2005 CarswellOnt 7013
Ontario Court of Appeal

McLean (Litigation Guardian of) v. Jorgenson

2005 CarswellOnt 7013, [2005] O.J. No. 5207, [2006] I.L.R. I-4464, 144 A.C.W.S. (3d) 342, 205 O.A.C. 227, 262 D.L.R. (4th) 556, 30 C.C.L.I. (4th) 165, 78 O.R. (3d) 308

ADAM MCLEAN, a minor by his litigation guardian, LORRAINE WILSON, DAN WILSON, SHAWN MCLEAN, by his litigation guardian, LORRAINE WILSON, NEIL MCKILLOP, KARL DUFF MCLEAN, TAMMY MCLEAN, KYLE MCKILLOP and MAUREEN MCKILLOP (Plaintiffs) and LORELEI JORGENSON, EDWARD ALLAN JORGENSON, JOSHUA JORGENSON, JOHN BRODERICK and RHONDA BRODERICK OPERATING AS J & R CYCLE and THE OPTIMUM FRONTIER INSURANCE COMPANY (Defendants / Respondents) and TD GENERAL INSURANCE COMPANY and GERMANIA FARMERS' MUTUAL FIRE INSURANCE COMPANY (Third Parties / Applicant / Appellant)

Weiler, Rosenberg, Gillese JJ.A.

Heard: September 13, 2005
Judgment: December 6, 2005
Docket: CA C43243

Proceedings: affirming *McLean (Litigation Guardian of) v. Jorgenson* (2005), 2005 CarswellOnt 694, [2005] I.L.R. 4389, 20 C.C.L.I. (4th) 249 (Ont. S.C.J.); additional reasons at *McLean (Litigation Guardian of) v. Jorgenson* (2005), 2005 CarswellOnt 1237, 20 C.C.L.I. (4th) 264 (Ont. S.C.J.)

Counsel: Nestor E. Kostyniuk, Scott Croteau for Appellant, TD General Insurance Company
John A. Kirby, Errol G. Treslan for Respondents, Lorelei Jorgenson, Edward Allan Jorgenson and Joshua Jorgensen
John M. Burnes for Respondent, Germania Farmers' Mutual Fire Insurance Company

Subject: Insurance; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

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Insurance

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X.1.d.ii.F Miscellaneous

Headnote

Insurance --- Actions on policies — Commencement of proceedings — Obligations of insurer — To defend — Interpretation of policy

Neighbour was injured when he attempted to aid insureds in starting recently-acquired snowmobile — Neighbour brought action against insureds — Property insurer and automobile insurer refused to defend claim — Insureds brought third party claim against property insurer and automobile insurer — Insureds brought motion for determination of insurers' duty to defend — Motions judge concluded that automobile insurer had duty to defend, but property insurer was not required to provide defence — Motions judge found that snowmobile was newly acquired vehicle under insurance policy — Motions judge held that injury was caused by ownership, use or operation of snowmobile — Motions judge observed that, as per terms of policy, all other vehicles owned by insureds were insured by automobile insurer, insureds intended to insure vehicle with insurer, and would have informed insurer of intent within 14 days from delivery of snowmobile — Motions judge found that property insurance allowed coverage for accidents occurring on residential property involving recreational vehicles which did not have registration requirements — Motions judge concluded policy exclusion in property insurance policy applied since snowmobile was required to be registered under Motorized Snow Vehicles Act — Automobile insurer appealed — Appeal dismissed — Starting snowmobile was ordinary and well-known activity of motor vehicles — All allegations in statement of claim with respect to injury revolved around operation of snowmobile — Automobile insurer had obligation to defend — Automobile insurer's duty to defend did not automatically trigger exclusion clause in property insurer's policy — Statement of claim failed to plead true and concurrent cause of action that may fall outside property insurer's exclusion clause — Motions judge was correct that automobile insurer had obligation to defend and that property insurer did not.

