COURT OF APPEAL FOR ONTARIO

CITATION: Live Nation Ontario Concerts GP, Inc. v. Aviva Insurance Company of Canada, 2024 ONCA 634
DATE: 20240827
DOCKET: COA-23-CV-0593

Roberts, George and Monahan JJ.A.

BETWEEN

Live Nation Ontario Concerts GP, Inc. and
Ontario Place Corporation

Applicants (Respondents)

and

Aviva Insurance Company of Canada and
Aviva Canada Inc.

Respondents (Appellants)

Dennis Ong, for the appellants

Kurt K. Pereira and Avi Sharabi, for the respondents

Heard: March 27, 2024

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated April 14, 2023, with reasons reported at 2023 ONSC 2284.

Roberts J.A.:

I. OVERVIEW

[1] This appeal concerns the extent of an insurer's duty to defend and to fund the defence costs of claims that are covered and uncovered under a policy of insurance ("mixed claims"). It involves the following related questions: (1) the correct application of the pleadings rule in determining whether claims are covered

or uncovered under a policy of insurance; and (2) whether an insurer can seek equitable contribution against an insured.

[2] The appellants submit that the application judge erred in declaring that, subject to a costs reallocation after trial or settlement, they are at present responsible under the insurance policy issued to their insured, Northwest Protection Services Ltd. ("NorthWest") ("Aviva policy"), for 100% of the respondents' past and future defence costs in relation to a personal injury action brought by Tara Nimmo against the respondents and NorthWest. The appellants submit their obligation should be limited to 50% of those costs based on the principles of equitable contribution. Specifically, they argue that the application judge erred in failing to treat the pleaded claims as mixed claims and in finding that the principles of equitable contribution were inapplicable as between the appellants and the respondents. They maintain that the application judge should have effectively treated the respondents as an insurer under its insurance policy with Starr Indemnity & Liability Company ("Starr") ("Starr policy") for the purpose of applying the principles of equitable contribution. In the alternative, they say that the application judge should not have made any determination in Starr's absence.

[3] The respondents maintain that the application judge made no error and that his interpretation of the pleadings and his allocation of defence costs are owed appellate deference. Even if this were a case of mixed claims, they say that the principles of equitable contribution do not apply because they are not an insurer

and, as an insured, they had the right to look to the appellants to defend the claims. Moreover, the application judge was entitled to order that the appellants at present fund 100% of the defence costs, subject to reallocation at the end of trial and settlement. The appeal should be dismissed.

[4] I agree that the application judge erred in his characterization of the true nature of the pleaded claims as only involving overlapping claims on which the appellants were the primary insurer. The claims are better described as mixed claims because some of the pleaded claims were not covered under the appellants' policy.

[5] The application judge's mischaracterization of the pleadings affects his determination of what claims are covered and uncovered under the Aviva policy. The appellants should not be required to defend claims and to fund costs that are solely attributable to the defence of claims clearly not covered under the Aviva policy. If a finding is made that certain costs were paid by Aviva but incurred solely in defence of claims not covered by the Aviva policy, those costs may be reallocated, and the respondents may be required to repay those costs to Aviva.

[6] However, the appellants have not asked that the costs be allocated at this point in time. Rather, they argue that the respondents should be required to pay 50% of their defence costs now solely on the basis of equitable contribution as if they were insurers. This position is unfounded.

[7] Given the absence of Starr from these proceedings, the application judge did not err in concluding that this was not a case of equitable contribution between insurers. Since the respondents are not themselves insurers, the appellants have no right to claim equitable contribution from them. I make no determination as to whether, and to what extent, the appellants may be entitled to apply for equitable contribution as against Starr in this or any subsequent proceeding.

[8] I would allow the appeal in part with respect to the characterization of the true nature of the pleaded claims and that certain of those pleaded claims are not covered under the Aviva policy. I would not disturb the application judge's order concerning the appellants' liability to fund 100% of the defence costs at the present time subject to their right to seek a reallocation of costs at the end of trial or on settlement. I would otherwise dismiss the appeal.

II. BACKGROUND

[9] As pleaded in their notice of application, the respondents operate as a producer and promoter of live musical entertainment at various sites, including the Budweiser Stage, an outdoor concert venue located in Toronto. The respondents lease and occupy the Budweiser Stage for the purpose of promoting outdoor concerts on site.

