

*Indexed as:*

**Amorini v. Select Coffee Roasters Inc.**

**Between**  
**Alfredo Amorini and Clara Amorini, plaintiffs (respondents),**  
**and**  
**Select Coffee Roasters Inc., Tom Harris and The Guarantee**  
**Company of North America, defendants (appellants)**

[2001] O.J. No. 581

143 O.A.C. 363

25 C.C.L.I. (3d) 236

[2001] I.L.R. I-3929

103 A.C.W.S. (3d) 396

Court File No. 603/00

Ontario Superior Court of Justice  
Divisional Court - Toronto, Ontario

**Southey, Jennings and Gillese JJ.**

Heard: January 29, 2001.  
Judgment: February 15, 2001.

(16 paras.)

*Insurance -- Payment of insurance proceeds -- Actions, relief against forfeiture -- When available -- Automobile insurance -- Action by insured against insurer, defences -- No action clause, effect of -- Statutory limitation period.*

Appeal by the defendant insurer, Guarantee Company of North America, from the dismissal of its motion to dismiss the Amorinis' action against it. The Amorinis were injured in a motor vehicle accident with the defendant, Harris. The insurer paid income replacement benefits, medical and rehabilitation benefits, and home maintenance expenses. The Amorinis were advised in 1998 that their benefits were discontinued. In 1999, the Amorinis issued a statement of claim seeking a declaration of entitlement to accident benefits. The insurer took the position that no action could proceed until the Amorinis had taken steps to mediate the matters in dispute. The Amorinis failed to take such steps, and when two years had passed after the denial of benefits, the insurer moved to dismiss the action on the basis that it was statute barred. The motions judge found that the insurer had suffered no prejudice.

HELD: Appeal allowed. There was a statutory precondition that mediation be undertaken within a two-year period, which the Amorinis had failed to do. Therefore, there was no jurisdiction to hear the Amorinis' claim against the insurer. Failure to seek mediation was non-compliance rather than imperfect compliance, so relief against forfeiture was not available.

**Statutes, Regulations and Rules Cited:**

Insurance Act, ss. 129, 281(1), 281(2), 281(5).

Statutory Accident Benefits Schedule, s. 51(1).

**Counsel:**

Douglas A. Wallace and Joanne Blacklock, for the appellant, Guarantee Company.  
Evan Tingley, for the plaintiffs (respondents).

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The following judgment was delivered by

**1** THE COURT:-- This is an appeal by the Guarantee Company of North America (the "insurer") from an order of Backhouse J., dated August 15 last, dismissing the insurer's motion to dismiss the action because of the failure of the plaintiffs to seek mediation of their claim. The learned Judge pointed out that there was no evidence of prejudice to the insurer, and held that s. 281(2) of the Insurance Act, requiring mediation, did "not create a statutory immunity but rather regulates the sequence of the various steps taken". She stayed the action pending mediation and ordered that mediation proceed expeditiously.

**Facts**

**2** The plaintiffs were in an accident on September 6, 1997, when the vehicle they were driving was rear ended by a vehicle driven by the defendant, Tom Harris. The insurer paid the plaintiffs income replacement benefits, medical and rehabilitation benefits and home maintenance expenses for a period of time. On December 12, 1997, the insurer advised the plaintiffs that it refused to make further home maintenance or housekeeping payments. On December 30, 1997, Clara Amorini was advised that the insurer refused to pay further income replacement benefits. On February 27, 1998, Alfredo Amorini was similarly advised.

**3** The Amorinis disputed the stoppage of weekly benefits and requested an assessment through a Disability Designated Assessment Centre ("DAC"). The DAC concluded that neither of the Amorinis suffered a substantial inability to perform the tasks of their pre-accident employment. The insurer advised Clara Amorini and Alfredo Amorini on March 6, 1998, and May 13, 1998, respectively, of its refusal to pay further benefits.

**4** On September 3, 1999, the plaintiffs issued a Statement of Claim seeking a declaration of entitlement to accident benefits.

**5** On September 16, 1999, counsel for the insurer advised counsel for the plaintiffs of their position with respect to the failure to take steps to mediate the matters in dispute.

**6** The plaintiffs failed to take any steps to have their claims to benefits mediated within two years of the insurer's refusal to pay benefits.