Insurance --- Actions on policies — Commencement of proceedings — Obligations of insurer — To defend — General principles

Evidence on coverage motion — Neighbour was injured when he attempted to aid insureds in starting recently-acquired snowmobile — Neighbour brought action against insureds — Property insurer and automobile insurer refused to defend claim — Insureds brought third party claim against property insurer and automobile insurer — Insureds brought motion for determination of insurers' duty to defend — Motions judge granted leave under R. 21.01(2)(a) of Rules of Civil Procedure to allow insureds to admit affidavit of insured LJ on motion — Motions judge concluded that automobile insurer had duty to defend, but property insurer was not required to provide defence — Automobile insurer appealed — Appeal dismissed — Preconditions to coverage under automobile insurance policy were that all other of insured's vehicles were to be insured by automobile insurer and snowmobile was newly acquired automobile — LJ's affidavit addressed issue of insurance of all of insured's vehicles and insureds' intention to insure snowmobile within 24 hours of delivery — Affidavit assisted in determining preconditions of coverage and did not offend policy reasons for exclusion of evidence on coverage motion of making premature findings — Affidavit was not controversial, affected only coverage and did not affect issues of liability — Automobile insurer was not deprived of cross-examination on affidavit since it did not request adjournment of motion to cross-examine on affidavit.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Neighbour was injured when he attempted to aid insureds in starting recently-acquired snowmobile — Neighbour brought action against insureds — Property insurer and automobile insurer refused to defend claim — Insureds brought third party claim against property insurer and automobile insurer — Insureds brought motion for determination of insurers' duty to defend — Motions judge concluded that automobile insurer had duty to defend, but property insurer was not required to provide defence — Automobile insurer appealed and brought motion to admit fresh evidence on appeal — Automobile insurer wanted to admit neighbour's statement to his insurer that insured JJ was owner of snowmobile and not insured LJ — Motion to admit fresh evidence dismissed; appeal dismissed — Neighbour's statement was controversial since it was opinion respecting disputed factual issue, was not based in fact and did not appear reliable — Issue of whether LJ was owner of snowmobile was contentious — If evidence was considered on coverage appeal, it would transgress trial judge's function and be premature engagement in prohibited form of fact-finding.

Table of Authorities

Cases considered by *Weiler J.A.*:

Amos v. Insurance Corp. of British Columbia (1995), [1995] 9 W.W.R. 305, 127 D.L.R. (4th) 618, 10 B.C.L.R. (3d) 1, [1995] I.L.R. 1-3232, 186 N.R. 150, 31 C.C.L.I. (2d) 1, 63 B.C.A.C. 1, 104 W.A.C. 1, 13 M.V.R. (3d) 302, [1995] 3 S.C.R. 405, 1995 CarswellBC 424, 1995 CarswellBC 1142 (S.C.C.) — considered

Beardsley v. Ontario (2001), 2001 CarswellOnt 4137, 151 O.A.C. 324, 57 O.R. (3d) 1, 17 C.P.C. (5th) 94 (Ont. C.A.) — referred to

Cooper v. Farmers' Mutual Insurance Co. (2002), 2002 CarswellOnt 1676, 37 C.C.L.I. (3d) 165, 20 C.P.C. (5th) 58, 159 O.A.C. 111, 59 O.R. (3d) 417, [2002] I.L.R. I-4121 (Ont. C.A.) — followed

Derksen v. 539938 Ontario Ltd. (2001), 2001 SCC 72, 2001 CarswellOnt 3605, 2001 CarswellOnt 3606, 205 D.L.R. (4th) 1, 15 M.V.R. (4th) 1, 277 N.R. 82, [2002] I.L.R. I-4029, 33 C.C.L.I. (3d) 1, 153 O.A.C. 310, [2001] 3 S.C.R. 398 (S.C.C.) — distinguished

Herbison v. Lumbermens Mutual Casualty Co. (2005), 255 D.L.R. (4th) 75, 2005 CarswellOnt 2264, 26 C.C.L.I. (4th) 161, 76 O.R. (3d) 81, 23 M.V.R. (5th) 1 (Ont. C.A.) — referred to

