CITATION: Stenton v. Estate of El Rifai, 2025 ONSC 6806
COURT FILE NO.: CV-21-00000726-0000
DATE: 20251204

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Joseph Stenton and Charlene Stenton, Plaintiffs

-and-

The Estate of Khaldoun El Rifai, by its Litigation Administrator Hayssam Rifai, and the Co-operators General Insurance Company, Defendants

BEFORE: Justice Spencer Nicholson

COUNSEL: J. O'Brien for the Plaintiffs

A. Neaves for the Defendant, The Estate of El Rifai

R. Vitols for the Defendant, The Co-operators General Insurance Company

HEARD: September 16, 2025

REASONS ON MOTION

NICHOLSON J.:

[1] This was originally scheduled to be an assessment of the plaintiffs' costs following the settlement of an action arising out of a motor vehicle accident that occurred on May 25, 2019. The corollary issue is how those costs should be apportioned between the insurer for the Estate of Khaldoun El Rifai and the Co-operators General Insurance Company ("the Co-operators"), who was the plaintiffs' insurer under the Ontario Family Protection Endorsement ("OPCF"). From time to time I have used the term "underinsurer" to refer to an insurer under the OPCF.

[2] On May 25, 2019, Joseph Stenton was driving in his pick up truck with a camper-trailer in tow. His vehicle collided with a vehicle being operated by the defendant Khaldoun El Rifai, coming from the opposite direction. The El Rifai vehicle crossed over the solid yellow line and hit Mr. Stenton's vehicle head on.

[3] The collision resulted in the death of Mr. El Rifai and of his wife who was a passenger in his vehicle, as well as very significant injuries to their three children riding in the back seat. Mr. Stenton was also significantly injured.

[4] Mr. Stenton sued Mr. El Rifai's estate as a result of his injuries from this accident. The action was defended by Mr. El Rifai's insurer, Town & Country Mutual Insurance Company ("Town & Country"). Mr. Stenton also sued his own insurer, Co-operators, pursuant to his OPCF

coverage on the basis that Mr. El Rifai was "underinsured". Mrs. Stenton advanced a claim pursuant to the *Family Law Act* for loss of care, guidance and companionship arising out of Mr. Stenton's injuries.

[5] The three children also sued their father, as well as Mr. Stenton, for their injuries.

[6] The Town & Country insurance policy had third party liability limits of $1 million. The $1 million limits had to be apportioned between the Stentons' claims and the claims of the orphaned children of Mr. El Rifai and his wife on a *pro rata* basis. The apportionment of the Town & Country limits had to be agreed upon by the Stentons, the litigation guardian for the children and the Co-operators as the Stentons' OPCF insurer and the Co-operators in their capacity as Mr. Stenton's third party liability insurer.

[7] Co-operators had limits of $2 million under the OPCF. Since the Town & Country limits were $1 million, Co-operators would be liable to the Stentons for up to a further $1 million, being the difference between the limits of the two policies. I note that there was a dispute between the plaintiffs and the Co-operators about whether there was an additional $1 million for Mrs. Stenton's claim under the same policy, which prolonged the litigation between the plaintiffs and the Co-operators.

[8] Town & Country offered to tender its limits early on in the litigation, on June 8, 2022, subject to an agreement being reached regarding apportionment and on condition that the estate not be pursued over the limits by any other party. This occurred prior to examinations for discovery being conducted. The Co-operators continued to defend the Stentons' action. The case was scheduled for trial in the Chatham jury sittings to begin the week of February 10, 2025.

[9] On December 22, 2023, the Co-operators agreed to the proposed apportionment of the Town & Country limits and agreed to discontinue its allegations of negligence against Joseph Stenton. A few days later, it offered its limits of $1,000,000 to the plaintiffs, plus costs to be agreed upon or assessed.

