

**IN THE MATTER of the Insurance Act, R.S.O 1990,
c.I.8, s. 268 and Regulation 283/95 made under the Insurance Act,**

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

AND IN THE MATTER of an Arbitration:

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE

Applicant

- and -

**AMERICAN HOME ASSURANCE COMPANY
AND YORK FIRE AND CASUALTY INSURANCE COMPANY**

Respondents

AWARD

COUNSEL:

**Mr. Ryan Naimark, for the Applicant, State Farm
Mr. D'Arcy McGoey, for the Respondent, National Tilden
Mr. Jamie Pollack, for the Respondent, York Fire**

ISSUE:

Is State Farm Automobile Insurance Company (State Farm), National Tilden American International Group (National Tilden), or York Fire and Casualty Insurance Company (York Fire) responsible for paying statutory accident benefits to or on behalf of Ms. Khadija Mohiuddin, as a result of injuries suffered in a motor vehicle accident which occurred on August 29, 1999?

ORDER:

National Tilden is responsible to pay statutory accident benefits to or on behalf of Ms. Mohiuddin.

HEARING:

The hearing of this matter was held in the City of Toronto on Saturday, October 19, 2002.

THE ISSUE:

This arbitration arises out of a priority dispute regarding the payment of statutory accident benefits to Ms. Khadija Mohiuddin who was injured in a motor vehicle accident on August 29, 1999. As Ms. Mohiuddin was not a named insured or a specified listed driver under a policy of automobile insurance, one must look to section 268 (2) of the Insurance Act in order to determine what insurer is liable to pay accident benefits. That section states:

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 at which the occupant is an insured,
 - (ii) if recovery is unavailable under sub paragraph (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 sub paragraphs (i) or (ii), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no fault benefits arose . . .

Section 2 (1) of Bill 59, the applicable legislation, defines "insured persons" with respect to a particular motor vehicle liability policy as meaning,

the named insured, any persons specified in the policy as a driver of the insured policy, the spouse of the named insured, and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile

In this particular case there are three possible insurers who might be responsible for payment of the statutory accident benefits:

- York Fire, the insurer of Ms. Khadija Mohiuddin's son, Abdullah Mohiuddin, with whom she had been living for one month prior to the motor vehicle accident

- State Farm, the insurer of Mohammad Mohiuddin, one of her other sons, with whom she had been living for approximately three months up until approximately one month prior to the accident

- National Tilden, the insurer of the rental vehicle in which Ms. Mohiuddin was a passenger at the time of the motor vehicle accident.

The central issue in this dispute is whether Ms. Mohiuddin , at the time of the accident was a "dependent" of either of her sons at the time of the accident. If so, either York Fire or State Farm is responsible for paying accident benefits. If not, National Tilden, as the insurer of the motor

vehicle in which Ms. Mohiuddin was a passenger at the time of the accident would be responsible to pay the accident benefits.

The question of dependency for the purposes of Bill 59 is dealt with by section 2 (6) of the Act states:

for the purposes of this Regulation, a person is a dependent of another person if the person is principally dependent for financial support or care on the other person's spouse or same sex partner.

THE FACTS:

It is agreed by the parties that at the time of the accident Ms. Mohiuddin was not dependent for "care" upon any other party. The only question therefore is whether she was dependent upon anyone for financial support. Accordingly, it is necessary to briefly review Ms. Mohiuddin's financial situation immediately prior to the accident.

At the time of the accident, Ms. Mohiuddin was 61 years of age. She was a licensed medical physician in India where she had practised until 1980 when she moved to Saudi Arabia with her husband, Mr. Mohammad Ahmed Mohiuddin. Ms. Mohiuddin had five children - Abdullah Mohammad, an electronics engineer living in Ottawa, Mohammed Ahmed Mohiuddin, a civil engineer living in Toronto, Fatima Ansari, a housewife living in Toronto, Hussein Mohiuddin, a civil engineer living in Saudi Arabia, and Mahseena Sehra, a housewife living in Saudi Arabia.

