

**IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, SECTION 268 and REGULATION 283/95**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTACT INSURANCE COMPANY

Applicant

- and -

AVIVA GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Sandy Williams and Shima Heidari for the Applicant

Alexander Hartwig for the Respondent

BACKGROUND:

1. Kelly Parker was injured when the car in which she was an occupant was involved in an accident on March 20, 2018. The car belonged to her boyfriend's father and was insured with Intact Insurance Company ("Intact") at the time. Ms. Parker was not a named insured on any auto policy and did not have a driver's licence. She submitted an Application for payment of benefits under the *SABS* to Intact.

2. Ms. Parker was almost thirty-years old at the time of the accident. She has been diagnosed with Asperger Autism and has social and behavioural challenges. Her mother, Kate Stone, was a named insured on a policy issued by Aviva General Insurance Company ("Aviva"). Ms. Parker moved out of her mother's house to live on her own approximately five years before the accident. She receives financial support from ODSP, and works part-time as a school crossing guard.

3. Intact accepts that the Claimant was not financially dependent on her mother. It claims, however, that she was principally dependent on her for care at the time of the accident, and that Ms. Parker would therefore be an "insured" under her mother's policy, and that Aviva would be in higher priority to pay her claim.

4. Aviva disputes that the Claimant was principally dependent for care on her mother at the time. It notes that she was living on her own, and that she received support from a variety of sources. Alternatively, Aviva claims that if it is found to be in higher priority to pay the claim, it should not be required to reimburse Intact for any amounts that were paid beyond the \$3,500 monetary limit for claims adjusted within the Minor Injury Guidelines ("MIG"). Intact removed Ms. Parker's claim from the MIG in January 2019, and had paid a total of \$4,585.50 in benefits at the time of the hearing.

THE EVIDENCE:

5. The parties filed a long and detailed Agreed Statement of Facts, derived mostly from the evidence provided by Ms. Parker (hereafter referred to as "Kelly") and her mother at Examinations Under Oath. Kelly also provided a signed statement to Intact early in the process. The parties filed

extensive written submissions outlining their positions, and submitted many cases related to the issues raised.

6. The question I must determine is whether the care that Ms. Parker received from her mother was significant enough to find that she was “principally dependent for care” upon Ms. Stone at the time of the accident.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act

268. (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.

Statutory Accident Benefits Schedule

3. (1) *In this Regulation,*

“insured person” means, in respect of a particular motor vehicle liability policy,

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

of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile,

(7) For the purposes of this Regulation,

(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

18. (1) The sum of the medical and rehabilitation benefits payable in respect of an insured person who sustains an impairment that is predominantly a minor injury shall not exceed \$3,500 for any one accident, less the sum of all amounts paid in respect of the insured person in accordance with the Minor Injury Guideline

(2) Despite subsection (1), the \$3,500 limit in that subsection does not apply to an insured person if his or her health practitioner determines and provides compelling evidence that the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the \$3,500 limit or is limited to the goods and services authorized under the Minor Injury Guideline.

RELEVANT FACTS:

7. Kate Stone, the Aviva insured, was examined under oath on two separate occasions. She is the Claimant's mother, and provided much of the relevant information. She explained that Kelly had been living with her until she moved to her own basement apartment when she was twenty-four years old, approximately five years before the accident. She stated that Kelly has a dual diagnosis of Asperger's Autism, with Anger Management issues. She described her as "very high functioning", but stated that her IQ is in the low 70s, which is considered to be in the low range.

8. Ms. Stone stated that Kelly also experiences learning challenges and social behavioural issues. She described her daughter as being a "child in an adult's body" and stated that she had been assessed at CAMH as having the mental age of a twelve-year old.

9. Kelly was employed on a part-time basis as a Crossing Guard in a school zone at the time of the accident. She worked on weekdays, for approximately two to three hours each day, from September to June. Her mother advised that she is employed through the Toronto Police Services, as part of a program to employ people with special needs. She explained that Kelly needs and likes routine, and that she excelled at her job. Kelly testified at her EUO that she really enjoys her work, but that when she was assigned to a busy intersection at one point a few years ago, she became frustrated and angry. She explained that when she feels that way she will “break down and cry”.