[10] The case settled on January 25, 2025. Co-operators paid the sum of $1 million, plus costs to be agreed upon or assessed. Town & Country, on behalf of its insured, paid the sum of $50,000 to the Stentons. The balance of its limits, plus costs, was paid towards the children's claims. The children also received a substantial settlement from the Co-operators acting in their capacity as Mr. Stenton's insurer, although that has little bearing on the matter before me.

[11] At the outset of the motion before me, I was advised that the parties had agreed upon the costs to be paid to the Stentons. The agreed upon amount is $275,000, all-inclusive of fees, disbursements and HST, plus $5,000 for PJI. The PJI is being paid entirely by Co-operators.

[12] The only issue remaining to be decided is how the fees of $275,000 should be apportioned between Town & Country and Co-operators.

Applicable Legal Principles:

[13] The insurers are in general agreement about the applicable law.

[14] The costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid (s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43).

[15] Rule 57.01 of the *Rules of Civil Procedure* sets out the factors to be considered by the court in exercising its discretion under s. 131(1).

[16] There is no dispute that the court has the jurisdiction to award costs against the defendant (and his insurer) as well as the underinsurer (see: *Burns v. Hedge* (2001), 2001 CanLII 4718 (ON CA), 146 O.A.C. 333 at paras. 43 and 44).

[17] In *Broadhurst & Ball v. American Home Assurance Co.*, [1990] O.J. No. 2317, 1990 CanLII 6981 (ON CA), one of the issues was how to apportion the payment of the legal fees between a primary and excess insurer. It had been held that the two insurers were under concurrent obligations to defend the defendant. The Court reviewed American and Canadian jurisprudence and held that where the excess insurer is "plainly at risk" it would be equitable to hold them responsible for some portion of the costs. In that case, costs were apportioned 50-50 between the primary and excess insurers.

[18] In *Bernard v. Lamarsh*, 2019 ONSC 6327, King J. dealt with a situation in which the primary insurer's policy limits were reduced to the statutory minimum of $200,000 as a result of a policy breach. The issue was how to apportion costs as between that insurer (Aviva) and the OPCF insurer, who had limits of $1 million. King J. relied upon *Burns v. Hedge, supra*. He noted that:

- All insurers participated in the litigation through productions, discoveries and medical examinations;
- All insurers were parties to the action; and
- All insurers opposed the plaintiff's claim and sought to limit their own exposure.

[19] King J. also referred to *Riddoch (Litigation Guardian of) v. Anderson*, [1991] O.J. No. 2667, where the primary insurer admitted liability for the motor vehicle accident and offered to pay its policy limits. The case continued against the underinsurer. In *Riddoch*, Morin J. held that once the primary insurer offered to pay its policy limits, it could "do nothing more". Therefore, the excess insurer was held responsible for the costs from the time that the limits were offered to the completion of trial.

[20] King J. ultimately determined that costs should be apportioned on a 50-50 basis in *Bernard*. He noted that the primary insurer could have done more because they did not, in fact, pay the sum of $200,000 into court. Rather than pay the sum into court, the primary insurer continued to

participate in the negotiations in an effort to maximize the portion of the $200,000 that would be received by one of the plaintiffs, to be a credit to Aviva as her underinsurer. In other words, the primary insurer's risk continued, although in its capacity as the underinsurer.

[21] I note that in *Burns v. Hedge, supra*, the Court of Appeal overturned the motion judge's determination that the primary insurer should be responsible for the entirety of the costs. The Court of Appeal apportioned costs equally between the three insurers in that case.

[22] I am also referred to the *Riddoch, supra,* case. To reiterate, Morin J. held that once the primary insurer had exhausted its policy limits, the excess insurer should bear the costs of the ongoing litigation. His concern was that the underinsurer would be given a free ride at the expense of the primary insurer. Morin J. ordered the primary insurer to pay party-and-party costs to the time that it was clear that the primary insurer's limits were exhausted and the OPCF insurer was required to pay the costs thereafter.