Mr. and Mrs. Mohiuddin lived in Saudi Arabia where Mr. Mohiuddin was employed as a civil engineer earning approximately \$75, 000 to \$80,000 per year until February 1998 when Mr. Mohiuddin retired. In 1995 Mr. and Ms. Mohiuddin began the immigration process to live in Canada. Between 1995 and 1998 Ms. Mohiuddin and her husband visited Canada and while there stayed with their daughter, Fatima. In April 1998 Mr. and Ms. Mohiuddin moved to Canada. They stayed for the first three months with Fatima and one and a half months each with their sons Abdullah and Mohammad respectively. In October 1998 Ms. Mohiuddin and her husband travelled to Saudi Arabia, Pakistan and India where they stayed until April 1, 1999 with other children and their own small residence in India.

On April 1, 1999 Ms. Mohiuddin returned to Canada and lived with Mohammad Mohiuddin (State Farm's insured) for three months. They then lived with their daughter Fatima for one month in July 1999 and on August 1 1999 lived with Abdullah (York Fire's insured) for approximately one month until the accident. At the time of the accident they were driving to Toronto to stay with their daughter Fatima where they intended to stay until September 15, 1999 when they would fly to Saudi Arabia. They had already purchased the airline tickets for the flight. It was the uncontested evidence of Mr. and Mrs. Mohiuddin and their children that Mr. and Mrs. Mohiuddin intended to repeat the pattern of residing in Canada for six months and travelling to Saudi Arabia, Pakistan and India for the remaining six months of the year. While in Canada they intended to live with each of their children for roughly the same periods of time.

THE TEST FOR DEPENDENCY:

The Court of Appeal in Miller vs. Safeco (1986) 13 C.L.I. 31, upheld the decision of Mr. Justice O' Brien where he held that the legislative intent, the amount and duration of the financial dependency, the financial need of the dependent and the ability of the claimant to be self supporting should be considered when deciding the issue of financial dependency. While these criteria were originally applied in a previous accident benefit regime, the Court of Appeal in Liberty Mutual Insurance Company vs. Federation Company of Canada (unreported decision dated April 10 2000) held that there is nothing in the language in the Bill 59 Schedule definition of dependency which would dictate a different approach than that taken in Miller and Safeco. In light of this it is helpful to apply the various criteria as set out in Miller vs. Safeco to the facts of this case.

The Duration of the Dependency:

A considerable period of time was spend by the parties at the hearing dealing with the question of what time frame prior to the accident should be considered when examining the question of dependency. The Courts and numerous arbitrators have held that when considering this question, one ought not to simply look at the situation at the actual moment of the accident, but rather examine a period of time that properly reflects the person's true financial position at the time of the accident. There are numerous cases that deal with this issue, however each is dependent upon its' particular fact situation and accordingly I do not propose to review the case law in this area at this point in time. Rather, I propose to review the fact situation of this particular case.

As already noted, Mr. and Ms. Mohiuddin had immigrated to Canada in or about April of 1998. From that time onward they followed a plan of spending roughly six months in Canada and six months in India, Pakistan, and Saudi Arabia. While in Canada they did or planned to spend roughly an equal amount of time with their three children. Since arriving in Canada in April of 1998, they had stayed with Fatima for roughly three months, and then with Mohammad and Abdullah for 1.5 months each before going to Saudi Arabia, Pakistan and India where they stayed with their other children and at their own home from October 6 to March 31 1999. From April 1 to June 30 1999 they stayed with Mohammad, in July with Fatima and in August until the time of the accident with Abdul. At the time of the accident they were on their way to stay with Fatima for a further few weeks until their flight to Saudi Arabia.

During their stays at each of their children's homes, they would live rent free and for the most part their living expenses in the way of food and minor items would be paid by the child at whose residence they were staying. The exception to this was Fatima's when Abdul and Mohammad would pay for some of their food while they stayed there. While Mr. and Ms. Mohiuddin might buy some very limited food and other items while in Canada, this was very much the exception and for the most part it was paid by the two sons.

