CITATION: Aviva Insurance v. TD and Sonnet, 2025 ONSC 4518
COURT FILE NO.: CV-24-00723414-0000
DATE: 20250805

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER of the Insurance Act, R.S.O. 1990, c.I.8 s.268, and Ont. Reg. 283/95 thereunder;

AND IN THE MATTER of the Arbitration Act, 1991, S.O. 1991, C.17;

AND IN THE MATTER of an Arbitration

BETWEEN:	
AVIVA INSURANCE COMPANY OF CANADA Applicant (Respondent on Appeal)	*Catherine H. Zingg and Anthony Naples,* for the Applicant (Respondent on Appeal)
– and –	
TD GENERAL INSURANCE COMPANY and SONNET INSURANCE COMPANY Respondents (Applicant on Appeal)	*Kamil Podleszanski*, for the Respondent (Respondent on Appeal) TD General Insurance Company *Danielle Gauvreau* and *Nicholas Maida*, for the Respondent (Applicant on Appeal), Sonnet Insurance Company
	HEARD: July 10, 2025

REASONS FOR DECISION

JOHN CALLAGHAN J.

[1] This appeal arises from an arbitration decision under s. 268 of the *Insurance Act*, RSO 1990, c. I.8 and Ontario Regulation 283/95, *Disputes between Insurers*, between the Respondents, Aviva Insurance Company ("Aviva") and TD General Insurance Company ("TD"), and the Appellant, Sonnet Insurance Company ("Sonnet'). The appeal is brought pursuant to s. 45 of the *Arbitration Act, S.O. 1991*, c. 17.

Overview

[2] Twenty-five-year-old Tony Sarkes (“Tony”) suffered a severe traumatic brain injury and multiple orthopaedic injuries in a motorcycle accident on June 10, 2018. The motorcycle that he was operating struck a pole and he was ejected across an intersection.

[3] Tony applied for benefits under the *Statutory Accident Benefits Schedule*, O. Reg 34/10 (“*SABS*”) and was deemed catastrophically impaired. There ensued a dispute between the insurers as to which insurer was responsible for the payment of the SABS. Aviva has paid the SABS but sought an order that either TD or Sonnet was the responsible insurer.

[4] The motorcycle was purchased by Tony, but title had not transferred and, therefore. the seller’s insurer still insured the motorcycle. That insurer was TD. At the time of the accident, Tony lived with his parents and two sisters in their family home. William and Shamiran Sarkes, Tony’s parents are the named insureds of an Aviva policy. Sarah Sarkes (“Sarah”), Tony’s sister, is the named insured of a Sonnet policy.

[5] The arbitration proceeded in writing. The record consisted of an agreed statement of facts, transcripts of examinations of Tony, Sarah, the parents and the prior owner of the motorcycle and an agreed book of documents including financial records for the family members.

[6] Arbitrator Philippa G. Samworth found that Tony was principally dependent for financial support upon Sarah who was insured by Sonnet, such that Sonnet is the priority insurer for the purposes of paying accident benefit. Additionally, it was found that the TD policy was in full force and effect as ownership of the subject motorcycle remained with the TD insured on the date of loss. That finding has not been appealed.

[7] Sonnet now appeals the Arbitrator’s award.

[8] For the reasons that follow, the appeal is dismissed.

Statutory Provisions

[9] Section 268(1) of the *Insurance Act* provides that every auto policy "shall be deemed to provide for . . . statutory accident benefits". Section 268(2) sets out priority rules where more than one auto insurer might be required to respond. It provides that a person who is an occupant “has recourse against the insurer of an automobile in respect of which the occupant is an insured”.

[10] Section 2(1) of the *SABS* provides that "any dependant of the named insured" is an "insured person" for any motor vehicle policy. A person is dependent on another person "if the person is principally dependent for financial support . . . on the other person". In this case, the priority dispute was decided by assessing whether Tony was a dependent and, if so, to whom was he a dependent. It was determined that Tony was dependent on his sister who was insured by Sonnet and not his parents who were insured by Aviva. If he was not a dependent on either his parents or

sister, the priority scheme would impose responsibility for the SABS on TD, the insurer of the motorcycle.

