

IN THE MATTER OF SECTION 268 OF THE **INSURANCE ACT**,
R.S.O. 1990, c.l.8,

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CITADEL INSURANCE COMPANY

Applicant

and

PEMBRIDGE INSURANCE COMPANY

Respondent

AWARD

This matter comes before me as an Arbitrator pursuant to regulations under the *Insurance Act* to determine a priority dispute between the two parties. This dispute arises out of an accident, which occurred in August of 2002 in which Marla Michaud suffered injuries. The injuries resulted in her claiming statutory accident benefits for various items of compensation.

In accordance with section 268 of the *Insurance Act* the insurer obliged to pay these benefits is Citadel if Marla Michaud is principally dependant for financial support on one or both of her parents. If she is not, Pembridge is the insurer that is obliged to pay these benefits.

Pursuant to the regulations issued under the *Insurance Act* Citadel has been paying the benefits, but has instituted these proceedings in order to determine the obligation of Pembridge in the circumstances of this case.

The Proceedings

Citadel has duly issued a notice of dispute between the parties and has commenced the arbitration proceedings as contemplated by Regulation 283/95, which governs this procedure. The parties participated in a number of pre-hearing conferences. The hearing was convened in February of 2005 in order to hear testimony from several witnesses. The hearing concluded on October 7, 2005 with the submission of additional documentation and the submissions of counsel with respect to the matter.

Counsel submitted an arbitration agreement, which was marked as Exhibit 1 to the proceedings. An agreed statement of fact and a number of joint documents were submitted as Exhibit 2. The applicant's document brief was submitted as Exhibit 3. The 2002 Income Tax Return was submitted by Pembridge as Exhibit 4.

The parties agreed that I can accept all of these documents as evidence in the proceeding and that I may choose to accept or reject the facts set out in those documents, other than the agreed statement of fact.

The Status of Marla Michaud

At the time of the accident Marla Michaud was 20 years of age and living in the lower floor of her parents' home. Her boyfriend, Don Evans, lived with her at that location to some extent. The evidence was in conflict as to whether he was "officially" living in the premises at the time of the accident but he certainly was there frequently, overnight and was engaged in a continuous relationship with Marla Michaud.

Marla and Don had lived on their own for a period of time. They had lived in various locations. They had lived independently.

Prior to the accident Marla Michaud formed the intention to return to live in the lower level of her parents home. She attributes this to financial pressures experienced as a result of her ambitions to return to school, and as a result of the debts of Don Evans.

She and Don took over a room in the basement of the Michaud residence. They did a significant amount of work to remodel the space to be suitable for their accommodation and they contributed their labour as well as some money towards the remodelling effort. They did not pay anything to the Michaud's for the use of this space in their house. They did not contribute to any of the ancillary costs for utilities and so forth. However, other than being provided with this basic shelter, the Michauds provided little to their daughter. Indirectly she received some benefits from the household as a result of being eligible for some reimbursement of health care expenses from the plan available to Marla's father, by reason of his employment. However, neither of the parents contributed to the various expenses of living encountered by Marla and her boyfriend. Marla paid for her own entertainment, her own clothes, her own food, all of her toiletries and makeup, her own entertainment and her own transportation costs. She saved money in furtherance of her plan to return to school.

As of the date of the accident she had not registered for return to school and it appears that she had become satisfied that she would not be returning to school in September due to a lack of funding. However she continued to have the hope of her return to school in January and ultimately she did return to school in January subsequent to the accident.

The Issue for Determination

In the initial documents exchanged between the parties there were two issues to be determined. The first issue had to do with whether or not Marla Michaud was principally dependent for financial support upon her parents. The second issue described in the documentation is the question of whether or not Donald Evans was her "spouse" within the meaning of the Statutory Accident Benefits Schedule.

Through the process leading up to the hearing it appears that the documentation and other evidence gathered by the parties enabled them to resolve the second issue. The only issue brought before me for determination is the dependency question.

This question arises because of the priority rules that are found in Section 268 of the *Insurance Act*. Those statutory provisions set out the priority of coverage when more than one insurer would be obliged to treat an injured person as a person entitled to Statutory Accident Benefits.

268. (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. 1993, c. 10, s. 26 (1).

[Inapplicable subsections omitted]

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,
 - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
 - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
 - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
 - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.
2. In respect of non-occupants,
 - i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
 - ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
 - iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
 - iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

Choice of insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

Same

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Same

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

Same

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

[Inapplicable subsections omitted]

Here, where Marla Michaud is the occupant of the vehicle insured by Pembridge, she has access to benefits under that policy if there is no other policy of a higher ranking to which she has recourse.