Counsel for National Tilden submitted that the appropriate time frame would be one month or five months prior to the accident. The one month time frame has some initial appeal as it is during this time frame while living with Abdul, that the accident occurred. While it is true that Ms. Mohiuddin had been living with Abdul for the one month prior to the accident and having

her food paid for by him, to look at this time frame alone would ignore the larger issues involving Ms. Mohiuddin's true financial situation. While she spent the last month prior to the accident with him, this was only part of the larger plan or arrangement which both Mr. and Ms. Mohiuddin were involved in and had planned to continue with in the future.

To limit the time frame to five months would also be too restrictive in my view. Part of the appeal for that time frame is that she was in Canada throughout. She had lived with Mohammad for three months, Fatima one month, and Abdul for one month. In my view, this approach suffers from the same shortcoming as the one month approach in that it fails to adequately reflect Ms. Mohiuddin's true situation. It ignores the fact that Ms. Mohiuddin had lived and continued to live roughly six months in Canada and six months in Saudi Arabia, Pakistan and India. In my view, the most appropriate time frame to be examined in this circumstance is the roughly one year prior to the accident. In the eleven months prior to the accident Ms. Mohiuddin spent six months in Saudi Arabia, Pakistan and India. Three months with Mohammad, one month with Abdul and one month with Fatima. While I noted that Ms. Mohiuddin had not spent an equal amount of time in the planned cycle with each child, it was roughly as planned. It is arguable that the time frame should be eleven months or even longer to include the time spent with Mohammad and Abdul in July to October of 1998, however the differences would have no material affect on the outcome.

Counsel for National Tilden argued that it was important to note that Ms. Mohiuddin, at the time of the accident, was a resident of Canada and only visiting India, Pakistan and Saudi Arabia for six months of the year. As such her situation should be viewed as living in Canada with visits

elsewhere. While this may be so, it does not, in my view, change the situation. Ms. Mohiuddin was involved in roughly one-year cycles of travel, and they would stay with different offspring at various times of the year.

The Financial Need of the Claimant and her Ability to be Self-Supporting:

As the financial need of the claimant and her ability to be self-supporting are somewhat interrelated I will discuss these matters at the same time.

In order to properly examine these criteria, it is important to have a thorough understanding of the financial situation of Mr. and Ms. Mohiuddin at the time of the accident. As previously mentioned Ms. Mohiuddin was a licensed medical doctor who gave up her practise in 1980 when she moved to Saudi Arabia with her husband. From that time until 1998 she lived with her husband who earned approximately \$75,000 to \$80,000 a year as a civil engineer in Saudi Arabia. When they moved to Canada in 1998 Mr. and Ms. Mohiuddin had the following assets:

- \$155,00 by way of a lump sum pension from the Saudi Arabia Oil Company
- traveller's cheques in the amount of roughly \$38,000
- roughly \$80,000 in cash
- a one bedroom in Hyderabad in India worth roughly \$3,300
- a very small Government of India pension worth \$200 to \$500 rupees per month.

After immigrating to Canada in 1998 Mr. and Mrs. Mohiuddin gave cash gifts to a number of their children including \$20,000 to Abdullah, \$30,000 to Mohammad, \$30,000 to Fatima, a house and some cash worth a combined total of roughly \$30,000 to their son Hussein. These gifts were in essence, a dispersal a part of Mr. and Ms. Mohiuddin's estate and could be considered part of their children's inheritance. Mr and Ms. Mohiuddin also decided to give their other daughter \$30,00 from their assets, but had not done so prior to the accident. The \$30,000 was subsequently transferred, in 2001, to the remaining daughter. Counsel for National Tilden suggested that since Mr. and Ms. Mohiuddin at the time of the accident had felt obligated to transfer the money to their remaining daughter I should not consider that amount when determining their financial worth at the time of the accident. I do not agree with counsel in this regard. While I do not think that a lot rests on it in the final analysis, I am of the view that since the money was still in the hands of Mr. and Ms. Mohiuddin at the time of the accident and they had no legal obligation to transfer it, it should be considered their asset at the time of the motor vehicle accident.

