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The Beard Winter Defender reports on legal issues related to the insurance industry.

The Beard Winter LLP Insurance Litigation Group acts for numerous insurers, ensuring that their claims are resolved promptly and economically, or proceed to trial quickly when necessary.

## CAREGIVING BENEFITS: “A LITTLE DETECTIVE WORK CAN GO A LONG WAY”



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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to [email](#) me and I will certainly explore the possibility of writing an article.

The test for entitlement to Caregiving Benefits in accident benefits claims is difficult to assess as it deals with claims that are difficult to disprove. An insurer will never be able to obtain surveillance to prove that a parent is in fact bathing their young child when they claim that they cannot. This will come down to a matter of credibility. However, as astute adjuster may be able to limit the value of such a claim, and/ or defeat a claim altogether by knowledge of the case law and a little detective work.

Under section 13 of the *Schedule*, a claimant is entitled to caregiving expenses if she suffered a substantial inability to engage in her pre-accident caregiving activities as a result of an impairment caused by the motor vehicle accident for the first 104 weeks post accident. After 104 weeks, the test changes to the more onerous requirement to prove that the injuries result in a complete inability to carry on a normal life. The benefit is for all reasonable and necessary expenses incurred as a result of the accident in caring for the “person in need of care”. The *Sched-*

*ule* sets out a maximum entitlement to caregiving benefits of \$250.00 weekly for each “person in need of care” and \$50.00 thereafter for each additional person.

Firstly, this is a maximum entitlement not a mandatory entitlement. Frequently once it is determined that an applicant is entitled to a caregiving benefit an insurer will often pay the maximum rate. An insurer is only obligated to pay for a caregiving benefit for the amount of care that is required by the applicant. In **Nickle v. RBC General Insurance Co. (2008)**, it was determined that the appropriate calculation of the caregiving benefit by a family member was \$10.00 /hr. The Arbitrator found that the only caregiving benefit to which the claimant was entitled in this case was once she attended treatment for her injuries (this was calculated based on the \$10/hr formulae).

In **Valle v. Aviva Canada (2005)** the Arbitrator found that the properly hourly sum for caregiving benefits performed by a family member was \$8.50/hr.

The invoices submitted to prove a claimant’s caregiving claim often are your best weapon against the claimant. In order to prove a claim for caregiving benefits, claimants often submit and rely on invoices presumably prepared by or on behalf of the caregivers. In **Chowdhury v. State Farm (2007)**, State Farm took the position that the invoices were fabricated in the office of counsel without any relation to the truth. Each of the five pages of invoices submitted for



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"Caregiving and Housekeeping Expenses" were identical with respect to duties performed, hours per day, days per week, the amount charged, and they were completed by someone from the office of counsel for the claimant. The Arbitrator found that it was implausible that the caregiver providers would provide the identical services every week without variation and was inconsistent with the evidence of the witnesses.

The claim for caregiving benefits is restricted to injuries sustained in the specific motor vehicle accident. In cases where the claimant has been involved in two or more motor vehicle accidents it is important to determine what the claimant was doing immediately before each accident. In **Singh v. Aviva (2006)** the claimant was involved in two accidents. Prior to the first accident, the claimant was the caregiver to her mother. However, immediately prior to the second accident she was still suffering injuries that restricted the types of caregiving responsibilities she could perform. Nonetheless, she stated that she was still the primary caregiver to her mother based on historical evidence and the fact that the insurer initially did pay her a caregiving benefit after the second accident. The Arbitrator disagreed. He found that the determination of the claimant's entitlement to caregiving benefits is based on what she was doing at the time of the specific accident. The claimant ceased being the primary caregiver at the time of the second accident and she was not entitled to a caregiving benefit.

There can only be one primary caregiver. If there are competing persons who may be obligated to provide care to the "person in need of care" then this must be investigated. In **Valle v. Aviva (2005)**, the Arbitrator underwent an analysis as to who was the primary caregiver for a grandson between that of the grandmother (claimant) or the mother. Although the grandmother certainly provided care to her nine year old grandson, it was determined that the mother was the primary caregiver and the claimant grandmother was not entitled to receive a

caregiver benefit.

The fact that a claimant may legitimately suffer pain, does not entitle her to a disability caregiver benefit. In **Khan v. Allstate (1998)** the Arbitrator confirms that a claimant must prove that she suffers from a "sizable inability, not [just] some inability." Accident injuries must have caused a "large and important impairment of h[er] ability" and that the inability to perform the tasks must be "relatively great in size of importance." It is settled law that the test for substantial inability is a functional one and pain, itself, is not compensable unless it is disabling.

A good in-home / medical assessment should give an astute adjuster a peek into the claimant's life. One should be able to tell who was primarily responsible for the "person in need of care", the particulars / relationship between the household members, how much time is spent providing care, and what care is actually needed. Then, a review of the invoices ought to be matched-up to this in-home assessment to determine what alleged caregiving services are being provided. By conducting this analysis right at the beginning and at regular intervals after receiving further medical assessments / documentation, it is possible that thousands of dollars may be saved on any given file. A claimant is unlikely to volunteer that she can return to performing her caregiving responsibilities – this is where the detective work of the thorough adjuster may bear better results than surveillance ever could.

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