



Appeal P96-00015

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALLSTATE INSURANCE COMPANY

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

and

JOYCE ALFRED

Respondent

Before: David R. Draper, Director's Delegate

Counsel: James M. Flaherty (for Allstate)
Eric K. Grossman (for State Farm)
G. Joseph Falconeri (for Joyce Alfred)

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. Subject to paragraph two, the appeal is dismissed and the arbitration order, dated November 30, 1995, is confirmed.
2. The "any other vehicle" argument raised by Allstate at the appeal hearing is reserved.
3. The issue of appeal expenses is reserved.

David R. Draper
Director's Delegate

April 23, 1997

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This is an appeal by Allstate Insurance Company (“Allstate”) from an arbitration decision, dated November 30, 1995, concluding that it is responsible for paying benefits to Joyce Alfred according to Ontario Regulation 672, *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994* (“the Schedule”).

II. BACKGROUND

On December 30, 1993, Ms. Alfred was seriously injured in a single-vehicle accident. She was a passenger in an automobile owned by Anandavadivel Sinnathamby and insured by State Farm Mutual Automobile Insurance Company (“State Farm”). At the time of the accident, Ms. Alfred did not own a car and did not have her own automobile insurance. Jebanendran Vyramuthu, who was also a passenger in the vehicle, owned a vehicle insured by Allstate Insurance Company (“Allstate”).

Ms. Alfred applied to both State Farm and Allstate for accident benefits. She applied to State Farm as the insurer of the vehicle in which she was an occupant. She applied to Allstate as Mr. Jebanendran Vyramuthu’s spouse. Both insurers agreed that Ms. Alfred was entitled to accident benefits, but disagreed about which company should pay. The dispute centred on whether Ms. Alfred and Mr. Vyramuthu were spouses at the time of the accident.

The parties prepared an “Agreed Statement of Facts,” including the following:

1. The applicant, Joyce Alfred, was born on August 25, 1966 in Sri Lanka . . .

4. Mr. Vyamuthu was born in Sri Lanka on August 29, 1963. At some point in time, he left to work in Germany.
5. In or about the month of January 1990, he met the applicant Joyce Alfred in Sri Lanka. They developed a relationship.
6. In Sri Lanka, Joyce Alfred lived with her parents. The family of Mr. Vyamuthu lived in another town. Mr. Vyamuthu would visit Joyce Alfred at her parents' home. They developed a relationship which included a sexual relationship.
7. In or about September 1991, he emigrated to Canada and was sponsored by his father who was already in Canada.
8. Joyce Alfred came to Canada from Sri Lanka¹ on August 5 in 1990 as a refugee claimant. She was granted refugee status on May 13, 1991. When she arrived in Canada, Ms. Alfred was about five months pregnant with a child who was conceived as a result of her relationship in Sri Lanka with Mr. Vyamuthu. The child was born in Canada on December 17, 1990.
9. As some point in the second half of 1993, Mr. Vyamuthu and Ms. Alfred re-established a relationship. They maintained separate residences at all material times.
10. During the material time, Joyce Alfred was receiving government assistance in the nature of family benefits from the Ministry of Community and Social Services.
11. At some point during the summer of autumn of 1993, Mr. Vyamuthu began to pay \$50.00 per month toward the support of his daughter.
12. Commencing in October 1993, at Mr. Vyamuthu's request, Baskaran Vyamuthu obtained a parking spot at Joyce Alfred's apartment building notwithstanding the fact that she did not have a driver's licence or a vehicle. This permitted Mr. Vyamuthu to park his car when he visited without having it towed away. Joyce Alfred continued paying the rest of the \$744.00 - in rent without assistance from Mr. Vyamuthu.

¹ The evidence at the arbitration hearing established that Ms. Alfred went to India before she came to Canada.

13. Joyce Alfred and Mr. Vyramuthu had discussed the possibility of marriage before the accident of December 30, 1993. It is their evidence that they had agreed to postpone any such action until such time as Mr. Vyramuthu obtained steady employment. Ultimately, they were married on August 8, 1994.