[23] Recently, in *Brazeau v. Smith*, 2025 ONSC 2294, Holowka J. dealt with a primary insurer whose limits had also been reduced to $200,000 and an underinsurer. After reviewing the above noted cases, costs were apportioned on a 50-50 basis.

[24] Finally, I have been referred to *Ward v. Dingwall*, 2014 ONSC 126, a decision of Shaw J. In that case, there were three defendants, with defendants A and B insured by Intact and defendant C insured by Zurich. Intact offered to settle the claim for its policy limits of $2 million seven months after the action was commenced. Five years later, Zurich agreed to let other defendants out of the action and admit liability on the part of its insured. Zurich also fluctuated in its position as to what its available policy limits were. It ultimately paid its policy limits of $8 million after demanding further evidence of the plaintiff's future care costs.

[25] Zurich argued that costs should be apportioned on a 50-50 basis between it and Intact. Zurich argued that both insurers had participated in every step of the proceeding until court approval was obtained.

[26] Shaw J. concluded that the most equitable allocation of costs was to divide them in accordance with the respective policy limits of the insurers. Thus, Zurich was responsible for 80 percent of the plaintiffs' costs and Intact 20 percent.

[27] From these cases, it is clear that the facts of each case are important and that the court has broad discretion to attempt to craft a fair, reasonable and equitable allocation of costs in the circumstances before it.

Relevant Chronology:

[28] As insurer for the at-fault motorist, Town & Country was involved almost immediately after the accident occurred. However, the Co-operators was also involved from an early stage following the accident, as it was Mr. Stenton's third party liability insurer and had to respond to

the claims made by the three children. The Co-operators were in correspondence with plaintiff's counsel in respect of the Stentons' claims under the OPCF as early as December 2, 2019.

[29] The Statement of Claim on behalf of the Stentons was issued on May 14, 2021.

[30] Plaintiffs' counsel requested Town & Country to place its limits into an interest bearing account on September 30, 2021.

[31] Counsel for Town & Country, on June 8, 2022, wrote to plaintiffs' counsel, including counsel for the three children (Mr. Khan), as well as Co-operators and Mr. Stenton's defense counsel (Mr. Sugar) indicating that Town & Country was prepared to tender its insurance policy liability limit of $1M to the plaintiffs, collectively. The offer was conditional upon receiving full and final releases as against the El Rifai estate.

[32] Town & Country would not be "finished" with the litigation by tendering their limits. The limits had to be apportioned between the plaintiffs. They would still be obligated to defend its insured through to the end of the litigation unless a full and final release was obtained in favour of its insured.

[33] Examinations for discovery were conducted in March of 2023 in the Stenton action. Counsel for the Stentons did attend at the examinations for discovery of the children in August of 2023 for the purpose of assessing their claims to determine how the limits would be apportioned between the children and the Stentons. Town & Country was required to participate as the defendant estate's insurer. Co-operators, in its capacity of OPCF insurer, participated to assess the Stentons' claims and the claims of the children for the purpose of apportionment.

[34] In December of 2023, the parties all agreed on how to apportion Town & Country's limits between the children and the Stentons. This included Co-operators. $950,000 was to be paid towards the children's claims and $50,000 towards the Stentons' claims. This was subject to court approval.

[35] Town & Country circulated Minutes of Settlement that were ultimately signed in October of 2024. This included Co-operators agreeing not to pursue its right of subrogation as against the defendant estate.

[36] Town & Country had little ongoing involvement in the litigation thereafter. However, they did attend a pre-trial. I note that attending court hearings such as pre-trials is mandatory for counsel of record.

[37] I note that the Town & Country policy limits were never actually paid until all of the children's litigation was completed.

The Positions of the Parties:

[38] The plaintiffs submitted a Bill of Costs for the proposed assessment. As noted, the insurers agreed to pay $275,000 towards their costs. This was 79% of what was sought in the plaintiffs' Bill of Costs for fees and the entirety of their disbursements.

