CITATION: Aviva Insurance Company of Canada v. Frank McKeown, 2016 ONSC 6017
COURT FILE NO.: CV-16-00548464-0000
DATE: 20160926

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
AVIVA INSURANCE COMPANY OF CANADA	)	Eric K. Grossman, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
FRAN McKEOWN, ROLAND SPENCER, DOLLY SINGROY, RENELYN AGALOOS, NAOISE HEFFERON and JOANNE HACKER	)	Alisa Mazo, for the Respondents
	)	
Respondents	)	
	)	
	)	**HEARD:** May 27, 2016, followed by written submissions

REASONS FOR JUDGMENT

JUSTICE W. MATHESON

[1] This application has been brought as a test case on the issue of "whether a justification is required" to compel a person claiming statutory accident benefits to attend at an examination under oath if the insurer requests one pursuant to subsection 33(2) of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("SABS") to the *Insurance Act*, R.S.O. 1990, C. I.8. Aviva also seeks an order compelling these respondents to attend for examinations under oath.

[2] The applicant has named six different SABS claimants as respondents, arising from five different motor vehicle accidents. The accidents are not related to each other. Aviva did not have the same external counsel on all of these claims. However, all of the claimants were represented by the same law firm in regard to their statutory accident benefits claims. That law firm persistently challenged Aviva's approach to requests for examinations under oath. That law firm also represents the respondents in this application.

[3] At the core of this application is the requirement in s. 33(4) of the SABS that the insurer give the insured advance notice, including "a reason or reasons" for the examination.

[4] Aviva takes the position that the above requirement to give a reason is a "mere matter of form" and is satisfied by general references to the purpose and/or scope of the examination, such as the insurer simply indicating that the examination is requested to evaluate the insured's entitlement to statutory accident benefits. I disagree. The insurer must give its reason or reasons for pursuing that particular examination under oath. The insurer must therefore, in good faith, have a reason or reasons to require such an examination in the context of what is intended to be an efficient and streamlined no fault process. The insurer is obligated to disclose that reason or those reasons before it can proceed with an examination. It did not fulfill this requirement in regard to any of the respondents.

Background

[5] Aviva has provided a lawyer's affidavit giving some of the history regarding each respondent's claims for statutory accident benefits. The respondents have put forward affidavits from two counsel, each of whom has provided additional evidence and correspondence regarding the handling of the respondents' SABS claims.

Evidence regarding why examination requested

[6] The only evidence put forward on this application regarding why an examination under oath (also called an EUO) was originally sought regarding any of the respondents is the following statement from the Aviva affidavit:

> In the course of adjusting the claim, the Applicant determined that it required an EOU in order to investigate its potential ongoing exposure for accident benefits. [Emphasis added.]

[7] The above statement does not disclose why Aviva required an examination under oath. The affidavit says a decision was made, but the affiant lawyer does not say why.

[8] This statement appeared in Aviva's affidavit evidence regarding four of the six respondents, specifically Joanne Hacker, Dolly Singroy, Renelyn Agaloos and Naoise Hefferon. Nothing was said in this regard for the respondents Fran McKeown or Roland Spencer.

[9] The bulk of the evidence advanced on the application is correspondence between the parties recording the events leading up to each of the respondents not attending for an EUO, summarized as follows.

Joanne Hacker

[10] The respondent Joanne Hacker applied for statutory accident benefits from her insurer, Aviva, arising from a motor vehicle accident in June 2015. About a month after the application was made, an Aviva Claims Adjuster wrote directly to Ms. Hacker, as follows:

> Dear Joanne,

> We are in receipt of your Accidents Benefits Application, please be advised that we require you to attend an Examination under Oath pursuant to Section 33 of the Statutory Accident Benefits Schedule, to give testimony regarding all benefits being claimed or you intend to claim.
>
> Our counsel will be in contact with you to secure a date for the Examination Under Oath in the near future.
>
> Please be advised that Aviva is not liable to pay Accident Benefits in respect to any period during which you fail to comply with s. 33 of the Schedule unless you provide a reasonable explanation for the failure to comply at which time any benefits withheld may become payable.
>
> Should you require a clarification or have any questions, we encourage you to contact our office. [Emphasis added.]

[11] Obviously, this letter did not say why Aviva was requesting the examination under oath. It did mention the intended scope of the examination: "to give testimony regarding all benefits being claimed or you intend to claim." Scope is addressed in a different part of s. 33.