There would be a higher policy to which she has recourse if she is considered a dependant of her mother, who is the insured under the Citadel policy. If Marla Michaud is principally dependant for financial support on her mother or her mother's spouse, then the Citadel policy is higher ranking and Citadel has the obligation to deal with the SABS in this case. This approach is mandated by the definition of dependency found in the regulation that sets out the Statutory Accident Benefits:

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

In short, the question that I am asked to resolve is whether or not Marla Michaud is principally dependent for financial support on her mother or her mother's spouse at the time of the accident.

The analysis of principal dependency can be made looking at either financial dependency or dependency for care. In this case there is no evidence to support any dependency for care.

The Dependency Evidence

The question of dependency or financial support is more complicated, however. In this case financial support derives, in part, from provision of shelter by the parents.

At the time of the accident Marla Michaud was living in her parents' residence. She was living there with her boyfriend. There was conflicting evidence about whether or not she and her boyfriend were "officially" living together at the time of the accident. It is clear that there was a degree of cohabitation.

There was also conflicting evidence about how long Marla Michaud had lived with her boyfriend in the parents' home in the months preceding the accident. It is clear that she had left home to live independently some years prior to the accident. It is also clear that she stayed away from home, living with her boyfriend for an extended period of time. The parties agreed however that Marla came home to live in her parents' home and was accompanied, to some extent, by Don, prior to the accident. At the very least this return to the parental household took place three or four months prior to the accident. It may have taken place a year prior to the accident according to some of the evidence.

Marla, at the time, appeared to be a capable young woman who had been gainfully employed in various employments. Her work record indicates that she was industrious enough to find employments with reasonably good remuneration. The evidence indicated that at the time of the accident she was actually earning pay in the approximate amount of \$387.50 per week. She was regularly employed on a full time basis at several different employments at various times.

During the year of the accident she earned nearly \$9,000.00. This accident took place in August and there was a period of disability until the beginning of October. After the beginning of October Marla was able to return to work on a partial basis. Extrapolating from that information, it seems clear that Marla had the capacity to earn income steadily, of at least \$1,000.00 per month and in fact earned income at the rate of about \$1,500.00 per month immediately prior to the accident.

A statement of earnings is contained at Tab 11 of Exhibit 3 which shows the most recent employment prior to the accident. That shows \$4,254.00 in earnings for 405 hours, something better than \$10.00 per hour. During the 8 pay periods prior to the accident it appears that Marla's earnings varied between \$310.00 and \$400.00 per week.

It is also noted in documentation at Tab 10 of Exhibit 3 that Marla Michaud had some part-time income of a minor amount \$25 to \$60 per week, during the period of time that she was employed full-time at Sitel. The part-time income was at Reitmans. Accordingly, we are dealing with a young woman who had significant gainful employment and a decent work record prior to the accident.

The living arrangements for this young woman were somewhat unusual. She had been living away from home with her boyfriend. She came back to live with her parents. Part of the reason for coming back into the parental home was to enjoy the economic benefit associated with that domicile. Her parents made available to her a space within the home. It was an unfinished basement. Marla and her boyfriend constructed living quarters for themselves in that unfinished basement. Some of the materials necessary for that construction were paid for by Marla's parents but no amount was paid to either Marla or her boyfriend with respect to the labour of the effort and some of the material costs were paid for by Marla and/or her boyfriend.

Marla and her boyfriend paid no rent or board for having the use of this room.

In addition to having provided the household with the labour involved in constructing the room, Marla provided some ancillary care giving services for her siblings in the household. There was testimony about this that suggested significant hours were associated with this but I am mindful of the fact that there are no records to give precise

calculations of what might have been involved in this activity by Marla for the benefit of her family. The evidence suggested that two or three or four times a week Marla would have provided some babysitting kind of services providing care for her siblings etc. I find that it is reasonable to conclude that Marla, on average, provided ten hours a week of her services towards the household.

These services, combined with the contribution to the construction in the household, represent a significant consideration for the benefit that Marla and Don obtained by living in the basement dwelling.

In addition to all of this there was considerable evidence about Marla's expenses. She gave testimony about her personal expenses, her food costs, her entertainment, transportation, educational expenses and so forth. From the evidence I conclude that Marla paid for virtually all of her own expenses of living.

This is not to suggest that Marla had excess cash. She had some financial challenges ahead of her. There was some kind of a debt associated with a car accident that her boyfriend was involved in. The evidence was unsatisfactory as to the amount of this debt and how it was paid but there was some evidence, which suggested that money saved by Marla from her work, went towards retirement of this debt of her boyfriend. However, this was not Marla's debt. To the extent that she chose to take her income and give it to her boyfriend to retire his obligations, it was a discretionary expenditure on her part. At any time she could have chosen to keep that money for herself and divert it to her own needs or wishes.