To receive accident benefits under a particular motor vehicle liability policy, the claimant must be an “insured person” within the meaning of section 2 of the *Schedule*. That definition includes the following paragraphs:

- (a) in respect of accidents in Ontario, an **occupant** of the insured automobile,
- (c) the named insured, his or her **spouse** and any dependant of either of them while the occupant of any other vehicle.
(emphasis added)

Ms. Alfred clearly was an insured person under the State Farm policy because she was an occupant of the insured vehicle at the time of the accident. The question was whether she also qualified under the Allstate policy as the spouse of the named insured, Mr. Vyramuthu.

At the arbitration hearing, the insurers agreed that if Ms. Alfred was Mr. Vyramuthu’s spouse at the time of the accident, Allstate is responsible for paying her accident benefits. If not, then State Farm must pay. Ms. Alfred took no position on the priorities issue.

“Spouse” is not defined in the *Schedule*, but is defined in section 224(1) of the *Insurance Act* (“the Act”), as follows:

- “spouse” means either of a man and a woman who,
- (a) are married to each other,
 - (b) have together in good faith entered into a marriage, or

- (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.

The same definition of “spouse” is included in the standard automobile policy as section 5.2.4, although the “or” does not appear in paragraph (b). Ms. Alfred and Mr. Vyramuthu were not legally married at the time of the accident, but had a child. Therefore, the question was whether they had “cohabited in a relationship of some permanence.”

Ms. Alfred and Mr. Vyramuthu were the only witnesses at the arbitration hearing. Ms. Alfred’s lawyer asked very few questions. As a result, most of the testimony came through cross-examination by the lawyers representing State Farm and Allstate.

Allstate’s argument at the arbitration can be summarized as follows. At the time of the accident, Ms. Alfred and Mr. Vyramuthu maintained separate residences. Although Mr. Vyramuthu spent the night at Ms. Alfred’s apartment once or twice a week, he did so as a visitor. They planned to get married in January 1994 and live together, but that was in the future. At the time of the accident, they were not cohabiting. This fact is reinforced by their evidence that there are religious and cultural prohibitions on living together before formal marriage. Further, there was no economic interdependence between them. Ms. Alfred did not rely on Mr. Vyramuthu for financial support, apart from the \$50 per month he paid for their daughter’s support. As a result, they were not “spouses” because they were not living together in a marriage-like state with a degree of economic dependency. Rather, they were in a kind of pre-marriage position, like other engaged couples who spend time together before marriage.

State Farm argued that Ms. Alfred and Mr. Vyramuthu cohabited in Sri Lanka and although physically separated, never intended to terminate their spousal relationship. In the alternative, it claimed they cohabited in Canada before the accident, intending to get married.

Because “cohabit” is not defined in the *Insurance Act*, the arbitrator considered its use in other legislation, most notably the *Family Law Act*. She found that the concept of cohabitation was well understood and adopted it for the purposes of the *Insurance Act*. The determination of cohabitation, according to the arbitrator, “involves both an objective and subjective test: determining the intention of the parties from the facts.” (Decision, p.7) While shared residence is an important factor, she found that it is not necessarily determinative:

Whether the couple share the same home is a very important factor. However, in some instances, couples who maintained separate residences have been held to be spouses, when their living arrangements are viewed in the broader context of their relationship. The cases have focused on the overall relationship rather than simple residency.

These cases illustrate the overriding principle: that each case turns upon its own special facts. Shared residency and joint economic arrangements may be the determinative criteria in many cases but not, given a different factual context, in certain others.

The extent to which the different elements of the marriage relationship will be taken into account must vary with circumstances of each case.

[Decision, p.8, footnotes omitted]

Applying the law to the facts of this case, the arbitrator acknowledged that a number of factors pointed away from cohabitation. However, she expressed “serious doubts” that she was given “the full picture of this couple’s relationship and contact in Canada.” (Decision, p.13). Looking at the entire situation, she concluded that Ms. Alfred and Mr. Vyramuthu cohabited in the months preceding the accident and, therefore, were “spouses.” Starting on page 13 of her decision, the arbitrator provides the following reasons:

Mr. Vyramuthu and Ms. Joyce [*sic*] were a couple forced apart by the contingencies and uncertainties of war. They had a child together. They both contemplated a future together, when events allowed them to be reunited, in keeping with the cultural and social norms within which they operated. When Ms. Alfred came to Canada, she lived in the same house as Mr. Vyramuthu’s family,

presumably with these plans in mind. In this context, it is difficult to believe that the parties had no contact with each other for almost two years after Mr. Vyramuthu moved to Canada. This is particularly so when the couple both lived for a period of time under the same roof, and clearly expected, throughout this period, to make their future together. In the absence of a cogent explanation, I conclude that the couple's apparent distance probably did not reflect the reality of their relationship and that Ms. Alfred's continued eligibility for family benefits may have influenced their formal living arrangements.

