasonable period of time to allow the Arbitrator to determine the nature of the relationship at the time of the accident.

I find that the appropriate time frame for analysis on the facts before me is the roughly seven month period pre-incident being the period of time the claimant was receiving Ontario Works. This situation had existed for a considerable period of time with no evidence that it was going to change. In fact, there was evidence adduced that the claimant planned to enroll in another adult learning class at Weable the day following the incident. I accept that evidence but am of the view that such planned enrollment was only to support a continuation of Ontario Works benefits and not a genuine attempt to upgrade his education. It is clear from the evidence that he earlier only attended Lifelong Learning minimally with no real attempt at completing the program. I do not accept Ali's evidence that his attendance was poor because he had the flu. There was simply no medical or other corroborative evidence in this regard.

Given the use of this time frame and the finding that he was resident at 46 Ivy Court, it is clear that Ali did not receive more than 50% of his needs from Asha, nor was she the largest contributor to his needs. No matter which approach is used (mathematical, LICO or plurality), financial dependency on Asha has not been established.

During the applicable time frame Ali was receiving $216 each month from Ontario Works. Asha's contributions came nowhere near that. I accept that she was providing him with about $80 each month as she testified and was also buying him clothes from time to time. I also accept the fact that Ali would spend time at King Edward where he would visit his sisters, have the occasional meal, use the internet and watch the occasional pay per view movie. At Appendix X2 of the accounting report of Daniel Edwards (retained by TD) dated January 9, 2017, an analysis is made of financial contributions on the assumption that Ali was residing at Ivy Court for the 7 month period pre-accident. He concluded that the average monthly contribution by Asha was $90. On this basis, Ali was contributing 38.8% to his own needs through Ontario Works whereas Asha was contributing 29.7% and Faduma 29.2% on the basis of the contributions outlined.

The "plurality approach" advanced by Arbitrator Densem in *Economical* (supra), even in the event it was good law, is not satisfied on the facts of this case. The largest independent support

source was Ontario Works; it was not Asha. I find that the second largest contributor was Faduma. Not only did she provide accommodation, but food and cash to Ali. I find that Mr. Edwards has undervalued both the cash and food contributions made by Faduma. As for cash contributions, the evidence varied. On her EUO, Faduma indicated at page 65 that her average cash contribution was $35 per week which was consistent with Ali's EUO evidence. It was only later in her EUO testimony that she indicated it was "every now and then whenever he asked for it". I find that Faduma's cash contributions to Ali may not have been $35 per week but were a lot higher than the $50 per month used by Mr. Edwards. Similarly, Mr. Edwards has only allowed 25% of $50 per month as her food contribution to Ali's needs. Faduma's bank records confirm far more grocery purchases than she was prepared to admit and certainly not consistent with a $12.50 monthly contribution to Ali. I do not accept her explanation that she gave food she purchased to food banks and the Salvation Army. This was a family that was barely making ends meet and was not in a position to be so generous. By increasing Faduma's cash contribution to even $20 per week and her food contribution to 25% of $100 per month raised her contributions to a percentage higher than Asha's. Clearly Faduma was the second largest contributor to Ali's needs aside from Ontario Works.

Over the 7 months pre-accident Ontario Works provided $216 for 7 months for a total of $1512. Asha contributed $90 per month by way of cash and clothing totalling $630. There was also evidence she contributed to hydro and phone at Ivy for a total of $150 per month with Ali presumably getting 1/3 of the benefit (3 person household at Ivy) for a 7 month total of $350. This brings Asha's total contributions to Ali's needs for the 7 month period to $980. At $20 per week Faduma's cash contributions for the 7 month period would be about $600. Her contribution to housing even assuming a 3 person household would be $700 for the 7 month period. Her contribution to food for the 7 month period would be $175 for a grand total contribution of $1477 and much greater than the $980 contribution of Asha. Given the finding that Ali was living at Ivy Court clearly makes Asha's contributions to Ali's needs less than those of her mother.

In my view all of this mathematical analysis is moot in any event as one of the criteria in determining financial dependency is the ability to be self-supporting as confirmed by the Ontario Court of Appeal in *Miller* (supra) and as outlined in *Federation Insurance Company of Canada v. Liberty Mutual Insurance Company* (Arbitrator Samis – May 7, 1999). I find on the facts before me that Ali Dorre had the capacity to provide for more than 50% of his basic needs. I accept the

principle outlined by Arbitrator Samis where he confirms that the ability to be self-supporting must be taken into account in determining dependency and writes:

> "An intelligent, able-bodied individual fully capable of employment who chooses to live at home with his parents ought not be considered dependent upon them".

