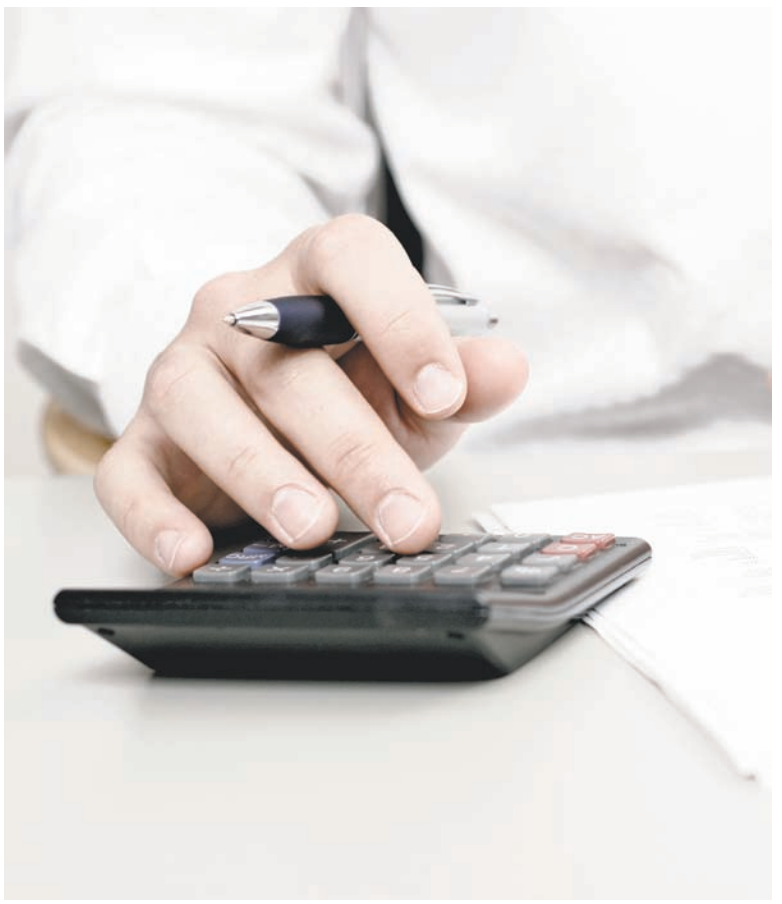
Focus INSURANCE

Debating incurred expenses

Issue pronounced when services provided by family or non-professional

Stacey Stevens



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In September, 2010, Ontario re-introduced the concept of "incurred" expenses in the *Statutory Accident Benefits Schedule*. Since then, automobile insurers and accident victims have debated how incurred expenses should be applied when paying benefits for allowable goods or services. The debate is even more pronounced when the person providing the goods or services is a non-professional or family member of the accident victim.

Section 3(1) of the *Schedule* states that an expense is not incurred unless the insured person has received the goods or services to which the expense relates, has paid the expense or has promised to pay it, and the person who provided the goods or services did so in the course of his or her regular occupation/profession or sustained an economic loss as a result of providing the goods or services to the insured person. The statute does not, however, provide further explanation as to the nature of the "economic loss" that must be sustained by a non-professional to qualify as an "incurred" expense.

The Financial Services Commission of Ontario (FSCO) and the Ontario Superior Court of Justice have recently released two decisions that will assist insurers and counsel in identifying what constitutes an "economic loss" for the purposes of applying s. 3(1).

In *Henry* v. *Gore Mutual Insurance Company* [2012] ONSC 3687, the applicant's mother stopped working in order to care for her catastrophically injured son. The attendant care benefit was assessed at $6,000 a month. Gore argued that its obligation to pay the benefit was equal to the amount of Henry's actual economic loss, rather than the assessed amount of the attendant care benefit. Justice Timothy Ray rejected Gore's argument, observing that the term economic loss is not defined in the Schedule, and concluded that the province's lack of further explanation meant that "no such calculation is relevant beyond a finding that the person has 'sustained an economic loss.' "

As such, he found that the term "economic loss" is a threshold finding in order for an expense to be incurred under the *Schedule*. It is not intended to be a means of calculating the quantum of the incurred expense.

Further, s. 42 of the *Schedule* makes it clear that the amount the insurer is required to pay is determined by way of Form 1, and removes any uncertainty as to the amount of the benefit payable in light of the economic loss threshold. This section requires the insured to submit an application for attendant care benefits by way of a Form 1 Assessment of Attendant Care Needs. This determines the insurer's obligation to pay the benefit in accordance with the specific type of care required, the exact amount of care being provided (broken down into minutes per week for each activity) and multiplying it by specified hourly rates.

Meanwhile, on Jan. 18, FSCO released its decision in *Simser v. Aviva* FSCO A11-004610, which dealt with the interpretation of "economic loss." In *Simser*, the insured claimed entitlement to an attendant care and housekeeping benefit. Julie Simser confirmed she provided the services to her injured husband and that in doing so, she was required to go to work early and leave work from time to time during the day in order to attend to him. There was no evidence to quantify any reduction in her pay for the time she was away from work.

Counsel for Simser relied on an expert opinion report from Prof. Jack Carr that addressed the interpretation of the term "economic loss" as it was understood in the field of economics. In Carr's opinion, there were various types of economic losses, one of which was an "alternative opportunity cost," which he defined as a person's time lost by providing the service rather than attending to another event, such as labour activities, leisure and going to school.

Arbitrator Edward Lee rejected Carr's opinion and preferred to rely on Blacks' Law Dictionary, which defined "economic loss" as a monetary loss such as lost wages or profits, the cost of repairing or replacing defective property, a commercial loss for inadequate value and a consequent loss of profits or use. In other words, it was the type of monetary loss that is usually recoverable in a lawsuit.

Although Lee in *Simser* confined the term "economic loss" to financial or monetary loss, it is clear from *Henry* that this financial/monetary loss is a threshold factual determination, and cannot be used by the insurer to escape its responsibility to pay for reasonable and necessary goods and services when these goods or services are being provided by a non-professional or a family member.

Stacey Stevens is a partner with Thomson Rogers in Toronto.