[12] Counsel to Aviva wrote to Ms. Hacker and her counsel by letter dated September 8, 2015. This letter is apparently a form letter. After referring to possible property damage claims, it stated as follows:

> If this matter is one where you have sustained injuries as a result of the aforementioned automobile accident, the examination will also be in regard to the nature of your injuries, and your entitlement to accident benefits under the *Statutory Accidents Benefits Schedule – Effective September 1, 2010*.

[13] Again, this letter did not say why an EUO was being pursued. It did mention the intended scope of the examination.

[14] Counsel for Aviva followed up and sent a letter dated September 30, 2015, enclosing a Notice of Examination. The cover letter indicated that counsel was prepared to accommodate reasonable rescheduling requests, and referred to the consequences of failing to attend, but gave no reason for the examination.

[15] The attached Notice of Examination referred only to the purpose of the examination, as follows: "to evaluate your potential entitlement to Statutory Accident Benefits including possible entitlement to Parts II, III, IV, V, and VI of the *Statutory Accident Benefit Schedule*." The *pro forma* nature of the Notice of Examination is shown by its inclusion of Part V – Death & Funeral Benefits – in relation to the claim of the living Ms. Hacker.

[16] By reply letter dated October 14, 2015, counsel to Ms. Hacker indicated that before any examination under oath was arranged, her client required a letter outlining "precisely what benefits the EUO pertains to, and why an EUO is needed to permit proper adjustment of the benefit in question." She indicated that she did not as a matter of course permit examinations under oath unless "compelling reasons are provided as to why an EUO is required to adjust a claim for a specific benefit."

[17] By reply letter the next day, counsel to Aviva referred to the purpose of the examination under oath in terms similar to the Notice of Examination but referencing different Parts of the SABS: "The EUO will be conducted to determine entitlement to benefits pursuant to Part II, III, IV, VIII, IX and X of the *Schedule*."

[18] By reply letter dated October 19, 2015, Ms. Hacker's counsel said the following on the subject of reasons:

> Section [33(4)] requires that the insurer shall give the person reasonable advance notice of the reasons for the examination. No reasons for the examination have been given. … [Emphasis added.]

[19] By reply letter dated October 20, 2015, Aviva's counsel recounted aspects of the history of the dealings between the parties and Aviva's position on certain issues, but made no response to this request for a reason.

[20] A letter was also sent directly from Aviva, dated October 30, 2016, referring to the need for an EUO, without providing a reason why, and emphasizing the consequences of failing to attend.

Renelyn Agaloos

[21] The respondent Renelyn Agaloos applied for accident benefits from her insurer, Aviva, arising from a motor vehicle accident in April 2015.

[22] Email correspondence suggests that Ms. Agaloos' counsel was originally told that the request for an examination under oath was made to get a general statement regarding the accident. Counsel questioned why it would be necessary if that was the reason. However, it was not advanced as the reason for the EUO when the issue was raised in correspondence.

[23] By letter dated September 24, 2015, counsel to Aviva wrote to Ms. Agaloos' counsel indicating that he had been retained to conduct an examination under oath, and inviting a discussion about scheduling. Aviva's counsel indicated that a formal notice would be provided once the examination had scheduled.

[24] Aviva's counsel followed up by email on November 26, 2015. By reply email on the same day, Ms. Agaloos' counsel wrote asking: "[P]lease provide me with the reason for the EUO."

[25] In response, Aviva's counsel indicated as follows: "The EUO is with respect to section 33 noncompliance and her SABS entitlement."

[26] As confirmed in later correspondence, in November 2015 Ms. Agaloos' counsel was then informed that Aviva was not proceeding with the examination.

[27] By letter dated January 7, 2016, Aviva's counsel wrote to move forward with the examination under oath. That letter indicated as follows, in relevant part:

> An examination under oath is required in order to assist Aviva Insurance Company of Canada, your insurer, in determining entitlement to specified benefits, medical and rehabilitation benefits, attendant care benefits, housekeeping and home maintenance expenses and costs of examinations arising from the loss of April 25, 2015. The scope of the examination will be limited to matters that are relevant to your entitlement to said benefits."

[28] By reply letter dated January 12, 2016, Ms. Agaloos' counsel wrote recounting various attempts to discover the reason for the requested examination and her understanding that the request for an EUO had been dropped.