Although there may have been some negative prognosticators for employment such as minimal education, poor work history and a lack of a driver's licence, I find on the evidence that he was capable of employment and could have earned at least minimum wage. Pre-accident he was heathy physically and mentally on his own admission. He described himself as being slim and having a "6-pack" and was playing basketball. He lived in a large city with an available public transportation system where presumably minimum wage job opportunity existed for those with minimal education such as in the service industry (McDonalds, Tim Hortons) or any manual labour job such as landscaping, loading, moving or many others. The evidence indicates he simply did not want to work and preferred his Ivy Court lifestyle while supported by Ontario Works, his mother and his sister Asha. When he last worked years earlier he worked 1 week at PRC Books in a telemarketing position and quit because it was boring. He then worked for 3 or 4 months at Angelo's Bakery stating "I just needed enough money for the summer then I just quit". As his friend and next door neighbour Mike Nguyen stated when asked why Ali was not working – "he was just lazy". This is not a case where there was evidence of physical disability, mental disability, alcohol/drug addiction or a rural geographical location with no available transportation system or job opportunity. Furthermore, I do not accept any suggestion that he was a full time student. I find that he only enrolled in Lifelong Learning to remain qualified for Ontario Works. He only attended one of the two classes in which he registered and his attendance was pathetic. In my view, he was capable of minimum wage jobs if he chose to do so. He preferred simply to be supported by Ontario Works, his mother and his sister Asha while doing whatever he was doing around the Ivy Court neighbourhood.

The accountant Karen Dalton testified that working 30 hours per week at a minimum wage job would have provided Ali with 76.8% of his basic needs. The accountant Daniel Edwards includes the LICO statistics at Appendix B2 of his report of December 9, 2016. It indicates that the low income measure for one person was $18,876. 50% of this would be $9,438. I find Ali Dorre had the capacity to earn at least $9,438 and provide for more than 50% of his needs.

What we appear to have here is a family member different than the rest of his siblings. He was a family member who dropped out or was kicked out of school early and became involved with the wrong crowd. He became involved in the wrong activities. The neighbourhood he lived in at 46 Ivy Court was conducive to those activities and probably why he spent most of his time there as I have so found. He was unlike his other four siblings who appeared to be motivated to complete their post-secondary school education and find competitive employment.

IMPACT OF FACTUAL FINDINGS

On the basis of the factual findings herein, I find that TD is the priority insurer and that State Farm's OPCF 44R underinsured coverage endorsement is not exposed as Ali Dorre was not principally financially dependent upon nor resided with his sister Asha Dorre at the time of this incident.

ORDER

I hereby order:

1. that TD(AB) is the priority insurer;

2. that TD(AB) assume carriage of the accident benefit claim of Ali Dorre;

3. that TD(AB) indemnify State Farm(AB) for benefits paid to and on behalf of Ali Dorre, together with interest calculated in accordance with the *Courts of Justice Act*;

4. that TD(AB) pay the costs of State Farm(AB) of this arbitration on a partial indemnity basis;

5. that TD(AB) pay the costs of the MVACF of this arbitration on a partial indemnity basis;

6. that the State Farm policy is not exposed to the tort claims of Ali Dorre;

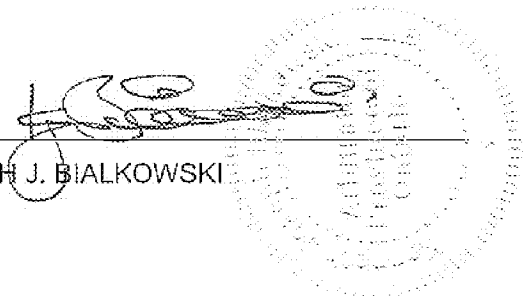
7. that TD(tort) pay the costs of State Farm(tort) of this arbitration on a partial indemnity basis;

8. that TD(tort) pay ½ of the costs of the Plaintiff of this arbitration on a partial indemnity basis given the mixed success of the plaintiff on the issues;

9. that TD(AB) and TD(tort) share the arbitrator's costs and if agreement cannot be reached on respective shares, I will receive submissions in that regard.

DATED at TORONTO this 27th)

day of February, 2017.)



KENNETH J. BIALKOWSKI
Arbitrator