COURT OF APPEAL FOR ONTARIO

CITATION: Hurst v. Aviva Insurance Company, 2012 ONCA 837
DATE: 20121129
DOCKET: C55032, C55033, C55044, & C55087

Simmons, Juriansz and Epstein JJ.A.

BETWEEN

Karen Hurst, Gillian Cornie, Devinder Singh,
and Elizabeth Clark

Plaintiffs (Respondents)

and

Aviva Insurance Company, Security National Insurance Company o/a TD Meloche Monnex, Aviva Canada Inc. and State Farm Mutual Automobile Insurance Company

Defendants (Appellants)

and

Insurance Bureau of Canada and Ontario Trial Lawyers Association

Interveners

Eric K. Grossman, for the appellants State Farm Mutual Automobile Ins. Co.

David Silverstone and Jennifer Matic, for the appellants Security National Insurance Company

Catherine Korte, Pamela Quesnel and Matthew Dugas, for Aviva Insurance Company

Bruce Kelly, for the respondents Karen Hurst, Gillian Cornie, Devinder Singh and Elizabeth Clark

John Craig and Vivian Bercovici, for the intervener Insurance Bureau of Canada

M. Steven Rastin and Stanley Pasternak, for the intervener Ontario Trial Lawyers Association

Heard: July 19, 2012

On appeal from the judgment of Justice J.W. Sloan of the Superior Court of Justice, dated February, 8, 2012.

Juriansz J.A.:

A. INTRODUCTION

[1] These appeals were heard together because they raise a common question related to the functioning of the province's no-fault system of automobile insurance. The question is when insured persons can commence court actions against their own insurers to claim benefits under the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("SABS"). This is a pure question of law depending on the interpretation of the statutory scheme under the *Insurance Act*, R.S.O. 1990, c. I.8 ("the Act").

B. BACKGROUND FACTS

[2] The respondents are four individuals who were victims of motor vehicle accidents in which they sustained serious injuries. The facts for each respondent followed a similar pattern.

[3] At the time of their respective accidents, the respondents each held a valid policy of insurance issued by one of the appellants. Disputes subsequently arose

between each of the respondents and their respective insurers concerning their entitlement to statutory accident benefits. Those disputes, as stipulated in s. 279(1) of the Act, must "be resolved in accordance with sections 280 to 283 [of the Act] and the *Statutory Accident Benefits Schedule*."

[4] Subsection 281(2) of the Act prevents insured persons from resorting to court actions against their insurers unless they first sought mediation and mediation failed. Accordingly, the respondents applied to the Financial Services Commission of Ontario ("FSCO") for mediation of their disputes. FSCO is the administrative agency responsible for administering Ontario's statutory scheme regulating auto insurance.

[5] The respondents took the position that mediation must be completed within 60 days of their applications to FSCO. In support of their position, they relied on several provisions in the Act, the *Automobile Insurance Regulations*, R.R.O. 1990, Reg. 644 ("the regulations"), and FSCO's Dispute Resolution Practice Code ("DRPC").

[6] The respondents waited at least 60 days after the date of their applications for FSCO to appoint a mediator and for mediation to take place. However, no mediator was appointed during that time period and mediation had not commenced in any of the respondents' cases.

[7] The respondents submitted that mediation had failed because the prescribed time for mediation set out under the Act and the regulations had expired. Each of the respondents wrote a letter to FSCO requesting a mediator's report declaring that the time for mediation had elapsed and that mediation had failed for the purpose of s. 281(2) of the Act.

[8] FSCO refused the respondents' requests. In a letter to each of the respondents, FSCO took the position that the prescribed time limit for conducting mediation did not begin to run until an application for mediation had been assessed by FSCO staff and found to be complete. Given that this had not occurred in any of the respondents' cases, FSCO refused to provide a report declaring that mediation had failed.