[29] By letter dated January 13, 2016, Aviva's counsel referred to and relied upon the email of November 26, 2015 for notice of the reasons. That email had said that the examination under oath was "with respect to section 33 noncompliance and her SABS entitlement."

[30] By email exchange on January 22, 2016, the Claims Advisor at Aviva confirmed that requested documentation had already been received. Ms. Agaloos' counsel therefore replied that since she had complied with the s. 33 information requests, the EUO should be canceled. In response, the Aviva Claims Adjuster wrote that the two things were separate:

> The section 33 request and the EUO are separate
>
> The EUO date remains. [Emphasis added.]

[31] By letter dated January 22, 2016, Ms. Agaloos' counsel wrote to Aviva's counsel that since there was no s. 33 noncompliance, that could not be the reason. Aviva's counsel disagreed.

Dolly Singroy

[32] The respondent Dolly Singroy applied for accident benefits from her insurer, Aviva, arising from a motor vehicle accident in April 2015.

[33] Counsel to Aviva wrote to Ms. Singroy's counsel by letter dated November 11, 2015, indicating as follows:

> Please be advised that I have instructions to arrange an Examination Under Oath for the purpose of obtaining clarification concerning her Income Replacement Benefits, and her injuries.

[34] Counsel's letter went on to propose dates and provide contact information to arrange for the examination. Nothing was said about why the examination was being requested.

[35] By reply letter dated November 12, 2015, a number of objections were made to this request although the absence of a reason was not specifically noted.

[36] In oral argument, Aviva's counsel fairly conceded that sufficient notice of an EUO under s. 33(4) had not been given to Ms. Singroy. An EUO has not been pursued since the above correspondence.

Naoise Hefferon

[37] The respondent Naoise Hefferon applied for accident benefits from her insurer, Aviva, arising from a motor vehicle accident in July 2013.

[38] Counsel exchanged correspondence and disagreed on the question of whether an examination under oath was necessary or mandatory in the circumstances. There is no reference to a reason being provided for the examination.

[39] Ultimately, Aviva's counsel served a Notice of Examination by letter dated February 12, 2016. The cover letter referred to the scope of the examination, as follows:

> You have applied for accident benefits as a result of the aforementioned automobile accident, and the examination will be in regards to the nature of your injuries, and your entitlement accident benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010.*

[40] The Notice of Examination referred to the purpose of the examination as follows:

> …to evaluate your potential entitlement to Statutory Accident Benefits including possible entitlement to Parts II, III, IV, V, and VI of the *Statutory Accident Benefits Schedule.*

[41] Again, the *pro forma* nature of the Notice of Examination is shown by the inclusion of Part V – Death & Funeral Benefits – in relation to the claim of the living Ms. Hefferon. These materials did not say why an EUO was being requested.

Fran McKeown and Roland Spencer

[42] The respondents Fran McKeown and Roland Spencer applied for accident benefits arising from a motor vehicle accident in January 2015 in which they were driver and passenger in the same car, insured by Aviva.

[43] By letter dated September 15, 2015, an Aviva adjuster wrote directly to these claimants, using the same form as the letter Aviva sent to Ms. Hacker, quoted above. The letter did not say why an EUO was being pursued. By reply on the same day, counsel to these claimants asked for the reason for the EUO, among other requests.

[44] Aviva's counsel's assistant sought to arrange an examination under oath. After making the initial contact, the assistant told Aviva's counsel that these claimants "refused to cooperate in setting a date unless reasons for the EUO were provided."

[45] By letter dated September 29, 2015, Aviva's counsel wrote to counsel to these claimants indicating the following in relevant part:

> Further to our telephone conversation of today, please be advised that we would like to schedule an EUO re To evaluate their entitlement to all benefits claimed, particularly medical and rehabilitation benefits.

[46] There then ensued a long course of correspondence between counsel in which a number of different issues were raised.

[47] By letter dated November 4, 2015, Aviva's counsel stated the purpose of the examinations as follows:

> The purpose of each examination will be to evaluate each of your clients' potential entitlement to accident benefits, particularly regarding their respective pre-accident health histories, post accident recovery, and their entitlement to coverage outside of the Minor Injury Guideline.

