SUPREME COURT OF YUKON

Citation: *Green v Ward*,
2025 YKSC 29

Date: 20250526
S.C. No.21-A0140
Registry: Whitehorse

BETWEEN:

AMY GREEN

PLAINTIFF

AND

DEVON CLARK AND SCOTT WARD

DEFENDANTS

Corrected Decision: The citation of the decision was corrected. The changes were made on June 4, 2025.

Counsel for the Plaintiff — Daniel S. Shier

Counsel for the Defendant Scott Ward — Aron M. Bookman

No one appearing for the Defendant Devon Clark

AND

S.C. No.23-A0014
Registry: Whitehorse

BETWEEN:

AMY GREEN

PLAINTIFF

AND

THE PERSONAL INSURANCE COMPANY

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — Daniel S. Shier

Counsel for the Defendant — Mina Khan

REASONS FOR DECISION

Overview

[1] This application raises issues of the timing of the participation of parties or potential parties in a legal action and the effect of that timing on the fairness to all parties and on the most expeditious and inexpensive resolution of the proceeding.

[2] The plaintiff was injured in a two-vehicle collision and initiated a legal action in tort against the owner and the driver of the other vehicle. The owner of that vehicle, who was not the driver, has defended the action in part on the basis that he did not give consent to the driver. If that defence is successful, the Uninsured Motorist Coverage ("UMC") in the plaintiff's own insurance policy will be engaged. In addition, the plaintiff's own insurance policy contains a Family Protection Endorsement 44 ("SEF 44") that provides for additional coverage if there is an uninsured motorist or the eligible claims are above the policy minimum.

[3] The plaintiff commenced a second action against her own insurer, the Personal Insurance Company, seeking declarations that the defendant vehicle was uninsured and that the plaintiff is entitled to payment of her damages arising from the collision under the UMC and the SEF 44, and for judgment for those amounts.

[4] This application by the plaintiff is for an order to have both actions tried together. The defendant Personal Insurance Company opposes and brings their own application for a stay of the action against them. They say the insurance action 'is not engaged' by the tort action and they have a right to 'wait and see' before incurring legal costs in defending the insurance action.

[5] For reasons of fairness, judicial economy, efficient use of scarce resources, and avoiding multiplicity of proceedings and inconsistent results, I grant the plaintiff's application and deny the defendant's application. In addition, I direct that the process and timing of determining whether the driver had consent to drive be discussed in case management as soon as possible, because it is fundamental to which insurance policy applies.

Issues

i) Are the two actions sufficiently related to be tried together?

ii) Is the action brought against the insurer premature?

iii) What is just in the circumstances?

Background

[6] On February 10, 2021, the plaintiff Amy Green ("Green") was driving her vehicle in downtown Whitehorse. While making a left hand turn on a green light she was struck by a vehicle owned by the defendant Scott Ward ("Ward") and driven by the defendant Devon Clark ("Clark"). She claims injuries and losses as a result of the accident. She filed a Statement of Claim against Ward and Clark on March 15, 2022, and an Amended Statement of Claim on August 5, 2024.

[7] Clark filed an appearance but no Statement of Defence. Green obtained default judgment against Clark on July 4, 2023.

[8] Ward filed a Statement of Defence on November 7, 2023, denying all allegations in the Statement of Claim. In addition, Ward specifically denied that Clark had his consent to drive his vehicle. Examinations for discovery have occurred of Green and Ward in this action.

[9] The Ward automobile was covered by an insurance policy. All insurance policies in the Yukon are governed by the *Insurance Act,* RSY 2002, c. 119, and must contain the provisions in the Standard Policy Form No. 1 ("SPF No. 1"), including a section on third party liability. It provides that the insurer agrees to indemnify the insured, and every other person who with his consent personally drives the automobile against liability imposed by law upon the insured or any such other person for loss or damage arising from the ownership, use, or operation of the automobile (s. 139).

[10] Green had coverage under an automobile insurance policy issued by the Personal Insurance Company, her insurer. As required by the *Insurance Act*, the policy included a provision for UMC, in which the insurer agreed to pay damages for bodily injury which the plaintiff is legally entitled to recover from the owner or driver of an uninsured automobile.