[9] Each of the respondents then commenced a court action against his or her insurer claiming the disputed statutory accident benefits. In response, the insurers brought motions to strike or stay the respondents' actions, arguing they were barred by s. 281(2) of the Act. The insurers' motions were heard together by Sloan J., who dismissed the motions. The insurers appeal that decision to this court.

[10] The common legal question raised in these appeals is when, for the purposes of s. 281(2), mediation has failed so that an insured person may bring an action in court.

C. STATUTORY SCHEME

[11] Ontario has adopted a comprehensive statutory scheme regulating automobile insurance. An integral part of this scheme is the process for resolving disputes between insured persons and their insurers set out in ss. 280 to 283 of the Act and in the regulations. Central to this process is the mandatory mediation of such disputes. Subsection 281(2) of the Act prevents insured persons from commencing court actions unless they have first sought mediation and it has failed.

[12] The full text of s. 281(2) provides:

> 281. (2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to submit an issue for arbitration in accordance with the *Arbitration Act, 1991* unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties.

[13] Section 280 deals with how the statutory mediation process should take place. Subsection 280(2) specifies that the process is started when any party files an application for mediation with FSCO. Once a party has filed for mediation, s. 280(3) requires the Director of Arbitrations under the Act to promptly appoint a mediator. Subsection 280(4) states that the mediator is required to attempt to effect a settlement "within the time prescribed in the regulations". The entire provision states:

> 280.(4) The mediator shall inquire into the issues in dispute and attempt to effect a settlement of as many of the issues as possible within the time prescribed in the regulations for the settlement of the type of dispute in question.

[14] Particularly relevant for this appeal is s. 280(7) of the Act, as it deals with when mediation has failed. It states the following:

> 280.(7) Mediation has failed when the mediator has given notice to the parties that in his or her opinion mediation will fail, or when the prescribed or agreed time for mediation has expired and no settlement has been reached.

[15] Pursuant to s. 280(6), a mediator, at any time before settlement is effected, may notify the parties of his or her opinion that mediation will fail.

[16] Section 10 of the regulations requires a mediator to attempt to effect a settlement of a dispute within 60 days after the date on which the application for the appointment of a mediator is filed.

[17] The DRPC also sets out time limits for the mediation process. Under the heading “Time Limits for Mediation”, Rule 19 provides that “mediation must be concluded within 60 days” of the filing of a properly completed application for mediation, unless the parties agree otherwise.

[18] The parties may extend the time for the completion of the mediation process by agreement, pursuant to s. 280(5).

[19] Finally, in the event that mediation fails, s. 280(8) requires the mediator to give the parties a report setting out the insurer’s last offer, a description of the

issues that remain in dispute, a list of materials that, though requested, were not produced and which were required to discuss settlement, and recommending whether or not the issues in dispute should be referred for a neutral evaluation under s. 280.1. The neutral evaluation process allows the parties jointly, or the unsuccessful mediator, to refer the issues in dispute to a person appointed by the Director “for an evaluation of the probable outcome of a proceeding in court or an arbitration”.

[20] Having set out the statutory scheme, I now turn to the issue of when mediation has failed for the purposes of s. 281(2) of the Act.

D. ANALYSIS

[21] On a first reading of the Act, the regulations, and the DRPC, it would seem that an insured person may commence a proceeding in court 60 days after filing an application for mediation with FSCO.

[22] This was the conclusion of the motions judge, who refused to dismiss or stay the respondents’ actions as being barred by s. 281(2). The motions judge noted that s. 281(2) allows a person to commence a court proceeding after mediation has been sought and has failed. Subsection 280(7) states that mediation has failed when the prescribed time for mediation has expired. The motions judge found that the only “prescribed time” in either the regulations or in the DRPC is 60 days. Section 10 of the regulations requires a mediator to

attempt to effect a settlement of a dispute within 60 days after the application for the appointment of a mediator is filed. Rule 19.1 of the DRPC also provides that mediation must be concluded within 60 days after the filing of an application for mediation. The motions judge concluded that it made “perfect sense” that these provisions created a 60-day time limit to deal with disputes, after which the respondents are free to commence a court action or proceed to arbitration.

