

## **Ontario Car Accident: Qualifying for Attendant Care Benefits is More Difficult Now**

### ***The Issue***

- Ontario's SABS (*Statutory Accident Benefits Schedule*) have continued to change and evolve, to limit insurance payouts arising from car accidents
- One of the changes on September 1, 2010 was to attendant care benefits
- Now a relative, unemployed prior to the accident, may not qualify for payment for their attendant care services
- The reason is that the relative has to show that s/he has "sustained an *economic loss* as a result of providing the goods or services" to the injured person

Since 1990, the automobile no-fault accident benefits insurance scheme in Ontario has been revised on an almost continuous basis with the stated purpose by the insurance industry to maintain some limits on insurance costs.

One such revision which has been in effect for motor vehicle accidents occurring after September 1, 2010, has been an attempt by the insurance industry to prevent a member of an injured insured's family who was not ordinarily an income earner or working outside the home, from profiting from an attendant care benefit, when they would likely be at home in any event (and would have looked after the injured insured without any compensation). For example, a stay at home mother.

The amended *Statutory Accident Benefits Schedule* – Effective September 1, 2010, Ont. Reg. 34/10, section 19 stated that the insurer still had to pay all "reasonable and necessary expenses" for attendant care, but also required that the expenses be "incurred" by or on behalf of the insured. "Incurred" was defined to require that the insured person "paid the expense, has promised to pay the expense, or otherwise legally obligated to pay the expense" and that the person who provided the service has "sustained an *economic loss* as a result of providing the goods or services...".

The issue which arises in these cases is what qualifies as an “economic loss”?

### ***Why This Matters***

The requirement that the service provider has to have “sustained an economic loss” as interpreted in [Henry v. Gore Mutual Insurance](#) (see below) means that there cannot be any claims made by non professional service providers who have not sustained an economic loss. Therefore, for example, unless someone has to stay home from work and loses income to provide attendant care then the attendant care benefits are not payable.

If however, the service provider has sustained an economic loss and the expenses have been “incurred” than all reasonable and necessary attendant care expenses must be paid as described in Form 1

### ***The Details***

In the recent case of [Henry v. Gore Mutual Insurance Company, 2012, ONSC 3687 \(CanLII\)](#), the Superior Court of Justice of Ontario considered the case where an 18 year old plaintiff suffered catastrophic injuries as a result of a September 28, 2010 motor vehicle accident. The maximum payable by the insurer under the SABS for attendant care was \$6,000.00 per month. This amount was not in dispute.

The injured insured elected to have his mother provide attendant care. Gore therefore calculated attendant care benefits payable according to the number of hours that the mother has been working as a proportion of the total attendant care hours assessed as reasonable. The insured instead asked the court to order Gore to pay the maximum of \$6,000 per month as described in Form 1, not a proportional amount based on the mother’s number of hours lost from work.

The court concluded that the term “economic loss” which was undefined in the regulations, was simply a threshold finding for “incurred expense” but was not intended as a means of calculating the quantum of the incurred expense. Therefore the revised provisions eliminated claims by non-professional service providers who did not sustain an economic loss.

Lawyers practicing in the area will want to familiarize themselves with Mr. Justice Ray's analysis:

*[7] In 1990, Automobile Insurance in Ontario witnessed the advent of limits on tort compensation for innocent victims of automobile accidents, and replacement with a scheme of enhanced benefits for all injured parties without regard to fault .<sup>[6]</sup> Both the limitations on tort based damages as well as no-fault benefits have been revised on an almost continuous basis since then with the stated intent to maintain some limits on insurance costs, as well as to maintain limits on no fault benefits. This latest revision was apparently to prevent a member of an insured's family who was not ordinarily an income earner or working outside the home, from profiting from an attendant care benefit, when they would likely be at home anyway - and would have looked after the injured insured without compensation.*

*[8] The amended regulation retained the requirement that the insurer pay all "reasonable and necessary expenses" for attendant care, but required that they be incurred by or on behalf of the insured person.... "Incurred" is defined in the amended regulation to require that the insured person has "paid the expense, has promised to pay the expense, or otherwise legally obligated to pay the expense", and that the person who has provided the service has "sustained an economic loss as a result of providing the goods or services.....".*

*[9] 'Economic loss' is not defined in the regulations. If the amount as opposed to the fact of the economic loss were intended to be relevant, then one would expect the regulations to be of assistance in calculating the amount, since economic loss has been defined in very broad terms in claims for compensation in tort law cases, and has been the subject of a great deal of jurisprudence because of the difficulty in quantification. This omission implies that no such calculation is relevant beyond a finding that the person has "sustained an economic loss" – or not. It is a threshold finding for "incurred expense", but is not intended as a means of calculating the quantum of the incurred expense. I accept that the amended provisions now eliminate claims by non professional service providers who have not sustained an economic loss.*

*[10] A plain reading of the section provides that if a family member stays home from work, loses income in order to provide all reasonable and necessary attendant care to the insured - and the insured is obligated to pay, promises to pay or does pay the family*



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*member, then the definition in [section 19\(1\)](#) has been met. All reasonable and necessary attendant care expenses must then be paid to the insured as described in the Form 1.*

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