



Accident Benefit REPORTER

Eliminating DACs

*T*he provincial government appears ready to deliver on its promise to eliminate Designated Assessment Centres (DACs). It has been long recognized that the DAC process is a very expensive one and many believe that little benefit comes from that process. To some, the DAC process is terribly flawed and biased in favour of the insurance industry. Others argue that DACs provide independent medical assessments that promote resolution of conflict between the injured person and their insurer. Either way, proposed regulations have been circulated which, perhaps with minor changes, are expected to become law in the next few months.

The proposed regulations (changes to O. Reg. 304/96) essentially replace more Insurer Examinations (IEs) for the DAC assessment process. For injured people, this is certainly the most significant change in the proposed regulation. Before exploring the expansion of IEs, some other important changes merit discussion.

Proposed section 32.1 allows insurers to have injured people who are in hospital or long-term care facilities examined by a health care professional even before any application for benefits has been submitted. The rationale for such a significant change is allegedly that this new section allows the insurer to determine whether there are medical and rehabilitation needs to be met immediately upon discharge. The report generated by this examination cannot be used later by the insurer to deny an application for benefits. Even though this examination might reveal a need for a benefit, there is no obligation in the proposed regulation that it be paid. It is still up to the injured person to submit all the appropriate forms to collect a benefit. Concerns for the injured person under this section include proper disclosure of rights to the person and matters of informed consent. This section essentially allows an IE before any steps have been taken to claim benefits and before the injured person has had an opportunity to seek legal advice.

Proposed changes under section 24 will allow IE assessors to consult with treating health care practitioners. It is difficult to imagine any benefit to the injured party from such a consultation and it is more likely that the purpose of the consultation would be to influence the opinion of the treating practitioners. This change is proposed despite previous assertions by the government that there ought to be a move back to allowing treating doctors to make treatment decisions.

Multiple Disability Certificates can be requested of the injured person by the insurer. Under the proposed changes, failure to deliver these certificates within 15 business days can

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result in a suspension of benefits. This is so despite the fact that the Disability Certificate must be completed by a health care practitioner who may not be able to produce it that quickly.

By far, the most significant change concerns IEs under section 42. It can be anticipated that the expanded right to IEs will, at least to some extent, offset the hoped-for savings from the elimination of DACs. Each denial or questioning of entitlement to a benefit will result in an IE. The insurer is free to choose any assessor to conduct the IE, as long as the injured person does not have to travel beyond a proscribed distance. There is no restriction on the assessor travelling.

Particularly worrisome for the injured person is section 42(10). This subsection requires the injured person to provide “all relevant prior test and examination results and such other information and documents as are relevant and necessary for a review of the insured person’s medical condition” within “5 business days” after notice of a section 42 IE. There are a number of practical difficulties with this requirement. First, it is unreasonable to expect that the injured person will know what information and documents are “relevant”. Second, it is impossible for a non-medical person to know what documents are “necessary”. Third, there will undoubtedly be some expense associated with the collection of this material. Finally, most, if not all, of the required documentation will be in the hands of third parties (i.e., hospitals, doctors, radiology clinics, etc.), over whom the injured person has little control. Yet failure to comply may result in a stoppage of benefits.

Section 42 IEs can be multi-disciplinary, despite the fact that they are merely responding to a request for benefits, likely supported by a single health care professional. There are no meaningful limits on the scope of the examination or the amount of money the insurer can spend on their expert. Yet there are significant limitations on the ability of the injured person to support the claim for benefits and dispute the findings of the insurer’s expert witnesses. Proposed section 42.1 provides some limited ability to respond to the IE, but is so restricted as to be virtually meaningless to the injured party in most circumstances. The time constraints imposed on the injured person for responding to an IE (usually 20 days to deliver a report from notice of denial) are likely, in practice, impossible to meet. The amount to be paid for these responses is so inadequate (maximum for a specialist is \$900) that it is difficult to imagine a health care practitioner prepared to take on the task or perform an analysis sufficient to resist the IE opinion. Insurers face none of these limitations.