[10] On September 1, 2016, the respondents promoted a concert at the Budweiser Stage. Tara Nimmo attended the concert. She was allegedly injured

when security personnel removed an unruly patron. On May 12, 2017, she issued a statement of claim in the Superior Court of Justice against the respondents and NorthWest, among others ("the Nimmo action").

[11] The allegations against NorthWest were that it was negligent in its provision of security services at the concert and that Ms. Nimmo was injured when NorthWest security personnel ejected "an inebriated and out of control patron in a careless and negligent manner" ("security negligence claims").

[12] The allegations against the respondents overlapped with the security negligence claims against NorthWest in that Ms. Nimmo alleged that the respondents failed to properly train, supervise, and instruct their security personnel to deal properly with unruly patrons and were liable for NorthWest's actions. The independent allegations of negligence against the respondents, unrelated to the security negligence claims, were that they failed to comply with their statutory obligations under the *Liquor Licence Act*, R.S.O. 1990, c. L.19 and the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, including serving alcohol in excessive amounts and failing to provide safe premises, to post any warning signs, to properly illuminate the premises, to perform routine ground maintenance on the premises, to implement a program or procedure for the routine inspection of the premises, and to provide alternative passages or entrance or exit ways ("the statutory negligence claims").

[13] The respondents delivered a statement of defence and crossclaim against all the co-defendants, claiming contribution and indemnity for any and all amounts for which the respondents were found liable in the Nimmo action.

[14] At the relevant time, NorthWest operated as a security services company. It was contracted by the respondents under a Services Agreement to provide "crowd management services" for all shows at the Budweiser Stage, including at the September 1, 2016 concert. Pertinent to these proceedings, the Aviva policy between NorthWest and the appellants included Commercial General Liability ("CGL") coverage for "bodily injury and property damage liability" resulting from the failure of NorthWest's services "to meet the level of performance, quality, fitness or durability warranted or represented" by NorthWest.

[15] NorthWest's security Services Agreement with the respondents required it to "procure and maintain…all customary and prudent insurance naming [the respondents] as Additional Insured" on the certificate of insurance under the Aviva policy and to "indemnify, defend and hold harmless [the respondents] from and against any and all claims or loss … arising from the acts or omissions of [NorthWest]." There is no issue on this appeal that the respondents were "additional insureds" as defined under the Aviva policy with respect to losses "arising from the acts or omissions of NorthWest".

[16] The respondents' Starr policy included CGL coverage for "bodily injury and property damage liability". Under the Starr policy, the respondents had a self-insured retention ("SIR") of $1 million applicable to "each wrongful act" that had to be exhausted before Starr's duty to defend and pay defence costs was triggered. The insurance provided under the Starr policy would only apply in excess of the respondents' SIR.

[17] Both policies had an "Other Insurance" clause that limited the insurers' obligations in certain circumstances "if other valid and collectible insurance is available to the insured for a loss covered", including under the CGL provisions.

[18] The respondents brought an application against the appellants for declaratory relief, including: the appellants' policy of insurance provided coverage; the appellants had a duty to defend and a duty to indemnify the respondents, and duty to prosecute the respondents' cross-claim under the policy; the respondents could continue to retain counsel of their choice; and the appellants were required to reimburse the respondents for all past and future defence costs on a full indemnity basis.

[19] The application judge was asked to determine "which of two insurance policies should govern [the respondents'] defence costs in a related claim". He rejected the appellants' position that their insurance policy was an excess policy which only applies when the limits under the respondents' policy with Starr are

exhausted. Notwithstanding the statutory negligence claims pleaded against the respondents in the Nimmo action, he concluded that “the essence of the claim relates to Ms. Nimmo being struck by [NorthWest] personnel while they were removing the unruly patron”. He also determined that the principles of equitable contribution were inapplicable in this case because the Aviva policy was not excess but the primary insurance policy that was triggered by Ms. Nimmo’s claim under which the respondents were additional insureds.