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Martin v. Redshaw (1992), 41 M.V.R. (2d) 315, *(sub nom. Martin v. Koeslag)* 62 O.A.C. 86, 14 C.C.L.I. (2d) 94, *(sub nom. Martin v. Koeslag)* [1993] I.L.R. 1-2898, 98 D.L.R. (4th) 289, *(sub nom. Martin v. Koeslag)* 11 O.R. (3d) 630, 1992 CarswellOnt 47 (Ont. C.A.) — considered

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. I-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 (S.C.C.) — referred to

Montreal Trust Co. of Canada v. Toronto Dominion Bank (1992), 40 C.P.C. (3d) 389, 1992 CarswellOnt 1131 (Ont. Gen. Div.) — referred to

Nichols v. American Home Assurance Co. (1990), [1990] I.L.R. 1-2583, 45 C.C.L.I. 153, 39 O.A.C. 63, 107 N.R. 321, 68 D.L.R. (4th) 321, [1990] 1 S.C.R. 801, 1990 CarswellOnt 619, 72 O.R. (2d) 799 (note), [1990] R.R.A. 516, 1990 CarswellOnt 994 (S.C.C.) — referred to

Sansalone v. Wawanesa Mutual Insurance Co. (2000), 2000 CarswellBC 885, 2000 CarswellBC 886, (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera*) 2000 SCC 24, 75 B.C.L.R. (3d) 1, 18 C.C.L.I. (3d) 1, (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera*) 185 D.L.R. (4th) 1, 50 C.C.L.T. (2d) 1, [2000] 5 W.W.R. 465, (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera*) [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, (sub nom. *Non-Marine Underwriters, Lloyd's of London v. Scalera*) [2000] 1 S.C.R. 551 (S.C.C.) — referred to

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Statutes considered:

Motorized Snow Vehicles Act, R.S.O. 1990, c. M.44
Generally — referred to

s. 12(1) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 2.01(1)(a) — referred to

R. 20 — referred to

R. 21.01(1)(a) — referred to

R. 21.01(2) — referred to

R. 21.01(2)(a) — referred to

R. 26.01 — referred to

R. 26.05(3) — referred to

APPEAL by automobile insurer from judgment reported at *McLean (Litigation Guardian of) v. Jorgenson* (2005), 2005 CarswellOnt 694, [2005] I.L.R. 4389, 20 C.C.L.I. (4th) 249 (Ont. S.C.J.), determining that automobile insurer had duty to defend action against insured and property insurer did not have duty to defend.

***Weiler J.A.*:**

Overview

1 Adam McLean and his family sued the Jorgenson family in negligence. [1] In his statement of claim, McLean alleged that Edward Allan Jorgenson suggested that his son, Joshua Jorgenson and he lift the rear of a snowmobile while Edward Allan revved the engine in an attempt to get it going. The track shredded and pieces flew off from the snowmobile and struck McLean. His left leg was seriously injured and it had to be amputated below the knee.

2 The Jorgensons called on their automobile insurer, TD General Insurance Company (TD) as well as their property insurer, Germania Farmers' Mutual Fire Insurance Company (Germania) to defend them. When they refused to do so, the Jorgensons brought a third party claim against them. The Jorgensons then brought a motion pursuant to Rule 21.01(1)(a) for determination of whether TD, Germania or both had a duty to defend the action on their behalf and sought leave of the court under Rule 21.01(2)(a) to have the affidavit of Lorelei Jorgenson considered by the motion judge. The motion judge granted leave to admit the affidavit, found that TD had a duty to defend, but that Germania did not and granted costs against TD to indemnify the Jorgensons for the costs of bringing the motion.

3 This appeal raises issues relating to the admission of the affidavit of Lorelei Jorgenson on the motion and coverage issues under the Jorgensons' policy of insurance, namely, whether the motion judge erred in holding that TD had an obligation to defend the Jorgensons and that Germania did not.

