CITATION: *Pare v. TD Insurance et al*, 2025 ONSC 5788
COURT FILE NO.: 1830/19
DATE: 2025/10/17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
TIMOTHY JACOB PARE	
Plaintiff	
– and –	
TD INSURANCE and ALLSTATE INSURANCE	Matthew Renwick and William Woodward, counsel, for the Defendant TD Insurance
Defendants	Jeffrey Goit, counsel, for the Defendant Allstate Insurance
	HEARD: April 7, 2025 by videoconference, virtually at London; supplementary written submissions completed August 22, 2025

HEENEY J.:

[1] This is a motion for summary judgment, brought by the defendant TD Insurance ("TD") against the co-defendant Allstate Insurance ("Allstate"). TD seeks a finding that Allstate is solely liable to pay the plaintiff for his damages sustained in a motor vehicle accident and are therefore obligated to reimburse TD for the monies paid by them to the plaintiff to settle the action.

[2] The central issue is whether the plaintiff meets the definition of an "insured person" under the OPCF 44R Family Protection Coverage endorsement ("44R") in the motor vehicle insurance policy issued by Allstate, such that Allstate is obligated to pay the plaintiff pursuant to the underinsured coverage provided for in that endorsement.

BACKGROUND

[3] This action arises out of a motor vehicle accident that occurred in North Charleston, South Carolina, on December 6, 2018. The plaintiff was driving a motorcycle owned by his father, Timothy Bernard Pares, a 2018 KTM EXC 500. Given the similarity of his name with the name of the plaintiff, I will refer to him by his middle name "Bernard". The

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motorcycle was insured by a policy in Bernard's name personally, issued by TD. That policy included 44R coverage.

[4] An individual by the name of Ronald Dukes was driving his vehicle in the opposite direction as the plaintiff and made a left turn directly in front of the plaintiff, causing a collision.

[5] Liability on Mr. Duke's part was conceded, and his insurer paid out its policy limits of $25,000 to the plaintiff, which was far below the amount needed to adequately compensate him for his injuries and other losses.

[6] The plaintiff had moved to South Carolina to work for a company owned by his father, Bernard, called Exact Laser Measurement ("Exact Laser"). He did contract work there for Mercedes-Benz. Exact Laser provided him with access to company vehicles, and he mainly drove one of those, a Ford F150, as his "daily driver". Exact Laser insured that vehicle, along with three others, with a policy issued by Allstate, which included 44R coverage on the F150.

[7] A few months before the accident, the plaintiff was offered a job directly with Mercedes-Benz and began working with them in September 2018. However, at the time of the accident the following December he was still technically an employee with Exact Laser, and was still being provided with company benefits, including the daily use of the F150. There is no issue that the plaintiff held the status of an employee with Exact Laser at the date of the accident.

[8] The plaintiff began using the motorcycle from the time it was purchased by his father in 2017, whenever he came to visit his parents in Ontario, for leisure and a bit of off-roading. It was the primary bike that he would use of his father's motorcycles. He brought it down to South Carolina in the back of the F150 and continued to use it in a similar fashion in the months leading up to the accident.

[9] The plaintiff commenced this lawsuit against both TD (the insurer of the motorcycle he was driving) and against Allstate (the insurer of the F150 that he regularly drove), claiming benefits under the 44R endorsement in each policy. Section 3 of 44R obligates the insurer to "indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist, as compensatory damages in respect of bodily injury to an insured person, arising directly or indirectly from the use or operation of an automobile." It is commonly referred to as "underinsured" coverage.

[10] At the Pre-Trial Conference on January 17, 2023, the parties came to an agreement on the quantum of damages and settled the plaintiff's claim in the amount of $143,500 all-inclusive. However, the defendants could not agree on which insurer was responsible for indemnifying the plaintiff for the loss. Accordingly, TD funded the settlement, subject to the parties' agreement that liability as between the two defendants would remain a live issue.

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SUMMARY JUDGMENT

[11] Summary judgment is an appropriate tool to utilize in resolving litigation, where there is no genuine issue requiring a trial. In *Hryniak v. Mauldin*, 2014 SCC 7, at para. 66, Karakatsansis J. outlined the approach to be taken by the court in deciding whether or not to exercise its discretion to grant summary judgment:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[12] Both the moving party, TD, and the responding party, Allstate, took the position in their submissions that this was an appropriate case for the court to utilize the summary judgment procedure. As already noted, the primary issue is whether the plaintiff is an "insured person" within the meaning of that term in 44R. The parties have each put their best foot forward in marshalling all of the required evidence to make that determination, and the evidence is not really in dispute. The task before the court will be one of applying the law to those facts, based upon the comprehensive submissions of counsel, including factums, oral submissions and supplementary submissions that I directed were to be filed.