[20] The application judge rejected the respondents’ argument that they had no coverage under the Starr policy until their SIRwas exhausted, finding that “self-insured retentions do not mean that an insured has no coverage but merely that, as a matter of contract, the insured has agreed to assume a certain amount of the insured risk”.

[21] However, the application judge concluded that it was nevertheless “most appropriate” to require the appellants to pay 100% of past and future defence costs because Ms. Nimmo’s claim was “based on the allegation that she was struck by [NorthWest] personnel who were removing an unruly patron”. Referencing this court’s decision in *Hanis v. Teevan*, 2008 ONCA 678, 92 O.R. (3d) 594, at paras. 32-33, leave to appeal refused, [2008] S.C.C.A. No. 504, the application judge made his order that the appellants must pay the respondents’ defence costs subject to the appellants’ right to apply to reapportion those costs at the end of a

trial or settlement to "ensure that the [appellants'] policy is not responsible for costs that are attributable solely to issues that do not relate to [NorthWest's] conduct."

[22] The application judge declined to order the removal of the respondents' current counsel. He stated that it might be appropriate to implement "some or all of the elements of the 'split file protocol'" from this court's decision in *Markham (City) v. AIG Insurance Company of Canada*, 2020 ONCA 239, 445 D.L.R. (4th) 405, at paras. 105-106, leave to appeal refused, [2020] S.C.C.A. No. 170.

III. ANALYSIS

(1) Standard of Review

[23] The application judge's interpretation of the standard form insurance policies of the appellants and Starr for the purpose of determining insurance coverage and the appellants' duty to defend is subject to a correctness standard of review: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 19, 24, 39-40, 43, 46. As the appellants allege that the application judge committed an error of law in misapplying the pleadings rule in his analysis of the duty to defend, the applicable standard of review of that issue is also correctness: *Michaud v. Sécurité Nationale compagnie d'assurance*, 2021 NBCA 39, [2021] N.B.J. No. 223, at paras. 15, 17.

(2) What is the extent of the appellants' duty to defend and to fund the respondents' defence costs on the uncovered claims in this case?

[24] The appellants do not dispute that they have a duty to defend the covered claims under the Aviva policy which was triggered by the pleaded claim of negligence against their insured, NorthWest. The principal question on appeal is whether the application judge erred in holding that the appellants are 100% liable for the respondents' defence costs, subject to an application for reapportionment, because of his characterization of the substance of the pleaded claims in the Nimmo action and his determination that equitable contribution cannot be claimed against the respondents, as insureds.

(a) General principles

[25] An insurer's obligations are found in the applicable policy. Courts should give effect to clear and unambiguous language in an insurance policy, having regard to the contract as a whole: *Non-Marine Underwriters, Lloyd's of London v. Scalera,* 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71. An insurer has a duty to defend where there is a mere possibility that the true nature of the pleaded claim, if proven at trial, falls within coverage and would trigger the insurer's duty to indemnify: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 SCR 245, at para. 19. Assessing the true nature of a particular claim is not an exercise to be undertaken in the abstract; rather, it should be approached

with a view to the specific limitations imposed by the policy at issue: *Papapetrou v. 1054422 Ontario Ltd.*, 2012 ONCA 506, 111 O.R. (3d) 532 at para. 47.

[26] The insurer has the duty to conduct the defence of such claims. However, absent express language to the contrary, the duty to defend extends only to claims that could potentially trigger indemnity under the policy. An insurer's obligation to defend is limited to defending claims that, if proven true, would fall within coverage under the policy: *Scalera,* at paras. 49, 74-76. Requiring an insurer to defend claims which cannot fall within the policy puts that insurer in the conflicted position of having to defend claims which in its interest should succeed: *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at p. 812.

[27] In *Scalera*, at paras. 50-52, the Supreme Court set out the following three-step process for determining whether a given claim could trigger indemnity and a duty to defend ("the three-step *Scalera* process"):

> First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.
>
> At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to

> defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.
>
> Finally, at the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend. [Emphasis added.]

(b) Application judge's analysis of the appellants' duty to defend

[28] The application judge correctly commenced his analysis at the first stage of the three-step *Scalera* process by examining the "substance" or "true nature" of the pleaded claims in the Nimmo action. As earlier noted, the application judge concluded that "the essence of the claim relates to Ms. Nimmo being struck by [NorthWest] personnel while they were removing the unruly patron."