While the elimination of DACs is good for injured people and likely to yield a considerable savings to the auto insurance system, what the government now proposes heavily favours the insurance industry to the detriment of the injured person. The draft regulation is densely drafted and difficult to understand for lawyers. It will be impossible for the injured person to navigate through this regulation without legal advice.

Another opportunity has been missed to simplify the process and substantially reduce expense. More forms, more assessments and more steps seem typically to be the response to the need for reform. It is time to reverse this trend. Clearly the interests of injured people and consumers are inadequately represented when auto insurance reform is considered.

We will be monitoring another upcoming change which is certain to be contrary to the interests of injured people: Preferred Provider Networks.

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Child Booster Seats Now Required By Law

*I*n Canada, car accidents are the leading cause of death and serious injury among small children. According to Transport Canada, 10,000 children age twelve and under are injured or killed in car accidents every year.

The Canada Safety Council reports that the use of child car restraints can prevent seventy percent (70%) of automobile crash-related deaths and serious injuries.

Unfortunately, despite the evidence of enhanced child safety with the use of child car restraints, the Canada Safety Council also reports that roadside checks of child car restraints reveal that less than fifty-two percent (52%) of our children are seat-belted at all and almost seventy-five percent (75%) are not restrained properly.

Transport Canada says there are four stages for properly securing children in motor vehicles:

- A rear-facing seat from birth until around age one (1) in an infant car seat
- A forward-facing child seat from 10 kilograms to 18 kilograms (from age 1 to age 4)
- A booster seat from 18 kilograms (from age 4 to age 8)
- A seat belt in a rear seat from 27 kilograms

Child seats have been mandatory in Ontario since the 1980s, but as of September 1, 2005, parents, grandparents, babysitters or any adults who carry children in a car must have forward-facing booster seats for children who have outgrown child car seats.

Prior to September 1, 2005, children over 18 kilograms (40 pounds) were only required to wear an adult seat belt. However, children who weigh between 18 and 36 kilograms (40 - 80 lbs.) are too big for child car seats, but not big enough to be properly protected by an adult seat belt.

The New Law - Bill 73

The government of Ontario introduced Bill 73 - The Highway Traffic Statute Law Amendment Act (Child and Youth Safety) 2004, which was passed into law on December 9, 2004.

One of the targets of Bill 73 is the mandatory and proper use of child car restraints - including car seats and booster seats. The new law, which went into effect September 1, 2005, makes it mandatory for anyone transporting children to make sure children are properly secured in either an infant seat, child seat, or booster seat.

According to the present law:

- Rear-facing infant car seats are required for infants weighing 9kg (20 lbs.) or less
- Forward-facing child car seats with a tether strap to better anchor the seat, must be used to secure children weighing between 9kg and 18 kg (20 to 40 lbs.)
- Booster seats are mandatory for children under the age of eight (8), weighing more than 18 kg but less than 36 kg (40 - 80 lbs.) and who stand less than 145 cm (4 feet 9 inches) tall
- A child can start using a seatbelt alone provided any one of the following is met:
 - The child turns age eight (8), or
 - The child weighs 36 kg (80 lbs.), or
 - The child is 145 cm tall (4 feet 9 inches)



When a child can sit against the vehicle's back seat, with legs bent comfortably over the edge of the seat and the shoulder belt flat across their shoulder and chest, the child can be protected by an adult seatbelt.

Parents, caregivers, grandparents and babysitters can be punished for not using proper child car restraints in vehicles. Drivers are responsible for ensuring passengers under age sixteen (16) are properly secured. Anyone convicted of not using child car restraints, or using them improperly, will be given two demerit points and a \$90 fine plus a \$20 victim fine surcharge.

There are specific exemptions for taxis, public vehicles, buses, emergency vehicles, vehicles on short-term lease and out-of-province drivers.

In addition, effective September 1, 2005, the government no longer collects Provincial Sales Tax (PST) on booster seats. Child and infant car seats are already PST-exempt.

Parents, grandparents and caregivers are encouraged to get more information about how to use booster seats and how to properly install infant car seats, child car seats and booster seats by attending a child car seat inspection clinic in their area. Details about upcoming clinics in the Greater Toronto Area can be found at www.mto.gov.on.ca. To find a clinic anywhere in Ontario, call your local police department or public health unit. St. John's Ambulance also hosts many clinics; clinic details can be found at www.sja.ca.

