

**IN THE MATTER OF THE INSURANCE ACT,
R.S.O. 1990, c. I. 8 AS AMENDED AND ONT.
REGULATION 283/95, AS AMENDED**

**AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, CHAPTER 17, AS AMENDED**

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

-and-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

A W A R D

Ian D. Kirby, Esq.
Counsel for the Applicant

Douglas N. Patton, Esq.
Counsel for the Respondent

The issue in this Arbitration is to determine which of the parties is the insurer liable to pay Statutory Accident Benefits to Kim Dennie by reason of injuries sustained by Kim Dennie in a motor vehicle accident which occurred on July 5, 2003.

Kim Dennie and her two children were passengers in a vehicle owned and operated by Matthew Csanig, when the Csanig vehicle was involved in a motor vehicle accident

on July 5, 2003. The Csanig vehicle was insured by the Applicant Allstate Insurance Company of Canada at the time of the accident.

Allstate Insurance Company paid benefits under the SABS to Kim Dennie. Allstate claims that those benefits under the SABS ought to have been paid by State Farm Mutual Automobile Insurance Company rather than Allstate.

At the time of the said accident, David Boekowske was the owner of an automobile insured by State Farm Mutual Automobile Insurance Company.

At the time of the subject accident, Kim Dennie did not have a driver's licence and was not a named insured under any automobile insurance policy.

Allstate contends that at the time of the subject accident, Kim Dennie was the spouse of the said David Boekowske and that accordingly, the claims for benefits under the SABS by Kim Dennie ought to have been made against State Farm, insurer of David Boekowske.

The issue to be determined in this Arbitration is whether or not Kim Dennie and David Boekowske were common law spouses on the date of loss, July 5, 2003.

If Kim Dennie and David Boekowske were common law spouses on the date of loss, then the insurer responsible to pay benefits under the SABS to Kim Dennie would be State Farm Mutual Automobile Insurance Company. If they were not common law spouses on the date of loss, then benefits under the SABS would be payable to Kim Dennie by Allstate Insurance Company of Canada.

SECTION 268 OF THE INSURANCE ACT

Section 268(2) of the *Insurance Act* sets out the rules for determining which insurer is liable to pay Statutory Accident Benefits to an Applicant.

Section 268(5) provides as follows:

“Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or **the person is the spouse** or same-sex partner or a dependant, as defined in the *Statutory Accident Benefits Schedule*, **of a named insured, the person shall claim Statutory Accident Benefits against the insurer under that policy.**”

Accordingly, if Kim Dennie and David Boekowske, hereinafter referred to as “Kim” and “David”, were common law spouses as at the date of loss, s. 268(5) would apply and Kim, being the spouse of a named insured, i.e. the spouse of David, shall claim Statutory Accident Benefits against David’s insurer, State Farm.

If Kim and David are not found to be common law spouses as at the date of loss, Kim would claim benefits against the insurer of the automobile in which she was an occupant at the time of the accident. That would mean that Allstate would be the insurer responsible to pay benefits to Kim.

Section 224(1) of the *Insurance Act*, defines “spouse” as follows:

“means either of a man and a woman who,
(c) are not married to each other and have cohabited continuously for a period of not less than three years, or have cohabited in a relationship of some permanence if they are the natural or adoptive parents of a child.”

There is no evidence in this case that Kim or David were the natural or adoptive parents of a child.

Accordingly, the portion of the definition of “spouse” applicable to this Arbitration is as follows:

“either of a man and a woman who, (c) are not married to each other and **have cohabited continuously for a period of not less than three years...**”

THE CASES

Counsel for Allstate made reference to the following cases:

- (a) Rodrigue v. Canadian General Insurance Company (OIC A-005175).

This is a Decision of Senior Arbitrator Susan Naylor at FSCO, dated August 30, 1995. The Applicant Yvonne Rodrigue was claiming Death Benefits by reason of the death of her alleged common law spouse. The Applicant maintained that she and the deceased cohabited continuously for a period of not less than three years and that they were spouses. Arbitrator Naylor considered the meaning of “cohabitation”. She noted a number of cases in which Courts considered various criteria to help define “cohabitation”. Those criteria included “accommodation arrangements, sexual and personal relations, responsibility for household services, interaction in a family and social context, financial arrangements and support, and responsibility towards children.”

