



**CITATION:** 2012 ONSC 905  
Cornie v Security National- Court File No.: C-484-11  
Hurst v Aviva - Court File No.: C-763-11  
Singh v Aviva - Court File No.: C-445-11  
Clarke v State Farm - Court File No.: C-677-11  
**DATE:** 2012-02-08

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Gillian Cornie, Plaintiff Court File No.: C-484-11

AND:

Security National Insurance Company o/a TD Meloche Monnex, Defendant

AND:

**RE:** Karen Hurst, Plaintiff Court File No.: C-763-11

AND:

Aviva Insurance Company, Defendant

And:

**RE:** Devinder Singh, Plaintiff Court File No.: C-445-11

AND:

Aviva Insurance Company, Defendant

AND:

**RE:** Elizabeth Clarke, Plaintiff Court File No.: C-677-11

AND:

State Farm Mutual Automobile Insurance Company, Defendant

**BEFORE:** The Honourable Mt. Justice James W. Sloan

**COUNSEL:** Bruce Kelly and Ian Britto (student at law), for all Plaintiffs  
Duane Burns & Jennifer Matic, for Security National Insurance Company o/a TD  
Meloche Monnex (C-484-11)  
~~Catherine Korte and Matthew Dugas, for Aviva Insurance Company (C-763-11)~~  
Pamela Quesnel & Alfred Cheng, for Aviva Insurance Company (C-445-11)  
Steven Coons, for State Farm Mutual Automobile Insurance Company (C-677-11)

**HEARD:** January 17, 2012

### ENDORSEMENT

[1] All of the plaintiffs, who were victims of motor vehicle accidents, have commenced court actions claiming entitlement to their Statutory Accident Benefits ("SABs").

[2] Cornie was injured in a motor vehicle accident on October 18, 2009, applied for mediation with the Financial Services Commission of Ontario ("FSCO") on February 14, 2011, asked for a mediator's report stating that the mediation failed on April 13, 2011, got a reply from FSCO on May 5, 2011 and issued a Statement of Claim for SABs on May 30, 2011.

[3] Singh was injured in a motor vehicle accident on December 14, 2009, applied for mediation with FSCO on December 15, 2010, asked for a mediator's report stating that the mediation failed on May 11, 2011, got a reply from FSCO on May 12, 2011 and issued a Statement of Claim for SABs on May 18, 2011.

[4] Hurst was injured in a motor vehicle accident on September 28, 2009, applied for mediation with FSCO on May 31, 2011, asked for a mediator's report stating that the mediation failed on August 2, 2011, got a reply from FSCO on August 4, 2011 and issued a Statement of Claim for SABs on August 18, 2011.

[5] Clarke was injured in a motor vehicle accident on September 30, 2008, applied for mediation with FSCO on May 12, 2011 and issued a Statement of Claim on July 21, 2011. The dates of when she asked for a mediator's report stating that the mediation failed and the date on which she got a reply from FSCO do not appear to be in evidence.

[6] In all four cases, 60 or more days after the plaintiffs filed their request for mediation, the plaintiffs' solicitor wrote to the Dispute Resolution Services Mediation Unit of FSCO asking them to send a mediator's report confirming that the mediation had failed.

[7] The plaintiffs' lawyer requested these reports because he opined that mediation was, by definition, failed since it was not held within 60 days. Counsel relied on ss. 19 and 21 of the Dispute Resolution Practice Code ("DRPC") in support of this proposition.

[8] In response to the plaintiffs' request for a failed mediation report their lawyer received a letter from one John Lobo who has the title of "Manager Mediation" of FSCO's Dispute Resolution Services, Mediation Unit.

[9] In answer to the requests of Cornie and Singh, Mr. Lobo responded on May 5 & 12, 2011 respectively, with a form letter as follows: (The lettering of the paragraphs is mine)

- a) Thank you for your letter dated April 13 [May 11 for Singh], 2011 with respect to the above noted mediation file, requesting the Report of Mediator be issued confirming the failure of all issues in dispute, because they have not been mediated within 60 days of the filing of the applications.
- b) We are not prepared to issue the requested Report of Mediator at this time. The Insurance Act establishes a mandatory mediation process, which is aimed at providing the parties with a speedy, economical and accessible mechanism for resolving disputes before they go to the trouble and expense of litigation or arbitration. The Dispute Resolution Services Branch (DRSB) is charged with ensuring that the parties are provided with

an opportunity to settle their disputes through meaningful mediation, which obviously has not yet occurred in this case.

