CITATION: Definity Insurance Company. v. Intact Insurance Company, 2024 ONSC 3195
COURT FILE NO.: CV-22-00000063-0000
DATE: 20240604

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Definity Insurance Company (formerly Economical Mutual Insurance Company) and Ryan Mark Duff o/a R.D.S. aka RDS Quality Cleaning Products Applicants	Cameron Foster and Mark O'Donnell, for the Applicants
– and –	
Intact Insurance Company Respondent	Douglas A. Wallace, for the Respondent
	HEARD: May 30, 2024

RULING ON APPLICATION RE: DUTY TO DEFEND

CHRISTIE J.

Overview

[1] The Applicants, Definity Insurance Company (formerly Economical Mutual Insurance Company) ("Economical") and Ryan Mark Duff o/a R.D.S. aka RDS Quality Cleaning Products ("Duff"), seek a declaration that the Respondent, Intact Insurance Company ("Intact"), owes a duty to defend Duff in three underlying actions.

[2] The Respondent, Intact, argues that they have no duty to defend, and the application should be dismissed.

[3] Economical further seeks a declaration that Intact is obligated to pay to it an equal one-half share of past and ongoing defence costs and disbursements, as well as interest thereon, incurred by Economical solely in the defence of Duff in the underlying actions, based upon the doctrines of equitable contribution, and/or equitable subrogation, and/or restitution. Intact concedes this point if they are found to have a duty to defend.

Facts

[4] Ryan Duff is the sole proprietor of a business known as RDS Quality Cleaning Products. Mr. Duff leased half of a multi-unit commercial and residential structure located at 350 Highway 36 in Lindsay, Ontario.

[5] On December 28, 2019, a fire occurred in the building and the entire building was destroyed. It is alleged that the fire originated in the garage occupied by Duff. More specifically, it is alleged that, in attempting to repair a forklift, Mr. Duff caused gas and oil to drain from the forklift, then used a 2012 GMC Sierra truck to boost the forklift with battery cables, at which time a fire erupted.

[6] There are three actions related to alleged damages and losses arising from the same fire, two against Ryan Mark Duff o/a R.D.S. aka RDS Quality Cleaning Products, Karen Jones, John Doe 1, and John Doe 2, and one against RDS Quality Cleaning Products and RDS Cleaning Supplies:

a. Court File No. CV-21-00000190-0000 ("Mah Action") – Statement of Claim issued December 20, 2021. The amended pleadings include the following.

i. The Plaintiffs, Oi Sim Mah, Duck Yue Mah, Oi Sim Mah o/a Derry's Restaurant, and Duck Yue Mah o/a Derry's Restaurant, claim damages in the sum of $5,000,000.

ii. The Plaintiffs were the owners of the mixed-use residential and commercial property located at 348-350 County Road 36, Lindsay, Ontario.

iii. Oi Sim Mah or Duck Yue Mah also carried on business as a sole proprietorship and/or partnership under the business name Derry's Restaurant, which was located at one of the commercial units at the property with a mailing address of 348 County Road 36, Lindsay, Ontario.

iv. Ryan Duff was a tenant of the other commercial unit at the property with a mailing address of 350 County Road 36, Lindsay, Ontario, which had a garage behind it.

v. The property also had two residential apartments.

vi. Ryan Duff was also the owner, lessee and/or operator of a forklift located at the property.

vii. The Defendant, Karen Jones, was the registered owner of a GMC Sierra truck, which was used to boost the forklift.

viii. On December 28, 2019 a fire occurred at the property which destroyed the property and the contents therein.

ix. The fire originated in the garage occupied by Mr. Duff.

As against all Defendants, the following claims are made at para. 12:

> The plaintiff's plead that the fire was caused by the conduct, activities, fault, negligence, want of care, breach of duty and/or breach of contract of the defendants or their servants, agents, employees, contractors or others for whom the defendants are at law responsible, the particulars of which include, but are not limited to, the following:
>
> a. They caused gasoline and oil to drain from a Forklift and then used the Truck to boost/charge the Forklift battery with battery charging clasps/jumper cables, causing a spark and the ignition of gasoline vapour;
>
> b. They left the fuel line of the Forklift open when charging the Forklift battery with the Truck;
>
> …
>
> d. They caused flammable and/or combustible materials to catch fire when charging the Forklift battery with the Truck;
>
> e. They charged the Forklift battery with the Truck in close proximity to combustible materials;
>
> f. They charged the Forklift battery with the Truck inside a building;
>
> g. They charged the Forklift battery with the Truck when fuel drain pans remained in the area;
>
> h. They failed to consider the reasonable dangers and risks involved before utilising the charging clasps/jumper cables;
>
> …
>
> o. They failed to take precautions to prevent ignition sources such as open flames, sparks or electric arcs when charging the Forklift battery with the Truck;
>
> r. They operated, refuelled and/or charged batteries for the Forklift with the Truck when they were not properly trained and/or authorized to do so;
>
> s. They used the Truck to charge the Forklift battery when they knew or ought to have known it was unsafe to do so in all the circumstances;

t. They used the Truck and/or Forklift in a such a way as to create a fire hazard;

