

*Indexed as:*

**Griffen v. Hopey Estate**

**Between**

**Kevin Griffen, plaintiff, and**

**The Estate of Richard Hopey, deceased, Robert Ackerman, Brian  
Gomes and State Farm Mutual Automobile Insurance Company,  
defendants**

[1998] O.J. No. 3012

41 O.R. (3d) 216

75 O.T.C. 76

39 M.V.R. (3d) 276

81 A.C.W.S. (3d) 361

File No. G20263-95

Ontario Court of Justice (General Division)  
Toronto Region

**LaForme J.**

Heard: June 18, 1998.

Judgment: July 20, 1998.

(10 pp.)

*Insurance -- Insurers -- Duties -- Duty to defend.*

Application by the defendant Gomes for an order declaring that Security National Insurance company had a duty to defend the claim made against him. The action arose from a motor vehicle collision in 1995. A vehicle owned by Gomes and operated by the defendant Hopey was involved in an accident with a motorcycle on which Griffen was a passenger. Hopey was a disqualified driver at the time. Security National was Gomes' insurer. It denied the obligation to defend on the basis that Gomes knew Hopey to be unlicensed.

HELD: Application granted. The pleadings demonstrated a claim that arguably fell within the policy coverage and thus triggered the obligation to defend. The obligation to defend was not suspended by a breach of condition under the policy.

**Statutes, Regulations and Rules Cited:**

Insurance Act, s. 258(14), 258(15).

**Counsel:**

P. Daffern, for the applicant (the defendant, Brian Gomes).

J. Schady, for the respondent (Security National Insurance Company).

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**1 LaFORME J.:**-- The Defendant, Brian Gomes (the "Applicant") seeks an order declaring that the Security National Insurance Company ("Security National") has a duty to defend him in the within action and in any other action which may arise out of this matter. Further, the Applicant seeks the right to control his own defence; to choose his own counsel; and to have Security National pay counsel's costs at their usual hourly rate.

**BACKGROUND:**

**2** The action arises out of motor vehicle collision that occurred in 1995. A vehicle owned by the Applicant and operated by the defendant, Richard Hopey, was in an accident with a motorcycle on which the plaintiff, Kevin Griffen, was a passenger. At the time, Richard Hopey was a disqualified driver and Security National was the insurer of the Applicant. It is alleged by Security National that the Applicant was aware that Richard Hopey was an unlicensed driver and in spite of this permitted him to drive his motor vehicle.

**3** Since the commencement of this action Security National has refused to defend the Applicant but has added itself as a Third Party pursuant to the Insurance Act. Security National admits that its interests are in conflict with those of the Applicant.

**POSITIONS OF THE PARTIES:**

**4** The Applicant submits that, where a plaintiff's claim potentially falls within the policy coverage, the insurer has a duty to defend the claim against its insured. And, that this duty to defend is independent of, and broader than, the insurer's obligation to indemnify. It is argued that, the duty to defend is determined solely by reference to the pleadings filed against the insured.

**5** Security National takes the position that, if it merely alleges that the insured is disqualified from obtaining indemnity and denies liability under a policy, it can suspend its duty to defend. The insurer may protect its position in such circumstances by applying to be made a Third Party to the original action under s. 258(14) of the Insurance Act. This, it asserts, is done without prejudice to any existing rights against the insured.

**THE LAW:**

**6** For purposes of this motion, I do not take the positions of the respective parties to be at odds on the law as it relates generally to an insurer's duty to defend. That is, it is understood that an insured purchases two benefits from the insurer: (i) mandatory defence for a claim within the risk covered; and (ii) indemnification or reimbursement for loss. And, as I understand their arguments, each agrees that the governing legal principles respecting the duty to defend are found in the Ontario Court of Appeal case of *Nichols v. American Home Assurance Co.*<sup>2</sup>. Where the parties part company is on the issue of if and when the insurer's duty to defend may be suspended.

**7** Essentially, *Nichols* holds that the duty to defend is broader than the duty to indemnify and arises where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract. Moreover, indemnification need only be possible, not a factual reality. The principles articulated in *Nichols* were reviewed and applied by the Ontario Court of Appeal in *Cummings v. Budget Car Rentals Toronto Ltd.*<sup>3</sup>. The court summarized those principles as:

1. Under the terms of an insurance policy the insurer has two duties to the insured: (i) there is a duty of the insurer to defend the insured where a claim is made against the insured; and (ii) there is the duty to indemnify or reimburse the insured.
2. The duty to defend is broader than the duty to indemnify.
3. The duty to defend arises where a claim is made against the insured that "might", not "actually", falls within the terms of the policy. The determination of whether the claim might fall within the policy terms will depend upon what is pleaded -- not on the facts that might be determined at trial.
4. The exception to the duty to defend arises where the terms of the policy exclude the insurer from defending. Thus, where there is such a clause and the pleadings are clear that the exclusion clause applies -- there is no duty to defend.

