

ONTARIO INSURANCE COMMISSION

BETWEEN:

BLAIR STEPHENS

Applicant

and

ZURICH INSURANCE COMPANY

Insurer

DECISION

Issues:

On March 2, 1995, Barbara Carbert died after she was struck by an automobile. The Applicant, Blair Stephens, alleged that he was Ms. Carbert's spouse and applied for spousal death benefits of \$50,000 from Zurich Insurance Company, payable under section 51 of the *Schedule*.¹ As Ms. Carbert's family denies that Mr. Stephens was Ms. Carbert's spouse, Zurich has not paid the death benefits to Mr. Stephens. The parties were unable to resolve their disputes through mediation, and Mr. Stephens applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issue in this hearing is:

1. Is Mr. Stephens entitled to death benefits of \$50,000 under section 51(1)(b) of the *Schedule*?

¹ The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993, and before November 1, 1996*. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94 and 781/94.

Mr. Stephens also claims interest on any amounts owing and his expenses incurred in the hearing.

Result:

1. Mr. Stephens is not entitled to death benefits under section 51(1)(b) of the *Schedule*.
2. Mr. Stephens is entitled to his reasonable expenses of the hearing.

Hearing:

The hearing was held in London, Ontario, on March 10 and 11, 1997, before me, David Evans, Arbitrator.

Information on those present at the hearing, the witnesses, and the exhibits is set out in the appendix.

Evidence and Findings:

On March 2, 1995, Barbara Carbert died when a motor vehicle struck her. At the time of the accident, Ms. Carbert lived with her son, Gary Sauve, and her daughter, Calinda Sauve, in London, Ontario. The Applicant, Blair Stephens, lived nearby with his mother, Beverly Mesurier.

Mr. Stephens claims spousal death benefits under section 51 of the *Schedule*. "Spouse" as defined in section 1 of the *Schedule*, in the context of this case, means either of a man and a woman who have lived together in a conjugal relationship outside marriage at some point during the previous year and have lived together in a conjugal relationship outside marriage continuously for a period of at least one year. Mr. Stephens and Ms. Carbert had lived together for approximately five years until the summer or early fall of 1993 when Mr. Stephens moved out. Since Mr. Stephens moved out more than a year before Ms. Carbert's death, he can succeed in this application only if I find that he and Ms. Carbert lived together in a conjugal relationship notwithstanding the fact that he had moved out.

Ms. Carbert and Mr. Stephens continued to have a relationship after their separation, including sexual relations. However, Ms. Carbert's family — her sisters and her son Gary — denied that this was a spousal relationship, in particular because Ms. Carbert did not form a mutual intention with Mr. Stephens for a temporary separation and did not know if he ever intended to come back.

Mr. Stephens testified that he moved out in order to assist his mother and to avoid further conflicts with Barbara and Gary over Gary's discipline. He stated that their relationship improved afterwards and that they intended to resume cohabiting after Gary left home.

Mr. Stephens relied on a number of cases to support his position that couples may maintain separate addresses yet still be considered "spouses." These cases interpreted the *Schedule* that applied to accidents occurring before January 1, 1994. The term "spouse" was not defined in that *Schedule* but was defined under section 224(1) of the *Insurance Act* to mean "either of a man and a woman who...are not married to each other and have cohabited continuously for a period of not less than three years." In *Osbourne and Allstate Insurance Company*,² Arbitrator Mackintosh considered several definitions of "cohabit," including "to live together in a conjugal relationship, whether within or outside marriage." This definition of "cohabit" appears to have been imported into the current definition of "spouse." Accordingly, I find that such cases may be of assistance in interpreting the current definition of "spouse."

In *Osbourne*, Arbitrator Mackintosh concluded that the definition of unmarried "spouse" contemplates an integrated relationship between a man and a woman that usually contains many though not necessarily all of the following elements: 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, shared responsibilities for raising children, shared vacations, and the expectation each day that there be continued mutual dependency. Shared residency of

² (March 6, 1995), OIC A-009110 (second decision on a preliminary issue)

a principal residence is a significant but not determinative indicator of the intention to cohabit.

On the facts in *Osbourne*, both members of the couple in question knew why they separated and knew that they were going to resume cohabitation. They maintained separate residences for 17 months to minimize the impact of their respective bankruptcies on each other. By the time of the hearing, they had resumed living together and had married. During their separation, their relationship continued as before, which included most of the elements of an integrated relationship set out above. In this context, Arbitrator Mackintosh concluded that the couple's cohabitation continued throughout.

I find *Osbourne* distinguishable both on the issue of intention and on the existence of an integrated relationship.

I will deal first with the intention of the parties. Mr. Stephens testified that Ms. Carbert knew that one of the reasons he moved out was to assist his recently-widowed mother, Beverly Mesurier. None of the witnesses called by Mr. Stephens testified that they knew of any problems concerning Mrs. Mesurier. The geography of Mr. Stephens' allegation makes little sense, as his mother lived within view of the house he shared with Ms. Carbert. Furthermore, Ms. Carbert's sisters found diaries kept by Ms. Carbert after the separation. No entries in the diaries support Mr. Stephens' contention. The diaries show a continuing relationship between Ms. Carbert and Mrs. Mesurier. The entries contain numerous references to Ms. Carbert visiting "Bev" (from the context, it is usually clear whether Ms. Carbert is referring to her sister — Beverley Adamo — or to Mrs. Mesurier). Mrs. Mesurier was in an excellent position to observe the relationship between her son and Ms. Carbert. She could have provided information on why she needed her son to live with her. However, Mr. Stephens chose not to call his mother as a witness — a woman who, all the witnesses agreed, was very close to Ms. Carbert. I draw the adverse inference that she would not have supported Mr. Stephens' testimony.