At the time of the accident Mr. and Ms. Mohiuddin had shifted their assets somewhat and they can be summarised as follows:

- \$92,000 of shares in the Islam Co-operative Housing Corporation Ltd.
- roughly \$49,000 cash in a TD daily account
- roughly \$5,815 cash in a Royal Bank account
- roughly \$2, 751 in a CIBC Bank account
- roughly \$400 in an Indian Bank account
- a property in India worth roughly \$3,333

It is worth noting that the shares in the Islam Co-operative Housing Corporation Ltd. apparently provided a six (6) percent dividend or roughly \$5,520 per year which could be taken out or plowed back into the Corporation. The shares could be redeemed for cash at any time.

In summary, Mr. and Ms. Mohiuddin had disposable assets of roughly \$153,000 at the time of the accident.

Financial Need and Support

The exact financial need and support of Ms. Mohiuddin is difficult to calculate with any certainty. Ms. Mohiuddin's evidence was that she relied totally upon her husband for financial support. By this I take her to mean that when she needed money for something Mr. Mohiuddin would generally provide it.

Having said that, it was agreed by the parties that while staying with their sons, the sons would provide the housing, groceries and other small expenditures without charge. The daughter was not expected to pay for the groceries and it was the evidence of the parties that when Mr. and Ms. Mohiuddin stayed with Fatima the two sons paid for some of the food. Other expenses such as travelling costs, gas etc. were borne by Mr. and Ms. Mohiuddin. These arrangements were made in accordance with their cultural beliefs rather than any immediate financial need.

Mr. Bruce Webster, a partner at Price Waterhouse Coopers testified at the hearing on behalf of National Tilden. He attempted to shed some light on the financial status of Ms. Mohiuddin at the time of the accident as well as her expenses. I have already discussed her assets as of the time of the accident. Mr. Webster attempted to estimate her expenses in the one and five months prior to the accident. He estimated her expenses at \$388.00 per month, allocating \$288.00 to room and board and \$100.00 for other miscellaneous expenses. Mr. Webster based these calculations of expenses on the evidence given by Mohammad Mohiuddin during the months of April, May and June 1999. He basically took the costs of running Mohammad Mohiuddin's home per month including mortgage payments, utilities, food, clothing, car expenses etc. and divided by nine, being the number of people in the home in order to get Ms. Mohiuddin's share of the expenses. He then took this same expense per month and applied it to the one-month that Ms. Mohiuddin stayed at Abdullah's, despite the fact that Abdullah lived in Ottawa in a totally different situation.

Mr. Webster allocated \$100.00 a month to Ms. Mohiuddin's income, being roughly one-twelfth of her stated income in her 1999 income tax return. It would appear that this was the income from the Islam Co-operative Housing Corporation. While it was not clear, it may be that the rest of the annual dividend from that corporation was re-invested in the corporation. The above amount does not appear to cover whatever interest Ms. Mohiuddin may have received from her bank accounts.

Mr. Webster was asked by National Tilden to do a second report wherein he purported to determine Ms. Mohiuddin's dependency using Statistics Canada information to determine the value of room and board that she received from her sons and also a calculation of her ability to live independently using her net worth at the time of the accident, being \$152,156. Based on the Statistics Canada analysis, Mr. Webster concluded that Ms. Mohiuddin's room/board and other expenses amounted to roughly \$530.00 a month or \$2,650.00 for the five months prior to the accident. Her income was again set at \$100.00 per month.

I appreciate that Mr. Webster was trying to deal with somewhat incomplete information when attempting to determine Ms. Mohiuddin's expenses, although I note that he had access to some of Abdullah's expenses which would have been useful but he apparently did not use them. Accordingly, he looked at the Statistics Canada figures for assistance. While I appreciate Mr. Webster's difficulties, I do not find the Statistics Canada figures to be particularly helpful. It was clear from the rigorous cross-examination of Mr. Webster that the known expenses of the two sons were considerably different than those attributed by the Statistics Canada approach. While I am prepared to say that the use of Statistics Canada figures may be of assistance in some cases, I do not find them to be so in this case.