As against the owner/lessor of the truck and forklift only, the pleadings are contained at para. 13 and include:

a. They gave control of the Truck and/or Forklift to Mr. Duff and/or John Doe 2, knowing that they were incompetent drivers and/or operators, lacking in reasonable skill, care, ability, or training to operate same;

b. They permitted the Truck and/or Forklift to be operated by Mr. Duff and/or John Doe 2, knowing that they were incompetent drivers and/or operators, lacking in reasonable skill, care, ability or training, and ought not to have been operating the said Truck and/or Forklift;

c. …

d. They permitted the Truck to be used to boost the Forklift battery when they knew or ought to have known of the risk of fire in all the circumstances;

e. ….

f. They failed to monitor the use and operation of the Truck and/or Forklift by Mr. Duff and/or John Doe 2.

b. Court File No, CV-21-00000193-0000 ("Jenkins Action") – Statement of Claim issued December 29, 2021. The amended pleadings include the following:

i. The Plaintiffs, Julie Mah and Reginald Jenkins, claim damages in the sum of $50,000.

ii. The Plaintiff, Julie Mah, is the daughter of Oi Sim Mah and Duck Yue Mah, owners of the property.

iii. Both Plaintiffs, with the consent of Oi Sim Mah and Duck Yue Mah, stored certain goods at the Property.

iv. Ryan Mark Duff knew the Plaintiffs and, at times, dealt with Julie Mah in relation to the Property.

The allegations of negligence are nearly identical to those in the Mah action above.

c. Court File No. CV-21-00000178-0000 ("Moore Action") – Statement of Claim issued December 6, 2021. The Pleadings include the following:

i. The Plaintiffs, Danny Moore and Mitzi Moore, claim damages in the amount of $550,000.

ii. They are spouses and were tenants in a second-floor apartment at 350 Highway 36, Lindsay.

iii. The Plaintiffs claim that they were forced to evacuate their apartment due to the imminent harm facing them from the fire. As a result, their personal property, valuables, and family heirlooms were destroyed in the fire that was caused by the negligence of the defendants.

While there is nothing alleged about the use of the truck, specifically, there are pleadings as follows:

7. The plaintiffs state that the fire and resulting damages were caused solely by the negligence of the defendants, the particulars of which include, but are not limited to:

b. They and their employees and agents were negligent in the use of gas and electric powered machinery on and near their premises which ignited flammable materials and cleaning products.

[7] At the material times, Economical insured Duff under a policy of commercial general liability insurance that provided coverage to Duff. Pursuant to that policy, Economical has been, and continues to be, providing a defence to Duff in each of the actions. Economical accepts that Mr. Duff is covered under their policy and that it owes a duty to defend him in all three actions.

[8] At the material times, the 2012 GMC Sierra truck was insured by Intact, under the name of the registered owner, Karen Jones, pursuant to a standard Ontario automobile policy with third party liability limits of $1 million. The principal operator of the truck was listed as Tammy Duff, who is married to Mr. Duff. There appears to be no dispute, at least for the purpose of this application, that Karen Jones, as registered owner of the truck, provided consent to Duff to operate the truck. Intact has not disputed that Duff would be an insured person under their policy if using or operating the truck in accordance with the *Insurance Act*.

[9] However, the Respondent, Intact, submits that the facts as pleaded allege that Mr. Duff was using the pickup truck as nothing more than a tool in his repair work on the forklift, not as a motorist, therefore, he was not using or operating the truck as it is contemplated in the *Insurance Act*, there is no duty to defend, and the application should be dismissed.

[10] In February 2022, when the Applicants sought coverage from Intact in relation to the defence of Duff, it was refused for this reason. It should be noted that Intact is defending the truck owner, Karen Jones, in the actions where she is named.

Analysis

Duty To Defend

[11] It must be clearly stated that this application is only to determine whether Intact has a duty to defend. This court is not determining or resolving issues relating to indemnity or loss, which will be dealt with on a complete record at trial. It is, therefore, essential that this court start out by clearly stating some guiding legal principles that apply in the context of this application, which is only to determine whether such a duty exists in this case.

[12] In *Demme v. Healthcare Insurance Reciprocal of Canada*, 2022 ONCA 503, Demme a former registered nurse, had her employment ended upon discovery by the hospital that she had misused an automatic medication dispensing unit over an extended period to obtain Percocet tablets. Civil actions were started, by patients whose records were affected, against Demme and the hospital. The hospital was a subscribing member of the Healthcare Insurance Reciprocal of Canada (HIROC), which insured hospitals and their employees. HIROC appointed counsel to represent the hospital in the actions but refused to represent Demme. Demme sought a declaration that HIROC owed her a duty to defend the actions and related relief. In fact, Demme moved for summary judgment for such a declaration. The motion judge dismissed the motion. Demme appealed and the appeal was dismissed. The court stated in part as follows:

> [29] There is no dispute the motion judge correctly stated the principles that guide a duty to defend analysis, namely:
>
> * The insurer has a duty to defend if the pleadings filed against the insured allege facts which, if true, would require the insurer to indemnify the insured;
>
> * If there is a mere possibility that the claim falls within the liability coverage, the insurer must defend;
>
> * The court must look beyond the labels used by the plaintiff to ascertain the "substance" and "true nature" of the claims. It must determine whether the factual allegations, if true, could possibly support the plaintiff's legal claims;
>
> * The court should determine if any claims pleaded are entirely "derivative" in nature, within the meaning of that term as set out in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551. A derivative claim will not trigger a duty to defend;
>
> * If the pleadings are not sufficiently precise to determine whether the claims would be covered by the policy, the insurer's obligation to defend will be triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred;