[11] The UMC is subject to restrictions, two of which are relevant on the facts of this case: first, an insured person must have the written consent of the insurer before any settlement or judgment is obtained against a person or organization that may be legally liable; and second, the insurer is only liable under the UMC for an amount up to the minimum limit for automobile bodily injury liability insurance applicable in the jurisdiction. In the Yukon, s. 150 of the *Insurance Act* sets the minimum policy limit of $200,000.

[12] Green's insurance policy included an SEF 44, in which an insured pays an additional premium for the protection of the excess coverage provided under the endorsement. It indemnifies the insured for any shortfall in the payment of an amount the insured is legally entitled to recover against an underinsured tortfeasor as compensatory damages in respect of bodily injury sustained by accident arising from

the use or operation of an automobile. However, the amount payable under the endorsement is not necessarily the full amount of the shortfall owed by the underinsured tortfeasor. The terms of the endorsement provide for specific deductions from the shortfall in order to determine the amount payable by the insurer to the eligible claimant. An underinsured tortfeasor is referred to as an inadequately insured motorist in the SEF 44 and is defined as "the identified owner or identified driver of an uninsured automobile as defined in the policy" (s. 1(e)(ii) of the SEF 44). The coverage under SEF 44 is up to the third-party limits of the policy and is subject to certain deductions, including the amounts recovered under the UMC.

[13] Green filed a Statement of Claim against her insurer on April 21, 2023, for the following relief: a declaration that Clark was the driver of an uninsured vehicle and Ward was the owner of an uninsured vehicle; a declaration that she is entitled to benefit under the UMC in her policy with respect to her losses and damages from the collision; an accounting and judgment against the insurer for the amount owing under the UMC; a declaration that she is entitled to be paid for all of her damages up to the limits of the SEF 44, after deduction of amounts actually recovered, and judgment against the insurer for those amounts.

Parties' Positions

[14] The plaintiff says the unresolved issue of consent to drive has a significant impact on the insurer, as the outcome will determine whether Ward's policy may cover the plaintiff's damages arising from the accident, or whether the plaintiff's policy with Personal Insurance Company may do so. The plaintiff seeks to keep the Personal Insurance Company involved for the purpose of settlement discussions and/or trial. The

plaintiff says the case law about consolidation of proceedings and trying actions together supports its position for reasons of judicial economy, efficient use of scarce resources, avoiding inconsistent results, and fairness to the plaintiff. Without the Personal Insurance Company involved until the conclusion of the tort action, there is a significant risk that the plaintiff will proceed through the entire case against Ward, the Ward policy will be found not to apply because the driver did not have consent, and the plaintiff will have to re-commence the litigation against her own insurer. The plaintiff argues that the Yukon decision of *Ursich v Security National Insurance Company*, 2005 YKSC 72 ("*Ursich*") relied on by the Personal Insurance Company is distinguishable because it dealt with costs only, not the legal positions of the parties and there was no UMC in that case, only a SEF 44 for claims in excess of $200,000.

[15] Ward agrees with the plaintiff that there should be an order for the two actions to be tried together. He relies in part on Rule 1(6) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules*"): that is, the *Rules* must be interpreted to achieve the most just, speedy, and inexpensive determination of every proceeding on its merits and to ensure proportionality of time and expense, with the amount claimed, the importance of the issues and the complexity of the proceeding. The defendant Ward states if a stay of the insurance action is granted, it will be unjust to Green because of the risk she will have to bear that she will be without a remedy if Ward proves Clark had no consent to drive. He says the consent issue needs to be resolved in order for the case to move forward and that the Personal Insurance Company, because of the effect of this issue on them, should be included in this determination.

[16] The Personal Insurance Company says they have no obligation to defend the insurance action until the tort action is resolved. They argue that the consent issue in the tort action does not impact the insurance action. They prefer to 'wait and see' because liability will only attach to them if Ward did not provide consent to Clark. They did not address what process would occur if the outcome of the tort action is that the Ward policy does not apply because Clark did not have consent to drive.

[17] Even if the Ward policy applies and the SEF 44 is engaged because the Ward policy does not cover all the plaintiff's damages above $200,000, the Personal Insurance Company, relying on *Ursich*, says they have no obligation to participate until it is clear the policy limits have been exceeded. In *Ursich*, the plaintiff had brought an action against two other defendants, and the Court said that the insurer had no obligation to contribute toward a global settlement and incur legal costs unless and until there was a policy limits issue. It endorsed their wait and see approach and awarded costs to the insurer to the extent of their participation.