[39] The insurers suggest that costs be apportioned differently over four different Stages of these proceedings, as follows:

(A) Stage I—Up to June 8, 2022 (when Town & Country conditionally tendered its policy limits) (79% of the fees is $30,752 and 100% of disbursements is $33,080)

(B) Stage II—For the period June 2022 to December 2023 (when Town & Country discussed paying their policy limits into court) (79% of fees is $62,046 and 100% of disbursements is $25,735)

(C) Stage III—January 2024 to October 2024 (when Minutes of Settlement were signed) (79% of fees is $22,787 and 100% of disbursements is $49,520)

(D) Stage IV—October 2024 to the date of approval for the minor plaintiffs (79% of fees is $45,696 and 100% of disbursements is $5,209)

[40] Both insurers also submitted Bills of Costs.

[41] Co-operators argues that each insurer should be liable for costs in accordance with the degree of participation that their counsel had in the process in each stage. The Co-operators' position is that Town & Country was actively involved in the first three stages of this litigation. They rely upon the insurers' respective Bill of Costs to assess how much each insurer was involved at each stage.

[42] Co-operators' position is that Town & Country should be responsible for 100% of the Stage I costs. Co-operators' counsel had minimal time and fees incurred during Stage I according to their Bill of Costs. There is no question that Town & Country's Bill of Costs demonstrates that their counsel was far more involved during Stage I.

[43] Co-operators argues that in Stages II and III, both insurers' counsel have approximately the same amount of time expended. Therefore, Co-operators proposes that the insurers share 50-50 the plaintiffs' costs attributable to Stages II and III.

[44] It is conceded that Town & Country played a lesser role after October 2024. Counsel for Co-operators has far more time in the file in Stage IV than Town & Country's counsel.

[45] The Co-operators argues that I have four options, as follows:

(a) Order that the insurers bear the plaintiffs' costs on a 50-50 basis (Similar to *Bernard* and *Brazeau*);

(b) Order that Town & Country pay 100% of the costs up until the point that the funds were actually paid in October of 2024 (as in *Riddoch*);
(c) Order that Town & Country bears 100% of the costs of Stage I, 50% of the costs of Stages II and III, and none of Stage IV;
(d) Order that each insurer bears the costs of Stages I, II and III on a 50-50 basis, and the Co-operators is solely responsible for Stage IV. Counsel for Co-operators emphasized that he was not advocating for this option.

[46] Town & Country argues that it was very early in these proceedings that it was clear that its policy limits were exhausted given the nature of the children's injuries, plus the Stentons' claims. It argues that it did not oppose the plaintiffs' claims. It did not seek to limit its own exposure. It did not meaningfully remain involved in negotiations. It did not have a vested interest in trying to protect its own interests. It was not fully engaged in defending the matter. Finally, Town & Country argues that it could not have done anything further to encourage settlement.

[47] Town & Country did not serve any expert reports, or take a position on liability adverse to the Stentons' claims. It did not attend the mediation that took place in July of 2024. The Co-operators, on the other hand, conducted surveillance on the Stentons from the early part of the litigation. From its Bill of Costs, it is apparent that the Co-operators also arranged independent medical examinations of Mr. Stenton. Town & Country did not arrange for any such examinations.

[48] Town & Country points out that unlike Aviva in the *Bernard* case, where Aviva continued to have a financial interest in the allocation of its primary insurance because it was also an underinsurer, Town & Country was disinterested in the apportion of its $1 million limits.

[49] Even at the mediation, Town & Country points out that the Co-operators offer to settle was for $350,000 plus costs, when it ultimately paid its limits of $1 million. Accordingly, the Co-operators continued to dispute the Stentons' damages until the very end. The Co-operators, fairly, points out that at the mediation, the plaintiffs' offers included far more than its available policy limits because of the plaintiffs' position with respect to those limits. It is, accordingly, unfair to conclude that the Co-operators was not prepared to offer more.

[50] Town & Country concedes that it was required to participate on behalf of its insured in steps such as examinations for discovery and the pre-trial. It would have been required to participate in the trial had the matter not resolved as against its insured.