> * In determining whether the policy would cover the claim, the usual principles governing the construction of insurance contracts apply, namely, the *contra proferentem* rule and the principle that coverage clauses should be construed broadly and exclusion clauses narrowly, as well as the desirability, where the policy is ambiguous, of giving effect to the reasonable expectations of the parties;
>
> * Extrinsic evidence that has been explicitly referred to in the pleadings may be considered to determine the substance and true nature of the allegations; and
>
> * An insurer's duty to defend is determined on the allegations made in the relevant statement of claim and policy; no other evidence generally is admissible.
>
> See*: Monenco Ltd. v. Commonwealth Insurance Co*., 2001 SCC 49, [2001] 2 S.C.R. 699, at paras. 28-35; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at paras. 23-24; *Panasonic Eco Solutions Canada Inc. v. XL Specialty Insurance Company*, 2021 ONCA 612, 466 D.L.R. (4th) 276, at para. 22; and *Tedford v. TD Insurance Meloche Monnex*, 2012 ONCA 429, 112 O.R. (3d) 144, at para. 14.
>
> [30] There is also no dispute that the motion judge's analysis followed the correct sequence of steps. First, he reviewed the pleadings to determine the true nature of the claims that were properly pleaded; next, he considered whether any claims were wholly derivative in nature; finally, he considered whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend: *Scalera*, at paras. 50-52.

[13] In *AIG Insurance Company of Canada v. Lloyd's Underwriters*, 2022 ONCA 699, the court was considering whether two insurers have a duty to defend a mutual policyholder in a progressive property damage claim. The Court stated:

> [40] A liability insurer's duty to defend arises when an insured shows a "mere possibility" that the true nature or substance of a pleaded claim, if proven at trial, falls within coverage and would trigger the insurer's duty to indemnify: *Progressive Homes Ltd. v. Lombard Insurance Company of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at paras. 19-20.
> …

> [44] In *Monenco Ltd. v. Commonwealth Insurance Co*., 2001 SCC 49, [2001] 2 S.C.R. 699, the Supreme Court sets out the legal principles for assessing whether an insurer's duty to defend has been triggered. The starting premise rests on the traditional "pleadings rule" (para. 28). If the pleadings filed against the insured allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence (para. 28). [45] Determining whether a duty to defend exists in any given situation requires an assessment of the pleadings to ascertain their substance and true nature (para. 35). The court may go beyond the pleadings and consider "extrinsic evidence that has been explicitly referred to within the pleadings … to determine the substance and true nature of the allegations, and thus, to appreciate the nature and scope of an insurer's duty to defend" (para. 36). However, this approach cannot cause the duty to defend application to become "a trial within a trial". The court considering the application may not look to "premature" evidence, which the Supreme Court defines as "evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation" (para. 37).
>
> [46] As this court stated in *Reeb v. The Guarantee Company of North America*, 2019 ONCA 862, 97 C.C.L.I. (5th) 175, at para. 6, excluding premature evidence from the application judge's duty to defend analysis avoids turning the hearing into a "trial within a trial" on contested facts or issues best reserved to the trial judge.

[14] As stated in *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 (CanLII), at para. 29, "…the insurer's duty to defend is broader than the duty to indemnify".

Coverage

[15] The determination of who is covered under a motor vehicle insurance policy in Ontario starts with a consideration of the *Insurance Act*, R.S.O. 1990, c. l.8. Section 239 of the *Insurance Act* states:

> 239 (1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,
>
> (a) arising from the ownership or directly or indirectly from the use or operation of any such automobile; and

> (b) resulting from bodily injury to or the death of any person and damage to property.

This court notes that the use or operation can be direct or indirect, suggesting a fairly broad range of activity is meant to be covered.

[16] Further, subsection 3.2 and 3.3 of the Standard OAP 1 wording for the Intact policy provides:

> **3.2 Who is Covered**
>
> You are covered when you, or anyone else in possession of a described automobile with your consent, uses or operates it. We will consider these other people insured persons.
>
> **3.3 What We Cover**
>
> You or other insured persons may be legally responsible for the bodily injury to, or death of others, or for damages to the property of others as a result of owning, leasing or operating the automobile or renting or leasing another automobile. In these cases, we will make any payment on your or other insured persons' behalf that the law requires, up to the limits of the policy.
>
> We will also reimburse anyone covered by this policy for costs involved in providing immediate medical aid needed by someone hurt in an automobile incident.
>
> When we receive notice of loss or damage caused to persons or property we will investigate. We may then negotiate a settlement on behalf of you or other insured persons.

[17] While ownership would seem relatively easy to define and confirm, there have been many cases that have considered what it means to "use" or "operate" an automobile for the purposes of insurance coverage. This court has considered all of the cases provided. Having said that, a leading case on the issue would now seem to be the Supreme Court of Canada's decision in *Citadel General Assurance Company v. Vytlingam* [2007] 3 S.C.R. 373.