It is not necessary to characterise the nature of those arrangements prior to the fall of 1993. It is unclear whether that Ms. Alfred and Mr. Vyramuthu cohabited in a legal sense prior to this time, but, in any event, I am satisfied that they did so afterwards, in the months leading up to the accident.

There is little question that the relationship was one of "some permanence". The couple was committed to each other and had concrete plans to marry, as in the example of *Re Labbe and McCullough*, cited previously.

Although, according to the testimony, Mr. Vyramuthu only stayed over at Ms. Alfred's apartment on weekends during the late fall of 1993, he structured his affairs so as to spend the majority of his free time at her home, with her and their daughter. The purchase of the parking space and Mr. Vyramuthu's own testimony suggests that he stayed over regularly, routinely and as a matter of course during this time. There may have been a number of reasons why he maintained a separate residence during the week and limited himself to living with Ms. Alfred on weekends. These might include cultural requirements that he and Ms. Alfred appear to live apart prior to marriage, convenience in respect of Mr. Vyramuthu's gruelling work schedule — he was working at two jobs during this time — or concerns about Ms. Alfred's family benefits. Ms. Alfred's receipt of family benefits may also explain why Mr. Vyramuthu did not contribute to her living expenses and the absence of shared financial affairs. However, I am satisfied that, viewed in the context of the broad spectrum of their particular relationship, the parties were cohabiting with each other on and off throughout, at least, November and December 1993. In my view, this is sufficient to bring them within the definition of "spouses" under section 224(1)(c) of the *Insurance Act*.

Allstate submits that the arbitrator's decision should not be allowed to stand because she erred in fact and law.

III. ANALYSIS

Allstate's objections to the arbitration decision can be divided into three main arguments. First, it claims the arbitrator erred in law in ignoring that the test of cohabitation starts with an objective determination of whether the two people lived together as spouses for some period. Second, Allstate submits that the arbitrator made factual findings inconsistent with the uncontradicted testimony of Ms. Alfred and Mr. Vyamuthu without any assessment that their evidence was not credible. Third, Allstate points to a number of specific findings that it contends are unsupported by the evidence.

For the following reasons, I am not persuaded that the decision should be disturbed.

1. "Cohabitation"

Allstate submits that the arbitrator ignored the objective component of cohabitation, relying too heavily on the fact that Ms. Alfred and Mr. Vyamuthu planned to get married and were married after the accident. It points in particular to the following two sentences from the decision:

"Whether or not a couple has cohabited in the legal sense involves both an objective and a subjective test: determining the intention of the parties from the facts." (p.7)

"However, the actions of the parties and their intentions and expectations must be viewed in their entirety." (p.13)

In Allstate's submission, the objective requirement of living together is critical because it allows people to control their legal status. Couples can avoid becoming spouses by not living together, even where their relationship is intimate and longstanding.

While I accept this as a general statement, it is difficult to see how it applies to this case. Ms. Alfred and Mr. Vyamuthu were not carefully guarding their unmarried status. On March 13, 1993, nine months before the accident, Mr. Vyamuthu obtained automobile insurance from Allstate, listing his marital status as married and stating, “wife not licenced.” There is no suggestion that “wife” refers to anyone but Ms. Alfred. After the accident, but before they were married, Ms. Alfred applied to Allstate for accident benefits as Mr. Vyamuthu’s spouse.