[13] I agree with counsel that summary judgment is an appropriate manner in which to proceed, and that it is in the interests of justice to do so. I am satisfied that there is no genuine issue requiring a trial, and that I have been provided with the evidence necessary to fairly and justly adjudicate the dispute, without incurring the delay and considerable expense of conducting a trial.

THE OPCF 44R FAMILY PROTECTION ENDORSEMENT

[14] As already noted, in para. 3 of 44R the insurers agree to indemnify an "eligible claimant" for damages caused by an inadequately insured motorist, in respect of death or injury to an "insured person".

[15] Section 1.3 of 44R defines the term "eligible claimant":

> 1.3 "eligible claimant" means
>
> (a) the insured person who sustains bodily injury; and

> (b) any other person who, in the jurisdiction in which an accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.

[16] Here, the plaintiff could only qualify as an eligible claimant pursuant to para. (a), as the insured person who sustains bodily injury.

[17] This leads us to the definition of "insured person", found in s. 1.6 of 44R:

> 1.6 "insured person" means
>
> (a) the named insured and his or her spouse and any dependent relative of the name insured and his or her spouse, while
>
> (i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;
>
> (ii) an occupant of any other automobile except where the person leases the other automobile for a period in excess of 30 days or owns the other automobile, unless family protection coverage is in force in respect of the other automobile; or
>
> (iii) not an occupant of an automobile who is struck by an automobile; and
>
> (b) if the named insured is a corporation, an unincorporated association, partnership, sole proprietorship or other entity, any officer, employee or partner of the named insured for whose regular use the described automobile is provided and his or her spouse and any dependent relative of either, while
>
> (i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;
>
> (ii) an occupant of an automobile other than
>
> (a) the automobile referred to in (i) above;
>
> (b) an automobile leased by the named insured for a period in excess of 30 days; or
>
> (c) an automobile owned by the named insured,
>
> PROVIDED family protection coverage is in force in respect of the other automobile, or
>
> (iii) not an occupant of an automobile, who is struck by an automobile;

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> EXCEPT THAT
>
> where the Policy has been changed to grant permission to rent or lease the described automobile for a period in excess of 30 days, any reference to the named insured shall be construed as a reference to the lessee specified in that change form.

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[18] I will now examine the Allstate policy and the TD policy each in turn, to determine whether the plaintiff meets the definition of "insured person" under the 44R coverage in each plan, so as to qualify as an "eligible claimant" for underinsured coverage. Pursuant to s. 2 of 44R, the definitions apply as of the time of the happening of the accident.

THE ALLSTATE POLICY

[19] This is the policy issued by Allstate to the named insured Exact Laser. Since the named insured is a corporation, the applicable definition of "insured person" is found in s. 1.6(b) of 44R.

[20] On the facts of this case (ignoring provisions that are clearly inapplicable), in order for the plaintiff to qualify as an insured person under s. 1.6(b), the following must be proven:

1. That he was an employee of Exact Laser;
2. That the described automobile was provided to the plaintiff for his regular use;
3. That he was an occupant of an automobile *other than* one falling within the three categories of vehicle enumerated in s. 1.6(b)(ii)(a), (b) or (c), which are:
    (a) The described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;
    (b) An automobile leased by the named insured, Exact Laser, for a period in excess of 30 days; or
    (c) An automobile owned by the named insured, Exact Laser;
4. That Family Protection coverage was in force in respect of the other automobile.

[21] As to the first point, it is common ground that the plaintiff was an employee of Exact Laser at the time of the accident.

[22] As to the second point, it is undisputed that Exact Laser provided him with an F150 truck for his regular use, as his "daily driver". It is similarly undisputed that the F150 was one of the described automobiles in the Allstate policy.

[23] As to the third point, the plaintiff was driving a motorcycle owned by Bernard when the accident occurred. The motorcycle clearly does not fit within the descriptions of any of

the automobiles described in (a) to (c), and thus it can be said that he was an "occupant of an automobile other than" those vehicles.

[24] As to the fourth point, it is undisputed that 44R coverage was in force with respect to the motorcycle, through the TD policy.

[25] Based on the clear, unambiguous meaning of these provisions, the plaintiff meets the definition of "insured person".

[26] However, Allstate argues that there is an additional criterion that must be established. At para. 30(iv) of its Factum, it submits that it must also be proven that:

> The Motorcycle meets the definition of "other automobile" under the OAP-1, such that the Allstate Policy OPCF 44R family protection coverage would be in force with respect to the Motorcycle.

[27] This argument flows from the wording of s. 22 of 44R, which states the following:

> Except as otherwise provided in this change form, all limits, terms, conditions, provisions, definitions and exclusions of the Policy shall have full force and effect.