- c) FSCO has published timelines for processing the mediation applications in the Dispute Resolution Practice Code (DRPC). The DRPC provides that an Application for Mediation will be registered and assigned to the mediator within weeks of it being deemed a completed application. It is the responsibility of DRSB to decide whether an application is complete and what particulars if any, are needed for completion. Once assigned to a mediator, mediations are concluded within 60 days or within the time extended by the agreement of the parties.
- d) As you are aware, due to the dramatic increase in application volume in recent years a significant backlog has developed, resulting in longer wait times for assignment.
- e) A number of initiatives have been undertaken to address the situation and we continue to explore further additional options to deal with the backlog.
- f) In the meantime, we would ask for your continued co-operation in scheduling mediations to assist our staff in dealing with these matters as quickly and efficiently as possible. [Emphasis added.]

[10] With respect to Mr. Lobo's letters of May 5 & 12, 2011, he does not take issue with the fact that more than 60 days have passed since the filing of the applications. He also does not state that the applications are deficient in any way.

[11] In answer to the request of Hurst, Mr. Lobo responded on August 4, 2011 with a revised form letter. The revision is to paragraph (d) with all other paragraphs being identical.

[12] Paragraph (d) in the August 4, 2011 letter reads:

As you are aware, due to the dramatic increase in application volume in recent years, there is a significant backlog in both deeming the application to be complete and assignment. Your application is in the queue and is not yet considered to be filed until registered as a complete application. The 60 day time period has not begun to run so the request for a Report of Mediator is premature. [Emphasis added.]

[13] Unfortunately for the plaintiffs the letters do not say anything about when they will have the opportunity to try to get their SABs.

[14] What is evident from both paragraphs (d) is that there has been a backlog for years (plural) and that nothing has improved with respect to the scheduling of mediations between May and August 2011.

[15] In paragraph (d) of the August 4, 2011 letter Mr. Lobo sets forth new nebulous rules for when his department deems an application to be filed and further states that he does not consider the application of Ms. Hurst to be filed yet. Unfortunately he does not support this contention with any statutory authority and the word "registered" does not appear in the definition section of the DRPC. His letter does state however, that mediation reports can be obtained 60 days from the point at which registration is complete.

[16] Pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8, a court action to enforce SABs cannot be commenced unless mediation is sought and mediation has failed.

[17] The defendant insurance companies have collectively brought this motion requesting that the court strike the statements of claim or alternatively stay them.

[18] The plaintiffs' submit they have complied with the law and that the mediation has by statutory definition "failed" since the 60 day time limit set out in the DRPC has expired.

[19] The insurance companies put forth numerous submissions as to why the actions should be dismissed or stayed.

[20] They are as follows:

- a) The 60 day period set out in s. 19 of the DRPC is directory not mandatory.
- b) The *Insurance Act* is paramount to the DRPC and ss. 278 to 283 are a complete code for dispute resolution of the SABs.

- c) If the actual mediation does not take place it undermines the limitation periods set out in ss. 281.1(1) & 281.1(2) (b) of the *Insurance Act*.
- d) The filing of the mediation application does not take place until a mediator is appointed, which starts the 60 day time limit. This means that the 60 day time limit had not run as of the filing of the court actions.
- e) FSCO has exclusive jurisdiction to deal with mediation of the SABs and until there is a failed mediation the court has no jurisdiction.
- f) If this court allows a "deemed mediation/deemed failure of mediation" s. 280(8) of the *Insurance Act* cannot be complied with.
- g) There will be a substantial prejudice to the insurance companies if their right to force mediation is taken away through no fault of their own. They submit there will be SABs Armageddon with thousands of additional court actions being filed.
- h) Because 75% of mediations are successful, cost effective and a substantial benefit to the insurance companies and plaintiffs, they must be held.

#### Dispute Resolution Practice Code (DRPC)

[21] The following sections of the DRPC were referred to:

1.1 These rules will be broadly interpreted to produce the most just, quickest and least expensive resolution of the dispute.

2.2 These guidelines shall be considered when interpreting the Statutory Accident Benefits Schedule.

#### 4.1 DEFINITIONS

"Commission" means the Financial Services Commission of Ontario.

"Dispute Resolution Group" means the Dispute Resolution Group of the Commission.

"file" means to file with the Dispute Resolution Group.

19.1 Subject to Rule 19.2, mediation must be concluded within 60 days of the filing of an application for mediation, completed in accordance with the requirements of Rule 12.