[48] That letter enclosed a Notice of Examination which described the purpose of the examination in different terms, as follows:

> …to evaluate your potential entitlement to accident benefits, and specifically your application for Non-Earner Benefits, Attendant Care Benefits, Medical Expenses, and the Cost of the

> Examinations including In-Home Assessment and Chronic Pain Assessment.

[49] On November 11, these claimants' counsel proposed alternatives to an examination under oath. By letter dated November 20, 2015, Aviva's counsel followed up and enclosed another copy of the Notice of Examination. By reply email the same day, these claimants' counsel did not agree with the request to schedule examinations under oath for a number of reasons, including the failure to provide a reason for the examinations.

Other issues

[50] Aviva has raised a number of other issues regarding the various positions taken by respondents' counsel. These other issues arise in only a few of the claims. Respondents' counsel has sometimes taken the position that all other rights to obtain information under s. 33 should be exhausted before an insurer can seek an examination under oath. Similarly, counsel has taken the position that certain documentation should be obtained before an examination.

[51] Respondents' counsel has also taken the position that something short of an examination under oath should satisfy the insurer and remove the need for an examination. For example, counsel offered statutory declarations as an alternative to an EUO in a few of the claims.

[52] In regard to the McKeown/Spencer claimants, their counsel also indicated that at the relevant time they were not well enough to submit to an EUO. They were each about seventy years old when the accident took place. This relates to a different subsection of s. 33.

[53] The evidence regarding certain of the respondents also showed a failure to meet other aspects of the s. 33(4) notice requirements, apart from the requirement to provide a reason.

[54] As a result of my decision below, it is not necessary to address these issues. They do not determine the outcome of this application.

Analysis

[55] The issue on this application is one of statutory interpretation, specifically the interpretation of the requirement to give a reason under s. 33(4)3 as a prerequisite to an EUO.

[56] Aviva's position is that it has the right to an EUO. Aviva submits that the notice requirement is merely a matter of form, and is satisfied by general references to the purpose and/or scope of the examinations, such as the insurer simply indicating that the examination is requested to evaluate the insured's entitlement to statutory accident benefits.

[57] The respondents disagree. They submit that s. 33 clearly requires a reason or reasons, and requires that the reason or reasons be disclosed, which was not done in any of the respondents' cases. They submit that it must be the actual reason for the examination, not a general reference to the purpose or scope of the examination.

Statutory interpretation of the SABS

[58] The proper approach to statutory interpretation is well-accepted. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature: *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.), at p. 134, 67 O.A.C. 135, at para. 9; *Rizzo & Rizzo Shoes Ltd. (Re.)*, [1998] 1 S.C.R. 27, at para. 21.

[59] In keeping with these principles, it is useful to briefly review where s. 33 of the Statutory Accident Benefits Schedule fits in the statutory regime.

[60] The statutory accident benefits claimed by the respondents are no fault benefits that form the foundation of Ontario's current no fault accident benefit regime. "No fault insurance is predicated upon the desire to provide accident benefits to all victims, regardless of fault, efficiently and expeditiously": *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 22, quoting Prof. Lewis Klar, "No Fault Insurance for Auto Accident Victims: A Background Paper", Canadian Bar Association 1991.

[61] Ontario's movement away from a fault-based system began in 1990. As summarized by the Court of Appeal in *Meyer v. Bright*, at para. 3, prior to 1990, Ontario's automobile accident compensation system consisted essentially of a third-party liability system in which there was an unrestricted right to sue in tort. Limited no fault benefits were payable on a first-party basis. However, in 1990, the Ontario legislature enacted the Ontario Motorist Protection Plan, which substantially limited tort claims in favour of a broadly based no fault regime. The legislation was designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, the legislation provided for enhanced benefits to be paid to accident victims regardless of fault: *Meyer v. Bright*, at para. 6; *Peixeiro v. Haberman*, at para. 22.

[62] The no fault statutory accident benefits and related procedures are set out in the SABS and have been the subject of a series of legislative changes since first introduced.

[63] The SABS in place prior to 2003 included what is now s. 33(1), under which claimants are obliged to provide certain information to an insurer upon request. There is no issue that an insured has a duty to cooperate with his or her insurer.