Law

4 Three principles relating to the duty to defend must be borne in mind in deciding this appeal.

5 First, the duty to defend, as distinct from the duty to indemnify, is triggered by the mere possibility that the claim could succeed: *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 (S.C.C.). Having regard to this low threshold, the need to decide the coverage issue expeditiously, and the need to avoid making premature findings at a preliminary stage that could affect the issue of liability as distinct from coverage, courts have traditionally examined only the pleadings, documents referred to in the pleadings, and the terms of the relevant insurance policy in deciding whether an insurer has a duty to defend a claim under Rule 21.01(1)(a): *Cooper v. Farmers' Mutual Insurance Co.* (2002), 59 O.R. (3d) 417 (Ont. C.A.) at paras. 9 and 11; *Monenco Ltd. v. Commonwealth Insurance Co.*, [2001] 2 S.C.R. 699 (S.C.C.). While the court must accept the facts as pleaded, it is not required to accept the characterization of those facts in the pleadings. The court must decide what the substance or true nature of the claim is as opposed to its form: *Sansalone v. Wawanesa Mutual Insurance Co.*, [2000] 1 S.C.R. 551 (S.C.C.) [hereinafter *Scalera*]; *Unger (Litigation Guardian of) v. Unger* (2003), 68 O.R. (3d) 257 (Ont. C.A.). In considering the terms of the relevant insurance policy and, depending on the circumstances, a court will: 1) interpret coverage provisions broadly in favour of the insured and exclusion clauses narrowly against the insurer; 2) apply the *contra proferentum* rule; and 3) consider the desirability of giving effect to the reasonable expectations of the parties where the policy is ambiguous. See *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398 (S.C.C.) at paras. 49, 52; *Scalera*, *supra*, at paras. 67-71.

6 Second, in relation to a motor vehicle, the duty to defend arises when there is a possibility that the injury arises from the "ownership, use or operation of a motor vehicle." This phrase is found in the coverage provision in TD's policy and is part of the exclusion clause in Germania's policy. In relation to "use or operation" the two-part test found in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.), at 415. That test is:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?

> 2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous. [2]

Each case must be decided on its own facts applying the two-part test outlined above.

7 Third, because there may be concurrent actions in tort, more than one insurer may be liable to defend and to indemnify an insured. To be concurrent, each cause of action must be "non-derivative" of the other. Put another way each cause of action must be independent of the other although the injuries arise from concurrent acts: *Derksen*, *supra*, at paras. 26-37; *Unger*, *supra*.

Analysis

The issues relating to Lorelei Jorgenson's affidavit

8 In order for coverage under the TD policy to exist, two preconditions had to be met. First, all other vehicles owned by the Jorgensons had to be insured with TD and second, the snowmobile had to be a "newly acquired automobile." The phrase "newly acquired automobile," is defined in the automobile policy as an automobile "acquired as owner" that was not covered under any other policy, "so long as you inform us within 14 days from the time of delivery and pay any additional premium required."

9 Lorelei Jorgenson, Joshua's mother, swore an affidavit that addressed these issues. In her affidavit she swore: 1) Joshua gave J & R Cycle a deposit of $1000 on her behalf towards the purchase of the 1996 Snowmobile, paid the remaining balance four days later and picked it up; 2) she completed the "Application for Transfer" for the snowmobile and signed the form as the buyer and gave it to Joshua to take with him to J & R Cycle; 3) she and her husband had insured all their other vehicles with TD including a previously purchased snowmobile registered in her name; 4) she intended to insure the snowmobile that had been purchased the previous day with TD and would have done so but for the accident happening within 24 hours of her taking delivery of it; and 5) all family members were listed as named insured under her previous policies.

10 The Jorgensons sought leave of the court to have the affidavit considered on the motion. Germania consented to the admission of the affidavit while TD did not. The motion judge granted leave to admit the affidavit of Lorelei Jorgenson. Admission of the affidavit forms the basis of four of TD's grounds of appeal.