21.1(b) Mediation has failed on an issue when: (b) the time limit for mediation, including any extension, has expired and no settlement has been reached.  
[Emphasis added.]

[22] In the preamble to the DRPC, FSCO states that it is responsible for regulating the insurance sector, providing regulatory and direct services that protect the public interest and enhance public confidence in the regulated sectors. The DRPC is said to “create rules for timely, cost-effective and fair dispute resolution services provided through FSCO’S Dispute Resolution Group” and said to help the parties move through FSCO’s dispute resolution process. [Emphasis added.]

[23] The preamble goes on to state that the mediation unit is fully or partially successful in over 75% of mediations.

**Is the 60 Day Period set out in s. 19 of the DRPC Directory or Mandatory?**

[24] The Ninth Edition of Black's Law Dictionary defines a “directory requirement” as a statutory or contractual instruction to act in a way that is advisable, but not absolutely essential – in contrast to a mandatory requirement. A directory requirement is frequently introduced by the word should or, less frequently, shall (which is more typically a mandatory word).

[25] The full import of s. 19 of the DRPC is that mediation must be concluded within 60 days. I cannot interpret the phrase “must be concluded” as directory. The plain English meaning of the phrase “must be concluded” in s. 19 makes it mandatory.

[26] Mr. Lobo, Manager of the Mediation Unit of FSCO, notes in all his letters to the plaintiffs’ solicitor that he considers there to be a mandatory 60 day period for the mediation to



be completed. In letters addressed to Cornie and Singh on May 5, 2011 and May 12, 2011, Mr.

Lobo writes that:

“[o]nce assigned to a mediator, mediations are concluded within 60 days or within the time extended by agreement of the parties”.

In the letter to Hurst’s counsel on Aug 4, 2011, Mr. Lobo alters his position somewhat by stating that Hurst’s:

“application is in the queue and is not yet registered as a complete application. The 60 day time period had not begun to run and so the request for a Report of Mediator is premature.”

[27] Section 280(4) of the *Insurance Act* states “The mediator shall inquire into the issues in dispute, 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.” [Emphasis added.]

[28] Regulation R.R.O. 1990, Reg. 664, s. 10 reads “A mediator is required, under section 280 (4) of the Act, to attempt to effect a settlement of the dispute within sixty days after the date on which the application for the appointment of mediator is filed.” [Emphasis added.]

[29] Section 280 (7) of the *Insurance Act* states “Mediation has failed when the mediator has given notice that in his or her opinion mediation will fail, or when the prescribed or agreed upon time for mediation has expired and no settlement has been reached. [Emphasis added.]

[30] Section 280 (7) of the *Insurance Act* talks about the prescribed time. The only time prescribed either by regulation 664 or the DRPC is 60 days. Since 60 days is the only time referred to in any legislation that has been submitted to me, I conclude that the prescribed time in section 280 (7) must be 60 days.

[31] The insurance companies rely on the decision of *Alberta Teachers' Assn. v. Alberta (Information and Privacy Commissioner)*, [2010] A.J. 51 (Alba. C.A.). In that case the complainants alleged that the defendants breached their personal privacy in October and December of 2005.

[32] The adjudicator issued a decision 17.5 months after the request for an inquiry, and the Office of the Information and Privacy Commissioner sought judicial review.

[33] The Judge hearing the Judicial Review Application found noncompliance with the mandatory 90 day time rule for completing the inquiry, causing a jurisdictional loss or invalidating the proceeding. The Commissioner appealed.

[34] It was evident before the Alberta Court of Appeal that the complainants would lose their rights unless the decision of the Judicial Review Judge was overturned.

[35] The statute in question stated that an inquiry under the *Personal Information Protection Act*, SA 2003 ("PIPA") "must be completed within 90 days..." unless the Commissioner notifies the parties that "the commissioner is extending that period."

[36] Notwithstanding that the words "must be completed" are in the above paragraph, the Court of Appeal stated at para. 22:

"... A mandatory time limit in a statute has been breached. What consequences did the legislature intend to follow from this? Crucial for present purposes is whether the legislature should be found to have intended that a terminating consequence would flow automatically and inexorably from the breach of the public duty specified in section 50(5) of PIPA. The statute's intent and the legislatures larger objectives should not be defeated willy nilly. Moreover, automatic and inexorable consequences will frequently affect parties who have no influence over the process (as here)." [Emphasis added.]