[64] Examinations under oath were introduced in 2003 as a part of a package of legislative reforms to the automobile insurance regime. The applicant has put forward the related 2003 Ministry of Finance White Paper, "*Automobile Insurance Affordability Plan for Ontario: Next Steps*", regarding the 2003 legislative changes. The White Paper indicated that the Ontario Government was working to address rising auto insurance premiums by putting forward a balanced reform package designed to ensure that injured people received the care they needed while reducing red-tape, fraud and abuse. Higher costs were attributed to a number of factors,

beginning with the higher cost of vehicle repairs and replacements and higher health care costs. Fraud was also identified as an issue.

[65] Examinations under oath were referenced in the White Paper, although not with much prominence. The White Paper does not support a legislative intention to introduce automatic or routine use of examinations under oath in the no fault regime, quite the contrary. The need for a reason for an examination under oath was noted in the White Paper at p. 10 as follows:

> One initiative will permit insurers to request a claimant be examined under oath where there is a reasonable concern about accident circumstances. [Emphasis added.]

Section 33

[66] The provision for an examination under oath has formed part of s. 33 of the SABS since 2003. Section 33 now provides as follows, in relevant part:

> 33. (1) An applicant shall, within 10 business days after receiving a request from the insurer, provide the insurer with the following:
>
> 1. Any information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit.
>
> 2. A statutory declaration as to the circumstances that gave rise to the application for a benefit.
>
> 3. The number, street and municipality where the applicant ordinarily resides.
>
> 4. Proof of the applicant's identity.
>
> (2) If requested by the insurer, an applicant shall submit to an examination under oath, but is not required,
>
> (a) to submit to more than one examination under oath in respect of matters relating to the same accident; or
>
> (b) to submit to an examination under oath during a period when the person is incapable of being examined under oath because of his or her physical, mental or psychological condition.
>
> (3) An applicant is entitled to be represented at his or her own expense at an examination under oath by such counsel or other representative of his or her choice as the law permits.

(4) The insurer shall make reasonable efforts to schedule the examination under oath for a time and location that are convenient for the applicant and shall give the applicant reasonable advance notice of the following:

1. The date and location of the examination.

2. That the applicant is entitled to be represented in the manner described in subsection (3).

3. The reason or reasons for the examination.

4. That the scope of the examination will be limited to matters that are relevant to the applicant's entitlement to benefits.

(5) The insurer shall limit the scope of the examination under oath to matters that are relevant to the applicant's entitlement to benefits described in this Regulation.

(6) The insurer is not liable to pay a benefit in respect of any period during which the insured person fails to comply with subsection (1) or (2).

(7) Subsection (6) does not apply in respect of a non-compliance with subsection (2) if,

(a) the insurer fails to comply with subsection (4) or (5); or

(b) the insurer interferes with the applicant's right to be represented as described in subsection (3).

(8) If an applicant who failed to comply with subsection (1) or (2) subsequently complies with that subsection, the insurer,

(a) shall resume payment of the benefit, if a benefit was being paid; and

(b) shall pay all amounts that were withheld during the period of non-compliance, if the applicant provides a reasonable explanation for the delay in complying with the subsection. [Emphasis added.]

[67] Thus, s. 33(2) requires an insured to submit to an examination under oath if asked to do so, except if incapable or if there has already been one examination and s. 33(4) imposes

mandatory advance notice with certain requirements. Subsection 33(4)3 imposes the requirement to give a reason or reasons. Subsections 33(4)4 and 33(5) relate to the permitted scope of the examination.

[68] Aviva has acknowledged that notice in accordance with subsection 33(4) is a necessary prerequisite to conducting an examination under oath, in addition to the requirements set out in s. 33(2). It is put this way in Aviva's factum:

> As a result, once the insurer complies with subsection 33(4), and in the absence of evidence of physical, mental, or psychological incapacity, the insured person is obligated to attend unless they have already done so in relation to the same accident. [Emphasis added.]

[69] Subsection 33(4) plainly requires that the insurer give reasonable advance notice before an examination under oath can take place. Notice is mandatory. The notice requirements are expressly enumerated. One of those requirements is that the insurer must give a reason or reasons for the examination.