[18] In *Vytlingam*, Mr. Vytlingam and his family were driving along a highway in North Carolina. Two men, Farmer and Raynor, loaded Farmer's car with boulders, drove to a highway overpass, and dropped the boulders onto passing traffic. One of the boulders struck the Vytlingam vehicle, causing serious injuries to the occupants. Neither Farmer nor Raynor had assets, but Farmer had a $25,000 limit automobile insurance policy. Vytlingam was awarded nearly $1 million in tort damages and sought to recover the shortfall under his own insurance policy's underinsured motorist coverage (OPCF 44-R Endorsement). Under this endorsement, "the insurer shall indemnify an eligible claimant for the amount

that he ... is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to ... an insured person arising directly or indirectly from the use or operation of an automobile". The question for the Court was whether Farmer's use of the automobile, to transport the rocks to the scene and thereafter escape, brought his actions within the ambit of the insurance coverage - that is, whether the Vytlingam's injuries arose "directly or indirectly" out of the use or operation of an automobile. The court, overturning earlier decisions, determined that use was established but causation was not. It must be remembered, however, that *Vytlingam* was decided in the context of determining the limits of the "inadequately insured motorist" coverage, which would require the Ontario insurer to stand in the shoes of Farmer and pay the amount Farmer ought to pay by way of civil damages.

[19] Speaking for the Court, Justice Binnie held that the "inadequately insured motorist" coverage could not be stretched as far as this case, despite the "highly sympathetic facts". The court stated in part as follows:

> [6] Counsel for the appellant contends, with some justice, that "it makes no sense to have an insurance endorsement pursuant to which recovery depends on someone else's limits ... [u]nless that insurance is designed to address occurrences that would trigger the liability insurance of the wrongdoer" (transcript, at p. 3). In Ontario the liability of the tortfeasor would be triggered where the occurrence falls within s. 239 of the *Insurance Act*…
>
> [7] The OPCF 44R, on this view, backstops s. 239(1)(a) in cases where the contribution of the tortfeasor's own insurer (if any) is inadequate. I think this view is correct. The OPCF 44R tracks the language found in s. 239(1)(a). Thus, Farmer may be a motorist (i.e. the owner or driver of the car) and he may be "at fault" for the respondents' injuries - but the question arises as to whether the claim can be said to arise "from the ownership or directly or indirectly from the use or operation of [an] automobile". In short, was Farmer at fault as a motorist? For the reasons that follow, I do not think that he was.
> …
>
> [9] Some of what is said in *Amos* is helpful to relate the claimants' injuries to the "use or operation of a motor vehicle", but *Amos* is not a template to resolve indemnity coverage, i.e ., the "motorist" issue, because the type of insurance and the coverage requirements in *Amos* did not require the presence of an at-fault motorist.
> ….
>
> [12] In this appeal, of course, we are not concerned with no-fault statutory accident benefits payable to an insured. In *Amos*, the focus was necessarily on the use of the claimant's car; the focus here is on

the use of the tortfeasor's vehicle. The questions are, firstly, whether the Vytlingams' claim is in respect of an inadequately insured tortfeasor whose fault occurred in the course of using a motor vehicle as a motor vehicle and not for some other purpose (as a diving platform, for example, as hereafter discussed), and secondly, whether the chain of causation linking the claimed loss or injuries to the use and operation of the motor vehicle, which is shown to be more than simply fortuitous or "but for", is unbroken.
…

[16] While no-fault insurance and indemnity insurance rest on different statutory provisions, both fall to be interpreted in the context of a motor vehicle policy. When Major J. said in *Amos* that it was a condition of no-fault coverage that the claim relate to "the ordinary and well-known activities to which automobiles are put" (para. 17), he was simply signalling that someone who uses a vehicle for a non-motoring purpose cannot expect to collect motor vehicle insurance. If, for example, a claimant got drunk and used her car as a diving platform from which to spring head first into shallow water, and broke her neck, she could not reasonably expect coverage from her motor vehicle insurer, even though, in a sense, she "used" her motor vehicle. The same conclusion is compelled under s. 239(1)(a) because an injury resulting from such an off-beat use could not sensibly be said to arise "directly or indirectly from the use or operation" of the motor vehicle as a motor vehicle.

[17] The appellant insurer seeks to restrict coverage in arguing, for example, that in this case, indemnification should be denied because Farmer used "the vehicle for the purpose of getting weapons to the scene of a crime", and "it is that kind of situation that should not fall ... within the meaning of ordinary and well known activities" (transcript, at p. 18).

[18] I am unable to agree. Firstly, even if transporting rocks across the countryside had been the effective cause of the Vytlingams' injuries, which it wasn't, transportation is what motor vehicles are for. The fact that transportation in this case was for a criminal purpose no more excludes coverage than the fact that Farmer may have been driving his vehicle on the night in question while impaired. Innocent drivers (or pedestrians) should not be denied indemnity if struck by (to give a further example) a getaway car "transporting" bank robbers from the crime scene. In all these cases, the tortfeasor, regardless of his or her subjective reasons for climbing into the car, is at fault as a motorist.