Senior Arbitrator Naylor also considered the meaning of “continuous cohabitation”. She determined that “the cases have made it clear that temporary interruptions in physical living arrangements do not terminate cohabitation, unless either party has demonstrated ‘in a convincing manner’ a settled state of mind that the relationship is at an end.”

Senior Arbitrator Naylor considered the facts particular to the Rodrigue case and concluded that the couple cohabited continuously for the three years before the subject accident.

(b) Osbourne v. Allstate/York Fire (OIC A-009110 and A-009111 and P97-00067). In this Arbitration at FSCO, there was an issue as to whether the female Applicant, who sustained injuries in a motor vehicle accident was a common law spouse of Winston Smart. The couple had lived together and had even purchased a home together prior to the subject accident. There was no issue that the couple had cohabited continuously for a period of not less

than three years prior to the accident but, because of dire financial circumstances, Winston Smart moved to a rented townhouse while the Applicant rented a flat. There is reference in the case to the relationship continuing aside from the sharing of a residence. They maintained two separate addresses for a period of 17 months. Notwithstanding that, the Arbitrator concluded that their cohabitation continued and it was determined that they were spouses as at the date of loss. The decision of the Arbitrator was varied when it was determined that both the Applicant and Winston Smart had married other people during the relevant three year period preceding the accident.

(c) *Molodowich v. Penttinen* 17 R.F.L. (2d) 376. The Court considered whether the couple were spouses on the basis that they have cohabited continuously for a period of not less than five years. This was a Family Law case. Reference was made to the case of *Feehan v. Attwells* (1979), 24 O.R. (2d) 248 and to the case of *Sanderson v. Russell* (1979), 9 R.F.L. (2d) 81 when the Courts considered the meaning of “cohabitation”. The Court listed various questions under the headings of Shelter, Sexual and Personal Behaviour, Services, Social, Societal, Economic Support and Children. There were 23 separate questions which the Court considered when considering whether there was cohabitation in this case. The Court then examined the facts in the subject case being dealt with and concluded that the parties were spouses.

(d) *Bellis v. Innes* (1980) 21 R.F.L. (2d) 40. In this case, the Court considered whether a couple were “cohabiting”. This was a Family Law case. The Court determined that “cohabit” “contemplate(s) an integrated relationship between the man and woman that will usually have many of the following elements, though not necessarily all of them: financial interdependence, a sexual relationship, a common principal residence, obligations on the part of

each to share the responsibilities of running the home, shared use of assets, such as cars, boats, etc., shared responsibilities for raising children, shared vacations and the expectation each day that there be continued mutual dependency”.

(e) Sanderson v. Russell (1979), 24 O.R. (2d) 429 (C.A.). In this Decision, the Court of Appeal dealt with a Family Law case. This involved a situation in which the couple were not married to each other but lived together as spouses for almost six years, except for a four or five day period when one of them moved out of the house. It was argued that because of the brief separation, there was not the requisite period of continuous cohabitation. Reference was made to the case of Feehan v. Attwells referred to above. The Court stated that

“Without in any way attempting to be detailed or comprehensive, it could be said that such a relationship has come to an end when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one. While the physical separation of parties following ‘a fight’ might, in some cases, appear to amount to an ending of cohabitation the test should be realistic and flexible enough to recognize that a brief ‘cooling-off’ period does not bring the relationship to an end. Such conduct does not convincingly demonstrate a settled state of mind that the relationship is at an end.”

