INCURRED EXPENSES – A NEW CHALLENGE FOR ACCIDENT VICTIMS

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On September 1, 2010, the interpretation of "incurred expense" changed and created new challenges for the families of innocent accident victims.

The SABS have been amended to include the following section:

> 3(7)(e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not **incurred** by an insured person unless,
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> (i) the insured person has received the goods or services to which the expense relates,
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> (ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and
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> (iii) the person who provided the goods or services,
>
> (A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or
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> (B) sustained an economic loss as a result of providing the goods or services to the insured person;

HISTORY

From 1991 to 1994[3] the definition of incurred expense for the purposes of obtaining attendant care required families to retain professional caregivers in

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[3] Statutory Accident Benefits Schedule accidents before January 1, 1994 (OMPP).

order to qualify for reimbursement under the SABS. This interpretation was confirmed by the Court of Appeal in *Monachino v Liberty Mutual*.[4]

In subsequent revisions of the SABS, the requirement to use professional caregivers was removed and the Courts interpreted the word "incurred" in a manner that was more favourable to the insured. In *Belair v McMichael*[5], the Divisional Court adopted Justice Campbell's interpretation in *Wawanesa Mutual Insurance Co. v Smith*[6] as follows:

> The "incurred" cases and the interpretative cases yield three principles.
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> First, although capable of a narrow meaning, the word "incur" is capable also of the wider meaning of "run into", "render oneself liable to", "bring upon oneself", or "be subject to". There is a wider sense in which the expenditure is incurred within the time limit as soon as it is known with certainty that it is necessary and its amount is known.
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> Second, the provision should be construed 'contra proferentem', the coverage interpreted broadly and the time limitation narrowly.
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> Third, a remedial and purposive interpretation suggests that unfairness would result from a narrow interpretation. As Osler J. pointed out in Macdonald the narrow interpretation penalizes the insured who lacks the money or the credit to pay, or become legally obliged to pay for, the insured services. As the motions judge pointed out in this case,
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> > …if the Defendant's position were correct it would allow those persons who could pay for services in advance to be in a much better position to recover than those who could not. This, as a matter of policy, would be totally unfair."

This liberal definition of the word incurred has been a great benefit to the families of accident victims because it permitted them to provide attendant care to their injured family member themselves and apply for the attendant care benefit under the SABS. It also permitted claimant's counsel to arbitrate rehabilitation expenses denied by the insurer as if those expenses had actually been paid even where goods and services had not been supplied due to the impecuniosity of the victim's family.

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[4] Monachino v Liberty Mutual, 2000 CanLII 5686 (ON.C.A.).
[5] Belair v McMichael 2007 CanLII 17630 (DIV. CT.)
[6] Wawanesa Mutual Insurance Co. v Smith (1998) 42 O.R. (3rd) 441 (Div.Ct.)

THE NEW DEFINITION

The September 1, 2010 changes to the regulation take us back to the situation which existed prior to 1994 and which proved to be so unfair to accident victims.

The new definition will apply to many sections of the SABS.

In sections 15 and 16 (medical benefits and rehabilitation benefits) the operative wording is:

> "the insurer…shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person…".

As in the predecessor regulations, these expenses must be "reasonable and necessary". However, the application of the regulatory definition of incurred requires that the insured have received the goods and services or have paid the expense or promised to pay the expense before they can be reimbursed by the insurers.

From a practical point of view this means that an insurer is not bound to respond to a claim for rehabilitation or medical expenses until steps have been taken by the insured to secure the goods or services being claimed. It will no longer be enough to make a simple recommendation in the form of a treatment plan or recommendation. Before any steps can be taken to enforce an insurer's obligation to pay an expense, claimant's counsel will have to show that the insured person has incurred an obligation in respect of the goods or services being claimed. As we all know, our clients' families are often impecunious or in precarious financial condition and are reluctant or unable to assume financial obligations without near certainty of recovering those expenses.

In section 17 (case manager services) the same enabling wording appears:

> "The insurer…shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of the accident for services provided by a qualified case manager in accordance with a treatment and assessment plan under section 38."

Again, it will be necessary for the insured to commit to a contractual obligation with a case manager for the provision of services before he or she will be eligible to be reimbursed by the insurer.

