

2017 ONSC 5099  
Ontario Superior Court of Justice

Ernst v. Northbridge Personal Insurance Corp.

2017 CarswellOnt 13619, 2017 ONSC 5099, 15 M.V.R. (7th) 259, 283 A.C.W.S. (3d) 171, 71 C.C.L.I. (5th) 269

**GREG ERNST, LAURIE ANNE STEWART and ANDREW ERNST (Applicants) and  
NORTHBRIDGE PERSONAL INSURANCE CORPORATION (Respondent)**

Gibson J.

Heard: June 5, 2017  
Judgment: August 25, 2017  
Docket: 3507/16

Counsel: Gordon Marsden, for Applicants  
Andrew A. Evangelista, Jennifer Kent, for Respondent

Subject: Civil Practice and Procedure; Insurance; Torts

**Related Abridgment Classifications**

Insurance

X Actions on policies

X.1 Commencement of proceedings

X.1.d Obligations of insurer

X.1.d.ii To defend

X.1.d.ii.C Allegation in pleadings

**Headnote**

Insurance --- Actions on policies — Commencement of proceedings — Obligations of insurer — To defend — Allegation in pleadings

Insured agreed to purchase property and all-terrain vehicle (ATV) from vendor and paid fee to have access to and storage on property prior to closing — Insured's son and his friend went for ride on ATV on property after obtaining vendor's permission — ATV collided with tree, and son and friend were severely injured — Friend and his family members commenced action against insured, son, and vendor for damages — Insurer denied coverage on basis that ATV did not constitute "newly acquired automobile" under policy — Insured and son brought application for declaration that insurer had duty to defend them — Application granted — Insurer's duty to defend was triggered since claim might fall into policy's coverage — Definition of "automobile" in s. 224(1) of Insurance Act included "motor vehicle required under any Act to be insured under a motor vehicle liability policy" — Off-Road Vehicles Act required ATV to be insured under motor vehicle liability policy unless ATV was driven on land occupied by owner of ATV — One alternative pleading in statement of claim was that insured owned ATV while vendor continued to own and occupy property — At trial, any combination of factual allegations contained in statement of claim could be proved, and alternative pleading at issue, if proven, would cause ATV to fall within coverage of insured's policy.

**Table of Authorities**

**Cases considered by *Gibson J.*:**

*Monenco Ltd. v. Commonwealth Insurance Co.* (2001), 2001 SCC 49, 2001 CarswellBC 1871, 2001 CarswellBC 1872, 274 N.R. 84, 204 D.L.R. (4th) 14, [2001] I.L.R. 1-3993, 155 B.C.A.C. 161, 254 W.A.C. 161, 32 C.C.L.I. (3d) 165, [2002] 2 W.W.R. 438, 97 B.C.L.R. (3d) 191, [2001] 2 S.C.R. 699, 2001 CSC 49 (S.C.C.) — referred to

*Non-Marine Underwriters, Lloyd's London v. Scalera* (2000), 2000 SCC 24, 2000 CarswellBC 885, 2000 CarswellBC

886, 75 B.C.L.R. (3d) 1, 18 C.C.L.I. (3d) 1, 185 D.L.R. (4th) 1, 50 C.C.L.T. (2d) 1, [2000] 5 W.W.R. 465, [2000] I.L.R. I-3810, (sub nom. *Scalera v. Lloyd's of London*) 253 N.R. 1, (sub nom. *Scalera v. Lloyd's of London*) 135 B.C.A.C. 161, (sub nom. *Scalera v. Lloyd's of London*) 221 W.A.C. 161, [2000] 1 S.C.R. 551, 2000 CSC 24 (S.C.C.) — referred to

*R. v. Gillespie* (2013), 2013 ONCA 40, 2013 CarswellOnt 684, (sub nom. *Haliburton (County) v. Gillespie*) 114 O.R. (3d) 116, (sub nom. *Haliburton (County) v. Gillespie*) 300 O.A.C. 393, 44 M.V.R. (6th) 1 (Ont. C.A.) — followed

#### **Statutes considered:**

*Insurance Act*, R.S.O. 1990, c. I.8  
Generally — referred to

s. 224(1) “automobile” — considered

*Occupiers' Liability Act*, R.S.O. 1990, c. O.2  
s. 1 “occupier” — referred to

*Off-Road Vehicles Act*, R.S.O. 1990, c. O.4  
Generally — referred to

s. 1 “occupier” — considered

s. 1 “off-road vehicle” — referred to

s. 15(9) — considered

APPLICATION by insured and their son for declaration that insurer had duty to defend them.