**8** Security National submits that there is a further exception to the above principles (the "Nichols rule"), namely; where the insurer alleges a breach of the policy, or breach of condition (ie. allowing an unlicensed driver to operate the vehicle), the duty to defend may be suspended. Indeed, there is case law which supports this position,<sup>4</sup> however, there are also cases which conclude the opposite.<sup>5</sup>

**9** Some of the breach of condition cases were examined by the court in *Cummings* but it did not decide the issue of whether in those circumstances the duty to defend is suspended. What is clear in the *Cummings* examination on this point is the court's conclusion that appellate courts are divided on whether or not a breach of condition case can suspend the Nichols rule. On my review of the authorities I conclude that it does not. That is, I adopt the holding in the *MacCulloch* decision:

[if] the allegations of liability against the insured in the statement of claim are within the coverage of the policy [they] trigger the duty to defend, whether or not a breach of terms of the contract may later be raised by the insurer to support a refusal to indemnify.<sup>6</sup>

**10** Security National argues that the case of *Minassian v. Toonen*<sup>7</sup> supports the position that s. 258(14) of the Insurance Act was intended to provide an alternative means for the insurer to fulfil its duty to defend while at the same time to deny the insured indemnity should the defence be unsuccessful. That is, where the insured is made a third party to the action, it will be in a position to defend on behalf of the insured and if unsuccessful, advance its claim to deny indemnification. In other words, in these circumstances the insurer represents both its interests and those of the insured and has no obligation to pay for counsel of choice of the insured.

**11** For reference purposes, s. 258(14) and (15) provides:

- (14) Where an insurer denies liability under a contract evidenced by a motor vehicle liability policy, it shall, upon application to the court, be made a third party in any action to which the insured is a party and in which a claim is made against the insured by any party to the action in which it is or might be asserted that indemnity is provided by the contract, whether or not the insured enters an appearance or defence in the action.
- (15) Upon being made a third party, the insurer may,
  - (a) contest liability of the insured to any party claiming against the insured;
  - (b) contest the amount of any claim made against the insured;
  - (c) deliver any pleadings in respect of the claim of any party claiming against the insured;
  - (d) have production and discovery from any party adverse in interest; and
  - (e) examine and cross-examine witnesses at the trial,

**12** The provisions of the Insurance Act apply to the benefit of the insurer and are directed at situations where the insurer denies any liability for indemnity, and in those circumstances where the insured may not enter an appearance. However, with respect, I do not agree with the submissions of Security National; *Minassian* is not a decision that supports their argument that the provisions allow for an alternative method for the insured to exercise its duty to defend, especially in circumstances as those before me.

**13** In *Minassian* the court found that s. 266(14) [now s. 258(14)] of the Insurance Act was an alternative method provided by the legislature to allow the insurer to address a dilemma. The dilemma is, where an insurer defends an action of an insured it may be deemed to have affirmed the contract of insurance and lose its right to deny coverage for breach of condition. The court concluded that this dilemma could be overcome in one of at least two ways: (i) the insurer could obtain a non-waiver agreement from the insured; or (ii) the insurer could be added as a third party pursuant to the Insurance Act.<sup>8</sup> The decision is not one which assists in determining whether an allegation of breach of condition suspends the insurer's duty to defend.

**14** The duty to defend is separate and, on the whole, distinct from the duty to indemnify. Indemnification is avoided in, at least, two instances: (i) if the plaintiff's claim against the insured fails; and (ii) if the insured has breached a relevant condition of the policy

agreement. Clearly these are two separate actions which for the most part will turn on different facts relevant to each. The interests of the insurer and the insured will be adverse, as they are admitted to be in this case. If one of the insurer's interests, if not the sole interest, is to avoid indemnification through misconduct by the insured, how can it be said the insured should feel confident that his interests will be properly advanced by the insurer through third party proceedings.

**DUTY TO DEFEND:**

**15** The parties did not spend much time arguing the merits of the pleadings and whether or not they triggered any duty to defend. In the result, I find that the pleadings demonstrate a claim that arguably falls within the policy coverage and accordingly Security National has a duty to defend the Applicant.

**16** Regarding those submissions that were made with respect to the circumstances that related to the issue of breach of condition; while they appear to amount to more than speculation, they also seem to be somewhat dubious. However, for purposes of this motion that is a matter which I need not concern myself with.

**DISPOSITION:**

**17** For the foregoing reasons, the motion is allowed. Security National is ordered to defend the Applicant in the within action, and it is further ordered that:

1. The Applicant is permitted to appoint counsel of his choice to represent him in the action and to conduct his own defence. This shall apply to both this action and any other that may arise out of this matter.
2. Security National is responsible for paying all legal fees and disbursements incurred to date by the Applicant and all future costs, all at the hourly rate usually charged by counsel chosen.

**18** The Applicant is entitled to his costs of this action. If counsel are unable to agree on costs they may contact me to argue the matter by way of conference call and I will fix them.

LaFORME J.

qp/d/amp/DRS

1 R.S.O. 1990, c. I.8.

2 [1990] 1 S.C.R. 801.

3 (1996), 29 O.R. (3d) 1.

4 For example see *Veillieux v. Chambers* (1995), 25 O.R. (3d) 538 (Gen. Div.) and *Carter v. Kerr* (1990), 69 D.L.R. (4th) 542 (B.C.C.A.).

5 See *Dominion of Canada General Insurance Co. v. MacCulloch* (1991), 78 D.L.R. (4th) 593 (N.S.C.A.).

6 *Ibid*, at p. 598.

7 (1987), 27 C.C.L.I. 235 (H.C.).

8 *Ibid*, at p. 241.