10. Ms. Stone testified that Kelly is very personable “one-on-one”, but that she has difficulties in group settings, which she finds overwhelming. She stated that she exhibits “explosive behaviour” if she feels overwhelmed or is not comfortable in a situation. She is able to take the bus to travel to work, but is not comfortable among crowds, so will only board a bus that is not crowded. She does not travel by subway.

11. Ms. Stone explained that Kelly needs support in various aspects of her life, including maintaining her apartment, eating well, managing her finances and maintaining personal hygiene. She advised that she has arranged for a Care Worker to attend Kelly’s apartment on a weekly basis to assist her with “life skills” such as planning and cooking simple meals, washing dishes, general cleaning and organising. The worker will also discuss the obstacles that Kelly may have faced during the week with her, and may take her out on occasional outings.

12. Ms. Stone advised that she generally visits Kelly at her apartment every other Thursday. She explained that the apartment is usually “a disaster”, as Kelly has difficulty throwing things out or letting things go. She will usually help her to sort laundry, go through the food in her fridge and sort through other types of garbage that has accumulated. She will remind her to brush her teeth, take a shower and make sure she has clean clothes. Kelly takes medication to manage her mood and symptoms, and her mother will also frequently need to cue her to take her pills.

13. Ms. Stone explained that Kelly has also received support from a Behavioural Specialist through Community Living Toronto, since she was fourteen years old. She recalled that this support worker visited their home once or twice each week during Kelly’s teenage years, when

she was experiencing significant social and mental challenges. She stated that as Kelly has learnt to function better over the last few years, their level of contact has diminished. She advised that they had decreased their contact at the time of the accident to a phone call once every week or two.

14. Kelly has a boyfriend named Jeff, who she has been involved with since approximately a year and a half before the accident. Ms. Stone described him as another “go to person” for Kelly, and explained that his family is also supportive and occasionally invites Kelly over for dinner and to their cottage in the summer. Jeff regularly drives Kelly to the supermarket so that she can do her grocery shopping.

15. Ms. Stone testified that Kelly “does not have a good concept of money”, and explained that she essentially manages her finances. She stated that she has set up two bank accounts in Kelly’s name, that she has the authority to manage. Ms. Stone has arranged for both the ODSP funds that Kelly receives and her employment earnings to be deposited into one account. She will then transfer \$20 from that account into Kelly’s second account on Monday, and another \$20 on Friday, essentially providing Kelly with an “allowance” or spending money that she will use to buy coffee or snacks. Ms. Stone stated that she has provided Kelly with a credit card to use when she shops for groceries, and that she pays that bill.

16. Ms. Stone explained that Kelly’s earnings and social assistance payments cover most of her living expenses, but that she usually “tops her up” with a couple of thousand dollars each year to ensure that Kelly does not go into debt. She will also write the monthly rent cheques for Kelly’s apartment and pay other bills on her behalf. She stated that she will occasionally involve Kelly in these tasks, but that she thought it was unlikely that Kelly would be capable of doing that on her own.

17. The evidence established that Ms. Stone provides a significant amount of emotional support to her daughter. She explained that Kelly calls her daily, sometimes “many times a day”. Ms. Stone stated that she is the one who assists Kelly with her daily challenges, and “talks her down” when she is upset about something. She will also either make decisions on her behalf, or provide support and assist her in making her own decisions.

18. Ms. Stone stated that over the last few years, there has always been a care worker to provide her with “backup” and assist with managing Kelly’s needs. She explained that there is a high turnover of care workers, and that she needs to spend a lot of time with Kelly to ease her into any changes to her routine, such as a new person involved in her care, or new programs that she will attend. Ms. Stone also explained that she will spend a lot of time with the care workers themselves, especially if they are new, preparing them in advance before they meet Kelly. She will typically stay involved once the care is being provided. She stated that Kelly may have explosive outbursts with someone who is unfamiliar to her, or “turn into a bully” , and that she must “train” the care workers to ensure that they understand her needs and reactions.

19. Ms. Stone acknowledged that Kelly spends time with her boyfriend Jeff and his family. She stated, however, that she has always been “Kelly’s primary person”, and estimated that she speaks with Kelly a few times each day, for a total of about thirty minutes. If she goes out of town on vacation, she explained that one of Kelly’s two sisters will usually step in as a primary contact, but that she will often still maintain contact with her.

20. Ms. Stone testified that Kelly would be able to react appropriately in the event of an emergency such as a fire, but stated that she has difficulty discerning small issues or problems from full-scale emergencies. She stated that Kelly will make frequent calls to 911 for assistance, or attend at the hospital every month or two, when she becomes overwhelmed.