[11] The *Disputes Between Insurers*, regulation provides that disputes under s. 268 shall be settled through arbitration conducted in accordance with the *Arbitration Act, 1991*. Section 45 of the *Arbitration Act, 1991* provides that, presumptively, parties can appeal only on points of law with leave, although the parties can provide for broader rights of appeal in their arbitration agreement. In this case, the parties agreed that any of them could "appeal the Arbitrator's decision on a point or points of law or mixed fact and law" to a judge of the Superior Court of Justice.

Issues

[12] This appeal involves consideration of two issues:

(a) The appropriate standard of review for this appeal; and

(b) Having regard to that standard of review did the Arbitrator err in her decision.

Standard of Review

[13] In any analysis of the standard of review, the first task is to determine if there is authority that sets out the standard of review.

[14] Prior to the Supreme Court of Canada's decisions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, the standard of review of an arbitrator's decision was the standard applied to administrative decisions which attracted a reasonableness standard of review, unless there are "questions of jurisdiction, constitutional questions, or general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" which would be assessed on a correctness standard: *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 (CanLII), at para. 53; *The Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company*, 2018 ONCA 101 (CanLII), at para. 49; *Ontario (Finance) v. Echelon General Insurance Company*, 2019 ONCA 629 (CanLII), at para. 10; *The Dominion of Canada General Insurance Company v. Unifund Assurance Company*, 2018 ONCA 303 (CanLII), at para. 35. However, since *Vavilov*, it has been recognized that the genesis of the right to appeal arises from the *Insurance Act.* Given the statutory origin of the right to appeal, the standard of review is the appellate standard: C*ontinental Casualty Company v. Chubb Insurance Company of Canada*, 2022 ONCA 188 (CanLII), at para. 46. Accordingly, earlier cases must be reviewed with some caution.

[15] In *Vavilov*, the Court held that for questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, the appellate standard for review is correctness.

[16] If the matter involves the application of a legal standard to a set of facts, then it is considered a matter of mixed fact and law. If the appeal includes questions of mixed fact and law, the standard of review is the palpable overriding review standard, unless the error involves an inextricable legal error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 8, 10 and 36. An extricable error generally involves the application of an incorrect standard, a mischaracterization of a legal test or a similar error in principle. However, as stated in *Housen*, the extraction of an error of legal principle from the factual analysis is difficult and it is only where the error is "readily extractable" does the standard of correctness apply: at para. 36.

[17] The palpable and overriding error is a high bar. In *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, the Supreme Court cited *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46 for the proposition that:

> Palpable and overriding error is a highly deferential standard of review. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. [citations omitted]"

[18] The Ontario Court of Appeal in *Farsi v. Da Rocha*, 2020 ONCA 92, 444 D.L.R. (4th) 197 used equally emphatic language that the error must not only be obvious but must be so obvious and impactful that altered the outcome of the decision. At para. 35, the Court of Appeal described the test as follows:

> A palpable and overriding error is one that is clearly wrong, unreasonable, or not reasonably supported on the evidence: H.L. v. Canada (Attorney General), *2005 SCC 25*, [2005] 1 S.C.R. 401, at para. 110. The Supreme Court recently explained in *Salomon v. Matte-Thompson*, 2019 SCC 14, 432 D.L.R. (4th) 1, at para. 33, "[w]here the deferential standard of palpable and overriding error applies, **an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case".** (*emphasis added)*

[19] Appellate deference to findings of fact include the reasonable inferences drawn from those facts by the tribunal. As the Supreme Court noted "appellate courts do not 'rehear' or 'retry' cases. They review for error": *H.L. v Canada (Attorney General)*, 2005 SCC 25, at para. 57.

[20] In assessing the reasons for the award, the appeal court can assume that those handling these cases are knowledgeable in the law. In this area, the arbitrators are experienced in insurance law and are chosen by the parties for that reason. In *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, at p. 664, the Supreme Court stated that "[t]rial judges are presumed to know the law with which they work day in and day out" - the same applies to the arbitrator in this case. Similarly, in reviewing the reasons for the award, the appeal court is concerned with whether the arbitrator turned her mind to the relevant factors that go to the believability of the evidence in

the factual context of the case, including truthfulness and accuracy concerns. It is not necessary that she address each fact or even utter the words “reliability” or “credibility”.

