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ECONOMIC LOSS IS ONLY A THRESHOLD TO ATTENDANT CARE BENEFITS

Henry v. Gore Mutual Insurance Company[1]

In July, the Ontario Court of Appeal upheld the decision from the Superior Court of Justice regarding the payment of attendant care benefits in situations where the insured has sustained economic loss. The Court of Appeal rejected the insurer's appeal that the amount owing for attendant care benefits was based on the quantum of the economic loss sustained by the attendant care provider.

The focus of the appeal was the statutory language in section 3(7)(e)(iii)(B) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[2] ("*SABS*"). The section provides that an expense (such as attendant care) is not incurred by an insured person unless the person who provided the goods or services sustained an economic loss as a result of providing the goods or services. The insurer argued that the quantum of the care provider's economic loss should be the measure of the attendant care benefit. The Court of Appeal disagreed. It upheld Justice Ray's finding that "economic loss serves as a threshold to (and not as a measure or factor in quantifying the amount of) reasonable and necessary attendant care benefits to be paid by an insurer."[3] Once an economic loss is established, the expense is incurred and the benefit is payable.

The Court of Appeal also considered the legislative intent of the provision, noting that the legislature explicitly chose not to tie the calculation of benefits to economic loss. The provision was designed to compensate a non-professional service provider (usually a family member) that sustained an economic loss in order to provide attendant care. The Court further clarified that a

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[1] 2013 ONCA 480, [2013] OJ No 3792, Hoy JA, aff'g 2012 ONSC 3687, [2012] OJ No 2928, Ray J [*Henry v Gore*].
[2] O Reg 34/10, as amended, ss. 3(7)(e), 19, 33(1), 42.
[3] *Supra* note 1 at 22.

family member should not benefit financially from providing care that would have otherwise been provided in due course.

The Court found that viewing economic loss as a threshold to entitlement rather than a measure of determining the quantum of the benefit was further supported by s. 19(2) of *SABS*:

> This interpretation is also consistent with the scheme and logic of SABS-2010. Subsection 19(2) provides that, subject to the maximums set out in subsection 19(3), "the amount of a monthly care benefit" is determined in accordance with the Form 1 required to be submitted under s. 42, and is calculated based on the number of hours of each type of attendant care that the insured person requires. As the respondent argues, s. 19(2) makes clear the underlying premise that, once entitlement is determined, the amount of the benefit is based on the insured's need for care. That amount is, of course, subject to the maximums in s. 19(3), and the insurer has the right to challenge a Form 1 (pursuant to s. 42) and to request certain information to assist it in determining the insured's entitlement (pursuant to s. 33).[4]

The Court of Appeal rejected the argument that Justice Ray had ruled that the insurer must pay all of the expenses described in a Form 1. The Court of Appeal found that no such overriding rule was created. The status quo of allowing insurers to request additional information (to verify claims) pursuant to s. 33(1) was not changed.

The Court of Appeal declined to consider the definition of "economic loss" in the context of the *SABS* despite the urging of the insurer. The economic loss was clear in the case at bar (being a loss of income). The Court acknowledged that "economic loss" was not defined within the *SABS,* but noted that the phrase had been defined "in very broad terms" for claims for compensation in tort law cases.[5]

Simser and Aviva Canada Inc. [6]

An appropriate definition for "economic loss" in the context of an attendant care benefits claim was discussed in the FSCO arbitral decision in *Simser and Aviva Canada Inc.* The arbitrator in *Simser* disagreed with the claimant's expert witness that "economic loss" can have a very broad meaning which could encompass a loss of economic opportunity. Rather, he found that the insurer's interpretation of economic loss was closer to the ordinary, everyday meaning of the words. Broadening the definition of "economic loss" to include a loss of opportunity would not be in accordance with the intentions of the legislature:

> As Aviva argued, whenever a service is provided, some person will have provided it. Further, a service provider will *always* expend or lose time in the provision of that service. Some opportunity, chance or time will *always* be lost. Therefore, if Professor Carr's definition is applied to the *Schedule*, every service provider will incur an economic loss in

[4] *Ibid* at 24.
[5] *Supra* note 1 (ONSC decision) at 9.
[6] FSCO A11-004610 (2013); this decision was discussed in greater detail in the Shillingtons LLP Bulletin from March 26, 2013

> every instance. This would render the distinction between professional and lay service providers meaningless, and would negate the meaning of the entire amendment.[7]

The arbitrator went on to hold that "economic loss" must "relate to some form of financial or monetary loss." This decision was appealed to FSCO and was heard in June of 2013. The appeal decision has not been released yet.

Commentary

In *Henry v. Gore*, the Court of Appeal confirmed that, in the case of attendant care, the economic loss sustained by the care provider is only relevant to the entitlement to the attendant care benefit. It has no bearing on the quantum of the benefit which must be determined based on the Form 1. However, the Court declined to provide guidance regarding the definition of "economic loss" beyond the fact that a loss of income satisfies the threshold.

In the *Simser* arbitration decision, the arbitrator declined to expand the definition of "economic loss" beyond some form of financial or monetary loss. The appeal decision should be enlightening as to how broad the definition of "economic loss" may be in the context of the *SABS*.

[7] *Ibid* at pp. 6-7.