[51] Town & Country's suggestion is that the costs for Stage I be divided on a 50-50 basis, and that it be required to pay no more than 25% of the costs of Stages II and III, and none of the costs that occurred in Stage IV.

Disposition:

[52] I begin by stating that I do not see the court constrained to only the four options set out by the Co-operators, or the one option suggested by Town & Country. The court has a wide discretion

to fix costs in a manner that it views as fair and reasonable that an unsuccessful defendant should expect to pay.

[53] In my respectful view, it misses the mark to compare the Bills of Costs between the two sets of defense counsel. The issue is not reimbursement of the defence costs, but who should pay the plaintiffs' lawyer's fees. The amount of time expended by plaintiffs' counsel, and the disbursements incurred in Stage I, still built up the plaintiffs' claims as against both defendants, even if defence counsel for the Co-operators was not yet as actively engaged in defending the claim. All of the time and disbursements in an early stage would impact the ultimate outcome in the case. The plaintiffs' lawyer's efforts increased the Co-operators' exposure throughout the entirety of the file, not just when the Co-operators retained lawyers who became actively involved in this case.

[54] I also note that to rely heavily on the time expended by counsel for insurers might incentivize counsel for the insurer with an ongoing duty to defend its insured to not properly defend because it might not want to have its fees considered as some indication of how much costs it should contribute to the plaintiff at the end of litigation.

[55] Thus, while the defence costs may be a factor for the court's consideration in determining how to apportion a plaintiff's costs, I would not place too much weight on those costs.

[56] In my view, the key thread running through the cases cited above is that the insurer who is driving the litigation should bear the costs of that litigation. This includes situations where the insurer continues to actively protect its financial interests, such as Aviva in *Bernard*. This was behind the result in *Riddoch* where Morin J. identified the "free ride" concern.

[57] While in the *Bernard* case it was clearly a factor that the primary insurer did not actually pay its limits into court, the key point differentiating that case, in my view, was that Aviva also benefitted as an underinsurer by taking an active role in the apportionment process as primary insurer. Town & Country's ongoing role in the litigation after offering to tender its limits was not for its own benefit, but because of its ongoing duty to its insured. The actual payment into court is not as significant a factor in my opinion.

[58] In *Brazeau*, it is clear from those reasons that both insurers continued to actively resist the plaintiff's claim. At para. 30, it is noted that this included discoveries, mediation, pre-trial conferences and medical examinations. I acknowledge that it is noted that the primary insurer did not commission defense medical reports in Brazeau.

[59] Several of the rule 57.01 factors apply in these particular circumstances. In my opinion, it is particularly important to consider the apportionment of liability (b) and the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceedings.

[60] In this case, the Stentons received only 5% of the Town & Country policy limits. Town & Country contributed to the legal expenses of the children, as set out in the Minutes of Settlement of $190,000, inclusive of HST, plus $33,910.81 towards disbursements, on the basis that it paid

$950,000 towards their claim. Importantly, the Co-operators paid 95% of the Stentons' damages, including the entirety of the Co-operators policy limits.

[61] Furthermore, one of the functions of costs awards is to promote or encourage reasonable behaviour during the course of litigation. In this case, Town & Country recognized from an early time the obvious fact that its policy limits would be exhausted and offered to pay those limits once the other parties agreed on how to divide them. Again, I do not place the importance upon actually paying the limits into court as King J. suggested in *Bernard*. As noted, I think the key point in *Bernard* is that Aviva was not actually finished disputing how the funds should be apportioned. In the case before me, I accept that Town & Country had no further interest in how the funds were divided up, so long as the case was resolved so that there was no further exposure upon its insured, the estate of the defendant.

[62] Insurers that act reasonably by offering to tender their limits early on should not be penalized. To the contrary, the court should encourage and incentivize such behaviour.