[23] Such a reading is strenuously contested by the insurance company appellants, supported by the intervener, the Insurance Bureau of Canada (“IBC”).

[24] They urge the court to undertake a purposive analysis of the legislative framework. In so far as the language of the text permits, the court should strive to arrive at an interpretation that is consistent with and promotes the legislative purpose and should avoid interpretations that defeat or undermine the legislative purpose.

[25] Put simply, their position is that an interpretation that permits insured persons to commence court actions without waiting for FSCO to actually attempt mediation of their disputes would effectively gut the statutory scheme for the resolution of such disputes. The overarching purpose of the statutory scheme of no-fault automobile insurance is intended to remove from the court system disputes arising from motor vehicle accidents. The statute assigns FSCO the responsibility of providing a dispute resolution process, particularly a mediation

service, to provide the parties with an efficient and economical process to resolve disputes about entitlement to accident benefits. The Act, as s. 281(2) sets out, makes the failure of mediation a precondition to commencing a court action. The legislative purpose in making mediation mandatory is to reduce costs for the parties and, in doing so, reduce the cost of insurance for all Ontario motor vehicle owners.

[26] The appellants support their argument by examining the functioning of FSCO. FSCO's services resolve some 75% of cases mediated. FSCO also eliminates from the system claims that are incomplete, vexatious, or barred by statutory limitation periods. Fresh evidence tendered by the IBC indicates that FSCO received a total of 36,492 applications for mediation in 2011. As of April 1, 2012, 21,023 of 26,240 active applications that had not yet been referred to mediation were more than 60 days old. Dismissing the appeal would allow these disputes to proceed in court or arbitration, when 75% of them would have been resolved by mediation before FSCO. The resulting costs could be immense. Insurers pay a filing fee of $500 for mediation, and $3,000 for arbitration. If all of the claims that would have otherwise gone to mediation are forced into arbitration, the cost to the insurance industry from the additional filing fees alone could amount to $83 million. When one considers the additional costs of court proceedings and legal fees, which are not so easily calculated, it is inevitable that there would be upward pressure on insurance premiums.

[27] The appellants and intervener submit that upholding the lower court decision would adversely affect the statutory system for resolving automobile accident benefit disputes, the civil court system, and the system for establishing automobile insurance premiums.

[28] Relying on this characterization of the purpose of the legislative framework, the appellants urge that the words of the various relevant provisions be interpreted to hold that insured persons cannot commence a court action until mediation between the parties has actually been attempted and failed, and a mediator's report has been issued.

[29] In my view, the appellants' identification of the statute's purpose is incomplete. No doubt it is an important purpose of the legislative framework to make mediation mandatory. That, though, is not the whole story. Reading the provisions in their entire context makes clear that the purpose of the legislation is to make mandatory a mediation process *that is timely and effective*. The timeliness aspect of the mandatory mediation process is evident from s. 280(4)'s requirement that mediation be conducted within the time prescribed by regulation and s. 280(7)'s provision that mediation has failed when the prescribed time for mediation has expired.

[30] The purpose of the legislative scheme of dispute resolution is to mandate a speedy mediation process, conducted and completed on a strict timetable, in

order to settle disputes quickly and economically. The speedy mediation process enables insured persons to receive the benefits to which they are entitled without delay. When the legislative purpose is properly characterized to include the timely resolution of disputes, there is no reason to resist the grammatical and ordinary sense of the legislation. Therefore, I do not accept the premise on which the appellants' entire argument is based. Nevertheless, I now turn to the specific arguments they put forward regarding the interpretation of the relevant statutory and regulatory provisions.