**Reasoning and Conclusions**

**7** Subsections 281(1), (2) and (5) of the Insurance Act make it clear that the plaintiffs had the right to commence legal proceedings within two years of the insurer's refusal to pay benefits. However, mediation is

a statutory precondition to the plaintiffs bringing such Court proceedings. Those subsections read:

- 281.(1) Subject to subsection (2),
- (a) the insured person may bring a proceeding in a court of competent jurisdiction;
  - (b) the insured person may refer the issues in dispute to an arbitrator under section 282; or
  - (c) the insurer and the insured person may agree to submit any issue in dispute to any person for arbitration in accordance with the Arbitration Act, 1991.

- (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 a evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties. 1990, c. 2, s. 65, part; 1996, c. 21, s. 37, part.

...

- (5) A step authorized by subsection (1) must be taken within two years after the insurer's refusal to pay the benefit claimed or within such longer period as may be provided in the Statutory Accident Benefits Schedule. 1990, c. 2, s. 65, part; 1993, c. 10, s. 1(1); 1996, c. 21, s. 37, part. (Emphasis added)

**8** It is well settled that the Courts have no jurisdiction to hear a plaintiff's claims until mediation takes place. (*Christakos v. Dominion of Canada General Insurance*, [1997] O.J. No. 1279 (Ont. Gen. Div.) 4; *Whitaker (Litigation Guardian of) v. Dominion of Canada General Insurance Co.*, [1998] O.J. No. 2981 (Ont. Gen. Div.) 2; *Mihichuk v. Allstate Insurance Company of Canada* (1998), 38 O.R. (3d) 762).

**9** In our view, a plain reading of s. 281(5), *supra*, and s. 51(1) of the Statutory Accidents Benefits Schedule below, leads to the conclusion that the plaintiffs were required to commence mediation proceedings with respect to their benefits dispute within two years of the insurer's refusal to pay benefits.

- s. 51(1) - A mediation proceeding or evaluation under section 280 or 280.1 of the Insurance Act or a court proceeding or arbitration under clause 281(1)(a) of (b) of the Act in respect of a benefit under this Regulation shall be commenced within two years after the insurer's refusal to pay the amount claimed. (Emphasis added)

**10** It is common ground that more than two years have elapsed since the insurer refused to pay benefits and that the plaintiffs have taken no steps to commence mediation proceedings.

**11** In the circumstances of this case, the statutory precondition that mediation be undertaken within a two year period can never be met because the statutory limitation period has expired. Thus, the Court has no jurisdiction to hear the plaintiffs' claims as against the insurer and the claims as against it should be dismissed.

**12** Counsel for the plaintiffs relied on the decision of Wilkins J. in *Hussaini v. State Farm Mutual Automobile Insurance Co.*, [1999] O.J. No. 1205, in which it was held that an action to recover benefits was not statute barred because it was brought before mediation had failed. Wilkins J., like Backhouse J. in the case at bar, held that s. 281(2) of the Insurance Act sought only to control the procedural timing of the bringing of the proceeding, and did not impose a time limit for the issuance of original process.

**13** The *Hussaini* case, in our judgment, is distinguishable from the case at bar, because the plaintiffs in

that case had commenced the mediation process within 2 years after the cessation of benefit payments, although the mediation process had not been completed before the action was commenced. In the case at bar, the action had been commenced within 2 years of the refusal of benefits, but no steps for mediation had been taken before the expiration of the 2 year period specified in s. 51(1) of the Statutory Accidents Benefits Schedule.

#### Relief Against Forfeiture

**14** Section 129 of the Insurance Act provides the Court with the power to grant relief from forfeiture where there has been "imperfect compliance with a statutory condition". The purpose of s. 129 is to allow relief and prevent hardship where there has been imperfect compliance. The issuance of the Statement of Claim does not amount to incomplete compliance as the statutory precondition calls for mediation. The failure to take any steps whatsoever to have the matter mediated is, in our view, non-compliance rather than imperfect compliance with a statutory condition. Thus, s. 129 cannot be invoked by the plaintiffs.

#### Orders

**15** The appeal is allowed. The plaintiffs' action as against the insurer is dismissed.

**16** Costs are payable by the plaintiffs to the insurer for this appeal and the leave to appeal motion before Justice Ground, fixed in the amount of \$2,000.

SOUTHEY J.  
JENNINGS J.  
GILLESE J.

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