21. Ms. Stone advised that Kelly will occasionally initiate her own social contacts, that she may not be aware of. She worries about this, because she feels that Kelly is vulnerable to “predators”. She testified about an incident in the past involving a TTC bus driver who began flirting with Kelly and would put “put his bus out of service” and drive her around. This apparently ultimately resulted in the police becoming involved and the bus driver losing his job.

22. Ms. Stone agreed with the suggestion put to her that Kelly is able to function at the high level that she does because of the supervision and guidance that she provides. When asked whether

she felt that Kelly would be able to work or engage in the community in the capacity that she does if it were not for her guidance and support, she stated that she would not.

23. Kelly Parker was also examined under oath by counsel. Her evidence did not differ significantly from that of her mother, although she minimised her need for assistance in certain areas. She claimed, for example, that she required help with laundry, cooking and housekeeping chores because she was “lazy”. She agreed that she called her mother a few times each day, in order to ask her a question or seek her guidance on something. She explained that she would discuss any decisions that she had to make with her mother “to make sure it was the right decision”. She stated that she did not make any big decisions without discussing them with her mother first, including whether or not she should socialise with someone new that her mother may have not met.

24. When asked whether she would be able to live on her own without her mother’s guidance, Kelly hesitated, but responded that she “probably” could do so. She acknowledged, however, that she would not be able to be as free and independent as she was, without her mother’s support and guidance. Kelly explained that overall, her mother’s presence provided her with a sense of security, and that she felt that she could live her life because she knew that her mother was always there for her to rely on.

RELEVANT CASE LAW:

25. The parties cited several arbitral awards and appeal decisions that address the issue of dependency for care. This issue comes up far less frequently than the question of whether a claimant is principally dependent financially on someone else, and there are consequently far fewer decisions addressing the issue. As always, the focus of the analysis will depend on the facts of each case, which can vary widely. The following general principles have emerged from the cases cited below:

- dependency for care cannot be addressed with the “same mathematical precision” as questions of financial dependency (Arbitrator Jones in *Lloyds’s of London Insurance v. Wawanesa Mutual Insurance Co.* (2004) CarswellOnt 11268, upheld on appeal by Justice Rady at [2004] O.J. No. 3661)

- a dependency for care analysis requires a consideration of both quantitative and qualitative factors, and should take into account the social support, emotional support and companionship provided, as well as the level of protection provided and the provision of services such as feeding, cleaning and transportation. (Arbitrator Densem in *Intact Insurance Company v Ontario (MVACF)* (2013) CarswellOnt 19350)
- The oft-cited factors set out in the *Miller v Safeco Insurance of America* decision (1985) 50 O.R. (2d) 797 (Ont C.A.) such as the amount and duration of support provided, the claimant's need for support and their ability to support themselves should be adapted to the "dependency for care" context (Arbitrator Jones in *Oxford Mutual Insurance Co. v Co-operators General* (2004) CarswellOnt 11272, overturned by Ont. S.C.J at (2005) CarswellOnt 3709, decision restored by Court of Appeal at [2006] CarswellOnt 4518)
- when considering the meaning of "principal dependence", courts have defined the word "principally" to mean "chiefly", "mainly" and "for the most part" (*Oxford Mutual Insurance v. Co-operators General Insurance – Ont. C.A., supra*)

26. In *Echelon v State Farm (Chikosa)* (2011) Carswell Ont 13197, I stated that the focus of a dependency for care analysis should be two-fold - how a claimant's physical and social needs are met, and the level of social and emotional support he or she receives from the person or facility providing care. That case involved an analysis of the relationship between a mother and her developmentally delayed son. In finding that the claimant was principally dependent on his mother for care, I noted that she cooked meals for him, oversaw his finances, ensured that he took his medication, and also provided supervision and a "level of oversight" that was critical, given the challenges he experienced as a result of his deficits.

27. In reaching my conclusion in that case, I relied on Justice Rady's comments in *Lloyds v Wawanesa, supra*, that the "sense of security" provided by the person providing care is a significant factor to consider. While the claimant in *Echelon v State Farm* lived with his mother, and Kelly does not, I find that there are many factual overlaps in the two cases, and the factors analysed are useful to my determination here. I will comment more on this case below.