The arbitrator did not simply rely on these actions as declarations of spousal status. She looked at whether Ms. Alfred and Mr. Vyamuthu fit within the definition of “spouse” at the time of the accident, including a consideration of their living arrangements. It was certainly open to her to look beyond the fact that they maintained separate residences and ask whether that reflected their actual living arrangements. The arbitrator found that their separate residences were more form than substance, and that there were a number of reasons for them to maintain the appearance of separateness. Most notably, Ms. Alfred was receiving a family benefits allowance as a sole-support parent. In my view, this was a legitimate consideration in evaluating the evidence.

In decisions such as *Re Labbe and McCullough* (1979), 23 O.R. (2d) 536, the courts have taken a broad view of cohabitation. A minimal period of “living together” may be sufficient where the other indicators of spousal status are strong and there are reasons that the couple spends time apart. In this case, the arbitrator found that in the months before the accident, Mr. Vyamuthu “structured his affairs so as to spend the majority of his free time at her [Ms. Alfred’s] home.” She also found that he had rented a parking space at her apartment, suggesting “that he stayed over regularly, routinely and as a matter of course during this time.” In my opinion, these findings provided a sufficient basis for the arbitrator’s conclusion that Ms. Alfred and Mr. Vyamuthu “cohabited in a relationship of some permanence.”

2. Failure to assess credibility

Allstate submits that the arbitrator made factual findings in the face of the uncontradicted testimony of Ms. Alfred and Mr. Vyamuthu without any assessment that their evidence was not

credible. Absent a clear rejection of their evidence, Allstate contends that the arbitrator had no factual basis for her conclusion.

While the arbitrator could have made her credibility findings more explicit, I accept State Farm's submission that she made "veiled findings against credibility." I also agree that the arbitrator's reluctance to make strongly negative credibility findings is explained, at least in part, by the nature of this hearing.

This was a dispute between two insurers. Everyone agreed that this young woman, who was married shortly before the hearing, was seriously injured in the accident and entitled to accident benefits. The only question was which company should pay. In the circumstances, it is understandable that the arbitrator might be less direct in her credibility findings than she would have been if she were denying Ms. Alfred's claim. I am not persuaded that Allstate was prejudiced by the absence of explicit credibility findings.

It is clear from the decision that the arbitrator found that Ms. Alfred and Mr. Vyramuthu understated the extent of their relationship. At page 13 of her decision, she states that she had "serious doubts" that she was given the full picture of this couple's relationship and contact in Canada. Allstate submits that she gives no reasons for this statement. In my view, however, her reasons are set out through the entire decision and are amply supported by the evidence.

Ms. Alfred and Mr. Vyramuthu maintained that they had no direct contact for two years after Mr. Vyramuthu arrived in Canada. The arbitrator found this "difficult to believe." As stated in many previous decisions, it is not my role on appeal to second-guess the arbitrator's assessment of the evidence. Even if it were, however, I would find no reason to doubt the arbitrator's assessment.

I had the advantage of a full transcript of the arbitration hearing. In my view, the arbitrator's unwillingness to rely on Ms. Alfred's and Mr. Vyramuthu's descriptions of their relationship is understandable. As she points out, this was a couple who started a serious relationship in

Sri Lanka, resulting in the birth of a child. They contemplated a life together, but the political situation in their country made it difficult to pursue their plans. They emigrated to Canada at different times, but both went to live in Mr. Vyramuthu's parents' house, living there at the same time for at least some period. Ms. Alfred acknowledged that she and her daughter interacted with Mr. Vyramuthu's relatives, who lived upstairs, but claimed she had no contact with him. Mr. Vyramuthu testified that he saw his daughter, but only when Ms. Alfred left her with his relatives. By the summer of 1993, months before they said they resumed contact, Mr. Vyramuthu obtained automobile insurance as a married man and agreed with representatives from the Family Benefits to pay child support. Finally, Mr. Vyramuthu rented a parking space at Ms. Alfred's apartment building. The agreed statement of facts says that the parking space was rented in October. In his testimony, Mr. Vyramuthu said it was even earlier, in September. In these circumstances, I find no reason to criticize the arbitrator's assessment that it is "difficult to believe" that they had no contact before the fall of 1993.

Allstate argued that the arbitrator imposed her own cultural expectations on two people from a different cultural background. There were certainly cultural aspects to this case. It is also true that assessing credibility in a cross-cultural context is a difficult task, but it is a task that the arbitrator cannot shirk. I find no indication that the arbitrator failed to assess the evidence properly, including a consideration of the cultural context.