[18] The Personal Insurance Company says in the case at bar if the actions are tried together and a stay of the action against them is not granted, they may incur costs and expend resources which may not be warranted, contrary to the object of Rule 1(6) to secure a just and inexpensive determination of every proceeding on its merits and to ensure proportionality.

Analysis

General

[19] Rule 5(8) allows for consolidation of proceedings or an order that they be tried together. Unlike the rules in some other jurisdictions, the *Rules* do not set out any factors to be considered by the Court in making this order.

[20] The purpose of both consolidation and trying together is to save judicial resources, reduce multiplicity of proceedings, save costs and time for all participants, and avoid inconsistent results.

[21] While traditionally cases have held that consolidation of proceedings may be ordered only where a decision in one case would dispose of the essential cause of action in another, or where claims brought in two proceedings could have been commenced in the same proceeding, more recently the considerations have been broadened to take into account administration of justice and fairness concerns. For example, at para. 22 of *Foran v Malek*, 2023 NSSC 29 ("*Foran*"), quoting from *King v RBC Dominion Securities Inc*., 2012 NSSC 225, the court wrote:

> [18] Although that [factor] remains an important consideration favouring consolidation, the absence of same does not preclude it. … an alternate consideration is whether the proceedings in question are "inextricably intertwined." … It remains, as it was in the past, a balancing of factors. [Emphasis in original]

[22] Further in *Jeffrie v Hendriksen*, 2011 NSSC 351, Rosinski J. noted at para. 55 that the risk of inconsistent findings or outcomes is "a good barometer of whether the proceedings are 'inextricably intertwined'" (*Foran* at para. 23).

[23] In *Healy v Halifax (Regional Municipality),* 2016 NSCA 47 ("*Healy*"), the court wrote:

> [35] … Although many cases have articulated a series of factors for consideration in a consolidation motion, the overarching consideration has been, and continues to be, what is "just" between the parties. … Determining what is "just" may be aided by the court considering certain factors, but should not be dictated by a rigid set of criteria. Perhaps what may not be "just" for a total consolidation, may be "just" for the extraction of a common issue.

[24] It follows from this that an order that two actions to be tried together, as is requested in this case, requires less scrutiny than an order for a consolidation of proceedings. Trying together does not require that the two proceedings form one action, or that resolution of one means resolution of the other. However, there should be a common question essential to both proceedings (*Perimeter Transportation Ltd. v Northwest Airporter Bus Service Ltd.*, [1978] BCJ No 820 (SC)). The court has discretion to decide whether and how the actions shall be heard together, based on the principles set out in the *Rules*, the jurisprudence, including what is just, convenient and in the interest of justice – both for the parties and the administration of justice (*Healy* at para. 38).

[25] In the case at bar, there are three possible outcomes related to insurance policy coverage as the case unfolds that raise different concerns. First, the Personal Insurance Company policy may not be engaged at all if Clark did have consent to drive and the Ward policy covers all the plaintiff's losses. The action against Personal Insurance Company would be dismissed. The question in this circumstance is whether the Personal Insurance Company should incur the costs of defending the insurance action before the tort action is concluded and the consent issue is resolved, or whether the plaintiff should conclude the tort litigation without their insurer's participation.

[26] A second possibility occurs if Clark did have consent to drive and the Ward policy covers the plaintiff's damages to a certain amount, but the plaintiff's damages exceed those covered by the Ward policy and so the Personal Insurance Company policy is engaged as a potential or actual excess insurer under the SEF 44 endorsement. The question in this circumstance is whether the Personal Insurance Company should incur the costs of defending the action before the tort action is concluded and they know whether the damages exceed the Ward policy limits, or whether the plaintiff should conclude the tort litigation without their insurer's participation.

[27] A third possibility is that Clark did not have consent to drive and the Personal Insurance Company is the sole insurer. The question in this circumstance is the same as that in the first possibility – should the insurer incur the costs of defending before the tort action is completed and before they know whether they are liable, or should the plaintiff conclude the tort litigation knowing she could have no policy coverage, and be required to re-commence litigation on the same issues against her own insurer.