#### ***Gibson J.:***

##### **I. Introduction**

1 The Applicants, Greg Ernst (“Greg”), Laurie Anne Stewart (“Laurie”) and Andrew Ernst (“Andrew”), seek a declaration that the Respondent, Northbridge Personal Insurance Corporation (“Northbridge”), has a duty to defend them in the action known as Court File No. 500/16, arising from an accident involving an all-terrain vehicle (“ATV”) on July 11, 2015, pursuant to an automobile insurance known as Policy Number [# omitted] (“the Policy”).

2 The Respondent has denied coverage and takes the position that, as the ATV was not required to be insured by a motor-vehicle insurance policy as at the time of the accident it was being operated on private property, it does not fall within the definition of “automobile” and is considered an “off-road vehicle”.

3 The issue for determination in this Application is whether or not the Respondent is obligated to provide a defence to the Applicants. The central determination upon which this turns is whether or not the pleadings, if taken as true, allege that the ATV was an automobile pursuant to s.224(1) of the *Insurance Act*.

##### **II. Summary of the Facts**

4 The Applicants Greg Ernst and Laurie Anne Stewart are the parents of the Applicant Andrew Ernst.

5 Greg and Laurie agreed to purchase a rural property located at 121179 First Line Nassagaweya, Moffat, in the Region of Halton (the “Property”) from Susan Heller, who had the spousal consent of Ross Heller. The Property has approximately 68 forested acres with wide trails that wind back and forth between the Property and adjacent private properties and connect to an adjacent conservation area. They entered into an Agreement of Purchase and Sale, dated April 13, 2015. The closing date for the sale was August 19, 2015.

6 In addition to the sale of the Property, there were discussions regarding the sale of chattels not included in the Agreement of Purchase and Sale. Amongst these were a backhoe and a yellow 2005 ATV 2G6A (the “ATV”). Eventually

Greg and Laurie and the Hellers agreed orally that the additional chattels would be purchased for a total of \$18,800.

7 Greg and Laurie ultimately agreed to pay the Hellers an additional \$1,200 to store their contents at the Property from July 19, 2017 to August 19, 2017 in advance of the closing date, and to have access to the house for painting and decorating during this time.

8 On July 11, 2015, Laurie and Greg, along with their son Andrew, who was 21 and lived with them, and Andrew's Mend Jake Taylor, visited the Property to transport boxes of contents for storage. During this visit, Andrew asked Susan Heller if he could take the ATV for a ride; she agreed and instructed him how to use it and where the trails were on the Property. Andrew and Jake then took the ATV for a ride.

9 During the visit, Susan Heller was given a cheque for \$20,000, which was to include the \$1,200 rental fee, the \$10,000 down payment for the chattels, and the remaining \$8,800 for these which was due August 19, 2015. Susan gave Greg a receipt for this amount and the key to the house. She did not give him documentation for the chattels, including the transfer section of the ATV ownership.

10 Later that same day, Greg, Laurie, Andrew and Jake returned to the Property. Andrew and Jake once again took the ATV for a ride. During this ride, an accident occurred which forms the basis of the underlying action (the "Accident"). Andrew and Jake were severely injured and required urgent medical attention. The ATV had evidently collided with a tree. Jake was transported by air ambulance to Hamilton General Hospital.

11 Jake Taylor and members of his family have commenced a personal injury action by Statement of Claim as against Andrew, Greg, Laurie, Susan and Ross Heller, and Aviva Insurance Company of Canada. The claim was issued on February 12, 2016. It is as a result of this action that the current application is brought.

12 In the Statement of Claim, Jake Taylor alleges that he sustained very serious injuries, including "a diffuse axonal brain injury, a concussion, skull fractures, facial fractures, neck fracture, separated shoulder, contusions, injuries to his neck and back," amongst other injuries.

13 Following the ATV accident, Greg and Laurie did not return to the Property, apart from to pick up Andrew's car, until closing of the sale.

14 The Hellers remitted the \$1,200 rent to them as they had never agreed to terms.

15 Greg and Laurie had three policies of insurance with the Respondent, Northbridge Personal Insurance Corporation, at the time of the Accident; two of these were automobile insurance policies, and the third was a homeowner's policy. Under one of the Applicants' automobile policies, Greg was insured as the principal driver and Andrew as an occasional driver; under the other, Laurie was the principal driver. Both of the automobile policies covered bodily injury up to \$1,000,000.