In support of its appeal, Allstate also argued that the onus was on Ms. Alfred to prove her entitlement to accident benefits under its policy. Therefore, the arbitrator should have denied her claim for accident benefits from Allstate unless she was persuaded that, on a balance of probabilities, Ms. Alfred was Mr. Vyramuthu's spouse at the time of the accident. State Farm did not contest Allstate's position about the onus, but claimed that the evidence supported the arbitrator's conclusion.

I find the onus question troublesome. Ms. Alfred made a claim under both policies, presumably asserting her entitlement. She applied to Allstate based on a policy that essentially listed her as a

spouse. Placing the onus on the applicant makes sense where he or she has a clear interest in proving entitlement. It does not work as well where, as in this case, the applicant has no particular stake in the outcome. In any event, I am satisfied that the evidence was sufficient to support the arbitrator's conclusions even assuming the onus was on Ms. Alfred to prove her spousal status.

3. Alleged factual errors

Allstate submits that the arbitrator made a number of findings that are unsupported by the evidence.

(a) Page 9 - "The history of the relationship between Ms. Alfred and Mr. Vyramuthu arises out of the civil disturbances in the war-torn country of their birth."

Allstate submits that the evidence clearly establishes that the relationship between Ms. Alfred and Mr. Vyramuthu started when he returned to Sri Lanka from Germany, where he was working. Further, he returned to Germany before the outbreak of violence in Sri Lanka.

Based on my reading of the transcript, I find that the arbitrator was faced with confusing testimony about when the violence started in Sri Lanka and when Mr. Vyramuthu returned to Germany. It is clear, however, that the civil disturbances split Ms. Alfred's family and resulted in her fleeing to India and then to Canada, where she claimed refugee status. While the couple's relationship may not have started as a result of the civil disturbances, the course of their relationship was affected by the violence. In my view, that is all the arbitrator was saying in this sentence.

(b) Page 9 - “The break-out of hostilities interrupted their relationship.”

The arbitrator concluded that Ms. Alfred and Mr. Vyramuthu were spouses based on their cohabitation in Canada, not in Sri Lanka. Therefore, this finding was not critical to the arbitrator’s conclusion. Even if it were, however, I am not persuaded it is wrong.

Allstate contends that Mr. Vyramuthu went back to Germany to work before the hostilities started. As stated above, the evidence on this point is unclear. At page 15 of her testimony, Ms. Alfred suggests that he returned after the disturbances started. Mr. Vyramuthu’s testimony is unclear, but contrary to Allstate’s submission, he testified at page 6 that he did not have a job waiting for him in Germany.

(c) Page 9 - “During that time, Ms. Alfred and Mr. Vyramuthu were not able to contact each other.”

Allstate claims that evidence established that Ms. Alfred and Mr. Vyramuthu did not contact each other, not that they were unable to do so. I accept this submission, but little turns on it. As stated above, the arbitrator’s conclusion was based on the couple’s cohabitation in Canada.

(d) Page 9 - “When Ms. Alfred came to Canada, she joined Mr. Vyramuthu’s family in Toronto.”

Allstate submits that while Ms. Alfred rented a basement apartment in a house owned by Mr. Vyramuthu’s parents, she did not “join” his family. The suggestion is that the arbitrator erred in finding that Ms. Alfred became a part of the Vyramuthu family. That is not how I read the sentence. In my opinion, the arbitrator is simply saying that Ms. Alfred “connected with” Mr. Vyramuthu’s family. It is certainly true that she located his family and relied on them to help her get settled.

(e) Page 10 - “Ms. Alfred suggested that she was unaware that Mr. Vyramuthu was in the country or was living in the apartment upstairs.”

Allstate claims that Ms. Alfred clearly testified that she knew Mr. Vyramuthu was living upstairs. My review suggests the evidence on this point was not so clear. The following exchanges appear as part of Ms. Alfred’s cross-examination by State Farm’s lawyer at pages 47 to 50 of the transcript:

Q. If Jebanendran [Mr. Vyramuthu] was living upstairs while you were living downstairs wouldn’t you think you would know about it?

