TIPS FOR FAVORABLY ADVANCING ATTENDANT CARE CLAIMS

Stephen M. Birman
Partner

416-868-3137 | 1-888-223-0448
sbirman@thomsonrogers.com

Stacey L Stevens
Partner

416-868-3186 | 1-888-223-0448
sstevens@thomsonrogers.com

Elysia M. Martini
Student-At-Law

416-868-3171 | 1-888-223-0448
emartini@thomsonrogers.com

THOMSON ROGERS
LAWYERS

This paper aims to provide a brief introduction on evidence to include (and not include) when advancing attendant care claims in a tort action, expert evidence required for successful attendant care claims, and amounts of attendant care a plaintiff may be entitled to receive.

After a traumatic brain injury, injured parties are typically entitled to attendant care to assist them with activities of daily living. In motor vehicle claims these claims are typically advanced through the Statutory Accident Benefits insurer at first instance. Depending on the nature of the injury's victims may need help with particular tasks such as cooking, cleaning, and dressing. Attendant care may also involve supervision if the injured party cannot be left alone safely or cuing if the injured party requires reminders to complete daily care tasks. In the most serious case, 24/7 attendant care can be required where an individual needs full time supervision or care.

When injuries result from a motor vehicle accident, injured parties have recourse to attendant care benefits through their auto-insurance provider. Due to legislated maximums set out in the *Statutory Accident Benefits Schedule*, however, an injured party may not be fully compensated for attendant care claims which often exceed the $6,000.00 per month cap available for catastrophically impaired individuals.[1] As a result, injured parties can advance the balance of their attendant care claims in a tort action to compensate them for any remaining attendant care needs. Unfortunately, in non-motor vehicle accident claims there is no insurance money available to address attendant care claims pending the litigation.

That said, past claims can still be compensated in lawsuit claims and it is important that ongoing services provided by professionals or family members are clearly documented so that these claims can later be proven in Court.

Attendant care claims are typically a significant component of future care cost claims, which in turn may be the largest component of most catastrophically injured plaintiffs' claims. As such, plaintiffs' counsel and rehabilitation providers should be familiar with the case law surrounding attendant care claims.

Four themes relating to provision of attendant care frequently appear in the case law:

- Do not overreach when presenting claims;
- Select appropriate evidence to establish attendant care;
- Plaintiffs are entitled to appropriate compensation but documentation is imperative; and,
- Selecting the appropriate method of delivery.

This paper will explore each theme in turn.

1. Do not overreach

Jurors are increasingly skeptical of personal injury plaintiffs. Writers note a growing perception that plaintiffs exaggerate their injuries to get as much money as possible out of a lawsuit.[2] It is

[1] *Statutory Accident Benefits Schedule*, O Reg 34/10, s 19(3).
[2] John McLeish and Lindsay Charles, "The perils of overreaching" (4 February 2016), online: https://www.thelawyersdaily.ca/articles/2165/the-perils-of-overreaching.

more important than ever for plaintiffs' counsel to combat this skepticism and foster a sense of trust with a jury. Claiming unrealistic and overly aggressive future care costs is a common way plaintiffs' counsel alienates a jury and ultimately leads to lower awarded damages than if counsel initially presents a realistic, conservative assessment.[3]

With respect to attendant care, overreaching may take many forms. For example, overreaching may involve submitting a life care plan that calls for rehab support worker intervention in a situation where a personal support worker who charges half the hourly rate would suffice. Whether at mediation or especially at trial before a jury, a plaintiff's life care plan must not be exaggerated and must be supported through independent expert reports or evidence from the plaintiff's treating practitioners.[4]

2. Evidence is required to support attendant care claims

To avoid the perception of overreaching, plaintiffs' counsel must ensure that attendant care claims are adequately supported by medical evidence. Without appropriate experts backing these claims, the court will refuse to award future care costs. In *Frazer v Haukioja*, the plaintiff asserted there was a "reasonable chance" he would require extensive medical supports and services for the remainder of his life. The plaintiff hired a life care planner to prepare a future care costs report. The life care planner, however, did not consult with the plaintiff's treating doctors or any other health care specialists, and she herself was not qualified to assess the plaintiff's needs for services and supports.[5] The Court held that without appropriate supporting expert evidence, it would be "an exercise in sheer speculation" to find a realistic risk of future costs of care.[6] The claims were thus not considered. It is critical that this consultation take place and be **documented through reiteration letters where possible.**