[19] Secondly, and in any event, the appellant insurer's argument overstates the scope of the *Amos* purpose test. The "ordinary and well-known activities to which automobiles are put" limits coverage to motor vehicles being used as motor vehicles, and would exclude use of a car as a diving platform (as above) or retiring a disabled truck to a barn to store dynamite (which explodes), or negligently using the truck as a permanent prop to shore up a drive shed (which collapses, injuring someone). In none of these cases could it be said that the tortfeasor was at fault as a motorist. In none of these cases could it be said that the motor vehicle was being used as a motor vehicle. That is the sort of aberrant situation that the *Amos* purpose test excludes, and nothing more. Here, as in *Amos*, it is the causation test that did the work, not the purpose test.

[20] In *Holdbrook*, an individual attempting to commit suicide in a truck parked in a warehouse caused an explosion. The fire insurer sought recovery from the truck auto insurer alleging that the damages occurred as a result of the ownership, use or operation of the truck. The claim was dismissed. Pugsley J.A., for the Court of Appeal, held, correctly, that the truck was not being operated or being used as a motor vehicle.

[21] Similarly in *Continental Stress Relieving Services*, damage was caused by a vehicle repairman whose careless use of a cutting torch caused gasoline fumes to ignite damaging the building and disrupting the businesses carried on there. The insurers of the businesses sought to recover against the motor vehicle insurers but it was held that the careless repairman could not be considered to be an at-fault motorist.

[22] However, to take another bizarre example for illustrative purposes. If instead of throwing rocks from the overpass Farmer had tried to jump his car at high speed over the interstate highway, Evel Knievel style, and crashed down on the Vytlingam vehicle, the insurer might want to argue that Farmer was not making an "ordinary and well-known" use of his vehicle. However, there is no doubt that Farmer would have been driving the vehicle and driving meets the *Amos* purpose test. Further, in the language of the OPCF 44R, the Vytlingam's claim in such a case would have arisen "directly or indirectly from the use or operation" of the tortfeasor's vehicle being used as a motor vehicle. The OPCF 44R is a big tent and not much will be excluded as aberrant to the use of a motor vehicle as a motor vehicle.

> [23] Thirdly, to be quite explicit, I would reject the position of the appellant and the intervener Insurance Bureau of Canada that the OPCF 44R coverage can be denied if the tortfeasor is engaging (as here) in criminal activity. This is not so. The insurer is selling peace of mind to its insured and the endorsement will frequently (and properly) be invoked despite criminality, as in the case of an insured injured by a drunk driver, for example.
> C. The Chain of Causation
> …
>
> [29] The claimant must implicate the vehicle in respect of which coverage is claimed in a manner that is more than merely incidental or fortuitous: *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*, [1960] S.C.R. 80. In that case, a taxi company had contracted to deliver developmentally impaired school children door to door. Its driver had negligently parked on the opposite side of the street, leaving a child to cross to its home unassisted, in the course of which the child was severely injured. The parents recovered against the taxi company and the taxi company sued its insurer for indemnification under a comprehensive policy that excluded coverage for loss arising out of the use of a motor vehicle. In these circumstances, Ritchie J. concluded that the driver's failure to escort the child across the street was severable from the "use or operation" of the insured vehicle (thus requiring the defendant insurer to pay up) stating:
>
> > ... the motor vehicle was stationary at the time of the accident and the chain of causation originating with its use was severed by the intervening negligence of the taxi driver whose failure to escort the boy across the street was the factor giving rise to the [insured]'s liability. [Emphasis added; p. 85.]
>
> Interestingly, in subsequent cases under motor vehicle policies, the outcome has been different. …These cases are very fact specific. However, if the vehicle's involvement is held to be no more than incidental or fortuitous or "but for", and is ruled severable from the real cause of the loss, then the necessary causal link is not established.

In *Vytlingam*, rock throwing was found to be an activity entirely severable from the use or operation of the Farmer vehicle.

[20] The Applicants in the case at bar argued that *Vytlingam* was decided in the context of an underinsured motorist and, therefore, the test as laid out by the Supreme Court of Canada was meant to be applied in that context. This court does not agree that the guidance in *Vytlingam* is restricted to that context. There must be some consistency across insurance

law where reasonable. While considering the under insured endorsement, the court considered s. 239 of the *Insurance Act* in an attempt to provide that consistency. The guidance from *Vytlingam* can, and should be, applied more broadly than what was suggested.

[21] Accepting that *Vytlingam* applies, this court must determine what guidance it provides. The Applicants state that nowhere in s. 239 of the *Insurance Act* or the applicable OAP wording does it suggest that the use and operation must be for a motoring purpose or using the automobile as a motorist as the Respondent suggests *Vytlingam* requires. This court agrees with the Applicants in this regard. However, it is also the view of this court that, while the *Vytlingam* decision does use the terms "motorist" and "motoring purpose" on a few occasions, it does not have the restricted meaning that the Respondent in this case wishes to ascribe to it. At para. 5 of *Vytlingam*, the court provided some meaning to its use of the word "motorist", as "whether the claim arose through an unbroken chain of causation from the ownership or directly or indirectly from the use or operation of a motor vehicle."

[22] In this court's view, the test established in *Vytlingam* is clear and the considerations are as follows:

> 1. Whether the fault occurred in the course of using a motor vehicle as a motor vehicle - for ordinary and well-known activities to which motor vehicles are put and not for some other purpose; and
>
> 2. Whether the chain of causation linking the claimed loss or injuries to the use and operation of the motor vehicle, which is shown to be more than simply fortuitous or "but for", is unbroken.