[29] I agree with the application judge's determination that insofar as the overlapping security negligence claims against NorthWest are concerned, they fall within the Aviva policy, and the Aviva policy is the primary policy that covers the respondents as additional insureds under the Aviva policy. As the application judge rightly noted, the "other insurance" language of the Aviva policy provides that the Aviva policy is "primary" except where there is other primary insurance available to NorthWest for which NorthWest has been added as an additional insured. NorthWest was not added as an additional insured under the Starr or any other insurance policy. As a result, the Aviva policy is the primary policy. This coincides

with the language of the Starr policy whose “other insurance” clause provides that it becomes excess insurance to the same coverage in the insurance policy under which the respondents have been added as an additional insured. Here, that is the Aviva policy. Aviva therefore has a duty, as the primary insurer, to defend the covered security negligence claims pleaded in the Nimmo action.

[30] However, the application judge made two key errors in his analysis. First, he wrongly concluded that all the pleaded claims amounted to security negligence claims that were covered by the appellants’ policy. Second, as a result of that conclusion, he failed to consider whether costs related solely to the defence of the statutory negligence claims that were not covered by the Aviva policy should be allocated against Live Nation.

(i) Not all of the pleaded claims relate to security negligence

[31] The application judge’s conclusion that all the pleaded claims amounted to security negligence claims was, respectfully, in error. In my view, the application judge mistakenly conflated the pleaded factual cause of Ms. Nimmo’s injuries with the substance of her pleaded claims against the respondents and NorthWest. In other words, the pleaded factual cause of Ms. Nimmo’s alleged injuries is that she was struck and hurt when NorthWest ejected an unruly patron. However, that pleaded factual cause of Ms. Nimmo’s injuries does not relate to the statutory negligence claims pleaded against the respondents.

[32] The present case can be distinguished from the circumstances in *Scalera*. In *Scalera*, the Supreme Court determined that the pleaded tort of battery was derivative from the intentional tort of assault because the pleaded factual substratum for both torts was the same, namely, the alleged sexual assault of the plaintiff by the defendant.

[33] Here, there is overlap between the pleaded factual substratum for the security negligence claims pleaded against NorthWest and the respondents. The security negligence claims against NorthWest and the respondents depend on the failure to properly carry out security services resulting in the pleaded injury to Ms. Nimmo.

[34] However, the separate statutory negligence claims pleaded against the respondents have nothing to do with the security negligence claims against NorthWest or the respondents. Specifically, the claims alleging that the respondents failed to properly carry out their statutory obligations are not derivative in nature from the pleading of negligently executed security services against both NorthWest and the respondents. Moreover, the pleaded factual substratum for the statutory negligence claims in some instances temporally precedes and, in any event, has nothing to do with the ejection of the unruly patron that allegedly caused Ms. Nimmo's alleged injuries. Rather, the statutory negligence claims stand on their own and can form the basis for a finding of liability against the respondents even if there is no finding of liability against them for the security negligence claims.

(ii) Application of the *Hanis* analytical framework

[35] The application judge made no error in turning to *Hanis* in his analysis. The analytical framework in *Hanis* applies here because this case as framed involves the question of covered and uncovered claims under one policy of insurance, the Aviva policy.

[36] The question became somewhat muddled because the parties asked the application judge to determine which of the Aviva and Starr policies responded to the pleaded claims in the Nimmo action. That request confused the issue that the application judge had to decide. In the absence of Starr as a party to the proceedings, the only questions that the application judge could determine were whether the pleaded claims were covered or uncovered under the Aviva policy, whether the appellants were the primary insurer for all the pleaded claims, and the extent of the appellants' duty to defend and to pay defence costs.

[37] While it was necessary for the application judge to look at the Starr policy for the purposes of interpreting the Aviva policy and determining whether the appellants were the primary insurer for the overlapping security negligence claims, in the absence of Starr, the Starr policy was otherwise irrelevant. The application judge could only determine the extent of the appellants' duty to defend and to pay defence costs under the Aviva policy, not Starr's duties under the Starr policy nor any obligation on the part of Starr to make equitable contribution as a concurrent

insurer. I shall return to this point in more detail under the next heading of my analysis.