The challenges created by section 19 (attendant care benefit) are even greater than in the previous sections. The applicable wording remains the same:

> "The insurer…shall pay for all reasonable and necessary expenses that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aid or attendant…".

Applying the new interpretative rules, it will be necessary to show that the person providing the attendant care "did so in the course of his or her regular occupation or profession" or "sustained an economic loss as a result of providing the goods and services to the insured person".

This means that families will need to hire a professional attendant care provider who is prepared to accept the SABS rates which, as we all know, are well below market rates. If a professional cannot be found to work for SABS rates, the family will have to supplement his or her wages out of their own pockets.

The alternative appears to be for a family member to quit their regular job to provide the care needed. That option seems to be the only way to avoid the necessity of hiring a professional caregiver. The regulation does not specify how great an economic loss needs to be incurred in order to be entitled to payment at the SABS rates for attendant care however we can expect insurers to argue that the economic loss must be commensurate with the monies being paid under the attendant care benefits. In other words, I think we can expect resistance from claims examiners in a case where a family member quits a part-time low paying job in order to work full time caring for a family member where they would be entitled to receive $6,000 a month under the SABS.

In section 23 (housekeeping and home maintenance) the wording is as follows:

> "The insurer shall pay up to $100 per week for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains a catastrophic impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident".

This section sets up a number of conditions that must be met before the insured person will be entitled to receive the benefits. Of particular importance is the requirement in the interpretation section that the "goods or services" be provided by someone in the course of his or her regular occupation or profession. This means that family members will need to retain the services of housekeepers and homemakers at market rates in order to recover the $100 a week under this section. The only alternative is for a family member to demonstrate that he or she has sustained an economic loss by giving up or curtailing their regular employment in order to provide housekeeping and home maintenance services.

Where, as is usually the case, the family members perform extra housekeeping and home maintenance tasks in their "spare time" they will not be eligible for payments under section 23.

THE WAY FORWARD

The new interpretative principle contained in section 3(7)(e) will dramatically reduce the eligibility of families to access resources under many sections of the SABS. It creates the very unfairness that was criticized by the Divisional Court in the *Belair v McMichael*[7] case. Case managers, medical and rehabilitation team members and claimant's counsel will need to be creative and persistent in their efforts to meet the requirement that expenses be "incurred".

The legislation provides one glimmer of hope in section 3(8) which reads as follows:

> "If in a dispute to which sections 279 to 283 of the Act apply, a Court or arbitrator finds that an expense was not incurred because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense, the Court or arbitrator may, for the purpose of determining an insured person's entitlement to the benefit, deem the expense to have been incurred."

This saving provision permits claimant's counsel to argue at an arbitration that even though the expense was not incurred in a manner that satisfies section 3(7)(e), a Court or arbitrator can, in an appropriate case, deem that the expense was incurred. The difficulty with this section is that it requires that the insured person initiate a dispute with the insurer and run the risk in costs of the dispute resolution process before they find out whether they will be entitled to payment for the goods and services which were denied by them.

In situations where attendant care or rehabilitation services are urgently required, it may be necessary for the insured's family to incur debt to fund these expenses. By doing so, they will meet the requirements of the interpretative section but will place themselves at risk of being left with significant financial liabilities if their claim is not deemed "reasonable and necessary". Claimant's counsel will need to be prepared to advise their clients on when the assumption of these risks is appropriate.

Other strategies which might be employed include:

(a) seek an advance payment from the insurers of tort defendants where a tort action exits;

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[7] Supra at note 5.

(b) recruit a family member who can meet the definition of "usual occupation or profession" in the provision of a particular service;

(c) negotiate litigation financing in appropriate cases to fund the provision of goods or services;

(d) negotiate partial deferral of payment for professional attendant care providers pending the resolution of a tort claim.

Many of these steps require that the accident victim have a viable tort claim. This effectively differentiates between classes of claimants based on their perceived fault in respect of the motor vehicle accident which caused their injury.

In *Wawanesa Mutual Insurance Co. v Smith*[8] Justice Campbell discussed the unfair burden of requiring the insured to pay for services in advance. Justice Campbell concluded as follows:

> "A purposive and remedial interpretation requires that the legislation be read so as not to require an insured person to finance, or to pledge her credit, in order to receive the very benefits for which she is insured."

As of September 1, 2010, this laudable principle no longer applies in Ontario.

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[8] Supra at note 6.