IN THE MATTER of the Insurance Act, R.S.O. 1990,

AND IN THE MATTER of Ontario Regulation 283/95, made pursuant to the Insurance Act

AND IN THE MATTER of the Arbitration Act, 1991, R.S.O. 1991, c.17

AND IN THE MATTER of an Arbitration;

B E T W E E N:

JEVCO INSURANCE COMPANY

Applicant

- and -

STATE FARM INSURANCE COMPANY

Respondent

DECISION ON PROCEDURAL MOTION NO. 2

This arbitration is before me pursuant to the *Arbitration Act*, 1991 as a result of a Loss Transfer Proceeding.

Jevco Insurance Company is the insurer of Gustin, who was injured in a motor vehicle accident which took place on June 28, 1998. State Farm is the insurer of Ronza, who is alleged to be a party who was involved in the accident and it is alleged that Ronza is responsible for the injuries sustained by Gustin. Parties have advised me that Gustin was injured and claimed accident benefits from Jevco. Accident benefits have been paid to Gustin by Jevco pursuant to the Statutory Accident Benefits Schedule under the *Insurance Act*. I have also been advised by the parties that a Statement of Claim has been issued by Gustin against Ronza with respect to tort proceedings.

Jevco would like to have production from State Farm of information in its file which relates to communications between Ronza and State Farm. State Farm resists production of this documentation on the basis that the communications are confidential and are thus privileged and protected from production, or on the basis that the dominant purpose of the documentation of the communication was for the purposes of litigation and is thus protected from production.

The Relationship between Ronza and State Farm

State Farm is an automobile insurer. Ronza is the policyholder. Ronza is a person who is alleged to be involved in a motor vehicle accident. The motor vehicle accident has given rise to claims being made against Ronza. State Farm is obliged to respond to those claims.

The usual process with respect to claims of this nature is well-known. Insurers are alerted to the possibility of a claim and conduct an investigation. They will get information from their policyholder, from witnesses, and may retain the services of experts and others to help understand the nature of the claim being advanced. Insurers routinely attempt to settle claims on behalf of their policyholders with third parties. If settlement is not possible, the insurer's file is turned over to defence counsel for the purpose of defending the policyholder in litigation brought by the third party. The claims file becomes the basis from which the defence counsel provides a defence to the policyholder. Liability insurance policies characteristically give the insurer the right and obligation to investigate and defend potential claims. There are usually provisions which give the insurer the option of settling such cases.

With respect to motor vehicle liability insurance in Ontario, these provisions are mandated by the *Insurance Act*. Section 245 of the *Insurance Act* provides as follows:

> **"Every contract evidenced by a motor vehicle liability policy shall provide that where a person insured by the contract is involved in an accident resulting from the ownership, or directly or indirectly from the use or operation of an automobile in respect of which insurance is provided under the contract, and resulting in loss or damage to persons or property, the insurer shall,**
>
> **(a) Upon receipt of notice of loss or damage caused to persons or property, make such investigations, conduct such negotiations with the claimant, and effect such settlement of any resulting claims as are deemed expedient by the insurer;**
>
> **(b) Defend in the name and on behalf of the insured and at the cost of the insurer any civil action that is at any time brought against the insured on account of loss or damage to persons or property; ..."**

Section 252 of the *Insurance Act* deals directly with the relationship between the insured and the insurer with respect to potential liability claims. Clause 252(1)(c) provides as follows:

> **"The insured, by acceptance of the policy, constitute and appoints the insurer as the insured's irrevocable attorney to appear and defend in any province or territory of Canada in which an action is brought against the insured arising out of the result of the ownership, use or operation of the automobile."**

Against this contractual and statutory background, an automobile insurer who is notified of a liability claim has the right and obligation to make appropriate investigations for the purpose of responding to any claim that might be made against the insured person. The Statutory Conditions of the policy require the insured person to give the insurer all available particulars with respect to an accident.

The relationship between the insured and the insurer is a special relationship governed by the terms of the policy, the statutory provisions of the *Insurance Act*, and the Statutory Conditions that are part of the insurance contract. It is a relationship which is created for

the purpose of allowing the insured person to be adequately defended in civil proceedings that may flow from an accident. There is a clear public policy interest in supporting an environment that will allow for the investigation and settlement of claims on behalf of those who are involved in motor vehicle accidents.

The facts of this particular case are described with some detail by the affidavit of Mr. Underwood, a representative of State Farm. In his affidavit he deposes that State Farm initially became involved in this case with the apparent consideration of determining whether or not a claim would be presented for the physical damages sustained by the vehicle operated by Ronza. After a couple of unproductive inquiries State Farm closed the file, "pending further activity". On July 28, 1998 the State Farm adjuster received a bill for Fire Department charges relating to the accident. The adjuster forwarded the bill to Jevco, the insurer of Gustin. On July 31, 1998 State Farm was contacted by an adjuster on behalf of Jevco indicating that they wished to hear from someone "to discuss issues of liability". On August 7, 1998, State Farm assigned an adjuster to contact Jevco's adjuster to "discuss the liability concerns". On August 14, 1998 State Farm's adjuster discussed matters with Jevco's adjusters and there was discussion with respect to a compromise based on various theories of liability.