[21] In priority disputes where the issue of dependency is considered, the courts have held that the determination is largely a matter of fact or a matter of fact and law: *Security National Insurance Co. v. The Wawanesa Mutual Insurance Company*, 2014 ONCA 850 at para. 4; *Intact Insurance Company v. Allstate Insurance Company of Canada*, at para. 53. Of course, in this case, the parties have limited the appeal to either matters of law or matters of mixed fact and law. There is no appeal allowed on matters of fact alone.

[22] The Arbitrator is not required to address every fact or resolve every factual dispute that may be raised by a party. An appeal is not an opportunity to reweigh the evidence. As the Supreme Court noted in *R. v. G.F.*, 2021 SCC 20, [2021] 1 SCR 801, at para. 79:

> Where ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error…

A failure to make a factual finding warrants appellate intervention only where it “gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion”: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014 at para. 15.

Did the Arbitrator Err?

[23] Sonnet makes several arguments which I will address in turn.

[24] First, Sonnet states that in applying the applicable test, the Arbitrator neglected to apply each factor in assessing dependency. Sonnet says that this amounts to error of law and cites *Housen v. Nikolaisen* at para. 27.

[25] Sonnet accepts that the Arbitrator identified the correct test for dependency, being the test in *Miller v. Safeco Insurance Co. of America*, 1984 CanLII 2019 (ON SC), affirmed 1985 CanLII 2022 (ON CA) (“*Miller*”). That test sets out four criteria:

i. Amount of dependency;

ii. Duration of dependency;

iii. Financial or other needs of the alleged dependent;

iv. The ability of the dependent to be self-supporting.

[26] The Arbitrator further recognized that the purpose of the criteria was to assess whether Tony was more dependent on others than himself. The parties accept that the Arbitrator correctly

identified that for Tony to be dependent that he "must depend on another for at least 51% of their financial need". The parties agreed that the assessment of dependency should consider Tony's circumstances for the year previous to the accident.

[27] The Arbitrator reviewed the evidence of Tony's financial situation. Tony held no regular job. There were no records as to how much he earned and from what work. Sarah filed a tax return for Tony saying he made zero income. The testimony of Tony, his parents and Sarah was of a general nature, explaining what Tony did to earn money. The evidence was that Tony would, from time to time, act as a bouncer in a night club, cut trees for neighbours, do odd jobs and assisted as a day mechanic. He lived at his parents' home. He did not contribute to household expenses. His sister provided him with "$200 here and $500 there" and she would help pay off his Visa bill. The Arbitrator found that he made enough money to "go clubbing and deal with his car" and phone.

[28] The parties accept that the Arbitrator correctly had regard to the low income cut-off criteria for a single person in Tony's municipality which was $20,998. She concluded that Tony would need to make more than $10,499 to meet 50% of that number.

[29] Given the state of the evidence, the Arbitrator concluded that there was insufficient evidence that Tony earned more than $10,499. She expressly stated: "While I suspect that Tony certainly had the ability to earn money and possibly earn a fair amount of money, there was just not enough evidence before me to reach the conclusion the Tony had the ability to be self supporting to the point that he could cover 51% of his expenses." She later went on to say that she "cannot draw any conclusion from the evidence before me that Tony was able to cover 51% of his expenses through his own earnings". In my view, these conclusions are supported by the evidence. The evidence of Tony's income and his means of support was not at all clear. While he did odd jobs, there was no record of what he earned. Aside from his entertainment and car expenses, the conclusion that he did not earn enough to support himself was a reasonable conclusion supported by the evidence.

[30] Sonnet states that the Arbitrator failed to apply the last criteria from *Miller,* being Tony's ability to be self-supporting, and therefore committed an error of law. I disagree.

[31] In this case, the Arbitrator was alive to all four factors in *Miller*. She expressly turned her mind to not only what he earned but his earning capacity. In considering the evidence she stated: "some of the difficulty revolves around the insufficiency of evidence with respect to Tony's earnings or even earning capacity." She went on to say that Tony may have "certainly had the ability to earn money and possibly earn a fair amount of money, there was just not enough evidence before me to reach the conclusion that Tony had the ability to be self supporting to the point that he could cover 51% of his expenses." She considered other arbitration cases where there was evidence that the claimant had capacity to be self-sufficient. Of course, each case turns on its own facts. In this case, the Arbitrator did not overlook or ignore the last criteria. Rather, she considered it and concluded the evidence failed to sway her that he could cover 51% of his expenses. There was no error in law. Rather, in applying the criteria, she concluded that the evidence did not establish that Tony had the ability to be self-supporting. This was a conclusion open to her to make.