[28] The "Policy" referred to in this section is the Ontario Automobile Policy, known as the OAP-1. It is the standard automobile policy in Ontario. Allstate argues that Special Condition 6 in the OAP-1 should apply in determining whether the motorcycle is an "other automobile" for purposes of coverage under s. 1.6(b) of 44R.

[29] Special Condition 6 provides as follows:

> **If you are a corporation, unincorporated association, partnership, sole proprietorship, business or other entity**, the employee or partner for whose regular use a described automobile is supplied, and their spouse who lives with that person, will be covered when they drive the other automobile, under the following conditions:
>
> - Both the other automobile and the described automobile must not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.
>
> - Neither the employee nor partner who is provided with a described automobile, nor their spouses if they live with the employee or partner, are driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.
>
> - The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.
>
> - *The other automobile must not be owned, hired, leased, or regularly or frequently used by you or by your employee or any partner, or by anyone living in the same dwelling as these persons.*

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- Except as provided under subsection 2.2.4, this policy doesn't cover the employee or partner or their spouse if they own, lease or rent any automobile and it is insured as the law requires and does not have a manufacturer's gross weight rating of more than 4,500 kilograms. [emphasis in italics added]

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[30] It is the fourth bullet point that Allstate relies upon, which I have italicized. They argue that the evidence taken on the plaintiff's examination for discovery show that he was a regular and frequent user of the motorcycle. Thus, it is argued that the motorcycle is excluded from coverage pursuant to this special condition.

[31] TD takes the position that this provision in Special Condition 6 has no application in determining whether the plaintiff is an "insured person" under s. 1.6(b) of 44R. It also submits that the plaintiff's use of the motorcycle was only occasional, as opposed to regular and frequent. As will be seen below, it is ultimately not necessary for me to resolve this evidentiary dispute.

[32] The authority for Allstate's argument comes from the reasons of Lauwers J.A. in *Kahlon v. ACE INA Insurance*, 2019 ONCA 774. In that case, Mr. Kahlon owned and leased a tractor to Bell City Transport and operated it as an independent contractor under fleet insurance provided by ACE INA Insurance. He also had automobile insurance on his personal vehicle through Allstate.

[33] In May of 2011 he was in Florida operating the tractor with a trailer. He stepped out of the tractor when it was stopped in traffic to determine the cause of the delay, and was struck by another vehicle, causing serious injuries. The insurance on the vehicle of the at-fault motorist was only $20,000, which was grossly insufficient to cover his actual losses.

[34] Both the fleet policy and the Allstate policy included a 44R endorsement, which included underinsured coverage. However, the ACE INA policy had an additional endorsement which contained an exclusion of 44R coverage for commercial vehicles like the one Mr. Kahlon was driving. Thus, the focus of the decision was on Mr. Kahlon's personal policy with Allstate, which contained no such exclusion.

[35] At paras. 38-9, Lauwers J.A. outlined the governing principles for the interpretation if insurance policies:

> The governing principles for the interpretation of insurance policies are found in *Progressive Homes Ltd*., at paras. 22-24, per Rothstein J., whom I quote and paraphrase: Where the language of the policy is unambiguous, the court gives effect to clear language, reading the contract as a whole. However, where the language is ambiguous, the court applies general rules of contract construction. The interpretation of the language should be consistent with the reasonable expectations of the parties, so long as the interpretation can be supported by the text of the policy. The court avoids interpretations that would give rise to an unrealistic result, or that would not have been in the contemplation of the parties when they entered into insurance contract.

> The rules of construction are to be applied in order to resolve ambiguity, not to create ambiguity where there is none. When the application of the rules of construction fails to resolve an actual ambiguity, courts will construe the policy contra proferentem — against the insurer. The corollary is that coverage provisions are interpreted broadly, and exclusion clauses narrowly.

[36] At para. 43 he noted that the 44R endorsement is not a stand-alone insurance policy, but rather is linked to the automobile policy to which it is attached. In that regard, he cited para. 21 from the reasons of Lang J.A. in *Shakur v. Pilot Insurance Co.* (1990), 74 O.R. (2d) 673 (C.A.). as follows:

> In any event, in my view, an endorsement is generally not understood to be a self-contained policy. As I have noted, the title of the Endorsement describes it as a "change form". An endorsement changes or varies or amends the underlying policy. While it may be comprehensive on the subject of the particular coverage provided in the endorsement, it is built on the foundation of the policy and does not have an independent existence. In any event, the Endorsement in this case is clearly not a stand-alone policy because it specifically provides that the policy terms remain in full force and effect, unless its terms are changed by the Endorsement.