A. But I go to the side entrance, I go to school and take this child to the daycare, but I never see him. I come home after three o’clock. Then after coming after three o’clock I go and bring my child.

....

Q. Now, that statement on the front page indicates that Jebanendran Vyramuthu lived at 14 Kenfin Avenue from 1991 when he came to Toronto until approximately February or March 1992. Now, assuming that that statement is accurate are you saying that you never saw Jebanendran when he was living under the same roof for several months?

A. Mostly I used the basement entrance, I don’t usually go to the main floor.

Q. And this is your explanation for why you did not see Jebanendran during the time he was living under the same roof?

A. Mostly for me there is a separate entrance for me. I don’t go to the main entrance . . .

Q. Do you doubt that Jebanendran lived in the same place or do you believe he did?

A. But he would have come and gone there but I never see him there.

Q. I understand that - -

A. I am certain that he was living there but I never see him coming or visiting there.

THE ARBITRATOR: I am sorry, but could you repeat that for me?

THE WITNESS: He has a written statement that he is living there but I never see him coming or visiting there.

BY MR. GROSSMAN

Q. Do you doubt that he was living there?

A. I am not sure whether he lived there, but I don't know. He might have come and gone there, he might have visited that place.

Based on this testimony, I am not convinced that the arbitrator's finding is unsupported by the evidence.

(f) Page 10 - "They both explained that, according to Tamil cultural traditions, they were expected to marry each other and that, in the meantime, Ms. Alfred would not consider marrying anyone else."

Allstate submits that this statement is wrong because Mr. Vyramuthu testified that he was living in the "European style." I find Allstate's submissions on this issue confusing. At the arbitration hearing, Allstate tried to use cultural and religious norms to help prove its position. It argued that Ms. Alfred and Mr. Vyramuthu would not have been living together at the time of the accident because it was not allowed in their cultural and religious traditions. In response to questions, mostly from Allstate's lawyer, Ms. Alfred and Mr. Vyramuthu agreed that there were cultural and religious rules or expectations governing relationships between men and women, including a prohibition on living together outside of marriage. They made it clear, however, that they did not comply with or feel bound by all these limitations. There are a number of examples, but the

following exchange from page 32 of the transcript displays the problem with Allstate's position.

Ms. Alfred is being cross-examined by Allstate's lawyer:

Q. All right. You have already said that you were not allowed to live together before you get married?

A. Yes.

Q. And I am asking you what is the source of that prohibition?

A. I don't know.

Q. Is it religious?

A. It is religious, for what reason I don't know.

Q. All right. I am not asking you for a philosophical answer, but whose rule is it? Is it a church rule?

A. That is a church rule. Because we used to go to the church and get married in Sri Lanka, in Ceylon so they are church rules.

Q. All right. Did Mr. Vyramuthu agree with you about the church rules?

A. I already bear him a child so, at that time we didn't think about it.

I find that the evidence supports the arbitrator's finding. Ms. Alfred and Mr. Vyramuthu agreed that according to their cultural traditions, their relationship had progressed to the point that they were expected to get married. It is not as clear that Mr. Vyramuthu felt bound to comply with the tradition. In contrast, Ms. Alfred testified that she would not consider marrying anyone else. Mr. Vyramuthu apparently understood this and was confident that she would be waiting for him if and when he was ready to marry her.

- (g) Page 11 - “Mr. Vyramuthu started spending the weekends at Ms. Alfred’s apartment, although he maintained his own residence at his sister’s apartment throughout the week. He explained that he was working at two service jobs during this time, and therefore restricted himself to staying over at weekends.”**

Allstate submits that the evidence established that Ms. Alfred and Mr. Vyramuthu did not move in together due to the cultural prohibition against doing so, not because of his work. For the reasons set out above, I am not persuaded that the cultural evidence was as strong as Allstate contends. The only relevant passage I can find in the transcript is at page 36, where Mr. Vyramuthu is being cross-examined by State Farm’s lawyer:

- Q. From the time you got back together with Joyce in Canada, did you drive from time to time with Joyce in the car?
- A. Not daily. I couldn’t take her daily because I was doing two jobs. But when I have the time I did.