[70] Aviva submits that its general references to the purpose and/or scope of the examination satisfy the requirement to give a reason. It relies primarily on *Kivell v. State Farm Mutual Automobile Insurance Co.*, [2016] O.F.S.C.D. No. 119 (Arbitrator) ("*Kivell*"), a decision that considered whether the insurer had complied with the obligation to give a reason for the requested examination under oath. In that case, the insurer relied on a general statement about the proposed scope and purpose of the examination as notice of its reason similar to statements relied upon by Aviva in this application. At para. 34, the Arbitrator held that because the requirement to give a reasons was found in s. 33(4) and not s. 33(2), it was "merely a matter of form, not substance," to notify the claimant about the general type of questions that would be asked. General notice of the purpose and scope of the examination was found to be sufficient. With due respect to the Arbitrator in *Kivell*, I disagree, as discussed below.

[71] Aviva also put forward *Aviva Insurance Company of Canada v. Balvers* (2007), 49 C.C.L.I. (4th) 313 (Ont. S.C.), another application to determine certain issues regarding s. 33 of the SABS. In that case, however, it was expressly conceded that the insurer had given proper notice. That case is therefore of limited assistance.

[72] The respondents rely upon the recent decision in *State Farm Mutual Automobile Insurance Company v. Aslan et al.*, 2016 ONSC 2725, 130 O.R. (3d) 474 ("*Aslan*"). In that case, the Court considered a similar application against seven SABS claimants, seeking an order that they attend for EUOs. The Court in *Aslan* also disagreed with the reasoning in *Kivell*.

[73] In *Aslan*, State Farm had sent a letter to each respondent saying, on the subject of a reason for the examination, only this: "We are requesting the examination for the purpose of determining whether State Farm is liable to pay benefits." This is similar to the statement made

in the Aviva affidavit for four of the six respondents. However, State Farm did not attempt to rely on these letters to fulfill the need to give a reason or reasons for the examinations. As indicated in para. 12, State Farm relied on the form of its notices of examination, which provided as follows:

> You are required to attend this Examination Under Oath in order to provide State Farm Mutual Automobile Insurance Company with information regarding the circumstances that gave rise to their Application for Accident Benefits. This includes, but is not limited to, questions regarding the circumstances of the accident, your entitlement to specified benefits, your entitlement to medical and rehabilitation benefits, your claims for attendant care and housekeeping benefits, the treatment you have received and your possible ongoing entitlement to these benefits into the future. [Emphasis added.]

[74] State Farm thus relied on a general statement regarding the purpose and scope of the examination.

[75] State Farm took the position that the general information in the notice of examination was all that was required. State Farm submitted that being more specific, particularly in cases involving potential fraud, would remove a tactical advantage and possibly inhibit or hinder exploration of the benefit entitlement questions sought to be explored in the examinations. The respondents submitted that fairness to the insureds and the plain reading of the SABS required disclosure of the real reason(s) for the examination under oath.

[76] The Court did not accept this submission. It held as follows, at paras. 18-19:

> [W]hile it is clear that the scope of questions which may be asked at the Examination Under Oath are those which are broadly relevant to the insured's entitlement to SAB benefits, it does not follow that the "reasonable advance notice" of reasons to be given to the insured under section 33(4) of the schedule are satisfied by simply stating that the examination will relate to the insured's entitlement to accident benefits.
>
> In my opinion, a review of section 33 of the SAB schedule demonstrates that the Legislature sought to achieve a balance between an insurer's right to properly determine eligibility for benefits with the insured rights to convenience and fairness in the process by receiving reasonable advance notice of the examination, a right to counsel or other representation, a right to be told in advance of the reasons for the examination and a right not to be examined during a period of medical incapacity. This is reflective

> of the good faith obligations owed by an insurer and an insured in contracts of insurance and of general consideration of fairness to both parties.

[77] The Court held that the reasons required to be given under s. 33(4)3 must be something more than giving notice of the scope of the examination. In accordance with the plain words of the section, the Court concluded that s. 33(4)3 regarding reasons and s. 33(4)4 regarding scope give rise to different obligations.

[78] The Court disagreed with the decision of the Arbitrator in *Kivell* that the requirement to give reasons was "merely a matter form, not one of substance." State Farm's notice of examination was found to be insufficient.

[79] I too find the suggestion that the notice requirement is merely a matter of form inappropriate. It is a mandatory statutory requirement. It is a prerequisite to an examination under oath. It is not satisfied by a general statement that the examination will be about entitlement to statutory accident benefits or a general reference to the purpose and/or scope of the examination.

[80] The ordinary meaning of "reason" is *why* something is happening. It is not the scope of the examination, but why the examination is being pursued.