11 TD asserts that the motion judge erred in four respects: 1) by improperly reviewing the affidavit; 2) in admitting Lorelei Jorgenson's affidavit; 3) by not allowing TD the opportunity to cross-examine on her affidavit; and 4) in the weight he gave to her affidavit.

12 If the admission of Lorelei Jorgenson's affidavit is upheld, TD seeks to have fresh evidence admitted on this appeal. Specifically, TD seeks to have us consider a statement made by Adam McLean to an adjuster for Optimum Frontier Insurance Company, his insurer for uninsured motorist coverage, to the effect that Josh, not Lorelei Jorgenson, is the owner of the snowmobile. Optimum produced the statement to TD after the motion was heard.

13 Before dealing with the admissibility of the affidavit, it is necessary to consider the extent to which the information pertinent to the conditions precedent was contained in the pleadings and insurance policies. McLean's statement of claim pleads that Lorelei Jorgenson and her husband Edward Jorgenson are the owners of the snowmobile, and in the alternative, that Josh Jorgenson is the owner. TD's Defence to the Third Party Claim admits that it issued motor vehicle policies to both Edward Allan and Lorelei Jorgenson, although not for the snowmobile in question. A review of the policies shows they provided coverage for newly acquired automobiles.

14 The Jorgensons' statement of defence denies the allegation in McLean's statement of claim relating to their ownership of the snowmobile. It would have been preferable for the Jorgensons to amend their statement of defence and third party claim to specifically plead, in the alternative, that Lorelei Jorgensen was the owner of the snowmobile and to refer to the Application for Transfer in these pleadings. Had they done so, the Application for Transfer would have been incorporated as part of their statement of defence and third party claim by reference and the court could have considered that document in respect of the motion under rule 21.01(1)(a). See *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 (S.C.C.), at 717 -718; *Cooper v. Farmers' Mutual Insurance Co.*, *supra*, at para 11; *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (Ont. C.A.); and *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.) at pp 395-396. Instead, the Application for Transfer is referred to in the notice of motion under rule 21.01(1)(a) for a determination of whether TD and Germania are obliged to defend the claim against the Jorgensons. The Jorgensons' statement of defence does plead facts from which an inference of ownership of a newly acquired vehicle could be drawn. The statement of defence pleads that Lorelei gave Josh the money to purchase the snowmobile on her behalf, states the date when payment for the snowmobile was made and the date when delivery was taken, and denies any negligence. In view of the Notice of Motion, the statements in the statement of defence and the fact that the Jorgensons could amend their pleading under rule 26.01 without prejudice to TD and Germania, I view the omission to plead ownership in the alternative and to refer to the Application for Transfer, as an irregularity. I bear in mind that Rule 2.01(1)(a) provides that a failure to comply with the rules is an irregularity and the court may grant any relief on terms that are just to secure the just determination of the real matter in dispute.

15 Examination of the policy would have disclosed the time within which the vehicle was potentially covered prior to a request for insurance being placed.

16 The affidavit was helpful in stating that all of the Jorgensons' other vehicles were insured with TD, the second precondition for coverage. That statement does not offend the policy reasons for excluding evidence on a coverage motion, namely, the need to avoid making premature findings at a preliminary stage that could affect the issue of liability and to avoid the protraction of proceedings by a trial within a trial. The statement was not controversial, affected only coverage and did not affect the issues of liability in the litigation. Consideration of this extrinsic evidentiary fact simply illuminated the question of law and is consistent with the reasoning in *Monenco*, *supra*, at 717-718. Indeed, to fetter the motion judge's discretion, so as to preclude admission of evidence that all of the family's other vehicles were insured with T.D., would be contrary to the interests of justice. See, by analogy, *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (Ont. C.A.) at para. 10 where evidence of a letter satisfying the precondition of giving notice to the Crown of a claim was admitted under rule 21.01(2) on a rule 21.01(1)(a) motion on the basis that to do otherwise would be contrary to the interests of justice.