16 In March 2016, the Applicants provided the Respondent with a copy of the Statement of Claim and a request that the Respondent defend the action on their behalf. The Respondent completed an investigation and ultimately denied coverage on the basis that the ATV did not constitute a "newly acquired automobile" under the Ontario Automobile Policy ("O.A.P. 1"). As a result, the Applicants commenced this application.

### ***The Ontario Automobile Policy***

17 Ontario Automobile Policy 1, which applies to the two automobiles Greg and Laurie insured with the Respondent, also provides coverage for "newly acquired automobiles" for 14 days on certain conditions. It is the Applicants' position that, at the time of the Accident, the ATV fell within this definition and was therefore insured.

18 Under the O.A.P. 1, newly acquired automobiles are defined as:

[A]n automobile or trailer that you acquire as owner and that is not covered under any other policy. It can be either a replacement or an additional automobile. The replacement automobile will have the same coverage as the described automobile it replaces.

19 The Respondent covered additional automobiles on the conditions that all automobiles of the insured were insured with the Respondent, any claim made for the additional automobile is made against coverage already provided for the other

insured automobiles, and the insurer is notified of the newly acquired automobile within 14 days of the date it is delivered.

20 Relevant to whether the Applicants' coverage with the Respondent would extend to an accident involving the ATV is how the legislation and caselaw has treated the term "automobile".

### III. Relevant Law

21 Section 224 of the *Insurance Act*, R.S.O. 1990, c. 1.8, includes in its definition of "automobile" a "motor vehicle required under any Act to be insured under a motor vehicle liability policy."

22 The ATV falls within the definition of "off-road vehicle" under the *Off-Road Vehicles Act*, R.S.O. 1990, Chapter O.4 (the "ORVA"). Under the *ORVA*, ATVs are required to be insured under a motor vehicle liability policy; however, an exception is contained in s. 15(9) of the Act such that insurance is not required where the vehicle is driven on land occupied by the owner of the vehicle.

23 Section 1 of the *ORVA* defines "occupier" as a person who is in physical possession of the land *or* a person who has a responsibility for and control over the condition or the land or the activities there carried on, or control over persons allowed to enter the land.

24 The Parties are in agreement that a person can be an "occupier", as contemplated by the *ORVA*, in four ways, as outlined in *R. v. Gillespie*, 2013 ONCA 40 (Ont. C.A.), at para. 23:

- 1) Be in physical possession of the land;
- 2) Be responsible for and have control over the condition of the land;
- 3) Be responsible for and have control over the activities there carried on; or
- 4) Have control over persons allowed to enter the land.

### IV. Positions of the Parties

25 The Parties are in agreement that an insurer's duty to defend an insured is related to, and broader than, its duty to indemnify. The duty to defend extends beyond claims that *do* fall within the policy's coverage, to include claims that could *potentially* fall within the coverage. As such, the determination of whether a duty to defend is engaged depends on the facts as pleaded in the Statement of Claim, as opposed to an ultimate finding of fact by a Court.

26 The Parties are also in agreement that the applicable test for determining whether or not a claim could possibly fall within a policy's coverage, triggering the duty to defend, is as follows:

1. Are the claims properly pleaded?
2. Are any of the claims derivative in nature?
3. Do any of the properly pleaded, non-derivative claims potentially trigger the insurer's duty to defend?

27 This third step requires the Court to examine the substance of the allegations contained in the pleadings to determine the true nature of the claim. If the claim alleges facts which, if proven, could potentially fall within the coverage of the policy, the insurer is obliged to defend the action: *Non-Marine Underwriters, Lloyd's London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 (S.C.C.), at para. 90.

28 As discussed below, the Parties are in agreement that this inquiry turns on the facts as alleged in the statement of claim, rather than findings of facts. As such, who the true owner of the ATV was and whether Greg and Laurie were actually occupiers of the Property at the time of the accident are not dispositive of this application and will not be determined here.

29 Before turning to the individual positions of the Parties, it is useful to review the allegations contained in the Statement

of Claim.

### ***The Claim***

30 Amongst others, the following allegations are contained in the underlying Statement of Claim:

18. The Defendant, Greg Ernst resides in the City of Oakville, in the Province of Ontario and was at all material times the owner of the ATV at the time of the crash, was a supervising adult at the time of the crash and was an occupier of the Property within the meaning of the *Occupier's Liability Act*, R.S.O. 1990, c. O.2, as amended.

19. The Defendant, Laurie Ernst resides in the City of Oakville, in the Province of Ontario and was at all material times the owner of the ATV at the time of the crash, was a supervising adult at the time of the crash and was an occupier of the Property within the meaning of the *Occupier's Liability Act*, R.S.O. 1990, c. O.2, as amended.

