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Jones et al. v. Manzon et al., 2024 ONSC 1205: The Basis for an Off-Coverage Position is Relevant in the Underlying Tort Action

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INTRODUCTION

In the recent decision of *Jones et al. v. Manzon et al.*, 2024 ONSC 1205,² Justice Daley held that there is a broad scope of discovery available to a Plaintiff where their uninsured or underinsured motorist insurer is a Defendant to the action. Justice Daley specifically held that a plaintiff may properly seek disclosure of the details of an insurer's investigation of a motor vehicle collision, as well as the circumstances of the insured's coverage, where the Plaintiff's OPCF 44R insurer is a named Defendant.³

Justice Daley also held that where documents relevant to the coverage issues are protected by privilege, the Plaintiff is still entitled to the factual information contained in those documents relevant to the coverage issues. The decision also contains helpful procedural guidance for these types of motions.

THE UNDERLYING ACTION

The underlying action arises from a tragic motor vehicle collision that occurred on August 4, 2018. Allison Jones was driving a vehicle with her son, daughter, and daughter's friend as passengers when the vehicle was struck at high speeds by Paul Manzon. Allison, her son, and her daughter's friend were all killed in the collision. Allison's daughter was seriously injured.

Mr. Manzon was insured by Aviva Insurance Company of Canada and had a policy with limits of \$2,000,000. At the time of the collision, the Jones family had a policy of insurance with Security National Insurance Company ("SNIC") that included an OPCF 44R endorsement providing uninsured and underinsured coverage to the family with limits of \$1,000,000. Mr. Manzon and SNIC are both named Defendants in the underlying action.

OFF-COVERAGE POSITION

After an investigation, Aviva took an off-coverage position and added itself to the action as a Statutory Third Party. A Statutory Third Party is a creature of statute, specifically s. 258(14) of

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² <https://www.canlii.org/en/on/onsc/doc/2024/2024onsc1205/2024onsc1205.html>

³ OPCF 44R coverage is insurance coverage accessed through an insured's own policy of insurance. The available limits may be accessed if an at-fault defendant is uninsured or has insufficient insurance available to respond to the claim.

the *Insurance Act*. The goal of this provision is to balance the interests of insurers and accident victims. Essentially, even when an insurance company denies coverage to their insured, they still participate in the litigation (as a Statutory Third Party) and must compensate the plaintiff up to a maximum of \$200,000. While \$200,000 is not insignificant, it constitutes a large reduction when the available limits are reduced from \$2,000,000.

A representative of Aviva underwent an examination for discovery and advised that Aviva was denying Mr. Manzon coverage based on a material change in the risk and other policy violations. However, the Aviva representative refused to disclose the particulars of the material change in risk and other policy violations that resulted in the denial of coverage position being taken. Aviva's position was that the coverage issue between itself and its insured, Mr. Manzon, is not an issue to be resolved in the underlying action, and as such, questions relating to the coverage issue were not relevant.

This issue prevented the parties from moving forward in the action, and the Jones family brought a motion to produce documents in the possession of Aviva connected to its investigation of the circumstances of the collision and any policy violations committed by Mr. Manzon that form the basis for its off-coverage position.

A determination of available coverage was of critical importance to the parties. If Aviva is successful in their denial of coverage to Mr. Manzon, the only insurance limits available to the Jones family from Aviva is the statutory minimum of \$200,000, rather than the full policy of \$2,000,000 held by Mr. Manzon. The off-coverage position also directly impacts SNIC's exposure in the litigation. Their exposure as a Defendant is entirely dependent on whether the off-coverage position has been taken "by operation in law" in accordance with the OPCF 44R policy. If it has, then the SNIC policy kicks in to cover the shortfall up to its policy limit of \$1 million. In this case, SNIC's exposure would be \$800,000. If Aviva's off-coverage position has not been taken "by operation in law", then the OPCF 44R policy is not engaged and SNIC is not exposed. To respond to the motion, Aviva was granted permission to appoint counsel to represent its interests on the coverage issue, distinct from counsel for Aviva as a statutory third party to the action. This created the unusual situation where two separate counsel were present for Aviva during the motion proceedings. Typically, the Plaintiff and their counsel will not have direct interaction with the coverage counsel involved with denial of the Defendant's coverage.