[31] First, the appellant insurers suggest that there is no time limit prescribed for the purposes of s. 280(7) of the Act. It will be recalled that s. 280(7) states that mediation has failed "when the prescribed or agreed time for mediation has expired". The appellants point out that the prescribed time limit in s. 10 of the regulations only refers to s. 280(4) and not to s. 280(7). The full text of s. 10 is as follows:

> 10. A mediator is required, under subsection 280 (4) of the Act, to attempt to effect a settlement of a dispute within sixty days after the date on which the application for the appointment of a mediator is filed.

[32] The appellants' position is that the 60-day time limit set out in s. 10 only applies to s. 280(4) and no time limit has been prescribed for s. 280(7). In the absence of any prescribed time limit for s. 280(7), the appellants contend that mediation should not be deemed to have failed upon the expiration of 60 days.

[33] I cannot accept this argument. It is generally presumed that when the legislature uses the same words in a statute they are to be given the same meaning. In my view, the entire section cannot reasonably be read so that the "prescribed time" in s. 280(4) is different than the "prescribed time" in s. 280(7). As noted by the motions judge, the only prescribed time for mediation in the regulations is 60 days. If the appellants' interpretation is accepted, it would render meaningless the part of s. 280(7) requiring mediation to be completed in a prescribed time period.

[34] Second, the appellants focus on the meaning to be attributed to the word "filed" in s. 10 of the regulations. The time limit for mediation set out in s. 10 is "sixty days after the date on which the application for the appointment of a mediator is filed." The appellants submit that an application is not "filed" until FSCO has examined it and concluded that it is properly completed and ready to be assigned to a mediator.

[35] The Manager of Mediations at FSCO took this position in written refusals of the respondents' requests for mediator reports declaring that the mediations had failed. The Manager explained that the requests for mediator reports were premature because FSCO had not yet registered the respondents' applications as complete, and hence they were not yet considered "filed". Therefore, in the Manager's view, the 60-day time period had not yet begun to run. The appellants

submit that the court should give weight to the interpretation adopted by those charged with administering a home statute.

[36] The appellants submit that the Manager's position is supported by the DRPC. Rule 19 of the DRPC provides that, unless the parties agree otherwise, "mediation must be concluded within 60 days of the filing of an Application for Mediation, completed in accordance with the requirements of Rule 12." Rule 12 of the DRPC specifies what must be included in a "completed Application for Mediation". The requirements include names and addresses, descriptions of each issue in dispute, listings of available documents and requested documents, and other such items. Rule 12.3 provides that, if an application appears to be incomplete, the dispute resolution group may hold the application in abeyance for 20 days from the delivery of the notice. The appellants also point out that, in accordance with Rule 13, the Dispute Resolution Group does not send to the insurer a copy of the insured person's application for mediation until that application is assessed as complete, and it is only then that a mediator is promptly appointed.

[37] The appellants submit that the legislative framework must be interpreted to allow FSCO to correct technical deficiencies in the application before the period set for mediation begins to run.

[38] I do not accept that the 60-day clock does not begin to run until FSCO has assessed an application as complete. Such an interpretation, which would allow FSCO to accumulate a backlog of any length, would ignore the legislative purpose of providing a speedy mediation process. As noted in s. 10 of the regulations, a mediator is required to attempt to effect a settlement of a dispute within 60 days *after the date on which the application for the appointment of a mediator is filed*. Rule 6 of the DPRC provides that a document that is required to be filed "must be delivered to the Dispute Resolution Group" by one of several methods of delivery permitted under Rule 7. Clearly, the word "filed" is used in the legislative scheme in its ordinary sense.

[39] All these provisions indicate that the expectation of the legislative scheme is that FSCO's assessment of applications filed with it will be done with sufficient dispatch to meet the prescribed time limit. It is not necessary on this appeal to decide whether the 60-day time period for the completion of mediation is reset when an incomplete application is re-filed.

[40] In reaching this conclusion, I have placed no weight on FSCO's interpretation of the Act as the appellants have submitted I should. Any deference that is due is not owed to FSCO, but to an arbitrator appointed under the Act, or to a Director's Delegate on an appeal of an arbitrator's decision. The issue of when an application is "filed" was directly addressed by Arbitrator Jeffrey Rogers in *State Farm Mutual Automobile Insurance v. Leone* (2012), FSCO A11-002196.

