ATTENDANT CARE INCURRED UNDER THE SEPTEMBER 1, 2010 SABS

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The insurer has been obliged to pay for incurred expenses for attendant care under successive SABS regulations. For an expense such as attendant care to be incurred, pursuant to *Wawanesa v. Smith*[1] we understand:

> "… the word "incurred" 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 the amount is known."

The September 1, 2010 SABS repeats pre-discussion SABS and enshrines the right for an attendant care provider to be a family member. Specifically, Section 3 (7)(c) provides:

> 3 (7)(c) "For the purposes of this regulation, an aid or attendant for person includes a family member or a friend who acts as that person's aid or attendant, even if the family member or friend does not possess any special qualifications."

On September 1, 2010, the SABS was amended. The new Section 3 (7)(e) is below:

> 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,
>
> (i) the insured person has received the goods or services to which the expense relates,
>
> (ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and

[1] Wawanesa Mutual Insurance Co. v Smith (1998) 42 O.R. (3rd) 441 (Div.Ct.)

(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

(B) sustained an economic loss as a result of providing the goods or services to the insured person;"

ATTENDANT CARE

In the normal course, as a pre-requisite to payment of attendant care, an occupational therapist or nurse will prepare a Form 1 which identifies the attendant care need.

In the context of attendant care, if

(a) the insured person (injured person) has received attendant care;

(b) the injured person has paid, promised to pay, or is legally obligated to pay for the Attendant Care; and

(c) the attendant care provider did so in the course of employment, occupation or profession in which he or she would normally have been engaged, but for the accident,

the insurer is obliged to pay the attendant care expense.

Equally, if

(a) the injured person has received attendant care;

(b) the injured person has paid, promised to pay, or is legally obligated to pay for the attendant care; and

(c) the attendant care provider sustained an economic loss as a result of providing attendant care,

the insurer is obliged to pay the attendant care expense.

In dealing with the insured person's obligation to pay for attendant care, in the ordinary course an insured person is in a position to agree or promise to pay a family member for services which they provide as an attendant. As such that is

not a significant hurdle. For a child, a custodial parent or guardian may pay for, provide a promise to pay for or have the legal obligation to pay for attendant care.

As to the provider of the attendant care, given that a family member may by definition be an attendant, and given that family members, whether it be children, spouse, siblings or parents, often provide attendant care in the course of their usual occupation as child, spouse, sibling or parent, the argument is fully available that they should be paid for attendant care provided to the injured person due to his/her injuries.

ECONOMIC LOSSES

In addition, there are many economic losses which may be suffered as a result of using one's time to provide attendant care, thereby leaving one unable to provide services for the purposes of other pursuits which have an economic value.

In his report attached as Appendix "B", Dr. Jack Carr, an Economist, evaluated three potential economic losses, among others, which a mother providing attendant care may have.

The mother did not have a job at the time of the accident, having been laid off previously. She could not be said to have permanently left the labour market. One of her economic losses was the loss of her availability to apply for a position to earn a living in her previous job or similar employment.

Secondly, the mother had another child. She was prevented/compromised in her ability to provide care to her second child in that she was required to devote herself full time to provide attendant care for her injured son. The cost of attendant care or babysitting services for her other child is an economic loss which she would sustain as a result of the need to provide attendant care to her injured son.

Finally, by virtue of her need to provide attendant care to her son, she was unable to engage in the regular home maintenance and housekeeping tasks in which she would otherwise have engaged. This too has been identified by Dr. Carr and the Courts as an economic loss.

A further alternative available for the family members is to engage a sitter to provide the care. This ordinarily is not the most economically viable option, given that the rates paid for attendant care under the Form 1 are substantially below market rates.

As to the nature or the extent of the economic loss necessary to trigger entitlement, we can expect a remedial and liberal interpretation of this phrase by

the Courts and Arbitrators. Courts will likely accept that the phrase "an economic loss" as it has no modifiers nor qualifications, will be interpreted broadly, in favour of the accident victim so that a modest economic loss will qualify and entitle the care provider for the injured person to receive payment for the full value of the attendant care which he/she provides.

DENIALS MAY LEAD TO ENTITLEMENT:

Where there is a denial by the insurer of an expense related to attendant care, Section 3 (8) of the SABS also assists the insured/injured person. It states:

> "if in a dispute… 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 an expense, the Court or Arbitrator may, for the purposes of determining an insured person's entitlement to the benefit, deem the expense to have been incurred."

As such, if there is a denial of attendant care and the Arbitrator finds that one of the reasons an expense for attendant care treatment was not incurred the Court or Arbitrator may deem attendant care to be incurred. For example if a person required attendant care but the only person available to provide it was a family member who did not sustain an economic loss or did not do so in the course of his or her usual occupations, a denial may follow and an Arbitrator's Order may reinstate entitlement.

In these circumstances, injured people will be well advised to engage appropriately trained occupational therapist and counsel who are prepared, respectively to produce reports which accurately identify the attendant care need and, if denied, are prepared to proceed to Arbitration or Interim Motions to obtain an Order compelling the insurer to pay attendant care.

EXPENSE APPLICATIONS

Applicants for payment of attendant care expenses for services they have provided should include information on the Expense Application or attached to the Expense Application relating to the attendant care. Where appropriate arrangements have been made with the injured person, the person submitting the claim for payment of the attendant care should indicate on the Expense Application:

> "I, the undersigned hereby certify that the insured person for whom I am performing these services has [*use one of:*] paid [*or*], promised to pay me for these services. I have [*use one of:*] provided these services in the course of my regular occupation or profession [*or*]

> have sustained an economic loss as a result of providing these services to the insured person."

MOTIONS FOR INTERIM BENEFITS

Motions for payment of interim benefits at the Financial Services Commission of Ontario have been a very helpful resource for injured persons and families who have provided attendant care to family members and had insurers deny the claim.

Two such interim motions, *Keyes v. The Personal* and *Haimov v. ING Insurance* were bought by counsel of record, David MacDonald. Each of these motions resulted in the Arbitrator ordering the insurer to pay past attendant care benefits and attendant care benefits on an ongoing basis. Copies of these cases may, in appropriate instances, be sent to adjusters to remind them of their obligation and the consequences of failing to pay reasonable attendant care owing to injured people who require this attendant care. These decisions may be downloaded from the firm profile page of the author, David MacDonald at www.thomsonrogers.com/david-macdonald.

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