THE MOTION FOR PRODUCTIONS

The Procedure for Production

In the decision, Justice Daley provides helpful guidance as to how motions of this kind are to proceed. Prior to the hearing of the motion, Justice Daley directed Aviva to provide the court with an in-camera brief of all the records in Aviva's possession relating to the collision, including documents related to its investigation of the tort claims and coverage issues. A table listing all of the documents in the Aviva file was shared with all counsel. The table also included Aviva's

position with respect to production, and their brief grounds for objection, such as “irrelevance”, “litigation privilege”, or “solicitor client privilege”.

At the initial hearing of the motion, coverage counsel for Aviva indicated that the insurer did not oppose the production of many documents listed, so long as the disclosure would not prejudice Mr. Manzon’s ability to defend the tort claims. Aviva’s position was that it was up to the court to determine whether the documents would prejudice Mr. Manzon’s defence. Justice Daley disagreed and held that it is the responsibility of counsel for Aviva, in its capacity as a Statutory Third Party, to defend the insured driver and that the insurer must take all reasonable steps to defend the insured driver despite the off-coverage position taken. Justice Daley then directed counsel for Aviva in its role as a Statutory Third Party to review the documents and provide its position on production on a document-by-document basis.

The updated list of documents was then circulated to all of the parties, and written submissions were exchanged followed by oral submissions at the hearing of the motion. Following the hearing of the motion, Justice Daley reviewed the table of documents as well as the documents themselves, and determined which documents were to be produced.

The Legal Framework for Production

In his decision ordering production, Justice Daley provides clarity on the legal principles applicable to these types of motions. Justice Daley held that the scope of discovery of a Defendant’s insurer differs where the Plaintiff has pursued its case against the Plaintiff’s uninsured or underinsured motorist insurer in the same action as a named Defendant. Specifically, Justice Daley held that there is a broader scope of discovery available where the OPCF 44R insurer is a defendant:

[24] ...the plaintiff may properly seek disclosure of the details of an insurer’s investigation of an accident as well as the circumstances of the insured’s coverage where the plaintiff’s underinsured motorist insurer is a party defendant to the action. If the plaintiff’s underinsured motorist insurer is not a defendant to the proceeding, the plaintiff’s discovery rights would be limited to those provided for in rule 31.06(4) of the *Rules of Civil Procedure* and the jurisprudence related to that rule.

In this case, the Jones family’s OPCF 44R insurer, SNIC, is named as a Defendant to the action. As such, Justice Daley concluded that the Jones family is entitled to disclosure of the details of the investigation leading to Aviva’s off-coverage position and its denial of coverage to Mr. Manzon, as well as details of the investigation relation to the collision itself. Justice Daley subsequently ordered the production of many of the documents listed in Aviva’s table, subject to specific claims of litigation or solicitor client privilege.

Where privilege was found to protect against disclosure, Justice Daley held that:

[36] ...when a claim of solicitor-client privilege is properly asserted to preclude disclosure of a protected document, that privilege cannot be used to avoid disclosure of material facts and information obtained in anticipation of litigation and for presentation to counsel: *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512 (Div. Ct.), at para. 25.

As such, in addition to granting leave to the Jones family and SNIC to conduct a further examination for discovery of the Aviva representative to answer all reasonable and proper questions arising from the documents ordered to be produced, Justice Daley permitted the Jones family and SNIC to question the Aviva representative about the material facts contained in the solicitor-client privileged documents that were not otherwise ordered to be produced.

THE TAKEAWAYS

This decision provides valuable guidance to personal injury litigants where coverage issues arise. The factual basis for an off-coverage position is relevant in the underlying tort action and a Plaintiff's scope of discovery is broader when examining a statutory third party in these situations. A Defendant's insurer is not entitled to deny coverage without any explanation for the basis of that position. A Plaintiff is entitled to that information, and where documents relevant to the coverage issues are protected by privilege, the Plaintiff is still entitled to the factual information contained in those documents relevant to the coverage issues. In practice, Plaintiff's counsel ought to request these documents well in advance of examinations for discovery. If still not provided by the time of discoveries, specific requests should be placed on the record, and *Jones* can be cited as the basis for the request. Should they be refused and the refusal maintained, a motion will need to be brought, as was done in this case.