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September 11, 2020

Justice Sector Consultation re: Mandatory Mediation and One-Judge Model
M-2020-10192

Thank you for the opportunity to express the views of Ontario's injured MVA (Motor Vehicle Accident) survivors regarding their access to justice in our court system.

FAIR (Fair Association of Victims for Accident Insurance Reform) is a grassroots not-for-profit organization of Ontario's injured MVA victims who have struggled with the current auto insurance system.

We appreciate the government's effort to keep Ontarians safe and maintain the administration of justice during the COVID-19 outbreak. FAIR members find that during the pandemic their cases have been further stalled in an already slow civil court system and we welcome the initiative to correct course on this. Ontario's MVA survivors are in crisis; many are relying on Ontario's inadequate social support systems while they wait to get to court and the timeline to get to that hearing keeps getting longer as insurer profits pile up.

Time matters. And that really is what is at stake for MVA survivors in this consultation - access to timely justice.

For clarity we have replied directly to each question.

Mandatory Mediation Program

1. Should mandatory mediation be expanded to apply throughout Ontario? Should the types of civil actions that mandatory mediation applies to under Rule 24.1 be expanded?

No

Given the current Covid-19 conditions and the overall general feeling that mediation is rarely successful it's seems counter-productive to expand the use of mandatory mediation. Mediation is only successful when both parties are willing to be flexible and we address this in question #1 under Single-Judge Proceedings.

2. Is mandatory mediation facilitating early resolution of civil disputes in your/your membership's cases?

No

Mediation successes that lead to early settlement don't appear to happen often and since this is a very expensive step for litigants, costs should be part of the consideration. It's not just about time; it's also about the slim likelihood of success.

In the context of Self Represented Litigants (SRLs) and the inherent imbalance of power that exists between these plaintiffs and defendants, it's felt that mediation is wholly ineffective for plaintiffs.

3. Should mediation be made mandatory prior to filing an action with the court? If so, how could access to justice be maintained for those unable to afford mediation fees?

No

Mediation should not be made as a precondition to filing an action as this only extends the timeline for litigants in an already slow system. The system needs to be more flexible, not less.

4. How often have you/your organization's members used the mediation roster used in your region?

N/A

5. Where you/your organization's members have used the roster, has the mediator been selected on consent of the parties or appointed by the mediation coordinator?

N/A

6. Are mediation rosters adequately supporting mandatory mediation requirements under the Rules (e.g. mediator availability, mediator expertise)? Why or why not?

There appears to be a wide range of mediator skill on these rosters so the expertise required to navigate complex auto insurance legislation isn't consistent or always available and this again slows cases down. We understand that many lawyers use privately arranged or outside mediators who do have the required knowledge and they are willing to pay a higher price to do so. You can see how quickly SRLs would be left behind in this scenario, first by not being aware of such differences in capabilities of mediators and financially they would be less prepared to pay higher fees.

7. What are the challenges/issues facing the current mediation roster process and how could this process be improved?

The mediation roster appears to pay significantly less than private mediators and this type of disparity often leads to poorer outcomes for those who cannot afford to 'buy up' using outside mediators.

There is a significant wait time to access the mediators on the roster so having mediation as a necessary step to get to the next stage of setting down a date for trial means another delay and another expense for all parties.

8. Should the requirement for each party to pay an equal share of a mediator's fees in a Rule 24.1 mediation matter be changed? If so, how should fees be allocated?

Where wealthy insurers are involved it should be they who pay for the costs of mediation. These costs can be included in the expenses which are decided, based on success, at the end of the trial. Our members tell us that their mediations are more of a step they have to take rather than a mediation held in good faith with intent to settle. In fact there is plenty of evidence that insurer settlement offers at mediations is a standard amount and we are told the offer doesn't reflect the individuality or severity of their injuries.

9. What are other improvements that can be made to the mandatory mediation program to make it faster, easier, and more affordable for litigants?

The Ontario court system currently has an exception for filing fees program for those in the system who face financial challenges. If this isn't already being used to assist civil litigants to access mediation then it should be considered as a possible remedy to control the costs for consumers who are facing opponents with very deep pockets.

10. Are the needs of litigants with limited financial resources being met by pro bono mediation services and/or the Access Plan?