[28] None of the cases relied on by the plaintiff is factually analogous. Interestingly, most of the cases in which the principles of the interconnection between two different claims arise, deal with the inverse situation – that is, where the insurer who is sought to be added as a defendant says it is prejudiced because it did not receive notice of a potential or actual claim against it until after the limitation period, therefore preventing it from protecting its position. In this case, ample notice of the claim was provided, enabling the insurer to protect its position. Yet, conversely, the insurer is asking to be removed from the litigation until after the conclusion of the case against the tortfeasor.

Issue i) Are the two actions sufficiently related to be tried together?

[29] Both of these actions relate to the same incident, the same plaintiff, the same injuries, and the same driver. There are other interconnections set out in the following that justify them being tried together.

[30] There are four aspects to the insurance claim: whether the driver was at fault and caused the plaintiff's injuries; whether the driver had consent to drive; what is the amount of the plaintiff's damages; and what is payable under the applicable insurance policy, after deductions.

[31] The first three aspects are also part of the tort claim: whether the driver was at fault and caused the plaintiff's injuries; whether the driver had consent to drive; what is the amount of the plaintiff's damages. Any deductions from payments under the policy form part of the insurance action only.

[32] If the Ward vehicle is found to be uninsured, then the Personal Insurance Company bears all the risk. Whether consent was provided by the owner Ward to the driver Clark determines whether the plaintiff's insurance policy is engaged or not. The consent issue directly impacts the Personal Insurance Company's claim, contrary to the argument of their counsel. In addition, the issues of fault, causation, and amount of damages are the same in both actions. For each of them, the plaintiff's success depends in part on a finding by the Court that the accident caused her injuries. If causation is established, the Court then has to consider the nature and extent of those injuries and their impact on the plaintiff's functioning. As a result, the actions are related.

[33] The case of *Foran* contains principles applicable to the second possible outcome in this case noted above at para. 26: that is, where the Ward policy applies but the

damages are in excess of its limits so the SEF 44 endorsement is engaged. *Foran* involved an SEF 44 endorsement, not a UMC, and the court ordered a consolidation of three proceedings arising from one accident: a tort action by the plaintiff pedestrian against an individual driver, an SEF 44 action in contract by the plaintiff against her own insurance company, Aviva Canada ("Aviva"), for recovery of damages in excess of the defendant's policy limit, and a claim for breach of contract by the plaintiff against the individual defendant's insurer, TD General Insurance Company ("TD"), for a termination of medical treatment and weekly income replacement benefits the plaintiff was receiving. The defendants Malek and Aviva consented to a consolidation of the actions.

[34] The court in *Foran* said at para. 32 that "[t]he SEF 44 insurer is responsible to pay the difference between the damages awarded, if any, against Mr. Malek and the limits of Mr. Malek's coverage under Section A of his insurance policy." The court went on to note the evidence in the tort action about liability and damages – the cause and extent of the plaintiff's injuries in particular – was determinative of the amount of monies payable under the SEF 44 by Aviva. Thus, the two actions were related.

[35] *Foran* also addressed the issue of combining one action in tort and another in contract. The court held this distinction did not matter for purposes of consolidation or trying together: what was important was the evidence required, the issues to be determined, and how the determination of the issues in one claim would affect the issues in the other claim.

[36] In the case at bar, the Personal Insurance Company denied liability and damages. In other words, its defence incorporates the same issues as were raised in the tort claim. Further, the plaintiff's SEF 44 policy provides that any judgment or

settlement she enters into under the policy must have the consent of the Personal Insurance Company. For all of these reasons, the two actions are sufficiently related to be tried together.

Issue ii) Is the action brought against the insurer premature?

[37] This may be the heart of the current procedural dispute, especially as it relates to the UMC. While the Personal Insurance Company maintains that the action against them is premature, there is support in the case law dealing with UMCs and the potential absence of insurance covering the tortfeasor, for their involvement at an earlier stage, and not only after the tort action is completed, if required.

[38] The insurance claim was brought against the insurer when the issue of consent was discovered. Because the issue remains unresolved, the plaintiff has no choice but to continue the tort action against the driver and owner, in the event the Ward policy applies. The plaintiff's direct action for recovery against the Personal Insurance Company under her own insurance policy - a first party UMC - requires three things:

1) a person insured;
2) who is legally entitled to recover damages from the owner or driver of;
3) an uninsured automobile.

(*Johnson et al v Wunderlich et al* (1987), 34 DLR (4th) 120 (ONCA) ("*Johnson*") at 128).