The arbitrator noted that Rule 4.1 of the DRPC defines “filed” to mean “filed with the Dispute Resolution Group”. This definition “does not require any action by the Commission for a document to be filed”. The arbitrator concluded that “filed” means “delivered” to the Dispute Resolution Group. This finding was affirmed on appeal to a Director’s Delegate. I agree with the analysis of the arbitrator and the Director’s Delegate.

[41] The appellants’ next submission is that the 60-day time frame to conduct mediation is not mandatory but directory. They submit that, in cases where a statutory duty is characterized as directory, non-compliance with the duty will not render an action or proceeding invalid. To determine whether a condition is mandatory or directory, they say, one must consider whether it would be “seriously inconvenient” to regard the performance of the statutory direction as imperative. In support of this principle, they rely upon the remarks of the Alberta Court of Appeal in *Alberta Teachers’ Assn. v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26, 316 D.L.R. (4th) 117, rev’d on other grounds 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 23:

> Where the legislation is silent "it is left to the courts to determine whether non-compliance [with a statutory duty] can be cured.": see [Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008).] Sir Arthur Channell in *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), at pp. 174-75 wrote that:

> When the Provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

[42] The Supreme Court of Canada has expressed doubt as to the usefulness of the distinction between mandatory and directory provisions, noting that the principle is "vague and expedient": see *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at p. 123. However, even accepting the test put forward by the appellant, the serious inconvenience in this case falls on both sides of the debate. While the appellants submit that it would cause serious inconvenience to require that mediation be completed within 60 days, the respondents submit it would also cause serious inconvenience for insured persons to wait to receive statutory benefits to which they are entitled because FSCO has failed to meet the statutory time limits.

[43] I would not give effect to the appellants' argument that the 60-day time limit is merely directory. Nor do I accept their argument that the failure to adhere to the 60-day time limit is merely a technical or procedural breach. The 60-day time

limit, as I see it, is an integral part of the legislative scheme that aims to provide a speedy mediation process.

[44] The appellants' next submission is that other provisions of the legislative framework are not consistent with a mandatory time limit for mediation. For example, they argue that if mediation is deemed failed after 60 days, there can be no mediator's report as contemplated by s. 280(8). Subsection 280(8) requires that, if mediation fails, the mediator must prepare and give to the parties a report setting out the insurer's last offer, a description of the issues that remain in dispute, a list of relevant materials that should have been produced by the parties but were not, and a recommendation as to whether the issues in dispute should be referred to an evaluation. The appellants note that none of this information would be available in cases where actual mediation had not occurred.

[45] In his thoughtful reasons, the motions judge suggested there is no reason why FSCO could not issue a report stating that mediation had failed because the prescribed time period had expired. The report could set out the information listed in s. 280(8), to the extent that such information is available at the time of the report. I, however, would approach the matter from a different perspective.

[46] The legal question before the court in these cases is whether the motions judge should have granted the appellants' motions to dismiss or stay the actions

commenced by the appellants as being barred by s. 281(2). I set out again the text of the statutory bar to commencing an action in s. 281(2):

> 281. (2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to submit an issue for arbitration in accordance with the *Arbitration Act, 1991* unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties.

[47] As can be seen, the section does not require that a person await the receipt of a mediator's report before commencing a proceeding. All that is required is that mediation has been sought and mediation has failed. I reiterate that s. 280(7) provides that one of the ways in which mediation can fail is that the 60 days prescribed for mediation expire.

[48] Subsection 280(8), it seems to me, has no bearing on the operation of s. 281(2). Whether s. 280(8) applies when mediation fails by the expiration of time, and what FSCO must or may do upon the expiration of the 60-day time period are not questions before the court on these appeals. I find it sufficient to observe that the failure of a statutory actor to perform a statutory duty does not eliminate a person's rights granted by the statute. Even if there is a breach of s. 280(8), that breach does not affect the operation of s. 281(2).