28. While both parties filed many cases with their materials, many involved individuals who were living in care facilities and receiving care and support from staff in those facilities. I find that the more relevant decisions are those in which family members provided a level of support that allowed the person in question to live independently. Along with the *Echelon v State Farm* decision, I find Arbitrator Densem's decision in *Aviva v State Farm* (2013) CarswellOnt 19348) to be helpful. That case involved a claimant with serious medical challenges and a history of drug and alcohol abuse who had moved into his sister and brother-in-law's home shortly before the accident. Arbitrator Densem found that the supervision and companionship that his family provided created a sense of security that enabled him to escape the downward spiral that his life had taken before he moved into their home, and determined that he was principally dependent on them for care.

PARTIES' ARGUMENTS:

29. Counsel for both parties filed extensive written submissions in support of their positions, which were detailed, well-reasoned and thoroughly addressed the evidence and case law in the area. In the interest of efficiency, I will only set out the main thrust of their arguments.

Intact's submissions

30. Counsel for Intact noted that the Claimant has a low IQ, and has been assessed to have the mental status of a twelve-year old. He submitted that she clearly needs support and assistance to function in the community, despite the fact that she lived on her own and was able to work on a part-time basis. He contended that she was only able to do these things because she received regular assistance with household chores such as cooking, cleaning and laundry from a care worker and from her mother, as well as many other forms of support.

31. Counsel noted that Ms. Stone "wears many hats" when it comes to supporting Kelly, including managing her finances, arranging all of the care that she receives from outside sources, and supporting her in making decisions through their daily contact. He submitted that she also assists Kelly with laundry and organising her apartment, and regularly cues or prompts her to maintain basic personal hygiene. She also provides emotional support to her in various ways, and

essentially ensures that all of her needs are met. He described her efforts as “consistently herculean”, and contended that they went well beyond the circumstances described in other cases in which arbitrators found that tasks or assistance provided by or for a parent were done out of love or feelings of obligation.

32. Mr. Williams argued that the fact that Kelly does not reside with her mother should not lead to the conclusion that she is not principally dependent upon her for care. He suggested that Kelly was only able to live independently because of the support she received from her mother, as well as the assistance she gets from her care workers. He contended that the care workers were trained and overseen by her mother, and in that way were an extension of her support. He argued that “but/for” the care and services provided by her mother, Kelly would not be able to live on her own. He noted that Kelly had acknowledged at her examination that the guidance that she received from her mother and her daily contact with her was what gave her the freedom to live on her own.

33. Counsel also reviewed the case law on dependency for care in detail. He highlighted my decision in *Echelon v State Farm*, cited above, and suggested that the facts of that case are sufficiently similar to those before me, and that a similar conclusion should be reached. Counsel noted my finding in that case that the mother’s presence in her son’s life provided him with “security and supervisory oversight that allows him to go out into the community, knowing that she is always available to assist, if required”, and submitted that the same principle applies here.

Aviva’s submissions

34. Counsel for Aviva highlighted the fact that the Claimant had lived on her own for five years before the accident, since the age of twenty-four. He noted that no evidence was filed, medical or otherwise, to establish her true intellectual capacity, and contended that the evidence suggests that Kelly was largely self-sufficient, notwithstanding her limitations. He submitted that her circumstances did not differ that much from other young adults who live on their own but depend on their parents for support with household chores, and call them regularly for advice or guidance.

35. Aviva acknowledged that Kelly received some support from her mother. Counsel noted, however, that the evidence indicated that she regularly interacted with and received support from other people, including a Care Worker, a Behavioural Specialist, her boyfriend and his family. She also worked a few hours each day, went on outings for recreational activities like swimming or skating, and had independent social interactions. Counsel noted that Ms. Stone testified that she only visited Kelly at her apartment once every two weeks, and contended that the majority of the support that Kelly received came from a combination of these other people, rather than from her mother.

36. Mr. Hartwig emphasized that none of the cases in which an individual was found to be principally dependant for care on someone else involved a person who lived on their own. He contended that this was the key distinguishing fact between the circumstances in this case and those in the *Echelon v State Farm* decision, and that my reasoning in that earlier decision is accordingly inapplicable here.