I am asked to consider the extent to which State Farm is obliged to disclose communications made to it by Ronza, as part of these proceedings.

State Farm asserts two grounds for resisting disclosure of such communications. Firstly State Farm argues that this is a confidential communication for which there is a privilege against disclosure. Secondly, State Farm argues that this is a communication protected by litigation privilege.

Are the Communications by Ronza to State Farm
Privileged from Disclosure as Confidential Communications?

In the Supreme Court of Canada the decision in *Slavutych* v. *Baker* [1976] 1 S.C.R. 254 the Court dealt with the concept of a confidential communication other than a solicitor-client communication.

The Court made reference to *Wigmore on Evidence*, Third Edition, wherein four conditions are outlined as necessary to establish a privilege with respect to communication:

"(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

The Court recognized a privilege with respect to a confidential communication which was referred to as a "tenure form sheet", completed in a university environment.

In the subsequent case of *A.M.* v. *Ryan*, the Supreme Court of Canada applied the same test in support of a finding that records of a relationship between a psychiatrist and a patient are privileged in appropriate circumstances.[1]

Closest to the facts at hand, however, is the case of *R.* v. *Westmoreland*.[2] Justice Steele of the Ontario Court had occasion to consider whether or not a statement given to an automobile insurer was producible. The statement was given by the insured person to his insurance company following a motor vehicle accident but prior to a threat of a civil action. Justice Steele found as follows:

> **"In the present case the facts indicate that prior to obtaining any statements the insurance company had probable cause to believe that litigation was contemplated from this accident, even though no solicitor was consulted until long after. The statements and other items in the file are privileged, not on a solicitor and client basis, but on the right afforded to a party to gather information in contemplation of probable litigation."**

However, Justice Steele also considered the *Wigmore* test as previously analysed by the Supreme Court of Canada. He held as follows:

> **"In my opinion, the documents fall within the four tests set out in *Slavutych* v. *Baker et al.* [1976] 1 S.C.R. 254 at page 260, 55 D.L.R. (3d) 224 at page 228, 38 C.R.N.S. 306 at page 311, as between the parties to the civil litigation because they were confidential and necessary to the maintenance of the relationship between the accused and insurance company, and that such relationship should be fostered and the injury to that relationship is greater than the benefit to the correct disposal of the civil litigation.**
>
> **These are not medical or professional reports prepared for litigation as contemplated in *Meaney* v. *Busby* (1977), 15 O.R. (2d) 71, 2 C.P.C. 340, they are the very confidential statements taken from a party and a witness for the purpose of the litigation. Therefore, their privilege does not lapse once the litigation is over."**

In view of the special relationship that exists between an insured person and a liability insurer, and the provisions of the contract as mandated by statute, I consider that the communication by the insured person to the insurer with respect to possible liability are confidential communications that satisfy the *Wigmore* test as applied by the Supreme Court of Canada and as applied by Mr. Justice Steele in *R.* v. *Westmoreland*.

In addition to considering the four criteria set out in the Wigmore test, I also observe that

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[1] [1997] 1 S.C.R. 157

[2] (1984) 48 O.R. (2d) 377

Ronza's statements to his insurer are entitled to an additional degree of protection because the statements are required by a Statutory Condition. Accordingly, Ronza is not at liberty to decline to give such a statement. Protection of Ronza's interests require that the statement be treated in confidence, as State Farm is endeavouring to do.

Litigation Privilege

With respect to litigation privilege in the traditional sense, I do not see that there can be any litigation privilege in this case with respect to matters prior to July 28, 1998. Thereafter there may be litigation privilege if the dominant reason for preparation of a document was a reasonable apprehension of litigation. As of July 31 at least, it would be reasonable for State Farm to expect litigation to flow from this accident.

Therefore, for documents which come into existence on or after July 31, 1998, litigation privilege may be asserted if the dominant purpose for the preparation of the document was in anticipation of litigation.

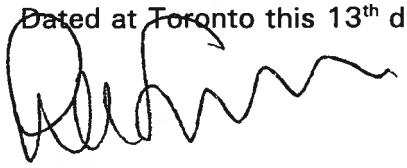
Examination under Oath

The parties have asked for directions with respect to examination under oath prior to the hearings in this matter. Section 25(6) of the *Arbitration Act, 1991* gives me the authority to direct examinations under oath or production of records and documents with respect to the parties and persons claiming through or under them. This is an appropriate case for this discretion to be exercised, and I direct that the parties shall submit to an examination under oath with respect to matters in issue under these proceedings. Such examination is not necessarily in lieu of examination at the hearing. The parties may, if they wish, tender transcripts of examinations for discovery at the hearing. I was invited to rule that pre-hearing examinations would be in place of examination at the hearing and I decline to make an order of this nature.

Conclusion

I hope that the foregoing is sufficient for the parties to deal with any production and discovery issues. If any further issues arise I may be contracted to deal with these issues. In particular, I understand that Jevco may have some argument to advance that privilege has been waived with respect to some of the communications between Ronza and State Farm. That issue is not before me in the current proceedings and I have not ruled on that issue and will do so only if so required as matters progress.

Dated at Toronto this 13th day of September, 2000.



Lee Samis