Counsel for State Farm made reference to the following cases:

(a) Catherwood v. Young (1995), 27 O.R. (3d) 63. In this case, as well as in the cases of McLean v. Wellington (1995) O.I.C.D. No. 18 and (1996) O.I.C.D. No. 102, McGuire v. Zurich Insurance Company (OIC A-00298 and A-002989, Zurich Insurance Company v. Robinson (OIC P-007196) and Economical Mutual Insurance Company v. Lott (1998), 37 O.R. (3d) 417 (C.A.), there was a consideration as to whether there had to be a temporal relationship between the date of the accident and the continuance of the spousal relationship. The Court in the Catherwood case determined “there is a theme throughout the

provisions requiring a temporal connection as a condition of entitlement.” The Court made reference to the McLean case when Arbitrator Mackintosh determined that she had to consider “spouse” relating to the situation between the couple at the time of the accident, rather than as at some other point in time. Accordingly, notwithstanding that the couple had previously cohabited in a relationship of some permanence, that relationship had ended prior to the accident in question, so that the Applicant in the McLean case was not a spouse of Dan McLean as at the date of loss.

In the McLean matter, on Appeal to the Director’s Delegate Susan Naylor, she supported the finding of Arbitrator Mackintosh that the definition of “spouse” had to be “linked to the time of the accident”. “They must have cohabited in such a relationship which continued at the time of the accident.”

The Director’s Delegate found that “it is a matter of common sense to recognize that both marriages and common-law relationships end”. She determined that “it is cohabitation as partners that determines non-married spousal status. When the parties cease to cohabit in the requisite relationship, they cease to be spouses. Whether a couple continues to cohabit in a relationship of some permanence is a question of fact, based upon the particular circumstances”.

Accordingly, based on the cases put before me and in particular, those referred to above, I must consider whether Kim Dennie and David Boekowske “**cohabited continuously for a period of not less than three years**” at the time of the subject accident.

The cases stand for the proposition that I must consider the spousal status as at the date of loss.

As set out in the Sanderson case, I must consider the facts of this case and whether the conduct of the parties “**convincingly demonstrate(s) a settled state of mind that**

the relationship is at an end". Following the cases, when considering the meaning of "cohabitation", I must consider that the cases enlarge the meaning of "cohabit" to include criteria other than simply living together as indicia of "cohabitation".

There was a separation of the parties in this case as will be set out below when I review the evidence and make findings of fact. I must consider whether that separation meant that the spousal relationship was over by the time of the accident. In the *Feehan* case, the Court concluded that the separation did not interrupt the period of cohabitation. "The separation was no more than a period of reflexion – of reassessment - ...There was no withdrawal from the relationship...The actions of both parties were consistent with a continuation of cohabitation, rather than with a cessation thereof."

Accordingly, I must look at the relationship between the parties to determine whether the separation in this case essentially ended the relationship.

THE EVIDENCE OF KIM DENNIE AND DAVID BOEKOWSKE

The evidence consisted of statements taken from Kim Dennie and David Boekowske at Sunnybrook Hospital, where Kim Dennie was confined, on July 28, 2003. Kim and David were present when the statements were taken from each other. Also present were representatives of the two parties to this Arbitration.

Kim Dennie stated she has common-law status with her spouse Dave. She stated that she currently lives with Dave and her two children in a rented house. She advised that her spouse Dave owns a vehicle that she then described. She stated that she has medical benefits through Dave through Great West Life.

Kim described the accident in which she was involved when she was a passenger in the Csanig vehicle. She described the injuries which she sustained and some of the treatment

which she had already taken by the date of the statement. She advised that prior to the accident that she and Dave provided financial support for the children except for an occasional \$100.00 per month paid to her by the natural father of her two children pursuant to a Court Order.

Kim advised that since the accident, her uncle and his wife have been looking after the children. She signed over temporary custody of the children to her uncle.

Kim advised that she is currently in a common law relationship with Dave. She stated that about one month before the accident, she was temporarily separated from Dave. Dave then stayed with a friend. She advised that she and Dave have reconciled since the accident. She stated that this was the first separation which she and Dave have had since they have been together. They have been together for four and one-half years. She stated that she and Dave split most of the expenses of living such as rent, utilities, bills and things for the children. They did not have a joint bank account. Kim advised that she was in receipt of Ontario Worker Benefits at the time of the accident.