There was some discussion about Marla's intention to become a student. In the testimony, it was clear that Marla had a long-term plan, prior to the accident, that involved returning to educational pursuits. She had a hope of returning to school in the September following the accident. She testified that she was saving money for that purpose. However, she had not yet paid any money for that nor had she gone to the extent of obtaining any firm arrangements for the education by the time the accident took place. While I don't doubt her resolve to continue with her education, confirmed by the fact she subsequently did return to school in January 2003, I do not find that her status as of the date of the accident could be regarded as that of a "student". She had not been in attendance at an educational facility for a considerable period of time. She had been involved in full-time employment over the previous months.

In her testimony Marla Michaud did indicate an intention to return to school in September. As of the date of the accident that may have continued to be her "intention" but there is no evidence of any overt steps taken towards achieving that. She had not paid for any tuition.

Analysis Of Dependency

The law with respect to dependency in these cases is reasonably clear. For Marla Michaud to be considered principally dependent for financial support upon her mother or her mother's spouse, it must be shown that her mother, or her mother's spouse, provided more than 50% of the financial support required to meet Marla's needs. The cases of *Miller v. Safeco* and *Liberty v. Federation* clearly identify the components to be taken into consideration in such circumstances. In addition to looking at the costs of meeting the person's needs, and their financial resources, it is also appropriate to look at

the persons capacity to earn income. Dependency cannot always be determined without looking at capacity. The *Liberty v. Federation* case makes this clear. At the hearing counsel argued cases that pre-date the *Liberty v. Federation* decision but I think those cases are no longer helpful on that issue.

I cannot conclude that Marla Michaud was principally dependent for financial support on her mother or her mother's spouse at the time of this accident.

The sole benefit that she derived from her parents was the accommodation of being allowed to live in the basement of the family home.

The actual value of the contribution made by the parents to the financial support of Marla is offset by her contribution to their household. The net value of the financial support given to Marla by her parents, in the form of living accommodation is offset by the services provided in exchange, is something less than \$375.00 per month.

There was testimony that Marla could have had similar accommodation in the vicinity for about \$375.00 per month. Making an allowance for the value of the contribution that Marla made to the household it appears to me that the financial worth of the net contribution of the parents to their daughter, while important, did not come close to creating a principal dependency. Marla Michaud was a young person who had the demonstrated capacity to earn more than \$350.00 per week on a regular basis. The net value of the financial support that she derived from her parents was less than 25% of what she could provide on her own.

In these circumstances I cannot conclude she was principally dependent for financial support on her parents.

I am mindful of the fact that Marla Michaud was preparing for a return to education. It may be that she was saving money to return to school. This case might be very different if she was already a student, had already commenced her educational program, and was earning income on an intermittent basis as she went through the educational process. On those facts, an Arbitrator might be persuaded to look at dependency over a time frame that includes income earning and periods of time in attendance at school with little or no income.

However, in Marla Michaud's case I think it is appropriate to look at her status from May until the date of the accident as an appropriate indication of her dependency as of the date of the accident. Her economic situation was stable during that period. Her residence status was stable during that period. I believe that that time frame most realistically reflects her state of dependency on the date of the accident.

In accordance with the terms of the Arbitration Agreement signed by the parties I am asked to find whether Marla Michaud was a dependent within the meaning ascribed to that term in the Bill 59 Statutory Accident Benefits Schedule, upon her mother and/or father, at the time of the subject accident. I answer that question in the negative.

The parties at the hearing indicated that the quantum of this claim had crystallized and if the parties are unable to agree to the amount of indemnity that ought to be paid in these circumstances by Pembridge to Citadel, I may be contacted to consider that issue as well as the question of any interest payable.

The parties have asked me to determine the costs of the Arbitration and the burden of payment of same but I am also mindful of paragraph 10 of the Arbitration Agreement which indicates the successful party shall be awarded party and party costs of the Arbitration to be fixed by me. I so order.

I therefore direct the parties to make any submissions with respect to costs to me within 30 days. The parties may do so in writing or in person. If they choose to do so in person or by telephone conference, I would ask them to give notice and arrangements can be made for convening a hearing on that issue. If the parties wish to make written submissions I would suggest that Citadel's counsel should make a written submission within 20 days and Pembridge should give it's response within 10 days thereafter.

Dated at Toronto this 25th day of May, 2006.

A handwritten signature in black ink, appearing to read "Lee Samis". The signature is written in a cursive style with a large initial "L" and "S".

Lee Samis