Given the high costs associated with attendant care, defence counsel will often hire their own experts to assess the plaintiff's future care needs. When deciding whose medical evidence to accept, the Courts typically prefer assessors whose opinions are based on practitioners' reports, specifically practitioners who have done full assessments on the plaintiff close to the trial date. On the other hand, the Court has rejected assessments conducted too long before trial by unqualified practitioners and looked skeptically at reports that drastically increase attendant care recommendations without proper justification.[7]

In *Khelifa v. Ontario Corp,* the Court rejected the plaintiff's future care costs report authored by the plaintiff's occupational therapist. The Court was concerned by the numerous mistakes in the report which contradicted recommendations from the plaintiff's medical practitioners. The occupational therapist's recommendations were held to be a "wishlist" rather than a reasonable assessment of the plaintiff's needs.[8] Courts expect occupational therapists to consult with a plaintiff's treating doctors when compiling a list of reasonable and necessary care items. The

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[3] *Ibid*.
[4] *Song v Hong*, 2008 CanLII 10056 (ONSC).
[5] *Frazer v Haukioja*, 2008 CanLII 42207 (ONSC) at para 282.
[6] *Ibid* at para 288.
[7] *Campbell v. Roberts*, 2014 ONSC 5922 at paras 443-445.
[8] *Khelifa v Sunrise et al*, 2015 ONSC 749 at para 205.

absence of this consultation indicated to the Court that the occupational therapist "did not understand the role of an expert". Accordingly, the Court attached little weight to the opinions in the report.[9]

The case law indicates that to be successful, plaintiffs must bolster their attendant care claims with qualified, impartial expert evidence from practitioners who have conducted recent, comprehensive assessments on the plaintiff. Without such evidence, a Court will not speculate as to what the plaintiff's future attendant care costs may be.

3. Plaintiffs are entitled to full compensation

Although plaintiffs' counsel should always ensure attendant care claims are reasonable and necessary, lest they be perceived as overreaching, plaintiffs should be **fully compensated** for the costs of their future care. The Supreme Court of Canada held that where a plaintiff's family is providing attendant care, the plaintiff is still entitled to receive the market value of these services. The assessment of future attendant care costs should not be reduced by the involvement or contributions of family members. Further, family members are not expected to provide care on a gratuitous basis.[10] In *Matthews*, the Court held that "it is the nature and quality of the services provided and their value to the person injured rather than the professional qualifications of the care provider that should govern the assessment".[11] It is very important that these claims be documented on an ongoing basis in order to satisfy the defendant and/or the Court of their veracity.

Full compensation also requires that damages awarded for future care costs put the injured party in the position he or she would have been but for the tort, to the extent that money is able to do so.[12] In *Andrews*, the Supreme Court of Canada assessed whether the plaintiff was entitled to much more expensive home care as opposed to institutional care. The Supreme Court reasoned that the institutionalized setting was not proper compensation for the plaintiff's loss and that "justice requires something better".[13] Further, there is no duty on the plaintiff to mitigate, in the sense of being forced to accept less than real loss. Although the plaintiff must be reasonable, **the Supreme Court held that "it cannot be unreasonable for a person to want to live in a home of his own".[14]**

4. Choosing the appropriate model of delivery

Depending on an individual's care needs, future care costs experts may recommend attendant care intermittently throughout the day. For example, a plaintiff may require assistance with dressing and bathing at morning and night, and assistance at mealtimes, but be independent for the rest of the day. Total attendant care time might only amount to a few hours. However, Courts have recognized that awarding care costs on this basis does not account for the fact that care providers usually do not provide services on a "drop by" basis. For example, in *Rolley v. MacDonell*, the

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[9] *Ibid* at para 208.
[10] *Andrews v Grand & Toy Alberta Ltd*, 1978 CanLII 1 (SCC), [1978] 2 SCR 229 [*Andrews*].
[11] *Matthews Estate v Hamilton Civic Hospitals*, 2008 CanLII 52312 (ONSC) at para 189.
[12] *Andrews, supra* note 10.
[13] *Ibid.*
[14] *Ibid.*

Court found that the plaintiff required 4.22 hours of attendant care provided intermittently during the day. The Court reasoned, however, that the provision of services would occur over a total of 10 hours and awarded damages based on this aggregate amount.[15]