The Respondent's suggested addition of "used for a motoring purpose" or "used as a motorist" would seem to suggest a more restrictive use than what *Vytlingam* set out and how it has been interpreted. It would appear that the "motorist" language in *Vytlingam* is taken specifically from the uninsured or underinsured context. However, *Vytlingam* does not suggest that "motorist" or a "motoring purpose" should be some general addition to a consideration of use. In this court's view, the Respondent is attaching too much weight to the reference to "motorist" in the decision. At the end of the day, the Respondent acknowledges that the test from *Vytlingam* is that set out in para 12, as set out above. In para. 12 there is no reference to "motorist" or "motoring purpose".

Repair Cases

[23] This court was referred to a number of cases involving repair work being undertaken.

[24] The Applicant relied on two repair cases wherein the court determined the activities in question constituted use or operation of the automobile.

[25] In *Pilliteri v. Priore*, 1997 CanLll 12135 (ONSC), while repairing body damage on a car owned by GP on premises owned by VP, DP started a fire through his negligent use of an oxyacetylene torch. The fire destroyed the premises. DP had agreed to work on GP's car

for compensation. VP was a friend of DP and allowed him to use the premises free of charge. State Farm was GP's automobile insurer and Co-Operators was DP's insurer under a homeowner's insurance policy. The Co-Operators policy excluded claims for damage arising from the ownership, use, or operation of any motorized vehicle. DP sought to recover indemnification from the automobile insurers, State Farm. The court ultimately found that when DP was trying to open the car door with the torch, he operated a part of the vehicle, the door, and this constituted "operation" of a part of the automobile. It is important to note that this case pre-dates *Vytlingam*.

[26] In *Horsefield v. Economical Mutual Insurance Company*, 2017 ONSC 4868, the Plaintiffs rented their house to their adult son. A few days later, the son was repairing the brake line on his automobile stored in the attached garage, when the gas tank under the automobile fell to the floor spilling gasoline which quickly led to a fire that destroyed the house. When interviewed, the son explained that his automobile was his everyday car and that he had parked it in the garage after its brakes went. On the date in question, he had placed the automobile on a ramp in the garage for the purpose of repairing a crack in the brake line. To make the repair, he moved the gas tank. The tank fell on the floor when he was on his back under the vehicle. North Waterloo, the Plaintiff's property insurer, paid for the damage and then sought to recover their costs from the son. The son advised his insurer, Economical, with whom he had a personal insurance policy. The policy stated that he was not insured for claims arising from ownership, use, or operation of a motorized vehicle, except those for which coverage was shown on the form. Economical refused to respond to the claim. The Court found that the tenant's maintenance and repair of his motor vehicle constituted "use" of a motorized vehicle within the meaning of the exclusion (para 45). It is worth noting that this case does not apply or consider the *Vytlingam* analysis.

[27] The Respondent points to a number of repair cases which have held that the activities did not constitute use or operation. While many are statutory accident benefit claims, which do not include indirect use, the cases are still worth considering with this caution in mind:

a. *M.R. v. Wawanesa*, 2020 CarswellOnt 13573 (LAT) – In the context of a statutory accident benefits claim, an adjudicator held that changing tires seasonally did not constitute normal use and operation of an automobile. The Tribunal noted at para 23: "Following *Vytlingam*, adjudicators have taken notice of the reasonable expectations of the insurer as well as the expectations of the insured. There appears to have been a sea-change in the approach of adjudicators."

b. *P.F. v. Economical Mutual Insurance Company*, 2019 CarswellOnt 20566 (LAT) - An accident benefits claimant sustained injuries while cleaning a toxic spill following a collision involving a tanker truck. Citing *Vytlingam* and *Continental Stress* as authority, the adjudicator found that after the truck and tractor-trailer collided, they were no longer operational and were no longer functioning as motor vehicles. It followed that the impairment did not result from their use or operation.

c. *C.C. v. Intact Insurance Company*, 2019 CarswellOnt 12697 (LAT), aff'd 2019 CarswellOnt 20503 (LAT) - Two brothers were in the process of replacing a fuel

pump in an automobile when an explosion and fire occurred, resulting in severe burns. They applied for accident benefits and entitlement to coverage. The Arbitrator held that the replacement of a fuel pump in a vehicle that had not been operated for several days and was hoisted on jacks was not an ordinary and well-known activity to which automobiles are put by motorists.

d. *Savard v. Royal & SunAlliance Insurance Co. of Canada*, 2012 ONSC 715 - The Plaintiff was in the process of removing the engine from a motor vehicle that was going to be scrapped when it fell on him causing injuries. He intended to remove the tires, rims, engine, and transmission. The exhaust had been removed and all fluids removed, as well as wiring, tires, and hoses. In considering whether this constituted an "accident" as defined in the *Statutory Accident Benefit Schedule*, the court held that while dismantling vehicles may be a common activity, it did not constitute use.

