IN THE MATTER of the *Insurance Act,* R.S.O. 1990,
c.I.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act,1991,*
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

JEVCO INSURANCE COMPANY

Applicant

- and –

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Domenic Nicassio
Counsel for the Applicant, Jevco Insurance Company ("Jevco")

Kevin Mitchell and Julianna Brimfield
Counsel for the Respondent, Wawanesa Mutual Insurance Company ("Wawanesa")

ISSUES:

This Arbitration involves a priority dispute between insurers. It is agreed that there are no limitation issues. The issues, as set out in the arbitration agreement and as paraphrased by me, are as follow:

[a] As between Wawanesa and Jevco, which insurer is responsible to pay statutory accident benefits to Mario[1] arising out of a motor vehicle accident occurring on January 20, 2012? This issue turns on the definition of "spouse" and the status of Mario in relation to Marcellina [the latter being the named insured under a policy of automobile insurance issued by Wawanesa].

[1] By reason of privacy concerns, Mario and Marcellina are not further described in this Award.

[b] If this issue is determined in favour of Jevco, what is the amount to be paid by Wawanesa to Jevco?

[c] What is the amount of interest owing upon the amount to be paid under paragraph [b]?

[d] What is the quantum of costs and which party has the burden of payment?

EVIDENCE:

The following documents were marked as exhibits at the hearing which proceeded on a written record only:

Exhibit 1 – Factum and Brief of Authorities of Jevco

Exhibit 2 – Document Brief of Jevco

Exhibit 3 – Written Submissions of Wawanesa

Exhibit 4 – Document Brief of Wawanesa

Exhibit 5 – Book of Authorities of Wawanesa

Exhibit 6 – Response of Jevco

Exhibit 7 – Supplementary Book of Authorities of Jevco

Mario was a pedestrian struck by an automobile operated by Maria G. and insured by Jevco. The accident occurred on January 20, 2012. Mario applied to Jevco for and received statutory accident benefits. Jevco ascertained that Marcellina was the named insured under a policy of automobile insurance issued by Wawanesa and, for reasons set out below, initiated this priority arbitration.

Mario and Marcellina were married in what was North York on October 6, 1980. They have lived separate and apart since May 3, 1995. There is no dispute on the evidence that they were, at the time of the accident, separated and this had been the case for almost 17 years.

Mario and Marcellina entered into an interim separation agreement dated August 28, 1995. The agreement provides, inter alia as it relates to this matter, as follows:

"1. The parties will continue to live separate and apart.

11. The Husband and the Wife agree that all personal property in the possession of one spouse at the date of this agreement shall remain the personal property of the spouse having possession of that personal property on the date of this agreement."

I wish to observe that the terms "husband" and "wife" are nothing more than and nothing less than definitional as they were set out to reference Mario and Marcellina at the commencement of the interim separation agreement.

The evidence is unambiguous that each of Mario and Marcellina viewed themselves as separated but that no divorce had been granted as at the time of the accident.

LAW AND ANALYSIS:

The "Priority Rules" are set out in section 268 (2) of the *Insurance Act*. Simply put, Mario, as a pedestrian, was a non-occupant. If he was, at the time of the accident, an "insured" under the Wawanesa policy, Wawanesa is the higher priority insurer and Jevco will succeed in this arbitration.

"Insured person" is defined under section 3 [1] of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*. For purposes of this arbitration, the important words are as follow:

> "insured person" means, in respect of a particular motor vehicle liability policy,
>
> (a) the named insured …and, if the named insured is an individual, the spouse of the named insured ….if the ….spouse …. is involved in an accident …….in or outside Ontario that involves another automobile…[paraphrased by me].

"Spouse" is defined under section 224 of the *Insurance Act* as, inter alia, either of two persons who are married to each other. While counsel for Wawanesa urges me to focus on the use of the present tense [**are married**], I cannot accept this submission. This definition defines one person's status in relation to another person.

Counsel for Jevco argues that marriage can only end with a divorce or death. This submission is supported by a decision of Arbitrator Malach in *Certas Direct Insurance Company v. Allstate Insurance Company* (Arbitrator Stephen M. Malach, Q.C., November 10, 2004) and by a decision of Arbitrator Torrie in *State Farm Insurance Companies v. Certas Direct Insurance Company and Unifund Assurance Company* (Arbitrator Paul G. Torrie, January 19, 2012).

Counsel for Wawanesa notes that "marriage" or its derivative forms are not defined in either the *Insurance Act* or in the SABS. He notes that "marriage" is defined in the *Civil Marriage Act* as:

> Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

The argument continues that two people who were married but have separated are no longer in a lawful union to the exclusion of all others and, therefore, would not meet this definition of marriage.