[63] From the time that Town & Country offered to tender its limits, to the conclusion of the trial, the Stentons' litigation was really against their OPCF insurer, the Co-operators. The Co-operators led the examinations for discovery, conducted surveillance, arranged medical examinations and attended mediation where it attempted to resolve the Stentons' claims. Had this case been tried, it would have been because of the position that the Co-operators, not Town & Country, was taking.

[64] I accept that Town & Country's offer to tender its limits was conditional on all parties agreeing to release its insured. I also accept that it had ongoing participation and could not extricate itself until it negotiated a full and final release for its insured. I note that the Co-operators was part of that process such that until it agreed to the allocation, and not to pursue the defendant estate for its subrogated claim, Town & Country could not exit the litigation. In other words, the Co-operators played an integral role in determining how long Town & Country had to remain involved. While I am prepared to apportion some of the costs for after the time it offered to tender its limits, especially in light of the position that Town & Country has taken in this motion, the majority of the plaintiffs' legal costs after the time that the limits were offered, even conditionally, should be borne by the Co-operators.

[65] While the suggestion by both counsel to break the litigation into stages is not an unreasonable approach, fixing costs is not a strictly mathematical formula of hours times hourly rates. Accordingly, I am not solely approaching the task in that fashion. However, I have used the Stages as a blueprint to assist in determining a reasonable allocation of costs.

[66] For the reasons above, I am not prepared to simply split the fees on a 50-50 basis, although I accept that in other similar cases that could be an equitable resolution.

[67] I am also not persuaded that it is appropriate in this case to compare policy limits, or the amount actually paid to the Stentons, although the latter is a factor that I have considered. To apportion costs on the basis of the $50,000 paid by Town & Country would unduly ignore that it

did continue to have an ongoing role in the litigation and that it was their insured who caused the loss by all the plaintiffs. Until the children's settlement was approved by the court, its role was not concluded. This also considers that the funds were only conditionally offered and not immediately paid into court.

[68] In the circumstances of this case, I find that Town & Country should be responsible for 75% of the costs until Town & Country offered to tender its limits (end of Stage I). The plaintiffs' lawyer's time on the file built the case up against both insurers so the Co-operators should bear some of those costs. Thereafter, the Co-operators was the defendant driving the litigation and Town & Country had a far lesser role *vis-à-vis* the Stentons. I would apportion costs 25% to Town & Country through to the end of Stage III. The Co-operators shall be responsible for the entirety of the Stage IV costs.

[69] Mathematically, this looks as follows:

STAGE	**TOWN & COUNTRY SHARE**	**THE CO-OPERATORS SHARE**
I	$47,875	$15,958
II	$21,945	$65,836
III	$18,077	$54,230
IV	$0	$50,905
TOTAL (Unrounded)	$87,897	$186,929
TOTAL (Rounded)	$88,000	$187,000

[70] I note that this is roughly one third payable by Town & Country and two thirds payable by the Co-operators of the total of the plaintiffs' costs.

[71] I am comfortable that this is a fair and reasonable allocation between the two insurers, whichever approach is adopted, keeping in mind that:

(a) Town & Country's insured caused the loss and it was required to remain involved until it obtained a release;
(b) Town & Country acted reasonably by offering to tender its limits as of June 2022 and thereafter the Stentons' litigation was really between the Stentons and the Co-operators; and
(c) The bulk of the Stentons' damages were ultimately paid by the Co-operators.

[72] I presume that there are offers to settle between the two parties about how to apportion the plaintiffs' costs. If the parties cannot resolve the issue of costs of the motion, whichever party beat their offer to settle, may serve and file written submissions no longer than two pages double spaced, plus any relevant offers to settle, through the Chatham trial coordinator to my attention by January 9, 2026. Responding submissions within the same parameters may be served and filed by January 19, 2026.

[73] If the party who beat their offer cannot be ascertained or agreed upon, the Co-operators may serve and file their costs submissions first, followed by Town & Country using the same dates. Nothing should be read into that arbitrary order of submissions.

Justice Spencer Nicholson

Date: December 4, 2025