[39] The first requirement has been met in this case. The plaintiff is insured. The second requirement of whether she is legally entitled to recover damages from the owner or driver may be met once there is a determination on the evidence or by agreement that the driver was at fault and the collision caused her injuries. The third requirement may be met once the issue of Ward's consent for Clark to drive the car has

been resolved through the evidence. The plaintiff has not set out any factual allegations in the insurance action to establish this. She has no independent knowledge of these facts and depends on the facts provided by Ward in the tort action. As noted above, the last two requirements of the cause of action against the insurer require findings that are common to both actions.

[40] The Court of Appeal in *Johnson* referenced several scenarios of how a case such as this could be litigated. They include:

- the injured insured sues his own insurer and the tortfeasor in the same action (*Barton et al v Aitchison et al* (1982), 39 OR (2d) 282 (CA)), normally done where the tortfeasor may be uninsured and there is some question about the insurance – or if there is a concern that the tortfeasor's insurer may deny liability or become insolvent;
- the injured insured can sue the tortfeasor only without suing his insurer; if judgment is unsatisfied against the tortfeasor, the insured then pursues his own insurer- this is what the Personal Insurance Company seeks in the case at bar;
- the injured insured sues his own insurer only and determines liability and damages; and
- the injured insured sues the tortfeasor, who later may be revealed to be uninsured, and later adds their own insurer under the UMC – this is similar to what has occurred the case at bar.

[41] There was no suggestion in *Johnson* that including the plaintiffs' own insurer in an action where there is doubt about the tortfeasor's insurance coverage was

premature. In fact, the question in *Johnson* was whether the plaintiffs' own insurer was notified early enough, within the applicable limitation period – i.e. two years from the date of the accident. The Court of Appeal overturned the trial judge's decision that the action against the plaintiffs' insurer pursuant to the UMC was statute-barred, because the insurer was added after the expiry of the two-year limitation period. It was not clear when the plaintiff discovered or ought to have discovered the material facts when the cause of action arose. Although the Statement of Claim alleged "at all material times" the alleged tortfeasors were uninsured, there was no indication of when the plaintiffs discovered or reasonably should have discovered this fact.

[42] Further on in *Johnson*, Finlayson J.A., in concurring reasons, commented there are often different factual possibilities where the status for insurance purposes of the uninsured automobile is at issue – the driver responsible for the accident "can be known, unknown, misstated, subject to change because of the subsequent insolvency of the insurer…" (at 134). Another factual possibility is the situation here, where there is a consent issue. Finlayson J.A. commented adversely on the situation where an insurer, who with knowledge of the accident, takes no position whatsoever in the hope that no claim will be made against it.

> … If a claim is eventually made [against the insurer], the insured may find for the first time that defences are being raised apart from [their] right to recover damages arising out of the accident. These could include the insurance status of the "uninsured" automobile, the status of the insured's own policy, and non-compliance with the notice and proof of claim provisions of the Schedule. (at 136)

[43] In other words, the insurer who sits on the sidelines, once engaged in the action, has the ability to raise matters that were either already litigated, or could have been

litigated earlier at the same time as liability was being assessed, thereby increasing costs, resources and time for resolving the actions. Finlayson J.A. went on to note that absent non-compliance with the statutory notice and proof of claim provisions, and prejudice flowing therefrom, the insurer is properly a party to the proceedings, even in circumstances where the liability is potential and not actual. The status of the automobile for insurance purposes may well be in doubt until this issue is resolved at the trial of the action against the alleged tortfeasor. Only a trial can determine what the facts are (*Johnson* at 137).

[44] The Personal Insurance Company argues that even in the second possibility, where the Ward policy covers the claim, but the damages may exceed its limits, they should be allowed to wait until the tort action is concluded and the amount of damages confirmed. The insurer relies on the statement of this Court in *Ursich,* validating the 'wait and see' approach. However, that case is distinguishable.