Kim advised that she requires assistance with all aspects of personal care since the accident. So far, nurses have been helping her. Dave has been looking after the home since the accident.

In his statement, Dave gives as his residence, the same address which Kim gave when giving her statement. That was 1644 Gregory Road in St. Catharines. Dave stated that on the date of loss, he resided at 120 Ontario Street and had lived there for three weeks prior to the date of loss. He moved back to 1644 Gregory after the accident. He stated that he was currently in a common law relationship with Kim. Prior to the subject accident, he was separated from Kim. Dave advised that on his Application for Insurance covering his automobile, he indicated

that he was single. He purchased a life insurance policy on July 26, 2003 and listed his two natural children as his beneficiaries.

Dave advised that between June 26, 2003 and July 5, 2003, he had daily contact with Kim both in person and on the telephone. He had two small dogs and he would drop them off at Kim's home and she would take care of them. He would pick up the dogs at the end of each workday.

Dave stated that Kim had asked for a separation and asked him to move out. He said that they were not sure whether or not there would be a reconciliation.

Dave did not report the accident to State Farm but his legal representative reported the accident to State Farm on July 25, 2003.

POSITION OF ALLSTATE

It was argued on behalf of Allstate that Kim and David had a common law relationship for four and one-half years pre-accident. The couple temporarily separated for a period of three to four weeks pre-accident due to a dispute. Allstate argued that this was their first separation in a four and one-half year relationship. Allstate argued that it was unknown what the couple would do re their long-term intentions. It was argued that the "cooling-off" period during which they had been separated did not end their relationship. It was pointed out that according to the evidence of David, they spoke daily in the three to four weeks during which they were separated.

Allstate argued that following the accident and Kim's discharge from the hospital, the couple moved back in together. State Farm took issue with the relevancy of that fact. State Farm contended that one must consider whether the couple were "spouses" as at the date of loss. What the couple did post-accident, State Farm argued, is not relevant.

Allstate argued that the common law relationship was ongoing at the time of the accident, notwithstanding the period of separation. It is argued that there was no settled intention of this couple to separate permanently and that one did not know as at the date of loss whether the dispute would blow over.

It is argued on behalf of Allstate that in the statements of both Kim and David, they both refer to one another as their common law spouse. Kim has set out in her statement that the separation was temporary and David has set out in his statement that they were both not sure whether or not there would be a reconciliation. As it turned out, they were back together post-accident.

It was argued that according to the cases, a temporary interruption in cohabitation does not end a common law relationship unless either party shows in a convincing way an intention to end the relationship. Allstate contends that there was no evidence of such a settled intention on the evidence in this case. In this case, the parties did not know whether or not there would be a reconciliation.

Counsel for Allstate characterized the position of State Farm at a bit of an extreme. It was argued that State Farm contends that you take a snapshot as at the day of the accident and that however brief any separation, that is too bad, as the common law relationship is at an end. I do not believe that the position adopted by State Farm is that extreme. State Farm does argue that one must consider the relationship as at the date of loss.

It is argued on behalf of Allstate that a common law relationship is not ended by reason of a brief period of separation of the parties.

POSITION OF STATE FARM

It is argued on behalf of State Farm that the accident is the triggering event and that one must look at the relationship at the time that the accident occurred.

I accept that submission and counsel for Allstate does not really disagree with the fact that I must consider the relationship and whether Kim and David were spouses at the time of the subject accident, i.e. July 5, 2003.

Counsel for State Farm points to the Sanderson case and the fact that the separation in that case was for a period of four or five days only. Counsel made reference to the fact that in the Sanderson case, there was reference to a “fight” and the need to have a brief “cooling-off” period. Counsel for State Farm argues that that might make sense if there was a fight. It was argued that there was no emotional or cathartic event in this case. Simply, the evidence that we have is that Kim asked David for the separation and asked him to move out. We have no idea as to why that was or what led up to it. We know that this separation lasted for approximately four weeks. We know that in the Sanderson case, the separation was only for a period of four or five days.

We also know that in this case, David had a different address for a period of three weeks.