37. Counsel noted that the Court of Appeal confirmed in the *Oxford Mutual, supra*, case that the factors set out in *Miller v Safeco, supra* regarding when an individual is principally financial dependent on someone else should be adapted and applied to the dependency for care analysis. He submitted that the amount and duration of care that Ms. Stone provided to Kelly, as well as her ability to be self-supporting, must therefore be examined closely. He noted that Kelly had been living on her own for five years pre-accident, that Ms. Stone came to her apartment once every two weeks, and spoke to her for approximately thirty minutes most days. Counsel argued that when this evidence is considered along with the fact that Kelly was able to do her own grocery shopping, and traveled by bus to work and other places, the support provided by her mother did not rise to the level of principal dependence.

38. Finally, counsel noted that unlike in the *Aviva v State Farm, supra*, case, no medical or other evidence has been tendered to support the argument that without her mother's support, Kelly would be on a downward slide and unable to function independently. He argued that the principles expressed by Arbitrator Densem in that case accordingly do not apply, and that the other cases

filed support a finding that Kelly was not principally dependent on her mother for care at the time of the accident.

ANALYSIS & REASONS:

39. Having reviewed all of the evidence closely, I am persuaded that while she lived on her own, the Claimant was only able to do so because she received various forms of support and care. While Kelly is clearly an impressive person and is relatively high functioning, the parties agree that she has learning, social and behavioural challenges in keeping with her diagnosis of Asperger Autism. Despite the fact that she lived on her own, and had been doing so for almost five years before the accident, the evidence suggests that she relied heavily on the various types of support that she received from a small circle of people in order to do so.

40. Counsel for Aviva contended that Ms. Parker's circumstances were akin to those of many other young adults who move out of their parents' house but continue to rely on them for help with laundry and occasional decision making. I do not agree. Ms. Stone testified that Kelly was like a "child in an adult's body" and that she had been assessed as having the mental age of a twelve-year old. These statements were not really challenged by Aviva. It is clear that Kelly's medical diagnosis causes her dependency. It follows from that fact that she is in need of care, and is not capable of being self-sufficient in the way that many of her peers might be at that age.

41. The question to determine here is whether Kelly was principally dependent for care on her mother, the Aviva insured, at the time of the accident. The cases have defined the term "principally" in this context as meaning "chiefly", "mainly" and "for the most part" (*Oxford Mutual v Co-operators, supra*). Was Kelly mainly dependent on her mother for care? I conclude that she was. While Ms. Stone was not her sole source of support or care, it is clear that she assisted her with a variety of tasks, such as cleaning and organising her apartment and ensuring that she maintained good personal hygiene. And while Kelly was paid for her work as a crossing guard and received funds from ODSP, her mother managed her finances, and essentially arranged for her to be paid an "allowance" from her earnings. Ms. Stone also provided her with a credit card, and paid the associated charges, so that Kelly would be able to go grocery shopping on her own.

42. Aviva highlighted the fact that Kelly had weekly visits from care workers, who assisted her in maintaining her apartment and with meal planning and cooking, and that these occurred more frequently than those of her mother. While that is true, it is important to note that it was Ms. Stone who arranged for and facilitated the care workers' visits. She trained them before they started working with Kelly, and prepared Kelly for the change in routine when there was turnover and a new worker was assigned to work with her. She also oversaw things once they started to spend time together. It is clear from Ms. Stone's evidence that this took up a fair bit of her time. Given all of her efforts on this front, it is fair to say that while the care workers clearly provided support to Kelly, their assistance could be seen as an extension of the care provided by her mother.

43. Most importantly, Ms. Stone provided frequent and necessary emotional support and security to Kelly. They would speak daily, often several times a day. Kelly would call her to "check in", get her advice, and discuss various things. Ms. Stone testified that she has always been Kelly's "primary person". She helped her manage her daily challenges, and "talked her down" when she was overwhelmed or upset. Both Kelly and her mother testified that Kelly relied heavily on her mother's support and guidance, and that Ms. Stone provided her with a sense of security that allowed her to function at the level that she did.

44. The case law directs me to consider both the quantitative and qualitative factors in the relationship, in order to determine whether principal dependency for care exists. While the fact that someone provides services like cooking, cleaning and transportation must be taken into account, the provision of emotional support, companionship, and supervision must also be factored into the analysis, and are arguably more important. In *Echelon v State Farm, supra*, I found that the claimant's mother provided her son both with concrete assistance such as doing his laundry, cooking and driving him to appointments, and also managed his finances, and kept track of whether he took his medication. I then stated –

Most importantly, her presence in his life provides him with the security and supervisory oversight that allows him to go out into the community, knowing that she is always available to assist if required. ..He is reliant on his mother to the point where he should be considered to be principally dependent upon her for care.