20. The Defendant, Ross Heller resides in the City of Milton, in the Province of Ontario and was at all material times the owner of the ATV at the time of the crash, was a supervising adult at the time of the crash and was the owner and occupier of the Property within the meaning of the *Occupier's Liability Act*, R.S.O. 1990, c. O.2, as amended.

21. The Defendant, Susan Heller resides in the City of Milton, in the Province of Ontario and was at all material times the owner of the ATV at the time of the crash, was a supervising adult at the time of the crash and was the owner and occupier of the Property within the meaning of the *Occupier's Liability Act*, R.S.O. 1990, c. O.2, as amended.

31 The Claim also alleges negligence on the part of the Hellers as owners of the Property, and of the Hellers, Greg and Laurie with respect to their supervision and maintenance of the ATV and the Property.

### ***Applicant's Position***

32 The Applicants note that, as Greg and Laurie insured all of their automobiles with Northbridge, a newly acquired automobile would automatically have the same \$1,000,000 bodily injury coverage as their other vehicles for 14 days, pursuant to the O.A.P. 1.

33 According to the Applicants, if the ATV belonged to Greg and Laurie, as is alleged in the Statement of Claim, the ATV was a newly acquired automobile at the time of the accident. A necessary implication of this assertion is that the ATV constituted an "automobile". The parties are in agreement that, based on the case law and relevant legislation, whether the ATV constituted an automobile is time and context specific, and depends on the facts as they stood at the time of the accident. The Applicants argue that, on the facts as pleaded in the claim, the ATV was an automobile at the time of the Accident because the claim also contains allegations that the Hellers remained the owners *and occupiers* of the Property at the time of the Accident.

34 As stated above, it is not necessary to determine whether Greg and Laurie or the Hellers (or all of them) were occupiers of the Property at the time of the Accident. What is relevant is whether factual circumstances were alleged which could lead to coverage under the Policy; in this case, this would be a situation where the owner of the ATV was not the occupier of the Property and the ATV was, therefore, an automobile as defined by the *Insurance Act*.

35 The Applicants argue that, where a Statement of Claim is not framed with sufficient precision to determine whether the claims fall within the coverage of the policy, the duty to defend will be triggered where a reasonable reading of the claim can infer a claim within the policy's coverage. Such a reasonable reading should give the "widest latitude" to the allegations in the Statement of Claim: see *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699 (S.C.C.), at paras. 31-32.

36 They also note that the courts are not bound by the labels chosen by the Plaintiff in wording the claim; rather, it is the substance of the allegations which must be examined. This does not extend to an evaluation of the merits of the claim.

37 The Applicants argue that, on a reasonable reading of the Statement of Claim, giving the widest latitude to the allegations, there are facts pleaded which, if taken as true, would support this finding. Specifically, the Applicants state that, on a reasonable reading, the Claim alleges that:

- Greg and Laurie were the owners of the ATV at the time of the accident and, as owners of the ATV, will bear liability

for the negligence of the operator of the ATV; and

- Greg and Laurie were not the occupiers of the Property at the time of the Accident.

38 It is argued that, if these allegations are proven, they will trigger a claim that falls within the coverage of the policy. While the claim clearly contains the allegation that Greg and Laurie were occupiers of the Property at the time of the Accident, as shown above, the Applicants point to another part of the Statement of Claim which states that on the date of the Accident Greg and Laurie “attended at the Property to move some items in despite the fact that they did not yet own the Property.” The Applicants point to these factual allegations as an alternative to those which allege that they were occupiers, and argue that this is an alternative which, if proven true, would mean that Greg and Laurie were not occupiers, did not have control over who was permitted on or excluded from the Property, and did not have control over the condition of the land or activities carried out thereon.

### ***Respondent’s Position***

39 The Respondent’s position on this application is that the allegations in the Statement of Claim, if taken as true, result in the conclusion that the ATV was not an automobile, as defined above, and therefore coverage is not triggered under the automobile policies issued by the Respondent.

40 The Respondent points to the following allegations contained in the Statement of Claim, in which the Plaintiffs plead that the Applicants were the owners of the ATV and occupiers of the Property at the time of the Accident (along with the similar allegations made with respect to the Hellers):

18. The Defendant, Greg Ernst... was at all material times the owner of the ATV at the time of the crash, was a supervising adult at the time of the crash and was an occupier of the Property...

19. The Defendant, Laurie Ernst... was at all material times the owner of the ATV at the time of the crash, was a supervising adult at the time of the crash and was an occupier of the Property ...