It was argued on behalf of State Farm that in the period of separation, there were no continuing features of cohabitation. It was argued on behalf of State Farm that there was no evidence that they were going through a “cooling-off” period as described in the Sanderson case. It was argued that there was no evidence of prior separations and reconciliations. It was argued that in the Sanderson case, one of the spouses did not move into new accommodation as is the case in this instance.

Counsel for State Farm argued that David noted that he was single on his Application for Automobile Insurance.

In his Life Insurance Application, David chose his two natural children as his beneficiaries.

It was argued that Kim assigned custody of her two children to her uncle rather than to David. It was argued that personal care which Kim required while in hospital was being provided by nurses rather than David.

It was argued on behalf of State Farm that David was not giving care to the children post-accident while Kim was confined in hospital.

Counsel for State Farm argued that the features of cohabitation referred to by Mr. Kirby in his argument were largely not present in this case.

REPLY BY ALLSTATE

It was argued on behalf of Allstate that in the end, one must consider whether there is a settled demonstrative intention of the parties to treat the relationship as at an end.

It was argued on behalf of Allstate that notwithstanding the separation, the parties continued to see each other daily.

Allstate again made reference to the fact that in their statements, the parties talk about an ongoing common law relationship.

In the final analysis, Allstate argues that the parties have reconciled. The separation was only temporary. There was never a settled intention to bring a four and a half year relationship to an end. Allstate thus contends that the parties were common law spouses as at the date of loss.

CONCLUSIONS

I have reviewed the evidence of Kim Dennie and David Boekowske. I have considered the definition of “spouse” in s. 224(1) of the *Insurance Act*. I have considered the cases to which counsel for both parties have made reference.

Based on the *Catherwood* and *McLean* cases, I must consider whether Kim and David were spouses at the time of the subject accident, i.e. July 5, 2003. In determining the issue between the parties, I must consider the definition of “spouse” in s. 224(1) of the *Insurance Act*. In view of the fact that there is no evidence in this case that Kim or David were the natural or adoptive parents of a child, the relevant portion of the definition which I must consider is whether or not this couple **have cohabited continuously for a period of not less than three years** as at the time of the subject accident.

I make the following findings of fact before setting out my conclusions. Prior to the subject accident, Kim and David and two natural children of Kim resided at 1644 Gregory Road in St. Catharines. They all resided there together for four and one-half years.

Kim gave evidence that about one month before the accident, she “temporarily” separated from Dave. She stated that that was their first separation since they have been together.

In her statement, Kim advised that she was not employed at the time of the accident. At the time of giving the statement, her son Jamie was almost nine years of age, while her daughter Brittany was almost 12 years of age. They all lived in a rented house.

Kim advised that she had medical benefits through Dave.

Kim advised that prior to the accident, she was the primary caregiver for her children. She stated in her evidence that she and Dave provided financial support for the

children prior to the accident except an occasional \$100.00 per month paid by the natural father of the children pursuant to a Court Order.

Kim advised that she has reconciled with Dave since the accident.

Kim stated that Dave has been looking after the home since the accident.

In Kim's statement, she stated that "I have common-law status with my spouse with Dave Boekowske". She stated that "I currently live...with Dave...". She stated that "my spouse Dave owns a vehicle." She further stated "I am currently in a common law relationship with Dave." I accept the facts set out in the statement of Kim Dennie as set out in these conclusions.

Clearly, in her statement, Kim Dennie has made it clear that she still regards Dave Boekowske as her spouse. That is evident from the quotations referred to above.

Kim Dennie stated that she was "**temporarily**" separated from Dave. I find as a fact that there is nothing in the statement of Kim Dennie that leads me to the conclusion that she had a settled state of mind that her relationship with David was at an end, as at the date of loss.

In the statement of David Boekowske, he has stated and I accept that in the 10 days prior to the subject accident, he had daily contact with Kim both in person and on the telephone. He would drop off his two small dogs at Kim's home and she would take care of them and he would pick them up at the end of each workday.

In his statement, David stated that Kim asked for the separation and asked him to move out. He stated that "we were not sure whether or not there would be a reconciliation".