45. Arbitrator Densem also focused on the “help, supervision and companionship” provided by the claimant’s family members in *Aviva v State Farm, supra*. He determined that this created a “sense of security” that enabled the claimant in that case to gain control over his life and maintain some level of independence with his daily life tasks. His conclusion that the claimant was principally dependent on his sister and brother-in-law for care was grounded in that finding.

46. The fact that a person on whom someone is alleged to be dependent for care provides a “sense of security” is clearly an important factor in these cases. It was specifically cited by Justice Rady in upholding Arbitrator Jones’ decision in *Lloyds v Wawanesa, supra*. As I found in *Echelon v. State Farm*, when that is present, along with emotional support and the provision of physical tasks or services, a finding of principal dependency for care is justified. I find that to be the case here. Ms. Stone provided three types of support to Kelly – she assisted her with various tasks, was her primary source of emotional support, and provided her with a sense of security that Kelly clearly relied on, and which allowed her to engage with the community.

47. Kelly clearly had (and presumably still has) a multi-layered framework of support that her mother orchestrated over the years which has allowed her to live independently and thrive. It is somewhat ironic that after all the effort that went into creating this, I am essentially being asked to tease out the various threads of support and care that Kelly receives to see whether the care provided by her mother rises to the level of “principal dependency”. In the end, I am persuaded that while Ms. Stone may not have quantitatively spent more hours with Kelly than anyone else, the variety and types of support that she devotes to her elevates her to the level of “principal caregiver”. It follows from this that Kelly was principally dependent upon her mother for care at the relevant time, and I so find.

48. As a final note, I have considered Aviva’s contention that none of the cases cited in which principal dependence for care was found involved a claimant who lived on her own. I acknowledge that in both the *Echelon v State Farm* and *Aviva v State Farm* cases cited above, the individuals in question lived with the family members from whom they received care. In my view, however, that is not a requirement and need not be a feature of the dependency relationship. As explained above, the qualitative factors that can lead to a finding of principal dependence, such as providing

emotional support and security or oversight do not necessarily require both parties to live in the same house.

49. Accordingly, for all of the reasons expressed above, I find that Kelly was principally dependent for care upon her mother, at the relevant time. She is therefore an “insured” under her mother’s policy with Aviva, and Aviva is in higher priority to pay her claims in accordance with section 268(2)1(i) of the *Act*.

REASONABLENESS OF PAYMENTS:

50. Kelly complained of neck pain and pain in her lower back after the accident. Her claim was initially adjusted within the Minor Injury Guideline (“MIG”), but was removed from the MIG in January 2019. Aviva submits that Intact is only entitled to be reimbursed for \$3,500, the monetary limit for medical / rehabilitation benefits payable for cases adjusted within the MIG. Intact has in fact paid \$4,585.50 to the Claimant for these benefits.

51. Kelly provided a signed statement in early April 2018, two weeks after the accident, in which she advised that her neck pain had improved somewhat but that her back pain persisted. She also advised that she was diagnosed with Autism, had anger management issues and took medication on a regular basis to stabilize her mood. Intact relied on this statement, as well as an OCF-23 form and two OCF-18 forms filed, in support of its decision to remove her claim from the MIG.

52. The above three forms were submitted to Intact by Physical Therapy One Clinic. The OCF-23 was submitted in March 2018, one week after the accident. Dr. Ghanesh, a chiropractor, noted on that form that the Claimant suffered from chronic migraines and Autism-Aspergers spectrum, and was being seen by a neurologist. He stated that her pre-existing conditions were a barrier to recovery. An OCF-18 form was submitted in late June 2018, in which Dr. Ghanesh noted that Kelly’s injuries were predominantly minor, but also stated that prolonged standing aggravated her pain. He also identified her work as a crossing guard as a barrier to recovery.

53. A further OCF 18 form was submitted on January 18, 2019. It contained a “check” next to the box stating that the applicant had a pre-existing medical condition that would prevent her from achieving maximal recovery if she was limited to the services authorised under the MIG. Dr. Ghanesh specified that Kelly had “Asperger-Autism spectrum disorder, took mood balancing medications and suffered from repetitive ankle strains”. He also noted that Kelly had reported a 90% recovery by the end of the summer, but that had diminished to about 30% after she returned to work in September. He commented that she was “in constant pain” and that a focus on active care would assist.

