

CITATION : OGOLLA OTIENO v. OSAMA AHMED HASSAN, 2026 ONSC 3235
COURT FILE NO.: CV-25-00007204-0000
DATE: 2026 06 02

SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: OGOLLA OTIENO, JASON, plaintiff

AND:

OSAMA AHMED HASSAN, AHMED, defendant
MOFFATT, ALONDRA, defendant
BELAIR INSURANCE COMPANY INC., defendant

BEFORE: Associate Justice NITCHKE

COUNSEL: KOTAK, NAINESH, for the plaintiff
SELF-REPRESENTED, for the defendant(s)
PATEL, SHERNAZ, counsel for proposed third party
Email: spatel@orplawyers.com

HEARD: May 21, 2026, by video conference

ENDORSEMENT

- [1] Motion by Definity Insurance Company (“Definity”) to be added as a Statutory Third party.
- [2] The facts are not contentious. The claim involves a single motor vehicle accident where Ahmed Osama Ahmed Hassan (“Hassan”) was the operator of a vehicle and the Plaintiff was a passenger.
- [3] The vehicle, a Honda, was insured under an Ontario Owner’s Policy of Insurance with Definity, with the named insured being Ana Rita Moffatt (a non-party to this litigation) (“Moffatt”). The Defendant, Alondra Moffatt (“Alondra”), is Moffatt’s daughter.

- [4] The Affidavit of Donna L. Kelly, law clerk, states that Definity denied coverage to Hassan based on the policy being “invalid” due to “Misrepresentation(s), Non-Disclosure(s) and/or Omission(s) by Moffatt in her Application for Insurance.” Additionally, Ms. Kelly states that Definity disputes that Hassan was an insured person under the policy as he was not a named insured, listed driver nor a person who had the consent of the named insured/owner of the vehicle to possess the vehicle.
- [5] The source for Ms. Kelly’s statements is not listed in the Affidavit. Essentially, these statements are inadmissible hearsay.
- [6] However, once an insurer denies liability under an automobile policy, s. 258(14) of the *Insurance Act* requires the Court to include that insurer as a “statutory third party.”
- [7] Accordingly, I accept that Definity has denied coverage to Hassan such that there will be an Order adding Definity as a Statutory Third Party.
- [8] I do not accept the reasons for the denial as they are vague and non-specific. This is normally not a relevant consideration at this stage; however, it does become relevant once the Court is being asked to endorse an Order as follows:
- An order that the question of any insurance coverage rights of the Defendant, Ahmed Osama Ahmed Hassan, against the Third Party shall not be disposed of at the Trial, but after the Trial in such a manner as this Honourable Court may direct.
- [9] The insurer’s reasons for denying coverage might involve facts and evidence that are also relevant to the underlying negligence claim. In such a case, a trial judge may decide that it would be appropriate to hear the negligence claim together with the coverage claim. Here, the insurer argues that a misrepresentation has nothing to do with the underlying negligence claim, such that the coverage claim ought to be heard separately.

- [10] In my view, the relief sought by the insurer at para. 8 above is inappropriate at the motions stage, and certainly not at the pleadings stage, for the reasons given by Justice Chown in *Deonanan v Kwan*, 2021 ONSC 266. In that case, Chown J. was concerned about the imbalance this could cause as “[t]he other parties seek information on the coverage question to help them to assess their risk. If I make the requested order, I will be giving the upper hand to Economical in the event this circumstance arises in this matter. I do not wish to make an order which would decide a potential issue in the lawsuit before the close of pleadings. I do not wish to pre-judge the issue or give any party the upper hand, when it is not necessary to do so at this stage.”
- [11] Chown J. felt it was premature to make the requested order because the pleadings remained open. The pleadings remain open here. It is conceivable that Hassan may commence third party proceedings against Definity in this action, seeking coverage. In that event, they would be entitled to have the coverage issues determined within the third party action, which may or may not be tried together with the main action: *Kapileshwar v Sivarajah*, [2008 CanLII 58154](#) at para [17](#).
- [12] Ms. Patel strenuously urges the Court to conclude that Chown J. erred in his analysis as to whether the indemnity claim ought to be tried at the same time as the negligence claim, or in a separate proceeding. She submits that his determination rests primarily on paras. 4 and 5 of his reasons. At para. 4, Chown J. observed that the weight of the jurisprudence supports the view that the Defendants’ claims for indemnity against the Statutory Third Party should be determined in a separate proceeding. However, at para. 5, he cited three authorities as a proposition that “the case law is not fully resolved” on this point.
- [13] Ms. Patel argued that the three cases reviewed in para. 5 of Chown J.’s reasons can be distinguished.
- [14] In *McInnis v Personal Insurance*, [2009 CanLII 59676](#) (ONSC), the issue before the Court was refusals given by the insurer to produce adjuster’s notes. In making the

order requiring the insurer to produce the notes, Healey J. quoted from *Longo v. Maciorowski* (2000) [2000 CanLII 16897 \(ON CA\)](#), 50 O.R. 595 (C.A.) and stated, at para. 9:

Further, it is not always the case that the tort action is tried separately from issues of indemnification. In *Longo* Catzman J.A. examined the law on this point in the context of an insurer's duty to defend, and ruled that it is not always practical or desirable to separate the proceedings and that there should be no hard and fast rule on the subject.

- [15] In *Longo*, the Court of Appeal was not ruling on the issue of whether or not the indemnity claim can be tried at the same time as the negligence claim. The issue for the Court was whether the insurer ought to pay for the defendant's separate defence.
- [16] Healey J. disagreed with the decision of Eberhard J. in *Roach v. Policandriotis* 2008 CarswellOnt 411 (SCJ), that concluded that the Rules, statutory scheme of the *Insurance Act*, and the case law all dictate that the issues of liability and indemnity should be tried separately. In support of this disagreement, Healey J. considered the insurer's position as a statutory third party akin to a regular third party and stated, at para. 6: [b]y joining into the action, the third party's liability to pay damages becomes a live issue." Healey J. goes on to acknowledge that a statutory third party is there to participate in the defence of its insured/the defendant; however, in my view, conflates the role of a statutory third party with a regular third party. The liability to pay damages to a tort victim is separate and distinct from the liability to indemnify an insured/defendant for its liability to pay damages to the tort victim.
- [17] The second case referred to by Chown J. is *Lica v Dhaliwal*, [2015 ONSC 3888](#). There, Price J. was asked to determine whether the facts behind an insurer's denial of coverage are relevant to the negligence action, and thus, disclosable on Examinations for Discovery. Price J. held that questions of coverage were relevant because they would assist the Plaintiff in determining whether the Defendants' insurer was justified in denying coverage to its insured, in the assessment of

whether to bring in an OPCF 44R insurer to the main action. At para. 36, he stated “[t]here must, therefore, be a legal determination that the third-party liability coverage has been limited before the OPCF 44R excess coverage becomes available.”

- [18] Price J. followed the Court of Appeal’s reasoning in *Maccaroni v. Kelly*, 2011 ONCA 411, that rejected the argument that the merits of a denial of coverage could only be determined in an action between the insurer and its insured; but held that the merits of that decision would *only* affect whether the Plaintiff is entitled to coverage under the OPCF 44R. The factual determination in respect of coverage would not bind the insurer or its insured. Price J. was therefore not deciding whether the negligence claim would be tried at the same time as the indemnity claim.
- [19] The third case referred to by Chown J. at para. 5 of his reasons is *Prentzas v Rivera*, [2015 ONSC 5867](#). In *Prentzas*, the Court followed *Maccaroni* in holding that the production of documents relating to the denial of insurance would be relevant to the Plaintiff in establishing whether he had access to his OPCF 44R coverage. Again, this does not establish that the negligence claim can be tried at the same time as the indemnity claim.
- [20] Therefore, I agree with Ms. Patel that the cases in para. 5 of *Deonanan* can be distinguished.
- [21] However, I am bound by *Deonanan* and I agree with Chown J., in particular paras. 7-10, that it is not appropriate for a motions judge to give “advice” to the trial judge, especially when the pleadings are not closed. A defendant may bring a third party claim seeking coverage in the main action. In that event, a trial judge may decide the coverage issue along with the main action, and “[t]he requested order would interfere with that possibility.” If the defendant brings an “ordinary procedural third party claim” against the insurer for indemnity for the claims of the plaintiff, “[t]hen

the issue would be decided in the third party action, which may or may not be tried with the main action” (see *Kapileshwar*, at para. 17).

- [22] Accordingly, I decline to issue an Order, at this stage, directing the indemnity claim to be decided after Trial.
- [23] The insurer also asks for an Order precluding the Jury from hearing any evidence that “Definity is a Third Party to this Action, subject to Order of the Trial Judge.” If the insurer agrees that the Trial Judge has the ultimate say in whether or not the Jury will hear this, then I do not see how it is appropriate for me to preliminarily decide it.
- [24] Accordingly, the Order at para. 1, 2 and 5 of the draft Order is granted. The motion is denied for the remaining paragraphs of the draft Order.

Associate Justice Nitchke

Released: June 2, 2026

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