[37] The key term of the policy at issue in that case was Special Condition 1. It is identical to the first bullet point in Special Condition 6, quoted above. The only difference is that Special Condition 6 relates to corporate insurance policies (as in the case at bar) whereas Special Conditions 1 to 5 relate to policies held personally. The preamble and Special Condition 1 provide as follows:

> **Special Conditions: For other automobiles to be covered, the following conditions apply:**
>
> 1. Both the other automobile and a described automobile must not have a manufacturer's gross vehicle weight rating (GVWR) of more than 4,500 kilograms.

[38] Mr. Kahlon's tractor exceeded the maximum gross vehicle weight specified under this condition. At paras. 58-9, Lauwers J.A. held that this term must be given full force and effect pursuant to s. 22 of 44R:

> AllState's liability to provide underinsured coverage to Mr. Kahlon turns on whether the first Special Condition in s. 2.2.3 of the policy applies to preclude the extension of underinsured coverage under the endorsement to Mr. Kahlon because he was driving a heavy commercial vehicle when he was injured in the Florida accident. Section 22 of the endorsement is the critical link between the AllState's policy and the endorsement, which I repeat for convenience:
>
> > Except as otherwise provided in this change form, all limits, terms, conditions, provisions, definitions and exclusions of the policy shall have full force and effect.

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> Reading the policy and the endorsement together, in my view, the relevant "limits, terms, conditions, provisions, definitions and exclusions of the policy" to which "full force and effect" must be given under s. 22 of the of the endorsement form are the Special Conditions in s. 2.2.3 of the policy, particularly the first one: "the other automobile . . . must not have a manufacturer's gross vehicle weight rating (GVWR) of more than 4,500 kilograms." The Special Conditions are a form of an exclusion clause, although the language operates by limiting the extension of coverage under the policy. Just as there is no extension of coverage under the policy for liability, accident benefits, uninsured automobile, and direct compensation — property damage to a vehicle to which the Special Conditions apply, there is no extension of coverage to an underinsured automobile.

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[39] Accordingly, Lauwers J.A. concluded as follows, at para. 72:

> As I see it, because the endorsement does not qualify the use of the term "other automobile", the use of that term in the policy prevails, including the associated Special Conditions. The "Special Condition" that excluded coverage for heavy commercial vehicles in s. 2.2.3 of the policy applies, and it deprives Mr. Kahlon of underinsured coverage under the AllState policy with respect to the accident.

[40] *Kahlon* was the subject-matter of recent commentary and interpretation by the Court of Appeal, in *Hesch v. Langford*, 2025 ONCA 2025. As it happens, this was an appeal of a decision that I made as the court of first instance, reported at 2024 ONSC 614. Briefly, it involved a fatal accident where Ashley Kerr ("Ashley") was killed when the car she owned and was driving collided with a vehicle driven by the at-fault defendant, who was uninsured. The plaintiff Joe Hesch ("Joe") was her husband, and sued for damages for loss of care, guidance and companionship, along with other family members.

[41] Like the case at bar, this was a contest between two insurance companies. Pafco insured Ashley's vehicle and Kent insured Joe's vehicle. Both had 44R coverage, and both were sued by Joe and the family members for uninsured and underinsured benefits. Pafco cross-claimed against Kent, claiming that Kent was the priority insurer of 44R coverage or, in the alternative, was required to pay a *pro rata* share.

[42] Pafco's motion for judgment was dismissed by me, after finding that Ashley was not an "insured person" under Joe's 44R coverage.

[43] The section at play in *Hesch* that defines "insured person" is s. 1.6(a)(ii), not s. 1.6(b)(ii) as in the case at bar, since Joe's policy was a personal, not a corporate, one. It states that an "insured person" means the named insured (Joe) and his or her spouse (Ashley), while:

> (ii) an occupant of any other automobile except where the person leases the other automobile for a period in excess of 30 days or owns the other automobile, unless family protection coverage is in force in respect of the other automobile; or

[44] I interpreted that as creating two distinct exclusions, namely: (1) "except where the person leases the other automobile for a period in excess of 30 days or owns the other

automobile”, and (2) “unless family protection coverage is in force in respect of the other automobile”.

[45] This interpretation was held to be erroneous. Among other things, Paciocco J.A., who wrote the decision for the court, astutely pointed out that that interpretation would only be available if the word “or” had been inserted immediately before the word “unless”. Paciocco J.A. concluded, at para. 14, that s. 1.6(a)(ii) creates one sole exclusion:

> In my view, the sole exclusion to coverage that s. 1.6(a)(ii) creates operates where the occupant of the other automobile “leases the other automobile for a period in excess of 30 days or owns the other automobile”. However, that exclusion does not apply (and coverage is therefore provided) if “family protection coverage is in force in respect of the other automobile”.

