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AN UNWELCOME SURPRISE CHANGE TO CLAIMING ONTARIO ATTENDANT CARE BENEFITS

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The Ontario government recently blindsided the personal injury community with a further amendment to the Ontario Statutory Accident Benefit Schedule (SABS). This was designed to essentially eliminate the possibility of friends and family members providing paid attendant care services to injured loved ones following a motor vehicle accident.

The contentious change relates to the revised definition of 'incurred' within subsection 3(7)(e) of the SABS. As of September 1, 2010, the definition of "incurred" was amended to prevent friends and family members from claiming payment for services they provide to their loved ones following an accident, unless they could establish that they had suffered an 'economic loss' in providing such services.

The amended definition of "incurred" forced friends and family members to prove, to the satisfaction of the injured person's accident benefit insurer, that they continued to lose income by providing care services to the injured loved one.

Following the September 1, 2010 change many insurers took the position that the person providing the service should only be paid up to the extent of their economic loss. The insurers argued that if the care provider only lost $100 a month of income from missing work, they should only qualify to be paid the lost $100 for that month regardless of the extent of services they provided during that span.

The Courts addressed this issue in *Henry* v. *Gore Mutual Insurance Company*, 2013 ONCA 480 2012 (O.C.A.). In Henry, the Ontario Court of Appeal upheld the decision by Justice Timothy D. Ray of the Ontario Superior Court of Justice that the extent of the economic loss was irrelevant under the legislation-so long as there was any economic loss during the period in question. The person can then qualify to be paid for all of the services they provided to their loved one during that period.

Now, the Ontario government has overturned the Henry decision by amending the legislation to state that compensation for attendant care services can only be paid to the extent of the economic loss. The change, set out in paragraph 2 of Ontario Regulation 347/13, states that, "….the amount of the attendant care benefit payable in respect of that attendant care shall not exceed the amount of the economic loss sustained by the attendant care provider during the period while, and as a direct result of, providing the attendant care."

The change, which is effective as of February 1, 2014, was made without consultation with accident victims and their advocates. Frankly, it does not appear that anyone considered the repercussions the change will have on the already overwhelmed FSCO dispute resolution system.

Given that the Courts continue to reject any attempts to retroactively amend contractual insurance obligations, it seems clear that the February 1, 2014 change will only apply to accidents that occur on or after February 1, 2014, although some insurers may try to argue otherwise.

This legislative change will alter the way in which plaintiff's personal injury lawyers operate. Historically, plaintiff's personal injury lawyers have regularly encouraged friends and family to provide needed care to their loved ones for a host of good reasons. This includes the provider's interest in doing so, the injured

person's preference, the superior service that would be provided, the limited funds available to outsource the service, and the favourable impact care by a loved one has on the injured person's rehabilitation.

Now, family members have almost no hope of being compensated by the accident benefit insurer for providing attendant care services to an injured loved one. This leaves plaintiff's personal injury lawyers with no choice but to recommend outsourcing attendant care services (by hiring providers willing to work within the offensively unrealistically low hourly rates stipulated in the SABS). While this will be the better option, the result will still be unfavourable to the claimant's recovery and will result in the family still being required to supplement the paid care provided (causing additional stress, anxiety and fatigue).

Even in cases where there is a clear and substantial economic loss that can be established by the care provider, the accident benefit insurer will be in a strong position to demand monthly updates by the service provider on the extent of their ongoing economic loss. In other words, the change will require the provider to document on an ongoing basis every missed dollar of income. Every monthly attendant care claim will involve a painful investigation into the extent of the economic loss suffered by the provider in providing the care. This leads to constant disputes and conflicts with insurers along with increased frustration, uncertainty and hardship on accident victims and their families (and cause a further backlogging to the FSCO dispute process).

The legislative change, requiring proof of the quantum of economic loss is expressed only in relation to attendant care benefits. Other benefits, such as housekeeping and home maintenance benefits, will not be impacted.

Compensation for attendant care services provided by friends and family will continue to be advanced, at market rates, in lawsuits against at-fault parties. Although, with the prospect of not being able to access the attendant care benefits in light of this legislative change, and with the negative impact this change will have on an injured person's rehabilitation, the magnitude of tort claims could increase drastically. Drivers, that naively continue to maintain only $1 million of automobile liability insurance, would be best advised to substantially increase their policy limits. This includes the amounts available under their Family Protection Endorsement (relating to claims against inadequately insured motorists).

This legislative change arguably serves to discriminate against persons not currently in the workforce. Retirees, stay at home parents and the unemployed are restricted from being compensated for providing needed and valued care to their seriously injured loved one.

We have a system of compulsory auto insurance in Ontario with a mandatory standard automobile insurance policy. It seems unfair to include what may be discriminatory provisions.

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