No

Pro Bono mediation services and/or the Access Plan do not appear to offer assistance to those suing their insurance company for unpaid car accident benefits related to personal injury. We are unaware of any legal clinics or assistance focused on this area and these injured and often very challenged personal injury litigants are simply left to fend for themselves.

Additional comments:

There's a definite problem with the way SRLs are handled in the civil litigation context and this is a growing area of concern. The court needs to come up with a package of information to assist people to have basic understanding of the court's expectations. The only assistance people are able to get with their cases is on rare occasions at community service events. That's unacceptable. The whole purpose of this consultation appears to be how to best move these cases through the court system so better informed participants will make that happen. This starts with educating judges who hear the cases as well as those plaintiffs who are self representing themselves.

This SRL fairness issue has recently been highlighted in Girao v. Cunningham, 2020 ONCA 260, http://canlii.ca/t/j6l6p in paragraphs 148 – 177 where flaws in the management of the trial record were found to have unfairly enabled the defence's strategy and prejudiced the outcome to a degree that required a new trial be set. The courts need to step up to assist SRLs to better understand the system if they want them to be more competent and the same goes for the Judges who preside over cases with SRLs.

[176] Ms. Girao was entitled to but did not get the active assistance of the trial judge whose responsibility it was to ensure the fairness of the proceeding. As a self-represented litigant, she was also entitled to, but did not get, basic fairness from trial defence counsel as officers of the court. The trial judge was also entitled to seek and to be provided with the assistance of counsel as officers of the court, in the ways discussed above. This did not happen.

Single-Judge Proceedings

1. Should a single-judge model be applied to all civil proceedings in Ontario? If not, what exceptions to the single-judge model would you propose and why?

FAIR supports eliminating the use of juries for personal injury trials. The single-judge concept shows great promise as a time-saver and as a way to improve the quality and economy of civil hearings. Judges should not be weighed down with the minutiae of co-coordinating hearings and should be afforded qualified assistance such as a Master to manage the time consuming and often expensive procedural issues.

We understand that there is a pilot project already ongoing in the province to test the workability of a One Judge Pilot Program in the Superior Court of Justice. We could find no information regarding outcomes on this pilot program and are unable to comment on whether it is a viable proposition without more knowledge. A closer look at this project could provide valuable assistance to the province in deciding the way forward in the effort to clear up the court backlog.

The advantage of a single Judge model would mean that the Judge, being aware of the progress of a case, could also gauge whether mediation should be undertaken by the parties. Mediation is only successful when parties arrive prepared and willing to compromise or with the intent of solving outstanding issues standing in the way of a case progressing.

2. Should parties' consent be required prior to a proceeding becoming a single-judge proceeding?

No

Whether or not to have a single-judge proceeding should not become another place and time to create differences.

3. In what, if any, circumstances, should a single-judge proceeding be able to be reassigned to another judge?

This is a question that might be best answered by reviewing the One Judge Pilot Program project outcome. There is always the risk of the perception of bias by one or the other party based on the trier-of-fact having access to many details BEFORE the hearing actually happens and that is something the AG should consider. From an SRL perspective having one judge does offer continuity and perhaps even some security that their case may not be derailed if they were to misunderstand time-line expectations or other requirements of the court.

Again, thank you for the opportunity to speak to the issues that matter to Ontario's personal injury litigants and to the efforts made by your office to ensure the Court's management continues to better serve the public and justice as a whole.

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ADDENDUM

Please see this September 9, 2020 ONSC decision with reasons that directly addresses the questions posed in M-2020-10192.

Louis v. Poitras, 2020 ONSC 5301
COURT FILE NO: 15-64232/15-66034
DATE: 20200909
https://www.yumpu.com/en/document/read/64137471/louis-v-poitras-final-signed

[62] None of the parties to these actions has an unfettered right to a jury trial. These parties should not be required to wait for a policy decision from the legislature. I decline to take a “wait and see” approach nor am I prepared to revisit the issue. I am satisfied that these are appropriate cases in which to exercise the discretion currently conferred upon me to strike a jury notice. I find that justice to the parties will be better served by these actions proceeding to trial, in a timely manner, before a judge alone.

Thank you.

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