[46] This interpretation was in keeping with a previous decision that had not been brought to my attention by counsel, *Parslow v. Old Republic Insurance Co. of Canada*, 2002 CarswellOnt 5176, (Ont. S.C.), aff’d 2003 CarswellOnt 1958 (Ont. C.A.).

[47] This aspect of *Hesch* has no direct relevance to the case at bar. What is highly relevant, though, is that the court ruled that I was also in error in concluding that Special Condition 5 in the OAP-1 also excluded 44R coverage for the “other automobile” that Ashley occupied at the time of the accident. Special Condition 5 reads as follows:

> **For all coverages, except Accident Benefits**, *the other automobile cannot be an automobile that you or anyone living in your dwelling owns or regularly uses.* (For the purposes of this paragraph, we don’t consider use of an automobile rented for 30 or fewer days to be regular use.) Nor can the other automobile be owned, hired or leased by your employer or the employer of anyone living in your household. However, if you drive one of these other automobiles while an excluded driver under the policy for that automobile, this policy will provide **Liability** and **Uninsured Automobile Coverages** while you drive that automobile. [emphasis in italics added]

[48] The submission of counsel that I accepted in coming to that erroneous conclusion is very similar to the submission made by Allstate in the case at bar. The OAP-1 exclusion relied on by Allstate here is found in Special Condition 6, and uses slightly different words, but largely says something similar:

> The other automobile must not be owned, hired, leased, or regularly or frequently used by you or by your employee or any partner, or by anyone living in the same dwelling as these persons.

[49] In arriving at that erroneous conclusion, I relied on *Kahlon*, and its holding that, since the 44R endorsement used the term “other automobile” generically, without qualification, Special Condition #1 of s. 2.2.3 of OAP-1, which excluded heavy automobiles with a gross weight of more than 4,500 kg., applied. Thus, the Mr. Kahlon did not meet the definition of “insured person” and was denied 44R coverage. I applied that reasoning to conclude that Special Condition #5 excluded 44R coverage for the “other automobile” because Ashley owned that other vehicle.

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[50] In his reasons on appeal, Paciocco J.A. drew attention to the first part of s. 22, which states "*Except as otherwise provided in this change form*…" and made the point that 44R is a "change form", where the changes that are "otherwise provided" in the form have paramountcy over the terms of the policy. At para. 24 he provided a succinct summary of what *Kahlon* stood for, in the following terms:

> As I will explain below, *Kahlon* dealt with the application of terms in the OAP-1 to a 44R endorsement and held that a definition contained in the OAP-1 applied to 44R coverage because the 44R endorsement did not say differently.

[51] At para. 26 he explained how s. 1.6(a)(ii) of 44R "provides otherwise" than Special Condition 5:

> It is important to note that Special Condition 5 and s. 1.6(a)(ii) use different language, suggesting that they are intended to bear different meanings. I agree with the motion judge that the Special Condition 5 clearly denies all of the coverage provided for in the OAP-1 to claimants who occupy their own vehicles. However, s. 1.6(a)(ii) provides otherwise relating to coverage under the 44R. As I have explained, based on its plain language it does provide coverage in some cases where the claimant is the occupant of their own vehicle, namely where that other vehicle has its own family protection coverage. Pursuant to s. 22 of the 44R, s. 1.6(a)(ii) therefore governs, rather than Special Condition 5. This is sensible. In exchange for the additional premium paid for the family coverage endorsement on both vehicles, the 44R endorsement operates as a change form and provides underinsured motorist coverage even in situations were the OAP-1 would not have provided primary insurance coverage, namely, where the person occupying their own vehicle also has a family protection coverage endorsement.

[52] At the first part of para. 30, Paciocco J.A. explained how *Kahlon* is simply an illustration of a case where a different outcome was not "otherwise provided" in 44R relative to the OAP-1:

> I also disagree with the motion judge's conclusion that the *Kahlon* decision supports his conclusion. As I have intimated, *Kahlon* simply decided that, although s. 22 would have given the 44R endorsement paramountcy over a term provided in an insurance policy had the 44R change form "otherwise provided", it does not do so when it comes to coverage for heavy commercial vehicles; the 44R endorsement neither addresses the exclusion of coverage for heavy commercial vehicles, nor does it purport to define "other automobile". Since the coverage exclusion for heavy commercial vehicles in the OAP-1 is not qualified or contradicted by the 44R endorsement, it takes full force and effect pursuant to s. 22, depriving Mr. Kahlon of the 44R coverage he was seeking. *Kahlon* is therefore an illustration of a case where a different outcome is not "otherwise provided" in a 44R relative to an OAP-1.