[45] *Ursich* was an application by Security National Insurance Company ("Security National") for costs for the dismissal of the insured's claim against her insurer under the SEF 44 provision in her policy. The plaintiff was injured in two motor vehicle accidents in 1999 and 2000; she commenced two actions against the tortfeasors in 2001; and the SEF 44 action against Security National, her own insurer in 2003. A Security National senior official (not legal counsel) asked plaintiff's counsel for a waiver of filing a Statement of Defence on the basis there was unlikely to be a "limits issue" (at para. 6). The plaintiff's counsel provided the waiver but expressed surprise at the insurer's position and encouraged them to participate in a mediation of the claims. Despite the waiver of filing the defence, Security National did file an appearance and Statement of

Defence, including allegations that the plaintiff breached the insurance policy by failing to provide prompt written notice to Security National of the particulars of the collisions; failing to provide a copy of the writs of summons and Statements of Claim upon commencing the collision actions; and failing to commence the SEF 44 action against Security National within the 12-month limitation period under the SEF 44. Over the next several months, the plaintiff provided the documents to Security National and continued to encourage the insurer to participate in the mediation and the subsequently scheduled mini trial. The collision actions both settled without Security National's involvement and the insurer learned of the settlement elsewhere than from the plaintiff. The Court dismissed the plaintiff's action against Security National (on consent of the plaintiff) and awarded them costs of $2,661.14, because the plaintiff did not notify Security National of the collisions in a timely way or provide copies of the relevant documents to them as required under the policy; plaintiff's counsel's correspondence with the insurer "seemed geared towards encouraging Security National to contribute towards global settlements in those other actions, when there was absolutely no obligation on Security National to do so" (at para. 25) and if counsel had not been so aggressive in this way, the insurer may not have incurred the costs of filing a Statement of Defence.

[46] The *Ursich* decision can be distinguished in the following ways:

- it is a decision on costs only, not on the prematurity of the involvement of the plaintiff's insurer or the legal positions of the parties;
- the Court in *Ursich* did not have the benefit of the case law provided in the within application – specifically *Johnson, Foran, Trieu v Harrison,* 2013 ONSC 5738 ("*Trieu*"), *Chambo v Musseau* (1994), 106 DLR (4th) 757

("*Chambo*") – all of which support the involvement of the plaintiff's insurer while the tort action is proceeding, where there is a possibility of their liability;

- in *Ursich*, unlike this case, the plaintiff did not follow the requirements of her policy in failing to give her insurer timely notice and copies of the claims, one of the reasons for the costs award against her; and
- there was no analysis of the policy rationale of involving the insurer in an action at the same time as the tort action, that is, to avoid multiplicity of proceedings, to achieve a just, convenient, and expeditious result, and to reduce costs and resources for the administration of justice.

[47] As a result of these distinguishing features, I do not consider the *Ursich d*ecision binding for the purpose of resolving these applications. Counsel for the Personal Insurance Company did not rely on any other cases, nor did she respond to the plaintiff's cases, except to say they were not from this jurisdiction and should be given less weight. Given the small size of the Yukon, and the relatively low volume of cases litigated before our Court, we are often required to rely on jurisprudence from outside of the jurisdiction to provide guidance and insights on the variety of issues we must consider and decide. The Yukon is also one of the few tort jurisdictions remaining for these kinds of cases, so even outside jurisprudential guidance is limited.

Issue iii) What is just in the circumstances?

[48] One of the criteria in determining procedural issues relating to timing of involvement of various parties is what is just and fair in the circumstances. This is supported in the jurisprudence that articulates the policy reasons and intention behind

the operation and application of UMC and SEF 44 provisions. It is also supported in the relevant *Rules*, particularly Rule 1(6). Here, it is just and fair that the two actions be tried together.

[49] In *Chambo*, the appellant commenced an action against the owner/driver of the uninsured car and his own insurer under the UMC at the same time but after the expiry of the two-year limitation period that applied to the claim against the owner/driver. The Court of Appeal held that the limitation period for the insurance action in contract began when the insured person knew or could have established with the exercise of reasonable diligence that the tortfeasor's motor vehicle was uninsured, and as a result the limitation period was not missed. In coming to this conclusion, the Court of Appeal noted that the UMC became part of the standard form insurance policy in March 1980, and formed part of a broad statutory scheme. The legislative intent "was to internalize costs to the activity (driving a motor vehicle) which created them. Before March 1980 the costs resulting from the negligence of an uninsured driver were externalized, in that they were paid by the taxpayers generally, through the Motor Vehicle Accidents Claim Fund. In my view, the uninsured motorist coverage legislation is remedial and should be given a broad and liberal interpretation." (at 760)

[50] These comments were relied on by the court in *Trieu*, who said:

> [28] …Osborne J.A. confirms that the legislative intent of the statutory provisions for uninsured motorist coverage is to address a majority of the situations in a broad and liberal manner, and to pass on the costs of administrating the uninsured motorist coverage to the insurance industry: *Chambo*, at p. 308.