[81] The requirement to give a meaningful reason is in keeping with the insurer's obligation of good faith. The concept that this notice is a mere matter of form is inconsistent with that obligation. The insurer must have a good faith reason to take this additional step and must be prepared to disclose it in advance of the examination. That is what s. 33(4) requires of an insurer.

[82] In *Aslan*, the insurer frankly submitted that it did not want to give a specific reason, especially in a fraud case, because it would remove its "tactical advantage" and possibly hinder the examination. This sort of tactical advantage, based on surprise, has been removed from civil litigation. It is perceived as unfair. It was also rejected in *Aslan*.

[83] The claimant in a tort action has advance notice of the insurer's position through a statement of defence, before any examination for discovery can take place. If, for example, fraud is alleged, the material facts of that allegation would be disclosed before any examinations for discovery. As well, there would be a corresponding right to examine the insurer. In contrast, under the SABS there are no pleadings. There is no right to discover the insurer. These fairness issues are addressed to some degree through the requirement that the insurer give reasonable advance notice of its actual reason or reasons for the examination under oath.

[84] The requirement that there be an actual reason, disclosed in advance, is also consistent with the overall statutory scheme. It ensures that insurers do not simply request these examinations as a matter of course, increasing the overall cost in the system and re-introducing a more adversarial process into what is intended to be an efficient, no fault regime.

[85] Although these respondents were represented by counsel, the evidence on this application also shows that examinations are pursued through direct contacts with claimants. SABS claimants may not be represented by counsel. This is yet another reason why the required notice should be meaningful to the claimant, not a mere matter of form.

[86] Aviva submits that the requirement to provide a reason could create problems. Perhaps the opposing counsel would not find the reason sufficient, for example, and a dispute could arise over the reason itself. That may be so, but it does not relieve the insurer from its statutory obligation to give a reason or reasons for the examination. Nor should a claimant assume he or she can postpone an examination by quarrelling over the reason for it. Presuming that the insurer has a good faith specific reason, as it must, and that it conveys that reason to the claimant, the examination under oath should proceed.

[87] With one possible exception, only general references to the purpose and/or scope of the examination were provided to the respondents. They were not given notice of the actual reason or reasons that Aviva was pursing an EUO. Aviva's notice was not compliant with s. 33.

[88] The one possible exception is the Agaloos claim. In that case, Aviva's counsel indicated that the examination under oath related to s. 33 noncompliance, as well as generally to the claimant's entitlement to statutory accident benefits generally. The issue of s. 33 noncompliance was specific to the claimant. However, that potential reason was later disabused as a reason by the insurer itself. After Aviva confirmed that it had received all the requested information, it nonetheless continued to pursue an EUO relying only on its general notice. It said the two issues were "separate." On the facts before me, Aviva was therefore relying on a very general reference to examining about entitlement, which is insufficient. As well, it is not clear to me that s. 33 non-compliance would be a reason for an EUO. Section 33 expressly provides for the consequences of a failure to comply with requests for information in its subsection (6), which provides that an insurer is not liable to pay during a period of non-compliance.

[89] Because the required notice was not given in any of the respondents' SABS claims, they were not obligated to attend and be examined under oath.

Judgment and costs

[90] I therefore declare that a justification is required to compel a SABS claimant to attend an examination under oath under s. 33 of the SABS, specifically a reason or reasons that must be disclosed under s. 33(4)3 of the SABS. The requested order that these respondents each attend for an examination under oath is denied for failure to give the required notice.

[91] If the parties are unable to agree on costs, the respondents shall make their submissions by delivering brief written submissions together with a costs outline by October 14, 2016. The applicant may respond by delivering brief written submissions and any other material by October 28, 2016. This timetable may be modified on agreement between the parties provided that I am notified of the new timetable by October 14, 2016.

Justice W. Matheson

Released: September 26, 2016

CITATION: Aviva Insurance Company of Canada v. Frank McKeown, 2016 ONSC 6017
COURT FILE NO.: CV-16-00548464-0000
DATE: 20160926

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

– and –

FRAN McKEOWN, ROLAND SPENCER, DOLLY SINGROY, RENELYN AGALOOS, NAOISE HEFFERON and JOANNE HACKER

Respondents

REASONS FOR JUDGMENT

Justice W. Matheson

Released: September 26, 2016