While this testimony may not fully support the arbitrator’s statement, it does not substantially undermine the decision. The arbitrator did not rely on Mr. Vyramuthu’s testimony because she found that he understated his contact with Ms. Alfred. Even if this finding is wrong, therefore, I am not persuaded that it is a sufficient reason for me to interfere.

- (h) Page 12 - Ms. Alfred estimated that Mr. Vyramuthu started to stay over at weekends at the end of October, while Mr. Vyramuthu thought it was somewhat later.”**

Allstate submits that October is the wrong month. I am satisfied, however, that there is evidence to support the arbitrator’s statement. Ms. Alfred’s testimony was confusing on this point. Initially, she said that her first contact with Mr. Vyramuthu was in November 1993, but later says that he started staying overnight in October (Transcript, pages 28 and 30).

For these reasons, I am not satisfied that the alleged errors, considered individually or collectively, provide a sufficient basis for interfering with the arbitration decision.

IV. “ANY OTHER VEHICLE”

The day before the appeal hearing, Allstate gave notice that it intended to rely on the recent Court of Appeal decision in *Warwick et al. v. Gore Mutual Insurance Company and State Farm Mutual Automobile Insurance Company*, judgment released January 22, 1997 (Court File C23617).

Based on this decision, Allstate submits that even if Ms. Alfred was Mr. Vyramuthu’s spouse at the time of the accident, she was not an “insured person” under section 2(c) of the *Schedule* because she was not “the occupant of any other vehicle”:

2. -(c) the named insured, his or her spouse and any dependant of either of them while the occupant of any other vehicle.

This argument was not raised at the arbitration hearing. State Farm did not object to Allstate raising this argument on appeal, but submitted that it did not have sufficient notice to respond fully.

Allstate relies on the following definition of “any other automobile” in section 5.2.2(iv) of the standard automobile policy:

- (iv) any **OTHER AUTOMOBILE**: other than the described automobile, which is of a gross vehicle weight of 4,500 kilograms or less, while personally driven by the insured or by his or her spouse if residing in the same dwelling premises as the insured, provided that . . .

Allstate submits that “any other automobile” only refers to certain automobiles “while personally driven by the insured or by his or her spouse . . .” Because neither Ms. Alfred nor

Mr. Vyamuthu was driving, Allstate contends that Ms. Alfred was not “the occupant of any other vehicle” and, therefore, was not an “insured person” under its policy.

Although the factual situation was somewhat different, Allstate raised this argument in *Adabi-Ghomi and Allstate Insurance Company and Wellington Insurance Company*, (June 28, 1996, OIC A-013683 and A-014141). Allstate has appealed the arbitrator’s decision that it is responsible for paying accident benefits. Recently, that appeal was adjourned to June 20, 1997 to be heard on the same day as two other appeals raising similar issues: *Addai-Agyekum and Coachman Insurance Company and Citadel Insurance Company*, (October 13, 1995, OIC A-009690 and A-009691); *Aujla and Progressive Casualty Insurance Company of Canada and Old Republic Insurance Company*, (March 20, 1996, OIC A-951628 and A-951629). In fairness to the parties in those appeals, I am not prepared to decide the issue in this case before hearing their submissions.

In the circumstances, I am prepared to consider the following options for dealing with the “any other automobile” issue raised by Allstate in this appeal:

1. Schedule oral submissions to be heard on June 20, 1997, the same day as the other appeals.
2. Accept written submissions and release my decision along with, or shortly after, my decisions in the other priorities cases, without further oral submissions.
3. Adjourn until after I release my decisions in the other priorities cases and then allow further submissions, either oral or written.

The parties are asked to advise me by May 19, 1997 if they have been able to agree on one of these options.

V. EXPENSES

Expenses were not argued at the appeal hearing because one of the parties filed an offer to settle before the hearing. This offer was sealed and, therefore, I am unaware of its contents. Although my authority to award expenses as between two insurers is not obvious, I will accept submissions on this issue if the parties are unable to resolve it. If the parties decide to present oral submissions on the “any other vehicle” issue on June 20, 1997, I will hear oral submissions on expenses then. If not, a time will be scheduled for submissions by telephone conference call.

David R. Draper
Director's Delegate

April 23, 1997