[51] In that case, the plaintiff was injured in the head by the defendant van driver's mirror, while getting on to a Toronto Transit Commission ("TTC") streetcar, because the

defendant failed to stop his van. The van driver's insurer denied coverage of the van driver's vehicle, unless it was found he was not using the van for commercial purposes. The defendant and the Motor Vehicle Accidents Claims Fund brought a third-party claim against the insurance company of the TTC, the Toronto Transit Commission Initiative ("TTCI"), because the streetcar, which was stopped with its doors open when the accident occurred, was "involved in the accident" under s. 268 of the *Insurance Act*. TTCI sought to strike out the claim against it for no reasonable cause of action. The court found that because TTCI was potentially liable to pay the plaintiff's accident benefits given the wording in the statute, it was a proper and necessary party to decide the issue of who is responsible.

[52] Finally, in *Healy* where the court ordered a common trial on liability for negligence by the municipality, fire and emergency service, and the province as a result of loss of homes after a forest fire, the court concluded at para. 35 that this was a partial consolidation, and that the basis for the decision was a determination of what was just. This determination had to be flexible, not rigid, and encompassed such concepts as judicial economy, the efficient management of scarce resources, and avoiding inconsistent results (para. 38). The court also noted in *Healy* that the relevant considerations to determine justness of consolidating on a common issue may be different in the context of consolidating entire proceedings.

[53] Counsel for the Personal Insurance Company raised a further injustice to it in addition to the expenditure of potentially unnecessary costs – that is, the decision-maker (judge or mediator) may be biased because of their knowledge of the upper limit of the plaintiff's insurance policy. I reject this argument for two reasons. First, as noted

by the plaintiff's counsel, normally the upper monetary limit of the policy, while disclosed to the parties, is not part of the evidence before the court. In these applications, the Personal Insurance Company chose to disclose it in their materials. Second, judges are trained and ethically obligated to make their decisions on the facts and the law, and not to be influenced by extraneous considerations.

Conclusion

[54] In this case, while there are costs that the Personal Insurance Company may have to incur unnecessarily if it is found that the Ward policy can satisfy the plaintiff's claim, the policy reasons behind the UMC, the SEF 44, and the *Rules* support their continued involvement now. The UMC, a legislated provision in the insurance policy in the Yukon, is designed to download the costs of uninsured motorists on the insurance industry. It is a remedial provision. Both the tort action and the insurance action are related to the extent that the fault of the driver, whether he caused the plaintiff's injuries, and the extent of those injuries are required to be proved. The SEF 44 engagement is dependent upon the determination of the extent of the plaintiff's injuries. The insurer can decide how much or how little to participate before they know the outcome of the consent issue, which has a significant impact upon them. The *Rules* have as their object:

> 1(6) … to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expense incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,

> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding.

[55] If a stay of the insurance action against the Personal Insurance Company were granted until the conclusion of the tort action, liability and damages might have to be relitigated in a subsequent action. Separate trials would be a significant and unnecessary increase in the plaintiff's and court resources and be contrary to the principle of proportionality. The Personal Insurance Company may also raise defences in a second trial related to the plaintiff's insurance policy that, if she had known about earlier, may have affected her risk analysis and further, may leave her without a remedy. Further, at the hearing of these applications counsel for the insurer conceded that their participation in settlement discussions even at this stage was a grey area. It is common for parties even with potential or future risks to be involved in settlement discussions in order to obtain certainty and finality of the proceedings against them. For the Personal Insurance Company to sit on the sidelines until the conclusion of the tort action seems contrary to the policy reasons behind the notice requirements and the limitation periods for insurers.

[56] Finally, the importance of the consent issue to the next stages of the proceeding and the respective roles of the two insurers may be a good reason for it to be determined first. It is a question that can be isolated from the other matters and may be able to be resolved either through agreement or a summary trial on that single issue. I direct that the timing and process of determining the issue of whether Clark had the

consent of Ward to drive the vehicle be discussed in a case management conference as soon as practicable.

[57] The plaintiff's application to have the two actions heard together is granted. The defendant Personal Insurance Company's application for a stay is dismissed.

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DUNCAN C.J