17 Alternatively, it was open to the motion judge to assume that the preconditions respecting coverage in the insurance policy were satisfied having regard to Rule 25.06 (3). Rule 25.06(3) provides that allegations of the performance or occurrence of all conditions precedent to the assertion of a claim are implied in the party's pleading and need not be set out. It is for the opposite party to plead non-performance or non-occurrence of the condition precedent in its pleading. Thus, it was for TD in its defence to the third party claim, to plead the issue of non-compliance with any condition precedent respecting insurance such as that not all other vehicles were insured or that the automobile did not come within the definition of a "newly acquired automobile" if it wished to do so. It did not do so and, instead, plead that Lorelei and Allan Jorgenson were not the "registered owners" of the snowmobile and that Joshua was.

18 At this juncture, it is appropriate to decide the question of the admissibility of the proposed fresh evidence. The proposed fresh evidence statement by McLean to the adjuster speaks to the issue of ownership of the snowmobile. I would decline to admit it for two reasons. First, McLean's statement is controversial in that it is not based on fact but on opinion respecting a disputed factual issue. It does not appear to me to be reliable evidence. Second, in *Cooper*, *supra*, the appellant argued that similar material, a statement to an adjuster, ought to have been considered by the motion judge. Cronk J.A., on behalf of the court, held at paras. 8-14 that the applications judge was correct in refusing to do so on the basis that the court ought not to admit extrinsic evidence on the contentious points in the underlying litigation respecting

liability. The same reasoning applies here. The issue of whether Lorelei Jorgenson is the owner of the snowmobile is a contentious one. McLean's statement to the adjuster might be a factor to consider in the liability action at trial where the facts are to be found but, at this stage of the proceedings, it could not negate the potential that Lorelei Jorgenson would nevertheless be held to be the owner of the snowmobile. If this court were to consider the proposed fresh evidence in determining the coverage appeal it would be transgressing on the trial judge's function and engaging prematurely in a prohibited form of fact-finding. Had TD been of the opinion that there was no realistic possibility that Lorelei Jorgenson would be found to be the owner of the snowmobile it could, after filing its statement of defence to the main action and to the third party claim, have moved for summary judgment under Rule 20 for a declaration that there was no genuine issue for trial on this point. At that time it could have supported its application with an affidavit from McLean respecting the issue of ownership. TD did not do so. I would dismiss the motion to admit fresh evidence.

19 TD's submission that it was not given an opportunity to cross-examine on Lorelei's affidavit must also fail. TD did not ask the motion judge to adjourn the motion to permit cross-examination on the affidavit in the event he decided to admit it nor request an adjournment after he decided to admit it.

20 The last submission made by TD in relation to Lorelei's affidavit is that the motion judge erred in the weight he gave to it. The motion judge correctly stated the test for determining coverage and observed in two separate places in his judgment that he did not have to determine the ownership of the snowmobile in order to decide the issue of coverage. All that was required was that the claim might fall within the terms of the policy and he held that it could. Although some of the other comments made by the motion judge can be interpreted as going beyond what was necessary to decide the coverage issue, they were understandable in light of the position taken by TD on the motion. As I indicate in the next portion of my judgment, the result on the coverage issue respecting TD would not have been any different.

21 I would dismiss the grounds of appeal in relation to the affidavit of Lorelei Jorgenson.

The coverage issue: Did the motion judge err in holding that TD had a duty to defend and that Germania did not?

22 The Jorgensons' automobile policy provides insurance for damages for bodily injury "as a result of owning, using or operating the automobile." The vehicles for which coverage is shown are "recreational vehicles if they are designed for use off public roads and are not required to be registered under any government authority." The homeowner policy with Germania is the mirror image of the automobile policy. The homeowner policy excludes claims "arising from the ownership, use or operation of any motorized vehicle...except those for which coverage is shown in this policy."

23 Before the motion judge, TD argued that the snowmobile was not required to be registered or insured because it was a motor vehicle intended for use off public roads and therefore was not covered under its policy but under the Germania policy. TD made the same submission before this court.