[38] While the application judge properly turned to *Hanis*, his mischaracterization of the pleadings led him to misapply the principles from that decision. Specifically, he failed to consider, as this court instructed in *Hanis*, whether there was justification for imposing upon the appellants an obligation to pay defence costs that are clearly not covered by the contract of insurance: *Hanis*, at para. 25.

[39] *Hanis* involved an insured's claim against only one insurance policy in the context of covered and uncovered claims. The insured defendant sought a declaration at the end of the trial that the insurer was required to provide a defence to an action for damages for wrongful dismissal and malicious prosecution, among other claims. The insurance policy in issue covered the claim for malicious prosecution but not the claim for wrongful dismissal. This court affirmed that the insurer's duties to defend and to pay defence costs associated with the claim for malicious prosecution was triggered. In determining the extent of the insurer's duties, the court distinguished between claims clearly covered and clearly uncovered under a policy of insurance and acknowledged that the imposition of a duty to pay defence costs solely related to uncovered claims would be unjustified. In this context, the court considered the issue of an insurer's obligation where defence costs would assist the defence of both covered and uncovered claims. The court concluded that the insurer was required to pay the entirety of defence

costs associated with the covered claim for malicious prosecution, even if those defence costs also assisted the defence of the uncovered claim for wrongful dismissal, subject to reallocation for costs solely relating to the uncovered claim. The basis for the court's conclusion was that the factual narrative underpinning both claims was the same and it was not possible to separate them. The trial judge's determination that the insurer was 95% liable for the defence costs was upheld on appeal.

[40] The principled distinction drawn in *Hanis*[1] between claims that are clearly covered and not clearly covered under a policy of insurance was applied in *Atlific Hotels and Resorts Ltd. v. Aviva Insurance Co. of Canada* (2009), 97 O.R. (3d) 233 (SC). *Atlific* involved an insurer's duty to defend claims in an action arising out of a slip and fall on ice at a resort hotel. The court in *Atlific* determined that the true essence of the action was not captured by any one particular claim or category of claims and that while the snow and ice claims appeared at first glance to be predominant, the claims alleging negligence in the hotel operations and management were "formidable" and could "stand on their own". As a result, the insurer was obliged to provide the applicant with a defence to only the snow and ice removal claims that fell within coverage of its policy and the hotel

[1] See also: *Papapetrou,* at para. 51, referencing *Hanis*: "[w]here an action includes both covered and uncovered claims, an insurer may nonetheless be obliged by the terms of the policy to pay all costs of defending the action save for those costs incurred exclusively to defend uncovered claims."

owners/operators were required to provide their own defence to the other two categories of claims.

[41] That is the case here. While there are overlapping security negligence claims that potentially trigger indemnity under the Aviva policy, there are also separate statutory negligence claims which are clearly not covered under the Aviva policy. As additional insureds, the respondents only enjoy the coverage provided under the Aviva policy which, as earlier noted, is restricted to the activities of NorthWest and the security negligence claims.

[42] Because of the error in characterizing the pleadings, the application judge did not undertake the full *Hanis* analysis. If he had recognized that not all the pleaded claims related to security negligence, he should have gone on to consider whether any portion of the defence costs related purely to the statutory negligence claims, and therefore not covered by the Aviva policy, should be allocated to Live Nation.

[43] The application judge's mischaracterization of the pleadings as being only security negligence claims affects his order insofar as it declares that the appellants are 100% liable as the primary insurer to cover the costs of defending all the pleaded claims. The appellants are not the primary insurer for nor responsible to defend the claims that are not clearly covered under its policy,

namely, the statutory negligence claims, and should not be required to cover the costs that are solely related to the defence of the statutory negligence claims.

[44] However, my conclusion that the statutory negligence claims are not covered under the Aviva policy does not, practically speaking, affect the mechanics of the application judge's order that the appellants must fund *at present* 100% of the respondents' defence costs, subject to reallocation at the end of trial or settlement. This order was open to the application judge to make given the record before him. Moreover, the appellants asked for equitable contribution from the respondents and not a costs allocation against the respondents before trial. In most cases, cost allocations between an insurer and an insured are conducted following trial because there is a clear record as to how defence costs were expended.