Buckle-up!

Wendy Moore Johns, Partner

Attendant Care Benefits Under Bill 198: Who, What, When, Where and How

Under Bill 198, family members who provide attendant care to accident victims may have access to two potential sources for payment of their care services. Those sources are the Attendant Care Benefits under the Statutory Accident Benefit Section (S.A.B.S.) and/or a claim against a person at-fault for the accident pursuant to the provisions of the Family Law Act.

The following case scenario raises issues related to S.A.B.S. Attendant Care entitlements:

Mary, mother of Brendan (8) and Annie (6), suffered catastrophic brain injuries in a motor vehicle accident. Now three years after the accident she remains hospitalized. Her needs are met by the hospital and by the family. The ward has sixteen patients. It is staffed by four nurses. Mary receives two hours of rehabilitation during weekdays.

As a result of the virtual loss of their mother the children have suffered various psychological impairments. They require attendant care to supervise them, to assist them with their personal care activities and to assist them in light of their impairments.



Mary's mother, Sophia has assumed the role of attendant care provider for Mary and the children.

1. Who is entitled to attendant care benefits

Pursuant to S.A.B.S. sections 2 (1) and 16 (1), any person who has sustained an impairment as a result of the accident is entitled to attendant care benefits. Both Mary and her children have sustained impairments. All are entitled to attendant care benefits.



David MacDonald
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2. Who provides the attendant Care?

The hospital does not provide attendant care and has no obligation to provide attendant care. The Ministry of Health and Long Term Care has stated:

“Simply put, attendant care (or personal support services) is not a service provided by a nurse; it is not an insured service [for OHIP to pay] under the Health Insurance Act; it is not an insured hospital service under the [Hospital Insurance] Act; and, lastly, it is not an OHIP insured [hospital] service.”

Previously, the Ministry indicated:

“Health care services not included in the OHIP assessment [and therefore to be paid by the automobile insurers include] ...

- attendant care,*
- personal support,*
- assistance with personal hygiene,*
- assistance with activities of daily living.”*

3. Where can the care be provided – in hospital by family members and/or sitters?

Yes. Attendant care benefits are payable by the insurer if needed in hospital and/or following discharge. Often, family members will provide care when:

“the applicant lacks the ability to independently get in and out of a wheelchair or to be self-sufficient in an emergency“ or “if the applicant lacks ability to respond to emergency or needs custodial care due to changes in behaviour” [Part 2 of the Form 1].

4. What is the trigger for determining and accessing attendant care benefits?

Sections 16 and 39 of the S.A.B.S. detail the process for assessment and obtaining payment. Completion of the Form 1 is the trigger.

5. What happens when the insurer receives the Form 1?

Under Section 39:

An insurer can accept the Form 1 amount or, within fourteen (14) days of receipt, can dispute it by arranging an assessment at an Attendant Care Designated Assessment Centre (DAC).

While waiting for the DAC, the insurer has the obligation to pay the attendant care pursuant to Section 39 (6) of the S.A.B.S.

6. What amount of care should be claimed for Mary?

Mary requires 24-hour-per-day care. As four nurses attend sixteen patients daily, there is one nurse for four patients. In a twenty-four hour period, each nurse would have no more than six hours per day for one-to-one care. As such, Mary receives six hours of nursing assistance, and two hours of rehabilitation each week day. Mary is receiving one-to-one medical or rehabilitation assistance from an OHIP paid health care professional for eight of twenty-four hours each week day.

Mary requires attendant care for the remaining sixteen hours each day. Sophia can claim payment for the actual hours she attends to Mary, to a maximum of sixteen hours per day and eighteen hours on weekends. The number of hours is multiplied by the Form 1 rates applicable to each type of care to get a total amount payable per month.

When Sophia is absent, a “private sitter” can care for Mary.

7. What amount of care should be claimed for Brendan and Annie?

Sophia should claim for the actual number of hours spent with Brendan and Annie to a maximum of the number of hours the Form 1 indicates is their need. As such, Sophia cannot claim attendant care benefits during school hours or hours with treatment providers or other outside the home activities which don't involve Sophia.