This did not reflect the reversal of an onus but rather the Arbitrator assessing the evidence adduced before her and drawing a reasonable inference as to Tony's earning capacity. In doing so, she neither forgot nor misapplied the test nor did she misconstrue the evidence.

[32] Sonnet submits that Tony received money from an insurance payout as a result of his car being stolen. It asserts that this should be accounted for in the assessment of whether Tony is dependent. A review of the record before the Arbitrator reveals that this argument was not raised at the arbitration. Rather, Sonnet argued that "capacity to earn and actual earnings are both to be examined when assessing dependency". Having not argued it below, it is not appropriate to raise this issue on appeal. Moreover, the amount suggested as being an insurance payout was not confirmed by Tony who could not remember what he was paid for his stolen vehicle, and frankly gave a convoluted answer that the car was stolen in 2013. The assessment of this evidence should have happened at the arbitration but as it was not raised that did not happen. It is not for this appeal court to assess the evidence and reweigh that which was not argued below.

[33] I find no error in the arbitrator's Assessment as to whether Tony was not self-supporting. The Arbitrator next assessed whether Tony was being supported by either his parents or his sister. In her analysis, the Arbitrator considered how Tony was living and supporting his lifestyle.

[34] Tony lived in the family home with his parents and two siblings. He contributed neither to the rent nor food nor other household expenses. As the Arbitrator said, any money he earned went to clubbing, his phone and his car when he had one. Even then he received additional living expenses from his sister. She regularly gave him money - "$200 here and $500 there". She helped him pay off his credit cards. The amounts given to Tony were said to be "a considerable sum based on the bank statements".

[35] In order to assess who paid for the household expenses from which Tony benefitted, the Arbitrator considered how the household was funded. The parents' sole source of income was ODSP. Between the mortgage and expenses of the minor daughter, the Arbitrator found that the parents were left with approximately $2,400 for the remainder of the household expenses including food. In contrast to the parents' ODSP, Sarah earned $75,000 a year. The evidence was that she contributed upwards of $2,100 a month to the household. As the Arbitrator found the sister "paid for hydro, Internet, food, car insurance and as well her money would have gone to contribute towards the mortgage." Based on her contributions to Tony directly and to the household in which Tony lived, the Arbitrator concluded that he was dependent on Sarah.

[36] It is argued that the Arbitrator erred by failing to do a calculation setting out relative contributions of Tony, Sarah and his parents to determine if Sarah, in fact, was contributing 51% of Tony's needs. It is further argued that the Arbitrator was conducting a "general standard of living within the family" analysis which was rejected by the Court of Appeal in *Miller*.

[37] It is clear that the Arbitrator was alive to the fact that she was to determine if Tony was "principally dependent" on his sister or his parents. She was also clearly aware that the test required

her to "be satisfied that Tony was at least 51% dependent on his sister for financial support". There is no doubt the Arbitrator understood the task at hand.

[38] I do not accept that the Arbitrator was conducting an analysis of the living standard of the family or that her approach was in any way erroneous. In circumstances where the record was not robust, the Arbitrator was taking logical steps to determine who was supporting Tony financially. Given the evidence, her decision to examine the household contributions was one such logical step. Between the contributions to the household and the contributions to Tony directly, it was open to the Arbitrator to conclude 51% of Tony's expenses were provided by Sarah. In my view, the logic of the decision is clear. While an accountant might have approached the exercise by creating spreadsheets and calculations, it was not necessary for the Arbitrator to do so. Indeed, unlike other similar cases, no accountants were called to provide expert assistance. The Arbitrator had to identify, then apply the test in *Miller* and come to a conclusion that was reasonable. She was not required to follow a formula. Like any decision, the decision was required to demonstrate a logical sequence demonstrating that the Arbitrator applied the required test in *Miller* to the facts as she found them. She did that. I see no error of law or palpable and overriding error in her analysis.

Disposition

[39] The appeal is dismissed.

[40] The parties are encouraged to agree on costs. Any party requesting costs shall serve and file a bill of costs and a submission of no more than 6 pages within 14 days of the receipt of this judgment. Any responding submissions of 6 pages must be accompanied by the responding party's bill of costs and must be served and filed 10 days after receipt of the requested costs.

Callaghan J.

[41] **Released:** August 5, 2025