54. Intact advised Kelly by letter dated January 24, 2019 that she was being removed from the MIG, “based on your pre-existing medical history and the barrier to recovery that your employment presents”. Intact submits that it is reasonable to assume that despite the minor nature of the injuries suffered, a person in Kelly’s circumstances may require treatment beyond the MIG limits to achieve maximal medical recovery. Counsel contended that the decision to remain her claim from the MIG was made in good faith, based on all the information available at the time.

55. Aviva contends that Intact’s decision to pay benefits beyond the MIG limits was arbitrary, and amounts to either payments not covered under the *SABS*, or payments greatly in excess of what the Claimant would be entitled to “had the file been managed by a reasonable claims handler”, citing my decision in a loss transfer dispute in *Jevco Insurance Company v. Dominion of Canada* (2014) CarswellOnt 19211. Counsel noted that section 18(2) of the *SABS* requires that evidence must support that a claimant’s pre-existing condition prevents them from achieving maximal recovery from the minor injury in order to have their claim removed from the MIG. He submitted that the only treatment that Kelly sought for her injuries was physiotherapy, and that there is no basis on which to conclude that having Autism and anger management issues prevents a person from recovering from soft tissue injuries within the MIG limit.

56. Counsel also noted that Intact had neither requested medical evidence such as clinical notes and records from Kelly’s treatment providers, nor conducted any assessments pursuant to section 44 of the *SABS* before making its decision. He argues that the decision to take her claim out of the

MIG was therefore made without consideration of the evidence or the provisions in the *SABS*, and that Aviva should not bear the consequences.

57. In Reply submissions, Intact claimed that given Kelly's intellectual deficits, it was foreseeable that she may not have been able to follow her treatment providers recommendations in the same manner as an adult without her condition would. Counsel also submitted that it is likely that her treatment providers would need to spend more time with her to ensure compliance with the protocols and regime provided.

58. I find that Aviva is required to reimburse Intact for the full amount of \$4,585.50 paid out in medical/rehabilitation benefits. The documents filed suggest that Intact's initial decision to adjust Kelly's claims within the MIG was reasonable, given the injuries reported. With the benefit of further information from treatment providers ten months later, Intact decided to remove her claim from the guideline. The letter provided to Kelly set out two reasons for doing so – her pre-existing medical history and the “barrier to recovery that her employment presents”. Kelly worked as a crossing guard – a job that requires much standing – and given this fact, I find this to be a reasonable approach to take.

59. Aviva may well have taken a different approach. It may have requested further information or assessments before reaching a decision. That, however, is not the test to apply in this context. As an insurer who has been determined to be in priority over the “first insurer”, Aviva must demonstrate that the actions taken (or not taken) by the first insurer in adjusting the claim has led to payments being made that were greatly in excess of what the Claimant would be entitled to if the file had been managed by a reasonable claims handler. This standard has been also expressed as “gross mismanagement” of a claim. The evidence does not support a finding that Intact's actions can be described in this manner, and I therefore dismiss this argument.

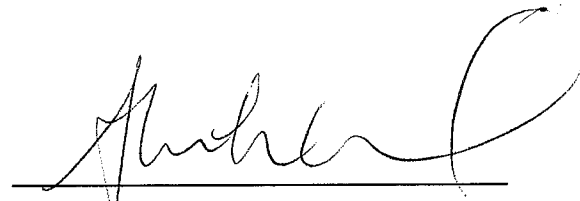
ORDER:

Aviva is the insurer with highest priority to pay Ms. Parker's claims, in accordance with section 268(2)1(i) of the *Act*. I hereby Order that Aviva shall reimburse Intact for benefits paid to her, or on her behalf, in the amount of \$4,585.50, plus applicable interest. If the file remains open, Aviva shall take over the adjusting of her claim.

COSTS:

The parties agreed in advance that the successful party would be entitled to costs in the amount of \$7,500. Given the result, I order Aviva to pay Intact this sum in legal costs, plus applicable HST. Aviva will also be responsible to pay the Arbitration fees. My account will follow under separate cover.

DATED at TORONTO, ONTARIO this 20th DAY OF NOVEMBER, 2020



Shari L. Novick , Arbitrator