Importantly, Section 16, does not limit the amount of attendant care to be claimed to that which is directly required due to the impairment caused by the accident.

Section 16 is only a trigger to entitlement.

8. What care does the Form 1 quantify?

Section 16 (4) indicates that the amount payable under the Form 1 shall be determined using a Form 1.

Care that is required “as a result of the accident” – The Form 1 states:

“Use this form to report the future needs for attendant care required by the applicant as a result of an automobile accident.”

Importantly, the Form 1 does not state:

‘attendant care as a direct result of the impairment’

The Form 1 is designed to permit assessment of any and all attendant care needs that exist as a result of the accident.

Brendan and Annie virtually lost their mother and all the care she provided as a result of the accident and each suffered an impairment.

The attendant care benefit to which each is entitled will be the total of the care they require:

- (a) for their impairment;
- (b) for their routine personal care needs under Part 1 of the Form 1;
- and
- (c) for their basic supervisory care needs under Part 2 of the Form 1.

9. How does an injured person “incur” an “expense” for attendant care provided by family members?

The courts interpreted this phrase in the case *Smith v. Wawanesa*, where Mr. Justice Campbell concluded that:



“For an insured to incur an expense, one need not actually receive the items or services or spend the money or become legally obliged to do so. It is sufficient that the reasonable necessity of the service or item and the amount of the expenditure are determined with certainty...”

The Financial Services Commission has adopted and accepted Justice Campbell’s comments. In the case of **McMichael and Belair**, a Form 1 had attested to twenty-four hour attendant care need. The Form 1 had quantified the expense of that need. The Arbitrator ordered that the attendant care be paid in accordance with the Form 1, less periods of time that the claimant was in attendance with treatment providers.

In the appeal decision of **Stargratt and Zurich**, Director’s Delegate Makepeace concluded:

“I agree with the arbitrator that Ms. Stargratt is not precluded from claiming benefits because her family did not expect or demand payment.”

The arbitrator in **S. D. and T.T.C.** indicated:

“A person who is unable or unwilling to promise payment in exchange for housework because of financial hardship and who did not in fact make any promise, could nevertheless ‘incur’ an implied obligation to pay within the meaning of the schedule.”

In a decision in which the writer was counsel for the applicant, **L.F and State Farm**, Mr. F had not paid his parents and/or his fiancé for their services and did not tell them they would be paid. Mr. F was awarded attendant care benefits initially and on appeal:

“These procedural rules provide at the disposal of an insured an immediate interim money benefit where a mutual examiner has determined the need for attendant care, so that insureds, while in pain and disability following an accident, do not have to scramble for assistance, relying essentially on the voluntary kindness of family and friends.”

In addition to the S.A.B.S. Attendant Care Benefit, if the injured person has sustained a “permanent, serious impairment of an important physical, mental or psychological function”, family members who provide attendant care have claims for the value of their services from the at-fault parties. Sub-sections 61 (2) (a) and (d) of the *Family Law Act* provide this right.

Section 61 of the Family Law Act

61 (2) The damages recoverable in a claim under sub-section (1) of section 61 may include:

“(a) actual expenses reasonably incurred for the benefit of the person injured or killed; ...

(d) where, as a result of the injury, the claimant provides nursing, housekeeping and/or other services for the person, a reasonable allowance for loss of income or the value of the services”.

Copies of the authorities referred to and a precedent letter for payment of attendant care are available upon request. Contact dmacdonald@thomsonrogers.com or by telephone at 416-868-3155.

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Education and Income Benefits for Children

When children are injured in motor vehicle accidents, their injuries may prevent them from completing their education and thereafter obtaining suitable employment. The Statutory Accident Benefit Schedules (SABS) in force in Ontario since June 1990 all provide for payment of benefits to compensate children whose lives are changed in this way.

The OMPP SABS (accidents occurring between June 22, 1990 and December 31, 1993) provide for payment of a weekly benefit during the period in which the child suffers a substantial inability to perform the essential tasks in which he or she would normally engage. The benefit amount is \$185.00 per week and is payable for life. This benefit is only payable to a person who was not earning an income at the time of the accident. Also, a person must attain the age of 16 before being eligible to receive the benefit.