[37] At para. 34 the Court states "the legislator intended a firm 90 day time limitation subject to a Commissioner discretion to extend s. 50(5) of PIPA. In light of its enactment of the possibility of discretionary adjustment by the Commissioner, it is evident that the legislature was aware that some flexibility was needed..." [Emphasis added.]

[38] Unlike the *Alberta Teachers' Assn.* case, no such discretion exists in the Ontario legislation, no rights are being lost and there is no breach of a public duty.

**The Insurance Act is Paramount to the DRPC and ss. 278 to 283 are a Complete Code for Dispute Resolution of the SABs.**

[39] Although ss. 278 to 283 of the *Insurance Act* deal with dispute resolution, they reference regulations (including, the DRPC), which merit consideration.

[40] In addition to the DRPC, R.R.O. 1990, Reg. 664, s. 10 reads:

"A mediator is required, under section 280 (4) of the Act, to attempt to effect a settlement of the dispute within sixty days after the date on which the application for the appointment of mediator is filed." [Emphasis added.]

[41] It is worth noting that if mediation is unsuccessful, which is said to occur in at least 25% of cases, either party may take the case to court. Parties are not forced resolve their differences through mediation. It is simply a process all parties must attempt, subject to the rules and time limits which are in place.

**If the Actual Mediation Does Not Take Place it Undermines the Limitation Periods Set Out in Sections 281.1(1) & 281.1(2)(b) of the Insurance Act.**

[42] This does not appear to be the case. The section simply allows for the extension of the limitation period beyond two years as set out in section 281.1(1) in circumstances described in section 281.1(2)(b).

[43] As Mr. Kelly submitted it simply requires the plaintiff's lawyer to track two potentially different limitation periods.

[44] ~~The defendants argued that in a catastrophic case under section 281.1(2)(b), if there is no mediation but only a deemed failure then the limitation period does not expire and may run indefinitely.~~

[45] This argument does not seem to take into account the two year limitation period set out in section 281.1 and the fact that the insurance company can request the mediation. In the unlikely event that a mediator would refuse to give a mediation report where one is required for the purposes of s. 281.1(2)(b), the insurance company may need to proceed by way of a mandamus or other application.

**The Filing of the Mediation Application Does Not Take Place Until a Mediator is Appointed, Which Commences the 60 Day Time Limit. This Means that the 60 Day Time Limit Had Not Run as of the Filing of the Court Actions**

[46] This submission must come from reading Mr. Lobo's letters of May 5 or 12, 2011. Although Mr. Lobo states this as fact in his letters, he does not provide any support for this contention. None of the insurance companies' counsel submitted evidence other than Mr. Lobo's letter as to why this would be so.

[47] Section 280 (2) of the *Insurance Act* states "The party seeking mediation shall file an application for the appointment of a mediator with the commission."

[48] Section 280 (3) of the *Insurance Act* states "The director shall ensure that the mediator is appointed promptly." [Emphasis added.]

[49] The definition section of the DRPC makes it clear that Commission means FSCO. Sections 6 and 7 of the DRPC state that the application must be filed with the Dispute Resolution Group of FSCO and service is effective 5 days after sending the application by mail with all other means of service such as fax or email being effective in less than 5 day.

[50] There is no allegation that the applications by any of the plaintiffs were not filed and served properly or that they were deficient in any way.

[51] Rule 19.1 the DRPC makes it clear that mediation must concluded within 60 days of the filing of an application for mediation.

[52] Nowhere in the DRPC does it state that the 60 days referred to in Rule 19.1 does not commence to run until a mediator is appointed.

[53] To accede to this submission could also mean that the 60 day time limit in these cases may not have commenced running as of the date of this judgment.

**FSCO has Exclusive Jurisdiction to Deal With Mediation With Respect to the SABs and Until There is a Failed Mediation the Court has No Jurisdiction.**

[54] The insurance companies submit that until there is a failed mediation the courts have no jurisdiction. I agree.

[55] The insurance companies submit that FSCO has refused to declare the mediation failed and refused to produce a report to that effect. I agree, but the question to be answered is whether or not the plaintiffs need such a report from FSCO under circumstances where they claim that the mediation has failed by statutory definition.

[56] The insurance companies submit that the plaintiffs must use whatever appeal procedures are available to them under the DRPC or proceed by way of judicial review with leave.

[57] Other than the insurance companies' submission, no evidence was presented to show that the plaintiff must follow some type of appeal procedure set out in the DRPC if there is failed mediation or if FSCO refuses to issue a failed mediation report.

[58] In fact, the *Insurance Act* is clear, that 60 days after an accident victim has filed an application for mediation s/he has more than one choice, and that one of those choices is to commence a court action.