While I admire the ingenuity and creativity of the argument, I am not persuaded. This legislation was designed to expand the definition of marriage. It came into being in 2005 and in recognition of the expanding circumstances of relationships and dynamics between two people who presumably seek recognition in the eyes of the law. It would take much more for Parliament or the Legislature to redefine the meaning of "spouse".

Counsel for Wawanesa argues further that the *Divorce Act* provides that a divorce can only be granted after a breakdown of marriage has occurred. A breakdown of marriage is established if spouses have lived separate and apart for at least one year. There is no question that had Mario or Marcellina sought a divorce, they would qualify by reason of their lengthy separation. However, there is a great difference between being qualified to seek a divorce and actually obtaining a divorce. As I have noted, Mario or Marcellina were married in 1980, separated in 1995 but remained spouses as at the time of the accident which occurred in 2012 as the evidence before me is clear and consistent that Mario or Marcellina were not divorced at the time of the accident.

Counsel for Wawanesa references a decision of the Supreme Court of Canada[2] which established that when two spouses are married, they owe each other a mutual duty of support. However, when a marriage breaks down, the presumption of mutual support no longer applies.

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[2] Bracklow v Bracklow, [1999] 1 S.C.R. 420, 1990 Can LII 715

He notes that the court used the phrase “marriage breakdown” and not “divorce” in the analysis. The court also recognized that, in modern society, a number of post marital scenarios may arise.

All of this may be so. However, this Arbitration is a dispute between insurers and not spouses. Jevco’s position succeeds or fails on the status of two individuals as at the time of the accident. This is not a situation where Mario seeks some form of support from Marcellina. It is simply a creature of the legislation and the regulations which has created a Byzantine scheme by which to determine priority to pay statutory accident benefits.

Counsel for Wawanesa notes that the *Family Law Act* allows for domestic contracts so that two people can define their rights and obligations toward each other. One example of a domestic contract is a separation agreement.

Counsel references a decision of the Ontario Court of Appeal[3] which stands for the proposition that a separation agreement is intended to allow two parties to negotiate the terms of their “social and economic disengagement” and is considered binding. The presumption that this agreement is binding and final should not be easily disturbed. This case was appealed to the Supreme Court of Canada[4] and upheld. The court stated that courts should only interfere with an agreement if it does not comply with the overall objectives of the *Divorce Act*, including the policy goals of certainty, autonomy and finality. Separation agreements are considered contracts. Only a significant departure from a range of reasonable outcomes anticipated by the parties should persuade a court to give an agreement little weight.

Counsel for Wawanesa notes that while this case dealt with support obligations set out in a separation agreement, the reasoning of the court should have wider implications with respect to the final and binding nature of separation agreements. A separation agreement is a contract that governs the ongoing obligations, or lack thereof, between two people after the breakdown of marriage. Principles of contract law should apply.

I agree with the submissions made in the preceding two paragraphs. However, the interim separation agreement made between Mario and Marcellina is silent on insurance generally and on automobile insurance specifically. It would take much more in the agreement to allow me to

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[3] Miglin v Miglin, 2001 Can LII 8525
[4] Miglin v Miglin, [2003] 1 S.C.R. 303, 2003 S.C.C. 24 (Can LII)

find that the parties to a separation agreement had actually put their minds to contracting out of the Byzantine scheme of automobile insurance and regulations in Ontario.

Counsel for Wawanesa notes that the Ontario Legislature has started to recognize that the traditional definition of "spouse" needs to take into account modern post marital situations and has begun to update legislation in response. One example is the *Pension Benefits Act* which follows a judicial decision[5] arising from a contest between a common law spouse and a separated legal spouse regarding the allocation of pension benefits. Indeed, while the Legislature acknowledged the status of the separated legal spouse, it created priority rules to deal with this situation.

Unfortunately, this submission does not assist Wawanesa. Rather, it highlights the problem. Unless and until the Ontario Legislature amends the legislation or promulgates new regulations to address the situation with which this arbitration is concerned, I cannot rewrite or amend a definition for spouse which Wawanesa submits may be outdated, antiquated or inappropriate.

Moreover, I note that if the Ontario Legislature has seen fit to amend legislation, promulgate regulations and issue special position statements from FSCO in relation to the matter of pension benefits, it should stand to reason that the absence of such activity on the part of the Ontario Legislature in relation to automobile insurance, statutory accident benefits and priority disputes suggests that the Ontario Legislature, in its wisdom or lack thereof, is content with the state of the law.

Counsel for Wawanesa acknowledges that there are two previous decisions of private arbitrators which have generally upheld the traditional definition of spouse. Counsel has pointed out that in *Certas v. Allstate*, cited above, Arbitrator Malach had reservations about applying the traditional or rigid interpretation of "spouse":

> I find that AR and RR were "spouses" at the time of the subject accident as they were "married to each other". They were never divorced. The marriage continued based on the definition in section 224 of the *Insurance Act*, notwithstanding that they had been separated for more than 10 years as at the date of loss and notwithstanding the terms of the Separation Agreement.