[53] He concluded as follows, in the first part of para. 31:

> I am therefore persuaded that on its plain meaning and when read in context s. 1.6(a)(ii) unambiguously provides coverage to the persons listed in s. 1.6(a) when they are driving their own vehicles, provided their vehicle has a 44R endorsement of

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> its own. Since s. 1.6(a)(ii) is not ambiguous, it must be given this plain meaning without consideration of the principles of interpretation that apply in cases of ambiguity.

[54] To summarize the above, Paciocco J.A. has interpreted *Kahlon as* standing for the proposition that, since the OAP-1 exclusion for heavy vehicles was not otherwise provided for in 44R, it continued to apply. However, where a 44R change form provides differently than the OAP-1, it will have paramountcy. Thus, the question before this court is, does s. 1.6(b) of 44R provide differently than the exclusion in Special Condition 6?

[55] Although I have already reproduced Special Condition 6 in its entirety, above, I will reproduce the relevant portion again here to facilitate the comparison. That part provides as follows:

> The other automobile must not be owned, hired, leased, or regularly or frequently used by you or by your employee or any partner, or by anyone living in the same dwelling as these persons.

[56] Section 1.6(b) of 44R has specific terms that cover the same ground as this Special Condition, i.e. the availability of coverage for “other automobiles” that are leased or owned by employees of the named insured and his or her spouse and any dependent relatives. I have already set it out above in full, but again I will repeat the relevant portions here, where it defines “insured person” as follows:

> (b) if the named insured is a corporation, an unincorporated association, partnership, sole proprietorship or other entity, any officer, employee or partner of the named insured for whose regular use the described automobile is provided and his or her spouse and any dependent relative of either, while
>
> …
>
> (ii) an occupant of an automobile other than
>
> (a) the automobile referred to in (i) above;
>
> (b) an automobile leased by the named insured for a period in excess of 30 days; or
>
> (c) an automobile owned by the named insured,
>
> PROVIDED family protection coverage is in force in respect of the other automobile,

[57] Unlike in *Kahlon*, where coverage for heavy commercial vehicles was never addressed in 44R, leading to the conclusion that the Special Condition applied “because the 44R endorsement did not say differently”, the relevant terms of 44R here do address essentially the same subject-matter as the Special Condition in question, and do “provide otherwise” in several respects:

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- 44R only excludes automobiles leased for a period in excess of 30 days, whereas the Special Condition exclusion applies to all leased vehicles;

- 44R only excludes automobiles leased by the "named insured", i.e. Exact Laser, whereas the Special Condition excludes vehicles leased by the named insured as well as by an employee or any partner, or by anyone living in the same dwelling as these persons;

- 44R only excludes vehicles owned by the named insured, whereas the Special Condition excludes vehicles owned by the named insured as well as by an employee or any partner, or by anyone living in the same dwelling as these persons;

- 44R, in effect, defines "other automobile" to mean an automobile "other than" an automobile as described in (a), (b) or (c), provided that family protection coverage is in force in respect of that other automobile. The Special Condition contains no such definition.

[58] To expand upon this latter point, it is noteworthy that s. 1.6(a)(ii), which applies to personal insurance policies, is structured differently than s. 1.6(b)(ii), which applies to corporate policies. In the former, all provisions relating to owning or leasing the other vehicle are combined into one single sentence, and the element of family protection coverage being in force constitutes an exception to the exclusion of automobiles owned or leased for more than 30 days by the named insured, his spouse, or any dependent relative.

[59] However, s. 1.6(b)(ii) approaches things differently. It provides 44R coverage to an employee of the named insured, and his or her spouse and dependent relative, *while an occupant of an automobile other than* the automobiles described in (a), (b) or (c), "PROVIDED family protection coverage is in force in respect of the other automobile".

[60] In my view, this amounts to a definition of "other automobile" for purposes of this coverage. It is not just any generic automobile, other than the described automobile, that will fit the definition. Instead, to qualify for coverage, the other automobile that is occupied by the claimant *must not* be one of the automobiles specifically described in (a), (b) or (c), and it *must* have family protection coverage in place.

[61] The fact that, in my view, "other automobile" has been defined in this way is a matter of considerable importance in concluding that 44R has "provided otherwise". I have already quoted para. 30 of the reasons of Paciocco J.A. where he was explaining the result in *Kahlon*, and he said "the 44R endorsement neither addresses the exclusion of coverage for heavy commercial vehicles, *nor does it purport to define 'other automobile'*". One might infer that if s. 1.6(a)(ii) (which was at play in *Kahlon*) had defined that term, the result in *Kahlon* may well have been different.