24 The motion judge carefully considered the *Motorized Snow Vehicles Act* R.S.O., 1990, c. M. 44 and regulations requiring that all snowmobiles with the exception of those owned by manufacturers, dealers and non-residents be registered with the Ministry of Transportation as well as s. 12(1) of the Act which prohibits a person from driving a snowmobile unless the vehicle is insured under a motor vehicle policy. He also considered at para. 62, *Martin v. Redshaw* (1992), 11 O.R. (3d) 630 (Ont. C.A.), in which this Court held that a snowmobile is a motor vehicle designed for travel on public roads so long as they are covered in snow, in the same way that it is designed for travel on other snow-covered surfaces. The motion judge's conclusion that the snowmobile in issue here was a "motorized snow vehicle" within the definition of automobile in the TD policy and not a recreational vehicle covered under Germania's policy is unassailable.

25 The next issue is whether the claims in negligence arises out of the "ownership, use or operation of a motor vehicle" under the TD policy, or fall under the Germania policy as general claims in negligence not related to the "ownership, use or operation of a motor vehicle" or whether there are concurrent actions in tort. To be concurrent each cause of action must be "non-derivative" of the other. To be non-derivative, the causes must be two independent, discreet and yet concurrent acts. The trier of fact must be able to, in theory, find the defendant liable on one but not the other.

26 The statement of claim alleged in paragraph 6 that Lorelei and Edward Jorgenson "were also the owners of a 1996 Polaris snowmobile that was being operated on the property of which they were occupiers" and in paragraph 13(d), that "they allowed the snowmobile to be operated when they knew or ought to have known that it was unsafe to do so." TD submits that this allegation and the allegations in the statement of claim at paragraphs 13(a), (b,) (c) and (e) properly fall under the homeowner's policy. These allegations are as follows:

> (a) they allowed a dangerous activity to be carried on on the premises over which they had care and control;
>
> (b) they put the plaintiff, Adam McLean, in a situation of danger when they knew or ought to have known that there was the possibility of serious injury;
>
> (c) they encouraged the plaintiff to participate in a dangerous activity that they knew or ought to have known would result in serious injury;
>
> (e) they failed to take any or adequate reasonable precautions to prevent an injury that they knew or ought to have known would result from the dangerous activity.

27 In describing the incident giving rise to the allegations of negligence, the statement of claim states: "Joshua was attempting to start the snowmobile" in paragraph 10; and Allan Jorgenson suggested that Joshua and the Plaintiff Adam McLean lift the rear of the snowmobile so they could "rev" the motor in the hopes that it would start to run better in paragraph 11.

28 The motion judge then stated at para 39 of his reasons, that "[t]here is no dispute that the injury to Adam was caused by the ownership, use or operation of a snowmobile...." As indicated above, the issue of whether McLean's injuries arose out of the "ownership, use or operation of a motor vehicle" was very much disputed.

29 Attempting to start a motor vehicle is an ordinary and well-known activity to which motor vehicles are put. Revving an engine may also be characterized as an ordinary activity. Suggesting that a person lift the rear of the snowmobile may not be an ordinary activity to which a snowmobile is put. However, lifting the rear of the snowmobile cannot be viewed in isolation. It is inextricably linked to the starting and revving of the motor.

30 The allegations that the Jorgensons allowed a dangerous activity to be carried on on their premises, that they knew or ought to have known that there was a possibility of serious injury, and that they allowed the snowmobile to be operated when they knew or ought to have known that it was unsafe to do so, are all linked to the ordinary operation or use of the snowmobile. Unless attempts are made to start the snowmobile or the snowmobile has been started and is running, no dangerous activity is carried on by the Jorgensons and no situation of danger is created. In my view, TD has a duty to defend McLean's claims against the Jorgensons.

31 However, the mere possibility that TD's policy might cover all the claims and engage its duty to defend does not automatically trigger the exclusion clauses in Germania's policy. See *Derksen*, *supra*. While the Germania policy excludes damages to persons arising out of the ownership, use or operation of an automobile, it does not exclude damages arising out of general negligence. The motion judge was of the opinion that the statement of claim did not properly plead any causes of action that were unrelated to the ownership, use or operation of the snowmobile and I would agree with him.