e. *Olesiuk v. Kingsway General Insurance Co.*, 2011 CarswellOnt 9791 (FSCO (Arb. Decision)) - Mr. Olesiuk was working late, performing bodywork repairs on his employer's pick-up truck with no-one else around. He was found in a pool of blood early the next morning in circumstances that the adjudicator accepted indicated that he had fallen from the hood of the truck while repairing the roof of the cab. The Applicant applied for statutory accident benefits. The Arbitrator held that Mr. Olesiuk was not involved in an "accident" as defined in the Schedule. Applying *Amos*, *Vytlingam*, and others, Arbitrator Feldman held that when a person is repairing a vehicle, they are not actually using the vehicle.

f. *Khan v. Certas Direct Insurance Company*, 2008 CarswellOnt 4541(FSCO (Arb. Decision)) – Mr. Khan was attempting to repair his wife's van when a fire started. Mr. Khan sustained burn injuries as a result and claimed statutory accident benefits. Mr. Khan argued that people routinely maintained their automobiles and that his repair of the vehicle in this case was a well-known activity to which automobiles are put. Certas argued that repair of a vehicle is not use or operation of the vehicle as repairs arise out of ownership and not use. Arbitrator Richards held that the repair of the vehicle in the garage was not "use or operation" of the vehicle. Factually, the Arbitrator found that the fuel line had been disconnected and some, if not all, of the wheels were not touching the ground. The Arbitrator also found that the fire was started by Mr. Khan's use of his tools in repairing the van – a new and independent source – the air compressor. The Arbitrator went on to find that even if this could be considered use, it would not meet the causation test.

[28] The Respondent acknowledged that there are some repair cases which have held that the activities, repairs to the insured automobile, did constitute use or operation:

a. *Davis v. Aviva Canada Inc*, 2017 ONSC 6173 – Again, in the context of statutory accident benefits, the court held that opening the insured's vehicle hood to check the level of windshield washer fluid is an ordinary and well-known activity to which automobiles are put, and therefore the purpose test was satisfied. The Court noted

> at para 13-14: "I view routine maintenance like checking and topping up fluid levels, checking tire pressure and filling the gas tank as satisfying the purpose test….On the other hand these cases turn on their own facts and no doubt some accidents arising out of auto repairs, depending on the venue and other surrounding circumstances, could well fall outside of the parameters of 'ordinary and well known activities to which automobiles are put'."

[29] This court does not agree that this case falls squarely within the repair cases. The repair cases provided relate to repair of the insured vehicle itself. This case does not. However, the cases do demonstrate the debate around this issue. At the end of the day, it is a factual determination to be made on all of the evidence.

Defence of the Truck Owner

[30] In the context of this case, the fact that Intact has extended a defence to the truck owner, but not Duff, does not cause this court to side with the Applicants.

[31] This court is willing to accept that there is no evidence that the defence of the owner has been limited or restricted in any way and that the allegations made against the owner and all other defendants are the same. However, it is clear that the allegations against Ms. Jones relate to her ownership of the truck and, therefore, do not engage the "use or operation analysis". There is no suggestion that she used or operated the vehicle in this scenario. While this court accepts that consistency is important so that people know what to expect, this court does not accept the notion that a defence for one, such as the owner, should lead to a defence for all. Just as a general concept, this could lead to some bizarre and unfair results. While it is true that the pleadings, as broadly presented, suggest that the owner's liability is connected to the use and operation of the truck, it seems obvious that this is not what this case is really about. There is absolutely no suggestion that the owner was present.

[32] Frankly, this court does not feel that this point was adequately argued, with supporting legal precedent, in order to decide the case on this issue. As such, in this case, Intact's defence of Ms. Jones is irrelevant to the question involving covering Mr. Duff. This court makes no comment as to whether this might be relevant in another case where the point is more fully argued and analyzed.

Is the Forklift an Automobile

[33] In the case at bar, it must be noted that at para. 37 of their factum, the Respondent, Intact, concedes that an argument could be made that using booster cables to repair an "automobile" might constitute a common activity to which automobiles are put, but that using them to repair industrial equipment is not. Intact argued that the forklift is not an "automobile", but rather industrial equipment. They rely on *Aviva Insurance Co. of Canada and Wawanesa Mutual Insurance Co*., 2015 CarswellOnt 15936 (Ont. Arb.) at para. 60, which found that a forklift was not an "automobile".

[34] Contrary to this position, the Applicant, points out that in s. 1 of the *Insurance Act*, an automobile is defined as:

> "automobile" includes a trolley bus and a self-propelled vehicle, and the trailers, accessories and equipment of automobiles, but does not include railway rolling stock that runs on rails, watercraft or aircraft; ("automobile")

Further, they point to OAP1 that includes a "motorized snow vehicle" as an automobile, suggesting the definition is broad. The Applicant, therefore, argues that the forklift is unquestionably an automobile in the context of considering whether there is a duty to defend.

[35] It is the view of this court that, for the purpose of this determination, it does not matter whether the forklift is an automobile for insurance purposes or not. The insured vehicle, the truck, is most certainly an automobile. The focus is on the "use" or "operation" of the truck, not the forklift. Specifically determining how common it is to use the truck, an automobile, to boost, a forklift, whether automobile or not, is not a level of specificity required on this application.