[45] Although the factual substrata of the covered and uncovered claims are different in the present case, there was no evidence how defence costs have been expended. As a result, it is not possible to determine how the appellants' duty to defend only the covered security negligence claims, as I would limit it, affects the reasonableness of the application judge's present allocation of defence cost liability, subject to reallocation. As in *Daher v. Economical Mutual Insurance Co.* (1996), 31 O.R. (3d) 472 (C.A.), here, there was no material filed to assist the court in properly assessing the costs and the court could not prorate the costs at this stage of the proceedings – it would be mere guess work on the part of the court.

Although advised that the action is ready for trial, we were not provided with the discovery transcripts nor any productions. We therefore cannot have any idea of the prominence of the security negligence claims as compared with the statutory negligence claims or even whether the statutory negligence claims were seriously pursued.

[46] As a result, I would not disturb the application judge's order that the appellants are at present 100% liable to pay the respondents' past and future costs, subject to their right to seek reallocation of costs from the respondents after trial or on settlement.

(3) The application judge did not err in declining to permit Aviva to seek equitable contribution from Live Nation

[47] My determination that the appellants are at present 100% responsible to pay the respondents' past and future costs is unaffected by the appellants' reliance on the principle of equitable contribution. The appellants contend that the application judge erred by failing to consider and apply *Markham* to permit the appellants to seek equitable contribution from the respondents. I would reject this argument. If equitable contribution is available, that remedy should have been sought, and may presumably still be sought, against Starr, but not against the respondents who are not an insurer.

[48] *Markham* dealt with the duty to defend overlapping and mixed claims that were covered under separate policies with two different insurers, both of whom were parties to the proceedings. As here, some of the pleaded claims overlapped under both policies, but other pleaded claims were covered under one but not both policies. The court applied the doctrine of equitable contribution as between the insurers and found that both insurers had to contribute but that, as the level of risk of each of the insurers for the respective pleaded claims could not be ascertained at the early stage of the proceedings and the claims did not allow for a precise allocation of defence costs, the fairest allocation at that point would be an equal sharing of the defence costs: at paras. 85, 87.

[49] In the absence of Starr as a party to these proceedings, *Markham* has no application to the present case. I disagree with the appellants that *Markham* permits Aviva to claim equitable contribution from the respondents as if they were insurers.

[50] Equitable contribution can only be sought from a concurrent insurer, not from the insured. The doctrine of equitable contribution flows from the fundamental principle of indemnity. Where a policy holder holds more than one insurance policy that may respond to claims in an action, the policy holder may not recover from the concurrent insurers more than the amount of the full loss. However, "the insured … is entitled to select the policy under which to claim indemnity, subject to any conditions to the contrary": *Family Insurance Corp. v. Lombard*

Canada Ltd., 2002 SCC 48, [2002] 2 SCR 695, at para. 14. The selected insurer is entitled to claim contribution from all other insurers who have a concurrent duty to defend the insured on the same or other of the pleaded claims: *Family Insurance*, at para. 14; *Markham*, at para. 79. Assuming, without deciding, that Starr is a concurrent insurer in this case,[2] the appellants could have and still may be able to seek equitable contribution from Starr.

[51] The appellants' focus on the respondents' SIR is, respectfully, misplaced in these proceedings. The existence of the SIR does not turn the respondents into an insurer and cannot be analogized to separate, primary insurance. Rather, it is a contractual provision between the respondents and Starr that affects the timing of the triggering of Starr's duty to defend and to pay defence costs and, as such, merely represents a sharing of the potential costs by an insured under its contract with its insurer.

[52] Nor do I agree that *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2024 ONCA 145, on which the appellants also rely, has any application to these proceedings as framed and in the absence of Starr. *Loblaw's* treatment of the insured's SIR and the allocation of costs may become relevant if Aviva seeks equitable contribution from Starr or if the trial judge

[2] There was no evidence before us as to whether the respondents had made a claim under the Starr policy, Starr accepted coverage or whether the SIR had been exhausted or was likely to be exhausted such that Starr's duty to defend under the Starr policy was potentially triggered.

allocates a portion of the defence costs against Starr and the respondents' SIR is not exhausted.