"Principally Dependent for Financial Support"

The Court of Appeal in Liberty Mutual Insurance Company vs. Federation Insurance Company of Canada [2000] O.J.No. 1234, upheld Arbitrator Samis' approach to dependency wherein he stated:

"Jonathan can only be considered principally dependent for financial support on someone else if the cost of meeting Jonathan's needs is more than twice Jonathan's resources".

This has given rise to what is sometimes referred to as the "fifty-one percent rule".

It now remains to apply this rule to this particular fact situation. This is somewhat difficult given the rather vague information that we have concerning Ms. Mohiuddin's expenses. Using Mr. Webster's calculations, which I do not accept as particularly accurate, he is of the view that based on the limited expense information of Mohammad, that if one takes the one month before the accident, Abdullah is responsible for seventy-four percent of the financial dependency and Ms. Mohiuddin twenty-six percent. If one looks at the five months prior to the accident Ms. Mohiuddin is responsible for twenty-six percent, Mohammad forty-eight percent, Fatima eight percent and Abdullah nineteen percent. If one reallocates some of the expensed previously attributed by Mr. Webster to Fatima to the two sons, the figures change slightly but not significantly.

The difficulty that I have with these figures is that they do not use what I consider to be appropriate time frames. They use a one or five month time frame, whereas I have found a longer time frame, appropriately twelve months. Unfortunately Mr. Webster did not calculate these figures. What seems clear however is that if one takes into account the time spent away from Canada, in other words, the remaining six months of the year, the share attributable to Abdullah and Mohammad goes down significantly. Clearly Mohammad's overall share over eleven or twelve months would drop to less than half the forty-eight percent that it was over five months. Similarly Abdullah and Fatima's shares would drop dramatically. While we do not know the exact expenses that Ms. Mohiuddin incurred while in Pakistan, India and Saudi Arabia, and even if we assume that the children support them in Pakistan and Saudi Arabia, and they support themselves while in India where they have a property and no children, it is clear that Ms. Mohiuddin's share would at least remain static and probably go up. Accordingly, even using Mr. Webster's figures which tend, in my view, to underestimate Ms. Mohiuddin's contribution and overestimate Abdullah's and Mohammad's, Ms. Mohiuddin would over the eleven or twelve months prior to the accident be the largest single contributor to her financial needs. In essence, she was dependent upon herself.

I have not done the same analysis for the assessment of dependency done by Mr. Webster using the Statistics Canada approach as I am of the view, for reasons previously stated, that that approach is fatally flawed. However, it would be subject to the longer frame in any event.

Based on the above, it is relatively clear that Ms. Mohiuddin's needs exceeded twice her resources at least based on Mr. Webster's calculations. That is not, however, the end of the matter. Simply because her needs are more than twice her resources does not make her principally depended upon someone else. After determining that Ms. Mohiuddin does not achieve the fifty-one percent level herself, one must then determine who is her principal financial provider. In this particular case based on the appropriate time frame even using Mr. Webster's figures, the principal financial supporter is Ms. Mohiuddin herself. Accordingly I find that Ms. Mohiuddin is not principally financially dependent upon any other party.

Ability to be Self Supporting

A considerable period of time was spent during the hearing dealing with the issue of whether or not Ms. Mohiuddin could be self supporting and if so what the implications of this were.

The parties were not in complete agreement as to what effect, if any, this criteria should have in this matter. Counsel for National Tilden argued that I should not take into account the savings and other assets available to Ms. Mohiuddin when considering the question of financial dependency. He argues that it is not incumbent upon a person to dispose of an asset before a person could be considered primarily dependent upon another. In support of this proposition he relied upon Martins vs. Jabralter General Insurance Company [1984] I.L.R.I. 779, Pagliarella vs. DiBiase Brothers Incorporated (1989) 71 O.R. (2nd) 193, Raffoul vs. State Farm Mutual

Automobile Insurance Company (April 25, 1996) F.S.C.O File No. P-00476 and Dominion of Canada vs. Zurich Insurance Company (unreported decision of Arbitrator B. Robinson, dated September 27 1999).