Very young children who were injured in accidents in the early 1990's are only now turning 16 and becoming eligible for receipt of this benefit. Therefore, those providing care and/or treatment to such children should be aware of this provision in the original OMPP SABS.

Children injured in accidents occurring after December 31, 1993, but before November 1, 1996, are entitled to benefits governed by the provisions of the Bill 164 SABS. Bill 164 specifically included "education disability benefits" which included weekly benefit payments and lump sum payments. Just like the OMPP SABS, entitlement to weekly benefits commences at age 16. The weekly benefits are equal to one half of the net average weekly Ontario industrial wage. These benefits are paid if the child suffers a "substantial inability" to continue his or her education.

In *Zehr v Canadian General*, an arbitrator held that a substantial inability to continue with an education can occur even though the child returns to school. In the *Zehr* case, the child was 17 years old at the time of the accident and had just completed Grade 12 with an A average. He participated in a variety of extracurricular activities and his goal was to complete Grade 13 and attend university to study Business and Finance. Post-accident, he did return to school and was able to qualify for entrance to university, but in university his average fell into the C and D range. He was not able to engage in extracurricular activities and had to be given extra time to complete tests and examinations. The arbitrator found that there was simply no reasonable comparison between this child's pre-accident and post-accident school activities and therefore held that he was entitled to a weekly education benefit, even though he was attending school.

After a child receives a weekly education benefit for two years, it is converted into a weekly loss of earning capacity benefit. Again, this benefit is based upon the average Ontario industrial wage. It increases by 5% every two years to a maximum of 90% of the net average Ontario industrial wage. At age 65, these benefits are adjusted and a pension is paid equal to 70% of the benefit being received at age 65.

In addition to weekly benefits, lump sum benefits are also provided to a child if he or she is unable to attend or successfully complete a year of education. The amount of the benefit increases with the level of education (elementary/secondary/post-secondary) and, while all



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missed years prior to age 16 are subject to a benefit, only one benefit payment is paid after a child reaches age 16, no matter how many years of school may be missed.



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In the case of **Rich v Jevco Insurance**, the child had completed Grade 10 and was 17 years old when the accident occurred. He returned to school but his marks dropped and he was unable to pass all of his courses. He transferred to a technical high school where again he was unable to pass all of his courses. The insurer argued that because the child was able to pass more than half of his courses, he had successfully completed his year and was not entitled to a lump sum benefit. The arbitrator disagreed and found that “successful completion” of school meant passing a similar number of courses after the accident as compared to before the accident.

With the passage of the Bill 59 SABS (pertaining to accidents occurring on or after November 1, 1996) education disability benefits (weekly and lump sum) were eliminated. With respect to weekly benefits, children are once again being treated as other “non-earners”. Again, non-earner benefits commence only once a child reaches the age of 16. The benefit is paid if the child suffers an impairment that continuously prevents him/her from engaging in substantially all of the activities in which he/she ordinarily engaged before the accident. Depending on the age of the child and the time that has passed since the accident, the benefit would either be \$320.00 a week or would start at \$185.00 per week and then be increased to \$320.00 per week. The benefit is payable until age 65 at which point an adjustment to 70% of the benefit amount is made and paid as a lifetime pension. While no lump sum education disability benefits are payable under Bill 59, “lost educational expenses” (lost cost of tuition, books, room and board) up to a maximum of \$15,000.00 will be reimbursed, if the expenses were incurred before the child’s accident.

In all cases, it is important to remember that, even though a child may not be in school or working at the time of an accident, benefits will be available to that child if he or she cannot obtain an appropriate education and, thereafter, obtain appropriate employment. Unfortunately, the level of the benefits are fixed under the SABS and do not take into account, and properly replace, the true lost future earning potential of many injured children.

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Emergency Medical Leave: What A Parent Should Know

*I*n a time when many parents balance both work and family, one thing is clear: a parent shouldn't be forced to choose between work and his or her child when that child has suffered a serious injury.