32 This case can be distinguished from *Derksen*, *supra* on that basis. Here, the statement of claim fails to plead a true concurrent cause of action that may fall outside of Germania's exclusion clause, or similarly outside of TD's coverage clause. In *Derksen*, the Court found two acts which created two distinct duties: 1) the duty to safely clean up the work site and 2) the duty to ensure the automobile could be operated safely. These duties created concurrent causes of action where one cause clearly fell within the exclusion clause in question, and one did not. It was possible to find the defendant negligent in the performance of one duty but not the other.

33 The concept of concurrent causes is well demonstrated in *Unger (Litigation Guardian of) v. Unger* (2003), 68 O.R. (3d) 257 (Ont. C.A.). At para. 15, Doherty J.A. found it significant that it was legally possible in *Derksen* to find the defendant liable even though he engaged in no negligent conduct in the use or operation of the motor vehicle. It was precisely on that basis that he found no concurrent cause of action. The plaintiffs were injured when a truck struck their automobile and they alleged both the driver and the driver's employer were negligent. The Unger family claimed the concurrent cause of action, outside of negligent use, operation or ownership of a vehicle, were the negligent business practices of the employer. The Court found the employer's commercial general liability insurer did not have a duty to defend because all of the allegations, in substance, alleged that the plaintiffs were injured as a result of the use, operation or ownership of the truck. The allegation of negligent business practices could not stand alone as a ground for recovery.

34 The same is true in this case. The court is not required to accept the plaintiff's characterization of facts or the descriptive labels used in a statement of claim. The substance of the pleadings is that Adam McLean was injured as the result of the use, operation or ownership of the snowmobile. *Unger*, *supra* at para. 16. The allegations of negligence pleaded in paragraphs 13 (a), (b), (c), (d) and (e) of the statement of claim, assist the Jorgensons in establishing their claim only to the extent that they help demonstrate that the snowmobile was being used or operated in a negligent fashion when the accident occurred. Whether the Jorgensons provided verbal direction as to how to deal with the snowmobile or failed to appreciate the risk involved in their actions does not detract from the fact that this incident arose from the attempted repair of a snowmobile. The allegations of negligence, allegedly outside of the use, operation or ownership of the snowmobile, cannot stand alone as a ground for recovery.

35 Therefore these allegations do not meet the test for a concurrent cause and fall within Germania's exclusion clause. I would hold that the motion judge correctly held that TD was obliged to defend the Jorgensons in the liability action and dismissed the coverage motion against Germania.

36 I would dismiss the appeal.

Costs

37 TD's notice of appeal seeks an order varying the costs award to the Jorgensons by the motion judge from costs on a substantial indemnity basis to costs on a partial indemnity basis with substantial indemnity for the motion itself. The motion judge gave detailed reasons for his award of costs and I would not interfere with it.

38 The Jorgensons are entitled to their costs of this appeal. I would fix these costs on a partial indemnity basis as was done in *Cooper*, *supra*. Accordingly I would order TD to pay costs to the Jorgensons fixed in the amount of $13,641 all inclusive. I would also order TD to pay costs to Germania fixed in the amount of $7092.58 all inclusive.

***Rosenberg J.A.*:**

I agree.

***Gillese J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 In addition, McLean sued J & R Cycle, the vendors of the snowmobile as well as The Optimum Frontier Insurance Company for uninsured automobile coverage. J & R cross-claimed against the Jorgensons.

2 This test is not always easy to apply as two recent split decisions from this Court indicate. *Vytlingam (Litigation Guardian of) v. Farmer*, [2005] O.J. No. 2266 (Ont. C.A.), leave to appeal to S.C.C. requested, [2005] S.C.C.A. No. 376 (S.C.C.) and

Herbison v. Lumbermens Mutual Casualty Co., [2005] O.J. No. 2262 (Ont. C.A.), leave to appeal to S.C.C. requested, [2005] S.C.C.A. No. 369 (S.C.C.).

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