[62] Lauwers J.A. also commented on the issue of a definition being present or not, at para. 70 of *Kahlon*, where he said:

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> The problem with this argument is that neither the policy nor the endorsement provides a technical definition of "other automobile." The term is used in a non-technical and generic way.

[63] This comment was made in response to counsel's argument, outlined at para. 69, which I do not need to repeat here. The important point to keep in mind is that *Kahlon* dealt with s. 1.6(a)(ii), which is applicable to personal policies. While that provision does not contain a definition of "other automobile", I am satisfied that the differently structured provision we are dealing here, s. 1.6(b)(ii), does do so.

[64] Since, as Lauwers J.A. observed, above, the OAP-1 does not define "other automobile" but, in my view, the provisions applicable to corporate policies in 44R, in effect, do so, I conclude that 44R provides differently than Special Condition 6 in this regard.

[65] I do note that Special Condition 6 contains an exclusion regarding *use* of the automobile, in stating that it "must not be owned, hired, leased, *or regularly or frequently used* by you or by your employee or any partner, or by anyone living in the same dwelling as these persons". One might argue that, while s. 1.6(b) does specifically deal with ownership and leasing of the automobile, it doesn't deal with regular or frequent use, so to that extent 44R does not provide differently. I would not accede to that argument.

[66] To begin with, both the Special Condition in question and s. 1.6(b) are clearly covering the same ground. The drafters of Special Condition 6 chose to exclude from coverage not only vehicles owned or leased by the employee or anyone living in the same dwelling, but also vehicles that were regularly or frequently used by those persons. The drafters of 44R chose, presumably intentionally, to limit the exclusion to ownership, not use, and to limit the persons affected by that exclusion to the named insured only. If the drafters of 44R wanted to put in an exclusion relating to use of the automobile, this is clearly where they would have put it. There is no logical reason why leaving out a particular limitation cannot be considered as "providing differently", in the same way as adding an additional limitation would be.

[67] Furthermore, the Court of Appeal in *Hesch* has already determined that 44R provides differently than the Special Condition in this regard. Special Condition 5, which was under consideration in that case, states: "the other automobile cannot be an automobile that you or anyone living in your dwelling owns *or regularly uses*." It thus has a "use" component, just like Special Condition 6 which is under consideration in the case at bar.

[68] Section 1.6(a)(ii) of 44R, which was the operative provision in *Hesch*, excludes coverage only where the other automobile is leased for 30 days or more, or is owned by the claimant (unless family protection coverage is in force in respect of the other automobile). It has no "use" component. Thus, one could make the same argument there as I have just postulated, which is that the failure of this section in 44R to address the use of the vehicle means that it does not provide otherwise than the Special Condition in that regard. This was, after all, Ashley's car. She owned it, she drove it, and she was driving it at the time the fatal accident occurred. If the Special Condition excluding from coverage a vehicle

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that the insured or anyone living in their dwelling regularly uses was still operative, she should never have been found to be an "insured person" under 44R.

[69] Nevertheless, Paciocco J.A., at para. 26, found that s. 1.6(a)(ii) governed, and not special Condition 5:

> However, s. 1.6(a)(ii) provides otherwise relating to coverage under the 44R. As I have explained, based on its plain language it does provide coverage in some cases where the claimant is the occupant of their own vehicle, namely where that other vehicle has its own family protection coverage. Pursuant to s. 22 of the 44R, s. 1.6(a)(ii) therefore governs, rather than Special Condition 5.

[70] I conclude that the lack of a "use" component in s. 1.6(b)(ii) is immaterial. The 44R endorsement has occupied the field dealt with by the relevant provision of Special Condition 6, and has provided differently, such that s. 1.6(b)(ii) is paramount. If it were otherwise, the 44R coverage purchased by Exact Laser would be rendered essentially worthless, as I will now explain.

[71] Recall that s. 1.6(b)(ii) provides 44R coverage to the named insured when occupying other automobiles, as well as to any officer, employee or partner of the named insured for whose regular use a designated company vehicle is provided. Subparagraphs (b) and (c) go on to exclude from that coverage only vehicles owned or leased by the *named insured*, but *not* by the employees, officers and partners. This demonstrates a clear intention by the drafters of 44R that employees and those other designated individuals will have coverage under the Allstate policy when driving a vehicle that they own or lease, provided that 44R coverage is in place on that vehicle. It is fair to say that many or perhaps most employees would have their own personally owned vehicle, in addition to the use of a company vehicle, so this provision would be of considerable benefit to them, so long as they made sure they put their own 44R coverage in place on that vehicle.