Conclusion

[36] In order to make this determination of a duty to defend, this court must assume the alleged facts in the pleadings to be true and answer the following questions:

a. Was Duff, at the material time, using or operating the Intact insured GMC Sierra truck as a motor vehicle – for an ordinary and well-known activity to which motor vehicles are put – when he attempted to jumpstart a forklift in his shop?

b. If the answer to (a) is yes, was there an unbroken chain of causation linking the claimed loss – the fire loss – to the use and operation of the motor vehicle – using the vehicle to jumpstart the forklift – which was more than simply fortuitous?

[37] If there is a mere possibility that the claim falls within the liability coverage, the insurer must defend. Having considered the totality of the circumstances, this court concludes that there is most certainly a duty to defend on the part of Intact. The following factors have guided this case to its determination:

a. The insurer has a duty to defend if the pleadings filed against the insured allege facts which, if true, would require the insurer to indemnify the insured.

b. Each of the pleadings must be considered in their totality to properly perform a duty to defend analysis.

c. If there is a mere possibility that the claim falls within the liability coverage, the insurer must defend.

d. The court must look beyond the labels used by the Plaintiffs to ascertain the true nature of the claims.

e. Coverage clauses should be construed broadly and exclusion clauses narrowly.

f. The reasonable expectations of the parties must be considered.

g. The duty to defend inquiry is not the trial. Contested facts or issues are best reserved to the trial judge.

h. An insurer's duty to defend is broader than the duty to indemnify.

i. The truck is unquestionably an automobile using any definition or analysis in insurance law.

j. There has been no suggestion that Mr. Duff used or operated the truck without consent of the owner.

k. The determination of what activity amounts to use or operation of an automobile in this context of a duty to defend is a factual one based on the pleadings presented. It is not a closed list of activities determined only by those facts which have already presented themselves, but rather a contextual exercise that must be undertaken in the context of the case presented.

l. There is no suggestion that the truck was inoperable.

m. It is alleged in the pleadings that the fire was a result of the negligence of Duff and /or the owner from their use and/or operation of the truck, specifically in the use of the truck to attempt to boost the forklift. The pleadings are replete with allegations that involve use of the truck, specifically, using the truck to boost, and that this contributed to the cause of the fire.

n. Using the truck, effectively as an electrical conduit, to boost another vehicle is using the truck as a motor vehicle. This is unquestionably an ordinary and well-known activity to which motor vehicles are put. This is not an unusual activity. There is no question that using the truck as a boost for another vehicle, whatever that other vehicle was, is such a common activity of which nearly everyone will be familiar. Such a use is contemplated by owners and users of motor vehicles and should be contemplated by insurance companies with coverage on motor vehicles. As for whether it is unusual or ordinary for a motor vehicle, such as a truck, to be boosting something such as a forklift does not need to be determined by this court on this duty to defend application, but rather should be properly dealt with in the context of the broader litigation.

o. For the purposes of the duty to defend analysis, this court must proceed on the basis that the pleading that the fire was a result of the negligence of Duff from his use and/or operation of the truck is in fact true. The chain of causation is unbroken between Duff's use of the truck and the fire which resulted in damages. The fire is clearly alleged to have arisen from that ordinary and well known activity of boosting involving jumper cables.

p. Whether or not using the truck to boost was actually a contributing factor in the fire is irrelevant at this point. The allegation has been clearly pleaded and the facts will be determined at trial. Issues of foreseeability and indemnity will be considered at the appropriate time but are not proper considerations on this duty to defend application.

q. In this case, the truck was allegedly integral to the fire. It was not simply the vehicle that transported Mr. Duff to the car. It was not simply sitting there when a fire occurred completely independent of it. It was allegedly being used as a conduit of electricity which may have ignited flammable liquid.

r. There is no exclusion clause for when the vehicle is being boosted or when the vehicle is boosting another vehicle.

s. Certainly, there is a mere possibility that the allegations, that the fire was a result of the negligence of Duff from his use of the truck to boost the forklift, fall within coverage under the Intact policy and triggers the duty to defend.

t. As for the Moore action, an allegation of using gas and electrical power machinery has been pleaded. This would certainly be broad enough to include a gas-powered vehicle such as the truck, especially when read in conjunction with other pleadings. There is no question that this relates to the same fire. The Plaintiffs would likely be permitted to amend their pleadings if it was requested. There is a benefit to all in dealing with this matter in a consistent manner.

[38] For all of the foregoing reasons, this application is allowed. Intact has owed, and continues to owe, a duty to defend in all three actions.

[39] As for contribution between Economical and Intact, Intact agrees that if this court determines they have a duty to defend, then Intact is obligated to pay an equal one-half share of past and ongoing defence costs and disbursements, as well as interest thereon, incurred by Economical solely in the defence of Duff in the underlying actions, based upon the doctrines of equitable contribution, and/or equitable subrogation, and/or restitution.

[40] As for costs of this application, the court strongly encourages the parties to consult with each other and attempt to reach a reasonable agreement. If the parties are unable to agree as to costs, the court will accept written submissions on costs, which shall be no more than two pages in length, excluding supporting documentation. All costs submissions are to be filed through the civil JSO portal as well as sent directly by email to Bev.Taylor@ontario.ca and which shall be provided no later than 4:30 p.m. on June 14, 2024.

Justice V. Christie

Released: June 4, 2024