[59] To suggest that an individual must go the expensive route of Judicial Review is ludicrous. This is consumer legislation and SABs issues often relate to small amounts of money and medical/rehabilitative assistance which are needed on a timely basis.

**If This Court Allows a "deemed mediation/deemed failure of mediation,"  
s. 280(8) of the *Insurance Act* Cannot be Complied With.**

[60] I disagree. Section 280(8) of the *Insurance Act* could still be complied with, despite the allowance for a "deemed mediation/deemed failure of mediation" by the mediator. There does not appear to be any reason why a mediator could not issue a report at the request of either of the parties simply stating that the mediation failed because the prescribed time period in which the mediation was to be held has expired.

[61] Since both parties will have filed an application and response, the mediator could set out (if necessary) the last offer of the insurance company, a description of the issues, the materials

that should be produced, if any, and a note stating whether s/he felt the issues should be referred for an evaluation under s. 280.1.

[62] ~~Mr. Kelly submits that parties can and do consent to get a failed mediation report. This submission went uncontested, so it appears that FSCO is prepared to issue a failed mediation report without a mediation actually taking place.~~

**There Will be a Substantial Prejudice to the Insurance Companies if Their Right to Force Mediation is Taken Away Through No Fault of Their Own.**

[63] There may be some prejudice to the insurance companies. There may also be some prejudice to accident victims if the insurance companies decide to employ this approach themselves.

[64] It must be remembered that the insurance companies have had since the date of the accidents to discuss and negotiate a settlement with each plaintiff. They are certainly not precluded from asking the plaintiff to continue with negotiations.

[65] Given the differences in resources between the plaintiffs and the Insurance Companies the prejudice to the plaintiffs if they can't access their accident benefits in a timely manner would far outweigh any prejudice to the insurance companies not being able to force the plaintiffs into mediation after 60 days.

**Because 75% of Mediations Are Successful, Cost Effective and a Substantial Benefit to the Insurance Companies and Plaintiffs They Must Be Held.**

[66] This submission misses the point. It is not that the plaintiffs don't want mediation but that they want it in a timely manner so they can get their SABs. If they cannot get mediation in

accordance with the published rules they propose to go to court or at least serve a Statement of Claim in an effort to get the SABs they feel they are entitled to.

### OVERVIEW

[67] It currently appears that FSCO's Dispute Resolution Services' Mediation Unit is functioning without timelines and has been doing so for years.

[68] The SABs are for the benefit of injured motor vehicle victims and are often required in a timely fashion.

[69] It makes perfect sense that the legislation and the DRPC refer to a 60 day time limit to deal with such disputes.

[70] In contrast to the injured victims, insurance companies are not in a vulnerable position. While there is nothing to suggest that these insurance companies are in any way responsible for the delay in mediation, there is no evidence that the delay in mediation is of any real consequence to them.

[71] Unfortunately Mr. Lobo's letters confirm that the problem of holding timely mediation sessions is one that has existed for years. While I may sympathise with his dilemma, he is unable in any of his correspondence to suggest when mediation will take place.

[72] The insurance companies take the position that the accident victims must simply wait. To entertain this argument could mean that an accident victim might have to wait 100, 300 or 500 days for mediation. I find that submission preposterous.

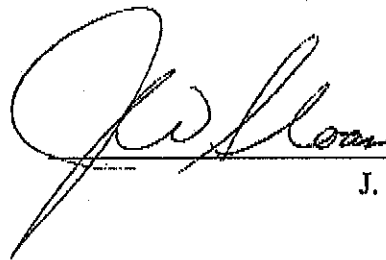


[73] No one wants to go to court for any sum under \$10,000 if mediation can resolve the issue, but accident victims should not have to remain in perpetual limbo.

[74] While some accident victims may choose the court route others will not and FSCO can continue try to get sufficient resources/mediators to comply with the 60 day period. Alternately, FSCO could seek a change in the 60 day time period and/or ask for some legislative discretion to extend the 60 day period in appropriate circumstances.

[75] For the above reasons I dismiss all four motions with costs.

[76] If the parties are unable to agree on costs Mr. Kelly shall forward his brief submissions on costs to me by February 22, 2012 and the moving parties shall forward their united response to me by March 2, 2012 and Mr Kelly shall forward his reply, if any, to me by March 9, 2012. The moving parties as set out above shall present one combined brief.



J. W. Sloan J.

**Date:** February 8, 2012