For plaintiffs with severe cognitive impairments as a result of a traumatic brain injury, intermittent attendant care may not be appropriate. In awarding damages for 24-hour a day attendant care, the court in *Kwok v. Abecassis* found it relevant that the plaintiff did not regularly sleep through the night and was subject to risk of falls, impulsive behaviour, slow reaction time, impaired judgment and an inability to carry out tasks when he would awake during the night. This was a similar level of risk that the plaintiff experienced during the day.[16]

In making the case for 24-hour a day attendant care, it may also be helpful to show that the plaintiff with a traumatic brain injury would be unable to respond properly in the event of an emergency. In *SM v. Intact*, a FSCO decision, the adjudicator reasoned that once it has been established that an injured party can no longer appropriately respond to an emergency, it is reasonable to start with the assumption that round the clock care is required.[17] In that case, the injured party had not demonstrated an ability to use emergency devices and was incapable of making "snap" decisions on her own. Given the unpredictability of the injured party's mood and behaviour, she reasonably required 24 hours per day of attendant care.

In a case involving a paraplegic plaintiff, the Court held that 24-hour a day attendant care was necessary because the plaintiff was at risk if an emergency arose. The Court rejected the defence's suggestion that attendant care could be replaced with an emergency call service. The Court noted that in an emergency, it would take the service up to 30 minutes to send a personal support worker to assist. However, the plaintiff may need urgent help from someone who understood his spinal cord injury.[18]

In *17-001681 v. MVACF*,[19] 24/7 attendant care was awarded to the Applicant who was suffering from a traumatic brain injury and suffering from significant cognitive dysfunction. The hearing Adjudicator relied upon the combination of medical, family member and situational occupational therapy evidence in arriving at the finding that Applicant presented a safety threat to himself or others and required full time care:

> "Dr. Lad testified that if the applicant is not given 24-7 supervision something bad is going to happen to him or someone else. I agree with Dr. Lad as the evidence presented by the applicant's daughter, case manager, OT and RSW support that the applicant has been unable to independently carry out his activities of daily living. Post-accident, the applicant has become homeless, and is unable to independently engage in rehabilitation, manage his medication and ensure that he has the basic necessities of food, clothing and shelter."

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[15] *Rolley v MacDonell*, 2018 ONSC 6517 at para 292.
[16] *Kwok v Abecassis*, 2017 ONSC 164 at para 176.
[17] *SM v Intact*, 2013 FSCO A11-000666 at 20.
[18] *Gordon v Greig*, 2007 CanLII 1333 (ONSC) at para 125.
[19] 17-001681 v Motor Vehicle Accident Claims Fund, 2018 CanLII 112134 (ON LAT)

The Adjudicator could not reconcile this evidence with the insurance assessor's suggestion that 4 hours of attendant care was sufficient (as proposed by the assessor), where that assessor had also identified safety issues, by noting as follows:

> "I find Mr. Kaine's opinion supports that the applicant requires significant supervision in carrying out his daily activities for safety reasons. What Mr. Kaine's report failed to mention was how the 4 hours of attendant care a day would assist in addressing the applicant's safety concerns. For example, at which times during the day would a service provider assist the applicant in feeding, administering medicine and supervision. Mr. Kaine did not testify at the hearing to explain."

Finally, the Adjudicator was heavily persuaded by the specific evidence/observations of safety concerns that was conveyed through a situational occupational therapy assessment and noted the following:

(i) The applicant could not remember his name despite meeting him (the assessor) on several occasions;

(ii) His medication was not stored properly and he was angry because of a lack of food;

(iii) While out in the community he witnessed the applicant be verbally and behaviourally inappropriate on 4 occasions;

(iv) The applicant spoke loudly using profanities and could barely order his lunch at Mr. Sub. Upon leaving the restaurant the applicant tried to get into two different cars;

(v) Mr. Turgeon had to step in on several occasions to prevent the applicant's behaviour from escalating.

It is critical that issues regarding impulsivity and judgment are documented in occupational therapy and situational assessment reports to help substantiate significant attendant care needs as was the case in this decision.

To conclude, given the importance of attendant care claims, plaintiffs' counsel are advised to thoroughly consider the extent of their clients' claims and the possibility of intermittent or round the clock care to ensure that clients are fully compensated using the appropriate care delivery model. These claims must be supported with ample expert evidence. In so doing, our clients will avoid the pitfall of alienating a jury with an unreasonable, excessive attendant care claim.