Mr. Stephens testified that another reason he moved out was to relieve the tension with Gary. Problems with Gary developed as Gary grew older and became a teenager.

However, Mr. Stephens also testified that he and Ms. Carbert had a number of other problems, such as his long working hours, his fatigue and irritability at the end of the day, his lack of interest in going out in the evening, his messiness, and the comments he would make about her weight. Mr. Stephens testified that Ms. Carbert was not pleased when he decided to move out, but she eventually agreed the move was necessary for their relationship. He stated that, furthermore, they intended to resume sharing accommodations after Gary left home. After reviewing the various entries in the diaries, which extend from January to May 1994 and for a few weeks in February 1995, I can find no support for his allegation. A number of entries refer to Ms. Carbert's continued disagreements with her son Gary, but nowhere does she suggest that, if only Gary left home, then she and Mr. Stephens could resume living together.

I find that Mr. Stephens and Ms. Carbert did not share a joint intention to separate for a short period in order to resume cohabitation later.

Dealing next with the requirement for an integrated relationship, some of the elements of such a relationship apply in this case. Ms. Carbert's diaries contain a number of references to her love for Mr. Stephens. Ms. Carbert did see Mr. Stephens regularly, as they shared their bowling nights and often visited on weekends. However, the diaries do not support Mr. Stephens' testimony about the regularity of their sexual relations. A number of entries indicate that Ms. Carbert went to Mr. Stephens' to watch television or to play with the computer and went home after he fell asleep: Ms. Carbert wrote on February 19, 1995: "Went to Blair's of course. What else do I normally do. What a bore."

Other elements of an integrated relationship are lacking. Regarding financial interdependence, Mr. Stephens testified that Ms. Carbert was always secretive about her own finances, and he never knew whether she received support from the father of her children or what amounts she received from social assistance. Ms. Carbert closed their joint account after Mr. Stephens moved out. Although Mr. Stephens let Ms. Carbert keep and use a Zeller's card, and he occasionally gave her some money, the last financial entries Ms. Carbert made in her 1995 financial diary were for amounts she owed Mr. Stephens, including for an item purchased at Zeller's. Ms. Carbert's diaries

also contain entries about amounts Mr. Stephens owed her for various items. In this context, I find that even the purchase of an expensive item, such as the stove that Mr. Stephens bought Ms. Carbert, is not enough in the total context of the relationship to constitute financial interdependence.

Although Mr. Stephens testified that he continued to help run the household, little other evidence supports this testimony. Ms. Carbert's brother-in-law fixed the toilet, the pipes, and the sink when they needed repairing. None of the other diary entries supports Mr. Stephens' testimony that he was regularly helping Ms. Carbert run her household. After Mr. Stephens moved out, all his attempts at disciplining or raising the children effectively ended: one of the reasons Mr. Stephens gave for moving out was to avoid conflicts over Gary's discipline. Ms. Carbert did not drive, and although Mr. Stephens often gave Ms. Carbert rides to go shopping or to go bowling, I find this assistance does not constitute shared use of an asset. As for a continued mutual dependency, the diary entries show a woman adjusting to being more independent. On a number of occasions she tells herself to "get on with her life," especially whenever Mr. Stephens did not call or come to her house when he said he would, and by April 1994 she writes "he's not all my life."

Mr. Stephens testified that their relationship only improved after he moved out. However, in a number of entries Ms. Carbert questions where the relationship was heading and whether they should continue. I note in particular the entry for April 7, 1994: "It sure is a weird thing we do..It just may be time to rethink this. I don't think I'm the type to be anyone's part timer. Especially not after living with that person for 5 years."

I find that the relationship between Ms. Carbert and Mr. Stephens during the year preceding the accident did not constitute the kind of integrated relationship that meets the definition of "spouse." Accordingly, I find that Mr. Stephens is not entitled to the spousal death benefit.

Expenses

Mr. Stephens is entitled to his reasonable expenses incurred in the hearing.

Order:

1. Mr. Stephens is not entitled to death benefits under section 51(1)(b) of the *Schedule*.
2. Mr. Stephens is entitled to his expenses incurred in respect of the arbitration.

David Evans
Arbitrator

Date

Appendix

Present at the Hearing:

Applicant:	Blair Stephens
Mr. Stephens' Representative:	Scott Tottle Barrister and Solicitor
Zurich's Representative:	Neil Colville-Reeves Barrister and Solicitor

Witnesses:

Blair Stephens
Linda Louise Jansen
Jason Chapman
Belinda Carbert
Beverley Adamo
Jackie Pomfrey
Janet Kitchenham
Gary Sauve

Exhibits:

Exhibit 1	Document Brief (Green Cover)
Exhibit 2	Document Brief (White Cover)
Exhibit 3	Green Hilroy binder containing financial entries for 1995
Exhibit 4	White Hilroy binder containing diary entries for 1993 and 1994
Exhibit 5	Diary of 1995