41 The Respondent also notes that the statements relied upon by the Applicants, acknowledging that at the time of the Accident the Property was still owned by the Hellers, are not determinative as legal title or ownership is not required for occupier’s liability to be established.

42 The “pleadings rule”, as cited by the Respondent states: “[i]f the pleadings 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. This remains so even though the actual facts may differ from the allegations pleaded”: see *Monenco Ltd. v. Commonwealth Insurance Co.* at para. 28.

43 The Respondent argues that at no point in the Statement of Claim do the Plaintiffs allege that the Applicants were the owners of the ATV but *not* the occupiers of the Property. While the Respondent acknowledges that the allegations in a Statement of Claim are to be given wide latitude, it argues that the reading of the pleading suggested by the Applicants results in a distortion of the Plaintiffs’ claims. The Respondent asserts that a plain reading of the Statement of Claim amounts to claims that the Applicants were both the occupiers of the Property and the owners of the ATV and that, taking these allegations as true, they do not fall within the coverage afforded by the Respondents’ automobile policies.

### **V. Analysis**

44 There is no dispute between the Parties that the insurance coverage provided by the Respondent would not apply if the ATV was being driven on property owned or occupied by the same person as the ATV itself, as under those circumstances the ATV would not qualify as an “automobile”.

45 The Respondent’s position is that this is precisely what is alleged in the subject Statement of Claim and that, as such, it does not owe the Applicants a defence. The Applicants’ position is that amongst the alternative forms of liability pleaded in the Statement of Claim, is the allegation that the Applicants owned the ATV while the Hellers continued to own and occupy the Property. The Applicants claim that this is sufficient to trigger a duty to defend.

46 The essential question which arises from the positions of the Parties is whether if proving some combination, but not all, of the allegations would require the insurer to indemnify the insured, is sufficient to trigger coverage? In this case, if all of

the allegations in the Statement of Claim are proven, then the owner of the ATV and the owner and/or occupier of the Property at the time of the Accident were one and the same, and the O.A.P. I would not apply.

47 The Respondent is correct that at no point in the Claim is it specifically alleged that the owner of the ATV and the occupier of the Property were different individuals at the time of the Accident. However, the Statement of Claim contains numerous allegations of fact, including inconsistent or alternative allegations, such as the conflicting allegations with respect to the ownership of the ATV at the time of the Accident.

48 The ‘pleadings rule’, cited by the Respondent and reproduced above, requires only that the pleadings “allege facts which, if true, would require the insurer to indemnify the insured”. These alleged facts must be examined reasonably, and given the widest latitude, as discussed above.

49 It would be too narrow a reading of the Statement of Claim to find that there is no duty to defend because the Plaintiffs never specifically alleged, in the alternative to their other allegations and all in one sentence or paragraph, that the ATV was owned by Greg and/or Laurie, but they were not occupiers of the Property, at the time of the Accident.

50 At trial, any combination of the factual allegations contained in the Statement of Claim may be proven. Reading the Claim reasonably, it clearly contains allegations that Greg and Laurie owned the ATV at the time of the Accident. Elsewhere, it also clearly contains allegations that the Hellers were the owners and occupiers of the Property at the time of the Accident.

51 This combination of alleged facts, if proven, would cause the ATV to fall within the coverage of the Respondent’s policy at the time of the Accident, and may therefore require the Respondent to indemnify the insured. This is sufficient to trigger a duty to defend.

52 If it is proven that the ATV was owned by Greg and Laurie but they were not occupiers of the Property, the ATV was a newly acquired automobile pursuant to the Policy and the accident occurred within the notice period of 14 days of liability coverage for bodily injury in the amount of \$1,000,000.

53 Therefore, if it is proven that Andrew was negligently operating the ATV and Greg and Laurie owned the ATV but were not occupiers of the Property, Jake Taylor’s claim for compensatory damages for personal injuries arising from the ATV accident will fall within the Policy’s coverage.

54 Since a claim may fall into the Policy’s coverage, Northbridge’s duty to defend the Applicants in respect of the Statement of Claim is triggered.

## **VI. Older**

55 The Respondent Northbridge is obligated to defend the Applicants in respect of the action known as Court File No. 500/16, arising from the accident involving the ATV on July 11, 2015.

56 If the Parties are not able to agree on costs, they may make brief written submissions to me (maximum 3 Pages, plus Bill of Costs). The Applicants may have two weeks to provide their submissions; the Respondent two weeks to respond; and the Applicants a further week for any reply.

*Application granted.*

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