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[5] Carrigan v Carrigan Estate, 2012 ONCA 736 (Can LII)

> I agree that this is a bit of a bizarre result. One would have thought that the definition of "spouse" in the *Insurance Act* should be amended to deal with situations in which spouses have entered into Separation Agreements, such as the one in question.

Arguably, the matter before Arbitrator Malach provided a stronger or better platform to argue against a finding of "spouse" as the separation agreement specifically provided that after 30 days from the date of the separation agreement, one spouse was to cease paying motor vehicle insurance premiums on behalf of the other and would have the other removed from a particular policy that was currently in both names. Despite this circumstance, Arbitrator Malach found that these two individuals remained "spouses" at the time of the accident. I agree.

Arbitrator Malach released his decision almost 11 years ago and the Legislature has not seen fit to take action. Arbitrator Paul G. Torrie made similar observations in *State Farm Insurance Companies v. Certas Direct Insurance Company and Unifund Assurance Company* which he released on January 19, 2012 as did Arbitrator Rudolph in *Kamstra v. Allstate Insurance and State Farm Mutual* [October 30,1996, as referenced in the decision of Arbitrator Torrie].

This "problem" was addressed peripherally or tangentially by FSCO in *Peters v. Aviva* (FSCO Arbitrator Wilson, April 10, 2006; FSCO Director's Delegate Makepeace, March 15, 2007) and by the Ontario Court of Appeal in *Axa Insurance Co. of Canada v. Prince*, 1998 Can LII 7123 (Ont. C.A.). I do not propose to review these cases extensively as they arise from a contest between individuals competing for receipt of a death benefit. They do not add to my understanding or impact upon my analysis of the issue before me in this Arbitration. These decisions do not alter my determination, nor did they alter the analysis or determinations of other arbitrators, that a person, once the spouse of another person, remains a spouse for purposes of automobile insurance generally and priority disputes specifically until death or divorce. While a legal spouse may lose out in a contest for death benefits as against other "spouses" or dependents, they remain a spouse for purposes of interpretation.

The balance of the submissions made by counsel for Wawanesa, in his written submissions and oral submissions at the hearing, while thorough and thoughtful, do not require specific comment in these reasons as they do not alter my analysis or the result.

At this juncture, I cannot resist the urge to make an observation. According to the FSCO website, there are over 300 insurers licensed in the province of Ontario. Many are not licensed to write automobile insurance policies. I suspect that while there may be something approaching 200 insurers licensed to write automobile insurance policies, there are likely fewer than 50

insurers and more probably fewer than 25 insurers which write over 90% of the automobile insurance policies in the province of Ontario. It would not take a great deal of effort for these insurers to work together to identify problems of mutual interest or concern, giving rise to priority disputes or otherwise, develop solutions to the problems and encourage the Legislature to make the necessary and appropriate changes. Insurers, in my view, desire certainty. A lack of certainty gives rise to litigation and arbitration.

Arbitrator Malach observed, above, that "one would have thought that the definition of" spouse" in the *Insurance Act* should be amended to deal with situations in which spouses have entered into Separation Agreements, such as the one in question". Arbitrator Torrie observed, above, that "the Legislature has not yet chosen to amend the *Insurance Act*, to remedy situations which produce outcomes such as this one, as suggested by Arbitrator Malach".

I respectfully suggest that either the Legislature is deaf, blind or oblivious to these observations or it is content with the results produced by virtue of the legislation and regulations as they currently stand. If the law requires clarification or updating, it should be done. However, it is a job for the Legislature or regulators; it is not the role or function of an arbitrator to change the law as it currently stands.

I would be remiss if I did not thank counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its current conclusion and to thank counsel for their thoughtful and comprehensive submissions.

CONCLUSION:

I find that Mario, at the time of the accident which gives rise to this arbitration, was the "spouse" of Marcellina. As such, Wawanesa has the higher priority to pay statutory accident benefits. Thus, Wawanesa is the insurer responsible to pay statutory accident benefits to Mario arising from a motor vehicle accident occurring on January 20, 2012.

I remain seized of this matter to address the following issues:

[a] What is the amount to be paid by Wawanesa to Jevco?

[b] What is the amount of interest owing upon the amount to be paid under paragraph [a]?

[c] What is the quantum of costs and which party has the burden of payment?

I will hold this matter in abeyance for 30 days to allow counsel to work through these issues. Thereafter, I will render my account in accordance with the terms of the arbitration agreements [short form and long form] and convene an arbitration teleconference to work through procedure and logistics so that I can make determinations on the issue or issues that remain outstanding and unresolved.

Dated at Toronto, this 9th day of September, 2015.

Vance H. Cooper, Arbitrator