I am not convinced that the cases cited stand for the proposition that in no situation should a parties ability to pay be considered a relevant consideration. The Court of Appeal in Miller vs. Safeco held that it was a relevant consideration. Various courts and arbitrators since that decision have held that it is a consideration. In Liberty Mutual Insurance Company vs. Federation Insurance Company (unreported decision of Samis dated May 7 1999) the Arbitrator stated:

Dependency implies something more than receipt of financial benefit. It requires some kind of need on the part of the person alleged to be a dependent. A very wealthy person might receive food, shelter, and other financial benefits from the family, but this would not support a conclusion that a person is principally dependent upon the family

See also: State Farm Automobile Insurance Company vs. Non-Marine Underwriters, Lloyd's of London [1997] O.J. No. 3402

Accordingly, I am of the view that the party's ability to pay is one of the relevant considerations to be examined. The weight or emphasis to be given to this particular criteria may well vary from case to case depending on the fact situation. In this particular case Ms. Mohiuddin's ability

to pay is a significant factor. She and her husband had roughly \$153,000 of fairly liquid assets at their disposal at the time of the accident. Given the fairly modest expenditures this would have provided them with the means to remain financially independent or at least not financially dependent within the meaning of the Statutory Accident Benefit Schedule for a considerable period of time.

Mr. Webster did an analysis whereby he determined that if one took their net worth of \$152,156 and purchased an annuity this would enable Mr. and Ms. Mohiuddin to receive \$10,200 per year for the rest of their lives. He further testified that the Statistics Canada figures showed that the average expenditure for a household for a couple aged 65 and over is \$22,606. He therefore he suggested that the couple could not live independently in the future, using their net worth at the time of the accident.

I have some difficulty with this analysis. As noted earlier, the Statistics Canada average is not particularly helpful in this case. It is clear from the evidence that many expenses that the Statistics Canada average included were not incurred by Mr. and Ms. Mohiuddin. In addition, it is clear that while Ms. Mohiuddin spent roughly six months in Canada, she spent the remaining six months of the year in Pakistan, India and Saudi Arabia. There was no evidence led as to the cost of living in these countries but there was no reason to believe that it would be more than in Canada and some reason to believe that it might well be less.

More important is Mr. Webster's finding that Ms. Mohiuddin could not have lived independently if the annuity was generating \$10,000 and her expenses were \$22,606. This is not the test. If you accept Mr. Webster's numbers at their strongest, which I do not, then Ms. Mohiuddin may not meet the fifty-one percent test in that her needs may have been more than twice her resources. What is clear, however, is that the \$10,200 generated from an annuity would make her by far the greatest contributor to her own financial situation and therefore not dependent on any other party as required by the Statutory Accident Benefit Schedule.

When one examines all the circumstances of this case one is drawn to the conclusion that Ms. Mohiuddin was truly not financially dependent upon any other person within the meaning of the SABS. While she may, for a brief period of time receive significant benefit from her children, this was for a very limited duration and was not of such a nature as to constitute true dependency but at most, temporary assistance. When taken as a whole, Ms. Mohiuddin's children may have been the largest financial supporters of her but this is not sufficient. The intent of the legislature, in my view, was to ensure that when an injured party is principally financially dependent upon an insured person then that person's insurance company will pay the accident benefits. It is not sufficient that the injured party be financially dependent upon a number of insured persons and then the insurer of the person who provides the most support pay the accident benefits. If as in this case, the injured party is principally dependent upon themselves, they are not a dependent within the meaning of SABS.

Costs

In the event that the parties can not agree upon costs, I may be spoken to.

M. Guy Jones

Arbitrator

Dated this _____ day of November, 2002