[72] If the "use" component of Special Condition 6 was still operative, this would mean that, while an employee would have 44R coverage even though he or she owned the other vehicle (provided that they put 44R coverage on it), that coverage would be taken away by Special Condition 6 if the employee "regularly or frequently used" *their own car*. This would be an absurd result and would render a provision clearly written to provide 44R coverage to employees who own their own vehicles essentially worthless.

[73] In my view, giving paramountcy to the clear provisions of s. 1.6(b) over Special Condition 6 "achieves a commercially realistic outcome that is consistent with the realistic expectations of the parties", to use the words of Paciocco J.A. in *Hesch*, at para. 32.

[74] I am satisfied that, based on its plain and unambiguous language, s. 1.6(ii) does provide coverage where the claimant is the occupant of an automobile other than the ones listed in (a), (b) and (c), provided that this other automobile has family protection coverage in force on it. The plaintiff's occupation of his father's motorcycle, which had 44R coverage in force on it, complies completely with the requirements of this section. I therefore conclude that the plaintiff meets the definition of "insured person". It follows that he is

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entitled to the underinsured benefits provided in the 44R endorsement in the Allstate policy.

THE TD POLICY

[75] This was the policy taken out by Bernard on the motorcycle, which was owned by him. The motorcycle was occupied by his son, the plaintiff, at the time of the accident.

[76] Once again, 44R coverage for the plaintiff under the TD policy depends upon whether he meets the definition of "insured person" in that endorsement. Since this was a personal, and not a corporate, policy, it is s. 1.6(a) that governs.

[77] Leaving out parts that are not applicable, s. 1.6(a) defines "insured person" as:

> the named insured and his or her spouse and any dependent relative of the name insured and his or her spouse, while
>
> (i) an occupant of the described automobile …

[78] The plaintiff was an occupant of the described automobile, being the motorcycle. However, he is not the named insured, nor the spouse of the named insured, so the only way he could meet the definition in s. 1.6(a) is if he was a "dependent relative" of Bernard. This term is defined in s. 1.2, and provides as follows:

> 1.2 "dependent relative" means
>
> (a) a person who is principally dependent for financial support upon the named insured or his or her spouse, and who is
>
> (i) under the age of 18 years;
>
> (ii) 18 years or over and is mentally or physically incapacitated;
>
> (iii) 18 years or over and in full time attendance at a school, college or university;
>
> (b) a relative of the named insured or of his or her spouse, who is principally dependent on the named insured or his or her spouse for financial support;
>
> (c) a relative of the named insured or of his or her spouse, who resides in the same dwelling premises as the named insured; and
>
> (d) a relative of the named insured or of his or her spouse, while an occupant of the described automobile, a newly acquired automobile, or a temporary substitute automobile, as defined in the Policy.
>
> **BUT** subsections 1.2(c) and 1.2(d) apply only where the person injured or killed is not an insured person as defined in the family protection coverage of any other policy of insurance or does not own, or lease for

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> more than 30 days, an automobile which is licensed in any jurisdiction of Canada where family protection coverage is available.

[79] It is undisputed that the plaintiff does not qualify under s. 1.2(a), (b) or (c). He is not principally dependent on Bernard or his spouse for financial support, and he does not reside with Bernard.

[80] The plaintiff does, at first glance, appear to qualify under s. 1.2(d), because he is a relative of Bernard while an occupant of the motorcycle. However, this term is subject to the proviso immediately below it. The relevant part of that proviso is that s. 1.2(d) only applies if the plaintiff "is not an insured person as defined in the family protection coverage of any other policy of insurance".

[81] I have already concluded that the plaintiff is an insured person under the family protection coverage of the Allstate policy. Thus, the proviso is engaged, and s. 1.2(d) does not apply. It follows that the plaintiff is not an insured person as defined in the 44R endorsement under the TD policy and is not entitled to underinsured benefits under that policy.

[82] Thus, the only 44R coverage available to the plaintiff is that which is attached to the Allstate policy. TD has no obligation to pay the plaintiff anything and is entitled to be reimbursed for the settlement monies that it has paid.

[83] Accordingly, summary judgment is granted. An order will go that Allstate shall pay to TD the sum of $143,500, which represents the monies paid to the plaintiff by TD in settlement of the plaintiff's claims against the defendant insurers.

[84] Costs are awarded to TD in the agreed-upon amount of $6,500 all inclusive, payable by Allstate.

T. A. Heeney J.

Released: October 17, 2025

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CITATION: *Pare v. TD Insurance et al*, 2025 ONSC 5788
COURT FILE NO.: 1830/19

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TIMOTHY JACOB PARE

Plaintiff

– and –

TD INSURANCE and ALLSTATE INSURANCE

Defendants

REASONS FOR JUDGMENT ON A MOTION FOR SUMMARY JUDGMENT

Heeney J.

Released: October 17, 2025

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