Ontario's employment law recognizes this principle and provides two forms of potential relief to parents under the *Employment Standards Act, 2000* (the "ESA"). First, parents may be eligible for up to 10 days of Emergency Leave per year. Second, and in addition to Emergency Leave, the ESA entitles parents to up to 8 weeks of Family Medical Leave in certain circumstances. Both forms of leave are unpaid.

Family Medical Leave came into being under the ESA only last year and seems to be part of a growing recognition of both the rights and needs of working parents in Ontario. Since 1982, discrimination on the basis of "family status" has been prohibited under the province's Human Rights Code. Recently, the Ontario Human Rights Commission released a discussion paper entitled *Human Rights & The Family In Ontario*, intended to raise awareness of these rights. The paper suggests that employers may have a duty to accommodate an employee's short-term needs in the face of an emergency involving a child, but notes there is very little case law to date on this point. In the meantime, employees may rely upon the ESA.

Under the ESA, Emergency Leave is unpaid, job-protected time off work for up to 10 days per calendar year. Some key points:

- To qualify, the employer must regularly employ at least 50 workers.
- Leave may be taken for personal illness, injury or medical emergency or for the death, illness, injury, medical emergency or other urgent matter relating to the employee's spouse, a parent, child, grandparent or grandchild of the employee or a spouse or same-sex partner; the spouse of a child; a sibling; or a relative who is dependant on the employee for care or assistance.
- An employee is obligated to advise the employer that he or she is taking this leave before it begins, or as soon as possible after.
- The 10 days don't have to be taken all at once.
- If only part of a day is taken off, that is counted as a full day towards the 10-day total.
- An employer is allowed to ask an employee to provide evidence that he or she is eligible for Emergency Leave, and the employee is required to provide evidence that is reasonable in the circumstances, which





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- may include a doctor's note, a note from a school or day care facility, or receipts.
- If a contract or collective bargaining agreement provides a greater right of benefit than the Emergency Leave provisions in the ESA, then that agreement will govern any leave.

The ESA also provides for Family Medical Leave. This is unpaid, job-protected time off work for up to 8 weeks in a 26-week period. Some key points:

- This leave may be taken to care and support a family member who has a serious medical condition with a significant risk of dying within a period of 26 weeks. The medical condition and risk of death must be confirmed in a certificate issued by a qualified medical practitioner. The employee is responsible for obtaining and paying the cost (if any) of obtaining the certificate.
- The family member may be the employee's spouse or same-sex partner, parent, child or child of a spouse or same-sex partner.
- Employees are entitled to this form of leave whether a full-time, part-time, permanent or a contract employee.
- An employer must be notified in writing that an employee will be taking a Family Medical Leave before it begins, or as soon as possible after. The employer is entitled to request a copy of the medical certificate.
- If two or more employees qualify to take leave to care for the same person (i.e. both parents are employed), the 8 weeks must be shared.
- The 8 weeks of leave do not have to be taken consecutively during the 26-week period but do have to be taken in periods of an entire week (with a week being calculated from a Sunday to a Saturday).

Under the ESA, an eligible employee cannot be fired for taking either an Emergency Leave or Family Medical Leave. In addition, an employer can be punished under the ESA if an employee takes or plans to take a leave and is intimidated, suspended, punished or in any way threatened, or the employee's pay is reduced. If an employee believes that his or her employer is not complying with the ESA, he or she can consult (and make a complaint to) the Employment Standards Branch of Ontario's Ministry of Labour. For more information, telephone: 1-800-531-5551.

With both forms of leave, an employee continues to earn seniority and credit for length of service while on leave and the employer must continue to pay into most benefit plans (i.e. pension, life and extended health insurance, accidental death and dental plans).

It is important to note that while both forms of leave are unpaid, a parent who is forced to take time off for a Family Medical Leave may be entitled to receive up to six weeks of Compassionate Care Benefits as a form of Employment Insurance from the federal government.

This article is intended to provide a summary of information for parents, concerning the various leaves from work they may be entitled to when a child is injured. For more information, please feel free to contact Robert Brent by telephone at 416-868-3218 or by email at rbrent@thomsonrogers.com.

Robert H. Brent, Associate

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