David Boekowske stated that he moved back to 1644 Gregory after the accident. He too spoke in positive terms as he stated that "I am currently in a common law relationship with Kim Dennie."

When he purchased automobile insurance on June 26, 2003, he indicated on the Application that he was single. When he purchased a life policy on the same date, his two natural children were his beneficiaries.

I find as a fact that this couple resided together for four and one-half years prior to the subject accident. They lived in the same rented house. They split most of the expenses including rent, utilities and bills. They both contributed to the support of Kim's two children over and above some funds received from the father of those children. Kim was covered under a medical plan through Dave's employer. Until the separation discussed in this Award, they had never separated. Based on that evidence, it is clear that at least, up to the time of their separation, they qualified as "spouses" under s. 224(1) of the *Insurance Act*. That is because they had cohabited continuously for a period of not less than three years. I find as a fact that there is no evidence which convincingly demonstrates a settled state of mind of Kim and David that their relationship was at an end. In their statements, they both speak in a positive fashion about currently being in a common law relationship. I have already referred to the fact that Kim has stated that they "temporarily separated" pre-accident. David has stated that he was not sure whether or not there would be a reconciliation.

I find that in the particular circumstances of this case, the separation of Kim and David was a temporary one. As set out above, Kim used the words "temporarily separated" in her statement. David has stated that the couple were unsure whether or not there would be a reconciliation. I find that neither party regarded the separation as ending their relationship. As set out in the *Sanderson* case, referred to above, one must be realistic and flexible and recognize that common law spouses do not end their relationship whenever there is an argument or a brief separation. There is no evidence in this case to convince me that the parties demonstrated a

settled state of mind to end their relationship when they separated for approximately one month prior to the subject accident.

In this case, Kim and David had daily contact in person and by telephone in the 10 days pre-accident. Dave dropped off his two dogs at the Gregory Road home and Kim looked after them and Dave picked them up at the end of each workday.

The fact that David listed himself as “single” on his Application for Insurance does not really assist me as I have no evidence as to whether that Application contains a box for common law spousal status. The fact that David listed his two natural children as his beneficiaries on a new life insurance policy does not lead me to a conclusion that he was treating his common law relationship with Kim as at an end. It is not unusual for parents to list their natural children as beneficiaries notwithstanding new marital or spousal relationships.

In the result, I find Kim Dennie and David Boekowske cohabited continuously for a period of not less than three years at the time of the subject accident and were common law spouses at the time of the subject accident.

The insurer responsible to pay benefits under the SABS to Kim Dennie is State Farm Mutual Automobile Insurance Company.

Accordingly, I order that State Farm Mutual Automobile Insurance Company reimburse Allstate Insurance Company of Canada for benefits paid out to Kim Dennie. If there is a dispute as to the amount to be paid, counsel may advise me and I will hear further argument.

In the Factum of Allstate, there is reference to the fact that benefits were also paid to Jamie Sansoucy and Brittany Dennie, the natural children of Kim Dennie. When the issues in this Arbitration were framed during the course of a Pre-Hearing Telephone Conference Call, there was no reference to benefits having been paid to those children. In the Factum delivered on

behalf of State Farm, there was no reference to this particular issue of the responsibility to pay benefits to the two children. At the Arbitration Hearing, that issue was also not addressed. Accordingly, I make no finding as to which of the two insurers was responsible to pay benefits to the aforesaid two children. The parties can determine whether my other conclusions in this Arbitration resolve that issue. If not, I will be pleased to hear further submissions of the parties as to that issue.

I order that State Farm Mutual Automobile Insurance Company pay to Allstate Insurance Company of Canada the sum of \$5,000.00 inclusive of GST and disbursements as the costs of this Arbitration. That was the quantum which both parties agreed would be the quantum of costs to be recovered by the successful party in this Arbitration.

I further order that State Farm Mutual Automobile Insurance Company pay the fees and disbursements of the Arbitrator.

DATED this 17th day of May 2005.

Stephen M. Malach, Q.C., Arbitrator