[49] Finally, the appellants claim that the absence of a mediator's report would have the effect of negating the limitation periods in ss. 281.1(1) and 281.1(2)(b)

of the Act. It is necessary to review these limitation periods before discussing this claim.

[50] As a general rule, s. 281.1(1) provides that a court proceeding or arbitration must be commenced within two years after the insurer's refusal to pay the benefit claimed. However, the legislative scheme recognizes that, since the parties may agree to extend the time for mediation, it is possible that mediation will not be completed within two years. Subsection 281.1(2)(b) deals with this eventuality by extending the limitation period where mediation has failed. Subsection 281.1(2)(b) states that, despite the two-year limitation period in s. 281.1(1), a court proceeding or arbitration may be commenced within 90 days after the mediator reports to the parties under s. 280(8). Subsection 280(8), it will be recalled, requires that the mediator provide a report to the parties upon the failure of mediation.

[51] The appellants argue that, if there is no mediator's report, the limitation period of 90 days after the mediator reports to the parties would never be reached and there would be no final limitation period. A claim, they say, could be brought in perpetuity. This problem of a perpetual limitation period, they submit, would be a consequence of deeming mediation to have failed after 60 days even though a mediator's report has not been prepared. They say that to avoid this problem, the legislative scheme should be interpreted so that mediation cannot be said to have failed until a mediator's report is provided to the parties.

[52] I see the problem as more imaginary than real. Without a mediator's report, s. 281.1(2)(b) could not apply and there could be no extension of the limitation period set by s. 281.1(1). Without a mediator's report, s. 281.1(1) would always apply to bar an action commenced two years after the insurer's refusal to pay the benefits claimed.

[53] The problem the appellants imagine could only arise if FSCO were to issue a mediator's report at some distant time in the future without mediation having taken place. It is not known what changes FSCO may make to its practice or rules as a result of this decision. Any future limitations issues are better addressed in the particular circumstances of the cases in which they may arise. No limitations issue arises in these appeals. In any event, I regard as unlikely in the extreme the prospect that FSCO would issue reports of failed mediation long after the expiration of the prescribed time without an agreement by the parties to extend the time limit.

[54] What can be said is that in light of the decision in these appeals, insured persons will either agree to extend the time for mediation beyond the time prescribed or they will not. It is a fair inference that those who refuse to extend the time for mediation do so because they wish to commence court actions or apply for arbitration. If they neglect doing so and commence an action two years after the refusal of benefits, s. 281.1(1) would apply to bar the action. On the other hand, those who agree to extend the time for mediation would eventually

have their cases mediated by FSCO. If mediation subsequently fails, a mediator's report would be issued, and the parties would quite properly be able to rely on s. 281.1(2)(b). In either eventuality, there would be no prospect of a perpetual limitation period.

[55] This submission of the appellants, like the others discussed above, provides no reason to depart from the ordinary meaning of the legislation.

E. CONCLUSION

[56] The legislative scheme for resolving disputes about statutory accident benefits requires that insured persons resort to a mandatory mediation process before commencing a court proceeding or submitting their disputes to arbitration. The Act, the regulations and the DRPC make it clear that this process is intended to be completed within 60 days from the filing of an application for mediation with FSCO, unless the parties agree to an extension of time. The scheme postpones the right of insured persons to commence civil actions against their insurer in order to allow the mediation process to be completed within the time prescribed, but leaves them free to commence actions once that period has expired.

F. DISPOSITION

[57] I would dismiss these appeals, and fix costs in favour of the respondents in the amount of $10,000 against the appellants and in the amount of $6,584

against the Insurance Bureau of Canada, inclusive of disbursements and applicable taxes.

"R.G. Juriansz J.A."
"I agree J.M. Simmons J.A."
"I agree Gloria Epstein J.A."

Released: November 29, 2012