[53] *Loblaw* involved the determination of coverage under competing serial insurance policies over different coverage periods where the insurers were parties to the proceedings. At para. 138, Pepall J.A. writing for the court confirmed that: "Unquestionably an SIR must be paid before an insurer has an obligation to defend." In giving effect to that principle, this court ordered that subject to the exhaustion of the applicable SIRs, the insurers would pay the defence costs of the action according to an agreed allocation based on a *pro rata* time on risk formula. In requiring the insureds to pay an insurer's *pro rata* share of the allocated defence costs, Pepall J.A. was not analogizing SIRs to primary insurance nor was she allocating defence costs between the insureds and the insurers. She was simply requiring the insureds to discharge their contractual obligation to exhaust the SIRs before an insurer's *pro rata* obligation to pay defence costs was triggered.

(4) Does the absence of Starr in these proceedings affect the outcome?

[54] The appellants submit in the alternative that the application judge erred in determining the duty to defend question in the absence of Starr as a party to the proceedings.

[55] While my disposition of the appeal turns on the determination of the characterization of the pleaded claims and its effect on the duty of an insurer to its

insured to defend a claim, it is important to address the question of Starr's absence to clarify the effect of this court's order.

[56] Given the way this application was framed, I disagree that the application judge erred in determining the application in Starr's absence. To repeat, the issue to be determined was the extent of the *appellants'* duty to defend the respondents in relation to the mixed claims pleaded in the Nimmo action, not Starr's duty to defend them. Under the principle of indemnity that I earlier canvassed, the respondents were entitled to bring their application solely against the appellants. The appellants could have added Starr as a party if they had been seeking an order of equitable contribution against Starr as a concurrent insurer. They did not do so. No relief was sought as against Starr.

[57] Moreover, whether the statutory negligence claims are actually covered under the Starr policy is not relevant to the determination as to whether they are covered under the Aviva policy or whether a portion of the defence costs should have been allocated to the insured pursuant to *Hanis* on the basis that they are clearly uncovered under the Aviva policy. For the purpose of the *Hanis* analysis, such claims are, from the perspective of the appellants, "uncovered" claims. As earlier noted, the relevance of the Starr policy is limited to the application judge's determination as to whether the Aviva policy was primary with respect to the security negligence claims. That determination bound only the parties to these proceedings. The issues of Starr's duty to defend and to pay defence costs, and

any obligation to make equitable contribution, have not yet been determined and are unaffected by this court's decision on this appeal.

[58] The parties had the opportunity to include Starr as a party to these proceedings. They chose not to do so. As a result, while the appellants and the respondents are bound by this court's decision, Starr is not bound by it.

[59] I would further clarify, however, that while I would make no determination respecting any right that the appellants may have to seek equitable contribution from Starr, nothing in this decision precludes any right that they may have to do so.

(5) Other Issues

[60] The appellants no longer challenge on appeal paragraphs 3 (the respondents' retention of their own counsel) and 4 (application of the "split-file protocol" from *Markham*) of the application judge's order. I would therefore not disturb them.

IV. DISPOSITION

[61] For these reasons, I would allow the appeal in part and declare that, for the purposes of any reallocation of costs at the end of trial or on settlement: only the security negligence claims are covered under the Aviva policy and the statutory negligence claims are not covered under the Aviva policy; and the appellants are not liable to pay defence costs that are solely related to the uncovered statutory

negligence claims. As the application judge ordered, any reallocation of costs shall be determined at the end of trial or on settlement.

[62] Excepting the costs disposition in paragraph 5 of the application judge's order, to which I return below, the rest of the application judge's order remains unchanged.

[63] In my view, there was mixed success on this appeal. I would therefore make no order as to the costs of the appeal.

[64] With respect to the costs of the application, I would not interfere with the $20,078.30 amount ordered by the application judge. However, I would set aside the application judge's award of that amount to the respondents and leave the issue of entitlement of those costs to the trial judge or the application judge, as the case may be, who determines the question of the reallocation of defence costs.

Released: August 27, 2024 "L.B.R."

"L.B. Roberts J.A."
"I agree. J. George J.A."
"I agree. P.J. Monahan J.A."